



**REBALANCING THE SCALES: RECONCILING INVESTOR PROTECTION,
STATE SOVEREIGNTY, AND HUMAN RIGHTS IN INVESTOR- STATE DISPUTE
SETTLEMENT (ISDS)**

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ABSTARCT

Investor-State Dispute Settlement functions as a framework through which foreign investors may bring claims of arbitration against host states, pursuant to an international investment agreement. Its core tension lies in the fact that, although it seeks to promote investor security and facilitate foreign investment, it simultaneously also generates concerns such as its implications on public policy and human rights. ISDS' emphasis on protecting investors often leads to the marginalisation of issues such as environmental protection, indigenous autonomy, and labour standards, resulting in a structural imbalance that can erode state sovereignty and broader public interest. This paper examines the intersection between ISDS and human rights by analysing procedural limitation that restrict significant third-party participation, including the constrained admission of amicus curiae submissions as well as jurisdictional barriers that inhibit arbitral tribunals from addressing human rights claims directly and propagate investors' exploitation. Through a detailed assessment of Methanex v. United States, Veolia v. Egypt, and the Niger Delta dispute, this paper highlights the adverse consequences of investment arbitration on public health, environmental safeguards, and workers' rights. These case studies underscore the pressing need for reform aimed at improving transparency, facilitating third party engagement, and embedding human rights considerations within investment adjudication. Ultimately, the paper argues for a calibrated approach that reconciles investor protection with preservation of public interests, ensuring a more equitable dispute resolution framework that upholds both economic objectives and human rights within the international investment regime.

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INTRODUCTION

Investor State Dispute Settlement (ISDS) is a legal framework that permits an investor from one Contracting State to an international investment treaty to initiate claims against another Contracting State in whose territory the investment has been made and thereby expropriated. This enforcement mechanism ensures that investors can seek substantial monetary compensation where a State exercises its sovereign functions by enacting legislation or policies, conducting investigations into alleged misconduct, suspending or revoking certain licences, enforcing judicial decision, issuing public statements, or undertaking other regulatory actions that might adversely affect and expropriate the investor interests.

In the contemporary global investment landscape, ISDS has emerged as one of the central features of international investment agreements and the governance of foreign direct investment. It enables foreign investors to pursue arbitral remedies and claims against States while providing confidence that arbitral awards will be enforceable across jurisdictions. Although ISDS represents a comparatively recent development in international economic and arbitration law, the growing number of arbitrations invoking ISDS provisions highlights its practical significance and effectiveness in resolving the disputes between investors and host states. Moreover, ISDS is portrayed as a just and functional alternative to domestic judicial systems, particularly in jurisdictions where adjudicatory process may be perceived as vulnerable to bias, corruption or procedural delays.

At the same time, the reliance on private arbitral tribunals within the ISDS framework poses serious challenges to the protection and advancement of human rights within the international investment regime. While these mechanisms are justified as safeguards against arbitrary or discriminatory conduct by host states, they have attracted sustained criticism for their restrictions on regulatory autonomy, undermining public policy objectives, exploitative of Global South and encroaching upon fundamental human rights. This tension exposes the structural imbalance inherent in ISDS and calls into question its compatibility with broader normative commitments to human rights and public interest governance.

NEXUS BETWEEN ISDS AND HUMAN RIGHTS

The preamble to the World Bank's Guidelines on the Treatment of Foreign Direct Investment noted *'that a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and economies of developing countries in particular, in terms of improving the long-term efficiency of the host country through greater competition, transfer of capital, technology, and managerial skills and enhancement of market access and in terms of the expansion of international trade'*.¹ However, some of the aspects that have been allegedly affected by the international investments via ISDS mechanisms in the past or in the near future soon range from the protection of citizens' health, access to energy, water and sanitation, workers' salaries, protection of the environment, and action on climate change to the growth of democracy itself.²

The primary deficiencies within ISDS mechanisms stem from procedural inadequacies that significantly affect the treatment of human rights concerns. These procedural shortcomings hinder the admission of pivotal claims related to human rights violations, as ISDS tribunals are often structured with a primary focus on investor protections rather than on broader public interests. This structural bias creates a legal environment where human rights issues, such as the rights of indigenous communities, environmental protections, and labour rights, are sidelined or insufficiently addressed. Consequently, ISDS mechanisms can perpetuate a dynamic where corporate interests consistently take precedence, weakening the host state's ability to uphold and protect essential public interests. Such inadequacies contribute to this imbalance and are outlined below.

INVESTOR PRIVILEGE AND HUMAN RIGHTS DISPOSSESSION

The structure of the Investor State Dispute Settlement regime reveals a deep and enduring conflict with the foundational principles of human rights law as the system is enshrined through a network of International Investment Agreements that is characterized by a profound asymmetry. It accords binding, enforceable rights exclusively to foreign investors while imposing no reciprocal obligations. Due to this one-sided architecture, it is observed that

¹ McLachlan C, Shore L and Weiniger M, 'World Bank Guidelines on the Treatment of Foreign Direct Investment' [2017] International Investment Arbitration 587.

