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INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) TREATY MECHANISMS AS A THREAT TO CLIMATE AND SUSTAINABLE DEVELOPMENT GOALS

by *Johanna Leffler**

I. Introduction

Since the industrial revolution, the Earth's global temperature has risen by almost 1.1 degrees Celsius (2 degrees Fahrenheit).¹ Warmer temperatures have worsened air and water quality, lengthened the duration of heat waves, and increased the frequency of extreme weather events. This has led to droughts, health crises, destruction of property, and the loss of ecosystems and biodiversity.² Climate change is threatening the human right to a clean, healthy, and sustainable environment, which was recognized as a universal right by the United Nations ("UN") General Assembly in 2022.³ World leaders and international climate experts have stressed the dire state of the global tem-

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1 Rebecca Lindsey & Luann Dahlman, *Climate Change: Global Temperature*, NOAA (Jan. 18, 2024), <https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature>.

2 EPA, *Climate Change Science: Impacts of Climate Change* (last visited Mar. 3, 2024), <https://www.epa.gov/climate-change-science/impacts-climate-change#:~:text=For%20example%2C%20many%20places%20have.and%20sea%20level%20is%20rising>.

3 G.A. Res. 76/300, The human right to a clean, healthy and sustainable environment (July 28, 2022) [hereinafter G.A. Res. 76/300].

perature rise, emphasizing that it must be limited to 1.5 degrees Celsius.⁴ The Paris Agreement was adopted at the UN Climate Change Conference (COP21) in 2015 with this goal in mind and is an international legally binding treaty seeking to limit the temperature increase to "1.5°C above pre-industrial levels."⁵ Unless states move away from fossil fuels and work to reform their economies, once this threshold is passed, the Earth may reach the point of catastrophic warming.⁶ Meanwhile, energy giants like BP are beginning to scale back on their climate initiatives, and even deepen their investments in oil and gas.⁷ Investor-State Dispute Settlement ("ISDS") treaty mechanisms threaten the human right to a clean, healthy, and sustainable environment by crippling states' abilities to enact meaningful climate change and sustainable development policies, thus hindering their ability to meet obligations under the Paris Agreement. Three recent international arbitration cases illustrate how efforts by states to enact or enforce environmental and sustainable-friendly policies in support of human rights and climate change can result in facing multi-million dollar suits for which it may lack the financial resources to defend. These cases include *Zeph Investments v. Australia*, *Glencore v. Colombia*, and *RWE v. The Netherlands*.

II. Background

ISDS is a procedural treaty mechanism that appears in thousands of international investment agreements ("IIA"), mostly in Bilateral Investment Treaties ("BIT").⁸ It is an arbitrator-based system which allows

4 Sarah Kaplan, *World is on Brink of Catastrophic Warming, U.N. Climate Change Report Says*, THE WASH. POST (Mar. 20, 2023), <https://www.washingtonpost.com/climate-environment/2023/03/20/climate-change-ipcc-report-15/> [hereinafter Kaplan].

5 U.N. Framework Convention on Climate Change ("UNFCCC"), *The Paris Agreement* (last visited Mar. 3, 2024), [https://unfccc.int/process-and-meetings/the-paris-agreement#:~:text=To%20limit%20global%20warming%20to%201.5%C2%B-0C%2C%20greenhouse%20gas.and%20decline%2043%25%20by%202030;see%20also%20Paris%20Agreement%20to%20the%20United%20Nations%20Framework%20Convention%20on%20Climate%20Change%2C%20Art.%202\(1\)\(a\)%20Dec.%2012%2C%202015%2C%20T.I.A.S.%20No.%2016-1104](https://unfccc.int/process-and-meetings/the-paris-agreement#:~:text=To%20limit%20global%20warming%20to%201.5%C2%B-0C%2C%20greenhouse%20gas.and%20decline%2043%25%20by%202030;see%20also%20Paris%20Agreement%20to%20the%20United%20Nations%20Framework%20Convention%20on%20Climate%20Change%2C%20Art.%202(1)(a)%20Dec.%2012%2C%202015%2C%20T.I.A.S.%20No.%2016-1104).

6 See Kaplan, *supra* note 4.

7 Evan Halper & Aaron Gregg, *BP Dials Back on Climate Pledge Amid Soaring Oil Profits*, THE WASH. POST (Feb. 7, 2023), <https://www.washingtonpost.com/business/2023/02/07/bp-climate-emissions-oil-profits/>.

