Boston University Global Development Policy Center

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Submission to the Special Rapporteur on human rights and the environment call for inputs: "Should the interests of foreign investors trump the human right to a clean, healthy and sustainable environment?"

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We are academics rather than representatives of states or businesses that are directly involved in investor-state dispute settlement (ISDS). However, between us, we have published a significant number of peer-reviewed academic journal articles on the relationship between foreign investment, human rights, and the environment. In this short submission we draw from collaborative research efforts that were published in 2022 in the journals *Science* and *Climate Policy*. The full articles are included as attachments with our submission.

1. Has your State been the subject of ISDS arbitration claims as a result of government actions intended to address climate change, protect the environment or advance the right to a clean, healthy and sustainable environment? Please provide details, including links to settlements or decisions by international arbitration panels where possible.

We would like to briefly sumarize several relevant cases that we have been studying in Canada and the United States. We would note that a common theme across these cases is that the existence of public pressure to act on climate change is used by investors as evidence that government decisions are "politically motivated" and thus illegitimate.

Lone Pine v. *Canada*

In 2011, the province of Québec passed a law (Bill 18) banning oil and gas exploration and production in the St. Lawrence River to protect the environment. Exploration licences were revoked and any licences that covered both a land and river portion were redefined to only include the land area. No compensation was paid to licence holders. Lone Pine, a company incorporated in Delaware, had entered (through a Canadian subsidiary) into a series of farmout agreements with the Canadian junior oil and gas company, Junex, gaining access to several exploration licenses near Trois-Rivières, Québec, to explore for shale gas. One of these licenses was located in the St. Lawrence River and was revoked when Bill 18 was passed. When this occurred, Lone Pine had yet to undertake any exploration within the river license area.

Lone Pine filed a claim under the North American Free Trade Agreement (NAFTA) arguing that Canada had breached two provisions of NAFTA: Article 1110 on expropriation and Article 1105 on the Minimum Standard of Treatment. The latter was clarified by the parties in the 2001 "Notes of interpretation" to be limited to "that which is required by the customary international law minimum standard of treatment for aliens". With respect to Article 1110, Lone Pine alleged that the revocation of the river permit

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expropriated its investment without any compensation. With respect to Article 1105, the company alleged that the revocation of the river exploration license was arbitrary, unfair and inequitable and violated its legitimate expectations. A key part of the company's argument was that Bill 18 was passed for political, rather than legitimate environmental, reasons (to appease the public and anti-fracking lobby). The company argued that it was owed lost future profits amounting to US$118.9 million.

The final Award in this case was issued on 21 November 2022. Although a Majority of the Tribunal dismissed all the claims, its reasons for doing so were extremely narrow. On expropriation, the Tribunal was unanimous that no ""substantial deprivation" had occurred because only part of the investment (the river exploration license) was affected by the ban. If Québec had passed a total ban on all oil and gas development (as it did in 2022), the outcome might have been different. On the minimum standard of treatment, the Tribunal stressed that "the standard to be met for a breach of NAFTA Article 1105 is a very high one", which suggests that the same conclusions might not have been drawn had the case occurred prior to the Notes of Interpretation or under a different treaty with a vague FET provision. Even with this high standard, one dissenting arbitrator concluded that the failure to provide the company with compensation, which he viewed as politically expedient and therefore not justifiable, was enough to create a breach.

TC Energy v. *United States*

On his first day in office, U.S. President Joe Biden issued an executive order that rescinded a permit issued by his predecessor – Donald Trump – for the cross border section of the Keystone XL pipeline (hereafter KXL). Without this critical permit, the project proponent, Canadian company TC Energy (formerly known as TransCanada) was unable to proceed with the pipeline, which was intended to bring tar sands crude from Alberta to refineries in Texas and Oklahoma.

In November 2021, TC Energy launched an ISDS claim under the 'legacy' provisions in the United States-Mexico-Canada Agreement (USMCA) that replaced NAFTA in 2020, which allow for disputes over investments made prior to 1 July 2020 to be referred to ISDS until 30 June 2023. This was the second time that the company had made an ISDS claim over the project. The first claim in 2016, following President Obama's decision to deny the same permit in the leadup to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, was withdrawn when President Trump reversed the decision. Both claims were for US$15 billion in compensation. TC Energy argues that the U.S. government has breached four separate provisions of NAFTA: Articles 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation and Compensation). The case is ongoing, with jurisdictional objections from the U.S. (about whether the NAFTA legacy provisions should apply to this dispute) being dealt with as a preliminary matter.