² The Southern African and East African Trade, Information and Negotiations Institute (SEATINI) and Traidcraft 'International Investment Agreements: An advocacy guide for CSOs' (2015), http://www.tjm.org.uk/documents/reports/Traidcraft-SEATINI_BITS_Advocacy_Guide_Complete-1.pdf, accessed 3 November 2024.

transnational corporate interests are prioritized over a multitude of competing concerns such as the regulatory autonomy of States, environmental integrity, welfare of local communities and the fundamental rights of individuals.³ Such legal insulation to elite investors comes at the expense of domestic stakeholders, particularly marginalized populations that bear the brunt of the socio-environmental burdens of extractive industrial projects.

Despite the growing recognition of environmental and socio-economic rights in international law, human rights remain conspicuously marginalized within the framework of International Investment Agreements. Key rights such as the right to life, health, food, and clean and healthy environment are largely excluded from the scope of protection under IIAs and their enforcement through ISDS mechanisms not as a mere omission but because of a deeper structural bias that privileges commercial certainty over human rights.⁴ This allows economics treaties to function in parallel and often in conflict with human rights obligations. Empirical evidence of this normative disconnect can be seen in the growing number of ISDS claims which directly challenge State actions that aim at fulfilling core human rights commitments.

International standards such as the UN Guiding Principles on Business and Human Rights underscore that States must preserve sufficient domestic policy space to meet human rights obligations, particularly when they are entering into investment agreements or contracts with foreign business entities. Principle 9 of the “Protect, Respect and Remedy” framework affirms that economic cooperation should not erode State sovereignty to legislate for bona fide purposes. However, the legal reality of the same is in reverse as these agreements act as a constraint, disincentivizing public interest regulation.⁵

Further, it has been elucidated in the UN Framework Principles on Human Rights and the Environment that international trade and investment agreements must enhance and not impair the ability of states to fulfill environmental and human rights obligations. However, under the present treaty structures, environmental stewardship is effectively penalized when foreign investors perceive it as a regulatory burden and these contradictions are not merely theoretical

³ Yilmaz Vastardis Anil, ‘Investment Treaty Arbitration as Justice Bubbles’ in *The Oxford Handbook of International Arbitration* (Oxford University Press 2020).

⁴ A/76/238, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, (27 July 2021) <https://docs.un.org/en/A/76/238> accessed 18 December 2025.

⁵ A/HRC/17/31, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (21 March 2011) https://www.ohchr.org/sites/default/files/Documents/Issues/Business/A-HRC-17-31_AEV.pdf accessed 18 December 2025.

but manifest in real-world disputes. A particularly egregious example involves the US-based Doe Run corporation which operated the toxic La Oroya smelter in Peru. Despite the overwhelming evidence of environmental contamination which caused long term health damage to local residents, especially children, Doe Run responded to the tightening of environmental regulations by Peru not with compliance but with two ISDS claims alleging unfair treatment. This inversion of accountability exemplifies how ISDS can function as a shield for corporate impunity rather than dispute resolution. Similarly, Slovakia was subjected to ISDS proceedings for amending its constitution to prohibit bulk water exports, which is a move clearly aimed at protecting the water sovereignty and environmental interests. The mere fact that a constitutional measure, reflecting democratic will and environmental ethics can be challenged by a private investor reveals the extent to which ISDS undermines domestic constitutionalism. Such cases also reveal how biodiversity and ecosystem integrity are placed at risk when ISDS is used to contest regulatory decisions that aim to limit ecological harm.

AMBIGUOUS JURISDICTION IN ADMITTING HUMAN RIGHTS CLAIMS

The ISDS framework confers distinct legal rights upon commercial entities or individuals acting in the capacity of foreign investors. These entitlements are not designed to advance human well being as an end in themselves, but rather function as instrumental guarantee facilitating the cross border movement and protection of capital.⁶ By contrast, international human rights law vests rights in all persons by virtue of their humanity, rendering such rights universal rather than selective in scope. Moreover, the enforcement of human rights norms is predominantly entrusted to domestic legal systems, with national courts bearing primary responsibility for their protection. As a result, ISDS and international human rights law have developed along fundamentally divergent trajectories, grounded in different legal sources, informed by distinct normative principles, and administered through very separate institutional frameworks.⁷ This divergence has produced a series of structural barrier that limit the incorporation and effective operation of human rights' norms within the ISDS regime.

Repeated but largely unsuccessful efforts to advance independent claims or counterclaims based on alleged human rights violations illustrate both, the importance of jurisdictional

⁶ Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016).

⁷ Moshe Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths' in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 97, 107.

questions and the inherent difficulty of integrating human rights into investments' arbitration. Arbitral tribunals derive their authority exclusively from the consent of the parties and may adjudicate only those disputes that fall within the jurisdiction expressly conferred upon the tribunal.⁸ Accordingly, the formulation of dispute settlement clauses in investment treaties, together with the applicable arbitral rules, plays a decisive role in delineating the range of claims that a tribunal is empowered to hear. Equally significant is the manner in which tribunals interpret the scope of their own jurisdiction, as such interpretations largely determine whether and to what extent human rights considerations may be addressed in investment disputes.

