1-2020

Environmental Injustice: How Treaties Undermine Human Rights Related to the Environment

Lisa E. Sachs
Columbia Law School, Columbia Center on Sustainable Investment, lsachs1@law.columbia.edu

Lise Johnson
Columbia Law School, Columbia Center on Sustainable Investment, ljj2107@columbia.edu

Ella Merrill
Columbia Law School, Columbia Center on Sustainable Investment, ella.merrill@law.columbia.edu

19 Environmental Injustice: How treaties undermine human rights related to the environment

Lisa SACHS,
Director of the Columbia Center on Sustainable Investment (CCSI)

Lise JOHNSON,
Head of Investment Law and Policy, Columbia Center on Sustainable Investment

Ella MERRILL,
Special Assistant to the Director, Columbia Center on Sustainable Investment

1 - Our planet faces unprecedented threats, including irreversible global warming, loss in biodiversity, and water pollution and scarcity. The impacts of these environmental crises also threaten human rights and exacerbate inequality within and between countries and populations. [1] Slowing or halting these worsening environmental trends – and addressing the impacts of environmental change on diverse populations – will require cumulative policy responses at the national and international levels.

2 - Fortunately, there are efforts to align globally around these challenges. The centrality of clean water and air, diverse ecosystems, rich soils and other elements of a healthy environment to human life and health has been recognized in numerous regional and international instruments and declarations over the past 50 years, and is included in many countries' constitutions. [2] Agenda 2030, universally adopted by all of the world's governments in 2015, also emphasizes and elaborates on the environmental crises and goals over the coming decade, including specific targets for governments, private sector entities and other actors to work toward. Following the adoption of Agenda 2030, several countries have advocated for a Global Pact for the Environment to create a framework for the international protection of the right to a healthy environment, as codified and reflected in the varied declarations, laws and conventions. [3]

3 - Concurrently with the elaboration of the right to a healthy environment has emerged both the concept and diverse and broad movements for environmental justice. There is no one definition of environmental justice ; the term has been used differently in different contexts and by different populations. Indeed, the « breadth of concepts used in defining environmental justice illustrates that the term is quite broad, integrated, expansive, and inclusive, embodying a variety of understandings of justice itself. » [4] However, the central, inter-related elements of the notion of environmental justice are those of « equity and distribution, individual and cultural recognition, political participation, and individual and community functioning. » [5] These principles of environmental justice have likewise been codified or incorporated in instruments, institutions and practices at the international level (such as with the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters) as well as at the domestic level (for instance, with the United States Environmental Protection Agency's Office of Environmental Justice).

4 - Yet in the race to take action to protect the environment and humanity's equitable and sustainable use of the planet's resources, many policymakers and advocates have overlooked how provisions buried in thousands of bilateral and multilateral investment agreements have stymied such critical policies and threaten to do so at an increasing scale. This is due to the investor-state dispute settlement (ISDS) mechanism, found in most international investment agreements (IIAs) including both bilateral investment treaties (BITs) and the investment chapters of free trade agreements (FTAs). This mechanism allows a specific subset of actors – international asset holders, often multinational enterprises – to sue host governments for government measures that undermine their actual or expected profitability, no matter the objective of the challenged measure. As a consequence, environmental measures are vulnerable to attack under those provisions when they impose additional costs on or otherwise negatively impact multinational enterprises and other international investors. This not only has negative implications for environmental protection, but also for the justice dimensions of environmental law and policy.

5 - As this chapter describes further, this private dispute mechanism limits governments' willingness and ability to adopt and enforce policies meant to protect citizens and the environment from potentially harmful corporate activities and has important implications for the future of environmental justice. The impacts of these treaties and of ISDS is only recently becoming clear ; most of the more than 3,300 treaties have been signed within the past forty years or so. [6] Disputes brought under the ISDS mechanism of these treaties are even more recent ; as of July 31, 2019,

1. G. Reeh, 'Human Rights and the Environment : The UN Human Rights Committee Affirms the Duty to Protect,' (Blog of the *European Journal of International Law*, 9 September 2019) <https ://www.ejiltalk.org/human-rights-and-the-environment-the-un-human-rights-committee-affirms-the-duty-to-protect/> accessed 1 November 2019.
2. For a summary, *see* « Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment »., A/73/50, 19 July 2018, available at http://srenvironment.org/sites/default/files/Reports/2018/Boyd%20Knox%20UNGA%20report%202018.pdf.
3. Global Pact for the Environment, *Objectives*, <https ://globalpactenvironment.org/en/> accessed 6 September 2019.
4. D. Schlosberg, *Defining environmental justice : theories, movements, and nature* (Oxford ; New York : Oxford University Press, 2007), at 52.
5. *Ibid*., at 79.
6. Columbia Center on Sustainable Investment, *Primer : International Investment Treaties and Investor-State Dispute Settlement,* <http://

983 known disputes had been filed, with more disputes brought confidentially [7] and others threatened and then settled, formally (23% of all cases brought between 1987 and 2018) [8] or informally, before an award was issued. [9] Half of all known disputes have been brought between 2012 and 2018, [10] and in 2018, 70% of the 50 substantive decisions by tribunals were made in favor of the investors. [11]

6 - Investor-state dispute settlement allows investors to remove disputes they have with host states, and stakeholders within them, from domestic administrative and judicial processes and norms. Investors are able to frame those disputes as alleged breaches of international investment law, and put them before ad-hoc, party-appointed, party-paid tribunals. Those tribunals are unconstrained by domestic rules and procedures and able to decide disputes without due consideration or deference to other obligations, rights, or policies of the host governments under domestic or international law, or rights and interests of third-parties relevant to or affected by the dispute. [12]

7 - While the mechanism is often described as providing investors with a mechanism of last resort they can use to challenge unremedied losses caused by uncompensated nationalizations appropriating the investors' property, or bad faith, corrupt, or discriminatory conduct by host states, the reality appears quite different. [13] Rather, investors have commonly used the ISDS mechanism to challenge government measures adopted in good faith to address issues of public concern, including those taken in the public interest to protect the life, health, and security of people or planet ; and tribunals have not only welcomed these claims but have awarded investor claimants substantial sums, out of public coffers, to compensate investors for economic impacts on their investments, including in many cases, alleged future lost profits.

8 - First, this article explains the various ways in which IIAs and ISDS affect environmental protection and justice, including by chilling legitimate and necessary regulation and enforcement. Second, the article illustrates how ISDS has undermined specific environmental measures, using examples of challenged actions to address the climate crisis and to protect water resources. Third, the article describes how ISDS undermines governance, democratic processes, and rights, including environmental impact assessments (EIAs) and stakeholder participation in them, the processes of environmental decision-making, [14] and efforts to protect communities' rights to representation and access to justice. [15] This article adds to existing literature that has documented how ISDS has been used to challenge environmental protection and policy making by looking at the implications of ISDS on other dimensions of environmental justice. It also adds to the debate regarding undue regulatory chill and regulatory risk-shifting by elaborating on theories explaining why and how ISDS can have these effects, and documenting additional ISDS cases challenging good faith environmental protection and policymaking. The article concludes with recommendations on how states can address the systemic impact of IIAs and ISDS on states' regulatory space over environmental and other public interest matters.

1. Impact of IIAs and ISDS on Environmental Governance

9 - As other studies have highlighted, [16] IIAs and ISDS cases challenge environmental protection in several ways.

10 - First, they increase the cost of environmental measures. If a government acts to address an issue of environmental concern – whether by passing new legislation or regulations, producing new or clarified interpretations of existing laws or regulations, adopting judicial or administrative decisions approving, rejecting, or otherwise shaping the governance of an investment

ccsi.columbia.edu/2019/06/03/primer-international-investment-treaties-and-investor-state-dispute-settlement/> accessed 1 November 2019.

