Investor-State Dispute Resolution and the Environment: A Case for Appropriate Dispute Resolution

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Contents

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I Introduction

Investor-state dispute settlement ('**ISDS**') clauses were initially introduced into free trade agreements between states in the 1960s, to protect investors from expropriation of their assets by newly created states and thereby to encourage investment in developing states. In the past two decades, the number of investor-state dispute ('**ISD**') cases relating to climate change and environment issues has increased dramatically, as has the amount of monetary compensation sought by investors bringing ISD claims.

Increasingly, investors are using ISDS clauses to claim compensation for speculative future losses for projects not allowed to proceed for climate change and environmental reasons, and to effectively coerce governments into allowing projects to proceed, despite national or international laws, or states' efforts to combat environmental degradation and climate change. Investors are also seeking compensation for "indirect expropriation" by which government regulation or action "indirectly" results in their investments being affected.

In these circumstances, it is unsurprising that there is growing criticism of ISDS clauses and calls for reform of these clauses or the total removal of them from free trade agreements. Some states are seeking to do the latter, such as South Africa, which has terminated their bilateral investment treaties. However, given ISDS clauses will survive the termination of the treaty if the treaty contains a survival clause, even if all free trade agreements containing ISDS clauses were terminated today, they will most likely continue to be available to be used by investors for many years afterwards.

How, then, are ISD to be managed? The answer may lie in appropriate dispute resolution of ISD. Appropriate dispute resolution involves using the dispute resolution process that is best suited to resolving the particular dispute. This requires understanding the characteristics of the particular ISD – "the fuss" – and of the available dispute resolution processes – "the forums" and then "fitting the forum to the fuss".[2]

The paper begins in Part II with an overview of ISD and continues in Part III with identifying the types of ISD involving climate change and environmental issues. The paper looks at six types of ISD cases concerning: public health; fossil fuel extraction combustion; other minerals (e.g. rare earth mining); climate change; renewable energy; and other environmental issues. In Part IV, the paper canvasses the controversies about, and legitimacy of, ISDS clauses and disputes.

The paper then discusses the fuss, forums and forms of dispute resolution. Part V explains that understanding the fuss involves, first, identifying the characteristics of ISD, including preliminary legal questions of standing and jurisdiction, substantive legal questions concerning investments affected and interferences with them, and factual questions concerning compensation. In understanding the fuss, we also need to recognise that ISD involving climate change and environment issues have at their core environmental problems. Environmental problems are complex, polycentric, interdisciplinary, value-infused, uncertain and changing, and involve the public interest.

Part VI of the paper discusses the forums of the dispute resolution processes that are available, including arbitration, litigation, mediation, conciliation, hybrid mechanisms, fact-finding processes and facilitative processes. To date, the most commonly used dispute resolution process is arbitration. Although arbitration is heavily favoured by investors, it may not always be the most appropriate forum for ISD. Criticisms of the use of arbitration of ISD include: a lack of transparency;

[2] Sander FEA and Goldberg SB, "Fitting the Forum to the Fuss: A User-friendly Guide to Selecting an ADR Procedure" (1994) (Jan) Negotiation Journal 49.

lack of consistency in decision-making and awards of compensation; lack of independence and neutrality of the arbitrators; lack of access for all stakeholders; and the adversarial nature of the process leading to arbitral tunnel vision and polarisation.

Analysing both the dispute and the dispute resolution processes allows evaluation of which forum is most appropriate for resolving the dispute. This matching process is appropriate not only for the dispute as a whole, but also for issues raised by the dispute. Some issues that arise in ISD are arguably better suited to litigation than arbitration, such as preliminary and substantive legal questions. Factual issues may be better suited to conciliation, where subject-matter experts (e.g. climate scientists) may assist in resolving the issues involving that expertise, mediation where subject-matter expertise is not required, or fact-finding inquiries.

Appropriate dispute resolution also involves consideration of the form of the dispute resolution process. The "form" refers to the ways in which a forum – the dispute resolution process – is organised and conducted. Part VII explains that selecting the appropriate form involves considering issues such as who the decision-makers should be; how and where the proceedings should be conducted; whether reasons for the decision should be given and made public; whether the proceedings are adversarial or inquisitorial or a combination; and whether parties should be allowed to appeal the decision.

Part VIII of the paper concludes by noting that consideration of these issues of the appropriate forum and form, and moving away from the presumption that arbitration is the best suited forum for the resolution of ISD, may assist in breaking the stronghold of arbitration in the resolution of climate change and environmental related ISD.

II Overview of ISD

(A) What are ISD?

ISD are disputes between an investor and a state ("host state"), brought under a trade agreement between the state of the investor and the host state. The ISDS mechanism was first conceived by German businessmen in the late 1950s, to protect their foreign investments at a time when many developing countries were regaining independence from colonial states. These businessmen called for an "international magna carta for private investors", an idea which was taken up by the World Bank in the 1960s, which argued it would assist developing states attract foreign capital. A resolution was passed at the World Bank's 1964 annual meeting to create a mechanism for handling investor-state cases, despite a large bloc of 21, mainly developing, states voting against the proposal.[3]

(B) How do ISD arise?

ISD arise out of provisions in trade agreements between states, either bilateral investment treaties between two states or free trade agreements between multiple states, which allow investors to bring claims against the state. An example is the Singapore-Australia Free Trade Agreement ('**SAFTA**'). While the SAFTA covers a range of topics agreed between Singapore and Australia, such as trade, customs procedures, movement of natural persons and intellectual property, of relevance to ISD is Chapter 8 of the SAFTA which covers investment.

The SAFTA allows a claimant (defined as an investor) to submit to arbitration a claim:

> (i) that the respondent has breached an obligation under Section A; and

[3] Claire Provost and Matt Kennard, 'The obscure legal system that lets corporations sue countries' *The Guardian*, 10 June 2015 <https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid>.

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach,

if that claim has not been resolved by consultation and negotiation.[4]

The obligations in Section A of Chapter 8 includes obligations regarding national treatment, most-favoured-nation treatment, minimum standard of treatment (requiring fair and equitable treatment and full protection and security), prohibition of performance requirements, transparency, and expropriation and nationalisation. Investors can bring an action claiming that the respondent, being the host state, has breached one or more of these obligations in doing (or not doing) a certain action, if they can show they have incurred loss or damage because of this.

(C) How are ISD resolved?

ISD are typically resolved by arbitration, the process for which is set out (to some degree) in the agreement itself. For example, the SAFTA specifies the procedural requirements for bringing a claim and the options for the rules of procedure governing the arbitration.[5] Under the SAFTA, the arbitral tribunals consist of three arbitrators: one each appointed by the disputing parties, and the third appointed by agreement between the parties.[6] The SAFTA also sets out the conduct of the arbitration: for example, how the location is decided, who can make oral and written submissions about the interpretation of the SAFTA, whether amicus curiae submissions are allowed, who has the burden of proof, and the ability of the tribunal to order interim measures, amongst other questions of conduct.[7]

The SAFTA addresses topics including the transparency of proceedings, governing law and expert reports. The SAFTA also sets out the limitations of the tribunal if they make a final award, in that they can only award monetary damages and any applicable interest, and restitution of property.[8] The tribunal is not allowed to award punitive damages.[9]

III Types of ISD

ISD involving climate change and environmental issues are of different types. The subject matter of these ISD include: public health, fossil fuels, other minerals, climate change, renewable energy and other environmental issues.

(A) Public health cases

As of July 2021, there were at least 33 ISDS cases related to public health identified by the United Nations Conference on Trade and Development ('**UNCTAD**').[10] The cases related to plain packaging of tobacco "are perhaps the most notorious" of ISDS cases concerning health and tobacco measures.[11]

(i) Philip Morris v Australia

In response to Australia's tobacco plain packaging laws passed in 2011, the tobacco company Philip Morris Asia Ltd brought an ISDS claim against Australia under the Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of

[4] SAFTA Chapter 8, Article 24 'Submission of a Claim to Arbitration'.
[5] Ibid, Article 24(3).
[6] Ibid, Article 27.
[7] Ibid, Article 28.
[8] Ibid, Article 33(1).
[9] Ibid, Article 33(6).
[10] 'UN investigates impact of investment treaties on human rights' UN Newsdesk, e795.
[11] Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7(2) *Transnational Environmental Law* 229, 231.

Investments (1993) (since terminated) (‘**terminated Hong Kong – Australia Agreement**’), seeking billions of dollars in compensation for the loss it alleged it had suffered by reason of this law. Philip Morris claimed that by enacting the plain packaging laws, Australia had breached its obligations under the terminated Hong Kong – Australia Agreement by expropriating its investments contrary to Article 6 of that agreement, and failing to provide fair and equitable treatment contrary to Article 2 of that agreement.[12] Both of these articles are fairly standard in investment agreements. Article 6 protected investors from being deprived of their investments except under due process of law for a public purpose, on a non-discriminatory basis and against compensation.[13] Article 2 stated that the investments and returns of the investors shall be accorded fair and equitable treatment by the states and shall enjoy full protection and security in the area of the state.

However, as Philip Morris had shifted its assets to Hong Kong in order to bring this claim, the tribunal decided that Philip Morris was not a Hong Kong company and the case was an abuse of process. Philip Morris Asia Ltd acquired a 100% shareholding in Philip Morris Australia Ltd, a holding company that owned 100% of the shares in Philip Morris Ltd, and therefore Philip Morris Asia Ltd acquired an indirect interest in Philip Morris Ltd.[14] This claim took four years for the tribunal to decide and cost Australia $24 million in legal fees, only half of which were recovered (after a further two years to determine costs).[15]

(ii) Eli Lilly v Canada

Eli Lilly, a pharmaceutical company, filed a Notice of Arbitration under the North American Free Trade Agreement (‘**NAFTA**’) after the Canadian judiciary held that the patents for two of its drugs were invalid for want of utility. Eli Lilly alleged in this notice that “the judiciary in Canada has created a new doctrine to assess whether an invention meets the condition of being ‘useful’ or ‘capable of industrial application”, and sought damages of $500 million as well as the amount it was required to pay from the provident loss of its patents and inability to enforce them.[16] This case was decided in favour of Canada[17] and Eli Lilly was ordered to pay the costs of the arbitration and 75% of Canada’s legal fees.[18]

(B) Fossil fuel cases

ISDS cases relating to fossil fuel projects and interests are accounting for an increasingly large percentage of ISDS cases and awards. In 2015, 26% of all disputes registered with the international Centre for Settlement of Investment Disputes concerned oil, gas and mining, and a further 15%

[12] Chief Justice French, ‘Investor-State Dispute Settlement – A Cut Above the Courts?’ presented at Supreme and Federal Court Judges’ Conferences, 9 July 2014, 5-6.
[13] Ibid, 5.
[14] Ibid, 4-5; Inaê Siqueira de Oliveira, ‘Corporate restructuring and abuse of rights: PCA tribunal deems Philip Morris’s claims against Australia’s tobacco plain packaging rules inadmissible’, *Investment Treaty News* (10 August 2016) <https://www.iisd.org/itn/en/2016/08/10/philip-morris-asia-limited-v-the-commonwealth-of-australia-pca-case-no-2012-12/>.
[15] ‘UN investigates impact of investment treaties on human rights’ (n 10); Patricia Ranald, ‘When even winning is losing. The surprising cost of defeating Philip Morris over plain packaging’, *The Conversation* (27 March 2019), <https://theconversation.com/when-even-winning-is-losing-thesurprising-cost-of-defeating-philip-morris-over-plain-packaging-114279>.
[16] French (n 12), 7-8.
[17] UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, ‘Eli Lilly v Canada’ <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/507/eli-lilly-v-canada>.
[18] Thomas Musmann, ‘Eli Lilly v. Canada – The First Final Award Ever on Patents and International Investment Law’, *Kluwer Patent Blog*, 4 April 2017.

concerned electric power and other energy resources.[19] Where the final award was disclosed, fossil fuel investors have been successful in 72% of ISDS cases decided on their merits.[20]

Seven of the top ten largest ISDS awards have involved fossil fuel interests,[21] including an award of $40 billion against Russia. Further, the average amount claimed in arbitrations involving fossil fuels is $1.4 billion, which is twice the average claim amount in non-fossil fuel related arbitrations. The average award in published arbitration awards involving fossil fuels is $600 million, which is five times the average award in non-fossil fuel related arbitrations. As of 2023, governments had paid more than $77 billion in compensation to fossil fuels investors.[22]

(i) Zeph Investments v Australia (coal)

Waratah coal case

In 2022, in a landmark decision, the Queensland Land Court recommended refusing environmental authority and mining lease applications by Waratah Coal Pty Ltd for the coal mine project located in the Galilee Basin of Queensland, partly due to the contribution it would make to climate change and thereby undermining human rights.[23] This coal mine project would have extracted 40 million tonnes of coal per year, equating to 1.58 billion tonnes of CO_2 emissions in its lifetime. The Queensland Department of Environment and Science followed this court decision by refusing the environmental authority. Waratah Coal appealed this decision but then withdrew the appeal in February 2023.[24]

In May 2023, Zeph Investments Pte Ltd, a Singapore-registered company which in January 2019 acquired 100% of the shares in the Australian company Mineralogy Canada Acquisition Corp Pty Ltd, which owns 100% of Waratah Coal,[25] filed a Notice of Arbitration, under the ASEAN-Australia-New Zealand Free Trade Agreement, against Australia seeking AUD$43 billion in damages for the refusal of the environmental permits. In October 2023, Zeph Investments filed a Notice of Intention to Commence Arbitration under the SAFTA, seeking AUD$69 billion in damages. The notices allege the decision of the Land Court "breached the minimum standard of treatment required under the fair and equitable treatment clause of the Agreement and constituted an expropriation." This is despite Waratah Coal's own expert witness assessing "the gross value of mining revenue from the project at just $A25.5 billion in today's dollars" and, after capital and operating costs, the project could in fact lose money, being worth "between negative $2.9 billion and $8.7 billion depending on modelling assumptions."[26]

The Australian government has said legal action by Zeph Investments would be "vigorously defended".[27] However, even if the claims are successfully challenged on standing or jurisdiction

[19] Tienhaara, 'Regulatory Chill in a Warming World' (n 11), 231.
[20] Kyla Tienhaara and ors, 'Investor-state disputes threaten the global green energy transition' (2022) 376(6594) *Science* 701, 701-702.
[21] OECD, DAF/INV/TR1/WD(2022)5/REV 2, 'Background note for November 2022 meeting on Investment treaties and climate change' by Directorate for Financial and Enterprise Affairs Investment Committee, dated 2 March 2023.
[22] 'Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights' Note by the Secretary-General, UNGA A/78/168, 4.
[23] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21.
[24] Julia Dehm, 'Undermining the Energy Transition', *Verfassungsblog*, 19 November 2023.
[25] 2023-24 Budget estimates re Zeph Investments.
[26] Stephen Long, 'Who knew Queensland's richest man is a foreign investor?' *The Australia Institute*, 24 November 2023
[27] Dehm, 'Undermining the Energy Transition' (n 24).

grounds, such as in the Philip Morris case, such claims can still have a "chilling effect" and be a warning "about how international arbitration risks undermining urgent and just energy transition".[28]

Environmental offsets

Zeph Investments Pte Ltd is also seeking AUD$41.3 billion under the ASEAN-Australia-New Zealand FTA, after the Queensland government granted environmental offsets to a different company on the land over which the Waratah Coal has mineral leases.[29]

(ii) Lone Pine v Canada

United States-registered company Lone Pine Resources Inc. brought a claim against Canada, alleging breaches of the NAFTA, due to the government of Quebec revoking all of its permits for oil and gas exploration, because of a moratorium on fracking.[30] This case was decided in favour of Canada.[31]

(iii) Rockhopper v Italy

The United Kingdom companies Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd ('**Rockhopper**') brought a claim against Italy following the Italian government's ban in 2015 of new oil and gas projects within 12 nautical miles of its coastline, for environmental reasons. Rockhopper had invested 33 million pounds and held a licence from 2014 to drill for oil, and yet was awarded compensation of 191 million pounds, plus interest. Rockhopper announced that it would use the windfall payment of public funds from Italy, to fund oil exploration activities off the coast of the Falkland Islands.[32]

(iv) TransCanada v USA

Canadian companies TransCanada Corporation and TransCanada PipeLines Limited ('**TransCanada**') announced it would bring a claim against the United States after the Obama administration rejected the Keystone XL pipeline following large-scale environmental activism against this pipeline. A permit was later issued by the Trump administration and TransCanada suspended the claim. However, the claim was revived (by TC Energy, formerly TransCanada) when the Biden administration reversed the earlier permit issuance and cancelled the permit.[33]

(iv) Chevron v Ecuador

An Ecuadorian court ruled that Chevron was required to pay compensation of $9.5 billion (reduced from $18 billion) in damages for contamination following devastating oil spills in the Amazon. Chevron Corporation and Texaco Petroleum Company sued Ecuador using the ISDS clause in the US – Ecuador bilateral investment treaty. In 2018 arbitrators ordered the Ecuadorian government to annul the original court decision.[34] Chevron claimed that the Ecuadorian court's decision was the product of fraud and racketeering activity and was unenforceable (as determined by the US District Court and upheld by the US Court of Appeals for the Second Circuit), and that Chevron had not

[28] Ibid.
[29] Long (n 26).
[30] Julia Dehm, 'OECD Public Consultation on investment treaties and climate change' submission <https://www.oecd.org/investment/investment-policy/OECD-investment-treaties-climate-change-consultation-responses.pdf>.
[31] UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, 'Lone Pine v Canada' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/547/lone-pine-v-canada>.
[32] 'Paying polluters' (n 22), 14; Dehm, 'OECD Public Consultation on investment treaties and climate change' (n 30).
[33] Dehm, 'OECD Public Consultation on investment treaties and climate change' (n 30).
[34] Aldo Orellana López, 'Chevron vs Ecuador: international arbitration and corporate impunity', Open Democracy (27 March 2019) <https://www.opendemocracy.net/en/democraciaabierta/chevron-vs-ecuador-international-arbitration-and-corporate-impunity/>.

operated in Ecuador. Instead, Chevron argued its subsidiary Texaco Petroleum was a minor partner in an oil-production consortium with an Ecuadorian company and had been fully released by the Ecuadorian government from further environmental liability.[35]

(v) Ruby River v Canada

United States – based Ruby River Capital LLC brought a claim against Canada for $20 billion for a refusal to approve a liquified natural gas project. Having spent only approximately $124 million on the project,[36] the amount claimed equated to $167 for every $1 invested.[37] The claim is currently pending.[38]

(vi) Perenco v Ecuador

Perenco Ecuador Limited, incorporated in the Bahamas, sued Ecuador under the France-Ecuador bilateral investment treaty, as a controlling interest in the company was held by the estate of a deceased French national.[39] Perenco was involved in oil extraction in the Amazon rainforest in Ecuador and claimed that Ecuador's imposition of a windfall profit tax and its takeover of Perenco's oil extraction activities was in violation of the France-Ecuador bilateral investment treaty.[40] Ecuador made a counterclaim, alleging that Perenco's oil extraction had caused significant environmental damage and breached Ecuador's environmental laws. The tribunal ultimately ordered both parties to pay each other, including an award against Perenco of US$54 million for the counterclaim[41] and an award against Ecuador for over $448 million.[42]

(C) Other minerals cases

In addition to fossil fuel cases, numerous ISD relate to non-fossil fuel mining projects. Such cases often relate to the refusal to issue or extend a mining licence.