Currently, the prevailing practice indicates that the human rights violations only rarely enjoy autonomous standing as independent claims before such tribunals.⁹ Where such claims cannot be pursued directly, affected individuals and communities often face constrained avenues for redress, giving rise to broader adverse implications for accountability and access to justice. This reluctance is primarily rooted in the consensual nature of investment arbitration, under which ISDS tribunals are competent only to hear those disputes that fall squarely within the jurisdictional bounds by consent of the parties.¹⁰ Consequently, both treaty based dispute settlement provisions and arbitral rules assume critical importance in shaping claim admissibility. At the same time, tribunals' approaches to interpreting their jurisdiction have been central to define the marginal role accorded to human rights within investment arbitration.¹¹

Although, human rights claims may not, in principle, be entirely excluded from the purview of arbitral jurisdiction where an investment has tangible human rights implications, tribunals have generally refrained from entertaining such claims directly. Instead, procedural constraints often restrict the ability of affected third parties to participate meaningfully in proceedings, reinforcing an inherent imbalance within the ISDS-driven investment arbitration system. The decision in *Biloune*¹² exemplifies the approach. In the case, tribunal declined to assume

⁸ Eric De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge University Press 2014) 132.

⁹ Yannick Radi, 'Realizing Human Rights in Investment Treaty Arbitration: A Perspective from Within the International Investment Law Toolbox' (2017) 37 *North Carolina Journal of International Law and Commercial Regulation* 1107, 1123.

¹⁰ Nicholas J Diamond and Kabir AN Duggal, 'Adding New Ingredients to an Old Recipe: Do ISDS Reforms and New Investment Treaties Support Human Rights?' (2021) 53 *Case Western Reserve Journal of International Law* 117, 121.

¹¹ *Id.*

¹² *Antoine Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, (1989) 95 ILR 187.

jurisdiction over an independent human rights claim, emphasizing the limits of its competence despite characterizing the dispute resolution clause as broadly-framed. In particular, the tribunal noted that the phrasing “in respect of an approved enterprise” did not reflect the parties’ consent to submit stand alone human rights claims to arbitration.

Jurisdictional limits are equally relevant in the context of counter claims advances by host States. In circumstances where international investment agreements impose minimal or no substantive obligations on investors, counterclaims may offer a potential avenue for alleging investor related human rights violations. Nonetheless, arbitral practice demonstrates a repeated reluctance to admit such counterclaims. Tribunals have frequently declined jurisdiction on the grounds of narrowly interpreting dispute resolution clauses as authorizing only investor-initiated claims, or due to the absence of clear consent by the investment to the adjudication of counterclaim.¹³

In situations where the scope of the dispute resolution clause precludes consideration of independent claims or counterclaims, tribunals may still engage with human rights indirectly through the application of relevant law. However, whether human rights are taken into account, and which specific norms, obligations, or instruments are relied upon, ultimately remains within the discretion of the tribunal. This discretionary approach further underscores the fragmented and uncertain position of human rights within this framework of investor disputes.¹⁴

The ISDS system’s restrictions on the admissibility of human rights claims create significant barriers to human rights protection. These limitations affect the ability of individuals and communities to present claims for human rights violations independently within investment arbitration proceedings, leading to several adverse effects. Without independent claims for human rights violations, corporations face fewer consequences for conduct that harms local populations or the environment. Workers alleging exploitative practices, such as forced labour, poor working conditions, or unfair wages, are likely unable to present these claims directly within the ISDS framework. For indigenous groups whose lands and resources are affected by foreign investments, the inability to independently bring claims means that forced displacement, loss of cultural heritage, and restricted access to essential resources may go

¹³ Andrea K Bjorklund, ‘The Role of Counterclaims in Rebalancing Investment Law’ (2013) 17 *Lewis & Clark Law Review* 461, 474.

¹⁴ Monica Fera-Tinta, ‘Like Oil and Water? Human Rights in Investment Arbitration in the Wake of Philip Morris v Uruguay’ (2017) 34 *Journal of International Arbitration* 601, 628.

unaddressed. In cases where foreign investments harm public health, such as exposure to hazardous materials, lack of representation means communities cannot seek remedies within ISDS.

The above discussion explains that the discretion of the investment arbitral tribunals does not require them to give specific reasons for their decision to allow or reject claims in ISDS cases. This is because of the lack of proper rules compelling the arbitral tribunals to provide robust reasons. The process of handling the application provides a lot of discretion to the arbitrators, which in turn results in inconsistency as there is no precedent in the investment disputes. This evidence provides an assertion that the procedural rules need to be reformed for enabling independent claims and counter-claims addressing human rights violations.

ESCALATING THREAT OF ISDS ON CLIMATE GOVERNANCE

The arbitral tribunals can impose massive financial liabilities on the State in the form of multi-dollar billion awards if they are persuaded that the state has violated its treaty obligations with respect to aspects such as fair and equitable treatment or indirect expropriation. This mechanism has been increasingly invoked to resist or reverse environment centric legislations, climate-related policies and regulatory reforms. The denial of oil and gas permits, phase-outs of coal-fired plants, imposition of fracking bans, rejection of large-scale mines and the enactment of laws to protect water resources have triggered ISDS claims by influential extractive and fossil fuel corporations. There has been a dramatic increase in the number of ISDS cases that specifically target environmental protection efforts from merely 12 before 2000 to 37 in the 2000-2010 period and 126 between 2011-2021¹⁵ which reflects a worrying trend of corporations exploiting ISDS to extract damages or deter regulations. The financial stakes are so high in many of the cases such that the states, particularly the developing countries, are forced to either dilute or reverse their quintessential environmental safeguards.

The UNCTAD reports elucidate that more than 127 of the ISDS claims have each sought more than USD 1 billion in damages, thereby weaponizing the investment arbitration as it transforms environmental governance into a fiscal liability and exposes vulnerable states to significant financial risks.¹⁶ A notable example of this is Zeph Investments, a Singapore-based investor

¹⁵ United Nations Conference on Trade and Development, 'Treaty-based Investor-State Dispute Settlement Cases and Climate Action', IIA Issues Note No 4 (September 2022).