8 Angelos Delivorias, *A Stronger Europe in the World: Multi-*

disputes to be settled when an investor (the claimant) believes that a state (the respondent) has infringed on its obligations under the relevant IIAs.⁹ If a foreign investor invests in another country (known as the 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 courts.¹⁰ Investors are not required to exhaust available domestic remedies through the host state's legal system.¹¹ Advocates of ISDS purport that foreign investors would face local bias, corruption, and inadequate adjudication, were they forced to proceed through the host state's domestic system.¹² 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.¹³ Only foreign investors can be claimants in ISDS proceedings.¹⁴ States and communities who are adversely affected by investor activity cannot bring claims against the foreign investor.¹⁵ While states may bring counterclaims, this only occurs in limited circumstances.¹⁶ Foreign investors are the controlling forces in bringing ISDS

proceedings, led by mining, fossil fuel, and other extractive industry corporations.¹⁷

In January 2023, the total number of ISDS-based claims reached 1,257.¹⁸ In presenting his 2023 report, the Special Rapporteur on human rights and the environment for the UN High Commissioner for Human Rights, David Boyd, reported to the UN General Assembly that “fossil fuel and mining industries [have] already w[on] over \$100 billion” in arbitration awards brought by foreign investors who use the ISDS system to seek “exorbitant compensation” from States that attempt to strengthen their policies regarding environmental protection.¹⁹ According to the UN Conference on Trade and Development (UNCTAD), more than 127 ISDS claims seeking \$1 billion or more in damages have been filed.²⁰ 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.²¹ 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.²² In cases where the foreign investor prevails over the host state,

lateral Investment Court (MIC), EUR. PARLIAMENT (last updated Feb. 20, 2024), [https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-multilateral-investment-court-\(mic\)](https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-multilateral-investment-court-(mic)).

⁹ *Id.*

¹⁰ Isabella Kaminski, *UN Investigates Impact of Investment Treaties on Human Rights*, 7 *THE LANCET* e794, e794 (Sept. 25, 2023) [hereinafter Kaminski].

¹¹ Columbia Ctr. on Sustainable Inv., *Primer on International Investment Treaties and Investor-State Dispute Settlement* (last updated Jan. 2022), <https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement>.

¹² Maria Rocha, Martin Dietrich Brauch & Tehtena Mebratu-Tsegaye, *Advocates Say ISDS is Necessary Because Domestic Courts are 'Inadequate,' but Claims and Decisions Don't Reveal Systemic Failings*, COLUMBIA CTR. ON SUSTAINABLE INV. (Nov. 29, 2021), <https://ccsi.columbia.edu/news/advocates-say-isds-necessary-because-domestic-courts-are-inadequate-claims-and-decisions-dont>.

¹³ 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*, ¶ 1–2, U.N. Docs. A/78/168 (July 13, 2023) [hereinafter Boyd Report].

¹⁴ *Id.* ¶ 12.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* ¶ 3.

¹⁸ IIA Issues Note No. 2, *Trends in the Investment Treaty Regime and a Reform Toolbox for the Energy Transition*, U.N. CONF. ON TRADE AND DEV. (Aug. 2023).

¹⁹ U.N. Off. of the High Comm'r for Hum. Rts., *Investor-State Dispute Settlements have Catastrophic Consequences for the Environment and Human Rights: UN Expert* (Oct. 20, 2023), <https://www.ohchr.org/en/press-releases/2023/10/investor-state-dispute-settlements-have-catastrophic-consequences>.

²⁰ Boyd Report, *supra* note 13 at ¶ 4.

²¹ *Id.* ¶ 18.

²² *Id.* ¶ 5. See generally Input from the Dominican Republic, *Call for Inputs: "Should the Interests of Foreign Investors Trump the Human Right to a Clean, Healthy and Sustainable Environment?"* U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS. (last updated Jan. 31, 2024) (accessed from <https://www.ohchr.org/en/calls-for-input/2023/call-inputs-should-interests-foreign-investors-trump-human-right-clean-healthy>) (“Unfortunately, due to decisions taken in defence of our environmental legislation and the protection of the environment, through the trade agreements to which we are party, we have been subjected to international arbitration . . . we understand the right of defence that investors want to enshrine in these treaties and agreements, but for states it is a high price to pay. Especially for developing countries.”) (emphasis added).

