

Features of ISDS

ISDS differs in several important ways from the dispute settlement mechanisms typically found in domestic court systems (see Table 1).

Table 1: Differences between Proceedings in Domestic Court Systems and in ISDS

	Domestic Court System	ISDS
Who can bring a claim?	Domestic law and/or any relevant contract determine who can bring claims; typically, they allow, e.g.: <ul style="list-style-type: none"> ▶ claims by states against investors; ▶ claims by investors against states; and ▶ claims by citizens/communities against investors; and ▶ claims by citizens/communities against states regarding a state's regulation of, or failure to regulate, investors. 	Investors covered by an investment treaty can bring claims against states. States cannot initiate ISDS claims against investors (even the possibility of counterclaims is extremely circumscribed), and citizens/communities cannot bring claims against investors or the state. Broad definitions of covered investors results in host government measures being challenged by a large range of individuals and entities, and allows for "treaty shopping," in which an investor routes its investment through a shell company in order to benefit from the protections of a particular country's treaty.
Who decides the claim?	Judges, who are subject to strict requirements regarding their independence and impartiality.	Private arbitrators, typically appointed by the parties to the dispute, and generally not governed by any robust or mandatory codes of conduct.
Where are cases decided?	In administrative or judicial tribunals or courts, located in the host country.	In arbitral proceedings often conducted outside of the host country.
Are disputes open to the public? Do they allow public participation?	Court proceedings in domestic legal systems are often open to the public. In many systems, interested and/or affected individuals or entities have the possibility to <ul style="list-style-type: none"> ▶ make amicus curiae submissions; and/or ▶ join disputes as a party. 	Under the vast majority of treaties, ISDS proceedings can be closed to the public. Few tribunals have allowed interested or affected individuals or entities to participate as amicus curiae. Non-parties are otherwise unable to join the proceedings.
What substantive law is applied?	Domestic law (including its choice of law rules), which may also incorporate international law. If there is a contract, the law specified in the contract (commonly the law of the host state) will typically be applied.	The law of the treaty, which is the treaty itself and any law specified in the treaty, and international law. When deciding contract-based disputes, the tribunal will also apply the law of the contract, and may also apply principles of international law to the contract.
What procedural law is applied?	Domestic procedural law will apply to address potentially outcome-determinative issues such as: <ul style="list-style-type: none"> ▶ who has standing to bring claims; ▶ whether claims are ripe; ▶ whether claims are timely or have been filed too late; and ▶ whether evidence is admissible. 	ISDS proceedings are governed by rules specified in the relevant investment treaty and any applicable rules of arbitration. Domestic rules of procedure generally do not govern ISDS proceedings.
What are the remedies?	Remedies are generally specified in domestic law or contract, and can include <ul style="list-style-type: none"> ▶ injunctive relief, ▶ declaratory relief, ▶ specific performance, ▶ restitution, ▶ compensation, and ▶ punitive damages. 	Remedies are usually in the form of compensation; but tribunals may, and have, also ordered other remedies. Some treaties prohibit certain types of remedies such as orders requiring states to abandon challenged measures, or awards of punitive damages.
Is there a possibility of appeal?	Domestic legal systems often provide some mechanisms for appeal. Errors of fact and/or law by a lower court or tribunal are common bases for appeal.	Decisions and/or awards are not subject to appeal. They can only be challenged on specific, narrow, procedural grounds. Awards generally cannot be challenged on the ground that the tribunal made an error of fact or law.

Impacts of Investment Treaties and ISDS on the Governance of Extractive Industries

Investment treaties and ISDS have a particularly pronounced impact on the domestic governance of extractive industries. Mined materials are often extracted, processed, refined, and distributed by large multinational corporations who are protected under international investment treaties through their home states. These large-scale extractive projects have significant long-term impacts on a host-state's environmental, social, economic, and geopolitical conditions.¹⁰ Management of extractives thus involves a wide range of legal and policy spheres, and robust institutions and processes to govern interactions between those spheres. Positive outcomes for host states and their citizens depend, among other things, on strategy and planning within and across government agencies at national and local levels; rights-compliant engagement with project-affected communities and other stakeholders; mechanisms for ensuring integrity of public officials and safeguards against corruption and capture; quality impact assessments able to identify potential harms and suggest and evaluate options for avoiding or mitigating those harms; effective processes for granting (and challenging) licenses or permits according to law; and the ability of a government to respond and act in the face of changed circumstances.

Several efforts by states to develop, refine, and implement their laws and policies governing extractive industry investments – whether through legislative instruments, court decisions, contract provisions, or administrative actions – have been challenged by investors under investment treaties through ISDS. Those claims, in turn, have exposed host states to potentially significant costs in terms of litigation expenses and/or liabilities. For investments in the extractive industries in particular, the sums at stake can be staggering, diverting resources away from other domestic priorities.¹¹ Additionally, ISDS claims can exacerbate the political, legal, and economic challenges associated with effective, open, and multi-dimensional regulation of extractive industry projects.

A significant majority of extractives cases are filed against developing countries. Developing countries are more exposed to claims than developed country counterparties because more investment in their extractive industry projects is covered by investment treaties.¹² Moreover, foreign investment in extractive industries in developing countries has preceded (often in response to the support, urging, and pressure of developed states) the development and effective deployment of systems for governing the environmental, human rights, and economic dimensions of those projects.¹³ About 86% of extractives cases (and 83% of all pending extractives cases as of 2020) were brought against a country with a gross national income (GNI) per capita of less than USD 12,535.¹⁴

¹⁰ For further reading on the extractives sector, IIAs, and corporate power, see Manuel Pérez-Rocha, *Missing from the Climate Talks: Corporate Powers to Sue Governments Over Extractives Policies* (2021); and Lea di Salvatore, *Investor-State Disputes in the Fossil Fuel Industry* (2021) IISD <https://www.iisd.org/system/files/2022-01/investor%E2%80%93state-disputes-fossil-fuel-industry.pdf>.