7. Investment Policy Hub, *Investment Dispute Settlement Navigator*, <https ://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 1 December 2019. Not all arbitration rules require disclosure of the legal challenge or of the related case materials. Columbia Center on Sustainable Investment, *Primer : International Investment Treaties and Investor-State Dispute Settlement* <http://ccsi.columbia.edu/2019/06/03/primer-international-investment-treaties-and-investor-state-dispute-settlement/> accessed 1 November 2019.
8. UNCTAD, 'Review of ISDS Decisions in 2018 : Selected IIA Reform Issues' (2019) *UNCTAD IIA Issues Note*, Issue 4.
9. For example, a report listing possible reasons for China's previously low profile in ISDS cases suggests it may be due to the country's preference for settling such disputes informally through diplomatic discussion. D. Pathirana, 'A Look into China's Slowly Increasing Appearance in ISDS Cases,' *Investment Treaty News* (26 September 2017).
10. Columbia Center on Sustainable Investment, *Primer : International Investment Treaties and Investor-State Dispute Settlement,* <http://ccsi.columbia.edu/2019/06/03/primer-international-investment-treaties-and-investor-state-dispute-settlement/> accessed 1 November 2019.
11. Either on jurisdictional grounds or on merits. UNCTAD, 'Review of ISDS Decisions in 2018 : Selected IIA Reform Issues' (2019) *UNCTAD IIA Issues Note*, Issue 4.
12. Columbia Center on Sustainable Investment, *Primer : International Investment Treaties and Investor-State Dispute Settlement,* <http://ccsi.columbia.edu/2019/06/03/primer-international-investment-treaties-and-investor-state-dispute-settlement/> accessed 1 November 2019.
13. There have been only a few cases, for instance, involving a tribunal's finding that the government acted in bad faith or discriminated against the investor on account of its nationality. With respect to bad faith, the authors searched cases available in the « Investor-State Law Guide » database for the terms « bad faith ». While, as of December 11, 2019, 249 interim and final awards had that phrase, only a few indicated a finding by the tribunal that the government had indeed acted in bad faith. *See*, for instance, *Yukos Universal Ltd v. Russia*, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014 (suggesting that the taxes assessed were not good faith measures aimed at raising public revenue) ; *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Venezuela*, ICSID Case No. ARB/07/30, Interim Decision, January 17, 2017 (finding that the tribunal *had not* previously concluded the government had acted in bad faith). Similarly, of the 209 decided disputes in the UNCTAD database as of December 13, 2019, only nine involved a finding that there had been a national treatment violation. Moreover, none involved a finding of discrimination against the investment *on account of* the investor's nationality. The cases instead involved findings that there had been disparate treatment of foreign investors based on factors other than nationality, factors that seemed unclear or unjustified to tribunals, or disparate treatment of investments arising from, or based on implications for, structures and locations of production along global value chains. In terms of direct expropriations, UNCTAD's database reveals that the successful claims (40) relate to government actions canceling projects due, for instance, to concerns about the impacts of the projects or the investors' conduct in relation to them (e.g., as in *Copper Mesa v. Ecuador*, discussed infra), government efforts to raise and collect taxes paid by projects (e.g., as in *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, Award, December 12, 2012), and/or disputes involving the government's takeover of projects. The latter have been concentrated in disputes involving just two countries, Russia and Venezuela. Additionally, where there have been findings of improper conduct, including allegations of uncompensated expropriation, the claims are generally pursued before remedies have been exhausted domestically, meaning it is unclear that any errors or other misconduct would have remained unremedied by the state absent the ISDS claim.
14. *Mobil and Murphy v. Canada (I)*, Case No. ARB(AF)/07/4 (ICSID. 2007).
15. E.g. *Copper Mesa v. Ecuador*, PCA Case No. 2012-2 ; *Bear Creek Mining v. Peru*, Case No. ARB/14/21 (ICSID. 2014).
16. J. Viñuales, 'Foreign Investment and the Environment in International Law,' (2012) Cambridge University Press ; K. Miles (e.d.), 'Research Handbook on Environment and Investment Law,' (2019) E. Elgar ; K. Tienhaara. 'The Expropriation of Environmental Governance : Protecting Foreign Investors at the Expense of Public Policy,' (2009) Cambridge : Cambridge University Press ; T. Slater., « Investor-State Arbitration and Domestic Environmental Protection », in *Washington University Global Studies Law Review, Vol. 14, n° 1*, 2015.

project – and those actions negatively impact investors' actual or expected profits, covered investors can challenge those actions in arbitration. The arbitration costs alone can raise the actual cost of adopting and implementing the measure, which can potentially shape the respondent government's (or even other governments') willingness and ability to adopt or maintain that or similar measures in the future. [17] Settlement of threatened and actual claims is also common, even though the settlement itself or its terms are rarely known. [18] One may assume that, in such cases, something is being given for the decision to drop a case, whether financial (which increases the cost of action) or regulatory (which is an agreement to stop, slow, or limit regulatory action, or to approve projects or terms that would otherwise be rejected). [19] If an ISDS case proceeds and the government is found liable and ordered to pay the investor, the actual costs of environmental measures are even higher (often substantially so), in addition to the likely chill on the government's willingness to adopt similar measures or enforce them against other investors. [20]

11 - Second, in terms of political costs, each suit alleges a violation of international law, a serious charge against countries that can cause respondent countries' reputations to suffer in the eyes of investors, other states, and other international law adjudicators and systems. Particularly if the measure reflects the policy preferences of a less politically powerful actor within the respondent country, such as a local municipality or an environmental agency, the country's executive leadership may deem the political cost of sacrificing that subsidiary entity's policy choice to be less than the cost of maintaining a course of action alleged to be inconsistent with international law (or other countries' or investors' interpretations of that law).

12 - Third, ISDS exacerbates the disproportionate power of investors relative to other domestic constituents. Legal systems outside of the ISDS context provide very little room for citizens or entities to take governments to task in any meaningful, consequential way for environmental *inaction*. Theory and research suggest that the regulatory state already tends to sit in a rather constant state of chill (especially when looking at the extent of action against well-resourced and financed groups). [21] ISDS reinforces that stagnation, enabling greater pushback against any movement in the direction of environmental protection, particularly when that movement would run counter to powerful vested interests.

13 - Fourth, ISDS can make it legally impossible to maintain the challenged measure. While not commonly done, tribunals can and have used powers of injunctive relief to order governments to do, or not do, certain things. They have ordered governments, for instance, not to take administrative enforcement actions in response to investor violations of domestic law, [22] and have ordered governments to nullify the effects of court decisions, including decisions awarding plaintiffs money as compensation for alleged environmental harms. [23] Additionally, private individuals and government entities in the host state may be able to pursue domestic actions to cause the removal of measures ISDS tribunals have deemed to violate the treaty. [24]

14 - Fifth, and relatedly, ISDS cases have norm-shifting and norm-creating effects. Indeed, « the debate over the extent to which the provisions of international trade and investment agreements can 'chill' domestic policy--including climate policy--seems strangely detached from more general assumptions about the normative force of international law. » [25] The very purpose of international treaties is to reduce domestic policy space, and ISDS decisions have largely failed to recognize or clarify governments' retained powers to adopt environmental (or other public interest measures) in the interest of their populations. To the contrary, decisions have expanded key dimensions of the scope of investor protections over time ; [26] holding that investors are able to enforce expectations that are invalid and nonexistent under domestic law ; [27] limiting the polluter pays principle ; [28] concluding that environmental or similar exceptions only apply

17. *See*, e.g., Congressional Research Service, 'Government Contract Bid Protests : Analysis of Legal Processes and Recent Developments,' (2018) (discussing the potential impact that litigation can have on agency action and public funding) ; on regulatory chill, *see*, K. Tienhaara, 'Regulatory Chill in a Warming World : The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) *7 Transnational Environmental Law* 2 : 229-250 ; J. Brown, 'International Investment Agreements : Regulatory Chill in the Face of Litigious Heat ?' (2013) *3 Western Journal of Legal Studies* 1 ; G. Van Harten and D. N. Scott, 'Investment Treaties and Internal Vetting of Regulatory Proposals : A Case Study from Canada,' (2016) *7 Journal of International Dispute Settlement* 1 : 92-116.
18. E. M. Hafner-Burton, S. Puig, and D. G. Victor, 'Against Secrecy : The Social Cost of International Dispute Settlement,' (2017) *45 Yale Journal of International Law* 279.
19. This latter type of « chill » – e.g., the issuance of a permit or permit terms coveted by an investor irrespective of the degree of compliance with environmental law or policy – is not captured by Berge and Berger's assessment of « systemic » regulatory chill.
20. If, for instance, an investor challenges one new environmental measure as applied to its project, and the tribunal orders the government pay the costs of that measure, other investors can bring follow-on suits similarly seeking compensation.
21. *See*, e.g., *See* generally R. E. Barkow, 'Insulating Agencies : Avoiding Capture Through Institutional Design,' (2010) 89 Texas Law Review 15, 26-64 ; N. Bagley & R. L. Revesz, 'Centralized Oversight of the Regulatory State,' (2006) 106 Columbia Law Review 1260, 1287-90 ; R. A. Kagan, 'Editor's Introduction : Understanding Regulatory Enforcement,' (1989) 11 Law and Policy 89.
22. *See*, e.g., *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, September 12, 2014, paras. 434-35.
23. *Chevron v. Ecuador*, UNCITRAL, PCA Case No. 2009-23, Second Partial Award on Track II, August 30, 2018 (reiterating and reconfirming orders to remove the enforceability and prevent enforcement of the « Lago Agrio » award).
24. Some contend that ISDS decisions do not actually interfere with regulatory prerogatives as they simply require that compensation be paid for allegedly offending measures, not that such measures be removed. But that argument ignores both the fact that tribunals have in fact ordered the removal of challenged measures, and that domestic actors can also potentially use the outcomes of ISDS decisions to cause the removal of measures deemed inconsistent with the IIA. As Porter and Gallagher explain :
« The assertion that trade and investment rules cannot modify domestic law appears to be based on an inaccurate assumption that these rules lack domestic legal effect. The domestic status of international law is usually discussed in the context of the distinction between the »monist« approach, which treats international law as part of the same legal system as domestic law, and the »dualist« approach, which treats it as a distinct legal system. »
M. Porterfield, et al., 'Assessing the Climate Impacts of US Trade Agreements' (2017) *7 Michigan Journal of Environmental and Administrative Law* 51, 66.
In the US, for instance, which contains features of monism and dualism, « implementing legislation for U.S. trade agreements typically provides that *federal law* may not be challenged in federal court on the grounds that it is inconsistent with a provision of a trade agreement. In contrast, the federal government may seek judgments in federal court declaring that *state or local laws*--including climate measures--are preempted by a trade or investment rule. » Id. at 73-74. This means that if a decision was rendered by an ISDS tribunal finding a local measure to breach an IIA, the federal government could sue domestically for the removal of that measure based on its inconsistency with the treaty.
25. Id. at 75.
26. *Bilcon v. Canada*, PCA Case No. 2009-04, Award, March 17, 2015, paras 435, 438.
27. *See*, e.g., *Tethyan Copper v. Pakistan*, Case No. ARB/12/1 (ICSID. 2012) ; *see* also L. Johnson, 'A Fundamental Shift in Power : Permitting International Investors to Convert Their Economic Expectations into Rights' (2018) Discourse.
28. *Burlington v. Ecuador*, Case No. ARB/08/05 (ICSID. 2008), Interim Decision on the Environmental Counterclaim, August 11, 2015, paras. 356-57. The tribunal in this case rejected Ecuador's argument that a strict liability regime applied to govern responsibility for pollution during the investor's oil operations.

