

## UN investigates impact of investment treaties on human rights

A UN's special rapporteur on human rights and the environment is exploring whether international dispute mechanisms compromise action on climate change and development—and how that can change.



Since the 1950s, thousands of investment agreements have been negotiated between pairs or groups of states. The stated aim of these treaties is usually to increase the inward flow of foreign money by promising companies will be treated fairly and guaranteeing the safety of their financial investments.

Most treaties include some form of investor-state dispute settlement (ISDS) mechanism to enforce them, which enables companies to sue foreign countries in which they have a stake for doing things that reduce the value of their investments. That could include breaching a contract, seizing or nationalising investments, or changing taxes, subsidies or regulations.

ISDS is carried out through a tribunal, rather than a court of law, but there are rules governing how it works. Arbitrators are appointed by both parties and the tribunal has the power to order states to pay compensation if it concludes that they broke the terms of the treaty.

Despite their prevalence, these mechanisms have long been criticised for stymying the ability of governments to make rules that benefit the wider public.

Their potential impact on climate change is a particular concern. The most high-profile agreement affected by this problem is the Energy Charter Treaty, a deal initially made after the Cold War between Western and post-Soviet states to try to integrate their energy sectors.

Now with over 50 members across the world, the treaty has increasingly been used by fossil fuel firms and others to try to claim back financial

losses incurred because of state measures. Last year, for example, the Italian government was ordered to pay €191 million, plus interest, to UK oil company Rockhopper as compensation for an offshore oil drilling ban.

In a more complex case, energy companies RWE and Uniper, which operate coal plants in the Netherlands, have tried to challenge the Dutch government's ban on coal-fired power generation by 2030. However, they have been thwarted by domestic courts in the Netherlands and Germany.

The Energy Charter Treaty is not the only agreement with this problem. In 2016, the energy company TransCanada sued the US government under the North American Free Trade Agreement (NAFTA) over then president Barack Obama's decision to cancel the Keystone XL tar sands pipeline on the grounds that it was incompatible with climate action. The company (now known as TC Energy) is seeking US\$15 billion in compensation for sunk costs and lost profits in the project, in which it would have played a major role.

The International Energy Agency has warned that there could be no new investments in coal, oil or gas if the world is to have a chance of limiting global warming to 1.5°C. Although the lack of transparency around ISDS makes it difficult to properly analyse its impacts, a 2021 policy briefing in *Science* found that about a fifth (231) of total claims to date related to the fossil fuel industry—mostly oil and gas—and investors were successful in 72% of completed cases.

A recent report by the UN Environment Programme and the

Sabin Center for Climate Change Law at Columbia University identified at least 14 climate-related ISDS cases filed between 2010 and 2022, concluding that international investment law is gaining increasing attention as a forum for climate change litigation.

The result of these tribunals can be crippling to states and might have a chilling effect on future legislation and regulation. In 2017, the Canadian oil firm Vermillion threatened the French government with an ISDS case over its fossil fuel phase-out plan, after which the law was subsequently weakened. And last year, it was reported that Denmark and New Zealand had designed plans to phase out oil and gas around investment treaties.

"An investor will launch an arbitration claim if it considers that there is prospect to win," says Lukas Schaugg, international law analyst at the International Institute for Sustainable Development. But it will also do so if it thinks it can exert pressure on the state "to nudge it to adopt a more liberal stance towards investment or not to adopt certain law or regulation that it was planning to adopt".

Schaugg adds the lack of opacity of tribunal processes and decisions, as well as the vagueness of written principles in many treaties, can make it difficult for states to anticipate how their actions will be handled. "There's actually little legal certainty. And as you can imagine, in the context of climate change and climate policy, states will need to move swiftly, with unprecedented amounts of public investment."

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For more on the **Rockhopper vs Italy case** see <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/800/rockhopper-v-italy>

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A 2022 report by the Intergovernmental Panel on Climate Change said trade and investment treaties may be limiting countries' ability to cut their emissions.

The 2021 *Science* policy briefing describes the threat of ISDS claims as a "major concern" for low and middle-income countries, particularly those vulnerable to severe climate change impacts and struggling to escape debt. Legal claims from oil and gas investors could cost more than US\$340 billion—an amount that surpasses current global public climate finance—and threaten the global green energy transition as well as efforts to adapt to climate change.

The public is also concerned. Five people from France, Cyprus, Belgium, Germany and Switzerland are taking action against 12 states at the European Court of Human Rights, arguing that membership and use of the Energy Charter Treaty prevents their governments from taking immediate measures to tackle climate change and therefore makes it impossible to achieve their Paris Agreement goals.