¹¹ See Table 2 “Examples of Awards and Expenses for Litigation and Arbitration in Extractive Industry ISDS Cases” and Table 3: “Examples of Extractives Cases in which the Rights of Third Parties were Raised”.

¹² Zoe Phillips Williams, *Risky Business or Risky Politics: What Explains Investor-State Disputes?* (Berlin: 2016) https://opus4.kobv.de/opus4-hsog/frontdoor/deliver/index/docId/2369/file/Dissertation_Williams_Zoe.pdf.

¹³ For instance, Colombia issued its first National Action Plan on Human Rights and Business in 2015. One of the main objectives of the policy was contributing to the implementation of due diligence as a company management process and as a basis for responsible investment in the country. By then, a great number of extractive industry projects with foreign capital had already been granted concessions and were conducting exploration and exploitation activities. See *Colombia Avanza, Plan Nacional de Acción sobre Derechos Humanos y Empresas, Consejería DDHH y Todos Por Un Nuevo País*, https://www.ohchr.org/sites/default/files/Documents/Issues/Business/NationalPlans/PNA_Colombia_9dic.pdf.

¹⁴ This analysis is based on the information available through UNCTAD's Investment Dispute Settlement Navigator, available at <http://investmentpolicyhub.unctad.org/ISDS> (updated as of December 31, 2020). 6% were brought against low-income countries, i.e. those with a gross national income (GNI) per capita of \$1,035 or less in 2019; 23% were brought against lower middle income countries, i.e. those with a GNI per capita between \$1,036 and \$4,045 in 2019; and 57% were brought against upper-middle income countries, i.e. those with a GNI per capita between \$4,046 and \$12,535 in 2019. GNI brackets and country classifications are based on World Bank lending categories for the 2019 fiscal year. For further information, see here: <http://data.worldbank.org/about/country-and-lending-groups>.

Cases and their Implications for Extractive Sector Governance

Among the cases concerning investments in the extractive industries sector, investors have challenged the following types of government acts and omissions:

- ▶ New and stronger environmental regulations or energy phase-outs (e.g., *Glamis Gold, Ltd. v. United States* 2003; *Lone Pine Resources Inc. v. Canada* 2013; *Rockhopper v. Italy* 2017; *Vattenfall AB and others v. Federal Republic of Germany (II)* 2012; *Westmoreland Coal Company v. Canada (II)* 2019; *RWE v. the Netherlands* 2021) (see Box 1);
- ▶ Requirements to consult with communities or compensate third-parties for harms caused (e.g., *Copper Mesa v. Ecuador* 2012; *Kappes, Cassidy & Associates (KCA) v. Guatemala* 2018; *Gran Colombia Gold v. Colombia* 2018; *South32 S.A. v. Colombia* 2020);
- ▶ Termination of contracts with investors (e.g., *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador* 2012; *IMING v. KPA (Kosovo)* 2019);
- ▶ Revocation/ termination of permits authorizing investors' operations (e.g., *Gold Reserve Inc. v. Venezuela* 2009; *Copper Mesa v. Ecuador* 2011; *Bear Creek Mining v. Peru* 2014; *Cosigo Resources and others v. Colombia* 2016; *Dominion Minerals v. Panama* 2016; *Nachingwea and Ntaka Nickel v. Tanzania* 2020; *Winshear Gold v. Tanzania* 2020; *Montero Mining v. Tanzania* 2021);
- ▶ Requirements to perform environmental impact assessments, or reapply for an environmental or social license (e.g., *Ascent Resources v. Slovenia* 2019; *South32 S.A. v. Colombia* 2020; *Menankoto SARL v. Republic of Mali* 2021);
- ▶ Decisions not to grant or renew permits and/or enforcement of existing environmental regulations (e.g., *Pac Rim Cayman LLC v. El Salvador* 2009; *Clayton and Bilcon of Delaware Inc. v. Canada* 2008; *Eco Oro Minerals Corp. v. Colombia* 2016; *Navodaya Trading DMCC v. Gabonese Republic* 2018; *Renco v. Peru (II)* 2018; *Odyssey v. Mexico* 2019; *Legacy Vulcan v. Mexico* 2019; *Alamos Gold v. Turkey* 2021);
- ▶ Changes to fiscal regimes (including changes in interpretations of and enforcement strategies for existing laws and regulations), the imposition of tax-related measures or royalties, and associated economic measures (e.g., *Occidental Exploration and Production Company v. Ecuador* 2004; *Perenco Ecuador Limited v. Ecuador* 2008; *Glencore v. Colombia* 2016; *Quiborax v. Bolivia* 2015);
- ▶ Requirements to purchase local goods and services or to invest in research and development (e.g., *Mobil Investments Canada, Inc. v. Canada* 2015);
- ▶ Moratoria on issuing permits (e.g., *Lone Pine v. Canada* 2013; *Pac Rim Cayman LLC v. El Salvador* 2009);
- ▶ Conduct during negotiation or renegotiation of contracts (e.g., *PSEG v. Turkey* 2009) (See Box 2).