(i) Zeph Investments v Australia (iron ore)

Zeph Investments Pte Ltd, owned by Australian Clive Palmer, has also served a Notice of Arbitration on the Australian Government regarding Western Australia's legislation passed in 2020 which "remove[d] Mr Palmer's ability to extract damages from the state regarding the Balmoral South Iron Ore Project in the Pilbara".[43] The project in question had been rejected by the Western Australian

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[35] Chevron, 'Ecuador lawsuit', <https://www.chevron.com/ecuador#:~:text=Ecuadorian%20Judgment%20Declared%20Fraudulent>. For more discussion of this case, see Erin Brokovich, 'This lawyer should be world-famous for his battle with Chevron – but he's in jail' *The Guardian* (8 February 2022) <https://www.theguardian.com/commentisfree/2022/feb/08/chevron-amazon-ecuador-steven-donziger-erin-brockovich>.

[36] Ruby River Capital LLC v. Canada (ICSID Case No. ARB/23/5) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/23/5>; Boston University, Submission to the Special Rapporteur on human rights and the environment call for inputs (2023) <https://www.ohchr.org/en/calls-for-input/2023/call-inputs-should-interests-foreign-investors-trump-human-right-clean-healthy>.

[37] 'Paying polluters' (n 22), 3-4 [citations omitted].

[38] UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, 'Ruby v Canada' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1289/ruby-v-canada>.

[39] Jus Mundi, 'Perenco v Ecuador' <https://jusmundi.com/en/document/decision/en-perenco-ecuador-limited-v-republic-of-ecuador-memorandum-opinion-of-the-united-states-district-court-for-the-district-of-columbia-thursday-16th-march-2023>; Matthew Levine, 'ICSID tribunal renders interim decision on Ecuador's environmental counterclaim in long-running dispute' IISD, Investment Treaty News, (26 November 2015) <https://www.iisd.org/itn/en/2015/11/26/awards-and-decisions-21/>.

[40] Allens, 'Investor state arbitration and the environment' 15 March 2021.

[41] Ibid.

[42] Jus Mundi, 'Perenco v Ecuador' (n 39).

[43] David Weber and Nicola Perpitch, 'Clive Palmer to sue Australia for $300 billion over iron ore project in WA's Pilbara region' *ABC News* 30 March 2023.

Government which, after Zeph Investments sought arbitration over the Waratah Coal decision of the Queensland Land Court (discussed above), passed legislation to extinguish the claim to compensation for the Pilbara project. In October 2021, in the judgment from challenges brought by both Clive Palmer, as the director of Mineralogy Pty Ltd and International Minerals Pty Ltd, and Mineralogy Pty Ltd, against the Western Australian law, the High Court of Australia ruled that the law was not "invalid or inoperative in its entirety".[44] Zeph Investments Pte Ltd owns Mineralogy Pty Ltd.[45]

The Notice of Arbitration claims that the legislation "effectively destroy[s] the claimant's iron ore mining investments in Western Australia" and claims the Western Australian government "unilaterally absolved itself of any liability for a proven breach of a state agreement in a long-running commercial dispute with the claimant's subsidiary … and, quite literally, terminated and invalidated the arbitration process by which damages for that proven breach were imminently to be determined".[46] The notice states that the Commonwealth of Australia "bears responsibility for measures and actions undertaken by the Government of Western Australia".[47]

The claim seeks US$198 billion (approximately AUD$300 billion) in damages as well as interest and costs, due to alleged loss of contractual entitlement, "moral damages" and "sovereign risk" to other projects."[48] This monetary amount was broken down by the then Premier of Western Australia as equating to approximately $11,500 for each Australian, who called the claim "pure greed".[49]

(ii) EEPL Holdings v Republic of Congo

Australian company Equatorial Resources Ltd has used its subsidiary EEPL Holdings to serve a Notice of Dispute and Request for Negotiations on the Republic of Congo through the agreement between the Republic of Congo and Mauritius. As there is no Australia – Republic of Congo investment treaty, this appears to be a case of forum shopping by the Australian company using its Mauritius-based subsidiary.

The claim is that its property was expropriated by the government of the Republic of Congo as their mining licence was granted to a Chinese company. Equatorial Resources Ltd had been exploring this area but had not begun mining.[50] This case is currently pending.[51]

(iii) Kingsgate Consolidated v Thailand

The Australian company Kingsgate Consolidated Ltd owns the Chatree gold mine in Thailand. In response to the health problems of locals caused by the mine, including high levels of manganese and arsenic in their blood, the Thai government ordered the closure of the mine and then refused to extend the mine licence. Kingsgate sued Thailand using the Thailand-Australia Free Trade

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[44] *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219; [2021] HCA 30 [93]; *Palmer v Western Australia* (2021) 274 CLR 286; [2021] HCA 31. See also Weber and Perpitch (n 43).
[45] Notice of Dispute, Zeph Investments Pte Ltd v The Commonwealth of Australia, PCA Case No. 2023-40 <https://www.italaw.com/sites/default/files/case-documents/italaw170014.pdf>.
[46] Weber and Perpitch (n 43).
[47] Ibid.
[48] Paul Karp, 'Clive Palmer hires Christian Porter for $300bn lawsuit against Australian government' *The Guardian* (30 March 2023).
[49] Weber and Perpitch (n 43).
[50] 'Australian Mining Companies launch claims for over US$35 billion against Republic of Congo' *Australian Fair Trade & Investment Network Ltd*, 21 June 2021.
[51] UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, 'EEPL v Congo' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1176/eepl-v-congo>.

Agreement, reportedly claiming billions from Thailand in lost future profits.[52] This claim led to Thailand allowing the re-opening of the mine.[53]

(iv) Bear Creek Mining v Peru

A Canadian mining company Bear Creek Mining Corporation brought an ISDS claim after the Peruvian government cancelled its mining rights following substantial community opposition and protest against the mine. Peru's main defence of the claim was that Bear Creek had not obtained a social licence to operate and therefore contributed to the protests.[54] Part of Peru's arguments in relation to this were that Bear Creek had not obtained free, prior and informed consent of Indigenous people. This consent is required by national legislation in Peru as well as the International Labor Organization's Indigenous and Tribal Peoples Convention 1989 ('**ILO Convention**'), to which Peru is a party.

However, the tribunal found in favour of the mining company and ordered Peru to pay $18.2 million in compensation and $6 million in legal costs, although this was substantially less than the $500 million claimed by Bear Creek due to the tribunal only awarding compensation for amounts Bear Creek had actually invested.[55] Notably, while the majority of the tribunal refused to reduce the compensation awarded based on the contributory fault of the company, the President of the tribunal Professor Philippe Sands dissented and stated he would have decreased the compensation by half due to Bear Creek's alleged violation of the ILO Convention.[56]

(v) Barrick v Papua New Guinea

A Canadian company used its Australian subsidiary, Barrick (PD) Australia Pty Ltd, to claim compensation due to the Papua New Guinea ('**PNG**') government's refusal to extend its expired 30-year lease of the Porgera gold mine. This was done as there is no Canada – PNG investment treaty. The gold mine "has a documented record of decades of environmental and human rights abuses" and has faced calls from human rights experts that the licence should not be given until the company tackles the abuse claims.[57]

However, in April 2021, the Prime Minister of PNG released a statement that the government would sign an agreement with Barrick to reopen the gold mine.[58] In January 2024, the tribunal issued a procedural order noting the discontinuance of the proceedings.[59]

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[52] Patricia Ranald, 'Another Australian miner sues another poor country, this time Barrick's Porgera in PNG', *Michael West Media*, 27 October 2020

[53] 'Paying polluters' (n 22), 16-17.

[54] Vinson & Elkins LLP, 'Controversial International Mining Arbitrations and the Impact of 'Social Licence' - Lessons Learned and Future Planning' *Lexology*, 31 October 2023 <https://www.lexology.com/library/detail.aspx?g=262ba3fd-f9f4-4f70-8cd2-7f037748dc5d>.

[55] UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, 'Bear Creek Mining v. Peru' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/589/bear-creek-mining-v-peru>.

[56] Vinson & Elkins LLP, 'Controversial International Mining Arbitrations and the Impact of 'Social Licence' - Lessons Learned and Future Planning' *Lexology*, 31 October 2023 <https://www.lexology.com/library/detail.aspx?g=262ba3fd-f9f4-4f70-8cd2-7f037748dc5d>.

[57] Ranald, 'Another Australian miner sues another poor country' (n 52).

[58] 'Barrick Gold vs. Papua New Guinea: Mining giant forces hand of government in reopening toxic project' *ISDS Platform*, May 2021 <https://www.isds.bilaterals.org/?barrick-gold-vs-papua-new-guinea>.

[59] ICSID Cases, 'Barrick (PD) Australia Pty Limited v. Independent State of Papua New Guinea (ICSID Case No. ARB/20/27)' <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/27> (accessed 19 March 2024).

(vi) Tethyan Copper Company Ltd v Pakistan

The Australian company Tethyan Copper Company Ltd held an exploration licence and intended to open a copper-gold mine in Pakistan, through its joint venture with the Balochistan Development Authority in which Tethyan owned a 75% stake (purchased from BHP in 2006).[60] However, the Balochistan government denied the application for a mining licence in 2011.[61] Tethyan Copper sued Pakistan and was awarded US$5.8 billion in compensation in 2019. This amount was more than 25 times the amount the company had invested (US$220 million) and included a payment for "lost future profits". The award is just short of the US$6 billion emergency loan the International Monetary Fund granted Pakistan to assist the country in dealing with its economic crisis.[62]

(vii) Eco Oro v Colombia

Canadian company Eco Oro Minerals Corp. brought a claim against Colombia under the Canada-Colombia Free Trade Agreement, in relation to a decision by the National Mining Agency, which allegedly deprived Eco Oro of its mining rights over 50% of the concession area it had held since the mid-1990s.[63] The tribunal found that Colombia was in breach of the agreement, under the Article relating to customary international law minimum standard treatment of aliens, which includes fair and equitable treatment and full protection and security. This was partly due to Colombia's failure to comply with constitutional obligations to protect the ecosystem at the time of Eco Oro's investment.[64] However, the tribunal reject Eco Oro's argument of indirect expropriation, as the deprivation of the mining rights was a legitimate exercise of Colombia's police powers.[65]

(viii) Odyssey v Mexico

Odyssey Marine Exploration, Inc. ('**Odyssey**'), based in the United States, has brought a claim for approximately USD$3.5 billion (later reduced to $2.36 billion)[66] against Mexico under the NAFTA in regard to the denial of environmental permits for Odyssey's seabed mining project by the Mexican Ministry of the Environment and Natural Resources. Odyssey claims that the decision disregarded the scientific evidence it supplied as part of the project development plan and environmental impact

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[60] Christopher Finnigan, 'Long Read: The Reko Diq "Fiasco" in Perspective: Pakistan's Experience of International Investment Arbitration' *LSE Blog,* 14 August 2019 <https://blogs.lse.ac.uk/southasia/2019/08/14/long-read-the-reko-diq-fiasco-in-perspective-pakistans-experience-of-international-investment-arbitration/>.

[61] Sofia de Murard, 'Tribunal finds Pakistan breached FET, expropriation and non-impairment obligations in the context of a mining joint venture with Australian investor Tethyan Copper Company' *IISD Investment Treaty News*, 17 December 2019 <https://www.iisd.org/itn/en/2019/12/17/tribunal-finds-pakistan-breached-fet-expropriation-non-impairment-obligations-mining-joint-venture-with-australian-investor-tethyan-copper-company-tethyan-copper-company-v-pakistan-icsid-arb-12-1/>.

[62] Kyla Tienhaara, 'World Bank ruling against Pakistan shows global economic governance is broken' *The Conversation*, 23 July 2019 <https://theconversation.com/world-bank-ruling-against-pakistan-shows-global-economic-governance-is-broken-120414>.

[63] UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, 'Eco Oro v Colombia' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/756/eco-oro-v-colombia>.

[64] Climate Case Chart, 'Eco Oro Minerals Corp. v Republic of Colombia' <https://climatecasechart.com/non-us-case/eco-oro-minerals-corp-v-republic-of-colombia/>.

[65] IISD Investment Treaty News, 'Majority in Eco Oro v. Colombia finds violation of minimum standard of treatment, holds that a general environmental exception does not preclude obligation to pay compensation' <https://www.iisd.org/itn/en/2021/12/20/majority-in-eco-oro-v-colombia-finds-violation-of-minimum-standard-of-treatment-holds-that-a-general-environmental-exception-does-not-preclude-obligation-to-pay-compensation/>.

[66] Laura Paddison, 'How a US mining firm sued Mexico for billions – for trying to protect its own seabed' *The Guardian* (31 January 2024) <https://www.theguardian.com/environment/2024/jan/31/how-a-us-mining-firm-sued-mexico-for-billions-for-trying-to-protect-its-own-seabed>.

assessment. The claim is currently pending.[67] De Anzizu, at the not-for profit Center for International Environmental Law, has stated that if the outcome is in Odyssey's favour, this could cause a "free-for-all" for other deep-sea mining investment companies that wish to take advantage of ISDS claims.[68]

(ix) Copper Mesa v Ecuador

Canadian company Copper Mesa Mining Corporation brought a claim for USD$69 million against Ecuador under the Canada-Ecuador bilateral investment treaty out of the alleged termination by Ecuador of its mining concessions. The tribunal awarded Copper Mesa USD$19.40 million.[69] The tribunal found, however, that Copper Mesa contributed to 30% of its loss by its own negligent acts and omissions.[70]

(D) Climate change cases

The previous United Nations Special Rapporteur on Humans Rights and the Environment, David Boyd, has expressed concern that "[f]oreign investors have weaponized" ISDS clauses, "[a]t a time when it is imperative that States accelerate the pace and ambition of climate and environmental action to prevent planetary catastrophe and fulfil their human rights obligations".[71]

There are numerous categories within which climate change-related ISDS cases can be grouped. These include compensation claims arising from "climate-justified" policy measures, the recission of climate change legislation and policy (see renewable energy cases, below), and decisions related to environmental permits (see fossil fuel cases and other minerals cases, above).[72] Barber argues that the claims for compensation from state decisions to phase out fossil fuels do not challenge the introduction of that policy but rather challenge the way the corresponding compensation schemes are implemented.[73]

Columbia University's Sabin Center for Climate Change Law and the Grantham Research Institute on Climate Change and Environment, with the Centre for Government and Law at Hasselt University, identified at least 13 climate change-related ISDS cases filed between 2012 and mid-2021. These cases all related directly to the "introduction, withdrawal or amendment of a policy measure explicitly developed to meet a country's climate goals."[74] It is likely that the number of climate change-related ISDS cases will increase if states adopt stricter climate change policies, "particularly if those policies directly affect fossil fuel investors".[75] The Sabin Center and the UN Environment

[67] UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, 'Odyssey v Mexico' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/977/odyssey-v-mexico>.
[68] Arthur Neslen, '"Litigation terrorism": the obscure tool that corporations are using against green laws", *The Guardian*, 12 February 2024 <https://www.theguardian.com/environment/2024/feb/12/litigation-terrorism-how-corporations-are-winning-billions-from-governments>.
[69] UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, 'Copper Mesa v Ecuador' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/436/copper-mesa-v-ecuador>.
[70] IISD Investment Treaty News 'Ecuador ordered by PCA tribunal to pay $24 million to Canadian mining company' <https://www.iisd.org/itn/en/2016/12/12/ecuador-ordered-by-pca-tribunal-to-pay-24-million-to-canadian-mining-company-copper-mesa-mining-corporation-v-republic-of-ecuador-pca-2012-2/>.
[71] 'Paying polluters' (n 22), 3.
[72] LSE, '"Investor-State Dispute Settlement" as a new avenue for climate change litigation', 2 June 2021.
[73] Louise Barber, 'Zeph Investments Pte Ltd: Notice of Intention to Commence Arbitration under the Singapore-Australia Free Trade Agreement' *Kluwer Arbitration Blog* 24 August 2023.
[74] LSE (n 72).
[75] Tienhaara and ors, 'Investor-state disputes threaten the global green energy transition' (n 20).