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.²³

III. Analysis

A. ISDS and the Paris Agreement

The Paris Agreement is a legally binding international treaty which pursues efforts to limit the global temperature increase to 1.5° Celsius above pre-industrial levels by reducing global greenhouse gas emissions.²⁴ The agreement is essential for achieving the seventeen Sustainable Development Goals (“SDG”), an urgent call to action by all UN Member States for global partnership to improve health and reduce inequality while tackling climate change to preserve our Earth for future generations.²⁵ The Paris Agreement established a foundational framework to attack climate change, including the strengthening of individual states’ climate goals.²⁶ The agreement established Nationally Determined Contributions (“NDCs”), binding commitments by all members to prepare, maintain, and communicate their contributions towards mitigating greenhouse gas emissions in support of the Paris Agreement goals.²⁷

While the Paris Agreement does not yet have direct application in investment arbitration, and direct references to the Agreement have appeared in only a few BITs, there has been a growing interest in applying the Paris Agreement to investor-state arbitration.²⁸ Re-

cent decisions in appellate courts from multiple jurisdictions, which use the binding Paris Agreement commitments and emissions targets to order governments to take action supporting those obligations, demonstrate how the Paris Agreement is spreading through domestic legal systems and may eventually seep into ISDS cases.²⁹ Other scholars have argued that arbitral tribunals should recognize environmental protection measures as an *erga omnes* obligation and a potential defense for host states.³⁰ Penalizing states for taking actions to address their international climate obligations hinders them from meeting crucial environmental targets and maintaining their international obligations.

B. ISDS and the Right to a Clean, Healthy, and Sustainable Environment

In July 2022, the UN General Assembly declared access to a clean, healthy, sustainable environment a universal human right.³¹ The resolution recognized the threat that the current rate of environmental degradation, climate change, and biodiversity loss pose to present and future generations’ enjoyment of human rights.³² The resolution also outlined the responsibility and obligation of states to promote and protect human rights, including in “all actions undertaken to address environmental challenges.”³³ Ultimately, the UN General Assembly’s resolution called upon all international

tor-State Arbitration, ICSID (May 17, 2023), <https://icsid.worldbank.org/news-and-events/speeches-articles/invoking-paris-agreement-investor-state-arbitration>.

29 Nikos Lavranos, *Using the Paris Agreement in Arbitrations*, THOMSON REUTERS: PRAC. LAW ARB. BLOG. (Mar. 31, 2020), <http://arbitrationblog.practicallaw.com/using-the-paris-agreement-in-arbitrations/>.

30 See Maria José Alarcon, *2023 in Review: Climate Change and ISDS – Reshaping Investment Arbitration to Achieve Climate Goals*, KLUWER ARB. BLOG (Jan. 31, 2024), <https://arbitrationblog.kluwerarbitration.com/2024/01/31/2023-in-review-climate-change-and-isds-reshaping-investment-arbitration-to-achieve-climate-goals/>; see also Maria José Alarcon, *Consequences of Recognizing Environmental Protection as an Emerging Erga Omnes Obligation in the ISDS Context*, KLUWER ARB. BLOG (Aug. 31, 2021), <https://arbitrationblog.kluwerarbitration.com/2021/08/31/consequences-of-recognizing-environmental-protection-as-an-emerging-erga-omnes-obligation-in-the-isds-context/>.

31 G.A. Res. 76/300, *supra* note 3; See generally U.N. News, *UN General Assembly Declares Access to Clean and Healthy Environment a Universal Human Right* (July 28, 2022), <https://news.un.org/en/story/2022/07/1123482>.

32 G.A. Res. 76/300, *supra* note 3 at 2–3.

33 *Id.* at 3.

23 Boyd Report, *supra* note 13 at ¶ 3; see also ¶ 8 (explaining how the “[t]he overwhelming majority of fossil fuel and mining ISDS claims are brought by investors from the global North against respondent States in the global South . . . States in Latin America have been subject to 327 ISDS claims . . . [i]n 62 per cent of these cases investors were successful, resulting in damages or negotiated settlements worth more than \$33 billion”).

24 U.N. Climate Action, *The Paris Agreement* (last visited Feb. 12, 2024), <https://www.un.org/en/climatechange/paris-agreement>.

