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International Investment Governance and Achieving a Just Zero-Carbon Future

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INTERNATIONAL INVESTMENT GOVERNANCE
AND ACHIEVING A JUST ZERO-CARBON FUTURE

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Columbia Center
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Introduction

The Intergovernmental Panel on Climate Change (IPCC) has estimated that the world has less than 30 years to fully decarbonize the global economy and avoid catastrophic and irreversible climate change.[1] Global decarbonization will require tremendous effort and will have implications for each individual country. As part of the Paris Agreement, states have committed to limiting global warming to 1.5°C compared to pre-industrial levels. The International Energy Agency (IEA) has supported the conclusion that the world must achieve net-zero greenhouse gas emissions by 2050, with significant advances by 2030, to have a chance of reaching this goal.[2]

To realize a zero-carbon future, 80% of all remaining fossil fuel assets must remain in the ground,[3] and according to the IEA, no new gas or oil fields should be approved, nor should any new coal mines be developed.[4] A rapid phase-out of fossil fuel energy must occur—little or no fossil fuel energy infrastructure can be built, and much of the existing infrastructure may need to prematurely retire.

The shipping and transportation sectors—from air travel and cargo shipping to public transportation systems in cities around the globe—must also be rapidly decarbonized. Energy efficiency standards for automobiles, buildings, and appliances will need to tighten. Other contributors to industrial emissions, such as the production and refinement of crucial substances and materials such as cement, steel, and fertilizer must also be reduced or replaced.[5]

At the same time that the vast majority of fossil fuel reserves must be left in the ground and existing infrastructure retired, trillions of dollars will need to be invested for the world to scale up access to affordable renewable energy.[6] The zero-carbon energy transition will require an unprecedented mobilization of financial resources towards investment in renewable energy generation, transmission, distribution, and storage; retrofitting of existing infrastructure; the development of new technologies; and carbon capture as needed.

The Paris Agreement acknowledges the need to Investment will be needed to "expand infrastructure and upgrade technology for supplying modern and sustainable energy services for all in developing countries, in particular least developed countries, small island developing States and landlocked developing countries."[7] Fortunately, many developing countries have tremendous renewable energy potential, particularly in wind, solar, geothermal, and hydro power.[8] Many also have the minerals necessary to produce renewable energy technology—minerals which the rest of the world will depend upon.[9]

Many regions depend on fossil fuel extraction for revenue as well, and the majority of fossil fuel assets that must be stranded to achieve climate commitments are located within their borders. For example, nine countries in Africa are represented in the top 40 countries with the highest share of GDP coming from oil and gas revenues—dependence ranges from 12% to 81% of government revenues over a three year period.[10] Lower income oil-producing countries will be hit especially hard as oil prices decrease, since the cost of production will not be globally competitive as demand decreases.[11]

[1] 'Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C approved by governments,' (2018) IPCC, https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments/; 'Net Zero by 2050: A Roadmap for the Global Energy Sector (2021) International Energy Agency, https://www.iea.org/reports/net-zero-by-2050.

[2] 'Pathway to critical and formidable goal of net-zero emissions by 2050 is narrow but brings huge benefits, according to IEA special report,' (2021) International Energy Agency, https://www.iea.org/news/pathway-to-critical-and-formidable-goal-of-net-zero-emissions-by-2050-is-narrow-but-brings-huge-benefits.

[3] Christopher McGlade and Paul Ekins, 'The geographical distribution of fossil fuels unused when limiting global warming to 2°C,' (2015) Nature 517, 187-190, https://www.nature.com/articles/nature14016.

[4] 'Net Zero by 2050: A Roadmap for the Global Energy Sector (2021) International Energy Agency, https://www.iea.org/reports/net-zero-by-2050, 11.

[5] 'America's Zero Carbon Action Plan,' (2020) The Zero Carbon Consortium, https://irp-cdn.multiscreensite.com/6f2c9f57/files/uploaded/zero-carbon-action-plan%20%281%29.pdf.

[6] Goal 7: Ensure access to affordable, reliable, sustainable and modern energy for all, United Nations Sustainable Development Goals, https://sdgs.un.org/goals/goal7.

[7] Goal 7, Target 7.b (n 6).

[8] Jeffrey D. Sachs et al., 'Roadmap to Zero-Carbon Electrification of Africa by 2050: The Green Energy Transition and the Role of the Natural Resource Sector (Minerals, Fossil Fuels, and Land),' (2021) https://ccsi.columbia.edu/content/roadmap-zero-carbon-electrification-africa.

[9] Martin Dietrich Brauch, "Reforming International Investment Law for Climate Change Goals" in Michael Mehling and Harro van Asselt (eds) Research Handbook on Climate Finance and Investment (Edward Elgar, 2021) https://academiccommons.columbia.edu/doi/10.7916/d8-300v-7h63; Perrine Toledano et al, "Don't Throw Caution to the Wind: In the Green Energy Transition, Not All Critical Minerals Will Be Gold Mines" (CCSI, 2020) https://ccsi.columbia.edu/content/dont-throw-caution-wind-green-energy-transition-not-all-critical-minerals-will-be-goldmines.