Programme concluded that "international investment law is gaining increasing attention as a forum for climate change litigation".[76]

States are facing ISDS claims for decarbonisation efforts in phasing out coal power plants. As demonstrated by the fossil fuel cases above and below, ISDS can threaten decarbonization efforts by states.[77] The Energy Charter Treaty ('**ECT**'), a multilateral agreement with over 50 state signatories,[78] has been labelled by climate activists in 2020 as the "biggest climate action killer nobody has ever heard of".[79] In addition, Germany has reportedly negotiated large compensation packages as part of its coal phase-out, "possibly in part to avoid ISDS".[80]

A study of foreign-owned coal power plants worldwide, which looked at 257 coal power plants which are known to involve foreign investment and have a reasonable risk of asset stranding, found at least 75% of the coal power plants are protected by at least one treaty which contains ISDS provisions. This 75% only accounts for the home state of the parent company. As demonstrated in the case studies of ISDS cases, the authors note that the real coverage percentage is likely to be "significantly higher" when complex corporate structures are taken into account.[81] This study also demonstrated how some treaties play a more significant role in protecting coal power plant assets. For example, the ECT alone protects at least 51 coal power plants which are exposed to stranded asset risk.[82]

When including oil and gas in addition to coal, Boyd has noted that there are over 10,000 fossil fuel assets worldwide covered by ISDS provisions, which may make states "reluctant" to phase out fossil fuels in a timely manner despite the Paris Agreement commitment of states to make "finance flows consistent with a low greenhouse gas emissions and climate-resilient development" under Article 2.1(c).[83] In fact, states which seek to fulfill their Paris Agreement obligations "may be liable to oil and gas corporations for $340 billion in future ISDS cases" which, as Boyd acknowledged, is "a major disincentive for ambitious climate action".[84] The Intergovernmental Panel on Climate Change has also acknowledged the threat of ISDS, in its 2022 report '*Mitigation of Climate Change*', warning that ISDS provides "a high level of investor protection against much needed climate action".[85]

A survey report published in 2022, which had over 900 respondents including end users of ISDS, leading practitioners, arbitrators and arbitral institutions, experts, and academia, stated that ISDS "faces challenges for resolving climate change related disputes". 41% of the respondents and 50% of

[76] 'UN investigates impact of investment treaties on human rights' (n 10).
[77] Julia Dehm, 'Environmental Justice Challenges to International economic Ordering', (2022) 116 *American Journal of International Law* 101, 105 citing Kyla Tienhaara & Lorenzo Cotula, 'Raising the Cost of Climate Action? Investor-State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets', *International Institute for Environment and Development* (October 2020).
[78] <https://energy.ec.europa.eu/topics/international-cooperation/international-organisations-and-initiatives/energy-charter_en>.
[79] Dehm, 'Environmental Justice Challenges to International economic Ordering' (n 77), 105 citing Thomas Dauphin, 'An Axe to Climate Action: 10 Reasons the EU and Governments Must Quit the Energy Charter Treaty', *Friends of the Earth Europe* (2020).
[80] Tienhaara and Cotula (n 77), 2.
[81] Ibid, 2.
[82] Ibid, 2-3.
[83] 'Paying polluters' (n 22), 4, citing Tienhaara and Cotula (n 77).
[84] 'Paying polluters' (n 22), 4.
[85] Intergovernmental Panel on Climate Change Working Group III, 'Mitigation of Climate Change' (2022), Chapter 15 'Investment and Finance', 1594.

the end user respondents stated that "arbitrator bias and issue conflicts would present a major challenge" in resolving climate change disputes.[86]

(i) RWE v The Netherlands

RWE AG and RWE Eemshaven Holding II BV ('**RWE**'), a European energy provider, challenged the Dutch government's ban on coal-fired power generation from 2030 using the ISDS clause of the ECT.[87] RWE sought compensation of 1.4 billion euros on the basis that the Dutch government had not offered adequate compensation or time for its Eemshaven power station to be converted from coal to biomass and that the exit law was not legal because it did not include "adequate compensation for this interference with the company's property".[88] This case is currently pending.[89]

(ii) Uniper v The Netherlands

Similar to RWE v The Netherlands, Uniper SE, a German multinational energy company, along with Uniper Benelux Holding B.V. and Uniper Benelux N.V. ('**Uniper**'), sought compensation under the ECT for a reported amount of 1 billion euros (whether this is correct is unconfirmed) as its Maavlakte power station would be forced to close less than 15 years after it opened or be required to run on a different fuel. Uniper claimed these adverse economic effects were due to the Dutch government's coal prohibition, which "lacks adequate compensation for stranded investments".[90] This case was discontinued.[91]

(iii) Westmoreland Mining v Canada (II)

United States-based Westmoreland Mining Holdings LLC brought a claim against Canada alleging it had been wrongly excluded from a compensation scheme designed to protect investors in Alberta's coal industry. This followed the Alberta government's 2015 plan to phase out coal-fired power plants in Alberta by 2030.[92] This claim was decided in favour of Canada.[93]

(E) Renewable energy cases

According to UNCTAD, the number of ISDS cases related to renewable energy have "proliferated" since 2011. There are at least 80 ISDS cases relating to the renewable energy sector (as of 2021), which mainly relate to photovoltaic power generation. Such cases are often brought by investors in response to legislative changes reducing feed-in-tariffs for renewable energy production. 90% of these 80 ISDS cases were brought under the ECT and Spain was the respondent in 60% of the cases. Cases in this category are almost always (98% of these 80 cases) brought by investors from developed regions against developed states.[94]

(i) The PV Investors v Spain

The PV Investors was successful in a claim against the Spanish government brought under the ECT due to a series of reforms taken by Spain which affected the renewable energy sector. This included

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[86] Future of International Energy Arbitration Survey Report 2022' Pinsent Masons and Queen Mary University of London, 7.
[87] UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, 'RWE v The Netherlands' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1145/rwe-v-netherlands>.
[88] Dehm, 'OECD Public Consultation on investment treaties and climate change' (n 30) (citations omitted).
[89] 'RWE v The Netherlands' (n 87).
[90] Dehm, 'OECD Public Consultation on investment treaties and climate change' (n 30) (citations omitted).
[91] UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, 'Uniper v The Netherlands' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1129/uniper-v-netherlands>.
[92] Dehm, 'OECD Public Consultation on investment treaties and climate change' (n 30) (citations omitted).
[93] 'Selected ISDS Cases'.
[94] UNCTAD, 'Treaty-based Investor-State Dispute Settlement Cases and Climate Action', IIA Issues Note, Issue 4 (September 2022).

a 7% tax on power generators' revenues, and reduction in subsidies for renewable energy products.[95]

(ii) Eskosol v Italy

Eskosol S.p.A. in liquidazione was unsuccessful in a claim against Italy which it brought due to government decrees to cut tariff incentives for some solar power projects. Eskosol claimed that two such measures caused its photovoltaic project to be unviable and led to the company's bankruptcy.[96]

(iii) Strabarg v Germany

Erste Nordsee-Offshore Holding GmbH, Strabag SE and Zweite Nordsee-Offshore Holding GmbH ('**Strabarg**') brought a claim against Germany due to its legislative changes to its renewable energy regime including offshore wind production. The claimants alleged it caused them to abandon their offshore wind projects. The decision is pending.[97]

(F) Other environmental cases

Fossil fuel, other minerals, climate change and renewable energy cases constitute the vast majority of climate change and environment related-ISD. Some other ISDS cases relate to other environmental issues, such as in the construction industry.

(i) Aven and others v Costa Rica

David R. Aven, Samuel D. Aven, Giacomo A. Buscemi and others, as shareholders of several entities that were engaged in a construction project of a hotel, beach club and villas in Costa Rica, brought a claim when the Costa Rican government terminated the project after the environmental viability permit ('**EVP**') was revoked. This was partly due to the identification by local authorities after the EVP had been issued that the property included wetlands and a protected forest and partly due to criminal investigations against one of the claimants.[98] The EVP had been issued in the absence of the claimant's subcontractor's report, which had identified potential wetlands on the site.[99] Costa Rica advanced an argument that the investors' rights under the treaty used could be subordinated to the right of the host state to protect the environment. Costa Rica also made a counter-claim against the investors for breach of environmental laws.

The tribunal held that the environmental protection provisions contained in the treaty used did implicitly impose obligations on investors to comply with host states' environmental laws. The

[95] UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, 'The PV Investors v Spain' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/435/the-pv-investors-v-spain>.
[96] UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, 'Eskosol v Italy' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/698/eskosol-v-italy>.
[97] UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, 'Strabarg v Germany' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1000/strabag-and-others-v-germany>.
[98] UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, 'Aven and others v Costa Rica' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/571/aven-and-others-v-costa-rica>; 'Inside Arbitration: David Aven v Costa Rica: Key takeaways for foreign investors to consider when resorting to investor-state arbitration in environmental disputes' Herbert Smith Freehills, 7 February 2019 <https://www.herbertsmithfreehills.com/insights/2019-02/inside-arbitration-david-aven-v-costa-rica-key-takeaways-for-foreign-investors-to>.
[99] Victoria Khandrimaylo, 'Tribunal finds Costa Rica's measures to protect the environment did not breach FET or its expropriation obligations under CAFTA-DR', *Investment Treaty News*, 21 December 2018 <https://www.iisd.org/itn/en/2018/12/21/tribunal-finds-costa-ricas-measures-to-protect-the-environment-did-not-breach-fet-or-its-expropriation-obligations-under-cafta-dr-victoria-khandrimaylo/>.

tribunal also indicated that investors which operate internationally are not immune from being subject to international law, especially environmental protection laws.[100]

(ii) Biwater v Tanzania

Biwater Gauff (Tanzania) Limited ('**Biwater**') had a controlling interest in a local investment vehicle company which had agreements with the Dar es Salaam Water and Sewerage Authority to implement an infrastructure project for water and sewerage, following Biwater's successful bid as part of the World Bank and other international financial institutions' award of money to Tanzania for such projects. Biwater brought a claim against Tanzania under the Tanzania – United Kingdom bilateral investment treaty following an attempted renegotiation of the project's underlying deal after the project failed to generate the expected income and experienced extreme financial and practical difficulties. Eventually, Biwater's contract was terminated, its senior managers were deported and its assets were taken over by government officials. The tribunal ultimately found in favour of neither party by finding liability but not awarding damages.[101]

IV Controversies about, and legitimacy of, ISDS clauses and disputes

(A) Arguments for ISDS clauses

There are two main arguments in favour of ISDS clauses. The first is what Landau describes as the historical goal of "depoliticisation" of ISD. ISDS clauses enable ISD to be elevated "away from local, regional and international politics and into a rule-based, objective system".[102] Landau quotes Broches' argument in 1963 that arbitration would be "a means of settling directly, on the legal plane, investment disputes between the State and foreign investor, [which] could insulate such disputes from the realm of politics and diplomacy".[103]

The second is that ISDS clauses provide confidence to investors and can increase the level of investment, particularly in developing countries.[104] Some argue that this investment assists states' economic development, which is important in allowing states to combat climate change.[105] Further, "most fossil fuels are owned by national governments and the reserves are national assets" and therefore ISDS clauses are not relevant to these assets.[106]

Even in developed countries, such as Australia, supporters argue that ISDS clauses are beneficial or at least cause minimal harm. French summarised Nottage's arguments in favour of inclusion of ISDS clauses in Australia's trade agreements:

- treaty based ISDS is important when dealing with developing countries where local courts and substantive rights may not meet widely accepted global standards;

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[100] Allens (n 40).
[101] UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, 'Biwater v Tanzania' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/202/biwater-v-tanzania>; and IISD Investment Treaty News, 'Biwater v Tanzania' <https://www.iisd.org/itn/en/2018/10/18/biwater-v-tanzania/>.
[102] Toby Landau KC, 'International Investment Arbitration and the Search for Depoliticisation', Outline of Key Points from The Alexander Lecture 2023 ('**Search for Depoliticisation, Key Points**'), [8].
[103] Ibid [9], citing Aron Broches, Chairman's Opening Address, Consultative Meeting of Legal Experts, First Session, 27 April 1964.
[104] Matthew Rimmer 'The Empire Strikes Back: Fossil Fuel Companies, Investor-State Dispute Settlement, International Trade, and Accountable Climate Governance' in B. Edmondson and S. Levy (eds.), *Transformative Climates and Accountable Governance* (Palgrave Studies in Environmental Transformation, Transition and Accountability, 2019) 77.
[105] 'ISDS and Climate Change – What Happens Next?' 22 December 2022.
[106] Ibid.

- ISDS is increasingly accepted by Australia's major existing and potential treaty partners, including countries in the Asia Pacific region;
- Australia should keep engaging with the system by negotiating specific improvements in future treaties;
- rejection of ISDS mechanisms runs a serious risk of preventing or seriously delaying the conclusion of any future FTAs;
- there has only been one claim brought against Australia under ISDS and that is the Philip Morris claim;
- the apprehended threat of "regulatory chill" from ISDS is likely to be minimal in Australia which is used to numerous public law challenges through its domestic courts.[107]

Supporters also argue that ISDS clauses can be drafted in a way that excludes ISDS claims being brought due to environmental regulation, such as through environmental protection clauses and non-regression clauses. Further, as demonstrated by the renewable energy cases above, supporters argue that ISDS clauses are used by investors to bring claims against states in relation to the regressive regulation of renewable energy developments, which illustrates how ISDS clauses can be used for environmental good rather than harm.

(B) Arguments against ISDS clauses

(i) Regulatory chill

A core argument against ISDS clauses is that it leads to "regulatory chill". "Regulatory chill" is the concept that governments will fail to pass legislation and regulate in accordance with the public interest in a timely and effective manner, due to concerns that ISDS claims will be brought against them.[108]

Tienhaara has put forward three types of ISDS-related regulatory chill: "internalisation chill", "threat chill" and "cross-border chill". Internalisation chill is where states vet proposed *general* measures (legislative, regulatory, administrative) to pre-empt possible ISDS claims or challenges. Threat chill is where a proposed measure is abandoned or delayed following the threat of ISDS proceedings, whether explicitly or implicitly. This threat relates to the chilling of *specific* regulatory measures proposed by governments. Cross-border chill is where proposed measures are abandoned or delayed after ISDS threats or claims are brought against other states, which have adopted similar measures. Of these three types of ISDS regulatory chill, threat chill is the most "familiar" form.[109]

Tienhaara labels cross-border chill as "potentially the most concerning" and acknowledges that it is likely to affect low- and high-income states in different ways:

> In the Global North, where stricter climate action should be taken first (in line with the principle of common but differentiated responsibilities and respective capabilities), certain circumstances — such as the older fleet of coal power plants — mean that scope for asset stranding in some sectors is more limited. On the other hand, some countries in the Global South have more substantial potential for asset stranding. They also often have more limited resources to defend ISDS cases. As governments in these countries become aware of an ISDS case in the Global North, they may come under pressure to abandon or delay necessary climate policy measures.[110]

The impact of regulatory chill from ISDS has been acknowledged by a multitude of people. Boyd has called ISDS a "major obstacle" to environmental action as states end up paying millions, if not

[107] French (n 12), 10-11.
[108] Tienhaara, 'Regulatory Chill in a Warming World' (n 11), 232.
[109] Ibid, 229.
[110] Tienhaara and Cotula (n 77), 21.

billions, in compensation when they introduce stronger laws and policies.[111] Boyd cites one prominent arbitration lawyer as acknowledging the undoubted chilling effect that ISDS has on policies, stating that "[i]nvestor-state arbitration is the biggest stick that investors have".[112] Boyd cites another international arbitration lawyer as stating that "even just the threat of such a suit is enough to halt or roll back [environmental] efforts by host States", elaborating that "because of structural flaws in the way these disputes are adjudicated, the ease of enforcing any resulting awards, and the scale of the awards relative to host country financial resources, the threats can be very effective even if they lack legal merit."[113] Malakotipour has also argued that the lack of consistency in tribunals' approaches to claims of indirect expropriation (discussed below) can potentially contribute to regulatory chill.[114]

Authors and activists Naomi Klein and Maude Barlow have stated that the Trans-Pacific Partnership ('**TPP**') can be "used as a weapon against ambitious climate policy" because it "gives foreign corporations the right to directly sue our governments for new laws or regulations – whether environmental, health or human rights – that they claim negatively affect their bottom line".[115] Academics have also noted that "[e]ven the threat of a massive ISDS claim will often be enough to deter governments from introducing regulations to protect its citizens or the environment or even from enforcing existing regulations" and that "[o]ur democracy, and our environment, cannot afford to expand the deeply flawed ISDS system".[116]

Separately but related to regulatory chill is compensation awarded to foreign investors to pre-empt and rule out ISDS claims. In Germany, RWE and LEAG (companies which mine and burn lignite, the dirtiest type of coal) were given over $4.5 billion by the government in compensation for ending coal-fired power generation by 2038. This compensation will increase if Germany brings forward its coal phase-out, which is likely to be necessary for it to meet its Paris Agreement commitments. In 2019, the German Ministry of Finance warned its Chancellor's office that regulating the coal phase-out would create an "increased risk of litigation, especially international litigation based on the Energy Charter Treaty".[117]

Examples of regulatory chill are to be found in many countries, including New Zealand, France, Denmark, Indonesia, Armenia, Thailand, the United States and Canada.

New Zealand in 2018 banned new oil exploration offshore but did not cancel existing offshore oil permits or ban onshore oil development. This is reportedly partly because of costly ISDS claims.[118] The New Zealand government also experienced regulatory chill in relation to health measures, when

[111] 'Countries risk "paying polluters" billions to regulate for climate: UN expert' *France24*, 15 December 2023 <https://www.france24.com/en/live-news/20231215-countries-risk-paying-polluters-billions-to-regulate-for-climate-un-expert>.
[112] 'Paying polluters' (n 22), 13, citation omitted.
[113] Ibid, 13.
[114] Maryam Malakotipour, 'The Chilling Effect of Indirect Expropriation Clauses on Host States' Public Policies: A Call for a Legislative Response' (2020) 22 *International Community Law Review* 235, 243-245.
[115] Naomi Klein and Maude Barlow, 'Stephen Harper's politics put Canada to shame: Don't be distracted by them.' *The Guardian* (15 October 2015) <http://www.theguardian.com/commentisfree/2015/oct/16/stephen-harper-canada-carbon-climate-change>.
[116] Jeffrey D. Sachs et al, 'Op-ed: TransCanada lawsuit highlights need to scuttle TPP', *MSNBC* (16 July 2016) <https://www.msnbc.com/msnbc/op-ed-transcanada-lawsuit-highlights-need-scuttle-tpp-msna877636>.
[117] 'Paying polluters' (n 22), 17.
[118] Ibid, 16 (citations omitted).

it delayed its plain packing tobacco legislation in response to the Philip Morris action against Australia.[119]

In France, following a threat of a billion-dollar ISDS claim over its fossil fuel phase-out plan by a Canadian oil company, the French government subsequently weakened this law which had originally required the phase-out of all fossil fuel extraction by 2040.[120]

Denmark's target deadline of 2050 for the phase-out of oil and gas production was not made as a 2030 or 2040 target as it could have been required to pay for "incredibly expensive compensation to foreign fossil fuel companies for ISDS claims".[121]

In Indonesia, an example of threat chill occurred when the state allowed an open-pit mine in protected forests following the threat of ISDS arbitration.[122]

In Armenia, the Amulsar Gold Project had been temporarily shut down by the state after protests regarding the mine's environmental impacts, in particular acid mine drainage. Subsidiaries, based in the United Kingdom and Canada, of the company that owned the mine threatened ISDS proceedings, which persuaded the state to allow the re-opening of the mine.[123]

In Thailand, the Chatree mine discussed in Part III Types of ISD above, was allowed to re-open following the filing of an ISDS claim. This is despite issues over high levels of arsenic and manganese in the blood of people living near the mine.[124]

In the United States, a senior policymaker is quoted as saying that national public interest regulation "ha[d] not been put in place because of fears of ISDS", despite the United States never having lost an investor-state arbitration.[125] Similarly, in Canada, government officials have stated that the fear of ISDS claims has shaped government policies.[126]

(ii) Rule of law, sovereignty, democracy and the judiciary

Concerns have been raised about the impact of ISDS on the rule of law, state sovereignty, democracy and the function of the judiciary. Boyd stated that:

> The rule of law requires all entities to be accountable to laws that are publicly promulgated, equally enforced, independently adjudicated and consistent with international human rights norms and standards. Replacing domestic courts with arbitration tribunals to adjudicate disputes between foreign investors and States removes important safeguards against human rights violations, including transparency, public participation, equality and non-discrimination. The ISDS system also undermines democracy by subordinating important policy decisions to arbitration tribunals that are unaccountable, whose decisions are not subject to appeal and that have no duty to consider domestic law.[127]

Retired Australian judge Elizabeth Evatt led 100 leading jurists and lawyers in an open letter which called upon the negotiators in the TPP to reject ISDS, due to concerns that "the expansion of this

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[119] Tariana Turia, 'Government moves forward with plain packaging', 20 February 2013, NZ Department of Health <https://www.beehive.govt.nz/release/government-moves-forward-plain-packaging-tobacco-products>.
[120] 'UN investigates impact of investment treaties on human rights' (n 10); 'Paying polluters' (n 22), 16.
[121] 'Paying polluters' (n 22), 16.
[122] Tienhaara, 'Regulatory Chill in a Warming World' (n 11), 236.
[123] ''Paying polluters' (n 22), 16-17.
[124] Ibid, 16-17.
[125] Tienhaara and Cotula (n 77), 21.
[126] 'Paying polluters' (n 22), 17.
[127] Ibid, 8.

regime threatens to undermine the justice systems in our various countries and fundamentally shift the balance of power between investors, states and other affected parties in a manner that undermines fair resolution of legal disputes". The group also expressed concern about the "structural problems inherent in the arbitral regime [which] are corrosive of the rule of law and fairness", and that investors are using ISD to "avoid the deliberate decisions of governments to require investors to pursue remedies in the domestic courts of the host nation".[128] In the United States, Senator Elizabeth Warren has stated that "ISDS provides a huge handout to global corporations while undermining American sovereignty" and has called for the removal of ISDS clauses.[129] A former Chief Justice of the High Court of Australia, Robert French, has also stated that ISDS presents a rule of law issue, and has implications for national sovereignty and democratic governance.[130] French has commented about the impact of ISDS on the judiciary, stating:

> So far as I am aware the judiciary, as the third branch of government in Australia, has not had any significant collective input into the formulation of ISDS clauses in relation to their possible effects upon the authority and finality of decisions of Australian domestic courts.[131]

As noted by French, and demonstrated by some of the case studies in Part III Types of ISD, it is not uncommon for investors to use ISDS provisions to challenge decisions of domestic courts.[132] In Eli Lilly v Canada, Eli Lilly attempted to challenge the Canadian judicial decision regarding the patents of two of its drugs, seeking $500 million in compensation. In the more recent case of Zeph Investments v Australia, Zeph Investments is seeking to use ISDS provisions to challenge a Western Australian law, after a related company had failed in its challenge to that law in the High Court of Australia.

