

Investor Bulletin: Chill factor – How does investor-state dispute settlement affect climate policy?

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Described as “litigation terrorism” and “the wild wild west of international law”, investor-state dispute settlement (ISDS) is a potent legal tool used by some companies to disrupt positive climate policy settings.

It is also not on the radar of many institutional investors, meaning companies are often wielding a powerful legal mechanism without adequate oversight.

ISDS is an international legal regime that lets companies sue governments for compensation over policy measures that adversely impact their expected profits. Fossil fuel companies such as Shell, bp, Exxon, Glencore, Chevron, Total, ConocoPhillips and Eni have all used ISDS to claim hundreds of millions, and sometimes billions of dollars, in taxpayer-funded compensation.^{1,2}

Awareness and understanding of the risks associated with the use of ISDS will help investors drive improvements in transparency and governance, and set expectations for the use of ISDS by companies in their portfolio.

Key points:

- The use of ISDS poses significant portfolio-level governance and reputational risks for investors, who own the companies which use this politically influential legal mechanism.
- ISDS not only blocks existing policy settings which promote the global energy transition, but the threat of its financial costs “chills” the ambition of governments that wish to develop more positive climate policy measures.
- The ISDS regime is intransparent – Some claims are never made public, and in other cases, the existence of the claim may be made known, but none of its key details. This means investors often have little oversight or influence over the use of ISDS, and may not be aware a company has brought, or threatened to bring, an ISDS claim against a climate policy measure.
- Despite obvious overlaps, existing frameworks for corporate climate lobbying, such as the Global Standard on Responsible Climate Lobbying, do not explicitly address ISDS, limiting the ability of investors to understand and assess how companies perform against this risk.

¹ Di Salvatore, L. 2021. ‘Investor-State Disputes in the Fossil Fuel Industry’. *International Institute for Sustainable Development*.

<https://www.iisd.org/system/files/2022-01/investor%E2%80%93state-disputes-fossil-fuel-industry.pdf>

² Ibid.

- Public scrutiny of the role ISDS plays in blocking positive climate policy, and the threat it poses to sustainable development in emerging markets, could pose a reputational risk to institutional investors.

Understanding ISDS - What is it?

The right to use ISDS is given to companies by international investment treaties agreed between two or more states. These treaties were first conceived in the decolonisation period of the 1960s, with the aim of protecting the property of companies from former colonisers against expropriation in the newly independent states. The design of international investment treaties, and the ISDS process they provide for, have changed little since this period. These treaties grant companies rights that often exceed those available in many domestic legal systems worldwide, with little to no consideration for public policy concerns such as human rights and environmental protection.³

Key features of the ISDS regime include:

- Instead of tenured judges, ISDS decision-makers are arbitrators - typically private international lawyers chosen by the parties to hear an individual case. At the same time as being an arbitrator in one case, they can represent a party or be an expert witness in another case - a feature known as 'double-hatting' or 'triple-hatting' which has led to widespread concern about the quality and impartiality of decision-making.⁴
- In contrast to a judge who earns a salary regardless of the number of cases they hear, an arbitrator earns a fee for each case they preside over. This raises questions about the incentives arbitrators have to arrive at pro-company decisions - a situation exacerbated by the fact that only companies, and not governments, can initiate ISDS claims.⁵
- Unlike many domestic jurisdictions, there is no system of precedent in the ISDS regime. This means decisions can be unpredictable and inconsistent, with conflicting outcomes in cases with identical facts.⁶
- Decisions made by arbitrators are final and binding, with only a very narrow avenue for appeal. Unlike other international law regimes, ISDS awards are highly enforceable, meaning states very often pay or else withdraw the measure complained of by the company.⁷

³ Boyd, David. 2023. 'Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights'. *United Nations Office of the High Commissioner for Human Rights*.

<https://www.ohchr.org/en/documents/thematic-reports/a78168-paying-polluters-catastrophic-consequences-investor-state-dispute>

⁴ Columbia Centre for Sustainable Investment. 2022. 'Primer on International Investment Treaties and Investor-State Dispute Settlement'.

<https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement>

⁵ Ibid.