[10] 'Beyond Petrostates: The burning need to cut oil dependence in the energy transition,' (2021) Carbon Tracker, https://carbontracker.org/reports/petrostates-energy-transition-report/.

[11] Roadmap (n 8).

Although they have contributed least to historic emissions, developing countries will be the most impacted by climate change and the energy transition. Developing and emerging economies in Africa, Asia, and the Americas are the most vulnerable to the physical and financial impacts of climate change. They have the lowest levels of electrification and the highest dependency on fossil fuels for energy. According to the most recent IPCC report, at least 3.5 billion people live in places that already desperately need to adapt to the impacts of climate change; the report estimates that developing countries alone will require USD 127 billion per year for adaptation costs.[12]

It is crucial that these countries receive the foreign direct investment (FDI) and financial support required to mitigate and adapt to climate change and to address climate-related impacts and damages.[13] The financing gap in developing countries is compounded by poor sovereign risk ratings, due to ill-designed rating systems.[14]

Until recently, international investment law and policy has been largely overlooked by negotiators at international climate change convenings such as the Conference of the Parties (COPs) to the United Nations Framework Convention on Climate Change (UNFCCC), despite the important role it plays in either advancing or undermining efforts to address climate change.

The most recent IPCC report recognizes that while investment treaties have the potential to play a role in advancing necessary investments, the treaties as drafted risk delaying or preventing necessary climate action.[15] As recognized by the IPCC report, investor protections granted through international investment law allow fossil fuel corporations, other high-emitting investors, and their shareholders to sue governments over actions and regulations—including those taken to comply with climate commitments—that negatively impact their investments' bottom lines.

However, a wholly new international investment regime designed with climate and other global goals in mind could be used as a tool to *accelerate* the investments needed to address the climate crisis and to facilitate international cooperation to achieve global climate and other development goals.

[12] IPCC, 2022: Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press. In Press.

[13] Martin Dietrich Brauch and Brenda Akankunda, 'Investment Governance in Africa to Support Climate Resilience and Decarbonization,' (December 10, 2021), https://ccsi.columbia.edu/news/investment-governance-africa-support-climate-resilience-and-decarbonization. See also Jeffry D. Sachs et al., 'Roadmap to Zero-Carbon Electrification of Africa by 2050: The Green Energy Transition and the Role of the Natural Resource Sector (Minerals, Fossil Fuels, and Land),' (2021) https://ccsi.columbia.edu/content/roadmap-zero-carbon-electrification-africa.

[14] For more on this, see United Nations, Inter-agency Task Force on Financing for Development, Financing for Sustainable Development Report 2022. (New York: United Nations, 2022), available from: https://developmentfinance.un.org/fsdr2022, p. 23.

[15] IPCC, 2022: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [P.R. Shukla, J. Skea, R. Slade, A. Al Khourdajie, R. van Diemen, D. McCollum, M. Pathak, S. Some, P. Vyas, R. Fradera, M. Belkacemi, A. Hasija, G. Lisboa, S. Luz, J. Malley, (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA. doi: 10.1017/9781009157926, Chapters 14 and 15.

What are Investment Treaties?

International investment law is made up of bilateral and multilateral investment treaties and investment chapters included within trade agreements that afford protections and privileges to foreign investors.[16] The vast majority of the over 3,300 investment treaties concluded to date (of which over 2,600 are in force) were signed with the expectation by state parties that they would help to promote FDI, thereby advancing development, and to strengthen diplomacy and the rule of law. Despite these assumptions, the evidence that investment treaties achieve their aims of increasing investment, and thereby development outcomes, is inconclusive, at best, and the extensive costs of the treaties for states and their stakeholders are mounting.[17]

The investor protections enshrined in investment treaties are enforced through investor–state dispute settlement (ISDS)—a private dispute settlement mechanism by which foreign investors can directly sue host states for actions perceived to affect their interests.[18] Although many treaties include clauses that specify certain exemptions or powers retained by governments for measures taken in good faith and in the public interest, these provisions have largely been overlooked, disregarded, or undermined by arbitrators.[19]

ISDS has been used to successfully challenge measures including:

- Changes to fiscal regimes;
- Requirements that investors purchase local goods and services or invest in local research and development;
- Termination of contracts, revocation or termination of permits, or decisions not to grant or renew permits;
- Requirements that investors to consult communities or compensate for harms;
- New or stronger environmental regulations and other changes to regulatory frameworks;
- Coal phase-outs; and
- Attempts to apply the polluter pays principle.[20]

[16] For a deeper look into investment treaties, see: 'Primer on International Investment Treaties and Investor-State Dispute Settlement,' (2022) Columbia Center on Sustainable Investment, https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement.

[17] Lise Johnson et al., 'Costs and Benefits of Investment Treaties: Practical considerations for states,' (2018) Columbia Center on Sustainable Investment, https://ccsi.columbia.edu/sites/default/files/content/pics/Cost-and-Benefits-of-Investment-Treaties-Practical-Considerations-for-States-ENG-mr.pdf; Joachim Pohl, 'Societal Benefits and Costs of International Investment Agreements,' (2018) OECD Working Papers on International Investment, https://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en; Joe C. Brada et al., 'Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis,' (2020) Journal of Economic Surveys, Vol. 35, Issue 1, https://onlinelibrary.wiley.com/doi/full/10.1111/joes.12392.