French also noted that ISDS provisions have been used successfully to challenge court decisions refusing to enforce or set aside awards in international commercial arbitration proceedings between private parties. For example, a case using the bilateral investment treaty between Bangladesh and Italy held that a decision of a court in Bangladesh, which set aside an award of the International Commercial Court, "amounted to expropriation of the awardee's property without compensation", contrary to Article 5 of the treaty.[133]

Given these concerns about the impact of ISDS on state sovereignty, rule of law, judicial systems and democracy, the National Centre for State Courts in the United States has called for trade agreements provisions not to be approved by the United States Trade Representative and Congress unless they "recognise and support the sovereignty of state judicial systems and the enforcement and finality of state court judgments and to clarify that under existing trade agreements, foreign investors shall enjoy no greater substantive and procedural rights than US citizens and businesses".[134]

(iii) Indigenous rights

The case of Bear Creek v Peru (set out in Part III Types of ISD) demonstrates how states acting to uphold Indigenous rights, particularly in relation to the requirement of free, prior and informed

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[128] TPP Legal, 'An open letter from lawyers to the negotiators of the Trans-Pacific Partnership urging the rejection of investor-state dispute settlement', TPP Legal (8 May 2012) <https://tpplegal.wordpress.com/open-letter/>.
[129] Matthew Rimmer, 'The Chilling Effect: Investor-State Dispute Settlement, Graphic Health Warnings, the Plain Packaging of Tobacco Products, and the Trans-Pacific Partnership' (2018) 7(1) *Victoria University Law and Justice Journal* 76, 92.
[130] French (n 12), 3-4.
[131] Ibid, 15.
[132] Ibid, 7-8.
[133] Ibid, 8.
[134] Ibid, 12 citing National Centre for State Courts, Free Trade Agreements <htpp://www.ncsc.org/services-and-experts/government-relations/international/free-trade-agreements.aspx>.

consent, can be ordered to pay compensation when this conflicts with mining licences. Indigenous communities in the Pacific Rim have "been alarmed about the impact of ISDS upon Indigenous rights".[135] In New Zealand, Māori communities were unsuccessful in bringing an action challenging the TPP under the Treaty of Waitangi. The claim was related to the impact of the TPP on their procedural and substantive rights and that the TPP would not protect their Treaty of Waitangi rights.[136]

(iv) Federalism

Faunce, cited by French, has commented that the ISDS mechanism in the TPP will impact on federal/state relations.[137] This is demonstrated by some of the ISDS case examples in Part III Types of ISD above. For example, the Australian case of Zeph Investments v Australia (the Pilbara iron ore project) brought due to the introduction of the Western Australia law which was upheld by the High Court, demonstrates a case where the federal government (Australia) may be required to pay compensation for an action, even where legal under domestic law, by a state. Other examples include Lone Pine v Canada (for actions taken by the Quebec government) and Westmoreland Mining v Canada (II) (for actions taken by the Alberta government).

(C) Calls for reform to, or removal of, ISDS clauses

(i) The reforms suggested and being implemented

Given the many arguments against ISDS clauses set out above, there is a multitude of literature and discussion calling for reform of trade agreements to address the concerns. Tienhaara has argued that there are three possibilities to reform trade agreements to ensure better alignment with climate change mitigation: exclude ISDS provisions; prohibit fossil fuel investors from using ISDS; or disallow challenges under ISDS provisions to all government measures taken to achieve international obligations. According to Tienhaara, not reforming ISDS will lead to unacceptable delays which "we simply cannot afford".[138] Tienhaara and others have urged taking the further step of terminating all investment treaties, or all bilateral investment treaties, which contain ISDS provisions.[139]

Boyd has questioned why states ratify free trade agreements that make tackling climate change, which is a "hydra-headed challenge" that is "already difficult and costly for a fossil-fuel exporting nation like Canada", even harder and more expensive.[140]

As put forward by Tienhaara in her third option above, some states are responding to criticisms of ISDS provisions by attempting to integrate elements of sustainable development and the rights of states to make policies about climate change and environment issues into bilateral investment treaties. The Australia-United Kingdom bilateral investment treaty acknowledges the rights of each state to "establish its own levels of domestic environmental protection and its own priorities relating to the environment, including climate change, and to establish, adopt or modify its environmental

[135] Rimmer 'The Empire Strikes Back' (n 104), 90.
[136] Ibid 90, and 'TPP Treaty clause not a breach, Tribunal says' *Waitingi Tribunal news* <https://www.waitangitribunal.govt.nz/news/tppa-treaty-clause-not-a-breach-tribunal-says/>. See also Amokura Kawharu, 'Process, Politics and the Politics of Process: The *Trans-Pacific Partnership in New Zealand*' (2016) 17 *Melbourne Journal of International Law* 1.
[137] French (n 12), 11.
[138] Rimmer 'The Empire Strikes Back' (n 104), 78 (citations omitted).
[139] See, e.g. Tienhaara and Cotula (n 77), 3; Tienhaara and ors, 'Investor-state disputes threaten the global green energy transition' (n 20), 703.
[140] Rimmer 'The Empire Strikes Back' (n 104), 82 (citations omitted).

laws and policies accordingly".[141] Similarly, the Georgia-Japan bilateral investment treaty states that regulatory action by a State to protect the environment does not amount to expropriation.[142]

Carve-outs are a more recent strategy in ISDS, and have mostly been used for tobacco control measures. For example, some Australian international investment agreements carve-out tobacco control measures from the ISDS provision, using the language that "[n]o claim may be brought under … [the section concerning ISDS] in respect of a tobacco control measure of a Party". Singapore has used the broader language of excluding from ISDS "any measure adopted and maintained or any treatment accorded to investors or investments … in respect of tobacco or tobacco-related products" in some of its investment agreements. Australia has taken an even broader approach in its agreements with Indonesia and Peru by excluding any measure "that is designed and implemented to protect or promote public health" from ISDS.[143] The China-Australia Free Trade Agreement takes a more extensive approach in preventing ISDS claims made against "'[m]easures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order".[144]

Van Harten has proposed a climate change carve-out in ISDS clauses[145] and has argued that a reliable carve-out can be achieved. The proposed clause is as follows:

> *This Article applies to any measure adopted by a Party to this Agreement and relating to the objective of stabilizing greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system or relating to any of the principles or commitments contained in Articles 3 and 4 of the United Nations Framework Convention on Climate Change of 1992.*
>
> *Such a measure shall not be subject to any existing or future treaty of a Party to the extent that it allows for investor-state dispute settlement unless the treaty states specifically and precisely, with express reference to this Article and this Agreement, that this Article is overridden. For greater certainty, in the absence of such a reference in a future treaty between two or more Parties, the future treaty is presumed to include in full and without qualification the first three paragraphs of this Article.*
>
> *Any dispute over the scope or application of this Article shall be referred to, and fall within, the sole and exclusive jurisdiction of [specific body and process pursuant to the multilateral climate change agreement]. For greater certainty, no investor-state dispute settlement tribunal, arbitrator, body, or process has jurisdiction over any dispute related to the scope or application of this Article.*
>
> *The Parties shall not agree to any future treaty that allows for investor-state dispute settlement unless the future treaty incorporates in full and without qualification the language of the first three paragraphs of this Article. The Parties shall make best efforts to renegotiate any existing treaty with a non-Party that allows for investor-state dispute settlement in order to ensure that the existing treaty incorporates in full and without qualification the language of the first three paragraphs of this Article*.[146]

[141] Australia-United Kingdom bilateral investment treaty Article 22.3.
[142] Ibid Article 11(4).
[143] Joshua Paine and Elizabeth Sheargold, 'A Climate Change Carve-Out for Investment Treaties' (2023) 36(2) *Journal of International Economic Law* 285, 292.
[144] Tania Voon and Dean Merriman, 'Is Australia's Foreign Investment Screening Policy Consistent with International Investment Law?' (2022) 23 *Melbourne Journal of International Law*, 22.
[145] Academics Joshua Paine and Elizabeth Sheargold have also proposed a carve-out of climate change measures, see above n 143.
[146] Gus Van Harten, 'An ISDS Carve-Out to Support Action on Climate Change', Osgoode Hall Law School of York University, Research Papers (2015), 1-2.

However, whether carve-out reforms are useful is contested; some have argued that these "reform efforts are unlikely to succeed in facilitating just and sustainable development".[147] In 2016, Boyd argued that the language "that purports to protect governments' right to regulate" is "practically useless", as "many arbitration panels have ignored or narrowly interpreted these provisions".[148] Nevertheless, some reform has been achieved by some bilateral investment treaties now expressly referencing the Paris Agreement, such as the 2018 Netherlands Model Bilateral Investment Treaty. This requires arbitral tribunals to give greater consideration to states' international climate obligations under the Pars Agreement when determining claims made by an investor against a host state.[149]

A stronger option may be to carve-out a prohibition on fossil fuel investors using ISDS, which has been discussed at the Organisation for Economic Co-operation and Development ('**OECD**') .[150] The European Commission proposed to remove coal, oil and gas from investments protected by the ECT and replace these with protection for hydrogen and insultation material.[151] The Institutional Investors Group on Climate Change has also advocated for the ECT not to protect fossil fuel investments, to allow Europe's economy to align with net-zero emissions and to avoid locking-in of carbon assets.[152] Another option for ISDS clause reform is to exclude certain claims from ISD, such as indirect expropriation (discussed below), which has been done by Brazil in its newer treaties.[153]

Still, some have argued that these options do not go far enough. Rimmer has pointed out that although general exceptions "may provide additional comfort to regulating states … such exceptions do not preclude significant financial and personnel costs in successfully defending measures".[154] Kahale has instead called for the ISDS system to be abolished altogether.[155]

According to Alfred-Maurice de Zayas, the former United Nations Independent Expert on the Promotion of a Democratic and Equitable International Order, "the abolition of ISDS does no injustice to investors, who can still avail themselves of the domestic courts and/or the well-tried mechanism of diplomatic protection". De Zayas also argued that the risks for investors "should be factored in as a normal cost of doing business" and makes the point that "the World Bank offers risk insurance".[156]

Boyd emphasised that many states are moving towards eliminating ISDS clauses altogether. Many European states withdrew from the ECT because of ISDS and Canada and the US agreed to remove ISDS from the US-Mexico-Canada agreement, the successor of the NAFTA. Other states including India and Indonesia have also "taken steps to avoid ISDS cases".[157] The Canadian Deputy Prime Minister Chrystia Freeland stated that by eliminating ISDS, Canada had "strengthened our government's right to regulate in the public interest, to protect public health and the

[147] 'Paying polluters' (n 22), 19-20.
[148] Rimmer 'The Empire Strikes Back' (n 104), 82 (citations omitted).
[149] ICC, 'Resolving Climate Change Related Disputes through Arbitration and ADR' 2019, 39.
[150] 'UN investigates impact of investment treaties on human rights' (n 10).
[151] Allens (n 40).
[152] Ibid.
[153] OECD, 'The notion of 'indirect expropriation' in investment treaties concluded by 88 jurisdictions: a large sample survey of treaty provisions', 19 October 2021, 4.
[154] Rimmer, 'The Chilling Effect' (n 129), 91 (citations omitted).
[155] George Kahale III, quoted in ibid, 91.
[156] Rimmer 'The Empire Strikes Back' (n 104), 106.
[157] Statement by Dr. David Boyd, Special Rapporteur on Human Rights and the Environment, 78th session of the General Assembly, Third Committee, Item # 73 (a- d), 19 October 2023, New York.

environment".[158] Tienhaara notes that some states, such as South Africa, have terminated all bilateral investments treaties "without any resulting reductions in foreign investment".[159]

However, if the treaty terminated contains a "survival clause", investors will continue to be able to use ISDS mechanism under that treaty for years after the termination of that treaty. For example, Article 14(4) of the terminated Hong Kong – Australia Agreement, which was terminated in January 2020, specifies a 15-year survival period during which time the treaty continues to be effective in respect of investments made before the date of termination.[160] States which mutually terminate a treaty can agree to extinguish the survival clause, however this is not possible in the case of unilateral termination.[161] In the case of the terminated Hong Kong – Australia Agreement, the new Hong Kong – Australia Investment Agreement (2020) specifies that the survival clause of the 1993 treaty ceases to have effect upon the date of entry into force of the new treaty.[162] However, unilateral termination of bilateral investment treaties is not uncommon: in 2008, Ecuador unilaterally terminated nine such treaties and a further 16 in 2017; Indonesia unilaterally terminated 25 such treaties between 2014 – 2017 and India sent notices to terminate such treaties to 61 partner states in 2016.[163] These (largely developing) states will therefore remain liable for ISDS if the unilaterally terminated treaties contain an ISDS mechanism and survival clause.

(ii) UNCITRAL Working Group III's procedural reforms

The United Nations Commission on International Trade Law ('**UNCITRAL**') established in 2017 its Working Group III to pursue ISDS reform. This ongoing working group has so far released draft guidelines for mediation and a draft code of conduct for arbitrators. At the Working Group's 47th session, held in January 2024, the draft provisions on procedural and cross-cutting issues were discussed, which include an article titled "Right to regulate".[164] This draft provision states that nothing in the investment agreement "shall be construed as preventing the Contracting Parties from exercising their right to regulate in the public interest and to adopt, maintain and enforce any measure that they consider appropriate to ensure that investments are made in a manner sensitive to the protection of … the environment". It also directs the arbitral tribunal to "give a high level of deference that international law accords to Contracting Parties with regard to the development and implementation of domestic policies, the right to regulate in the public interest and the right to adopt, maintain and enforce measures sensitive to the protection of … the environment" when assessing the alleged breach of the host state.[165]

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[158] Scott Sinclair, 'Withdrawing Canada from the treaty-based international investment arbitration system', Canadian Centre for Policy Alternatives submission to the Standing Committee on International Trade regarding ISDS, <https://www.ourcommons.ca/Content/Committee/432/CIIT/Brief/BR11281558/br-external/CanadianCentreforPolicyAlternatives-e.pdf>.

[159] Tienhaara and ors, 'Investor-state disputes threaten the global green energy transition' (n 20), 703.

[160] See DFAT, 'Australia's bilateral investment treaties' <https://www.dfat.gov.au/trade/investment/australias-bilateral-investment-treaties> and the terminated Hong Kong – Australia Agreement <https://www.austlii.edu.au/au/other/dfat/treaties/1993/30.html>.

[161] Nathalie Bernasconi-Osterwalder and Sarah Brewin, 'Terminating a Bilateral Investment Treaty', IISD Best Practices Series – March 2020.

[162] Ibid.

[163] Ibid.

[164] UNCITRAL Working Group III: Contribution to the 'Right to Regulation' Provision, Memorandum, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/r2r_memo_for_wgiii_47th_session.pdf>.

[165] UNCITRAL Working Group III, 'Possible reform of investor-State dispute settlement (ISDS) - Draft provisions on procedural and cross-cutting issues' A/CN.0/WG.III/WP.231, 46th session in Vienna, 9-13 October 2023

However, Boyd has stated that "these procedural reforms [of UNCITRAL Working Group III] do not overcome the fundamental flaws of the ISDS system".[166]

(iii) OECD's consideration

The OECD's seventh Annual Conference on Investment Treaties, held in 2022, included two sessions of discussion on the alignment of the Paris Agreement commitments and investment treaty policies.[167] The OECD held public consultations prior to the conference which, along with the conference, contributed to "ongoing government-led work on investment treaties and climate change at the OECD".[168] The OECD has also began broader government-led consideration of "The Future of Investment Treaties", which "explores how the investment treaties could help address these challenges [such as the climate crisis] and how to deal with existing agreements in a pragmatic way."[169]

(iv) Reform in Australia

Australia has begun to move away from the inclusion of ISDS in its free trade agreements. Some of Australia's more modern free trade agreements, such as those with the United Kingdom, Hong Kong and the Regional Comprehensive Economic Partnership (with 14 states in the Asia-Pacific) do not include ISDS.[170]

Australia's Department of Foreign Affairs and Trade ('**DFAT**') began a review of bilateral investment treaties in mid-2020, which included review of ISDS clauses. The background paper for this review stated that Australia's "modern FTA practice" includes, among other practices, "reiteration of the Government's right to regulate", "exclusion of ISDS claims against public health measures", "enabling a case to be blocked by an investor without substantial business activities in Australia", "limiting forum shopping", and "providing detailed rules on ethics and conflict of interest of arbitrators".[171]

Submissions to this review have noted carve-outs in some of Australia's bilateral investment treaties. An example is Article 15 of the Hong Kong – Australia Investment Agreement (2020), which states that "Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure … to ensure that investment activity … is undertaken in a manner sensitive to environmental, health or other regulatory objectives". Another example is the Peru-Australia Free Trade Agreement (2020), which contains two articles allowing states to take action to regulate the environment:

> Article 8.16: Investment and Environmental, Health and other Regulatory Objectives
>
> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

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[166] Annex III, 'Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights' Note by the Secretary-General, UNGA A/78/168, 3.
[167] Agenda, 'Investment Treaties and Climate Change: Paris Agreement and Net Zero Alignment', for 7th Annual Conference on Investment Treaties 10 May 2022 .
[168] OECD, '2022 Conference on investment treaties: Paris Agreement and Net Zero alignment' <https://www.oecd.org/daf/inv/2022-conference-investment-treaties.htm>.
[169] OECD 'The Future of Investment Treaties' <https://oecd.org/investment/investment-policy/investment-treaties.htm>.
[170] Voon and Merrimanm (n 144), 22.
[171] DFAT, 'Review of Australia's Bilateral Investment Treaties' (August 2020), page 3.