⁶ Arato, J., Brown, C. and Ortino, F. 2020. 'Parsing and managing inconsistency in investor-state dispute settlement'. *The Journal of World Investment & Trade*, 21(2-3), pp.336-373.

<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1214&context=other>

⁷ European Parliament Research Service. 2014. 'Investor-state dispute settlement (ISDS) state of play and prospects for reform'.

https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545736/EPRS_BRI%282015%29545736_EN.pdf

- Unlike a court hearing where cases are typically publicised and hearings are open to the public, many ISDS cases are shrouded in secrecy, with strict conditions of confidentiality on the parties.⁸

Portfolio-level risk

ISDS blocks existing climate policy, restricting long-term value creation

A number of recent ISDS claims directly challenge host states' climate policy measures, with the prospect of many more claims whose existence is confidential:

Case name	Climate policy measure challenged
<i>RWE v Netherlands and Uniper v Netherlands</i>	A law introducing a phase-out plan that would require the closure of all coal plants by 2030
<i>Rockhopper v Italy</i>	A moratorium on offshore oil & gas operations
<i>Ascent v Slovenia</i>	Environmental impact assessment reducing permitted oil & gas production
<i>Lone Pine Resources v Canada</i>	A fracking ban
<i>Ruby River Capital LLC v Canada</i>	A decision not to grant a permit for a LNG plant after environmental assessments showed major environmental and climate change concerns
<i>Alberta PMC v United States; TC Energy v United States</i>	The revocation of a permit for the Keystone XL pipeline

Research shows if urgent action is taken in response to climate change, the avoided economic damages (in a ~1.8°C world) are between one and a half to almost four times higher than the cost of mitigation (in a ~3°C world),⁹ before the positive impacts on biodiversity, human health and tipping points are factored in.¹⁰

⁸ Joint Submission from IISD, CIEL, and ClientEarth on the Call for Inputs from the UN Special Rapporteur on Human Rights and the Environment. 2023. 'Investor-State Dispute Settlement (ISDS) Mechanisms and the Right to a Clean, Healthy, and Sustainable Environment'.

<https://www.iisd.org/system/files/2023-06/iisd-ciel-clientearth-isds-sustainable-environment-submission-2023.pdf>

⁹ van der Wijst, K.-I. et al. 2023. 'New damage curves and multimodel analysis suggest lower optimal temperature'. *Nat. Clim. Chang.* 13, 434–441

¹⁰ Kikstra, J. S. & Waidelich, P. 2023. 'Strong climate action is worth it'. *Nat. Clim. Chang.* 13, 419–420.

Considered in this context, ISDS, when used to prioritise short-term fossil fuel returns, delays and exponentially increases the costs of an orderly energy transition, by threatening climate-related initiatives that preserve and protect long-term fiduciary value for investors.

The use of ISDS “chills” the development of new climate policy settings

The Intergovernmental Panel on Climate Change (IPCC) has warned of regulatory chill resulting from governments “refraining from or delaying the adoption of mitigation policies, such as phasing out fossil fuels” because of ISDS concerns.¹¹

The primary reason for this is the size of compensation awards under the ISDS regime, which is far greater than what companies could seek under domestic law.¹² Since 1998, ISDS tribunals have awarded \$114 billion to companies, of which \$80 billion went to fossil fuel companies.¹³ One study estimates that climate policy action worldwide could attract a further \$340 billion in ISDS claims from oil and gas companies.¹⁴

The threat of a company bringing an ISDS claim against a government can have as potent a chilling effect on climate policy as the actual initiation of a claim. One law firm, which advises mining companies on ISDS, notes that:

“for every investor-State case that goes through to completion, there are several instances where companies have used [the prospect of an ISDS claim] as leverage to negotiate with the host government and cause it to change its behavior more quickly and less expensively.”¹⁵

The following are publicly-known examples where ISDS has “chilled” countries’ climate policy-making:

- New Zealand banned new offshore oil exploration in 2018, but stopped short of cancelling existing offshore oil permits or banning onshore exploration, due to fears of ‘run[ning] afoul of investor-state settlements’, according to its Climate Change Minister.¹⁶
- Denmark chose to set a 2050 deadline for halting oil and gas exploration, as setting an earlier

¹¹ Intergovernmental Panel on Climate Change. 2022.