[18] For more detailed information on ISDS, see: 'Primer on International Investment Treaties and Investor-State Dispute Settlement,' (2022) Columbia Center on Sustainable Investment, https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement.

[19] For example, see Eco Oro v. Colombia, ICSID Case No. ARB/16/41.

[20] Lisa Sachs, et al., 'Environmental Injustice: How Treaties Undermine Human Rights Related to the Environment,' (2020) La Revue de Juristes de Sciences Po N°18, https://ccsi.columbia.edu/sites/default/files/content/docs/blog/revue-numero-18-L.-Sachs_-Johnson_-Merill-nvestment-Law-and-Environmental-Justice-.pdf.

Investment Law and Policy and Climate Goals

As policymakers increasingly adopt measures to address climate change—phasing-out coal- or gas-fired power plants, implementing energy efficiency standards or carbon-pricing schemes, revoking permits for the exploration or extraction of fossil fuel resources, applying new zoning rules accounting for sea level rise, etc.—the profitability of high-emission investments will be impacted. Similarly, policymakers may take other fiscal or regulatory measures in response to changing market conditions for energy, even if not explicitly climate-motivated. The potential impacts of these measures on various investments would be similar to those that have, in the past, led to ISDS claims.[21]

Through ISDS, the cost of stranding assets and otherwise meeting climate mitigation targets or adapting to climate change is shifted from the investor to states, taxpayers, and energy consumers. Effectively, fossil fuel companies could be "reimbursed" when climate measures hurt their bottom lines, despite having been warned for decades that the burning of fossil fuels is the main cause of climate change and that their reserves were at risk of stranding;[22] even now, fossil fuel companies continue to explore for new reserves, despite the IEA's declaration that there is no case for additional fossil fuel exploration or extraction. International investment law insulates investors against risks associated with the energy transition, prolonging reckless investment in fossil fuels, and encouraging investment in assets and practices that should have been abandoned years ago.[23]

One of the thousands of treaties that threatens climate action is the Energy Charter Treaty (ECT), a treaty which was originally created to promote international cooperation in the energy sector.[24] Today, state parties to the ECT risk being held liable for important public interest measures, including climate policy, under the ECT's ISDS mechanism. In fact, the ECT is the most frequently invoked investment treaty to date.[25] A former employee of the ECT secretariat became a "climate whistleblower" after stating that the ECT is not at all Paris-compatible (a reference to the Paris Agreement). Highlighting that the motivation behind a government measure is not relevant in ISDS disputes, she cited examples of cases in Eastern Europe where governments face claims for changing laws to address energy poverty. Were investors to continue bringing cases challenging climate policies, she predicted that taxpayers would end up paying billions of dollars in damages to fossil fuel investors.[26]

[21] Ibid.
[22] Martin Dietrich Brauch and Brenda Akankunda, 'Investment Governance in Africa to Support Climate Resilience and Decarbonization,' (December 10, 2021), https://ccsi.columbia.edu/news/investment-governance-africa-support-climate-resilience-and-decarbonization.
[23] Kyla Tienhaara and Lorenzo Cotula, 'Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets,' (2020) International Institute for Environment and Development, https://pubs.iied.org/17660iied. See also Martin Dietrich Brauch and Brenda Akankunda, 'Investment Governance in Africa to Support Climate Resilience and Decarbonization,' (December 10, 2021), https://ccsi.columbia.edu/news/investment-governance-africa-support-climate-resilience-and-decarbonization.
[24] Martin Dietrich Brauch, 'Should the European Union Fix, Leave or Kill the Energy Charter Treaty,' (2021) Columbia Center on Sustainable Investment, https://ccsi.columbia.edu/news/should-european-union-fix-leave-or-kill-energy-charter-treaty.
[25] Martin Dietrich Brauch and Brenda Akankunda, 'Investment Governance in Africa to Support Climate Resilience and Decarbonization,' (December 10, 2021), https://ccsi.columbia.edu/news/investment-governance-africa-support-climate-resilience-and-decarbonization. This piece uses the example of the Save Lamu campaign, in which communities were able to halt an undesired coal-fired power plant project in Kenya.
[26] Yamina Saheb in Investigate Europe, 'Whistleblower Yamina Saheb on the Energy Charter Treaty (2021) https://www.youtube.com/watch?v=w7GT_mrGX7Q; Kyla Tienhaara et al., 'Investor-state disputes threaten the global green energy transition,' (May 2022) 376 Science 6594 https://www.science.org/doi/abs/10.1126/science.abo4637, pp.701-703.