if the government was acting to resolve a problem created by the investor's wrongful conduct ; [29] and discounting the relevance of local concerns and legal complaints about environmental or livelihood related risks of projects when determining whether projects would have or should have gone ahead. [30] More broadly, one cannot find an example of a tribunal rejecting a claim against an environmental measure on the ground that such claims are facially meritless and outside of what the treaties were established to do.

15 - These complex and often non-transparent ways in which actual or threatened ISDS cases, or even the risk of such cases, impact on decision making and outcomes, all contribute to the systemic 'chill' that IIAs and ISDS have on environmental action. Literature and available evidence likely underestimate the extent of such regulatory chill. [31] Indeed, as is often noted, chill is difficult to document, [32] particularly but not only because of the confidentiality of informal or even formal settlements, the extreme difficulty of measuring *inaction* or shifts in power dynamics and norms over time, and the effects those have on different areas of policy.

A. - Implications for Climate Action

16 - The international scientific community's assessment that the world needs to strand 80% of proven fossil fuel reserves and transition to zero-carbon energy systems [33] in order to avoid the most disastrous consequences of global warming has enormous implications for global investments. While trillions of dollars of new investments will be required to meet growing demands for clean energy, significant existing investments in fossil fuel extraction, transmission, and processing will have to be urgently phased out. In line with goals and commitments agreed by the international community, individual countries are increasingly adopting a range of policy tools to shift energy generation and transmission, including phasing out coal-fired power plants, adopting mechanisms like carbon-pricing schemes, or employing other regulatory tools, such as fuel efficiency standards, methane leakage, and emissions controls. [34] Additional measures will be necessary, including the revocation or modification of permits for exploration for, extraction of, and power generation from fossil fuel resources. [35]

17 - Each of these measures will impact the profitability (and in some cases, viability) of investments related to carbon-intensive energy, the types of economic impacts that have triggered ISDS claims. Measures to mitigate climate change that are vulnerable to being challenged through ISDS claims include, but are certainly not limited to, strengthening performance standards and emissions limits, the imposition of carbon taxes, energy source phase-outs, zone restrictions limiting future development, and the denial of permits for fossil fuel development or use. [36]

18 - Indeed, we have already started seeing the first cases. In 2015, following years of delay, the United States government rejected TransCanada's construction permit to build the Keystone XL Pipeline. Obama announced that the pipeline would undercut efforts on the part of the government to make the United States a leader in climate action. TransCanada, in its notice of arbitration, likened activist opposition (largely from indigenous groups) as a « litmus test » for politicians and accused Obama of rejecting the project simply to prove his « environmental credentials ». [37] In its $15 billion ISDS claim against the United States under the North American Free Trade Agreement (NAFTA), the company alleged it had borne substantial expenses related to the project, and sought compensation for future lost profits it allegedly expected to earn from the development and operation of new fossil fuel infrastructure. [38] In addition to claiming that the government's decision violated the treaty's fair and equitable treatment provision and wrongfully expropriated the investor's investment, TransCanada also claimed discrimination against its particular investment project by the government, due to the fact that no application for a Presidential permit for cross-border pipelines had ever been previously rejected. [39] Ultimately, the case was withdrawn by TransCanada after President Trump was elected and approved the resubmitted permit application. [40]

19 - In 2015, the new provincial government of Alberta, Canada announced that it would phase out its coal-fired power

29. *Bear Creek v*. Peru, ICSID Case No. ARB/14/21, Award, paras 410-412, 475 (discussing the role of investor fault in addressing the « character » of the measure for the purpose of determining whether an expropriation had occurred, and for the applicability of the treaty's general exceptions clause). Under the tribunal's reasoning, the exception would arguably not apply if the government were addressing a problem, such as climate change, that exists irrespective of the investor's legal « fault ».
30. *See*, e.g., discussion of *Copper Mesa v. Ecuador*, PCA Case No. 2012-02, and *Bilcon v. Canada*, PCA Case No. 2009-04, infra. investor roughly USD 20 million, representing 70% of the costs it allegedly expended in developing the project.
31. The authors of recent research into regulatory « chill » in ISDS find that there is anecdotal evidence of it, but conclude that it is likely not a « systemic » problem. T. Laudal Berge and A. Berger, 'Does investor-state dispute settlement lead to regulatory chill ? Global evidence from environmental regulation' (2019) <https ://www.peio.me/wp-content/uploads/2019/01/PEIO12_Paper_78.pdf> accessed 1 November 2019.
Their data, however, would likely miss many if not most forms of chill, including weakening of regulations or laws from initial proposals through to passage ; non enforcement of measures ; decisions to grant permits that otherwise might not be allowed, or to include terms that would otherwise not be offered, and interpretations of domestic laws in ways that internalize norms of strong investor protections.
32. *Ibid.*. *See* also sources on regulatory chill cited supra, n. 17.
33. J. Leaton et. al., 'Unburnable Carbon 2013 : Wasted capital and stranded assets,' (2013) *Carbon Tracker and Grantham Institute at the London School of Economics and Political Science*.
34. *See* Climate Change Laws of the World, Grantham Research Institute on Climate Change and the Environment, available at : http://www.lse.ac.uk/GranthamInstitute/research-theme/governance-and-legislation/, accessed 10 December 2019.
35. Deep Decarbonization Pathways Project, 'Pathways to deep decarbonization 2015 report,' (2015) SDSN – IDDRI ; M. Gerrard and J. Dernbach, *Legal Pathways to Deep Decarbonization in the United States* (Environmental Law Institute 2019).
36. B. Skardvart Güven and L. Johnson, 'International Investment Agreements : Impacts on Climate Policies in India, China, and Beyond' in K. P. Gallagher and C. Barakatt (eds), *Trade in the Balance : Reconciling Trade and Climate Policy Report of the Working Group on Trade, Investment, and Climate Policy* (Boston University, 2016) ; N. Lobel and M. Fermeglia, 'Investment Protection and Unburnable Carbon : Competing Commitments in International Investment and Climate Governance' (2018) 4 Diritto del Commercio Internazionale.
37. *TransCanada v. United States*, Case No. ARB/16/21 (ICSID. 2016), Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of NAFTA.
38. Ibid.
39. B. Skardvart Güven and L. Johnson, *op. cit.*
40. E. Lou, 'TransCanada's $15 billion U.S. Keystone XL NAFTA suit suspended,' *Reuters* (28 February 2017). Since that date, environmental organizations, indigenous groups and others have filed suit to challenge the new permit. Those challenges met with some success, as the federal court examining the permitting decision's compliance with environmental and administrative laws found flaws in the government's environmental review of the pipeline and the government's failure to adequately justify its decision to reverse course and approve the pipeline in 2017. (*Indigenous Environmental Network v United States Department of State*, CV-17-29-GF-BMM, Order, November 8, 2018). In 2019, President Trump revoked the flawed 2017 permit and issued a new presidential permit designed to fall outside the scope of environmental and administrative law requirements and judicial scrutiny of those matters. *Indigenous Environmental Network v. Trump*, CV 19-28-GF-BMM, Memorandum in Support of Motion by TransCanada Keystone Pipeline LP and TC Energy Corporation to Dismiss Plaintiffs' Complaint Pursuant to Fed. R. Civ. P. Rule 12(b)(1) or 12(b)(6), July 16, 2019).