‘Climate Change 2022: Mitigation of Climate Change – Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change’, chapter 14, p.1499.

¹² Bonnitcha, J., & Brewin, S. 2020. ‘Compensation under investment treaties’. *International Institute for Sustainable Development*: Winnipeg, Canada.

<https://www.iisd.org/system/files/publications/compensation-treaties-best-practices-en.pdf>

¹³ Transnational Institute, PowerShift & Trade Justice Movement. 2024. *Global ISDS Tracker*.

<https://www.globalisdstracker.org/>

¹⁴ Tienhaara, K., Thrasher, R., Simmons, B. A., & Gallagher, K. P. 2022. ‘Investor-state disputes threaten the global green energy transition’. *Science*, 376 (6594), 701-703.

¹⁵ Crowell Client Alert. 2014. ‘How Mining Companies Can Mitigate Risks and Protect their Investments, Part I: International Investment Agreements’.

<https://www.crowell.com/en/insights/client-alerts/how-mining-companies-can-mitigate-risks-and-protect-their-investments-part-i-international-investment-agreements>

¹⁶ Meager, E. 2020. ‘COP26 targets pushed back under threat of being sued’. *Capital Monitor*,

<https://capitalmonitor.ai/institution/government/cop26-ambitions-at-risk-from-energy-charter-treaty-lawsuits/>

one of 2030 or 2040 risked “incredibly expensive” ISDS claims, according to its Climate Minister.¹⁷

- Guatemala cited the threat of ISDS as a reason not to suspend the licence of a Canadian-owned goldmine for alleged human rights abuses, according to government documents revealed via freedom of information.¹⁸
- France backed down from prohibiting extensions of existing fossil fuel concessions following an ISDS threat from Canadian gas giant Vermilion, according to government correspondence revealed by investigative journalists.¹⁹
- A 2019 report from the Centre for Research on Multinational Corporations (SOMO) and Friends of the Earth Netherlands (Milieudefensie) published internal Shell emails showing the company “used the threat of an [ISDS] claim in direct communications with the Nigerian president” in negotiations relating to a lucrative offshore oil licence.²⁰

Governance risks

Investors have limited transparency and oversight of the usage of ISDS

Institutional investors often have little oversight or influence over companies’ use of ISDS, and may not be aware that one of its companies has brought, or threatened to bring, an ISDS claim challenging a climate policy measure.

This is because the ISDS regime is notably lacking in transparency²¹ - some claims are never made public, and in other cases, the existence of the claim may be made known, but none of its key details. For example, in 2023 Glencore instituted its fourth ISDS claim against the Colombian government, but

¹⁷ Ibid.

¹⁸ Moore, J, and Perez Rocha, M. 2019. ‘Extraction Casino: Mining companies gambling with Latin American lives and sovereignty through supranational arbitration’, <https://ips-dc.org/wp-content/uploads/2019/07/ISDS-Mining-Latin-America-Report-Formatted-ENGLISH.pdf>; Laura Paddison, L. 2024. ‘How a US mining firm sued Mexico for billions – for trying to protect its own seabed’, *The Guardian*.

<https://www.theguardian.com/environment/2024/jan/31/how-a-us-mining-firm-sued-mexico-for-billions-for-trying-to-protect-its-own-seabed>

¹⁹ Friends of the Earth Europe, Transnational Institute & Corporate Europe Observatory. 2019. ‘Red Carpet Courts’, p.35. <https://10isdstories.org/report/>; Le Monde. 2018. ‘How the threat of arbitration allowed lobbies to unravel the Hulut law’.

https://www.lemonde.fr/accord-commercial-europe-canada-ceta/article/2018/09/04/comment-la-menace-d-arbitrage-a-permis-aux-lobbys-de-detricoter-la-loi-hulot_6005132_4998347.html

²⁰ Centre for Research on Multinational Corporations (SOMO) and Friends of the Earth Netherlands (Milieudefensie). 2019. ‘Bend or break: How Shell used an international investment treaty to browbeat Nigeria into a lucrative deal on OPL 245 oil field’. <https://www.somo.nl/wp-content/uploads/2019/02/Shell-Nigeria-EN.pdf>

²¹ Boyd, D. 2023. ‘Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights’. *United Nations Office of the High Commissioner for Human Rights*. <https://www.ohchr.org/en/documents/thematic-reports/a78168-paying-polluters-catastrophic-consequences-investor-state-dispute>

the nature of the dispute, the policy measure challenged, and the amount of compensation sought, are not known.²²

Even where institutional investors know of ISDS claims brought by companies in their portfolio, they are unlikely to have information to assess whether these claims are aligned with the company's public climate ambitions and the goals of the Paris Agreement. They are unlikely to be aware of any governance safeguards to supervise the company's appropriate use of ISDS, or be in a position to provide feedback on the development of such safeguards.