Article 8.18: General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Chapter shall be construed to prevent the adoption or enforcement by a Party of measures:

(a) necessary to protect human, animal or plant life or health;
(b) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter;
(c) imposed for the protection of national treasures of artistic, historic or archaeological value; or
(d) relating to the conservation of living or non-living exhaustible natural resources.[172]

Although DFAT is not due to report on its review until mid-2024,[173] the federal Labor government elected in 2022 has made specific statements about ISDS. The Australian Labor Party and the Labor government have a policy against including ISDS in new trade agreements and to review ISDS provisions in existing agreements.[174] In November 2022, the federal Minister for Trade and Tourism, Don Farrell, announced that the government would look to "reform existing ISDS mechanisms to enhance transparency, consistency and ensure adequate scope to allow the Government to regulate in the public interest."[175]

V The Fuss: Characteristics of ISD

Despite a trend to exclude ISDS provisions from new trade agreements, many existing agreements contain ISDS clauses. There is a need to consider how best to deal with ISDS disputes, as they will continue to arise. This question entails understanding both the nature of the dispute, what can be termed the "fuss", and the type of dispute resolution process most appropriate to resolve the dispute, the "forum". This part of the discussion paper analyses the fuss – the characteristics of ISD involving climate change and environmental issues. Part VI The Forum: Dispute resolution processes analyses the forums – the dispute resolution processes - for resolving the fuss.

This part suggests that understanding the fuss involves, first, identifying the characteristics of ISD generally and, secondly, the nature and characteristics of the environmental problem that the ISD involves. Starting with the first, there are five considerations that need to be taken into account in analysing the characteristics of ISD: standing; jurisdiction; investment affected; interference with that investment; and compensation.

(A) Standing

The first consideration concerns who has standing to bring ISDS claims. One criticism of the ISDS system is the broad way in which arbitral tribunals have allowed shareholders, and subsidiary companies, to bring ISDS claims (see case examples in Part III Types of ISD above, such as Barrick v Papua New Guinea; Zeph Investments Pte Ltd v Australia; EEPL Holding Mauritius v Republic of Congo; Tethyan Copper Company Ltd v Pakistan). These cases provide examples of where

[172] ACT Law Society, Submission to DFAT review, 'Review of Australia's Bilateral Investment Treaties' (2 October 2020).
[173] The review, commenced in mid-2020, is scheduled for four years: see DFAT, 'Australia's bilateral investment treaties' (n 160).
[174] Dehm, 'Undermining the Energy Transition' (n 24); Senator the Hon Don Farrell, 'Trading our way to greater prosperity and security', speech given to The Australian APEC Study Centre, RMIT Melbourne, 14 November 2022: Senator Farrell stated that the Government "will not include investor-state dispute settlement in any new trade agreements".
[175] Senator the Hon Don Farrell (n 174).

shareholding companies have sued in relation to companies based in the same state against which the ISDS claim is brought, where the shareholding company is based in a different state, and where the subsidiary company which has sued as allegedly suffering interference with their rights is located in a state which does not have a treaty, or has a treaty but without the necessary ISDS provisions, with the host state.

Companies are also able to sue due to their state of registration rather than the state in which they are based. For example, in Lone Pine v Canada, despite Lone Pine being registered in the US, it has been claimed that "Lone Pine is really a Canadian firm, being 'a Calgary-based firm' that 'would not have standing as a foreign entity to sue Canada under NAFTA but [Lone Pine company president] Granger said it can do so because it is registered in Delaware'".[176]

The ability of shareholders to bring ISDS claims "considerably broaden[s] potential claimants to a wide range of financial investors that hold direct or indirect, majority or minority equity stakes in fossil fuel companies".[177] Tienhaara makes the point that a "single dispute could expose states to multiple claims by the firm and its direct and indirect shareholders, and in aggregate terms the arrangement can significantly increase the exposure of states to ISDS claims."[178]

(B) Jurisdiction

The second consideration concerns what is the appropriate jurisdiction to hear and decide the ISDS proceedings. Another criticism of the ISDS system is the prevalent use by investors of shareholding companies and subsidiary companies located in a different jurisdiction to the investor to bring ISDS claims, especially where the investor could not bring an ISDS claim itself. Allowing claims to be brought by such companies leads to "treaty shopping" (or "nationality shopping"), in which companies can create subsidiaries, or ensure their shareholding is such that their parent company is located, in states with treaties containing ISDS clauses with the host state. The term "forum shopping" seems to be used interchangeably with "treaty shopping" in discussing ISDS cases. Forum shopping is described as the "a practice whereby a complainant will select the agreement and/or the procedures under which it will initiate a dispute because it considers it more likely to produce the expected result".[179]

Boyd has observed:

> Foreign investors and law firms have identified creative ways to access the immense power available through ISDS provisions in IIAs. For example, it is common for foreign investors located in State A that does not have an [international investment agreement] with State B where an investment is proposed, to incorporate a related enterprise in State C that does have an [international investment agreement] with State B. The foreign investor may have few if any employees or activities in State C, but merely through the act of incorporating there, is able to access the benefits of that State's [international investment agreements]. Arbitration tribunals routinely allow these "mailbox companies" to initiate ISDS claims. For example, it is estimated that over $100 billion in ISDS claims have been filed under Netherlands investment treaties by investors based in other States, using mailbox companies in the Kingdom of the Netherlands. A recent ISDS claim against Peru illustrates the

[176] Rimmer 'The Empire Strikes Back' (n 104), 80 quoting Glyn Moody, 'Canadian-based company sues Canada under NAFTA, saying that fracking ban takes away its expected profits', *TechDirt* (4 October 2013) <https://www.techdirt.com/articles/20131004/07500724750/canada-hit-with-another-massive-investor-state-dispute-settlement-demand.shtml>.
[177] Tienhaara and Cotula (n 77), 14-15.
[178] Ibid, 14-15.
[179] Julien Chaisse and Yves Renouf, 'Investor-State Dispute Settlement' in Jane Drake-Brockman and Patrick Messerlin (eds), Potential Benefits of an Australia-EU Free Trade Agreement: Key Issues and Options (University of Adelaide Press, 2018), 309.

> problem, as the foreign investor relying on the Kingdom of the Netherlands - Peru bilateral investment treaty is the subsidiary of a Japanese corporation with only one employee in the Kingdom of the Netherlands.[180]

The case of Philip Morris v Australia is a rare positive example of an investor being disallowed from bringing its claim due to clear treaty, or forum, shopping. Philip Morris Asia Ltd, which brought the claim and was incorporated in Hong Kong, bought a 100% shareholding in Philip Morris Australia Ltd (and thereby a subsequent indirect interest in the subsidiary Philip Morris Ltd) in February 2011, which was less than one year after the Australian Government announced it would introduce tobacco plain packaging legislation. The tribunal found that Philip Morris was not a Hong Kong company and the case was an abuse of process, ending the claim. However, while this may appear to be a victory for the host state, Australia was still involved in years of process to determine this question and the attendant issue of costs, and ultimately only recovered half of its $24 million in legal costs.[181] Despite this case being disallowed in a clear case of forum shopping, this appears to be a rare example of ISDS being disallowed on this basis. The other cases where the claim has been brought by a shareholder or subsidiary, shown in Part III Types of ISD, were not disallowed on this basis and demonstrate that forum/treaty/nationality shopping is often successful in expanding the ability of corporations to bring ISDS claims.

(C) Investment affected

The third consideration concerns the "investment" said to have been interfered with by the state's action. In the early period of the ISDS system, the impugned state action involved expropriation of improved real property, such as mines, power plants, and other infrastructure assets. More recently, the impugned state action involves revoking an existing or not granting a new statutory approval to conduct a project or activity that adversely affects the environment, including contributing to climate change. A question arises whether such action affects a relevant "investment".

"Investment" is defined in the SAFTA as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk". Licences, authorisations, permits and similar rights conferred under law are specifically listed as forms of investment.[182] However, absent such an express provision in the trade agreement deeming "licences, authorisations, permits and similar rights conferred under law" to be investment, questions may arise whether such forms of statutory approvals are "rights" or "property", the interference with which can found an ISDS claim for compensation.

Australian jurisprudence has limited claims for compensation for regulatory action that renders less usable and less valuable a statutory approval, such as an aquifer access licence. One basis has been that such statutory approvals are not "property" and hence there cannot have been a regulatory acquisition of property. Some of these cases[183] have referred to Lord Wilberforce's statement that,

> before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.[184]

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[180] 'Paying polluters' (n 22), 13 (citations omitted).
[181] Ranald, 'When even winning is losing' (n 15).
[182] Ibid Article 1(l).
[183] See eg *The Queen v Toohey; Ex parte Meneling Station Pty. Ltd.* (1982) 158 CLR 327; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140.
[184] *National Provincial Bank Ltd. v. Ainsworth* (1965) AC 1175, at pp. 1247-1248,

In *ICM Agriculture Pty Ltd v Commonwealth*,[185] landowners brought a claim regarding their bore licences, to access groundwater, held under New South Wales legislation, which had been replaced with aquifer access licences thereby reducing the amount of groundwater they were entitled to by 70%. The landowners argued that this replacement was an acquisition of property not on just terms, which involved arguing that the licences were property and that they were acquired. Although the case particularly concerned the question of whether the bore licences were property, the case contains a useful discussion of what constitutes property at common law. French CJ, Gummow and Crennan JJ, although ultimately finding that it was unnecessary "to determine whether the bore licences were of such an insubstantial character as to be no more than interests defeasible by operation of the legislation which called them into existence",[186] cited Mason J in an earlier case, stating that,

> where a licensing system is subject to Ministerial or similar control with powers of forfeiture, the licence, although transferable with Ministerial consent, nevertheless may have an insufficient degree of permanence or stability to merit classification as proprietary in nature.[187]

French CJ, Gummow and Crennan JJ also referenced arguments by the respondent that the bore licences were of "insubstantial character" due to the subjection of the licence to limitations and conditions of the licence. However, Hayne, Kiefel and Bell JJ found that the licences "may readily be accepted … [as] a species of property".[188]

(D) "Interference" with the investment

The fourth consideration concerns whether the impugned state action can be regarded as an "interference" with an investment. Most commonly, the investor claims the interference involved an "expropriation" of the investment. This raises the question of what constitutes expropriation. Is it only direct expropriation, or does it extend also to indirect expropriation? Another question that arises is whether a decision of a domestic court of the host state that adversely affects the investment can constitute an "interference" with the investment.

(i) Expropriation of property

ISDS claims relating to the revocation or non-grant of a statutory approval, such as a mining licence, usually claim that the investor's "property" (i.e. the statutory approval) has been "expropriated". Expropriation is "the taking by the state of private property for public purposes, normally without compensation."[189] Under the SAFTA, parties cannot "expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation" except in certain cases.[190] Expropriation was a central reason for inclusion of ISDS clauses in trade agreements from the 1960s, to protect against nationalisation of infrastructure assets, which "marked the 70s and 80s"[191] whereby states required a forced and permanent transfer of title.[192] However, this direct expropriation has largely been overtaken by "indirect expropriation".[193] One example of this is Barrick v PNG, in which Barrick has brought a claim against

[185] (2009) 240 CLR 140.
[186] Ibid [80].
[187] Ibid [76], citing Mason J in *R v Toohey; Ex parte Meneling Station Pty Ltd* 158 CLR 327; [1982] HCA 69.
[188] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 [147].
[189] Oxford Reference, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095805665>.
[190] SAFTA Article 13.
[191] OECD, *"Indirect Expropriation" and the "Right To Regulate" in International Investment Law* (2004), 2 <https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf>.
[192] OECD, 'The notion of 'indirect expropriation' in investment treaties' (n 153).
[193] Ibid.

PNG over its government's refusal to grant an extension of Barrick's expired lease at a gold mine. Another example is the claim brought by Mineralogy in relation to the Waratah Coal project, in which the claim has been brought on the basis of a refusal to grant a mining permit.

According to the OECD, indirect expropriation:

> is used to describe a measure or series of measures in which the taking does not fulfil the formal criteria of a direct expropriation but has an equivalent economic effect that is "tantamount" to those of a "direct" expropriation or "hollow out" the elements that constitute ownership.[194]

Investors have used the concept of indirect expropriation to bring ISDS claims, alleging that regulatory measures, including those taken for environmental purposes, constitute "indirect expropriation". These claims have been upheld by tribunals. In fact, UNCTAD's case analysis found that, for ISDS cases for which information about the alleged breach was available and analysed, claims for indirect expropriation was the second-most claimed breach, second only to a claimed breach of fair and equitable treatment requirements. Of these cases in which indirect expropriation was claimed, it was found to exist in around 28% of the cases.[195]

Language specifying the concept (and therefore the boundaries) of "indirect expropriation" was first included in a treaty in 2003. Around half of the treaties concluded since then contain such explicit language, however this accounts for only approximately 18% of treaties in force as of October 2021.[196] Therefore, the vast majority of treaties do not provide protection against the concept of "indirect expropriation", or at least some limitation of this expansive concept, by specifying the "scope and conditions of that concept".[197] The OECD outlines the components that make up the specifications of indirect expropriation when such language is included in ISDS clauses. These are:

- setting out the assets that can be subject to indirect expropriation: for example, by limiting it to interferences with tangible or intangible property rights or property interests and thereby excluding other elements which may be covered by an investment, such as licences, permits and other government authorisation;
- including a positive description of the notion of indirect expropriation: for example, specifying that indirect expropriation is an "action or series of actions adopted by a Party that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure" or "tantamount to direct expropriation", which is the most common form of positive description;
- specifying the criteria to consider when deciding if an indirect expropriation has occurred: this can include the economic impact and character of the government action, and the extent to which that action interferes with reasonable investment-backed expectations; and
- specifying criteria that either typically, or always, exclude the occurrence of indirect expropriation: for example, by specifying that non-discriminatory regulatory actions which are designed to protect legitimate public welfare objectives cannot constitute indirect expropriations.[198]

Malakotipour notes that while tribunals usually adopt an ad-hoc approach to indirect expropriation claims, there are two common facts which are frequently used. First, there is a high threshold for a positive finding of indirect expropriation and secondly, the tribunals consider the legitimate expectations of the investor.[199] "Legitimate expectations" was elaborated upon by the tribunal in the Thunderbird v Mexico award, which stated:

[194] Ibid, 3 (citations omitted).
[195] As cited in ibid, 3-4.
[196] Ibid, 6.
[197] Ibid, 6.
[198] Ibid.
[199] Malakotipour (n 114), 243.

> Legitimate expectations relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.[200]

The United Nation's Environment Programme's Sustainability Toolkit for Trade Negotiators argues that the lack of common definition of indirect expropriation and tribunals' case-by-case interpretation raises sustainable development concerns. Numerous ISDS cases relating to fossil fuel and mining projects are brought by investors following the denial of a licence, such as a mining licence, to the investor (or their subsidiary or shareholder).

For example, Tethyan Copper's successful claim against Pakistan was argued on the basis that the denial of a mining licence had the effect of unlawful expropriation in breach of Article 7 of the Australia – Pakistan agreement.[201] In supporting its argument, Tethyan Copper referred to documents which it alleged showed that the denial constituted an expropriation, including a 2009 Cabinet decision to ""tak[e] over Rekodiq Copper & Gold Project [the project in question] from TCCP" and a 2009 memorandum to the Chief Secretary which stated "the Government of Balochistan has decided to take over the project from TCCP".[202] The state of Pakistan argued that the rejection of the mining lease application was an "exercise of regulatory power", which does not amount to expropriation. Pakistan further argued that the claimant never had a "right to mine" there, the existence of that right being determined by Pakistani law. Pakistan challenged the claimant's alleged "right to mine" including that the laws did not confer such a right, issues relating to the joint venture which existed and that the relevant licensing authority "is *obliged* to reject mining lease applications unless the application satisfies various objectives".

In deciding the case, the Tribunal acknowledged there was no direct taking of the claimant's interest in the joint venture or its interest in the Pakistani company set up by the claimant. However, the Tribunal found that:

> After Claimant had spent more than US$240 million on its exploration work and had completed its Feasibility Study on the Initial Mine Development of the area, TCCP [Tethyan Copper Company Pakistan] filed an application for a mining lease, which would have allowed Claimant to amortize the expenditures it had incurred during the exploration period. By denying TCCP's Mining Lease Application, however, the Licensing Authority rendered it impossible for Claimant to make use of the information and data it had collected and thereby also rendered Claimant's interest in both [the joint venture] and in TCCP useless. Without a mining lease, neither of them could any longer fulfill their exclusive purpose, after the exploration had been completed; thus, following the denial of TCCP's Application, the value of both the [the joint venture] and TCCP was effectively neutralized.
>
> Consequently, the Tribunal finds that the denial of TCCP's Mining Lease Application was a measure having an effect equivalent to expropriation. While the Tribunal is aware of, and agrees with, Respondent's argument that a bona fide regulatory measure of the State cannot amount to an expropriation, the Tribunal recalls its finding above that the decision of the Licensing Authority was not justified by any of the grounds invoked in the Notice of Intent to Reject and/or in this arbitration. Rather, it was motivated by the [Government of Balochistan's] decision to implement its own project,

[200] *International Thunderbird Gaming Corporation v. Mexico* (*Thunderbird v. Mexico*), Award (2006), UNCITRAL IIC 136, [147].
[201] Tethyan Copper Company Pty Limtied v Islamic Republic of Pakistna, ICSID Case No. ARB/12/1, Award (12 July 2019) <https://www.italaw.com/sites/default/files/case-documents/italaw10737.pdf>, see [155].
[202] Decision On Jurisdiction and Liability in Tethyan Copper Company Pty Limited Claimant v Islamic Republic Of Pakistan Respondent (ICSID Case No. ARB/12/1), 10 November 2017, at [1237], available <https://www.italaw.com/sites/default/files/case-documents/italaw10738.pdf>.

> instead of continuing its collaboration with Claimant, and therefore amounted to a violation of Respondent's [fair and equitable treatment] obligation.[203]

Whether or not the mining lease was not granted due to the Government of Balochistan's decision to implement its own project, arguably does not adequately address the preliminary argument that no *right* to be granted the mining lease existed. The absence of a right should logically preclude a claim of expropriation for the taking of that right, as if the right did not exist in the first place, it therefore could not be taken.