plants by 2030 under its Climate Leadership Plan. [41] The plan included compensation of $1.4 billion to three companies owning coal-fired plants in connection with their commitment to switch to natural gas, and to waive any claims against the government in connection with investments they had made in coal to feed those plants. In response, Westmoreland, whose mine-mouth operations supplied coal to some of the phased-out operations, but did not itself own or operate coal-fired power generating facilities, alleged that Alberta's compensation of the coal-fired power plants but not of the coal mines themselves breached treaty obligations in the NAFTA to provide fair and equitable treatment. Westmoreland claimed $357 million in damages. [42]

20 - Lama Energy Group also sued Canada, under the Canada-Czech Republic bilateral investment treaty (BIT), [43] alleging that the Government of Alberta was unduly delaying approvals for their oil sands project, in light of the government's environmental concerns. [44] The policies that triggered these actions, however, were subsequently reversed ; after the election of conservative Premier Jason Kenney in June 2019, Lama received regulatory approval for its project despite pushback from First Nations groups who claim the activities will put sacred lands and drinking water at risk. [45]

21 - In all three cases above, subsequent reversals of climate-related policy led to the withdrawal of arbitration by the investor, indicating a discouraging trend in global policymaking. While there is not necessarily a causal chain between the launch of those cases and the government's subsequent change in position, ISDS claims undoubtedly further raise the costs and risks of climate action for governments that do adopt climate measures, and offer those governments that are uninclined to adopt bold climate policies a justification for their inaction.

22 - Mere threats of cases can have similar effects. In the summer of 2017, spurred by the ambition of the 2015 Paris Climate Agreement, French Environment Minister Nicolas Hulot drafted a law that would end fossil fuel extraction on French territory by 2040. The law would ban the renewal of all exploitation permits, and if enacted, would mean only a few projects could have continued to exist after 2030. [46] In reaction to Hulot's new law, Vermilion, a Canadian oil and gas company with numerous extraction sites in France [47], threatened arbitration, alleging that the planned law would violate numerous provisions under the Energy Charter Treaty. [48] By September of the same year, the Government had released a second, drastically weakened draft of the law, now allowing the renewal of oil exploitation permits until 2040. [49] Most recently, in response to the Dutch government's announcement in 2018 that it would shut down all coal-fired power plants by 2030, [50] Uniper, the owner and operator of one of the country's largest power plants, threatened arbitration under the Energy Charter Treaty if the legislation is passed into law, hoping similarly for a policy reversal. [51]

23 - These types of cases, in which investors claim government action should shift focus onto other actors, be less dramatic, broaden compensation, or otherwise change strategy, are very likely to increase in the context of climate change. The scale of policy change required to transition energy systems will undoubtedly create some losers. But ISDS enables covered investors, alone, to contest their losses on a highly-consequential legal plane that can stifle crucial action, or disproportionality shift the cost of action onto others without the same international legal rights. [52]

24 - Through that cost– and risk-shifting, IIAs and ISDS can create moral hazards, as investors may overinvest in projects that either contribute to or are not resilient to global warming, relying on their expectation that they will be compensated if policy changes course and causes a drop in the value of their investments. This certainly includes investments in extraction, transmission and refining of fossil fuels, as there is no room in the remaining carbon budget for any new such projects, but is also true for other investments that are vulnerable to climate-related shocks and impacts. [53] Early movers that invest in clean technologies and reducing exposure to adverse weather events may ironically bear more regulatory and commercial risks and costs than those laggards that only act when forced to by the government, and then sue for costs incurred or losses suffered due to those measures. Even if those claimants ultimately lose, their claims will have imposed additional costs and risks on climate action that targets firms (as opposed to action that is, for instance, paid for by consumers or taxpayers).

25 - Notably, when oil companies have won ISDS cases, tribunals have awarded compensation that assumes decades of future profits from the development and sale of their reserves. [54] By awarding that compensation, tribunals are insulating companies from the risks of future stranding, and are locking the public into paying for oil at artificially inflated market prices that do not take

41. The Government of Alberta, *Climate Leadership Plan – Implementation Plan 2018-19* (June 2018).
42. *Westmoreland v. Canada* (UNCITRAL, 2018).
43. Agreement Between Canada and The Czech Republic for the Promotion and Protection of Investments, 6 May 2009, IC-BT 1157.
44. D. Charlotin, 'Frustrated by Delays in Licensing Process Czech Oilsands Investor Puts Canada on Notice of a Claim Under Bilateral Investment Treaty,' *IA Reporter* (8 April 2019) available at <https ://www.iareporter.com/articles/frustrated-by-delays-in-licensing-process-czech-oilsands-investor-puts-canada-on-notice-of-a-claim-under-bilateral-investment-treaty/> accessed 1 November 2019.
45. The Canadian Press, 'Alberta Oil Sands Project Wins Regulator Approval Despite Indigenous Objections,' *The Globe and Mail* (13 June 2018).
46. Gouvernement of France, *France, the first country to prohibit exploitation of hydrocarbons* (7 September 2019), <https ://www.gouvernement.fr/en/france-the-first-country-to-prohibit-exploitation-of-hydrocarbons> accessed 1 December 2019.
47. Vermilion Energy, *France*, <https ://www.vermilionenergy.com/our-operations/europe/france.cfm> accessed 1 November 2019.
48. Energy Charter Treaty, 2080 UNTS 95 ; 34 ILM 360 (1995).
49. Friends of the Earth France, *« End fossil fuels ? » Decrypting Hulot's Law*, <https ://www.amisdelaterre.org/Mettre-fin-aux-energies-fossiles-Decryptage-de-la-loi-Hulot.html> accessed 1 December 2019.
50. Government of the Netherlands, *Climate Policy*, <https ://www.government.nl/topics/climate-change/climate-policy> accessed 1 December 2019 ; Uniper, *Annual Report 2017 : Financial Results*, 23 <https ://www.uniper.energy/sites/default/files/2018-03/2018-03-08_fy2017_uniper_annual_report_en.pdf>accessed 1 November 2019.
51. E. Van Der Schoot, 'Claim for coal prohibition for State,' *De Telegraf* (5 September 2019).
52. This can be illustrated in myriad ways. There may, for instance, be important debates around who bears the cost for fuel-switching. To what extent is the burden borne by private utility companies ? To what is extent is the burden borne by users ? To what extent is it borne by taxpayers more generally ? A government may determine that equities demand it be borne by private utility companies ; and domestic courts may uphold the legality of such assessment. But investment treaties give those companies – if foreign owned – the unique power to challenge such assessments and shift the burden back to taxpayers or users based, inter alia, on ISDS adjudicators' perspectives of whether the government's determination was « unfair » or « inequitable » to those companies or investors.
53. *See*, e.g., K. Bos and J. Gupta, Stranded Assets and Stranded Resources : Implications for Climate Change Mitigation and Global Sustainable Development 56 Energy Research & Social Science 101215 (2019) (discussing potential for stranding, and challenges and policy implications of providing compensation to owners of stranded fossil fuel-related assets).
54. *See*, e.g., *Perenco v. Ecuador*, Case No. ARB/08/06 (ICSIDE. 2008) Award, September 27, 2019 (not including any reference to climate change or stranding of assets in the discussion of the future price of oil).

into account the externalities and risks associated with extraction and sale of the commodity.

26 - As cities, states and countries continue to adopt policies in line with their international commitments and in response to domestic pressures and climate-related incidents to address the mounting climate crisis, the threat of additional ISDS cases mounts. The risks of ISDS are both that governments will be deterred from taking such critical measures (or will reverse the measures in response to a filed suit) and that governments will provide free risk insurance to investors for fossil-fuel-related investments, distorting investment decisions and incentives and increasing the public costs of climate action.