Westmoreland Coal Company v. *Canada*

In 2015, the Alberta government committed to phasing out coal-fired power by 2030. Without the infrastructure to export coal, the climate plan also resulted in a de facto phaseout of local thermal coal mining. To ensure support for the plan, major utility companies in the province were provided with "transition payments" to facilitate the switch to gas and renewable energy. Mining companies, including

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Westmoreland Coal, an American mining firm, however, did not receive a government handout, because they do not produce energy. The first dispute involving this measure, filed in 2018, was withdrawn by the company, which had filed for bankruptcy in the U.S. and was going through a restructuring. The second, filed by a different corportate entity (Westmoreland Mining Holdings), was thrown out at the jurisdictional phase because the company had not been the investor at the time of the dispute. In 2023, the original corporate entity (Westmoreland Coal) filed a new claim under the NAFTA legacy provisions in USMCA. The company argues that, through Alberta's coal-fired power phase out, Canada has breached NAFTA Articles 1102 (National Treatment) and 1105 (Minimum Standard of Treatment). Although the claimed amount is not yet public, the firm previously complained that it would suffer loses of more than CDN$440 million as a result of the early closure of its mine.

Ruby River Capital v. *Canada*
Earlier this year, Ruby River Capital LLC., an American company, filed an ISDS claim under the NAFTA legacy provisions in USMCA against Canada over its failed bid to develop an LNG facility in Québec. The project was rejected by both the provincial government and the federal government over concerns about greenhouse gas emissions and the impact of the project on marine life and Indigenous communities. The company argues that these decisions were political, rather than legitimately motivated by environmental concerns, and that Canada has breached four separate provisions of NAFTA: Articles 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation and Compensation). Ruby River is seeking US$20 billion in compensation, even though it only spent around CDN$165 million on the project.

2. Has your State been threatened by foreign investors regarding potential ISDS arbitration claims to be pursued regarding proposed government actions intended to address climate change, protect the environment or advance the right to a clean, healthy and sustainable environment? Please provide details of the proposed measures, the foreign investors making the threats, and whether the proposed measures were implemented or abandoned.

Although it is difficult to definitively prove that threats of arbitration have led to delay or weakening of climate policies, there is some preliminary evidence to this effect. In 2017, the Canadian oil firm Vermillion threatened the French government with a ISDS case over its fossil fuel phase-out plan. The law was subsequently weakened. Last year, it was reported that both Denmark, one of the initiators of the Beyond Oil and Gas Alliance, and New Zealand had designed their oil and gas phase-out plans, at least in part, to minimize the impact on leaseholders that are protected by investment treaties.

Threats of ISDS and even the knowledge that ISDS claims are possible can also distort the power dynamics in negotiations between investors and states on compensation. For example, the German coal power phase-out involved a negotiated compensation scheme that has been widely criticized as being overly generous and is currently being investigated by the European Commission. It has been noted that the contracts negotiated with the main firms involved (which include RWE, a firm suing the Netherlands over its coal power phase-out) have explicit provisions to prevent ISDS cases under the Energy Charter Treaty.

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3. Has your State taken any actions to protect itself from future ISDS claims that could result from government actions intended to address climate change, protect the environment or advance the right to a clean, healthy and sustainable environment? For example, withdrawing from investment and trade treaties containing ISDS mechanisms (e.g. Energy Charter Treaty), renegotiating these treaties, or refusing to include ISDS provisions in new investment and trade treaties. What were the motivations for, and consequences of, these actions? What were the main obstacles to taking such actions?

We would like to highlight that Canada and the U.S. removed the ISDS mechanism from their trade relationship when they terminated NAFTA and adopted the USMCA. Chrystia Freeland, the then-deputy prime minister of Canada, noted at the time that the removal of ISDS "strengthened our government's right to regulate in the public interest, to protect public health and the environment." While we applaud this decision, we believe it reflects a double-standard, whereby the U.S. and Canada have reduced their own exposure to ISDS but have kept agreements that only impact their treaty partners in the Global South. Importantly, 33 U.S. Democrats have recently called on the U.S. Trade Representative and State Department to eliminate ISDS provisions from existing deals as well as ensuring that future agreements do not include it.