25 U.N. Dep’t of Econ. and Soc. Affs., *The 17 [SDG] Goals* (last visited Feb. 12, 2024), <https://sdgs.un.org/goals>.

26 Melissa Denchak, *Paris Climate Agreement: Everything You Need to Know*, NAT. RES. DEF. COUNCIL (“NRDC”) (Feb. 19, 2021), <https://www.nrdc.org/stories/paris-climate-agreement-everything-you-need-know#sec-summary>.

27 UNFCCC, *Key Aspects of the Paris Agreement* (last visited Mar. 3, 2024), <https://unfccc.int/most-requested/key-aspects-of-the-paris-agreement>.

28 Arman Sarvarian, *Invoking the Paris Agreement in Invest-*

actors (*including* business enterprises) to “adopt policies, to enhance international cooperation . . . [and] to scale up efforts to ensure a clean, healthy and sustainable environment for all.”³⁴ It must be noted that while UN General Assembly resolutions are not legally binding unless they are adopted by the UN Security Council, they can be extremely persuasive as catalysts for action.³⁵ However, some human rights professionals, including the former Special Rapporteur on the right to food, believe that human rights *are* non-derogable norms of international law (*jus cogens*), and that treaties which prove to be inconsistent with human rights should be considered “void and terminated.”³⁶

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.³⁷ Many initiatives which become subject to ISDS claims interfere with the human right to “clean air, safe and sufficient water, healthy and sustainably produced food, non-toxic environments, healthy biodiversity and ecosystems and a safe climate.”³⁸ The right to a safe climate has been jeopardized by fossil fuel and resource exploration projects.³⁹ Fossil fuel companies have, and will continue to use ISDS to challenge states who take action to limit fossil fuels⁴⁰ in support of their environmental and sustainable development goals for their population. Where a foreign investor is successful in a multi-million-dollar arbitration against a host state, the high cost of defending against the proceedings, and possible paying of damages, can divert essential financial resources away from local communities and meaningful environmental and sustainable development policies impacting human rights.

34 *Id.*

35 Int’l Inst. for Sustainable Dev. (IISD), *UNGA Recognizes Human Right to Clean, Healthy, and Sustainable Environment* (Aug. 3, 2022), <https://sdg.iisd.org/news/unga-recognizes-human-right-to-clean-healthy-and-sustainable-environment/>.

36 Boyd Report, *supra* note 13 at ¶ 14 (citing G.A. Res. 19/59/Add.5, ¶ 1.3 (Dec. 19, 2011)).

37 *Id.* at ¶ 53.

38 *Id.* at ¶ 54.

39 *Id.* at ¶ 57.

40 *Id.*

C. Illustrative ISDS Cases

In the case of *Zeph Investments v. Australia*,⁴¹ a Singapore-based mining company Zeph Investments (“Zeph”), brought an investment claim against Australia after the Queensland Department of the Environment and Science followed the recommendation of the Queensland Land Court and refused to grant a mining lease for Zeph’s proposed coal mine in the region.⁴² The Land Court cited evidence of the potential human rights impact and climate change resulting from the mining project, specifically taking into consideration the emissions associated with the combustion of coal at the mine and the potential resulting environmental harm.⁴³ The Land Court found that emissions from the mine would be 1.58Gt of Co2 between 2029 and 2051, a material contribution to Australia’s remaining carbon budget to meet their commitments under the Paris Agreement.⁴⁴ The Land Court further found that the mine would have limited the human right to life, the right to property, the rights of children, the cultural rights of First Nations Peoples, and the right to enjoy human rights equally.⁴⁵ The action is currently pending before the Permanent court of Arbitration (“PCA”) under the ASEAN-Australia-New Zealand Free Trade Agreement (“AANZFTA”) with a damages claim of AUD 41.3 billion (approximately 27 billion USD).⁴⁶

Another notable case is *Glencore v. Colombia*.⁴⁷ Glencore, a Swiss-based trading and mining company, had a coal mining exploration and exploitation contract with the Colombian mining agency Carbocol.⁴⁸

41 Louise Barber, *Zeph Investments v. Australia: The Latest in Investor-State Climate Change-Related Claims*, KLUWER ARB. BLOG (Aug. 24, 2023), <https://arbitrationblog.kluwerarbitration.com/2023/08/24/zeph-investments-v-australia-the-latest-in-investor-state-climate-change-related-claims/>.