B. - Implications for Quality of and Access to Water Resources

27 - Treaty protections, as they have been interpreted by investment tribunals, have also allowed investors to challenge governments' prerogative to protect water resources from contamination and ensure that water is accessible and affordable to all. In Romania, Gabriel Resources was developing the Rosia Montana gold and silver mine when conflicts arose surrounding the potential threats the mine posed to nearby water sources. Pressured in part by environmental groups, Romania declined to issue necessary environmental permits to the company for fear of cyanide pollution, particularly given recent memory of the cyanide spill and subsequent environmental disaster in 2000, in which Romania was found by the European Court of Human Rights to be liable by failing to conduct an adequate environmental impact assessment (EIA). [55] Gabriel Resources filed a request for arbitration in 2015, contending that non-issuance of the environmental permit breached treaty protections. [56] As of 2017, they had invested $700 million to finance the project. [57] The company is seeking $4.4 billion in damages from Romania, roughly 2% of Romania's GDP. [58]

28 - On the other side of the Atlantic Ocean, a U.S. company, Lone Pine, which holds permits for petroleum and natural gas exploration in the Utica basin in Canada, claimed $100 million from Canada after Quebec implemented a moratorium on fracking below the St. Lawrence River, in response to concerns about the impacts of fracking and other development activities on the water source. [59] And in Colombia, a series of cases were brought against the country after the Colombian Constitutional Court ordered the prohibition of mining activities in páramos (wetland) regions in 2016, in order to preserve an important source of the country's water supply. As a consequence of this decision, the National Mining Agency reduced the size of several mining companies' concession areas in order to exclude areas located within conservation zones. Eco Oro Minerals Corp., Red Eagle Exploration Limited, and Galway Gold all brought separate cases against Colombia in response. Combined, their claims amount to almost $1 billion. [60]

29 - The case of Indonesia's struggle with several foreign mining companies in 2004 is a well-investigated instance of regulatory chill and its deleterious effects on the environment. Shortly after the end of the dictatorial Suharto government in 1998, the new President enacted a forestry law restricting open-pit mining in certain areas where these activities posed a threat to water supplies. [61] Following the President's announcement, several foreign mining companies made private threats to arbitrate. By the government's assessment, Indonesia could have faced billions of dollars in damages if these suits were brought. Meanwhile, violent clashes between local villages and paramilitary officers guarding a mining site broke out. Two months following the deadly clash, in 2004, the Indonesian president issued an emergency decree that exempted twelve mining companies from the new forestry law. Today, eight of these twelve companies have mined in protected forest areas. The indigenous population has had to endure environmental destruction, including harm to local water resources from mining waste discharge-outcomes the forestry law had set out to prevent. [62]

30 - This is one of many instances where just the threat of arbitration has been enough to turn around new environmental regulation, allowing companies to hold on to advantages won under previous regimes. This is egregious in the context of companies' locking in promises from dictatorial regimes, as with Suharto and also in Libya post-Qaddafi and in Egypt post-Mubarak. [63] However, it is equally problematic in prohibiting the evolution and improvement of water management practices in democratic regimes, given the need for governments to be able to respond to the growing global water crisis, greater contestation over water uses, evolving technologies, and improved knowledge of the value of ecosystem services, among other factors that influence policies.

C. - Implications for Environmental Justice

31 - As described above, ensuring environmental justice requires deliberative policy-making processes and outcomes that ensure equity, informed participation (including but not only of the most marginalized voices), and just representation. ISDS can undermine these democratic and deliberative processes, prevent the informed participation of interested parties, and result in outcomes that dramatically skew the proportional weight of environmental risks and impacts. The following sections describe the impacts of ISDS on aspects of environmental justice.

1° Environmental Impact Assessments and Stakeholder Participation in Them

32 - Environmental impact assessments are widely accepted and relied upon features of government approval processes, used to identify and inform governments and other stakeholders of anticipated environmental impacts from certain proposed projects. [64] The identified and assessed impacts are intended to guide decision making, including the gateway decision of

55. *T?tar v. Romania*, Case No. 67021/01 (ECHR. 2009).
56. *Gabriel Resources v. Romania*, Case No. RB/15/31 (ICSID. 2015).
57. G. Rosia Montana, 'Annual Information Form of Gabriel Resources LTD. For the Year Ended December 31, 2017' (30 April 2018) <http://www.gabrielresources.com/site/documents/AIF_2018_Master_Filing_300418.pdf> accessed 1 November 2019.
58. The World Bank, *The World Bank in Romania*, <https://www.worldbank.org/en/country/romania/overview> accessed 7 August 2019.
59. *Lone Pine v. Canada*, Case No. UNCT/15/2. (ICSID. 2013).
60. *Eco Oro v. Colombia*, Case No. ARB/16/41. (ICSID. 2016) *; Red Eagle v. Colombia*, Case No. ARB/18/12. (ICSID. 2018) *; Galway Gold v. Colombia*, Case No. ARB/18/13. (ICSID. 2018).
61. Act No. 41 of 1999 Dated September 30, 1999 Re Forestry Affairs, <https://www.documentcloud.org/documents/3032117-1999-Forestry-Law.html>.
62. C. Hamby, 'The Secret Threat That Makes Corporations More Powerful Than Countries,' *BuzzFeed News* (30 August 2016). Similarly, after a forestry law was passed in Ghana which imposed a moratorium on mining, the government nonetheless allowed mining activities to continue in protected forests due to ISDS threats from American, Canadian and South African corporations. K. Tienhaara. op. cit.
63. Chris Hamby, *ibid.*
64. EIAs are also increasingly seen as being required under international law, and are included in both the Escazù Agreement and Aarhus Convention. Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazù Agreement) adopted in Escazù, Costa Rica (4 March 2018). Convention on Access to Information, Public Participation in Decision-Making and Access to Justice

whether or not to approve a proposed project and how to shape it.

33 - While domestic institutions have pathways for challenging any determinations made on the basis of an EIA, investors have used ISDS to bypass those domestic processes, including domestic rules and procedures. In some cases, investors have alleged that EIA processes and outcomes have breached more favorable treaty protections ; in others, investors have used ISDS to render legally irrelevant the whole EIA process, securing compensation for their investments in projects irrespective of their fate under the EIA.

34 - *Bilcon v. Canada* [65] is an example of the first type of case. Bilcon, an American mining company, sought to develop a mining and marine terminal project in Canada and was required to obtain various approvals from provincial and federal authorities. As part of the EIA, an expert panel was assembled with the mandate to provide a non-binding opinion on whether or not the project should proceed in light of its potential impacts on the human and natural environment. The panel proposed that the project be rejected in light of its anticipated impacts, including that the project was inconsistent with « core community values. » Taking into account the panel's recommendation, officials in the provincial and federal governments then rejected the project based on their assessments of potential negative impacts on the environment and livelihoods dependent upon it. [66]

35 - Bilcon and its shareholders sued under the NAFTA, taking issue with various aspects and conclusions of the expert panel process, and the governments' subsequent decisions to reject the project. The tribunal ruled in Bilcon's favor, finding fault in particular with the expert panel's approach, which considered the project's consistency with « core community values. » The tribunal ordered Canada to pay $7 million (though the investors had sought hundreds of millions in damages), stating that the « advisory panel's consideration of 'core community values' went beyond the panel's duty to consider impacts on the 'human environment,' » in violation of the NAFTA. [67]

36 - The dissenting arbitrator in the case, Professor Donald McRae, highlighted at least two fundamental implications of the award : first, that investors could bypass domestic remedies in the case of disagreement with environmental review panels, allowing a NAFTA tribunal to decide on the proper application of domestic law, and « importing a damages remedy that is unavailable under Canadian law. » Professor McRae noted that this « is a significant intrusion into domestic jurisdiction and will create a chill on the operation of environmental review panels. » [68] Second, Prof. McRae noted that the « subjugation of human environmental concerns to the scientific and technical feasibility of a project is not only an intrusion into the way an environmental review process is to be conducted, but also an intrusion into the environmental public policy of the state. » [69]

37 - Canada unsuccessfully challenged enforcement of the award in Federal Court ; the presiding judge acknowledged that the decision raises « significant policy concerns, » including « its effects on the ability of NAFTA Parties to regulate environmental matters within their jurisdiction, the ability of NAFTA tribunals to properly assess whether foreign investors have been treated fairly under domestic environmental assessment process, and the potential 'chill' in the environmental assessment process that could result from the majority's decision, » but that the Federal Court had a very limited scope to review the tribunal's determination. [70]

38 - In addition to taking issue with how the expert panel interpreted Canadian law governing environmental impact assessments and the relevance of « core community values », the tribunal also found that Canada improperly discriminated against the claimants by applying stricter scrutiny to the environmental and social impacts of the claimant investors' proposed project than had been applied in separate previous projects. This aspect of the tribunal's decision makes it riskier for governments to strengthen their legal frameworks (and interpretation thereof) over time. Provided a claimant can point to an earlier period or instance when rules, policies, or practices were more lax, and other projects benefitted from more permissive frameworks or approaches, they can claim that they are being discriminated against relative to those earlier projects.

39 - Of course, it may be that the process at issue in *Bilcon* and other domestic EIA processes are flawed. Indeed, while investors may argue EIA processes are too lengthy and burdensome, there is a significant amount of literature finding that EIA processes too commonly fail to adequately assess or manage risks. [71]. Assuming that there are errors in the process, it is important to interrogate the implications of investors' being able to use ISDS to highlight both those errors and secure monetary relief for them.

40 - Notably, ISDS only allows one side – the project proponent – to challenge adverse decisions. When an EIA supports a project, those opposed to the project neither are able to use the ISDS process nor have access to equally powerful tools under other areas of international law to advance their claims. This creates a structural imbalance in favor of project proponents and against other interests opposed to the proposed project, which might be more expansive in scope and impact, and accompanied by fewer mitigation options, than that supported by other stakeholders.

41 - Moreover, the enforcement of treaty protections, as interpreted by investment tribunals, has allowed for a much broader scope of review of EIA processes and outcomes than is available domestically. In domestic jurisdictions, there are generally pre-set rules of procedure or evidence or other statutory rules on

in Environmental Matters (Aarhus Convention) done at Aarhus, Denmark (25 June 1998) art 6.