This means companies often wield an extraordinarily potent legal tool, which can disrupt the policy settings of the energy transition, without adequate internal governance processes or oversight.

Existing frameworks for lobbying do not address ISDS

The institutional investor community has put in place frameworks for corporate climate lobbying, such as the Global Standard on Responsible Climate Lobbying. These frameworks do not explicitly address ISDS.

This is significant because many of the reasons why institutional investors mobilised to address negative climate lobbying also apply to the usage of ISDS. For example, the Investor Statement of Intent for the Global Standard on Responsible Climate Lobbying notes:

'corporate lobbying... has frequently opposed policy measures that would support the goal of delivering net-zero emissions by 2050.'

The signatories go on to state that:

'As investors and investor groups, we recognise that lobbying that seeks to delay, dilute, or block climate action runs counter to our interests.'

Even if ISDS is not commonly understood as a tool for lobbying, companies use it to challenge policy measures that would support the goal of net zero emissions by 2050.

Similarly, many ISDS claims 'seeks to delay, dilute, or block climate action'²³ which is contrary to the interests of institutional investors with diversified portfolios, and therefore an interest in the long-term health of the broader financial system.

The absence of a normative framework covering ISDS in the same manner as lobbying makes it harder for investors to understand and assess the companies in their portfolio against this risk.

²² United Nations Conference on Trade and Development (UNCTAD). 2023. 'Glencore International A.G., C.I. Prodeco S.A., Consorcio Minero Unido S.A. and Carbones de la Jagua S.A. v. Republic of Colombia (IV)'. <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1319/glencore-and-others-v-colombia-iv->

²³The Global Standard on Corporate Climate Lobbying. 2022. 'Investor statement of intent: Global Standard on Responsible Climate Lobbying'. https://climate-lobbying.com/wp-content/uploads/2022/03/2022_investor-statement-of-intent_GlobalStandard-Responsible-Climate-Lobbying.pdf

Reputational risks

ISDS is attracting public scrutiny for blocking climate policy

ISDS has become a controversial topic, attracting mainstream media coverage²⁴ and civil society action worldwide.²⁵ In Europe, this is largely due to controversies surrounding the Energy Charter Treaty (ECT) and concerns about its role in blocking policy action necessary to ensure a safe climate.

In 2024, the EU²⁶ and UK²⁷ withdrew from the ECT, with the UK Energy Minister at the time stating that “remaining a member would not support our transition to cleaner, cheaper energy, and could even penalise us for our world-leading efforts to deliver net zero.”²⁸

With governments now recognising the risks of ISDS and exiting the investment treaties that give access to it,²⁹ investors need to consider if they want to associate with companies benefitting from a legal regime that blocks policy settings which promote the global energy transition.

Positions on sustainable development may be at odds with the use of ISDS

The majority of ISDS claims in the oil, gas, and mining sectors are brought by companies from the global north against governments from emerging market economies.³⁰ In such cases, the amount of compensation sought can outstrip public spending on health and education.³¹

The use of ISDS in this context, which UN representatives describe as “perpetuating extractivism and economic colonialism,” potentially contradicts public positions and statements by companies and investors on sustainable development. The failure to supervise the use of ISDS against climate policy could implicate institutional investors in a legal regime that has a questionable social license.

²⁴ See for example Al Jazeera. 2021. ‘[Corporate courts vs the environment](#)’; BBC. 2024. ‘[UK quits treaty that lets oil firms sue government](#)’; Financial Times. 2023. ‘[Britain must leave the Energy Charter Treaty](#)’; The Guardian. 2024. ‘[Secretive court system has awarded over \\$100bn public money to corporations, finds new analysis](#)’.