Table 1: ISDS Cases Related to Measures Aimed at Mitigating or Adapting to Climate Change

Case Name	Treaty	Project Details	Amount Claimed	Outcome	Challenged Policy Measure
Vattenfall v. Germany (2009)	ECT	Moorburg coal-fired power plant.	1.4 billion USD	Settled.	New administration imposes stricter water use requirements and mandates construction of fish ladder.
TRUenergy v. Australia (2009)	Hong Kong-Australia BIT	Local energy firm.	N/A	Threatened.	Compensation for coal-fired plants and other heavy polluters under climate-related legislation.
Vattenfall v. Germany II (2012)	ECT	Two nuclear power plants in Germany.	5.14 billion USD	Settled. Germany paid total of 2.5 billion USD to four energy companies.	Germany's plan for nuclear phase-out by 2022.
Lone Pine v. Canada (2013)	NAFTA	Hydraulic fracturing (fracking) under St. Lawrence River.	109.8 million USD	Pending.	Quebecois government moratorium on oil and gas activity in certain ecologically vulnerable areas leads to revoked petroleum and natural gas exploration permits.
TransCanada v. United States (2016)	NAFTA	Keystone XL Pipeline carrying crude oil from Alberta tar sands to U.S. refineries.	15 billion USD	Settled.	U.S. President's cancellation of pipeline citing climate change concerns.
Rockhopper v. Italy (2017)	ECT	Oil exploration in Ombrina Mare field located six miles offshore.	N/A	Settled. Italy to pay over 190 million USD.	Italian Government ban on oil and gas exploration within 12 nautical miles of coastline.
Westmoreland v. Canada (2018)	NAFTA	Coal mines deliberately located next to power plants to cut export infrastructure needs.	357 million USD	Discontinued.	Phase out of coal power plants by 2030.
Lama v. Canada (2019)	Canada – Czech Republic BIT	Oil sands field in Alberta, Canada.	Unknown	Notice of intent to bring a claim.	Delays in regulatory approval following new, environment and indigenous rights-friendly administration.
Vermilion v. France	ECT	Oil and gas company with 26 extraction sites in France.	Unknown	Threatened. Never brought to bear due to subsequent weakening of legislation.	French Environment Minister drafted law ending fossil fuel extraction on French territory by 2040 and banning renewal of all exploitation permits.
Ascent Resouces v. Slovenia (2020)	ECT	Fracking in Petišovci oil and gas field near critical water sources.	Est. 126.7 million USD	Notice of intent. Slovenia subsequently passed law allowing some fracking.	Slovenian Environment Agency asked investor to conduct an environmental impact assessment, required to obtain an environmental permit.
Uniper v. the Netherlands (2021)	ECT	One of the Netherlands' largest coal-fired power plant.	Est 1.06 billion USD	Notice of dispute.	Dutch government plan to shutdown shut down all coal-fired power plants by 2030.
RWE v. the Netherlands (2021)	ECT	Two coal-fired power plants.	Est. 2.96 billion USD	Pending.	Dutch government plan to shutdown shut down all coal-fired power plants by 2030.
TC Energy v. United States (2021)	USMCA NAFTA Legacy Provision	Keystone XL Pipeline.	15 billion USD	Notice of intent.	Executive order revoking pipeline's construction permits.
Alberta PMC v. United States (2022)	NAFTA	Province-owned Alberta. Petroleum Marketing Commission.	1 billion USD	Notice of dispute.	U.S. President's cancellation of Keystone XL pipeline.

The threat alone of an ISDS case, or fear of ISDS cases, can discourage or prevent governments from regulating investments to reduce greenhouse gas emissions.[27] This phenomenon—regulatory chill—results from several factors: prohibitively high litigation costs,[28] high costs of adverse ISDS awards, and fear of damaged reputations. The average amount investors seek in damages is 1.6 billion USD (there is no penalty for over-claiming), and the average amount of an award is 437.5 million USD.[29] In some countries, these costs have piled up—Colombia, for example, has faced 17 cases since 2016, and Spain has faced roughly over 50 arbitrations for retracting one sector-specific set of incentives in response to a tariff deficit and a financial crisis.[30]

At least four of the cases included in Table 1—*TransCanada v. United States, Westmoreland v. Canada, Lama v. Canada, and Vermillion v. France*—led to subsequent reversals of policy by states, which then led investors to withdraw their claim, having achieved the desired outcome.[31] Though regulatory chill[32] has long been discussed as an issue, it has been difficult to document or measure. In recent years, however, more concrete evidence has arisen, including in the climate policy space. In addition to the cases mentioned above, in 2022, policymakers in Denmark and New Zealand explicitly stated that the threat of ISDS stalled their countries' climate policymaking.[33]

Companies in the oil, gas, and mining sectors have filed about a quarter of all known ISDS claims, and 29% of all known claims in 2021.[34] They have been awarded 73.2 billion USD by arbitral tribunals since 1995. Of the 14 known ISDS awards exceeding 1 billion USD, 11 were awarded to oil, gas, and mining companies. Pending claims brought by oil, gas, and mining amount to 99.1 billion USD as of 2021—this number does not include the 40 pending cases for which claim amounts have not been disclosed.[35] In 2021, investors initiated at least 68 known ISDS cases.[36] All this to say, policymakers around the world can reasonably expect treaty-based challenges from fossil fuel and other extractive companies, investors involved in infrastructure or in the electricity sector, as well as other types of investors, to increase in the years and decades to come.