4. Is your State participating in international processes intended to reform some of the problematic aspects of ISDS mechanisms, such as amendments to the ICSID rules, reforms proposed by UNCITRAL Working Group III, or amendments to the Energy Charter Treaty? In the alternative, does your State or business favour the elimination of international Investor-State Dispute Settlement mechanisms? How could this be achieved in a way that ensures States are able to fulfil their obligations to protect human rights and the environment while enabling foreign investors to bring forward claims before impartial courts or tribunals?

We would like to briefly address why we favour the elimination of ISDS mechanisms. Reform efforts have, to date, been inadequate in addressing the core issue in ISDS, which is its asymmetrical nature. The system provides enforceable rights to corporate actors alone and imposes no obligations on those actors. It is a also system that provides no public benefits. Numerous studies attempting to demonstrate that investment treaties lead to increased foreign direct investment (FDI) have only provided weak and inconsistent evidence and countries that have terminated treaties have not experienced any loss of FDI. Even if it could be demonstrated that investment treaties do facilitate FDI, in the case of certain sectors such as fossil fuels, increased investment is not a desirable outcome for the planet. We are not suggesting that investors in these sectors should have no legal recourse; if they lost their privileged access to ISDS, they would still be owed due process within the courts of their host country under customary international law.

5. Please provide any other information regarding the impacts of ISDS mechanisms on human rights and the environment, including your perspective on the wisdom of prioritizing the interests of foreign investors above the right to a clean, healthy and sustainable environment and other human rights, especially where the rights of specific groups including women and girls, children, Indigenous Peoples, people of African descent, peasants and other local communities, disabled persons, migrants, persons living in poverty and other groups are involved.

ISDS mechanisms have negative impacts on all areas of environmental protection and human rights. However, we focus here on the potential impacts on supply-side policies to address the climate crisis, as

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this is what we have devoted the most attention to in our recent research. Firms in the oil and gas sector are well-versed in ISDS and willing to rely on this judicial mechanism to defend their interests against those of the regulating states. Law firms are also actively encouraging investors to make claims in response to climate action.

Keeping global warming to below 1.5ºC or even 2ºC requires a "rapid, just, and equitable wind-down of fossil fuel production". In 2021, the International Energy Agency (IEA) modelled an energy pathway consistent with limiting global warming to 1.5ºC. Under the Net-Zero Emissions by 2050 (NZE) scenario, "no new" oil and gas fields or coal mines would be approved for development. The NZE involves no development of new fossil fuel projects where a final investment decision had not been made as of the close of 2021. The intention was to minimize the stranding of upstream production assets by avoiding the early closure of fields where significant capital has already been invested. The NZE also, therefore, minimizes the potential for investor claims for compensation. Nevertheless, if firms have been awarded permits, even if only for exploration, they have an "investment" under the definition of most investment treaties and could bring ISDS claims if government action to stop fossil fuel development impacts the value if their investment.

Our recent research highlights that some oil and gas producing countries in the Global South face substantial financial risk from ISDS if they cancel new projects in line with keeping warming below 1.5ºC. If left unchecked, ISDS could create a flow of finance from those countries to private companies based primarily in the Global North. This would be in opposition to international pledges by the Global North to provide climate finance to the Global South (which rich countries are already failing to meet). In some cases, ISDS awards to oil and gas firms could absorb a substantial amount of the public finance necessary to achieve Nationally Determined Contributions (NDCs) to the Paris Agreement. For example, Indonesia has some of the highest annual emissions in the world (473 Mt CO_2 yr), but its total mean valuation of protected oil/gas assets ($3.9 billion) constitutes 17% of the costs needed to achieve its NDC. Several countries with high ISDS risk are also highly vulnerable to the impacts of climate change and need public finance to devote to adaptation measures. For example, Mozambique is in the top 25% of the world's most vulnerable countries to climate change, yet the total mean net-present value of all its treaty-protected oil/gas assets ($29 billion) is nearly twice the size of its GDP in 2019 ($15 billion).

In conclusion, we believe that ISDS poses a considerable threat to the human right to a clean, healthy and sustainable environment, especially in countries with populations highly vulnerable to the impacts of climate change. States that act to curb fossil fuel production in line with climate science face the risk of substantial financial losses in ISDS. Even when no claim is brought, the threat of ISDS may shape the design and stymy the ambition of climate policy. Governments are well aware of this. Even the U.S., which as never lost an investor-state dispute, has omitted ISDS in its newest treaty with Canada. Unfortunately, countries in the Global South have less maneuverability to exit investment treaties if their Global North partners are uncooperative. Climate change is a global issue that requires a global response and, as such, a quick and coordinated dismantling of the ISDS regime is the most sensible path forward.