65. *Clayton/Bilcon v. Canada*, PCA Case No. 2009-04.

66. *Clayton/Bilcon v. Canada*, PCA Case No. 2009-04, Canada's Counter-Memorial on Damages, June 9, 2017, 30-41 ; Award on Damages, January 10, 2019, para. 172

67. *Clayton/Bilcon v. Canada*, PCA Case No. 2009-04 ; In N. Lobel and M. Fermeglia, *op. cit.*, the authors note that in a case with a comparable outcome, *Compania del Desarollo de Santa Elena S.A. v Republic of Costa Rica*, the tribunal found that, « While an expropriation or taking for environmental reasons may be classified as a taking for public purpose, and thus be legitimate, [this] [...] does not affect the nature of the measure or the compensation to be paid for the taking [...]. The international source of the obligation to protect the environment makes no difference. » *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (Case No. ARB/96/1), Award, 17 February 2000, para. 71. This finding holds important implications for future cases where, as was the case in *Clayton/Bilcon v. Canada*, permit denial or revocation on the basis of climate or environmental protection will be challenged.

68. *Ibid.* para. 48.

69. *Ibid.* para. 49.

70. 'Judgement of the Federal Court of Canada,' *2018 FC 436 (Conclusion)* (2018).

71. A. Barker, C. Jones, 'Investment Facilitation and EIS's : A Critique of the Performance of EIA within the Offshore Oil and Gas Sector,' *43 Environmental Impact Assessment Review* 31, 34 (2013) ; J. Li, 'Environmental Impact Assessments in Developing Countries : An Opportunity for Greater Environmental Security,' (2008) USAID and FESS Working Paper No. 4. (discussing environmental impact assessments in Asia) ; B. Anifowose, D. M. Lawler, D. van der Host, and L. Chapman, 'A Systematic Quality Assessment of Environmental Impact Statements in the Oil and Gas Industry,' (2016) *572 Science of the Total Environment* 570 (focusing on environmental impact statements in Nigeria) ; A. Ingelson and C. Nwapi, 'Environmental Impact Assessment Process for Oil and Mining Projects in Nigeria : A Critical Analysis,' (2012) *10 Law, Environment and Development Journal* 35.

the scope of judicial review that are designed to permit scrutiny of EIA decisions, while also pragmatically confining the availability and scope of review as to when, for what, and how long litigation can proceed. But claimants in ISDS cases are not limited by those rules. Thus, although IIAs are often described as providing a last resort for investors, and offering checks only against egregious government conduct, recourse to ISDS actually offers a much more flexible, open-ended and promising avenue for investors than the more consciously circumscribed path available in domestic law.

42 - ISDS also offers investors remedies they would generally not be entitled to under domestic law. In disputes in which investors have contested EIA processes or outcomes, they have been awarded not just the additional costs incurred in participating in, challenging, or redoing the allegedly flawed proceedings. Instead, they have been awarded total sunk costs invested in the project, raising the costs to governments of EIA processes or decisions that investors dislike.

43 - Additionally, when investors have challenged permit denials or other measures rejecting the project even before EIAs had been completed or considered, tribunals have awarded investors the sunk costs in developing or future lost profits anticipated from the project. This is the second type of case referred to above – those which effectively render EIA processes irrelevant – and includes disputes such as *Copper Mesa v. Ecuador*, [72] *Bear Creek v. Peru*, [73] and *Tethyan Copper v. Pakistan*. [74]

44 - More specifically, under domestic processes, until an EIA is approved and relevant domestic stakeholders have either chosen not to exercise or have been unsuccessful in their efforts to challenge the EIA process or decision, projects are not certain to go ahead (and even then, their future is not secure, as other permits and approvals, including those related to water usage and other infrastructure, are often required). If the project does not secure those essential approvals and fend off challenges, the investor may not recover any of the project's development costs, much less future profits. The risks applying for and securing permits and other authorizations are part of the risks of doing business, particularly in highly regulated and controversial industries and activities. Tribunal awards in projects without fully approved EIAs and other permits therefore represent a windfall to the investor and undue burden on the government. They provide the investor funds it was not otherwise entitled to and effectively ignore both the public's power to participate in and challenge EIA approvals, and the outcome determinative role that EIAs are supposed to play.

2° Implications for Domestic Powers to Shape Local Costs and Benefits

45 - A routine dynamic in ISDS is that of a resource-rich (and often, but not always, less developed) country facing claims from foreign investors with interests in resource extraction or exploitation. There are costs and benefits to resource extraction, and to the involvement of foreign investment in these processes. Each state has a right and an obligation to weigh these carefully, also taking into account the rights and interests of their stakeholders to meaningfully participate in relevant decision making. A state and affected individuals and communities should be able to ensure that the domestic public benefits of each project outweigh the public costs before a project is allowed to proceed. Ensuring that investor interests are compatible with the interests and further development of local communities, and enabling meaningful local participation in project-related decision-making, are central aspects of sustainable investment.

46 - In some cases, governments have adopted measures governing extractive industry projects that do not address environmental matters directly, but do so indirectly by trying to ensure that the socio-economic gains from projects warrant the consumption of exhaustible natural resources. Those economic gains can be crucial for providing governments the budgetary resources necessary to effectively monitor and regulate projects, and promoting the economic gains that can drive environmental improvements based on the theory of the environmental Kuznets curve. [75] These types of economic or development-oriented measures, including efforts by local communities to ensure project benefits outweigh environmental costs, have, however, also been subject to ISDS challenges with follow-on implications for environmental protection.

47 - In *Mobil and Murphy v. Canada*, for instance, investors successfully contested government attempts to ensure that extraction of oil in the regions of Labrador and Newfoundland drove long-term development in a low-income region. The tribunal determined that measures requiring that the claimants invest a specified minimum amount in education, training, research, and development (R&D) violated the NAFTA's restrictions on performance requirements. [76]

48 - In the politically contentious claim against South Africa's Black Economic Empowerment (BEE) policies, [77] *Foresti v. South Africa*, a group of European mining investors claimed that BEE requirements breached the protections provided by the Luxembourgish and Italian investment treaties with South Africa. [78] BEE policies obligated the companies, among other things, to meet certain social and development objectives, which the claimants alleged were not economically feasible. These included special programs for Historically Disadvantaged South African employees, such as housing and training.

49 - States' environmental decision making, including and especially related to extractive projects, should also be allowed to change, with evolving environmental standards and norms, democratic processes that reflect changing views of the electorate, and new technological innovations and alternatives. But as described above, IIA provisions can make such domestic policy evolutions exceedingly costly. In 2019, for example, Aura Energy Limited served a notice of dispute against Sweden under the Energy Charter Treaty after the Mining Inspectorate of Sweden, responding to domestic concerns over the environmental impacts of uranium exploitation and in light of the availability

72. *Copper Mesa Mining Corp. v Ecuador*, PCA Case No. 2012-02, Award, March 15, 2016 (awarding sunk costs notwithstanding the lack of an approved EIA).
73. *Bear Creek Mining v. Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017 (awarding sunk costs notwithstanding the lack of an approved EIA).
74. *Tethyan Copper v. Pakistan*, ICSID Case No. ARB/12/1, Award, July 12, 2019 (awarding roughly USD 4 billion in future lost profits, plus interest, for a project notwithstanding the lack of approved EIAs).
75. The validity of the environmental Kuznets curve, and whether and when it accurately describes or predicts environmental protection is a matter of continued study and debate.
76. *Mobil and Murphy v. Canada (I)*, Case No. ARB(AF)/07/04 (ICSID. 2007).
77. BEE policies are for the benefit of Historically Disadvantaged South Africans, as remedial measures responding to the effects of discrimination of the apartheid era. through socio-economic strategies such as facilitating ownership and management of enterprises and investment in black-owned or managed enterprises. B-BBEE Commission, 'Broad-Based Black Economic Empowerment Act,' (2016) <https ://www.bbbeecommission.co.za/wp-content/uploads/2016/09/Consolidated-B-BBEE-Act-2013.pdf> accessed 20 November 2019.
78. Accord entre l'Union économique belgo-luxembourgeoise et la République d'Afrique du Sud concernant l'encouragement et la protection réciproques des investissements, signed 14 August 1998 ; Agreement Between the Government of the Republic of South Africa and the Government of the Italian Republic on the Promotion and Protection of Investments, signed 6 September 1997.

of alternative sources of energy, announced in 2018 that companies would no longer be able to apply for exploration or exploitation permits for uranium mining. [79] In its notice, Aura stated that protecting investors from the impacts of this sort of rule-making is an understood purpose of the Energy Charter Treaty : « the ECT provides a level playing field of rules to be observed by all participating governments, thereby mitigating risks associated with energy-related investment and trade. » [80] Particularly in light of the global energy transition, in which states have important choices– and changes– to make with respect to where they source their energy, the implications of investor protections blocking such domestic choices would be massive.