BOX 1: Preserving Regulatory Space to Address the Climate Crisis¹⁵

Governments are moving to transition their economies away from fossil fuels to address the climate emergency. This transition must invariably constrain the sector's ability to profit from non-renewable energy reserves. When protected by a treaty with ISDS, companies in the fossil fuel industries may seek compensation from states as a result of the climate-driven need to strand fossil fuel assets. Companies have brought (or threatened) cases against government measures including: Quebec's 2011 moratorium on fracking in the St. Lawrence River basin (*Lone Pine Resources v. Canada*); the denial of a pipeline construction permit on the grounds that the project was counter to the government's climate commitments (*Transcanada v. United States*); a plan by Alberta's provincial government to phase out coal-fired power plants in the province by 2030 (*Westmoreland v. Canada I & II*); a draft law phasing out fossil fuel extraction in France by 2040 (*Vermillion v. France*); a government decision to ban coal-based power generation in the Netherlands by 2030 (*RWE v. the Netherlands and Uniper v. the Netherlands*).

As efforts to combat climate change become more urgent, stranded fossil fuel assets will necessarily rise as well. Foreign investors may resort to ISDS to protect themselves from shouldering the financial burden of this necessary and inevitable economic transition. If those claims succeed, it will be governments (and their taxpayers) who will pay, through the outsized costs of ISDS awards, rather than the fossil fuel companies who continue to defy climate science and to fight necessary regulation.

Under investment treaties, the fact that a measure was adopted in good faith and for a legitimate, public interest purpose generally does not operate as a defense to claims, nor does the fact that a measure is consistent with, or even required under, domestic law or other areas of international law (like the Paris Agreement on Climate Change or international human rights law). Consequently, governments attempting to develop, refine, strengthen, and enforce their legal frameworks governing extractive industries may face exposure to claims and liability when those actions negatively affect the rights, or even the mere "expectations" of foreign investors. Below are just a few ways in which treaty protections pose threats to regulating against harmful investor behavior.

BOX 2: Asymmetric Obligations in *PSEG v. Turkey*

The dispute concerned the development of a mining and power plant project, for which an implementation contract had been initiated by the Ministry of Energy and Natural Resources following their approval of the investor's feasibility study. While awaiting the next step in the contract's approval process to be completed, the investor revised its mining plan and made several changes to its proposed project. Although the implementation contract was approved (based largely on the original feasibility study), the government sought to renegotiate the contract based on some of the investor's proposed changes. The tribunal concluded that, while the government had not behaved in "bad faith", and the negotiations were handled competently "on occasion", the government had been "negligent" and its "attitudes and policies" had changed during its interactions with the investor. This was sufficient to constitute a breach of the FET obligation. The tribunal ordered the government to compensate the investor for USD 9 million in costs expended during the pre-contract and pre-project phase (plus interest), and bear 65% of the disputing parties' roughly USD 21 million in legal and arbitration costs.

Protecting Illegal Investments or Contractual Provisions

Where a host state government enters into an investment contract in breach of domestic law, for example through an ultra vires act of a government official (i.e. one that was beyond its power or authority), such a contract will often be deemed void ab initio (or void "from the beginning"), voidable, or unenforceable in domestic legal systems (irrespective of whether the government was knowingly or negligently at fault). Some ISDS tribunals have, however, determined that the government is estopped or precluded from arguing that the investor-state contract is illegal and hence unenforceable under domestic law and the investment treaty.¹⁶ By binding governments to illegal or ultra vires contracts, tribunals can override domestic law norms and give legal force to rights that would not otherwise exist under the domestic legal framework.

¹⁵ Lise Johnson, "International Investment Agreements and Climate Change: The Potential for Investor-State Conflicts and Possible Strategies for Minimizing It," (2013) 39 *Environmental Law Review* 11147; Kyla Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement," *Transnational Environmental Law* 2, (2018) 229-250.

Limiting Use of Tools for Leveraging Investment for Sustainable Development

Many investment treaties restrict the use of performance requirements, removing an essential means for host governments to try to ensure that the investment leads to broader socioeconomic development and social inclusion, for example, thus benefiting not only the investor but also the citizens of the host state. Investment tribunals have further strengthened restrictions on performance requirements by adopting broad interpretations of their scope. (See Box 3).

BOX 3: Broad Interpretations of Restrictions in *Mobil v. Canada*

Following the discovery of oil fields off the coast of Newfoundland, Canada, the government put in place a legal regime designed to require investors engaging in development of the offshore resources to make expenditures for research and development (R&D) and education and training (E&T) in the local province. These and other requirements were enacted in the 1987 “Accord Act”. When Canada concluded the North American Free Trade Agreement (NAFTA), it listed the Accord Act as an exception to the treaty’s restrictions on performance requirements. The NAFTA also included within that exception any “subordinate measure adopted or maintained under the authority of and consistent with the [Accord Act]”. Pursuant to the Act, Canadian officials issued guidelines that sought to impose additional and stronger requirements with regard to R&D and E&T. Mobil objected, arguing that the new guidelines violated the NAFTA’s prohibitions on performance requirements. The investment tribunal agreed, adopting a broad view of the restrictions contained in that treaty, and a correspondingly narrow view of the relevant exceptions thereto.