A review of Australian jurisprudence relating to the Constitutional provision which prohibits the Commonwealth acquiring property other than on just terms may assist in analysing the concept of indirect expropriation. By likening "expropriation" to the idea of acquisition other than on just terms, this Australian jurisprudence may assist in developing an argument that indirect expropriation as argued by investors in ISDS cases takes the legal concept of expropriation too far. In *ICM Agriculture v Commonwealth*, referenced above, the majority of the High Court held that the replacement of the bore licences with the aquifer licences, did not amount to an acquisition of property within the meaning of s 51(xxxi) of the Constitution. French CJ, Gummow and Crennan stated that:

> in the present case, and contrary to the plaintiff's submissions, the groundwater in the [Lower Lachlan Groundwater System] was not the subject of private rights enjoyed by them. Rather … it was a natural resource, and the State always had the power to limit the volume of water to be taken from that resource. … The changes of which the plaintiffs complain implemented the policy of the State respecting the use of a limited natural resource, but that did not constitute an 'acquisition' by the State in the sense of s 51(xxxi).[204]

In another case, *JT International SA v Commonwealth*, Chief Justice French discussed the meaning of "acquisition", stating:

> Taking involves deprivation of property seen from the perspective of its owner. Acquisition involves receipt of something seen from the perspective of the acquirer. Acquisition is therefore not made out by mere extinguishment of rights.[205]

In *Commonwealth v WMC Resources Ltd*,[206] the High Court considered whether federal legislation which had the effect of reducing the size of an exploration permit area, involved acquisition of property such that "just terms" compensation would be required under section 51(xxxi) of Australia's Constitution. The majority of judges found that this did not amount to acquisition of property. Although they found that the permit holder did have "proprietary rights", the rights were the creatures of statute and the amendment of the statute did not amount to acquisition of the property.[207]

These cases show that High Court of Australia has interpreted "acquisition" for the purpose of s 51(xxxi) of the Australian Constitution as not covering government actions to limit a company's or individual's right to natural resources and that it requires the taking of something rather than only extinguishing the rights. If this interpretation of "acquisition" was applied to "expropriation" in ISDS cases, claims seeking compensation for "indirect expropriation" might not be allowed. The notion of "expropriation" in such treaties would be interpreted according to the original intention for its

[203] Ibid, [1328]-[1329].
[204] *ICM Agriculture Pty Ltd v Commonwealth* (n 185), [84]
[205] (2012) 250 CLR 1, [42].
[206] (1998) 194 CLR 1; [1998] HCA 8.
[207] *Commonwealth v WMC Resources Ltd* [1998] 194 CLR 1; HCA 8.

inclusion, being to protect investors against (newly created) states taking their assets. This would limit "expropriation" to direct expropriation and not also include indirect expropriation.

(ii) Interference in decisions of courts

A second type of interference raised by investors is adverse decisions of domestic courts of the host states. Some ISDS decisions have found that lawful decisions of domestic courts of the host state have amounted to an action that allows for an ISDS claim by an investor (see e.g. Chevron v Ecuador and Bangladesh v Italy; see also the recent claim against Australia in Zeph Investments v Australia regarding a Western Australian law which was upheld by the High Court of Australia).

French has suggested that ISDS provisions could be amended to preclude investors from bringing any challenge to the decision of a domestic court.[208] This would preclude investors from arguing that a legally valid decision made by a domestic court amounts to an "interference" with their rights under a treaty entered into with the government of that state, thereby upholding the doctrine of separation of powers and the independence of the judiciary. These important principles are arguably undermined by international arbitral tribunals deciding ISDS cases and ultimately ordering state governments to overturn awards and decisions of domestic courts.

(E) Compensation

(i) Amount of compensation

The fifth consideration concerns how compensation for an established interference with an investment should be determined. The amount of compensation paid to investors who are successful in ISDS claims has been criticised by academics and economists. In 2016, leading economic and legal experts wrote a letter to US Congress urging them to reject the TPP and any other agreements which include ISDS, warning that:

> ISDS grants foreign corporations and investors a special legal privilege: the right to initiate dispute settlement proceedings against a government for actions that allegedly violate loosely defined investor rights to seek damages from taxpayers for the corporation's lost profits. Essentially, corporations and investors use ISDS to challenge government policies, actions, or decisions that they allege reduce the value of their investments.[209]

The case of Tethyan Copper v Pakistan has been heavily criticised for its compensation award:

> Large awards pose serious challenges for developing countries. For example, the USD 4 billion award (excluding interest) in the Tethyan Copper v. Pakistan in July 2019 was almost as large as the International Monetary Fund's (IMF) bailout that had been agreed two months earlier with the intention of saving the Pakistani economy from collapse.[210]

The compensation awarded in Tethyan Copper was calculated using the 'discounted cash flow method', which led to the compensation amount (US$5.8 billion) vastly exceeding the amount of the actual sunk costs of the investor (US$300 million). In other cases, such as Bear Creek v Peru, the tribunal used the 'cost-based method', which accounts for the actual expenditures of the investor. The discounted cash flow method has been criticised as being speculative, and resulting in excessive

[208] Rimmer 'The Empire Strikes Back' (n 104), 102 (citations omitted).
[209] Laurence H. Tribe et al, '220+ Law and Economics Professors Urge Congress to Reject the TPP and Other Prospective Deals that Include Investor-State Dispute Settlement (ISDS)' 7 September 2016, <https://www.citizen.org/wp-content/uploads/isds-law-economics-professors-letter-sept-2016.pdf>.
[210] Jonathan Bonnitcha and Sarah Brewin 'Compensation under Investment Treaties', International Institute for Sustainable Development (November 2020) 1 <https://www.iisd.org/sites/default/files/publications/compensation-treaties-best-practicies-en.pdf>.

awards due to its reliance on "often exaggerated projections of expected future income across an investment's lifespan as the basis for determining compensation".[211]

UNCITRAL's draft provisions for reform of ISDS claims state that tribunals should only award compensation for amounts established "on the basis of satisfactory evidence and that are not inherently speculative". However, they state that tribunals:

> may award monetary damages on the basis of expected future cash flows only insofar as they are based on a case-by-case, fact-based inquiry that takes into consideration, among other factors, whether the investment has been in operation in the territory of the respondent Contracting Party for a sufficient period of time to establish a performance record of profitability.[212]

(ii) Compensation for fossil fuel projects

There is debate about how much, if at all, fossil fuel companies should be compensated for stranded assets occurring as a result of climate change regulatory measures. Given the scale and pace of the transition required, some commentators have called for fossil fuel businesses only to be partially compensated or to receive no compensation. Requiring compensation (especially when awards of compensation are speculative and inconsistent, and therefore difficult to calculate prior to an award) to be paid to fossil fuel businesses for actions taken to advance the energy transition provides leverage to the fossil fuel industry and "strengthen[s] its position in negotiations with governments over possible compensation". This makes it harder for states to regulate in this industry in line with the public interest.[213]

(F) Environmental problems

In understanding the fuss, consideration also needs to be given to the context and cause of the ISD. ISD involving climate change and environmental issues have at their core environmental problems. As Fisher has explained, environmental problems are complex, polycentric, interdisciplinary, value-infused, uncertain and changing.[214] Environmental problems also involve the public interest. Disputes involving the public interest are not simply inter-party disputes – they involve many other stakeholders, including the public.[215] Understanding this type of ISD, therefore, involves identifying all of the stakeholders, including the public, and their interests and concerns. These provide the context for and frame the ISD involving climate change and environmental issues.

VI The Forum: Dispute resolution processes

The preceding part discussed the "fuss" – the characteristics of ISD. This part discusses the "forum" – the different types of disputes resolution processes available to resolve ISD.

The investor perception of the most appropriate forum for resolving ISD is clear: contract-based arbitration is most highly ranked by investors. The 2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS ('**2020 Investor Survey**') found:

> respondents expressed positive views of ISDS (as it is currently stands) as compared to other options such as government negotiation, direct negotiation between investors and states, mediation and litigation in the host state's courts. Contract-based arbitration was the most highly rated dispute resolution mechanism with 81% positive views and an average score of 9 out of 10, while treaty-based arbitration received a significant 72% positive views and an average score of 8 out 10.

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[211] 'Paying polluters' (n 22), 11.
[212] UNCITRAL Working Group III ('Possible reform of investor-State dispute settlement (ISDS) (n 165), 11.
[213] Tienhaara and Cotula (n 77), 3.
[214] Elizabeth Fisher, 'Environmental Law as "Hot" Law' (2013) 25 *Journal of Environmental Law* 347, 347-354.
[215] Brian J Preston, 'The role of public interest environmental litigation' (2006) 23 *Environmental and Planning Law Journal* 337.

> Respondents showed less enthusiasm for other mechanisms, with 45% positive views expressed in favour of government intervention (and an average score of 6 out of 10), and 52% and 54% positive views for direct negotiation with the host state and recourse to mediation respectively (with average scores of 6 out of 10 for mediation and 7 out of 10 for direct negotiation between investors and states). Litigation in the host state's courts received 61% negative views, with 71% of respondents ranking treaty-arbitration higher than they ranked litigation. This could reflect a general distrust of domestic courts by investors when it comes to resolving investment disputes/securing a remedy under an investment treaty.[216]

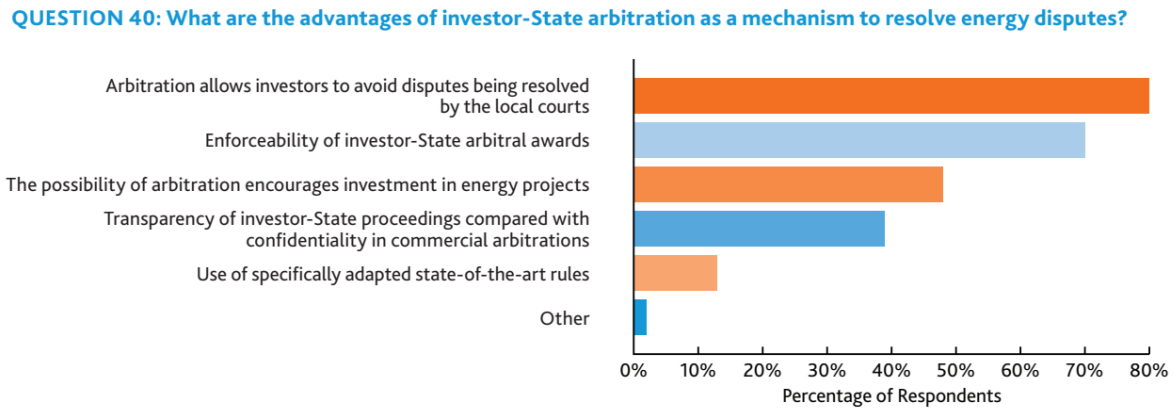
Given this is an *investor* survey and as the outcomes of ISD resolutions seem to (disproportionally) favour investors in fossil fuel cases, the preference for the status quo is unsurprising. There needs to be a deeper analysis of which forum is most appropriate for ISD, or for specific issues of law or fact in ISD.

(A) Arbitration

As noted above, the 2020 Investor Survey found that contract-based arbitration was the most preferred mechanism for resolving ISD. A 2022 study, conducted by Queen Mary University ('**2022 Survey**'), also found that arbitration was the preferred choice for resolving energy infrastructure disputes:

> When asked to rank their preferred dispute resolution method by sub-sector, arbitration scored highest in every instance. 40% of respondents saw arbitration as being their preferred choice for resolving energy infrastructure disputes. Arbitration is perceived as being least suitable to climate change disputes compared to the other sub-sectors, although even in this case arbitration was seen by the largest proportion of respondents (26%) as the most suitable forum for resolving disputes and was ahead of litigation (16%). Respondents noted the reason why arbitration scored comparatively low in this area as being due to the public interest element of holding corporates to account for so called 'greenwashing' which made climate change disputes more suitable for resolution by high level negotiation and court proceedings in the public domain.[217]

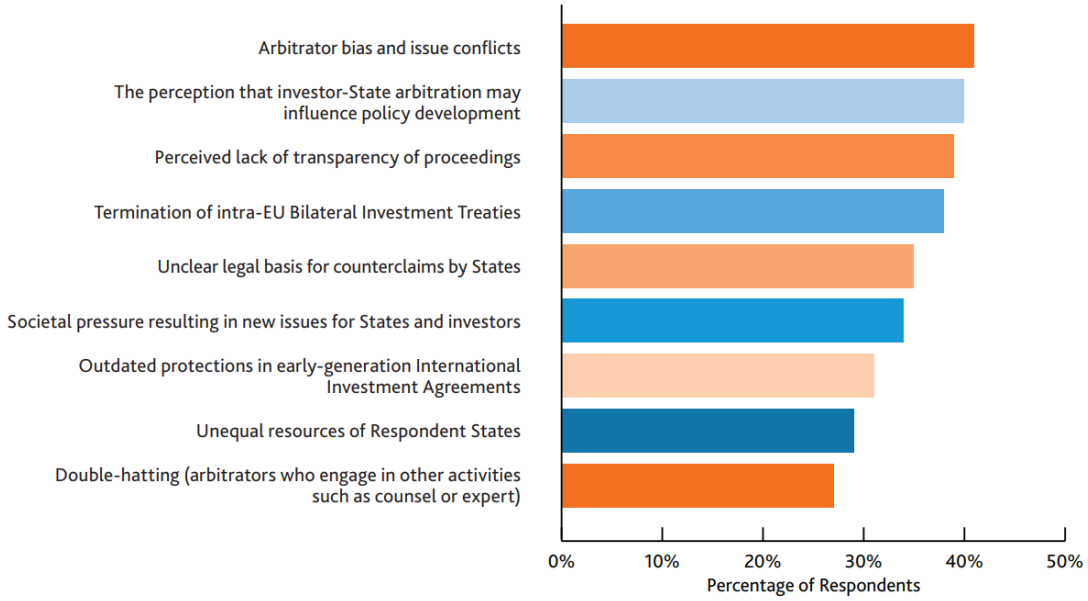
This survey also asked respondents what the advantages are of investor-state arbitration in resolving energy disputes: [218]



[216] '2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS', May 2020, CCIAG and Queen Mary University of London, 7 ('2020 Investor Survey').
[217] 'Future of International Energy Arbitration Survey Report 2022' (n 86), 6.
[218] Ibid, 39.

Nevertheless, the 2022 Survey noted that investor-state arbitration faces challenges in resolving climate change-related disputes:[219]

QUESTION 41: What challenges does investor-State arbitration face as a process for resolving climate change related disputes?



Salter has argued that arbitral tribunals will improve in how they deal with environmental disputes,[220] while Vadi has claimed that, despite their flaws of limited mandate and historical unevenness in dealing with environmental concerns, such tribunals can still contribute to global climate governance.[221]

This investor optimism regarding arbitration of ISDS claims involving climate change and environmental issues is not universally shared. Many outside investor circles and those involved with ISDS arbitration have criticised arbitration as an unsatisfactory process for resolving ISDS claims involving climate change and environmental issues. The criticisms of arbitration include:

(a) lack of openness and transparency of the process;[222]
(b) lack of consistency in decision-making and awards of compensation, as arbitration is a precedent-free process;[223]
(c) lack of independence of arbitrators, the process being marred by the "revolving door" and "double-hatting" phenomena;[224]
(d) the adversarial nature of the commercial arbitration model used for ISDS claims leads to "arbitral tunnel vision" and "polarisation";[225] and
(e) lack of neutrality of arbitral tribunals, as by seeking to be apolitical, they politicise the dispute by favouring certain social, economic and political ideologies and positions.[226]

[219] Ibid, 41.
[220] Rimmer 'The Empire Strikes Back' (n 104), 104, citing Salter, T. 'Investor-state arbitration and domestic environmental protection' (2015) 14 *Washington University Global Studies Law Review*, 131, 131-135.
[221] Ibid, 104, citing Vadi, V. 'Beyond known worlds: Climate change governance by arbitral tribunals' (2015) 48 *Vanderbilt Journal of Transnational Law*, 1285.
[222] 'Paying polluters' (n 22), 9 (citations omitted).
[223] Malakotipour (n 114).
[224] 'Paying polluters' (n 22), 11.
[225] Landau 'Search for Depoliticisation, Key Points' n 102, at [3](ii)(b) and (c).
[226] Ibid, [21]-[23].

(B) Adjudication by courts

A majority (61%) of respondents to the 2020 Investor Survey had negative views of resolving ISD in a host state's courts, with 18% neutral and 21% having positive views of this process. As previously observed, this is not surprising given investors' proven success in arbitral tribunals for fossil fuel cases but likely lack of success in host states' courts. However, weight should not be accorded to the subjective preferences of only one party to ISD in selecting the most appropriate forum for resolving ISD. The preferences of the host state need also to be considered. Consideration also needs to be given to objective criteria concerning the nature and characteristics of the different dispute resolution processes, what Fuller referred to as the "limits" of the dispute resolution process, in determining which dispute resolution process might be best suited to resolving ISD.[227]

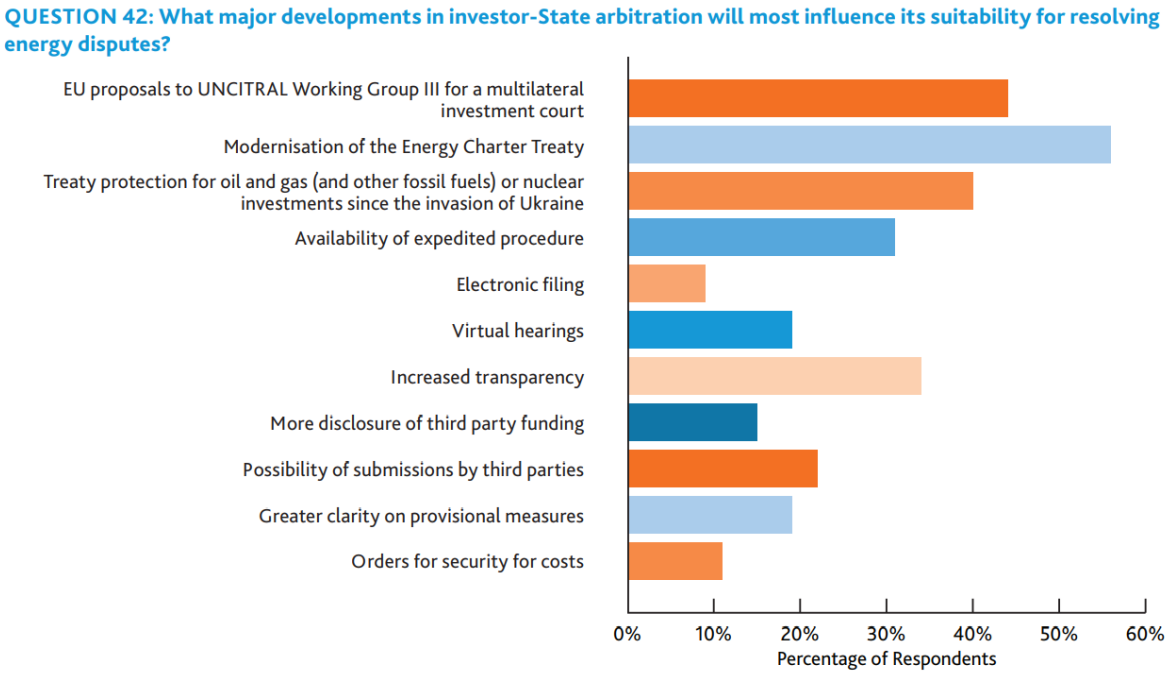
In any event, host state courts are not the only adjudicative forum in which ISD can be resolved.[228] In 2015, the EU published its 'Proposal for Investment Protection and Resolution of Investment Disputes', which proposed the creation of an investor-state court system ('**ICS**') modelled on the WTO for investment disputes. [229] However, progress on the court has been limited.