[27] Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement,' Transnational Environmental Law Vol 7. Issue 2 (2018), https://www.cambridge.org/core/journals/transnational-environmental-law/article/regulatory-chill-in-a-warming-world-the-threat-to-climate-policy-posed-by-investorstate-dispute-settlement/C1103F92D8A9386D33679A649FEF7C84.

[28] The average cost of ISDS proceedings adds up to USD 13 million for the claimant and respondent together. 'Primer on International Investment Treaties and Investor-State Dispute Settlement,' (2022) Columbia Center on Sustainable Investment, https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement.

[29] Ibid.

[30] Ibid; UNCTAD, Investment Dispute Settlement Navigator, Investment Dispute Settlement Navigator https://investmentpolicy.unctad.org/investment-dispute-settlement.

[31] Martin Dietrich Brauch, 'Climate Action Needs Investment Governance, Not Investment Protection and Arbitration,' (2022) Columbia Center on Sustainable Investment, https://ccsi.columbia.edu/news/climate-action-needs-investment-governance-not-investment-protection-isds. See also Ella Merrill and Martin Dietrich Brauch, 'U.S. Climate Leadership Must Reject ISDS: As the United States Faces Another $15 Billion Suit from the Fossil Fuel Industry, it's Time for President Biden to Take a Decisive Stance,' (2021) Columbia Center on Sustainable Investment, https://ccsi.columbia.edu/news/us-climate-leadership-must-reject-isds-united-states-faces-another-15-billion-suit-fossil-fuel.

[32] For more on regulatory chill, see: Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement,' (2018) Transnational Environmental Law Vol. 7 Issue 2, https://www.cambridge.org/core/journals/transnational-environmental-law/article/regulatory-chill-in-a-warming-world-the-threat-to-climate-policy-posed-by-investorstate-dispute-settlement/C1103F92D8A9386D33679A649FEF7C84; Julia Brown, 'International Investment Agreements: Regulatory Chill in the Face of Litigious Heat,' (2013) Western Journal of Legal Studies, Volume 3, Issue 1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2617369.

[33] Elizabeth Meager, 'COP26 targets pushed back under threat of being sued,' (2022) Capital Monitor, https://capitalmonitor.ai/institution/government/cop26-ambitions-at-risk-from-energy-charter-treaty-lawsuits/.

[34] Manuel Perez Rocha, 'Missing from the Climate Talks: Corporate Powers to Sue Governments Over Extractives Policies,' (2021) Inequality.org, https://inequality.org/research/missing-from-the-climate-talks-corporate-powers-to-sue-governments-over-extractives-policies/; Leo di Salvatore, 'Investor-State Disputes in the Fossil Fuel Industry,' (2021) International Institute for Sustainable Development, https://www.iisd.org/publications/report/investor-state-disputes-fossil-fuel-industry.

[35] Extractives brief; Manuel Perez Rocha, 'Missing from the Climate Talks: Corporate Powers to Sue Governments Over Extractives Policies,' (2021) Inequality.org, https://inequality.org/research/missing-from-the-climate-talks-corporate-powers-to-sue-governments-over-extractives-policies/.

[36] UNCTAD, Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement.

A New Vision for International Investment Governance[37]

Simply attempting to re-balance the international investment regime by refining certain investor protections, and to mitigate the harms of a system which provides little benefit to states, does not address the fundamental misalignment of investment treaties with both the globally-agreed climate goals and the broader sustainable development agenda.[38]

Recent attempts to avoid certain harms through special provisions have not proven effective. For example, tribunals have ignored or minimized exceptions or carve-outs protecting certain types of measures from ISDS claims,[39] and investors can circumvent them in the framing of the claim. Many proposed reforms rely on interpretation and application by party-appointed arbitrators, who have an interest in finding jurisdiction over cases,[40] or fail to remedy other harmful aspects of the system, such as the exclusion of important voices from proceedings. The overarching issue is that the harms of investment treaties, even with the proposed reforms, outweigh the uncertain benefits.

As noted, billions of dollars must be mobilized worldwide towards mitigation and adaptation, and foreign direct investment will play an important role. States have an opportunity to think critically about how investment governance can serve and support climate goals at the state and international levels moving forward. Specifically:

1. Treaties could promote investments that aid state parties in advancing climate and energy commitments and needs, including with respect to mitigation, universal access to affordable renewable energy, and climate adaptation. States should ensure that treaties do not promote investments that undermine this progress.
2. Treaties could strengthen domestic governance and public institutions. Meeting the climate crisis will require robust regulation and enforcement. Treaties should empower states to regulate investment in line with climate commitments and human rights standards.
3. Treaties could serve as means of addressing gaps in transnational climate governance and prevent regulatory races to the bottom.

These objectives are considered in turn below.