Undermining Good Governance and Equality before the Law

The system for governing extractive industry projects is often complex by design. Different entities have responsibilities over their areas of authority and expertise, charged with ensuring, for instance, that the project does not generate undue environmental harm and complies with environmental law and policy; that the project generates tax revenue; that it drives economic diversification; that it creates sustainable and quality jobs; and that governance of the project complies with domestic and international norms regarding transparency, accountability, and participation. Approval of the project by one government entity, and at one point in the process, does not mean that the project will be able to proceed. Similarly, rejection by one entity, and at one point in the process, does not mean that the project is doomed. Rather, there are commonly periods of contestation through which diverse interests and complex issues can be raised, evaluated, adjudicated, and challenged.

Investment treaty claims against governments allow investors, and investors alone, to exit the domestic legal system at any point when a decision or the process is unfavorable to them, and take their issue to a forum where they are able to reframe the law and facts, and exclude other voices and interests. For instance, if a domestic environmental group successfully challenges the grant of an extractive industry permit on the ground that it violates environmental norms,¹⁷ the investor is able to challenge that court decision before an ISDS tribunal; the environmental group in the underlying domestic law proceeding is excluded from the ISDS dispute; and, as ISDS tribunals have interpreted investment treaties, the tribunals are not bound by, and can undo the effects of, the domestic court decision even if there is no evidence of corruption, fraud, discrimination, or other outcome-determinative failings at the domestic law level.

This, in turn, creates an unpredictable system where decisions on proposed projects depend not on the domestic policy objectives, laws, or regulations governing extractive industry projects, but whether and to what extent foreign investors are able to seek a better outcome from a system of law favorable to foreign investors’ economic interests. As a result, the voice, interests, and rights of other stakeholders are marginalized.

Imposing Financial Liability

The financial implications of investor-state arbitrations can be significant whether host states win or lose (see Box 4 and Table 2).

¹⁶ See e.g., *Kardassopoulos v. Georgia*, (ICSID Case No. ARB/05/18), Decision on Jurisdiction, July 6, 2007; *RDC v. Guatemala* (ICSID Case No. ARB/07/23). Note that some tribunals have determined that an investor cannot benefit from the protections of an investment treaty if there is evidence that the investor procured its investment through fraud or corruption. Tribunals have otherwise bound governments to contracts whose illegality arises from other grounds, including *ultra vires* conduct.

¹⁷ These facts are analogous to the case of *Infinito Gold v. Costa Rica*, ICSID Case No. ARB/14/5.

Box 4: Outsized Damages in *TCC v. Pakistan*

In the 2019 case *Tethyan Copper Company (TCC) v. Pakistan*, damages of USD 4.1 billion were awarded to the investor, not including interest. Pakistan's legal fees amounted to USD 25.5 million. In addition to its own fees, Pakistan was ordered to pay the claimant's legal costs in their entirety (USD 59.5 million) and the arbitration fees (over USD 3.7 million). Pakistan is considered a lower-middle income country, and had received a USD 6 billion bailout from the International Monetary Fund just months before the award was issued. The costs of the case against TCC amounted to 1.4% of the country's overall GDP.

Table 2: Examples of Awards and Expenses for Litigation and Arbitration in Extractive Industry ISDS Cases

Case Name and Number	Amount respondent state ordered to pay to claimant	Amount expressed as a percentage of host state GDP ¹⁸	Amount in legal/expert fees and arbitration costs born by the respondent state
<i>Unión Fenosa Gas, S.A.v. Arab Republic of Egypt</i>	Damages: USD 2 billion, plus interest	Damages: 0.8% GDP	Respondent legal fees: USD 1.8 million Claimant fees borne by respondent: USD 10 million All arbitration fees borne by respondent: USD 690,080
<i>Stans Energy Corp. and Kutisay Mining LLC v. Kyrgyz Republic (I)</i>	Damages: USD 117.7 million, plus interest	Damages: 1.32% GDP	Respondent legal fees: USD 5.3 million Claimant fees borne by respondent: USD 3.2 million 2/3 arbitration fees borne by respondent: USD 909,088
<i>Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan</i>	Damages: USD 4.1 billion, plus interest	Damages: 1.47% GDP	Respondent legal fees: USD 25.5 million Claimant fees borne by respondent: USD 59 million All arbitration fees borne by respondent: USD 3.7 million
<i>Khan Resources v. Mongolia</i>	Damages: USD 80 million, plus interest	Damages: 0.68% GDP	Respondent legal fees: Unknown Claimant legal fees borne by respondent: USD 8.7 million All arbitration fees borne by respondent: USD 730,778
<i>Anatolie and Gabriel Stati, Ascom Group S.A., Terra Raf Trans Trading Ltd v. Kazakhstan</i>	Damages: USD 508 million, plus interest	Damages: 0.21% GDP	Respondent legal fees: USD 17.6 million Claimant legal fees borne by respondent: USD 8.9 million ¾ arbitration fees borne by respondent: USD 920,866
<i>Tidewater Investment SRL and Tidewater Caribe, C.A. v. Venezuela</i>	Damages: USD 46.4 million	Damages: 0.014% GDP	Respondent legal fees: USD 9 million Claimant legal fees borne by respondent: USD 2.5 million Arbitration fees borne by respondent: Unknown
<i>Gold Reserve Inc. v. Venezuela</i>	Damages: USD 713 million, plus interest	Damages: 0.15% GDP	Respondent legal fees: USD 12.8 million Claimant legal fees borne by respondent: USD 5 million ½ of the costs of the arbitration: Unknown
<i>Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador (II)</i>	Damages: USD 1.1 billion, plus interest ¹⁹	Damages: 1.25% GDP	Respondent legal fees in arbitration proceedings: Unknown Claimant legal fees borne by respondent in arbitration proceedings: None Respondent legal fees in annulment proceedings: USD 5.6 million ½ of the costs of arbitration: Unknown
<i>Yukos Cases ((1) Hulley Enterprises Ltd. v. Russian Federation; (2) Veteran Petroleum Limited v. Russia; and (3) Yukos Universal Limited (Isle of Man) v. Russia)</i>	Damages: USD 50 billion, plus interest	Damages: 2.43% GDP	Respondent legal fees in arbitration proceedings: USD 27 million Litigation and arbitration fees and costs: USD 71.5 million All arbitration fees borne by respondent: USD 9.7 million
<i>Vannessa Ventures Ltd v. Venezuela</i>	None – state prevailed in dispute	N/A	Over USD 15 million