3° Implications for Relative Voice and Power under the Law

50 - The extraordinary rights that ISDS confers on investors come at an even greater cost to the rights of other stakeholders, including domestic citizens that may be adversely impacted by the investments and that seek to have a meaningful voice in shaping whether and on what terms projects proceed. A number of the cases referred to above highlight these issues, including *Bilcon*, *KCA*, and *Kingsgate*. Another relevant case is *Copper Mesa v. Ecuador*. [81]

51 - Copper Mesa Mining Corporation's exploration concession in the Junín region of Ecuador faced great opposition from the community due to the environmental concerns surrounding potential mining activities, doubts about the quality of information being provided about the risks, and questions about the availability of meaningful opportunities to identify and mitigate risks to the environment and livelihoods dependent upon it.

52 - When, in the mid-2000s, Copper Mesa acquired its interest in the concession, concerns about mining in the region were already heightened. In the 1990s, another investor had tried to develop the project. Tensions had escalated between that investor and local communities after an environmental assessment that anticipated severe effects was made public. A landowner opposing the project was shot, and the investor abandoned the project. Citizens pursued a case before the World Bank Inspection Panel, successfully alleging that the project had violated the World Bank's internal guidelines on environmental assessments and community consultations. Following these events, domestic actors worked to pass legislation and constitutional reforms aiming to better protect the environment in the region from future extractive projects. Nevertheless, and against that background, Copper Mesa secured a new exploration permit to try again to develop the project.

53 - Rather than soothing lingering tensions and concerns over the project, Copper Mesa inflamed them. An eventual ISDS tribunal recognized and condemned the « reckless escalation of violence which [Copper Mesa] (by itself and by its contractors and sub-contractors) had introduced into the Junín area..., particularly with the employment of organised armed men in uniform using tear gas canisters and firing weapons at local villagers and officials. » [82] The tribunal further found that these corporate efforts were part of « premeditated, disguised and well-funded plans [by the company] to take the law into its own hands » [83] and opined that it « was miraculous that no-one had been killed during one or more of these violent incidents. » [84] The company, by its actions, had acquired « a malign reputation for intimidation, threats, deception, mendacity, and violence amongst members of the local communities. » [85]

54 - In response to the escalating conflict at the mine site exacerbated by the company, the government successfully brokered a deal among the government, company and local communities. But after the company failed to abide by the agreement, tensions again rose, and community members blocked access to the project. As the conflict became more acute, in April 2008, Ecuador passed a law permitting the revocation of mining concessions falling into certain categories, including those without environmental impact assessments and those that had been pursued without a prior referendum process. Several months later, in October 2008, Ecuador revoked Copper Mesa's concession, citing Copper Mesa's failure to consult the community. [86]

55 - From Copper Mesa's entry into the country through Ecuador's revocation of the permit, local governments, communities, and other entities had pursued series of resolutions, declarations, and legal actions indicating concerns about or opposition to the project. In 2005, a local mayor filed an action to nullify the concessions for lack of consultation. In 2005, an Ecuadorian environmental organization and other non-governmental organizations filed a complaint under the OECD's National Contact Point (NCP) process ; in 2006, the relevant environment agency deemed the company's environmental impact assessment inadmissible ; in 2006 and 2007, local communities requested police protection from pro-mining-related abuses ; in 2007, communities participated in government-coordinated negotiations to find a peaceful solution to the conflict ; and in 2009, community members brought a case in Canadian courts to seek remedies against Copper Mesa, two of the company's directors, and the Toronto Stock Exchange for harms caused by Copper Mesa in Ecuador.

56 - Various legal and other barriers precluded lasting or meaningful relief to these community claimants. For example, doctrines limiting corporate and shareholder liability and establishing the separateness of corporate forms doomed the Canadian case. As the court said :

« The threats and assaults alleged by the plaintiffs are serious wrongs. Nothing in these reasons should be taken as undermining the plaintiffs' rights to seek appropriate redress for those wrongs, assuming that they are proven. But that redress must be sought against proper parties, based on properly pleaded and sustainable causes of action. The claims at issue in these proceedings do not fall in that category. » [87]

57 - Ultimately, local communities were only able to trigger a national government reaction when they protested and physically blocked roads. It was that action that the tribunal said the government should have quashed, rather than giving « legal

79. Aura Energy Limited, 'Aura Energy Lodges Compensation Claim with Swedish Government for Loss of Häggån Uranium Project,' *London Stock Exchange* (8 November 2018), <https ://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/AURA/14299873.html> accessed 1 November 2019 ; Mining Inspectorate of Sweden, 'Uranium is removed as a concession mineral in the Minerals Act,' (9 August 2018), <https ://www.sgu.se/en/mining-inspectorate/about-the-mining-inspectorate/news/2018/august/uranium-is-removed-as-a-concession-mineral-in-the-minerals-actny-sida/> accessed 1 November 2019.
80. Aura Energy Limited, 'Aura Energy Lodges Compensation Claim with Swedish Government for Loss of Häggån Uranium Project,' *London Stock Exchange* (8 November 2018), <https ://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/AURA/14299873.html> accessed 1 November 2019.
81. *Copper Mesa Mining Corp. v Ecuador*, PCA Case No. 2012-02, Award, March 15, 2016.
82. *Copper Mesa*, Award, para 4.265.
83. *Copper Mesa*, Award, para. 6.99.
84. *Copper Mesa*, Award, para 4.265.
85. Ibid.
86. *Copper Mesa*, Award, paras 1.110-1.111.
87. *Piedra v. Copper Mesa Mining Corp*. 2011 ONCA 191 (Court of Appeal for Ontario, March 11, 2011).

force to the physical blockade. » [88] According to the tribunal, which sided for the investor in its claims that the government violated the treaty's fair and equitable treatment and expropriation provisions, « [i]t's of course difficult to say now what [Ecuador] should have done to resolve all the claimants' difficulties and still more so whether anything it could have done would have changed the claimants' position for the better. Plainly the Government of Quito could hardly have declared war on its own people. Yet in the Tribunal's view, it could not do nothing. » [89] Ecuador was ordered to pay more than $19 million in damages to the company. [90]

58 - Some commentators noted favorably that the tribunal « only » awarded the investor sunk costs, suggesting that the ISDS case thereby properly penalized the investor for its misconduct. But this fails to recognize the windfall nature of the award. Rather than penalizing the investor, the award insulates the investor from the risks of loss it otherwise would have borne due to the risks of project failure caused by its own fault and/or to the rights, voice, and power of other stakeholders. This fact pattern and outcome send signals to other potential claimants, counsel, arbitrators, and governments, encouraging other suits aimed at overriding community voices or concerns, changing government decisions, recouping sunk costs, and/or securing compensation for future lost profits even in cases of clear corporate wrongdoing and projects of uncertain fate.

59 - More recently, for instance, in Armenia, local communities protested the Amulsar Gold Project owned by Lydian International, because of concerns over the mine's environmental impacts on nearby lakes, mineral springs and agricultural land, particularly in light of its location in an area with significant seismic activity. [91] Lydian's subsidiaries in Canada and the UK filed arbitration requests against Armenia after the project was temporarily shut-down due to protests. [92] As in so many cases, as described above, the threat of arbitration seemed sufficient to change the government's mind ; in August 2019, Prime Minister Nikol Pashinyan announced that mining could proceed [93], saying that the project posed no environmental threat.

60 - In Guatemala, investors have also subverted the rights of citizens with respect to environmental decision-making. In 2010, the Inter-American Commission on Human Rights (IACHR) recommended that the Guatemalan government close the Marlin mine, operated by the Canadian company Goldcorp, because of the negative impacts the mine posed to the surrounding environment and local indigenous populations. Mayan communities in San Miguel Ixtahuacán contested that they had never consented to the mine. [94] Following the IACHR recommendation, the President agreed to suspend operations, but the mine reopened shortly thereafter. It was later reported that the Guatemalan government had cited the threat of ISDS as a motive behind re-opening the mine, as it did not wish for the investors « to activate the World Bank's [investment court] or to invoke the clauses of the free trade agreement to have access to international arbitration and subsequent claim of damages to the state. » [95] Another mining operation, owned by U.S.-based company KCA, was also met with resistance from impacted indigenous groups in Guatemala. Though its Environmental Impact Assessment was approved by the Ministry of Energy and Mines in 2011, opponents alleged that the operating permit held by the company was not legal as they had failed to carry out community consultations, required under domestic law. [96] The Supreme Court ordered an official suspension of the mine in 2016 for lack of prior consultation with the indigenous population. [97] KCA submitted an official notice of intent to Guatemala in May 2018, after the mining project had been suspended for two years, and filed for arbitration that November. The case is pending. [98]