¹⁶ United Nations Conference on Trade and Development, *Investment Dispute Settlement Navigator* (UNCTAD online database) <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 18 December 2025.

that filed a USD 200 billion ISDS claim against Australia for refusing to approve a proposed mining project; a claim that significantly exceeds the value of the project. This exemplifies the disproportionate compensation demands which can accompany ISDS claims.¹⁷

A USD 20 billion claim was sought from Canada by a United States based firm for it was denied approval for a liquified natural gas project and the investor claimed a staggering USD 167 in compensation for every USD 1 that was invested showcasing the speculative windfall potential of ISDS litigation.¹⁸ In another high-profile case, TransCanada sought USD 15 billion after the US government rejected the Keystone XL pipeline on environmental grounds underscoring the vulnerability of sovereign climate policies to corporate challenge under investment treaties.¹⁹

Nigeria was subject to a USD 6 billion award which has since escalated due to interest over the failed development of a natural gas processing facility with the dispute being marred by allegations of fraud but nonetheless demonstrates how ISDS can be leveraged even in contentious and opaque circumstances.²⁰ Meanwhile Mexico faced claims of USD 3.5 billion related to its refusal to approve an undersea phosphate mine raising critical questions about the balance between extractive industry interests and marine environmental protection.²¹ The intersection of environmental justice and indigenous rights can be illustrated through the case of Glencore initiating proceedings against Colombia after the government imposed restrictions to protect a vital river used by the indigenous communities to challenge the expansion of one of the largest coal mines in the world.²²

¹⁷ *Letter from Counsel for Zeph Investments addressed to the Minister for Foreign Affairs of Australia* <https://www.italaw.com/sites/default/files/case-documents/italaw170014.pdf> accessed 18 December 2025; Rory Cross, 'What you need to know about Clive Palmer's \$300bn lawsuit against Australia' (University of New South Wales Newsroom, 6 April 2023) <https://newsroom.unsw.edu.au/news/business-law/what-you-need-know-about-clive-palmers-300bn-lawsuit-against-australia> accessed 18 December 2025.

¹⁸ *Ruby River Capital LLC v Canada* (International Centre for Settlement of Investment Disputes (ICSID) Case No ARB/23/5) <https://www.italaw.com/cases/10270> accessed 18 December 2025.

¹⁹ *TC Energy Corporation and TransCanada Pipelines Limited v United States of America* (International Centre for Settlement of Investment Disputes (ICSID) Case No ARB/21/63) <https://www.italaw.com/cases/9339> accessed 18 December 2025; Pete Evans, 'Keystone XL owner TC Energy seeking \$15B from US for costs of cancelling pipeline' CBC News (23 November 2021) <https://newsroom.unsw.edu.au/news/business-law/what-you-need-know-about-clive-palmers-300bn-lawsuit-against-australia> accessed 18 December 2025.

²⁰ William Clowes, 'Nigeria cries foul again over gas company's \$11 billion award' Bloomberg (3 November 2022) <https://www.bloomberg.com/news/articles/2022-11-03/nigeria-cries-foul-again-over-gas-company-s-11-billion-award> accessed 18 December 2025.

²¹ *Odyssey Marine Exploration, Inc v United Mexican States* (International Centre for Settlement of Investment Disputes (ICSID) Case No UNCT/20/1) <https://www.italaw.com/cases/7261> accessed 18 December 2025.

²² *Glencore International A.G. v Republic of Colombia* (International Centre for Settlement of Investment Disputes (ICSID) Case No ARB/21/30) <https://www.italaw.com/cases/9760> accessed 18 December 2025.

A comprehensive empirical analysis of published ISDS awards between 1990 and 2020 illustrates that there is an exponential increase in both the frequency and the scale of monetary damages which are awarded against states. Between 1990 and 1999, only six ISDS awards were issued with the average damages amounting to a relatively modest \$3.8 million which has risen to 51 awards between 2000 and 2009 with the average being \$67.1 million. Post this, the period from 2010 to 2019 witnessed 142 ISDS awards with the average quantum of damages reaching \$246.1 million excluding the \$50 billion awarded in the Yukos Oil cases against the Russian Federation.²³ This signals not only the intensified use of ISDS by corporate actors but also the growing willingness of the arbitral tribunals to entertain and reward claims premised on the loss of expected profits even when the state actions were grounded in public interest obligations such as climate imperatives.

Moreover, the cost of defending these ISDS claims even when successful, imposes a substantial burden on state budgets as the governments approximately spend \$5 million per case in legal fees and associated expenditures.²⁴ For many low and middle-income countries, these costs are prohibitive and they divert critical public resources from sustainable development goals including environmental restoration, health and climate adaptation efforts. Despite the plethora of growing evidence, some states continue to deny or downplay the risk of ISDS liability in the context of environmental regulation. Switzerland, for instance, maintains that “the state is not liable to pay damages for measures taken to combat climate change provided that they are proportionate and non-discriminatory”.²⁵ However, this formalistic view has been contradicted by emerging international practice and empirical data. The OECD has itself acknowledged that even non-discriminatory government policies designed to phase out coal have resulted in ISDS claims or multi-billion-euro payments for the settlement.