¹⁸ Calculations based on host state gross domestic product (GDP) for the year in which the award was issued, per World Bank figures, available at <http://data.worldbank.org/data-catalog/GDP-ranking-table>.

¹⁹ This amount was reduced in annulment proceedings from an original award of USD 1.8 billion, plus interest.

Exclusion of Local Perspectives and Participation in ISDS

By nature, extractives projects have wide-reaching impacts on surrounding communities. The projects underpinning these claims necessarily implicate land rights, access to (potable) water, impacts on biodiversity, cultural impacts, and other dimensions of health, environment, livelihoods, and rights. In several cases, investor claims themselves address either the impact on an investment by third parties (invoking full protection and security provisions when there is disruption to activities from protests, for example, or challenging a requirement to consult with communities) or a state's inability to protect an investment from such disruption.²⁰ Furthermore, the financial and reputational and financial risks of ISDS may disincentivize states from meaningfully defending the rights of affected third-parties. ISDS claims have also resulted in legal interpretations by tribunals or remedies which adversely impact human rights and other third-party interests.²¹

Despite the importance of local perspectives on the issues at stake in ISDS – and the substantial implication of the awards and outcomes (or the effects of regulatory chill²² from threatened cases) on local communities – third-party participation in investment disputes is extremely limited.

Third parties may request to participate as amici curiae. It is up to the tribunal to decide whether or not an amicus submission will be accepted, and the requirements for acceptance can be prohibitively narrow in scope.²³ Even when a submission to participate is accepted, it only provides a limited opportunity for third parties to provide context deemed relevant by the tribunal, and is not meant to grant substantive remedy to affected rightsholders.²⁴



²⁰ For example, see *GCM Mining Corp v. Colombia* (ICSID Case No. ARB/18/23) where the investor, a Canadian mining company, alleged that the former South American state failed to protect its assets from coercive actions produced illegal miners located in the zone where its subsidiary was conducting an extractive project. Table 3 provides further cases in which third-party rights were raised in proceedings.

²¹ For more on the rights of third-parties in ISDS, see Jesse Coleman, Lise Johnson, Brooke Güven, Lorenzo Cotula and Thierry Berger, *Third-Party Rights in Investor-State Dispute Settlement: Options for Reform*, (CCSI, IISD, and IIED), https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/150/#:~:text=Third%20Party%20Rights%20in%20Investor,also%20offering%20examples%20of%20procedural.

²² For further discussion of ISDS and regulatory chill, see, Kyla Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement," *Transnational Environmental Law* 2, (2018) 229-250; Julia Brown, "International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?" *3 Western Journal of Legal Studies* 1 (2013); Gus Van Harten and Dayna Nadine Scott, "Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada," *7 Journal of International Dispute Settlement* 1, (2016) 92-116.

²³ In *Eco Oro v. Colombia*, for example, the tribunal denied an amicus curiae submission presented by the Committee for the Defense of Water and the Páramo de Santurbán alongside several international organizations. *Eco Oro v. Colombia* (ICSID Case No. ARB/16/41), Procedural Order No. 6.

²⁴ See Katia Fach Gómez, "Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest," *2 Fordham International Law Journal* Vol. 35, (2012) 509-564; Nathalie Bernasconi, Martin Dietrich Brauch, Howard Mann, "Civil Society and International Investment Arbitration: Tracing the Evolution of Concern," (eds) Thomas Schultz and Federico Ortino, *The Oxford Handbook of International Arbitration* (2020).

Table 3: Examples of Extractives Cases in which the Rights of Third Parties were Raised

