

## JOINT SUBMISSION FROM THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL)<sup>1</sup>, THE INTERNATIONAL INSTITUTE FOR SUSTAINABLE INVESTMENT (IISD),<sup>2</sup> AND CLIENTEARTH<sup>3</sup> ON THE CALL FOR INPUTS FROM THE SPECIAL RAPPORTEUR ON HUMAN RIGHTS AND THE ENVIRONMENT

### INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) MECHANISMS AND THE RIGHT TO A CLEAN, HEALTHY, AND SUSTAINABLE ENVIRONMENT

#### I. State experience and public participation in ISDS claims challenging measures intended to address climate change; protect the environment; or advance the right to a clean, healthy, and sustainable environment.

A. ISDS claims are numerous, often opaque, and largely inaccessible to the public.

**There are at least 175 treaty-based ISDS cases, closed or pending, that are tied to environmental measures.**<sup>4</sup> Many of those cases challenge measures that regulate polluting activities or protect the environment.<sup>5</sup> These include claims related to the termination of mining concessions due to environmental concerns,<sup>6</sup> claims brought following constitutional decisions to ban certain types of mining activities in

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1. CIEL is an independent, nonprofit organization with offices in Washington, DC, United States, and Geneva, Switzerland. Since 1989, CIEL has used the power of law to protect the environment, promote human rights, and ensure a just and sustainable society. In the context of investor-State dispute settlement (ISDS), CIEL has provided technical expertise on international environmental and human rights law. CIEL has participated as amicus curiae in multiple investment arbitration cases, has published extensively on investment and trade law, and has worked on ISDS reform and free trade agreement negotiations.

2. IISD is an award-winning independent think tank working to create a world where people and the planet thrive. IISD works with governments and civil society to develop and improve legal and policy tools focusing on the critical linkage between investment and sustainable development. IISD actively participates in the ISDS reform process at the United Nations Commission on International Trade Law (UNCITRAL) Working Group III, the UN talks on a binding treaty on business and human rights, and the negotiations of several innovative investment instruments in the Global South. As an integral component of its investment work, IISD is also the host and convener of the Investment Policy Forum, an event that brings together officials across world regions to discuss the latest trends in these areas, exchange experiences, design innovative approaches, and assess possible next steps.

3. ClientEarth is an independent, non-profit organization providing dedicated public interest legal capacity for the environment since 2007. ClientEarth's goal is to use the power of the law to bring about systemic change that protects the Earth for and with its inhabitants. We come up with practical solutions to the world's toughest environmental challenges and work with people, campaigners, governments, and industry to make those solutions a reality. ClientEarth has legal expertise in the application and enforcement of environmental law, as well as relevant knowledge and experience in supporting non-governmental organizations and communities in various legal forums, including in supporting groups submitting amicus briefs in arbitration proceedings. ClientEarth has extensively published on and actively participated in investment and ISDS reform negotiations.

4. According to data published by the UN Conference on Trade and Development (UNCTAD), about 15 percent of all 1,190 known ISDS cases based on investment agreements are related to environmental protection, and the numbers could be higher as many cases are kept confidential, see UNCTAD, "[Treaty-based Investor-State Dispute Settlement Cases and Climate Action](#)" (2022).

5. UNCTAD, "[Treaty-based Investor-State Dispute Settlement Cases and Climate Action](#)", (2022). Note that this number may be larger as transparency and access to information to investment cases is limited.

6. See for e.g., Skubenko and others v. North Macedonia Valentin Drozdenko, Artem Kadomskiy, Igor Kompanets and others v. Republic of North Macedonia (ICSID Case No. ARB/19/9).

protected areas,<sup>7</sup> claims arising out of a restriction on oil and gas activities due to environmental concerns,<sup>8</sup> or claims challenging the phaseout of coal-fired power plants.<sup>9</sup> More generally, claims have also arisen out of environmental and social impact assessment (ESIA) processes, particularly those concluding that an exploitation license or permit should be denied, halting an investment project deemed to have unacceptable environmental or social impacts, or whose impacts cannot be mitigated.<sup>10</sup>

**ISDS is usually kept private and initiated without prior litigation in the domestic courts of the host State.**<sup>11</sup> In contrast, victims of environmental harm are usually left with recourse to domestic courts only. While ISDS claims often heavily impact communities and Indigenous Peoples, they remain severely underrepresented within the investment treaty regime.<sup>12</sup> Further, the attempts by local communities and Indigenous Peoples to provide relevant information before ISDS tribunals have been largely in vain.<sup>13</sup>

**In particular, obstacles to filing amicus briefs are significant as they are restricted to narrow conditions and contingent on arbitrator discretion.** Even when admitted, tribunals are not obliged to consider amicus curiae arguments, and indeed rarely do.<sup>14</sup> In addition, amici often struggle to present effective arguments related to social rights, as the permitted scope of their submissions has been construed restrictively, access to information is limited, and some tribunals have interpreted the ‘significant interest’ requirement very narrowly.<sup>15</sup> More generally, human rights and environmental considerations have also not received adequate weight from arbitration tribunals.<sup>16</sup>

Moreover, reliance on counterclaims is also often ineffective due to limited scope, inadequate remedies, access and capacity constraints, and the burden of proof on respondent States. Counterclaims can also only be initiated by States, which may have interests diverging from those of the wider public.

- B. Investors employ ISDS as a lobbying tool to restrain regulatory action, yet its impact remains inadequately documented due to a lack of transparency.