A slight majority of investors, in the 2020 Investor Survey, do not favour the creation of a multilateral investment court ('**MIC**') (31% strongly oppose, 25% somewhat oppose, 6% no opinion, 30% somewhat favour and 8% strongly favour), with concerns raised by respondents as to whether such a court would raise their risk in countries in which they are investing.[230] Investors also said that a MIC would "negatively affect the credibility of the ISDS system and investors' confidence in it".[231]

Other potential downsides to having adjudicative forums set up for ISDS include the costs required to keep professional judges on retainers. Some states, such as Australia, may be sensitive to this given the minimal number of cases brought against them. Another issue may be the minimal number of qualified specialists who would be able to act as judges in an ICS.[232]

[227] Lon Fuller, 'The Forms and Limits of Adjudication', (1978) 92(2) *Harvard Law Review* 353.
[228] 2020 Investor Survey (n 216), 7. Note that the "data collected for this survey is based on answers received from corporate counsel and management representatives of organisations investing internationally. Ultimately, it is investors that are the beneficiaries and users of the investment dispute regime and, for this reason, this study explores the views and perceptions of those organisations, not the views of the external counsel representing them. Our respondent group comprised a majority (79%) of corporate counsel (with functions varying from that of legal counsel, Head of Legal / Disputes to General Counsel), a sizeable number (13%) of management representatives and a smaller proportion of business or commercial managers and other functions (7%)." … "A large portfolio of industry sectors are represented, including energy and electricity (39%), manufacturing (24%), and construction sectors (20%)."
[229] Chaisse and Renouf (n 179), 289.
[230] 2020 Investor Survey (n 216), 22.
[231] Ibid, 23.
[232] Chaisse and Renouf (n 179), 305.

In the 2022 Survey, almost 50% of respondents stated that the EU proposals for a MIC would most influence the suitability of investor-state arbitration to resolve energy disputes: [233]



The report on this study stated that the outcome of the MIC as the second most popular choice indicates:

> that amongst survey respondents at least, there is appetite to explore the possibility of such a court as an alternative to the status quo. One interviewee whose involvement in ISDS is primarily investor-sided indicated that the views on the suitability of investor-State arbitration as a dispute resolution mechanism would likely differ depending on the party's approach: while States might identify significant transformations such as ECT modernisation, multilateral investment courts and increased transparency as factors influencing suitability, investors were likely to be more interested in pragmatic factors such as increased use of electronic filing and virtual hearings. In fact, the broader consensus is rather wait-and-see. A previous (2020) QMUL survey on users' views on ISDS reforms concluded that, where possible, investors would opt for contract-based arbitration, although concerns were expressed as to the ability to improve efficiency in arbitrations involving States.[234]

The question of whether adjudication by courts is an appropriate dispute resolution process for ISD is not restricted to considering adjudication of the whole dispute; it also is relevant to considering whether particular issues in dispute should be resolved by adjudication. The benefits of a court may be the ability to address the issues of transparency and independence (discussed in Part VII The Forms: Ways to run the processes below). Courts may be appropriate to resolve preliminary legal issues of standing and jurisdiction, as well as substantive legal issues of liability, using judges who are experts in international investment law and international trade law. Using such courts ensures independence, prevents "pro-investor bias", as exists in arbitration of ISDS awards, and develops jurisprudence by reason of the published, authoritative decisions of the court. This may lead to less treaty/forum/nation shopping by companies and therefore less frivolous ISDS claims, with the ISDS claims that do proceed being more likely to be brought by companies which are legitimate investors in the host country.

[233] 'Future of International Energy Arbitration Survey Report 2022' (n 86),42.
[234] Ibid, 42 (citations omitted).

(C) Conciliation

Arbitration and adjudication by courts are two adjudicative processes for resolving ISD. There are also consensual processes for resolving ISD, conciliation and mediation.

According to the United Nations Handbook on Peaceful Settlement of International Disputes describes, conciliation is:

> a peaceful settlement procedure which would, on the one hand, provide [the parties] with a better understanding of each other's case by undertaking objective investigation and evaluation of all aspects of the dispute and, on the other hand, provide them with an informal third-party machinery for the negotiation and non-judicial appraisal of each other's legal and other claims, including the opportunity for defining the terms for a solution susceptible of being accepted by them.[235]

Consensual forums are included in some ISDS treaty provisions, to encourage the parties to first attempt to resolve their dispute through consultation and negotiation. For example, Article 23 of the SAFTA states that:

> 1. In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation.
>
> 2. The claimant shall deliver to the respondent a written request for consultations setting out a brief description of facts regarding the measure or measures at issue.
>
> 3. For greater certainty, the initiation of consultations and negotiations shall not be construed as recognition of the jurisdiction of the tribunal.

This provision, however, may not be a binding requirement (parties "*should*" seek). The UNCITRAL draft provisions on procedural and cross-cutting issues on the possible reform of ISDS would strengthen this encouragement by stating that: "A dispute between a Contracting Party and an investor of the other Contracting Party (the "disputing parties") *shall be* settled as far as possible amicably through consultation or negotiation"[236] (emphasis added).

A search of UNCTAD's database of international investment agreements in March 2024 showed that, of 2,592 international investment agreements, 631 agreements contained a provision allowing for voluntary conciliation or mediation.[237] As of April 2021, 13 cases had been reported under the ICSID conciliation rules since 1982.[238] UNCTAD's database does not record any agreements which contain a provision mandating compulsory conciliation or mediation,[239] although Ubilava notes that two treaties (the Hong Kong – United Arab Emirates bilateral investment treaty and the Indonesia – Australia Comprehensive Economic Partnership Agreement) provide for mandatory conciliation as a pre-condition to arbitration but only for the claimant investor, not the respondent state.[240]

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[235] ICCA – Draft Annex on Conciliation and Commentaries' 13 November 2023. 3. Citing United Nations Office of Legal Affairs, Codification Division, Handbook on Peaceful Settlement of International Disputes, UN Doc. OLA/COD/2394 (1992), para. 140.

[236] Provision A(1).

[237]UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, 'IIA Mapping' <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping> (accessed 14 March 2024).

[238] Catherine Kessedjian et al, 'Mediation in Future Investor-State Dispute Settlement' (2023) 14 *Journal of International Dispute Settlement* 192, 199-200.

[239] 'IIA Mapping' (n 237).

[240] Ana Ubilava, 'Mandatory Investor-State Conciliation in New International Investment Treaties: Innovation and Interpretation' *Kluwer Mediation Blog*, 5 September 2020.

Conciliation is beneficial in that it allows parties to "build trust, increase communication, strengthen their relationship and de-escalate differences … [and] can also reflect different cultural, economic, developmental and other preferences."[241] Particularly important for climate change and environment related ISD, conciliation can facilitate having subject-matter experts determine issues of fact between parties. The International Council for Commercial Arbitration's ('**ICCA**') draft annex on conciliation for the Paris Agreement in Article 6 (Appointment of Commission Members) states that, when making an appointment to the Commission, regard should be had to the candidates "relevant subject-matter expertise, relevant professional experience, and considerations of diversity, equity, and inclusion." The commentary on this paragraph states that this:

> is aimed at ensuring that some or all of the Commission members have relevant subject-matter expertise and experience, which may be especially beneficial in cases requiring the assessment of complex climate-related evidence, while taking account of diversity and fair representation. Similar provisions are found in the PCA Optional Rules for Conciliation of Disputes Relating to Natural Resources and / or the Environment. Disputing Parties may agree on other characteristics that the Commission members, and the Secretary-General of the PCA or the person designated by the Secretary-General of the PCA, should consider in making any appointment. In addition, States could consider provisions requiring the Secretariat to establish and maintain lists of individuals with relevant climate change and environmental expertise, including from: relevant bodies in the global climate regime, such as the UNFCCC; rosters of experts maintained by such bodies; or academic, legal, scientific or other institutions. This might be similar to the "specialized list of arbitrators" and "list of scientific and technical experts" maintained by the PCA for use in environmental disputes. Other provisions might allow for States Parties to appoint experts to such a list, or require the list to be made publicly available."

Therefore, conciliation may be an appropriate forum for ISD related to technical issues of climate change or environmental problems, where the conciliators have subject-matter expertise in those issues.

(D) Mediation

Another consensual process for resolving ISD is mediation. Mediation is similar to conciliation except that the mediator may not have, and does not use, subject-matter expertise as occurs in conciliation.

The benefits of mediation include that it preserves neutrality and confidentiality; parties have full control over the outcome of the dispute; it is pacific and non-adversarial; it protects relationship between the parties; and it has various practical advantages including time and cost savings.[242]

Mediation is not disliked by investors. The 2020 Investor Survey found that the respondents "would welcome a mandatory requirement to go through mediation before arbitration proceedings can be commenced."[243] The report states that mediation "is increasingly thought about as a helpful mechanism to resolve, mitigate or prevent disputes."[244] This report also discussed when mediation could best be used in disputes:

> The interviews allowed us to explore how investors might perceive the mediation of investment disputes. An interviewee expressed the view that mediation was not appropriate for all investment disputes and should therefore be available on a voluntary basis to the parties. This point was echoed

<https://mediationblog.kluwerarbitration.com/2020/09/05/mandatory-investor-state-conciliation-in-new-international-investment-treaties-innovation-and-interpretation/>.

[241] ICCA (n 235), 4.

[242] Gregory Vijayendran SC, 'Environmental Disputes – a Case for Mediation?' presentation at Borneo conference, February 27 2024.

[243] 2020 Investor Survey (n 216), 5.

[244] Ibid 5.

by interviewees generally who said that mediation should not be forced upon the parties. Other comments made by interviewees were that:

> • mediation is better suited than formal dispute resolution mechanisms to achieve the parties' commercial or business objectives as it has less of a negative impact on the parties' relationship;
> • the commencement of formal proceedings and the institution of an arbitral tribunal can be used as leverage by the investor to get settlement discussions started with the state; and
> • a mandatory mediation phase could undermine the position of investors and not encourage fruitful discussions.
> • Finally, it was stated that mandatory mediation would constitute an unnecessary step for the parties towards the resolution of their dispute which would potentially lead to an increase in time and cost. In this respect respondents were asked what impact mandatory mediation would have on the cost and duration of ISDS proceedings on a scale from "0" (substantially reduce cost and duration) to "10" (substantially increase cost and duration). Respondents believed that the introduction of mandatory mediation would lead to an increase [in] costs, with the majority of responses ranging between 6-10 (49%). This finding was confirmed by interviewees, who expressed their concerns over the introduction of mandatory mediation with respect to the potential increase of time and costs.[245]

Mandatory mediation prior to arbitration may assist in reducing ISDS claims taken to arbitration and could be used, if not to resolve the dispute entirely, to resolve some issues in dispute.

In recent years, mediation rules have also been developed which can facilitate investor-state mediation. For example, ICSID announced draft ICSID Mediation Rules in August 2018 and in 2019, the United Nations Convention on International Settlement Agreements Resulting from Mediation (commonly known as the Singapore Convention) opened for signature and came into effect from 12 September 2020.[246]

Mediation may be useful to resolve factual disputes where subject-matter expertise is not required (conciliation being better suited where subject-matter expertise is required). An example might be the quantum of compensation payable once liability has been agreed or established.

(E) Hybrid mechanisms

The appropriate dispute resolution process may be a hybrid mechanism, such as med-arb or con-arb, or arb-med-arb or lit-med-lit. This enables the parties to move between different forums as appropriate, perhaps to deal with different issues, or at different stages in the dispute resolution.

A hybrid mechanism may be specified in the trade agreement. For example, although in a different context, the Singapore International Arbitration Centre ('**SIAC**') and the Singapore International Mediation Centre ('**SIMC**') have agreed on an Arb-Med-Arb Protocol ('**AMA Protocol**').[247] Under the AMA Protocol, a party commences the arbitration with the SIAC,[248] the Registrar of SIAC informs the SIMC of the arbitration commenced,[249] the Tribunal constituted by SIAC stays the arbitration and informs the Registrar of SIAC that the case can be remitted for mediation to SIMC,[250] and the Registrar of SIAC sends the case file to SIMC for mediation at SIMC.[251] The mediation is then

[245] ibid, 25.
[246] Ubilava (n 240).
[247] SIAC-SIMC Arb-Med-Arb Protocol in Singapore International Mediation Centre Mediation Rules 2024, available at <https://siac.org.sg/the-singapore-arb-med-arb-clause>.
[248] Ibid [2].
[249] Ibid [3].
[250] Ibid [5].
[251] Ibid [5].

conducted at SIMC.[252] If the dispute is not settled by mediation, the arbitration proceeding resumes.[253] If the dispute is settled by mediation, SIMC informs the Registrar of SIAC that settlement has been reached. If the parties so request the Tribunal may render a consent award on the terms agreed by the parties.[254]

A similar protocol has been agreed between the Singapore International Commercial Court ('**SICC**') and the SIMC, this time providing for litigation-mediation-litigation ('**LML Protocol**').[255] A party commences proceedings in the SICC and states that the parties have agreed to refer the dispute for mediation in accordance with the LML Protocol.[256] SICC, after dealing with any objections to referral of the dispute to mediation, can give directions in relation to the mediation of the dispute,[257] and stay the SICC proceedings for the period of mediation.[258] The SIMC then administers the mediation in accordance with SIMC's mediation rules.[259] If the parties conclude a mediated settlement agreement, the parties inform the SICC Registry and, if required, the SICC may record the terms of the mediation settlement agreement as an order of court.[260] If the parties do not conclude a mediated settlement agreement, the parties seek directions of the Court on the conduct of the proceedings and for the adjudication of the dispute by the Court.[261]

(F) Fact-finding processes

Contested issues of fact may be able to be resolved through fact-finding processes. These can include appointment of one or more persons to investigate and provide a report on identified issues of fact. A legal procedure used by domestic courts is to make orders for reference to a referee appointed by the court for inquiry and report by the referee on the whole of the proceedings or on any question arising in the proceedings.[262] The referee is authorised to inquire into and report on any facts relevant to the inquiry and report on the matter referred.[263] This is one mechanism that could be used for fact finding in ISD. Another more formal mechanism could be to establish a commission of inquiry that would inquire into and report on any matter referred to the commission.[264]

(G) Facilitative processes

There are also facilitative processes that may assist in resolving ISDS claims. Facilitative processes are similar to consensual processes like conciliation and mediation, in using an independent dispute resolution practitioner to facilitate the resolution of the dispute, but differ in not directly facilitating negotiation between the parties, but rather in case managing the dispute. This might include assisting the parties to identify the real issues in dispute, thereby shifting their attention from the positions they take (the outcome sought) to their interests in seeking that outcome.

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[252] Ibid [6].
[253] Ibid [8].
[254] Ibid [9].
[255] SICC-SIMC Lit-Med-Lit Protocol in SIMC Mediation Rules 2024 at <https://www.sicc.gov.sg/litigation-mediation-litigation-framework> ('LML Protocol').
[256] Ibid [2(b)] and [2(c)].
[257] Ibid [2(d)] and [2(e)].
[258] Ibid [4(b)] and [4(c)].
[259] Ibid [4(d)].
[260] Ibid [6(d)].
[261] Ibid [6(e)].
[262] See, for example, Uniform Civil Procedure Rules 2005 (NSW) ('**UCPR**'), r 20.14(1).
[263] UCPR r 20.17(1)(a).
[264] Toby Landau KC, 'International Investment Arbitration and the Search for Depoliticisation', lecture presented at the CIARB Alexander Lecture 2023, 8 November 2023 ('**Search for Depoliticisation Lecture**').

VII The Forms: Ways to run the processes

Parts V and VI have discussed the "fuss" and the "forum". The aim of appropriate dispute resolution is to match the forum to the fuss. But there is another consideration for achieving appropriate dispute resolution – the "form" of the forum. The form refers to the ways in which the selected forum – the dispute resolution process – is organised and conducted. Appropriate dispute resolution entails arranging the form of the forum to fit the fuss. The purpose of this part is not to prescribe the forms that should be used for ISD, but rather to set out relevant issues in relation to the form that should be considered. Many of the criticisms of the ISDS *process* are criticisms of the forms in which the process has been organised or conducted. For example, the ISDS process has been criticised for:

> use of ad hoc tribunals; a lack of transparency; lengthy proceedings; high legal and arbitration costs; inconsistent decisions caused by the lack of precedents and appeals; third-party funding for cases as speculative investments; and excessively high awards based on dubious and inconsistent calculations of expected future profits. Furthermore, arbitrators are not independent judges, but instead remain practising advocates with potential or actual conflicts of interest."[265]

(A) Decision-makers

For adjudicative processes, one of the forms issues that needs to be considered concerns the decision-makers adjudicating the ISDS claim. There are four questions: who should be the decision-maker? How should the decision-maker be appointed? Should the decision-maker have subject-matter expertise? Should the decision-maker have an inquisitorial role?

(i) Identity of decision-maker

The European Union's proposal for an investor-state court system ('**ICS**'), discussed above, would require judges to possess the qualifications for appointment to judicial office in their home state or, at the very least, be jurists of recognised competence. The EU has stated it would be "desirable that they have particular expertise in areas such as international investment law, international trade law and the resolution of disputes arising under these areas."[266] In the case where judicial officers are appointed decision makers, it is of course important that the threshold for their competence and jurisdiction is high.

Boyd has stated that the "arbitrators are predominantly white, male, business-friendly investment law attorneys from the global North".[267] Approximately 95% of arbitrators are men.[268] The 2021 International Arbitration survey found:

> Ethnic, geographic and cultural diversity were often considered to be interconnected. Some interviewees, both counsel and arbitrators, stressed that the impact of ethnic, geographic and cultural diversity on perceptions of impartiality and independence of arbitrators can depend, in part, on the nature of a given dispute. This is particularly the case in investor-state arbitration, where they felt diversity or the lack thereof could be viewed as having an impact on both party and public perceptions of the legitimacy of the process. Another example from interviewees is where an arbitral panel is composed entirely of arbitrators who have no relationship with or understanding of a specific country or culture central to a dispute. This could lead parties to feel that the arbitrators might fail fully to appreciate cultural differences and (perhaps subconsciously) favour parties from areas or cultures with which the arbitrators are more familiar. This concern arose particularly in relation to

[265] 'AFTINET updated briefing paper on ISDS', 5.
[266] Chaisse and Renouf (n 179), 291.
[267] 'Paying polluters' (n 22), 10-11.
[268] French (n 12).