Case Name and Number	Year Lodged - Year Determined	Home state of investor	Subsector	Notes on Third Party Rights	Amount Claimed	Outcome	Award
<i>Glamis Gold v. United States</i>	2003 - 2009	Canada	Mining of metal ores (gold)	The U.S. referred in its defense to the rights of Native Americans under U.S. Law. An amicus brief submitted by the Quechan Indian Nation, which was accepted, argued that the tribunal should interpret NAFTA in a way that is consistent with U.S. obligations under conventional and customary international law.	USD 50 million	Decided in favor of state	-
<i>Chevron and TexPet v. Ecuador (II)</i>	2006 - 2011	United States	Extraction of crude petroleum and natural gas	Company's claim challenged an Ecuadorian court decision that Texaco (later merged with Chevron) was liable for toxic wastewater dumping and oil spills in the Amazon.	USD 649 million	Decided in favor of investor	USD 77.7 million
<i>Burlington Resources v. Republic of Ecuador</i>	2008 - 2017	United States	Extraction of crude petroleum and natural gas	Ecuador filed successful counterclaim alleging breaches by company of Ecuadorian environmental law.	USD 1515.6 million	Decided in favor of investor	USD 379.8 million
<i>Perenco Ecuador Limited v. Republic of Ecuador (Petroecuador)</i>	2008 - 2019	Bahamas	Extraction of crude petroleum and natural gas	Ecuador filed successful counterclaim to cover costs of environmental remediation from Perenco's oil blocks.	USD 1423 million	Decided in favor of investor	USD 416.5 million
<i>Clayton and Bilcon of Delaware Inc. v. Government of Canada</i>	2008 - 2019	United States	Other mining and quarrying	Claimants' proposed project drew substantial local opposition, and was rejected by a joint provincial/federal environmental assessment panel. The investors sued in response.	USD 443.40 million	Decided in favor of investor	USD 7 million
<i>Pac Rim Cayman LLC v. Republic of El Salvador</i>	2009 - 2016	United States	Mining of metal ores (gold)	Claimant failed to submit environmental permit and faced community opposition due to health concerns of mining activities. Company filed claim after state refused to issue exploitation concession.	USD 314 million	Decided in favor of state	-
<i>Copper Mesa Mining Corporation v. Republic of Ecuador</i>	2011 - 2016	Canada	Mining of metal ores (copper)	Claim brought by locals in Ontario courts against Copper Mesa for alleged harassment and threats of violence.	USD 69.7 million	Decided in favor of investor	USD 19.4 million
<i>South American Silver Limited v. The Plurinational State of Bolivia</i>	2013 - 2018	Bermuda	Mining of metal ores (silver)	Tensions between local communities and company officials led to violence. The government reached an agreement with Indigenous communities, claiming state ownership of mining concessions.	USD 385.7 million	Decided in favor of investor	USD 18.7 million
<i>Bear Creek Mining v. Republic of Peru</i>	2014 - 2017	Canada	Mining of metal ores (silver)	Presidential permission for acquirement of mine revoked citing a need to preserve "environmental and social conditions" in the region.	USD 522.2 million	Decided in favor of investor	USD 18.2 million
<i>Infinito Gold Ltd v. Republic of Costa Rica</i>	2014 - Pending	Canada	Mining of metal ores (gold)	Concession was granted before approval of EIA. Constitutional Chamber of the Supreme Court of Costa Rica determined the claimant's concession violated Costa Rican Constitution, namely the right to a healthy environment.	USD 93.8 million	-	-

Table 3 (continuation): Examples of Extractives Cases in which the Rights of Third Parties were Raised

Case Name and Number	Year Lodged - Year Determined	Home state of investor	Subsector	Notes on Third Party Rights	Amount Claimed	Outcome	Award
Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania	2015 - Pending	Canada; United Kingdom	Mining of metal ores (gold)	Romania denied claimant's environmental impact assessment and refused to issue environmental permits for operation of the mine, partially in response to resistance to the mine from environmental groups.	USD 3285.7 million	-	-
Eco Oro Minerals Corp v. Republic of Colombia	2016 - Pending	Canada	Mining of metal ores (gold and silver)	Colombia Constitutional Court ordered that mining activities in protected páramos (wetland) regions be prohibited.	USD 764 million	-	-
Cosigo Resources, Ltd., Cosigo Resources Sucursal Colombia, Tobie Mining and Energy, Inc. v. Republic of Colombia	2016 - Pending	United States	Mining of metal ores (gold)	Colombia published a resolution creating the Yaigojé Apaporis national park, encompassing the area of the mining concession.	USD 16511 million	-	-
Kingsgate Consolidated Ltd v. The Kingdom of Thailand	2017 - Pending	Australia	Mining of metal ores (gold)	Thai government issued a moratorium on gold mining, citing public health concerns, and did not renew claimant's processing license.	-	-	-
South32 S.A. v. Colombia	2020 - Pending	United Kingdom	Mining of metal ores (nickel); manufacture of basic metals	Company filed claim after it was ordered by state to reapply for environmental license and carry out community consultations after a 2015 study found harmful health impacts on local communities due to mining activities	-	-	-
Barrick (PD) Gold Australia Pty v. Papua New Guinea	Notice of dispute filed 2020	Australia	Mining of metal ores (gold)	Claim filed after state did not renew license to operate, alleging environmental damage.	-	-	-
Ecuagoldmining v. Republic of Ecuador	Notice of dispute filed 2020	China	Mining of metal ores (gold)	Gold mining project halted due to community protests. Community obtained order from local courts directing claimant to suspend operations.	-	-	-
Lupaka Gold v. Republic of Peru	Notice of dispute filed 2020	Canada	Mining of metal ores (gold)	Company claims the state failed to support the company against blockades and protests led by the community of Parán.	-	-	-

Reform Options for Investment Treaties

States should carefully consider their reasons for signing investment treaties and define the scope and content of these agreements to advance their policy goals and protect their ability to regulate in the public interest. These considerations apply equally to existing treaties as well as to any new treaties, though the avenues of reform differ. Policy-makers could consider the following steps toward aligning their investment treaties with their development objectives:

- ▶ Assess both costs and benefits of their existing investment treaties, including the impacts of treaties on states' ability to regulate in the public interest.²⁵
- ▶ Establish a set of achievable domestic and international development priorities, and identify ways in which foreign investment can be shaped to serve these objectives.²⁶
- ▶ Create processes for the design of investment treaties, decision-making around treaty reform, and the resolution of investment-related disputes, in a way that allows all relevant stakeholders to meaningfully participate.
- ▶ Consider terminating treaties that are mis-aligned with national objectives,²⁷ either by terminating the treaties or withdrawing consent to arbitration.²⁸
- ▶ When choosing to keep an existing treaty, clarify broad or vague provisions by issuing unilateral or joint interpretive statements.²⁹
- ▶ Consider incorporating into new or revised treaties binding investor obligations regarding human rights and other responsible investment standards, or existing standards such as the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.³⁰



²⁵ Lise Johnson, Lisa Sachs, Brooke Güven and Jesse Coleman, *Costs and Benefits of Investment Treaties: Practical Considerations for States*, (CCSI, 2018) <https://ccsi.columbia.edu/sites/default/files/content/pics/Cost-and-Benefits-of-Investment-Treaties-Practical-Considerations-for-States-ENG-mr.pdf>; 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, 2018) https://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en.