1 | Promoting Climate-Aligned Investment and Preventing Harms

FDI is needed to achieve rapid decarbonization[41] and universal access to affordable renewable energy.[42] For many countries, the path to net-zero will require, among other measures, the pursuit of strong, flexible, and digitized centralized grids; decentralized, affordable connection to grids, mini-grids and solar power systems; national digitization transformations; and the electrification of transportation. Fossil fuel subsidies will need to be dropped.[43]

Furthermore, the Paris Agreement takes into account the "imperative of a just transition of the workforce and the creation of decent work and quality jobs."[44] Technology and skills must be transferred to host countries so that its citizens may stand to benefit from

[37] This section draws significantly from a three-pillar framework introduced in a 2019 paper by the Columbia Center on Sustainable Investment (CCSI). Lise Johnson et al., 'Aligning International Investment Agreements with the Sustainable Development Goals,' (2019) Columbia Journal of Transnational Law 58-1, https://ccsi.columbia.edu/content/aligning-investment-treaties-sustainable-development.

[38] Martin Dietrich Brauch, 'Reforming International Investment Law for Climate Change Goals,' (2020) Research Handbook on Climate Finance and Investment, Edward Elgar Publishing Ltd., https://academiccommons.columbia.edu/doi/10.7916/d8-300v-7h63. See also Martin Dietrich Brauch, 'Climate Action Needs Investment Governance, Not Investment Protection and Arbitration,' (2022) Columbia Center on Sustainable Investment, https://ccsi.columbia.edu/news/climate-action-needs-investment-governance-not-investment-protection-isds.

[39] 'Primer on International Investment Treaties and Investor-State Dispute Settlement,' (2022) Columbia Center on Sustainable Investment, https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement; For example, in Eco Oro v. Colombia (ICSID Case No. ARB/16/14) or Odyssey v. Mexico (ICSID Case No. UNCT/20/1).

[40] David Gaukrodger and Kathryn Gordon, 'Investor-State Dispute Settlement: A scoping paper for the investment policy community,' (2012) OECD Working Papers on International Investment, OECD Publishing, https://www.oecd.org/investment/investment-policy/WP-2012_3.pdf, page 47.

[41] Goal 13: Take urgent action to combat climate change and its impacts, United Nations Sustainable Development Goals, https://sdgs.un.org/goals/goal13.

[42] Goal 7: Ensure access to affordable, reliable, sustainable and modern energy for all, United Nations Sustainable Development Goals, https://sdgs.un.org/goals/goal7.

[43] Jeffry D. Sachs et al., 'Roadmap to Zero-Carbon Electrification of Africa by 2050: The Green Energy Transition and the Role of the Natural Resource Sector (Minerals, Fossil Fuels, and Land),' (2021) https://ccsi.columbia.edu/content/roadmap-zero-carbon-electrification-africa.

[44] Paris Agreement (2015) United Nations, Preamble, https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

those transfers, as well as related advances such as a digitization transformation.[45] However, many investment treaties restrict performance requirements or technology transfers, making it difficult for developing countries to attract and leverage the beneficial investment they need to transform the economy through quality jobs and new technologies.

Investment treaties should be reimagined as tools to promote renewable energy, the creation of "green" jobs, technological and industrial innovation, and digital access. They should *discourage* investments whose practices or products are inconsistent with the realization of climate or other sustainable development goals. As previously noted, investment treaties indemnify investments that undermine climate commitments. In addition to eliminating those protections, treaties could also mitigate harms by *limiting or eliminating* fossil fuel subsidies or other regulatory or fiscal incentives or subsidies undermining climate goals.

2 | Strengthening Governance and Preserving Regulatory Space

Investment treaties allow foreign investors to bypass domestic institutions and processes, bringing claims for alleged harms directly to private arbitration. Investors also challenge the outcomes of domestic judicial and administrative processes when the outcomes undermine their interests.[46] Investment treaties disregard the principle of equality before the law by granting stronger protections to investors as compared to other private parties, and by making it possible to ignore the rights and interests of other parties affected by investments, including local communities, Indigenous Peoples, and domestic investors.[47]

ISDS could be described as a form of political risk insurance (PRI) (as it has particularly in the case of stranded fossil fuel assets) but there are several key differences between ISDS, which is granted to the investor "for free" by the state, and PRI, which investors must purchase through the private sector. Through its purchase, PRI requires investors to internalize at least some of the costs of risky investment activities or decisions. Because they will bear some of the cost, investors have less incentive to take risks. If the price for PRI for carbon intensive investments were high enough, and ISDS did not provide additional indemnification from stranded assets, investors would assume greater risks if they continued to pursue fossil-fuel-based activities.[48]

[45] Jeffry D. Sachs et al., 'Roadmap to Zero-Carbon Electrification of Africa by 2050: The Green Energy Transition and the Role of the Natural Resource Sector (Minerals, Fossil Fuels, and Land),' (2021) https://ccsi.columbia.edu/content/roadmap-zero-carbon-electrification-africa.

[46] Maria Rocha et al., 'Advocates Say ISDS Is Necessary Because Domestic Courts Are 'Inadequate,' But Claims and Decisions Don't Reveal Systemic Failings,' (2021) Columbia Center on Sustainable Investment, https://ccsi.columbia.edu/news/advocates-say-isds-necessary-because-domestic-courts-are-inadequate-claims-and-decisions-dont.

[47] Lisa Sachs and Lise Johnson, "Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities," in José Antonio Ocampo, ed., International Rules and Inequality: Implications for Global Economic Governance (Columbia University Press), 2019.