²⁵ See for example [War On Want](#); [Global Justice Now](#); and [Friends of the Earth Europe](#).

²⁶ European Council. 2024. ‘Energy Charter Treaty: EU notifies its withdrawal’.

<https://www.consilium.europa.eu/en/press/press-releases/2024/06/27/energy-charter-treaty-eu-notifies-its-withdrawal/>

²⁷ UK Government. 2024. Council of the EU Press Release ‘UK departs Energy Charter Treaty’.

<https://www.gov.uk/government/news/uk-departs-energy-charter-treaty>

²⁸ Ibid.

²⁹ Investment treaty terminations have vastly outstripped the number of new treaties signed every year since 2017. See UNCTAD. 2023. ‘Trends in the investment treaty regime and a reform toolbox for the energy transition’.

<https://unctad.org/publication/trends-investment-treaty-regime-and-reform-toolbox-energy-transition>

³⁰ UNCTAD. 2022. ‘Treaty-based ISDS cases and climate action’.

<https://investmentpolicy.unctad.org/publications/1270/treaty-based-investor-state-dispute-settlement-cases-and-climate-action>

³¹ Bonnitcha, J., & Brewin, S. 2020. ‘Compensation under investment treaties’. *International Institute for Sustainable Development*: Winnipeg, Canada.

Key stewardship considerations for investors

Investors concerned by the chilling effect of their companies' use of ISDS on government climate policy can:

- set clear expectations around when they would not consider it appropriate for a company to use or threaten an ISDS claim i.e. in response to a non-discriminatory, public interest policy measure designed to pursue the goals of the Paris Agreement.
- encourage companies to increase transparency and implement robust governance procedures for any use of ISDS, to ensure consistency with the company's public policy positions and the goals of the Paris Agreement.
- leverage the thematic overlaps of ISDS and lobbying into their existing work by integrating ISDS into:
 - ongoing engagement activities around lobbying
 - existing normative frameworks such as the Global Standard on Responsible Climate Lobbying.

Questions to guide company engagement

Investors can also use the following questions to help guide discussions with companies about their usage of ISDS claims:

The alignment of ISDS claims with company climate policy and the Paris goals

- Does the company ensure the lodgement of any ISDS claim is aligned with its policies on climate change, human rights, political influence and lobbying, and other related topics?
- Does the company ensure that all assumptions (for example, asset life, production forecasts, commodity price, etc) and financial modelling underpinning compensation claims are aligned with the goals of the Paris Agreement and the company's climate commitments?

Company guidance and oversight of the use of ISDS

- Does the HSEC/ECC committee (or equivalent) play a role in the decision to initiate an ISDS claim, and in the supervision of an ongoing claim?
- Does the company have a policy on the use of ISDS, or other guidance on circumstances in which the use or threatened use of ISDS is not appropriate?

Questions in respect of specific ISDS claims³²

Where the existence of the dispute is known, but no further details are disclosed:

³² Which questions are relevant depends on what is publicly disclosed about the dispute, and this can differ greatly. The [UNCTAD](#) and [ICSID](#) ISDS databases show what has been publicly disclosed about a specific claim.

- What is the government policy, law or judicial/administrative decision that is the subject of the claim? How does the company allege this policy, decision etc. violated its rights?
- How much is the company seeking in financial compensation?
- On what grounds are the particulars of the claim being kept confidential?³³

Where there is some information on the claim available³⁴:

- How much has the company spent on this claim, including tribunal fees, arbitrator fees, external counsel, expert witnesses, and litigation funding arrangements?
- What is the expected spend on the claim until completion, including enforcement costs?
- What assumptions underpin the alleged lost income for which compensation is being sought? E.g. asset valuation techniques and related assumptions and projections as to commodity prices, asset operating periods, political risk discounts etc.
- How are these assumptions aligned or otherwise with the company's stated goals regarding the Paris Agreement?
- What alternative dispute resolution processes and/or domestic legal remedies did the company pursue before initiating ISDS proceedings?

³³ The details asked about above are often publicly disclosed on the UNCTAD & ICSID databases and are not legally privileged.

³⁴ e.g Subject matter of the dispute; amount of compensation sought etc.

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