Conclusion and Recommendations

61 - Notably, many treaties, especially free trade agreements, recognize the importance of bilateral or multilateral cooperation on environmental protection and preservation. Treaties include non-derogation provisions, committing the treaty partners not to lower environmental standards or enforcement in order to attract or retain investment. The NAFTA created a Commission for Environmental Cooperation (CEC) [99] ; the US-Peru FTA includes an annex on forest governance [100] that initially earned the support of environmental groups (though that support has waned in implementation) [101] ; the Japan-Mexico Economic Partnership

88. *Copper Mesa*, Award, 6.83.
89. Ibid.
90. *Copper Mesa v. Ecuador, Award, 10.9*.
91. R. Elliot, 'PM Pashinyan Approves Amulsar Mining,' *The Armenian Weekly* (19 August 2019) <https ://armenianweekly.com/2019/08/19/pm-pashinyan-approves-amulsar-mining/> accessed 6 September 2019.
92. 'Lydian Announces Submission of Notices to Government of Armenia Under Bilateral Investment Protection Treaties,' *Lydian International* (11 March 2019) <https ://www.lydianinternational.co.uk/news/2019-news/452-> accessed 6 September 2019.
93. 'Lydian Announces Armenia's Decision to Allow the Amulsar Project to Proceed,' *Lydian International* (19 August 2019) <https ://www.globenewswire.com/news-release/2019/08/19/1903794/0/en/Lydian-Announces-Armenia-s-Decision-to-Allow-the-Amulsar-Project-to-Proceed.html> accessed 1 November 2019.
94. 'Guatemala Suspends Marlin Mine : Human Rights and Environmental Organizations Applaud the Decision, Urge President Colom's Government to Protect Communities Against Retaliation,' Center for International Environmental Law (24 June 2010), available at <https ://www.ciel.org/news/guatemala-suspends-marlin-mine-human-rights-and-environmental-organizations-applaud-the-decision-urge-president-coloms-government-to-protect-communities-against-retaliation-2/> accessed 15 November 2019.
95. ISDS Platform, *Free trade's chilling effects*, available at <http://isds.bilaterals.org/ ?free-trade-s-chilling-effects&lang=en> accessed 15 November 2019 ; T. Laudal Berge and A. Berger, *op. cit.*
96. 'Notice of Intent Pursuant to the Free Trade Agreement between the Dominican Republic, Central America and the United States,' White & Case LLP (16 May 2018).
97. 'Over 200 Organizations Denounce Multimillion-Dollar Suit Brought by US Mining Firm Against Guatemala,' Center for International Environmental Law (24 April 2019).
98. 'Notice of Intent Pursuant to the Free Trade Agreement between the Domican Republic, Central America and the United States,' White & Case LLP (16 May 2018), available at <https ://www.italaw.com/sites/default/files/case-documents/italaw9713.pdf> accessed 20 November 2019 ; ISDS Platform, *Free trade's chilling effects*, available at <http://isds.bilaterals.org/ ?free-trade-s-chilling-effects&lang=en> accessed 20 November 2019 ; UNCTAD Investment Dispute Settlement Navigator, *Kappes v. Guatemala*, <https ://investmentpolicy.unctad.org/investment-dispute-settlement/cases/917/kappes-v-guatemala> accessed 20 November 2019>.
99. A commission established by Canada, Mexico, and the United States under the North American Agreement for Environmental Cooperation (NAAEC) to support efforts towards addressing environmental concerns, especially those posed by free trade between the three countries. Commission for Environmental Cooperation, *About the CEC*, <http://www.cec.org/about-us/about-cec> accessed 4 September 2019.
100. « United States – Peru Trade Promotion Agreement, » entered into force February 1, 2009, Annex 18.3.4, <https ://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text> accessed 20 November 2019.
101. Environmental Investigation Agency, 'Implementation and Enforcement Failures in the US-Peru Free Trade Agreement (FTA) Allows Illegal Logging Crisis to Continue,' (2015) June 2015 Briefing Paper, <https ://www.illegal-logging.info/sites/files/chlogging/Implementation_and_Enforcement_Failures_in_the_US-Peru_Free_Trade_Agreement_(FTA)_Allows_Illegal_Logging_Crisis_to_Continue.pdf> accessed 20 November 2019 ; 'Peruvian Timber Exporter Excluded from Selling in the United States for Three Years,' (2017) Center for International Environmental Law, <https ://www.ciel.org/news/peruvian-timber-exporter-excluded-selling-united-states-three-years/> accessed 20 November 2019.

Agreement, « recognizing the need for environmental preservation and improvement to promote sound and sustainable development, » commits the parties to a number of cooperative activities. [102] However, these provisions to promote cooperative environmental protection and governance have had disappointing results [103] for a variety of reasons, including the lack of enforcement mechanisms or the will to enforce.

62 - By contrast, the dispute-settlement provision in the investment chapter, which can be enforced directly by investors without their home state involvement, has much sharper teeth, and investors and their counsel have demonstrated their eagerness to bite. In recent years, some of the newer treaties have added in some language in the investment provisions or dispute settlement sections that attempt to safeguard government regulatory space, either specifically for environmental measures or for public interest measures more generally. A survey conducted by the OECD in 2011 found that, of 1,623 sample IIAs, 5.2% include language « [r]eserving policy space for environmental regulation for the entire treaty » and 1.3% do so for specific subject matters. [104] However, these added provisions or exceptions have not proven effective. While examples of tribunal interpretations of police power provisions and environmental exceptions have been limited to date, they have been interpreted so restrictively as to negate their intent. In *Bear Creek v. Peru*, for instance, the tribunal ignored and failed to apply the police powers language expressly contained in the treaty. [105] It also interpreted the treaty's general exceptions clause exceedingly narrowly by, among other things, appearing to require the investor to have been at legal fault for the environmental (or social) problem a measure seeks to address in order for the measure to be covered by the exception. [106] Language emphasizing the importance of corporate social responsibility and the protection of human rights has similarly not seemed to play any role in cabining investor protections when ISDS tribunals are interpreting and applying the treaty. [107] And, even if exceptions or police powers principles apply, tribunals nevertheless may still require compensation for an affected investor. [108]

63 - In large part because of the growing number of cases that have continued to challenge – often successfully through settlement or decision – public interest measures, including but not limited to the environmental measures discussed in this chapter, governments and especially their citizens are starting to question the legitimacy of ISDS and its suitability for 21st century governance challenges. [109]

64 - Investment has a critical role to play in achieving the Sustainable Development Goals (SDGs), including those on environmental protection and restoration and access to justice ; accordingly, investment governance – including through international commitments and cooperation – has an equally critical role in shaping those investment flows and their contributions to and impacts on sustainable development. Enough ISDS cases have illustrated the tremendous risks of putting enforceable investor protections at the heart of investment governance. Global investment governance needs to be redesigned for the 21st century, with people and the planet at the core. [110]

102. Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership (entered into force 1 April 2005) art. 147(1), <https ://www.mofa.go.jp/region/latin/mexico/agreement/agreement.pdf> accessed 6 September 2019.
103. United States Government Accountability Office, *Four Free Trade Agreements GAO Reviewed Have Resulted in Commercial Benefits, but Challenges on Labor and Environment Remain, Report to the Chairman, Committee on Finance, U.S. Senate* (July 2009), <http://www.gao.gov/new.items/d09439.pdf> accessed 6 September 2019.
104. K. Gordon, J. Pohl, Environmental Concerns in International Investment Agreements : A Survey (2011), OECD <https ://www.oecd.org/daf/inv/internationalinvestmentagreements/WP-2011_1.pdf> accessed 20 November 2019.
105. *Bear Creek Mining v. Peru*, Case No. ARB/14/21 (ICSID. 2014). Award, Nov. 30, 2017. Award, Nov. 30, 2017, paras. 368-416 (failing to apply the police powers exception contained in Annex 8.12(1)(c) of the Canada-Peru treaty).
106. *Bear Creek Mining v. Peru*, Case No. ARB/14/21 (ICSID. 2014). Award, Nov. 30, 2017, para. 475
107. *Bear Creek Mining v. Peru*, Case No. ARB/14/21 (ICSID. 2014). Award, Nov. 30, 2017. The award contains no discussion, for instance, of how the treaty's provision on principles of corporate social responsibility impact interpretation or application of the agreement.
108. *Bear Creek Mining v. Peru*, Case No. ARB/14/21 (ICSID. 2014). Award, Nov. 30, 2017, para. 477.
109. For a collection of critiques raised by different state and non-state actors, *see* L. Johnson, et al., 'Clearing the Path : Withdrawal of Consent and Termination As Next Steps for Reforming International Investment Law' (2018), nn. 2-6 < http://ccsi.columbia.edu/files/2018/04/IIA-CCSI-Policy-Paper-FINAL-April-2018.pdf /> accessed December 13, 2019.
110. L. Johnson, L. Sachs and N. Lobel, 'Aligning International Investment Agreements with the SustainableDevelopment Goals,' *Columbia Journal of Transnational Law*, forthcoming 2019.