According to some estimates, States fulfilling their obligations under Paris Agreement particularly those seeking to phase out fossil fuels may face potential ISDS claims that amount to \$340 billion which is a staggering liability that functions as a de facto penalty on climate

²³ Jonathan Bonnitcha, Malcolm Langford, Jose M. Alvarez-Zarate and Daniel Behn, ‘Damages and ISDS Reform: Between Procedure and Substance’ (2023) 14 *Journal of International Dispute Settlement* 213, (JIDS 14(2) June 2023).

²⁴ Matthew Hodgson, Yarik Kryvoi and Daniel Hrcka, *Empirical Study: Costs, Damages and Duration in Investor-State Arbitration* (British Institute of International and Comparative Law and Allen & Overy, June 2021).

²⁵ David R Boyd, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (UNGA, A/78/168, July 2023) <https://docs.un.org/en/A/78/168> accessed 18 December 2025.

ambition.²⁶ The ramifications of the same is evident through the hesitancy of the States to enact or enforce robust emissions reduction policies, particularly in relation to coal, oil and gas transitions. This surge in claims coincides with a critical juncture for global climate action. Scientific consensus affirms that to keep global warming within the 1.5° C threshold which is an objective central to the Paris Agreement, the global CO₂ emissions must fall by at least 45% by 2030 and reach net zero by 2050.²⁷ Another core objective of the Paris Agreement as articulated under Article 2 (1) (c) is the reorientation of global financial flows towards low greenhouse gas (GHG) emissions and climate-resilient development. ²⁸These targets are fundamentally incompatible with the substantial expansion of coal, oil or gas infrastructure yet, the ISDS mechanisms empower fossil fuel companies to litigate against precisely the kind of policy interventions which would enable those targets to be met. More than 10,000 fossil fuel assets globally remain protected under the ISDS provisions which includes nearly 75% of all foreign-owned coal-fired power plants. ²⁹

This legal entrenchment of fossil fuel investments casts a long shadow over the capacity of States to implement an orderly, timely and just transition from coal and high-emission energy sources. This reveals a critical disjunction between treaty law theory and the reality of ISDS i.e., investment treaties even though ostensibly neutral and procedural often fail to adequately shield states when environmental measures conflict with corporate profit expectations. The doctrine of proportionality is widely cited in investment arbitration yet consistent protection has not been accorded to climate actions. Tribunals frequently interpret indirect expropriation and fair and equitable clauses in a manner that privileges investor certainty over regulatory evolution.

The statistical reality is sobering as more than fifty ISDS claims seeking over \$11 billion in compensation have been filed against Spain alone in response to the efforts of the State to reform subsidies and regulations supporting renewable energy sector. As a response to this,

²⁶ Kyla Tienhaara, Rachel Thrasher, B Alexander Simmons and Kevin P Gallagher, 'Investor-State Disputes Threaten the Global Green Energy Transition' (2022) 376 *Science* 701.

²⁷ Intergovernmental Panel on Climate Change, *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Core Writing Team H Lee and J Romero (eds), IPCC 2023) <https://www.ipcc.ch/report/ar6/syr/> accessed 18 December 2025.

²⁸ *Paris Agreement to the United Nations Framework Convention on Climate Change* (entered into force 4 November 2016) T.I.A.S. No 16-1104 https://unfccc.int/sites/default/files/english_paris_agreement.pdf accessed 18 December 2025.

²⁹ Kyla Tienhaara and Lorenzo Cotula, *Raising the Cost of Climate Action? Investor-State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets* (International Institute for Environment and Development, October 2020) <https://www.iied.org/17660iied> accessed 18 December 2025.

Spain has issued a public statement voicing grave concerns about the disproportionate financial pressure exerted by ISDS claims noting that such a litigation “serves to discourage States from promotion energy transition policies for the fear of being sued by foreign investors”.³⁰ This situation is emblematic of the broader dysfunction of the states being trapped in a system where advancing the collective interest in climate stability exposes them to private liability claims that divert funds and stifle policy innovation.

This tension has been formally acknowledged by the Intergovernmental Panel on Climate Change (IPCC) in its Sixth Assessment Report. The IPCC explicitly recognizes that the International Investment Agreements (IIAs) and in particular the Energy Charter Treaty (ECT) constrain the ability of the States to adopt the level of policy ambition required to effectively address climate change.³¹ The ECT originally intended to ensure energy cooperation and investor protections in post-Cold War Europe has since then become a flashpoint in the conundrum between climate change mitigation and investor rights. It is under the aegis of this treaty that the fossil fuel investors have launched a cascade of ISDS claims against States pursuing green energy transitions.

The prioritization of fossil fuel protections under ISDS mechanisms particularly in the context of ECT has drawn international condemnation due to the growing volume of claims, the scale of compensation sought and the normative clash between environmental sovereignty and investor rights have fueled calls for treaty termination. The United Nations Secretary General has explicitly flagged the Energy Charter Treaty (ECT) as incompatible with contemporary climate objectives and human rights obligations warning of its chilling effect on sustainable policymaking.³² However, despite these warnings the ECT remains legally binding on many signatory states and efforts to modernize or exit the treaty have encountered significant geopolitical and legal obstacles.

This architecture of international investment law which was ostensibly created to protect cross-border investments and promote development has become a mechanism through which

³⁰ David R Boyd, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (UNGA A/78/168, July 2023) <https://undocs.org/A/78/168> accessed 18 December 2025.