> arbitrators from North America and Western Europe when dealing with disputes involving legal or cultural mores from other parts of the world.[269]

Such arbitrators often themselves act for foreign investors in other cases.[270] The ISDS system has faced criticism for this perceived conflict of interest and pro-investor bias.[271] The ISDS system has been described as having "revolving doors" in which individuals serve in various roles (arbitrator, lawyer, even expert) in sequential cases.[272] The ISDS system has also been criticised for allowing double-hatting, by which an individual is allowed to act as a lawyer and an arbitrator in two or more cases concurrently which raises "serious concerns about the ability to adjudicate fairly".[273]

The 2020 Investor Survey found that 61% of respondents believed arbitrators of ISDS disputes should be allowed to act as lawyers in other ISDS proceedings, and 57% agreed that arbitrators should be allowed to act as expert witnesses in other ISDS cases.[274] Given the arguments that there is pro-investor bias in ISDS (supported by the high success rates of investors in such cases), it is unsurprising that investors support the status quo and do not wish to ban arbitrators from acting as lawyers when the investors themselves may benefit from this arrangement. Investors did raise arguments that if restrictions on arbitrators were put in place, a majority of respondents thought impacts would include availability and diversity of arbitrators to choose from.[275]

Double-hatting and the revolving door phenomena arguably interfere with the independence of arbitrators determining ISD. This is contrary to the IBA Guidelines on Conflicts of Interest in International Arbitration, which requires that "[e]very arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated."[276]

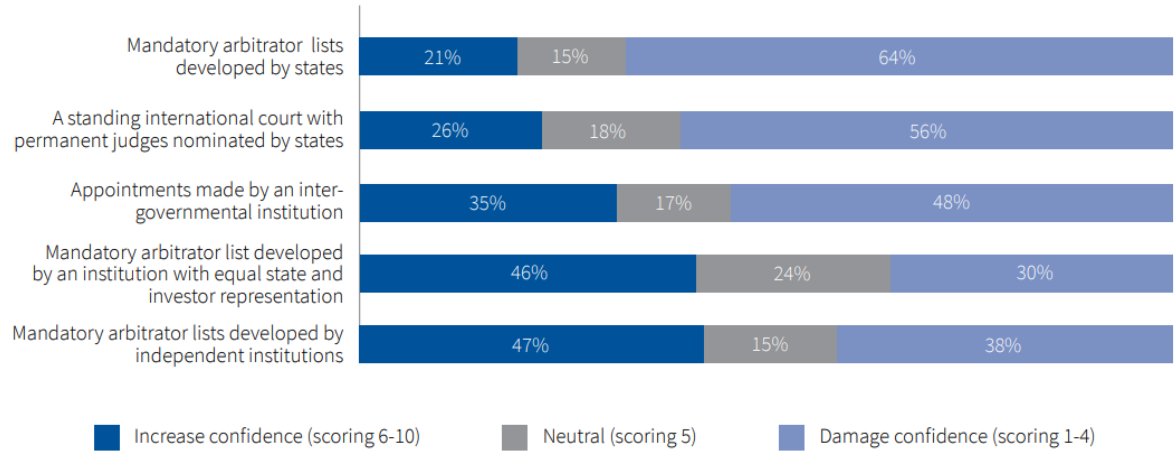
(ii) Appointment of decision-makers

One way in which the issue of independence of arbitrators may be improved is for independent institutions to develop mandatory arbitrator lists. As shown in the Chart 11 below,[277] 47% of respondents to the 2020 Investor Survey (noting this is limited to *investor* perceptions) believed this would increase confidence and help "ensure the impartiality and independence of ISDS

[269] '2021 International Arbitration Survey: Adapting arbitration to a changing world', White & Case and Queen Mary University of London, <https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf>
[270] Statement by Dr. David Boyd (n 157).
[271] 'Paying polluters' (n 22), 10-11.
[272] Ibid, 11.
[273] Ibid, 11.
[274] 2020 Investor Survey (n 216), 15.
[275] Ibid, 15.
[276] ICC (n 149), 22 citing IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 1.
[277] 2020 Investor Survey (n 216), 16.

arbitrators."[278]

Chart 11: Do you think the following mechanisms for the selection and appointment of ISDS arbitrators, if introduced, would increase your confidence in the impartiality and independence of the system?



(iii) Subject-matter expertise of decision-maker

As discussed in the Conciliation section above, a form question is whether the decision-maker should have relevant expertise in the subject matter of the dispute. Subject-matter expertise may assist in resolving disputes which turn on scientific or economic arguments rather than purely on questions of law. Under the ICC Arbitration rules, "users of ICC arbitration should be more open to appointing tribunal members with appropriate climate change related legal, scientific or technical expertise, in appropriate disputes, especially in three-member tribunals comprising at least one legally-trained arbitrator." [279] This approach could be applied to ISD related to climate change and environment matters to ensure that the arbitrators (or at least one or more of the arbitrators) have relevant subject-matter expertise.

(iv) Inquisitorial role of decision-makers

Barrister and arbitrator Toby Landau KC has argued that one of the issues in using the existing commercial arbitration model for ISD is that the tribunal suffers from "tunnel vision" in that, in their neutral position, they rely on being educated by the parties. The tribunal therefore only receives the "full picture" of the issues if the counsels provide this, which, according to Landau, they do not. Landau argues for decision-makers to play a far greater inquisitorial role in ISD resolution, possibly through a commission of inquiry. Under this suggested form, the tribunal would play an active role in determining issues such as who gives evidence and how the evidence is heard. This would enfranchise individuals who would otherwise condemn the ISD resolution process and, by association, the outcome.

Landau argues that this mode can occur within existing ISD frameworks, as the rules used for ISD do allow tribunals to take initiative, such as by asking questions, making enquiries and calling their own witnesses. A less realistic way this can be achieved, according to Landau, is by creating "true" commissions of inquiry.[280]

[278] Ibid, 5.
[279] ICC (n 149), 19.
[280] Landau, Search for Depoliticisation Lecture, n 264.

(B) Conduct of proceedings

A number of forms questions arise regarding the conduct of the proceedings: should the proceedings be open and transparent? Should third party participation be allowed and if so, who and how? Where should the hearing be located?

(i) Transparency of proceedings

The Rio Declaration on Environment and Development (1992) ('**Rio Declaration**'), in Principle 10, states:

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

This principle should be kept in mind when determining the form of ISD which relates to environmental or climate change matters.

There has been growing debate about increasing the transparency of ISD proceedings. The UNCITRAL Rules of Transparency in Treaty-based Investor-State Arbitration, which came into force on 1 April 2014, set out procedural rules for transparency and accessibility to the public of investor-state arbitration. The rules state that parties' main submissions, a list of exhibits, expert reports and witness statements, and the arbitral tribunal's orders, decisions and awards are all to be made available to the public, subject to exemptions for confidentiality and protected information.[281]

In Boyd's criticism of ISDS arbitration to the United Nations General Assembly, he stated that:

> Access to information is a human right and is integral to the full enjoyment of other human rights, including the right to a healthy environment. Unlike domestic legal procedures, ISDS cases are cloaked in secrecy. Claims never need to be made public, hearings are often conducted behind closed doors, documents are often confidential and both awards and negotiated settlements can be kept secret. Unlike arbitration between two private parties where confidentiality might be justified, the participation of States means that ISDS arbitration often involves important public policy issues and can have huge economic implications.
>
> The number of known ISDS claims has risen in recent years, but the lack of transparency makes it impossible to assess precisely how many cases exist, or the content of those cases. Even more difficult to quantify is the number of ISDS claims that have been threatened by foreign investors but not filed and that have successfully pressured States to weaken existing or withdraw proposed climate and environmental laws, regulations, taxes or other policies.
>
> Lack of transparency is a particular problem in ISDS cases related to fossil fuels, which are often completely confidential, meaning that party submissions, procedural orders and awards are not made public. For example, databases indicate that Clara Petroleum Ltd. filed an ISDS claim against Romania in 2022. None of the documents associated with the case are available, so the basis of the complaint and the quantum of damages sought are unknown. Almost one third of known fossil fuel arbitrations are settled before reaching final decisions and all settlement documents are confidential."[282]

[281] ICC (n 149) 41.

[282] 'Paying polluters' (n 22), 9 (citations omitted).

The case of *The Federal Republic of Nigeria v Process and Industrial Developments Limited*[283] involved the challenging of an award granted in a contractual arbitration between Nigeria and Process & Industrial Developments Limited (‘**P&ID’**). The High Court overturned the award for three reasons: first, P&ID provided and relied on evidence it knew to be false; second, P&ID bribed a Nigerian official to obtain the initial contract and to prevent this information from arising at the hearing; and third, P&ID had accessed Nigeria’s legal documents covered by legal professional privilege during the arbitral process, which discussed Nigeria’s legal strategy.[284] Although the case was not an ISD, Robin Knowles J’s observations about the issues which arise due to the private nature of arbitration, especially in relation to disputes involving states, are applicable to the current ISD arbitration mechanisms:

> The privacy of arbitration meant that there was no public or press scrutiny of what was going on and what was not being done. When courts are concerned it is often said that the “open court principle” helps keep judges up to the mark. But it also allows scrutiny of the process as a whole, and what the lawyers and other professionals are doing, and (where a state is involved) what the state is doing to address a dispute on behalf of its people. An open process allows the chance for the public and press to call out what is not right.[285]

Increased transparency of arbitral ISDS proceedings would likely aid in “enhancing the legitimacy of those proceedings with broader stakeholders”.[286] In relation to climate change-related disputes, the International Chamber of Commerce has suggested that increased transparency could be achieved by opening the proceedings to the public (including by publishing submissions, procedural decisions, and hearings), and publishing awards.

The ICCA’s November 2023 Draft Annex on Conciliation and Commentaries[287] proposes an article on ‘Transparency and Confidentiality’:

> Article 21: Transparency and Confidentiality
>
> > a. The existence of the conciliation shall be public. The Secretariat shall, upon the constitution of the Commission, identify on its website the names of the Disputing Parties, the Commission members, the agents or representatives and counsel for the Disputing Parties, and the issue(s) in dispute.

The commentary on this provision states that:

> Climate change is a global issue with wide-ranging impacts that may extend well beyond the Disputing Parties under the UNFCCC and the Paris Agreement. As Article 12 of the Paris Agreement recognizes, increased “public awareness, public participation and public access to information” are important steps toward “enhancing actions” under the Paris Agreement. Making public certain aspects, such as the existence of a conciliation and the Recommendatory Award (or parts of it, where certain information has been designated confidential by a Disputing Party and must be redacted), may assist with creating a shared understanding of the interpretation and application of the UNFCCC and the Paris Agreement.”[288]

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[283] [2023] EWHC 2638.
[284] Robert K Campbell , Christopher Jefferies , Emily J A Evans, ‘Case Update: The Federal Republic of Nigeria v Process & Industrial Developments Limited’ *Faegre Drinker*, 1 November 2023 <https://www.faegredrinker.com/en/insights/publications/2023/11/case-update-the-federal-republic-of-nigeria-v-process-and-industrial-developments-limited>.
[285] *Nigeria v Process and Industrial Developments Limited* [2023] EWHC 2638, [589].
[286] ICC (n 149), 41.
[287] ICCA (n 235).
[288] Ibid, 25.

(ii) Third party participation

As the dispute is between an investor and a state, situations can occur in which directly affected communities are excluded from ISDS proceedings. This occurred in Eco Oro v Colombia and von Pezold v Zimbabwe, as Boyd recorded:

> In *Eco Oro*, a foreign investor filed a claim based on Colombia's refusal to grant permits for a mine expected to cause significant environmental damage and jeopardize water supplies. Communities and civil society organizations opposing the project applied to submit an amicus brief, arguing that the actions taken by Colombia were justified by the State's human rights obligations, including protection of the right to a healthy environment. The tribunal refused to admit the proposed submissions. In *von Pezold*, a case about land reform, the tribunal rejected an application from Indigenous Peoples, concluding that Indigenous rights were outside the scope of the dispute."[289]

Applying Principle 10 of the Rio Declaration may suggest that individuals should be able to participate, at least in some way, in ISDS proceedings. One way this could be achieved is by allowing amicus curiae submissions.[290]

(iii) Location of hearing

As part of the conduct of the proceedings, another question that should be asked when determining the form of the forum for ISD hearings is where the hearing should be held. As discussed in the 2023 CIARB Alexander Lecture by Toby Landau KC, ISD hearings are held in states other than the host state, which removes the dispute from its natural context. By hearing the dispute in the location of the dispute, this allows the decision makers to understand the social, political and economic context of the dispute and to hear from local people impacted by the decision.

Landau cites the case of Copper Mesa v Ecuador as an example of an ISD which was heard in Washington DC, far away from locals in Ecuador who were significantly impacted by the investor's conduct, for example by hiring paramilitary forces. Although some community members travelled to Washington DC to be heard by the tribunal determining the ISD, the tribunal decided not to hear from these witnesses. Ecuador was ultimately ordered by the tribunal to pay $19.4 million (which includes a substantial reduction due to the investor's conduct). Landau argues that having ISD heard at the location of the dispute would increase legitimacy and acceptance of the award. [291]

In Australia, the practice of hearing disputes "on Country" is increasingly used by courts in determining cases related to Aboriginal and Torres Strait Islander peoples. In 2022, the Queensland Land Court found that confining the evidence of Aboriginal and Torres Strait Islander witnesses to their written statements and not allowing them to speak on Country would be an unjustifiable limit to their cultural rights. The Court allowed these witnesses to give evidence on Country in accordance with their cultural protocols.[292] Similarly, in the ongoing climate change dispute in *Pabai Pabai v Commonwealth*, following a decision to do so by the Chief Justice of the Federal Court, the Federal Court of Australia held hearings on country in the Torres Strait Islands to hear evidence from Torres Strait Islander witnesses.[293]

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[289] 'Paying polluters' (n 22), 10 (citations omitted).
[290] ICC (n 149), 46.
[291] Landau, Search for Depoliticisation Lecture, n 264.
[292] *Waratah Coal* (n 23).
[293] Isabelle Reinecke, 'A court among the coconut palms: when justice came to visit the Torres Strait" *The Guardian* (8 October 2023) <https://www.theguardian.com/environment/2023/oct/09/climate-change-class-action-world-first-australia-torres-strait-boigu-island>.

In ISD cases in which there has been a certain level of community impact, it may be appropriate for the forum to be located in the community, either for all or part of the proceedings. This is important in allowing local witnesses to be heard and in order to increase the legitimacy of the decision.

(C) Reasons for decision

Providing reasons for decision enhances the transparency of an arbitration of ISDS proceedings for the parties. But there are good reasons for extending transparency to other stakeholders and the public by publishing the arbitral award and reasons for the decision.

In 2019, the ICC recommended the publication of awards in resolving climate change-related disputes through arbitration and ADR.[294] In 2021, ICSID amended its rules to increase transparency in public participation. These amendments "increase the likelihood that case materials, awards and decisions will be published, and provide guidance to tribunals about permitting amicus curiae submissions." [295] However, publication can still be blocked by parties' refusal to consent, amicus curia submissions can be blocked by the tribunal and "there are no other mechanisms for public participation, even by impacted communities."[296] Given these concerns, Boyd stated that these "modest changes fail to address the fundamental flaws of IIAs."[297]

There may be an argument that awards should be available to the public as it is the government's – and therefore the taxpayers' – money that is used to pay compensation. Freedom of information is crucial in a democracy in ensuring citizens have the requisite information to hold government to account. As noted by Mark McGowan, former Western Australian premier, in relation to the proceedings brought by Zeph Investments against Australia in relation to a Western Australian law, the compensation sought equates to $11,500 per Australian citizen – a not insignificant amount.

Requiring the publication of awards, and reasons for such awards, may also be a positive step in addressing the issue that ISDS system lacks the precedents to ensure consistency of decisions.[298]

Another question in the context of publishing reasons is the language(s) in which the decision should be published. Malcolm Rogge's documentary "The Tribunal", about the Copper Mesa v Ecuador arbitration, highlights how, given the town affected is in Ecuador, many locals were unable to read the decision as the decision was published in English (and was heavily redacted).[299]

(D) Appeal rights

Currently, there is no appeal right for substantive ISDS decisions. Chaisse and Renouf have noted that:

> The current ISDS system has been systematically criticised as it does not include any corrective mechanism in the event that arbitrators 'get their decisions wrong'. The impossibility to appeal awards also results in far less legal certainty, making the system as a whole less predictable for both host state governments and investors.[300]

Although governments can apply to have awards granted from decisions made by the ICSID overturned or annulled, this is rarely successful. A 2021 review of annulment applications brought

[294] ICC (n 149), 42
[295] Annex III, 'Paying polluters' (n 166), 2.
[296] Ibid, 2.
[297] Ibid, 2.
[298] French (n 12).
[299] *The Tribunal* (Malcolm Rogge in partnership with CCSI, 2023).
[300] Chaisse and Renouf (n 179), 292, citing European Commission. (2015a). *Investment in TTIP and beyond—The path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*. Brussels: European Commission DG Trade.

under ICSID showed that investors have been successful in only seven, and unsuccessful in 56, applications and states have been successful in 13, and unsuccessful in 75, applications.[301]

The ability to appeal tribunal decisions was "one of the key issues raised in the EU public consultations on the ICS". The suggestion to allow appeals "received broad support from both EU businesses and NGOs."[302] The EU's ICS proposal consists of two levels of jurisdiction, being the Tribunal of First Instance and the Appeals Tribunal.

The 2020 Investor Survey found there were mixed views of allowing an appeals mechanism in ISDS, and that "nine in ten respondents would be opposed to a re-hearing of the tribunal's factual and legal findings."[303] The findings in relation to appeal mechanisms for investment arbitration more broadly were:

> Respondents were asked whether an appeals mechanism should be introduced in investment arbitration. Respondents expressed mixed views in response. Equal proportions of respondents favoured (35%) and opposed (35%) the inclusion of such a mechanism; 24% indicated they were strongly opposed to it, while 17% were strongly in favour. Similar figures were obtained from the respondents working in multinational organisations and respondents working for small and medium-sized enterprises. Respondents were asked what the preferred scope of review would be if an appeals mechanism was to be introduced. They were provided with the opportunity of selecting more than one option from the list set out in the chart. A majority of respondents favour the inclusion of a mechanism for the review of serious procedural irregularity (77%) and manifest errors of law (66%). A lower proportion of respondents would welcome the review of manifest errors of fact (42%) and on the merits (i.e. the application of the law to the facts in the light of the evidence put on the record 48%).[304]

VIII Conclusion

The resolution of investor-state disputes in environmental cases needs to be appropriate. Achieving appropriate dispute resolution of ISD involves, first, fitting the forum to the fuss and, second, framing the form of the forum to fit the fuss. These tasks involve:

a) *diagnosing the fuss*: identifying the nature, issues, extent and other features of the dispute, and the identity and capabilities of the disputants;
b) *understanding the forums*: identifying the limits of the dispute resolution processes available to resolve the dispute;
c) *fitting the forum to the fuss*: matching the dispute resolution process that is best suited to the dispute and disputants; and
d) *framing the forms*: organising and conducting the selected dispute resolution process in ways that are most conducive to resolving the dispute.

This discussion paper has explored this process of framing the forms of the forum to fit the fuss. The current practice of arbitration of ISD involving climate change and environmental issues is lacking in many respects, undermining public trust and confidence in the ISDS system. There is a pressing need for a reset – to ensure appropriate dispute resolution of ISD involving climate change and environmental issues. The paper has suggested ways in which this reset can be achieved, both by

[301] Johannes Koepp, Yarik Kryvoi and Jack Biggs, 'Empirical Study: Annulmnet in ICSID Arbitration', 2021 <https://www.biicl.org/documents/10899_annulment-in-icsid-arbitration190821.pdf>.
[302] Chaisse and Renouf (n 179), 292, Citing European Commission. (2015a). *Investment in TTIP and beyond—The path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*. Brussels: European Commission DG Trade.
[303] 2020 Investor Survey (n 216), 5.
[304] Ibid, 20.

better matching the forum to the fuss and by better organising and conducting the forms of the forum to resolve the fuss.