[48] Lise Johnson et al, 'Alternatives to Investor-State Dispute Settlement,' (2019) Columbia Center on Sustainable Investment Working Paper 2019, https://ccsi.columbia.edu/sites/default/files/content/docs/our%20focus/extractive%20industries/Alternatives-to-ISDS-11-April-2019.pdf, pp. 6 and 7.

International investment law should *protect and strengthen domestic judicial systems*, rather than bypass or undermine them. International investment law could strengthen states' administrative and judicial systems by requiring the exhaustion of local remedies and by allowing international review only in instances of alleged gross denial of justice claims, which could be resolved through state-state dispute settlement.[49] Proponents of ISDS often claim that the mechanism is necessary because domestic courts can be "inadequate"—whether that means they lack capacity, are susceptible to corruption, or are biased in some way. Research, however, does not support this conclusion: as of 31 July 2020, only 11% of known ISDS treaty-based claims regarded challenges to judicial proceedings or decisions, and investors were mostly unsuccessful in those claims (while they are mostly successful in other ISDS claims).[50] ISDS remains unique in the realm of public international law as the only avenue to remedy that enables claimants to skip or bypass domestic courts. Under international human rights law, in comparison, claimants are required to exhaust local remedies, thus giving the state both a chance and an incentive to address harms before claims are brought under international law.[51]

3 | Encouraging and Facilitating Cooperation

Finally, investment treaties could help to address investment governance challenges of an international, continental, and regional nature – those related to climate change foremost among them. For example, treaties could include commitments by state parties to work together to share information and opportunities for investment projects that support common climate goals. They could facilitate cooperation between state parties in developing and sharing technologies used to accelerate the energy transition, including in energy efficiency, renewable electricity, grids, green hydrogen, battery production and recycling, and climate-resilient infrastructure.[52] They could also include financial commitments and mechanisms to ensure that all states have adequate resources to invest in zero-carbon energy, contributing to both climate action and universal energy access, as well as in other mitigation measures, and in climate resilience and adaptation.

[49] See, Martin Dietrich Brauch, 'Exhaustion of Local Remedies in International Investment Law,' (2017) IISD Best Practices Series, https://www.iisd.org/system/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf, pp. 24 and 26

[50] Maria Rocha, Martin Dietrich Brauch, and Tehtena Mebratu-Tsegaye, 'Advocates Say ISDS is Necessary Because Domestic Courts Are 'Inadequate,' But Claims and Decisions Don't Reveal Systemic Failings,' (2021) Columbia Center on Sustainable Investment, https://ccsi.columbia.edu/news/advocates-say-isds-necessary-because-domestic-courts-are-inadequate-claims-and-decisions-dont.

[51] Maria Rocha, Martin Dietrich Brauch, and Tehtena Mebratu-Tsegaye, 'Advocates Say ISDS is Necessary Because Domestic Courts Are 'Inadequate,' But Claims and Decisions Don't Reveal Systemic Failings,' (2021) Columbia Center on Sustainable Investment, https://ccsi.columbia.edu/news/advocates-say-isds-necessary-because-domestic-courts-are-inadequate-claims-and-decisions-dont, p. 12

[52] See, for instance, Article 2.3 of the Model Treaty on Sustainable Investment (TSI) for Climate Mitigation and Adaptation, Art. 2.3 https://martinbrauch.files.wordpress.com/2022/04/treaty-on-sustainable-investment-for-climate-change-mitigation-and-adaptation.pdf. See also Brooke Skartvedt Güven and Lise Johnson, 'Trading in the Balance: Reconciling Trade and Climate Policy,' (2016) Report of the Working Group on Trade, Investment, and Climate Policy, https://ccsi.columbia.edu/sites/default/files/content/docs/Trade-in-the-Balance-International-Investment-Agreements-Impacts-on-Climate-Change-Policies-in-India-China-and-Beyond-Nov-2016.pdf ; Martin Dietrich Brauch, 'Climate Action Needs Investment Governance, Not Investment Protection and Arbitration,' (2022) Columbia Center on Sustainable Investment, https://ccsi.columbia.edu/news/climate-action-needs-investment-governance-not-investment-protection-isds.

Considerations for States

The international investment law regime requires a significant reimagining for it to become consistent with and supportive of global climate goals. Reforms proposed to address these issues within existing investment treaties will prove ineffective and insufficient. The climate crisis joins earlier calls for the entire system to be turned on its head—investments that facilitate a zero-carbon future should be encouraged; investments that stand in the way should be phased out. States must retain the regulatory space needed to take effective action. And international cooperation is critical in mobilizing the finance, technology, and resources needed to make this all possible.

The greatest opportunity for states is to design wholly new treaties that are tailored to the specific constraints, drivers, and governance challenges related to sustainable investment. As discussed above, treaties centered around enforceable investor protections have not been effective at mobilizing investment. Investor protections also constrain governments' ability to use various fiscal and policy tools to attract, shape, and finance investment. Governments could consider how investment treaties could support governments' policy objectives and foster supportive international commitments and collaboration related to climate goals, including mitigation (the zero-carbon energy transition in particular) and adaptation.