³¹ Intergovernmental Panel on Climate Change, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC 2022) <https://www.ipcc.ch/report/ar6/wg3/> accessed 18 December 2025.

³² *Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change* (UNGA A/77/226, July 2022) <https://docs.un.org/en/A/77/226> accessed 18 December 2025.

influential industries entrench their interests against the imperatives of a warming planet. Such an asymmetry is not merely economic but epistemic as ISDS tribunals often lack climate expertise, operate in relative opacity and are structurally more receptive to the quantifiable losses of corporations than to the diffuse, long-term harms of ecological collapse. The convergence of ISDS mechanisms and fossil fuel protections constitutes a profound legal contradiction at the heart of international law for the friction it presents is not merely technical but paradigmatic. It demands a fundamental rethinking of the hierarchy of legal norms governing global investment and environmental governance and sans these structural reforms the states will remain caught in that paradox of being legally bound to mitigate climate change yet financially punished from doing so.

INADEQUACY OF ADMITTING THIRD-PARTY PARTICIPATION (AMICUS CURIAE)

Unlike international commercial arbitration, which primarily concerns disputes between private contractual parties, investor state arbitration directly engages with challenges to governmental measures and regulatory conduct. Consequently, disputes arising under ISDS frameworks extend beyond the immediate interests of the investor and the host State and often implicate broader public concerns.³³ This distinctive feature raises important questions regarding the role of public participation in investment arbitration, particularly given that avenues for such participation remain significantly constrained.

Within the ISDS oriented investment arbitration regime, the concept of amicus curiae has emerged as a limited mechanism through which civil society actors seek to articulate public interest and human rights considerations. Amicus curiae submissions are often regarded as a means for non-disputing parties to highlight the wider societal implications of investment disputes.³⁴ In principle, legal proceedings affecting the rights or interests of third parties should allow for some form of participation by those impacted.³⁵ However, the transplantation of the traditional confidential and non-transparent characteristics of international commercial

³³ Tomoko Ishikawa, 'Third Party Participation in Investment Treaty Arbitration' (2010) 59 *International and Comparative Law Quarterly* 373.

³⁴ Katia Fach Gómez, 'Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest' (2012) 35 *Fordham International Law Journal* 510.

³⁵ Gus Van Harten, Jane Kelsey and David Schneiderman, *Phase 2 of the UNCITRAL ISDS Review: Why 'Other Matters' Really Matter* (Osgoode Hall Law School, Osgoode Digital Commons All Papers 328, 2019).

arbitration into the ISDS context has largely excluded meaningful third party involvement, even where public rights and interests are directly at stake.³⁶

The Methanex case³⁷ represents what is called a “seminal moment” in the evolution of third-party participation in investor state arbitration. Brought under the North American Free Trade Agreement (NAFTA), the dispute arose from a challenge by a Canadian investor to regulatory measures adopted by the Government of California to prohibit the use of certain substances on public health grounds. The arbitral tribunal acknowledged its authority to receive written submissions of amicus curiae from non-disputing parties but declines to extend this authority to granting access to arbitral documents or oral hearings. It held that decisions regarding disclosure of documents rested with the disputing parties rather than the tribunal itself, on the basis that amici, as members of the general public, possessed no entitlement to materials produced during the arbitration. In doing so, the tribunal underscored that the acceptance of amicus curiae submissions was an exercise of tribunal discretion rather than a procedural right vested in third parties.

Investment treaty disputes frequently engage substantial public interests, thereby strengthening the normative case for broader third party participation in arbitral proceedings. Nonetheless, the public interest dimension of such disputes is inadequately addressed through the narrow confines of amicus curiae practice, which is typically restricted to written submissions addressed to the tribunal.³⁸ Meaningful third party participation, by its very virtue, extends beyond the mere filing of written observations and encompasses more substantive forms of engagement in the adjudicatory process.³⁹

The constrained role accorded to amicus curiae in investor-state disputes has far reaching implications. Arbitral decisions often have consequences not only for the host state and the investor, but also for large segments of public whose interests are affected yet remain procedurally excluded. Third party participation in ISDS proceedings is neither a guaranteed

³⁶ G Mahith Vidyasagar, ‘Place of Affected People’s Rights in ISDS Reform Options’ (2023) 17 *NUALS Law Journal* 4.

³⁷ *Methanex Corporation v United States of America* (Final Award on Jurisdiction and Merits, UNCITRAL, 3 August 2005) 44 ILM 1345 <https://www.italaw.com/cases/683> accessed 18 December 2025.

³⁸ Nicolette Butler, ‘Non-Disputing Party Participation in ICSID Disputes: Faux Amici?’ (2019) 66 *Netherlands International Law Review* 143.

³⁹ Lance Bartholomeusz, ‘The Amicus Curiae before International Courts and Tribunals’ (2005) 5 *Non-State Actors and International Law* 209, 211.

right nor an entitlement, but rather a matter left entirely to the discretion of the tribunal.⁴⁰ Even where amicus submissions are permitted, there is no assurance that they will meaningfully influence the tribunal's reasoning or outcome.⁴¹ This procedural limitation directly undermines public interest protection by preventing affected groups, including indigenous communities and worker's organisations, from effectively presenting their concerns before arbitral tribunals, thereby constraining their ability to seek redress.