42 *Id.*

43 *Id.*

44 Kathryn Pacey & Shaun Milligan, *QLD Land Court Recommends Refusal of Thermal Coal Mine on Climate Change and Human Rights Grounds*, HERBERT SMITH FREEHILLS LLP (Nov. 25, 2022), <https://hsfnotes.com/environmentaustralia/2022/11/25/qld-land-court-recommends-refusal-of-thermal-coal-mine-on-climate-change-and-human-rights-grounds/>.

45 *Id.*

46 *Id.*

47 *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, <https://www.italaw.com/cases/7539>.

48 Sofia de Murard, *Colombia is Ordered to Pay over USD 19 Million for Frustrating Glencore’s Legitimate Expectations*, IISD

Carbocol was replaced by three agencies: Ingeominas, the Colombian Geological Service, and the National Mining Agency.⁴⁹ In a renegotiated amended contract, Ingeominas lowered its royalties in exchange for Glencore's additional investment in the mining project.⁵⁰ A subsequent investigation by Colombia's supervisory agency of public funds concluded that the amendment was against the country's interests, and held Glencore and Ingeominas jointly liable for a fiscal liability fine.⁵¹ Glencore ultimately filed an investment suit against Colombia before the International Center for Settlement of Investment Disputes ("ICSID") under the 2006 Colombia-Switzerland BIT which was settled in favor of the investor, Glencore, for the frustration of "legitimate expectations."⁵² In 2019, the tribunal ordered Colombia to pay \$19 million plus interest, roughly half of its legal costs and full arbitration costs.⁵³

Glencore is now the sole owner of the Cerrejón open-pit coal mine, La Guajira, Colombia.⁵⁴ For the Wayúu indigenous people, La Guajira is ancestral land from which they have been displaced due to the continuous expansion of the mine.⁵⁵ In addition to their displacement, the mine has contaminated the air quality, consumed significant amounts of water, and dumped hundreds of millions of liters of liquid waste into principal regional water sources which local communities rely on.⁵⁶ Unsafe levels of harmful chemicals such as mercury and lead have been found in the local water sources leading to water and food scarcity, and health impacts for La Guajira's residents,⁵⁷ ultimately harming their universal human right to a clean, healthy, and sustainable environment. Glencore has now lodged an ad-

ditional multi-million-dollar suit against Colombia after the Colombian Constitutional Court found in favor of indigenous communities seeking to protect the Bruno River in La Guajira from yet another expansion of the mine; Glencore claimed the decision was discriminatory and denied them fair and equitable treatment.⁵⁸ The exact amount of the claim has yet to be disclosed. Should Glencore prevail once more, local communities are sure to experience continued exasperated effects of the mine on their natural resources and environment.

A final informative case is *RWE v. The Netherlands*.⁵⁹ RWE, a Germany-based energy company, filed suit under the Energy Charter Treaty ("ECT") after the government of the Netherlands announced plans in 2019 to phase out all coal-fired power plants by 2030.⁶⁰ The 2019 Climate Act, which prompted RWE's suit, was adopted by the Dutch parliament as legislation intended to reduce their greenhouse gas emissions to meet their targets on climate change obligated under the Paris Agreement.⁶¹ RWE's Request for Arbitration calculated their anticipated damages to be in excess of 1.4 billion Euros.⁶² While the RWE matter has been thwarted by domestic courts in Germany and the Netherlands,⁶³ the *RWE v. The Netherlands* case is revealing. First, it demonstrates the significant threat that states face from foreign investors who wield the ISDS mechanism to squash domestic regulations implemented to meet international climate obligations, which only seek to maintain a clean, healthy, and sustainable environment for current and future generations. Second, states are implementing express domestic legislations in furtherance of their Paris Agreement commitments, supporting the theory that the agreement's obligations

(Dec. 17, 2019), <https://www.iisd.org/itn/en/2019/12/17/colombia-is-ordered-to-pay-over-usd-19-million-for-frustrating-glencore-legitimate-expectations-glencore-international-a-g-and-c-i-prodeco-s-a-v-republic-of-colombia-icsid-case-no-arb-16-6/> [hereinafter de Murard].

49 *Id.*

50 *See Glencore*, ICSID Case No. ARB/16/6, Award, ¶ 135, 197–98 (Aug. 27, 2019); *see also id.*

51 *See Glencore*, ICSID Case No. ARB/16/6, Award, ¶ 315.

52 *See Glencore*, ICSID Case No. ARB/16/6, Award, ¶ 1540; *see also* de Murard, *supra* note 48.