This is not just a climate problem; foreign investors have used investment treaties to make claims against policies that protect the wider environment, public health or human rights.

Glencore is bringing an ISDS case for an undisclosed amount against Columbia following a Constitutional Court ruling that aimed to protect local communities and their environment from an expansion of Cerrejón, the largest open-pit coal mine in Latin America. The mining company previously won a separate US\$19 million claim against Colombia.

Research by the United Nations Conference on Trade and Development identified at least 33 known ISDS cases related to public health as of July 2021. One notable example, says Martin Dietrich Brauch, lead researcher at the Columbia Center on Sustainable Investment, is the use of ISDS by

tobacco companies as a threat to plain packaging requirements, which were shown to be effective in reducing smoking rates.

There is "ample evidence" of the outsized costs of investment treaties and ISDS, says Brauch. "ISDS awards weigh more heavily on the smaller and already burdened public treasuries of more vulnerable countries as they divert scarce public resources away from achieving their development priorities, including poverty alleviation, healthcare, infrastructure, and education."

And there is little evidence that the treaties themselves have the intended effect of increasing inward investment.

Concerned about the influence of these international agreements, the UN's special rapporteur on human rights and the environment David R Boyd is exploring how ISDS mechanisms relate to the right to a clean, healthy and sustainable environment.

Boyd tells the *Lancet* that ISDS lawsuits, and even the threat of such claims, are blocking urgently needed actions to prevent planetary catastrophe and protect human rights.

"An explosion of ISDS claims in recent years is led by fossil fuel, mining and other extractive industry corporations, resulting in exorbitant damages awards against states, permits granted for environmentally destructive activities, and the weakening of vital rules intended to address the climate crisis," says Boyd.

A press release from the Office of the United Nations High Commissioner for Human Rights hints that states have already been ordered to pay more than US\$100 billion to corporations in the coal, oil, gas, electricity and mining industries by international arbitration panels—a figure that will be explained when Boyd's final report is published in October.

Boyd believes states must take immediate action to end their exposure to ISDS claims by withdrawing their consent to arbitration under existing

investment agreements, negotiating a removal of ISDS or terminating existing agreements that include these mechanisms.

Schaugg says international investment law is already changing in a fundamental way. "States are increasingly moving towards terminating their existing stock of international investment agreements. They're doing that in part because of climate-related concerns, but also, more generally, because they think these treaties cut down their regulatory freedom."

The US trade department, for example, has been asked by a group of Democrats to remove ISDS provisions from existing deals and to stop including it in future agreements.

While some had suggested renegotiating the Energy Charter Treaty to improve its provisions, this now looks unlikely after a number of individual countries, including Germany, France and Spain, pledged to leave altogether. The EU as a whole is set to quit too on the basis that remaining would "clearly undermine" climate targets. The UK is being encouraged by its official climate advisors to follow suit.

However, tackling the legacy of the treaties will be difficult. Lauge Poulsen, professor at UCL's department of political science and chair of the OECD's inter-governmental work programme on climate change and investment law, says most of these treaties have sunset clauses, which means they continue to apply for years or even decades after a party leaves.

Italy, for example, was sued under the Energy Charter Treaty after it had already left. NAFTA was replaced in 2020 by a new deal which removed ISDS between the US and Canada, but the TC Energy vs US Government lawsuit continues. "It's a core challenge which makes arguments for multilateral and bilateral discussions so important," says Poulsen, who was speaking in a personal capacity at an LSE event.

One option, elaborated by academics in the *Journal of International Economic Law*, could be a climate carveout with fossil fuel investments excluded from disputes. This is something currently being discussed at the OECD.

The United Nations Commission on International Trade Law has also been working on reforms, says Schaugg, potentially including a code of conduct for arbitrators.

In some areas things are more progressive. A bilateral treaty between Morocco and Nigeria, signed in 2016, became the first international investment agreement

that established binding obligations on investors to uphold human rights. And an update to the African Continental Free Trade Area currently under discussion is expected to have a much better balance of investor rights and obligations, to take into account sustainable development and to try to find alternatives to arbitration before things escalate to a full-blown dispute.

“Because some of the African countries have been victims of the old system they have come up with more innovative instruments,” says Schaugg.

However, says Brauch, most of these efforts are tinkering in the margins, and are not addressing the fundamental issues with treaties and ISDS. He believes a wholly new regime is needed for governing international investment that “advances, and does not undermine, the achievement of climate and other sustainable development goals and the realisation of human rights”.

*Isabella Kaminski*

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For NAFTA ISDS news see <https://insidetradetrade.com/daily-news/isds-be-phased-out-over-three-years-canada-pared-down-mexico>

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