The current indiscriminate procedural barriers to actual participation by third-party right holders in ISDS arbitration is a key limitation to provide access to remedy for Indigenous Right Holders.⁴² Irrespective of the merit of claims submitted to ISDS arbitration, indigenous groups whose legal rights are directly affected cannot participate as actual parties, retain legal representation, submit pleadings, or present evidence to defend their rights. This exclusion results solely from substantive legal and procedural barriers and further harms Indigenous communities by excluding their participation, fuelling social unrest, enabling ecological destruction of their ancestral lands, and undermining their sovereignty. In addition, since third-party participation is a matter of tribunals' discretion and not a right of the non-disputing parties, many laws for the protection of workers' rights can be threatened, if a foreign investor argues they have a discriminatory effect on their interests.

The impact of such restrictions and discrimination is evident in cases such as the Niger Delta Case⁴³, where a private company initiated proceedings against Nigerian government a seeking to block the enforcement of a judgment entered against the company by a Nigerian Court for extensive environmental pollution and human rights abuses, and Véolia (France) vs. Egypt⁴⁴, where a multinational utility corporation launched a dispute against Egypt, demanding US\$110 million following changes to Egypt's labour laws leading to an increase in minimum wage.

⁴⁰ *United Parcel Service of America Inc v Government of Canada* (ICSID Case No UNCT/02/1) <https://www.italaw.com/cases/1138> accessed 18 December 2025.

⁴¹ Lucas Bastin, 'The Amicus Curiae in Investor-State Arbitration' (2012) 1 *Cambridge Journal of International and Comparative Law* 208, 224.

⁴² Valentine Olusola Kunuji, 'Access to Remedy for Indigenous Right Holders in Relation to Investment-Related Human Rights Abuses – a Critical Search for an Effective Legal Framework' (PhD thesis, University of East Anglia 2022) 143, 145 <https://ueaeprints.uea.ac.uk/91696/1/Valentine%20Kunuji%20-%20PhD%20Thesis%20-%20September%202022.pdf> accessed 18 December 2025.

⁴³ *Shell Petroleum N.V. and The Shell Petroleum Development Company of Nigeria Limited v Federal Republic of Nigeria* (International Centre for Settlement of Investment Disputes (ICSID) Case No ARB/21/7) <https://www.italaw.com/cases/9776> accessed 18 December 2025.

⁴⁴ *Veolia Propreté v Arab Republic of Egypt* (International Centre for Settlement of Investment Disputes (ICSID) Case No ARB/12/15) <https://www.italaw.com/cases/2101> accessed 18 December 2025.

In all these cases, the central dispute directly affects the rights of individuals; however, they are afforded no representation, resulting in a gross violation of their human and legal rights. The foregoing, therefore, warrants a closer examination of the provision relating to third-party participation and how the non-participation is disabling the access to remedy for right-holders. Because Investor-State arbitration disputes often involve issues that touch upon the matters of public policy and therefore the arbitral awards have a significant impact on the welfare of the citizens of the host-State. When a State loses while defending a legitimate public policy, along with the monetary compensation, the cost arbitration will also have to be paid out of the 'public purse'. When such a burden is going to be placed on the people, they must be given adequate representation.

LEGAL ASYMMETRY LEADING TO EFFECT ON SOVEREIGNTY OF STATES

Probably the most long-lasting and commonplace argument for ISDS is that foreign investor protections will attract investment to a country and that it will improve the investment climate, especially if the country has weak national institutions.⁴⁵ However, there exists a deep problem with this argument. Even if it were shown that ISDS regularly attracts investment to countries accepting it, this finding would also reveal just how much the concentration of wealth and mobility of capital have weakened states,⁴⁶ by intensifying competition among them for private investment to such a degree that they have sacrificed principles of equality under the law, democracy, and judicial independence in order to favour multinationals and billionaires.

Despite their prevalence, ISDS mechanisms have long been criticised for stymying the ability of governments to make rules that benefit the wider public.⁴⁷ Foreign investors have weaponized ISDS mechanisms by using them to challenge initiatives taken by states which are intended to strengthen and implement climate and environmental laws, regulations, standards, and policies.⁴⁸ If a foreign investor invests in another country (host state) and the host state has taken some step that reduces the value of their investment or threatens the investment, ISDS allows the investor to sue the host state through arbitration rather than the host state's domestic

⁴⁵ Ibrahim F I Shihata, 'The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA' (1986) 1 *American University International Law Review* 97.

⁴⁶ Beth A Simmons, 'Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment' (2014) 66 *World Politics* 12.

⁴⁷ Isabella Kaminski, 'UN investigates impact of investment treaties on human rights' *The Lancet Planetary Health* 7(10) e794–e796 (2023) [https://doi.org/10.1016/S2542-5196\(23\)00214-0](https://doi.org/10.1016/S2542-5196(23)00214-0) accessed 4 November 2024.

⁴⁸ David R Boyd (Special Rapporteur on Human Rights and the Environment), *Paying Polluters: the Catastrophic Consequences of Investor-State Dispute Settlement for Climate and Environment Action and Human Rights* (UNGA A/78/168, July 2023) <https://docs.un.org/en/A/78/168> accessed 18 December 2025.

courts.⁴⁹ Investors are not required to exhaust available domestic remedies through the host state's legal system.⁵⁰ Further, States and communities who are adversely affected by investor activity cannot bring claims against the foreign investor. While states may bring counterclaims, this only occurs in limited circumstances. Foreign investors are the controlling forces in bringing ISDS proceedings, led by mining, fossil fuel, and other extractive industry corporations.