²⁶ Lise Johnson, Brooke Güven, and Jesse Coleman, *Investor-State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get Us There?* (CCSI, 2017) <https://ccsi.columbia.edu/news/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there>; Lise Johnson, Lisa Sachs and Nathan Lobel, "Aligning International Development Agreements with the Sustainable Development Goals," *Columbia Journal of Transnational Law*, Vol. 58 (2019).

²⁷ In 2014, South Africa terminated its BITs with Austria, Denmark and Germany, and Indonesia terminated 18 of its 64 BITs. See UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (2015), http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf.

²⁸ Lise Johnson, Lisa Sachs, Brooke Güven, and Jesse Coleman, *Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law*, (CCSI, 2018) <https://ccsi.columbia.edu/content/clearing-path-withdrawal-consent-and-termination-next-steps-reforming-international>; Brooke Güven, Lise Johnson, *Draft Treaty Language: Withdrawal of Consent to Arbitrate and Termination of International Investment Agreements*, (CCSI, IIED, and IISD, 2019) <https://ccsi.columbia.edu/sites/default/files/content/docs/our%20focus/uncitral-submission-termination-withdrawal-en.pdf>.

²⁹ Ladan Mehranvar and Lise Johnson, "Missing Masters: Causes, Consequences, and Corrections for States' Disengagement from the Investment Treaty System" (forthcoming, 2022); Lise Johnson, *Aligning Swiss Investment Treaties with Sustainable Development: An assessment of current policy coherence and options for future action*, (CCSI, 2015) <https://ccsi.columbia.edu/sites/default/files/content/docs/our%20work/Aligning-Swiss-IIAs-with-SD-CCSI-June-2016-1-1.pdf>.

³⁰ OECD, *Guidelines for multinational enterprises*, 2011, OECD Publishing <https://www.oecd.org/daf/inv/mne/48004323.pdf>; UN OHCHR *UN Guiding Principles on Business and Human Rights*, 2011, United Nations https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

- ▶ Participate in international reform of investment treaties and ISDS, including, for instance, at the United Nations Commission on International Trade Law (UNCITRAL) Working Group III and ICSID.³¹
- ▶ Promote international efforts to overcome transnational governance challenges related to international investment, including efforts to combat incentives schemes and other provisions that foster races to the bottom; close governance gaps that erode tax bases and externalize harms; address challenges posed to the global commons such as the climate crisis;³² and the establishment of a legally binding instrument on transnational corporations.³³

In all cases, states should be cognizant of the varied and significant implications of international investment law for the governance of investments in the extractive industries sector, and of the ways in which this rapidly expanding body of law can influence whether, when, and how foreign investment in this sector contributes to sustainable development.



³¹ See “Working Group III: Investor-State Dispute Settlement Reform,” UNCITRAL, https://uncitral.un.org/en/working_groups/3/investor-state; ICSID, ICSID Rules and Regulations Amendment Process, <https://icsid.worldbank.org/resources/rules-amendments>. For more on the substantive negotiations in UNCITRAL’s Working Group III, including CCSI’s engagement with the Working Group, see: <https://ccsi.columbia.edu/content/ccsi-and-uncitral-working-group-iii-investor-state-dispute-settlement-reform>.

³² Lise Johnson, *Aligning Swiss Investment Treaties with Sustainable Development: An assessment of current policy coherence and options for future action*, (CCSI, 2015) <https://ccsi.columbia.edu/sites/default/files/content/docs/our%20work/Aligning-Swiss-IIAs-with-SD-CCSI-June-2016-1-1.pdf>.

³³ Lise Johnson, Brooke Güven, and Jesse Coleman, *Investor-State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get Us There?* (CCSI, 2017) <https://ccsi.columbia.edu/news/investor-state-dispute-settlement-what-are-we-trying-achieve-does-isds-get-us-there>.

Glossary

A list of key protections provided by international investment law and their definitions:

- 1. Non-discrimination:** The obligation not to discriminate among or between investors is found in almost all investment treaties. It usually consists of two relative standards, which require that the host state treat foreign investors no less favorably than: (1) domestic investors (also referred to as the “national treatment” obligation); and (2) other foreign investors (also referred to as the “most-favored nation”, or MFN, treatment obligation).
- 2. Expropriation:** Expropriation generally falls into two categories: direct and indirect. Direct expropriation involves “the physical taking or nationalization of an enterprise, which usually involves a transfer of ownership to the state.”³⁴ While it can take various forms, indirect expropriation is generally understood as an action or measure taken by the state that has the effect of depriving the investor of the benefit of its investment, while not resulting in the transfer of ownership. Investment treaties typically recognize that governments may lawfully expropriate property, but require that any expropriation must be “promptly, adequately, and effectively” compensated.
- 3. Fair and equitable treatment:** Tribunals have struggled to interpret and apply this vague standard, as most treaties typically give no clear guidance regarding its meaning. Some tribunals have adopted a relatively narrow approach, concluding that states will only be liable if their conduct is egregious and shocking.³⁵ Others have interpreted the provision much more broadly, establishing a high standard that requires host states not to act in a manner that affects the “basic” or “legitimate expectations” that were taken into account by the foreign investor when making the investment.³⁶ Investors have relied extensively on this broad interpretation of FET in challenging the conduct of host states. Indeed, this provision has become a “catch-all” clause, allowing investors to succeed where their other claims (for example in relation to expropriation) fail.³⁷
- 4. Umbrella clause:** this provision can require the host state to comply with certain obligations or commitments owed to (or entered into with) investors or investments.³⁸ Any clear interpretation of the umbrella clause remains elusive because the specific wording of these clauses often varies from treaty to treaty, and even clauses with identical wording have been given different interpretations by arbitral tribunals. According to some tribunals, investors can use umbrella clauses to enforce any obligation owed by the state, which can include obligations owed under other areas of international law, general domestic law, or under specific investor-state contracts. Other tribunals have interpreted the provision more narrowly, concluding that umbrella clauses only allow an investor to enforce obligations owed specifically to it under an investor-state contract.

³⁴ *Ibid.*, p. 15.

³⁵ See e.g. *Glamis Gold v. United States*, UNCITRAL, Award, June 8, 2009.

³⁶ See e.g. *Tecmed v. Mexico* (ICSID Case No. ARB(AF)/00/2), Award, May 29, 2003, para.154 (government conduct must be “free from ambiguity and totally transparent” so that the investor may know all the relevant rules and regulations, and their respective goals, before investing); and *Occidental v. Ecuador* (ICSID Case No. ARB/06/11), Award, July 1, 2004, paras. 185-186, 190-191 (the FET obligation enables review of the correctness of domestic court and/or administrative determinations, and requires “stability and predictability” and “certainly entails an obligation not to alter the legal and business environment in which the investment has been made”).

³⁷ Nathalie Bernasconi-Osterwalder, Aaron Cosbey, Damon Vis-Dunbar, Lise Johnson, *Investment Treaties and Why They Matter to Sustainable Development: Questions and Answers*, (IISD, 2011), p. 12 <https://www.iisd.org/publications/investment-treaties-and-why-they-matter-sustainable-development-questions-and-answers>.

³⁸ It seems that states have become increasingly reluctant to include such provisions in newly drafted treaties: of the treaties concluded in 2014, all omitted such a clause. See UNCTAD, “Recent Trends in IIAs and ISDS” (IIA Issues Note No. 1, February 2015), at p. 3 http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf.

5. Restrictions on performance requirements: A performance requirement “is a condition that investors must meet in order to establish or operate a business, or to obtain some advantage offered by the host state.”³⁹ Examples include mandatory or incentive-based requirements that investors: (1) use or accord a preference to local providers of goods or services; (2) make expenditures in the host country on research and development or education and training; or (3) hire a certain number or percentage of local employees. These investment treaty provisions limit the number of options available to states to try to ensure that foreign investment produces development benefits in the host state.

6. Full protection and security: This standard has frequently been interpreted by ISDS tribunals to obligate the host state to provide physical protection and security to the investor, including from actions by the host state and third parties (such as local communities).⁴⁰ Inaction by the host state is not sufficient to meet this obligation—rather, active conduct by the state to protect the investor is required.⁴¹ The Government of Ecuador was found to be in breach of this protection in *Copper Mesa v. Ecuador*, for its “negligence” in effectively protecting the investment concessions from blockades formed by human rights defenders protesting the mining activities. Damages were reduced in acknowledgement of the government’s having fired live rounds at the protestors, but it was still found to have failed to “impose its will on the anti-miners, acting with all the powers and forces available to a sovereign State...”.⁴² This inaction, according to the tribunal, contributed to the project’s failure.

ABOUT THE AUTHORS

- ▶ Ella Merrill is a Program Associate at the Columbia Center on Sustainable Investment (CCSI)
- ▶ Jesse Coleman is a Lead Researcher at CCSI
- ▶ Lisa Sachs is Director of CCSI
- ▶ Lise Johnson is a Senior Fellow at CCSI



³⁹ Nathalie Bernasconi-Osterwalder, Aaron Cosbey, Damon Vis-Dunbar, Lise Johnson, *Investment Treaties and Why They Matter to Sustainable Development: Questions and answers*, (IISD, 2011), p. 27.

⁴⁰ Jen Moore, Manuel Perez Rocha, “Extraction Casino: Mining Companies Gambling with Latin American Lives and Sovereignty through Supranational Arbitration” (April 2019) <https://ips-dc.org/wp-content/uploads/2019/07/ISDS-Mining-Latin-America-Report-Formatted-ENGLISH.pdf>.

⁴¹ *Input to the UN Working Group on Business and Human Rights regarding guidance on human rights defenders and the role of business* (March 15, 2018), Columbia Center on Sustainable Investment.

⁴² *Copper Mesa v. Ecuador* (PCA Case No. 2012-2), Award (Mar. 15, 2016), para 6.82.

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AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

Columbia Center on Sustainable Investment

Jerome Greene Hall 435 West 116th Street New York, NY 10027

Phone: +1 (212) 854-1830

ccsi.columbia.edu