53 *See Glencore*, ICSID Case No. ARB/16/6, Award, ¶ 1602; *see also* de Murard, *supra* note 48.

54 ABColombia, *Unmasking Glencore: A Toxic Legacy in Colombia* (Nov. 14, 2023), <https://www.abcolombia.org.uk/event-unmasking-glencore-a-toxic-legacy-in-colombia-and-peru/>.

55 *Id.*

56 *Id.*

57 *Id.*

58 London Mining Network, *Glencore – Drop the Suits Against Colombia* (Nov. 22, 2023), <https://londonminingnetwork.org/2023/11/glencore-petition/>. *See generally* UNCTAD Inv. Disp. Settlement Navigator: *Glencore International A.G. v. Republic of Colombia*, ICSID Case No. ARB/21/30 (2021), <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1122/glencore-v-colombia-iii->.

59 *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4, <https://www.italaw.com/cases/9156>.

60 *Id.*

61 Jack Ballantyne, *Netherlands Faces First ICSID Claim over Coal Plant Ban*, GLOB. ARB. REV. (Feb. 3, 2021), <https://globalarbitrationreview.com/article/netherlands-faces-first-icsid-claim-over-coal-plant-ban>.

62 *RWE*, ICSID Case No. ARB/21/4, Request for Arbitration, ¶ 16 (Jan. 20, 2021).

63 Kaminski, *supra* note 10 at e794.

may find their way into ISDS mechanisms in the future. The UN General Assembly declaration that access to a clean, healthy, sustainable environment is a universal human right has been heard around the world. On April 18, 2024, the Parliamentary Assembly of the Council of Europe released a report from the Committee on Social Affairs, Health and Sustainable Development, which stressed the urgent need for a legally binding framework to enshrine the right within the Council of Europe and in international law.⁶⁴ Investors, like in the illustrative cases above, will continue to use ISDS mechanisms to the detriment of states, their environment, and the status of human rights in their country.

IV. Recommendations: Applying Human Rights Law

Recent developments indicate that some nations are becoming weary of ISDS provisions and that investment treaties may begin moving away from them.⁶⁵ Short of eradicating the ISDS system as a whole, potential resolutions could include:

- i. Requiring foreign investors to first exhaust all remedies available in the domestic jurisdiction rather than allowing them to bypass them.
- ii. Incorporating binding provisions creating the obligation to uphold human rights and incorporate effective provisions for environmental protections in IIAs.⁶⁶

⁶⁴ Eur. Parl. Ass., *Mainstreaming the Human Right to a Safe, Clean, Healthy and Sustainable Environment with the Reykjavik Process*, Doc. No. 15955 (2024).

⁶⁵ See Letter from Elizabeth Warren, Sheldon Whitehouse, & Steven Cohen, U.S. Senators, to Katherine Tai, U.S. Trade Representative, & Anthony Blinken, Sec'y of State, *Warren, Whitehouse, Cohen, Lawmakers Urge Biden Administration to Eliminate Investor-State Dispute Settlement from Existing U.S. Trade and Investment Agreements* (Nov. 2, 2023), <https://www.warren.senate.gov/newsroom/press-releases/warren-whitehouse-cohen-lawmakers-urge-biden-administration-to-eliminate-investor-state-dispute-settlement-from-existing-us-trade-and-investment-agreements>; see also Monika Dulian, *EU Withdrawal from the Energy Charter Treaty*, EU PARLIAMENT BRIEFING (Dec. 2023), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754632/EPRS_BRI\(2023\)754632_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754632/EPRS_BRI(2023)754632_EN.pdf).

⁶⁶ See Reciprocal Investment Promotion and Protection Agreement, Morocco-Nigeria, Dec. 3, 2016, Arts. 13–15, 18 (this bilateral treaty between Morocco and Nigeria was among the first to incorporate binding obligations to uphold human rights and

- iii. Officially recognizing the right to a clean, healthy, and sustainable environment as a non-derogable *jus cogens* norm of customary international law to create more effective incentives and enforcement on the side of foreign investors.

The threat of ISDS claims present states with a Hobson's Choice. First, states can choose to enact meaningful climate change and environmental protection regulations in fulfillment of international climate commitments but risk getting called to court by a foreign investor seeking millions of dollars to boost their already immense profits, monopolizing the states time and financial resources that could be directed towards much needed environmental initiatives. Otherwise, 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.

provisions for environmental protections).