While large foreign investment companies are able to shoulder the burden of a costly arbitration, the cases come at a high cost for states. Smaller nations, low-income states, and developing economies can lack the financial resources and structural capabilities to defend against the claims. Leading the pack in the filing of ISDS claims is the profitable fossil fuel industry, which comes after states and governments who dare to implement domestic legislation to address climate crises in support of their commitments under international treaties. In cases where the foreign investor prevails over the host state, the enormous financial damages imposed on the state allow environmentally destructive activities to continue, and prompts the rolling-back of crucial domestic rules addressing pollution, loss of biodiversity, and climate change, resulting in weakened climate action, disproportionately affecting poorer communities and vulnerable populations who are already more susceptible to climate impacts like extreme weather, floods, and food insecurity. By stifling climate initiatives, ISDS mechanisms indirectly but significantly impact the right to health, safety, and livelihood.

Additionally, investment projects in sectors like mining, agriculture, and energy often require land acquisition. ISDS pressures can lead governments to prioritize investor interests over the rights of local and indigenous communities, resulting in forced displacement without adequate consultation, compensation, or resettlement options. This violates land rights, cultural rights, and, ultimately, the right to livelihood for those dependent on the land for survival. The financial strain imposed by ISDS claims can divert limited state resources away from essential social services like healthcare, education, and infrastructure. This can worsen poverty, limit access to essential services, and further marginalize low-income communities. The deprivation

⁴⁹ Isabella Kaminski, 'UN Investigates Impact of Investment Treaties on Human Rights' (2023) 7 *The Lancet Planetary Health* e794, e794–96 [https://doi.org/10.1016/S2542-5196\(23\)00214-0](https://doi.org/10.1016/S2542-5196(23)00214-0) accessed 4 November 2024.

⁵⁰ Johanna Leffler, 'Investor-State Dispute Settlement (ISDS) Treaty Mechanisms as a Threat to Climate and Sustainable Development Goals' (2024) *Human Rights Brief* Vol 27 Iss 2 Art 3 <https://digitalcommons.wcl.american.edu/hrbrief/vol27/iss2/3/> accessed 18 December 2025.

of these services compromise individuals' economic, social, and cultural rights and exacerbates inequality.

Investment treaty provisions on ISDS may also cause a 'regulatory chill', which means that states may be reluctant to adopt certain advanced policies due to the threat of being sued. For example, certain health, environmental, and labour policies are likely to be rolled back or weakened in order to circumvent ISDS-related controversies. In the case of *Philip Morris v. Australia*⁵¹ and *Philip Morris v. Uruguay*⁵², Australia and Uruguay implemented plain packaging laws for tobacco products to reduce tobacco use, mandating standardized packaging with health warnings and no logos. Philip Morris, a major tobacco company, filed ISDS claims against both countries under their respective BITs, alleging that these laws constituted to an expropriation of its trademark rights and violated fair and equitable treatment. While Australia's case was dismissed on jurisdictional grounds, Uruguay faced a long legal battle but ultimately won. However, the high litigation costs sent a warning to other countries considering similar regulations.

Hence, ISDS poses a threat to the universal human right to a clean, healthy, and sustainable environment through its interference with state policies seeking to protect the right to a healthy environment, to water, to health, and more. States can fail to enact regulations that make meaningful contributions towards their international commitments, ultimately negatively impacting the local resources and quality of life, while foreign investor continue to profit off of natural resources at the expense of the human right to a clean, healthy, and sustainable environment.

CONCLUSION

In conclusion, the ISDS system, while designed to protect foreign investment, presents profound challenges to the protection of human rights, environmental standards, and state sovereignty. In Investor-State arbitration disputes, "investor rights intersect human rights, but the arbitration mechanism did not reflect the importance of the latter and the fact that the protection given to investors would detract from human rights of individuals and communities

⁵¹ *Philip Morris Asia Limited v The Commonwealth of Australia* (UNCITRAL, PCA Case No 2012-12) <https://www.italaw.com/cases/851> accessed 18 December 2025.

⁵² *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* (International Centre for Settlement of Investment Disputes (ICSID) Case No ARB/10/7) <https://www.italaw.com/cases/460> accessed 18 December 2025.

affected by the way the investors operated.”⁵³ The restrictive mechanisms, such as limited third-party participation and ambiguous jurisdiction over human rights claims, prevent affected communities and individuals from accessing justice and remedy, thus perpetuating imbalances that undermine equitable growth and democratic principles. Moreover, the ‘regulatory’ chill effect discourages states from enacting policies in critical areas like environmental protection and labour rights due to the threat of costly arbitration, further eroding state sovereignty and undermining international commitments to human rights and sustainability.

Ultimately, ISDS is about increasing corporate power over our economies and limiting the ability of governments to regulate corporate behaviour. To address these challenges, the ISDS framework requires substantive reform to balance investor protections with the obligations of states to safeguard the human rights and welfare of their citizens, ultimately promoting a more equitable and sustainable global investment environment.

⁵³ Lorenzo Pellegrini, Murat Arsel, Martí Orta-Martínez and Carlos F Mena, ‘International Investment Agreements, Human Rights, and Environmental Justice: The Texaco/Chevron Case From the Ecuadorian Amazon’ (2020) 23 *Journal of International Economic Law* 455, 461.