Existing Investment Treaties

For existing treaties, the most effective way for states to limit their exposure to claims and to regulatory pressure from the threat of claims would be to terminate or withdraw consent to arbitration.[53] In treaties unilaterally terminated or from which treaty partners withdraw, a sunset clause may allow claims to be brought for a decade or longer after the treaty is terminated or after withdrawal. For example, though Italy withdrew from the ECT in 2016, the U.K. offshore oil investor Rockhopper was able to successfully bring a claim in 2017 through the twenty year sunset clause.[54] Accordingly, an optimal way to pursue termination or withdrawal from investment treaty, or withdrawal of consent to arbitration would be through the agreement of all treaty parties (to first remove the sunset clause) or through a multilateral convention, like that concluded by EU member states.[55] States could encourage such multilateral coordination through existing fora, such as United Nations Commission on International Trade Law's Working Group III on Investor-State Dispute Settlement Reform[56] and the Organization for Economic Co-operation and Development (OECD).[57]

Anticipating Claims

States can also begin to prepare for the eventuality of claims related to regulation of fossil fuels or other high-emitting sectors. States might work with academics and civil society organizations to understand how international commitments, climate science, or considerations like the depreciating value of oil and gas[58] might be relevant factors in disputes that might arise.

[53] 'Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law,' Columbia Center on Sustainable Investment, https://ccsi.columbia.edu/content/clearing-path-withdrawal-consent-and-termination-next-steps-reforming-international. See Brooke Güven and Jesse Coleman, 'Briefing Note on Addressing Tensions and Overlaps between the Protocol on Investment and Other Sources of Investment Law' (CCSI Briefing prepared for the AfCFTA Secretariat, November 2021).

[54] Rockhopper v. Italy, ICSID Case No. ARB/17/14.

[55] 'EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties,' (2020) Financial Stability, Financial Services and Capital Markets Union, European Commission, https://ec.europa.eu/info/publications/200505-bilateral-investment-treaties-agreement_en.

[56] 'Working Group III: Investor-State Dispute Settlement Reform,' United Nations Commission on International Trade Law, https://uncitral.un.org/en/working_groups/3/investor-state.

[57] 'International investment law,' Organization for Economic Cooperation and Development (OECD) https://www.oecd.org/investment/internationalinvestmentagreements/oecdworkoninternationalinvestmentlaw.htm.

[58] Compensation for a Just Energy Transition to a Zero-Carbon World: Practices and Principles in International Law (April 14, 2022) Columbia Center on Sustainable Investment, https://ccsi.columbia.edu/events/compensation-just-energy-transition-international-investment-domestic-law.

States should also strongly consider the potential for ISDS claims before further actions to explore for or extract fossil fuels or related infrastructure.

Finally, states might use tools available under international law, such as joint interpretative statements, to minimize uncertainties regarding the degree of regulatory space preserved for states under investment treaties,[59] and otherwise to confirm the importance and relevance of international law, including climate and human rights commitments and frameworks.

Specific approaches to interpretation have been proposed, such as issuing joint declarations that clarify investment treaties do not 'constrain climate change measures enacted in good faith.'[60] Additionally, references in treaty provisions and preambles to multilaterally agreed-upon standards such as the UNFCCC and the Paris Agreement, the OECD Guidelines for Multinational Enterprises, and the UN Guiding Principles on Business and Human Rights could be included.[61] It's important to note, however, that while useful, these interpretative approaches do not carry the same weight as treaty language designed to establish 'legal clarity' and reduce interpretive discretion left to tribunals.[62]

These measures will only provide limited forms of protection against claims. Arbitral tribunals are not required to consider interpretations of investment treaties issued unilaterally by states, for example, and may not give appropriate weight to joint interpretative statements. But clarifications and preparing for possible cases and defenses can potentially mitigate the damage of future cases.

Drafting New Treaties

The greatest opportunity for states is to design wholly new treaties as tools for meeting their own development goals and international obligations, including meeting internationally agreed upon emissions commitments. Most crucially, when drafting new treaties, states should consider the three pillars above—that treaties thoughtfully promote investments that contribute to climate and other sustainable development goals, including by identifying and addressing the actual constraints to those investments; that they strengthen domestic governance, protect states' regulatory space, and promote the rule of law; and that they facilitate international cooperation for governance challenges of an international nature—and draft provisions that meet and promote these objectives.

[59] Ladan Mehranvar and Lise Johnson, "Missing Masters: Causes, Consequences, and Corrections for States' Disengagement from the Investment Treaty System" (2022) Journal of International Dispute Settlement, Oxford University, https://doi.org/10.1093/jnlids/idac008.
[60] UNCTAD, World Investment Report 2010 (UNCTAD, 2010) https://unctad.org/system/files/official-document/wir2010_en.pdf ; Lise Johnson et al., 'Aligning International Investment Agreements with the Sustainable Development Goals,' (2019) Columbia Journal of Transnational Law 58-1, https://ccsi.columbia.edu/content/aligning-investment-treaties-sustainable-development.
[61] UNCTAD, Investment Policy Framework for Sustainable Development (UNCTAD 2015) https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf, 83.
[62] UNCTAD, UNCTAD's Reform Package for the International Investment Regime (UNCTAD, 2018) https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf.

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