**Foreign investors have used investment agreements to cast down policy measures.** It is impossible to quantify how many measures and regulations have been subject to the threat of treaty arbitration due to transparency issues, as well as methodological and data challenges. However, the mere threat of such awards – as well as the cost of defending against an arbitration claim – has become a powerful disincentive for States to undertake some policy measures that could adversely affect foreign investors. As an example,

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7. See for e.g., *Red Eagle v. Colombia* Red Eagle Exploration Limited v. Republic of Colombia (ICSID Case No. ARB/18/12); *Galway Gold v. Colombia* Galway Gold Inc. v. Republic of Colombia (ICSID Case No. ARB/18/13).
  8. See for e.g., *Lone Pine v. Canada* (ICSID Case No. UNCT/15/2).
  9. See for e.g., *Westmoreland Mining Holding, LLC v. Canada* (ICSID Case No. UNCT/20/3); *RWE v. the Netherlands* (ICSID Case No. ARB 21/4); *Uniper v. the Netherlands* (ICSID Case No. ARB/21/22).
  10. See for e.g., *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29).
  11. UNCITRAL, [“Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules”](#) (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013) (2014).
  12. United Nations General Assembly (UNGA), [“Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises,”](#) A/76/238 (2021), para. 26; see also Perrone, N., [“The ‘invisible’ local communities: foreign investor obligations, inclusiveness, and the international investment regime,”](#) *American Journal of International Law Unbound*, vol. 113, (2019), pp. 16–21.
  13. See for e.g., in *Odyssey Marine Exploration, Inc. v. United Mexican States* (ICSID Case No. UNCT/20/1), the majority of the tribunal denied the application for leave and concluded that the *Sociedad Cooperativa de Producción Pesquera Puerto Chale S.C.L.* – who has a fishing concession in the area where the Don Diego Project was being established, severely impacting their rights to fish as well as other rights – did not have a significant interest in the arbitration and would not bring a particular knowledge or insight different from that of the disputing parties; see *Odyssey Marine Exploration, Inc. v. United Mexican States* (ICSID Case No. UNCT/20/1 Procedural Order No. 6, Professor Sands’ Dissenting Opinion), para. 5.
  14. See for e.g., *Canada-Peru BIT Art. 39.7*.
  15. Somda, S., [“Protecting Social Rights Using the Amicus Curiae Procedure in Investment Arbitration: A smoke screen against third parties?”](#) *Investment Treaty News* (2019); See also *Odyssey Marine Exploration, Inc. (USA) v. United Mexican States*. (ICSID Case No. UNCT/20/1, Procedural Order No. 6, Professor Sands’ Dissenting Opinion), para. 2.
  16. UNGA, [“Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises,”](#) A/76/238 (2021), para. 48.

Denmark and New Zealand admitted that the threat of investor-State lawsuits hindered their climate policy ambitions.<sup>17</sup>

**Threats may be based not only on investment agreements but also on investment contracts.** For instance, investors have threatened to commence an arbitration, alleging a violation of stabilization provisions in project-specific contracts. These provisions protect investors from future changes in legislation and obligate States to compensate for losses resulting from such changes.<sup>18</sup> The majority of project-specific contracts are confidential, and threatened claims, though undocumented,<sup>19</sup> are an increasing concern for governments aiming to enact stronger laws safeguarding community and environmental rights.

- C. States have not always been effective in attempting to protect themselves from future ISDS claims, reforms have failed to limit risks, and new treaty language is insufficient, leaving termination as the best policy option.

**States have tried to address the risks of ISDS claims by reforming the substantive provisions in investment treaties and the procedural rules governing investment arbitration.**

On the one hand, States have sought to mitigate ISDS risks by removing ambiguities in treaties, clarifying the intended scope and interpretation of treaty standards,<sup>20</sup> and adding policy exceptions that exempt certain types of regulatory action.<sup>21</sup> Notwithstanding, these “modernized” treaties have not resulted in significant normative development, as arbitral tribunals continue to draw on jurisprudence based on old treaties when interpreting “modernized” treaties.<sup>22</sup> This is demonstrated by the *Eco Oro v. Colombia* decision, where the arbitral tribunal disregarded an environmental exception in the Colombia-Canada FTA.<sup>23</sup> At least 116 treaties signed after 2011<sup>24</sup> contain a similar exception, rendering the decision particularly far-reaching.

On the other hand, while States have also attempted to address concerns about ISDS through procedural reform in their recent investment treaties or revision of certain arbitration rules such as the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules, the effect of these changes remains to be seen. They have also engaged in a reform process under the auspices of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III, where various options for reform are being discussed, such as a code of conduct for arbitrators or the creation of a Multilateral Investment Court.<sup>25</sup> It remains to be seen how these potential reforms, if adopted, would advance normative development in a positive and significant manner.

**States have also opted for the termination of their treaties, either unilaterally or by consent (with or without renegotiation).**<sup>26</sup> The investment regime is no longer growing; it's shrinking. In the last five years, States have terminated at least 250 investment treaties,<sup>27</sup> and since 2017, the number of terminations exceeded the number of new treaties entering into force. These measures represent the most promising avenue for States to reduce exposure to ISDS in the future. They have done so based on a cost-benefit

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17. Meager, E., “[Cop26 targets pushed back under threat of being sued](#),” Capital Monitor (2022).

18. The following examples are drawn on the experience IISD has gathered when providing advisory services on investment governance to developing countries.

19. *Ibid.*

20. *Ibid.*

21. Ahmed, B., “[Treaty Exclusions](#),” Jus Mundi (2023).

22. Wolfgang A., “[Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes](#),” OUP (2022).

23. Benton Heath, J., “[Eco Oro and the Twilight of Policy Exceptionalism](#),” (2021).

24. See EDIT, [Electronic Database of Investment Treaties](#).

25. European Commission, “[Multilateral Investment Court Project](#),” (2015).

26. Customary international law, as embodied in the Vienna Convention on the Law of Treaties (VCLT), along with the clauses of the investment treaty itself, stipulates the process and timing for a State to terminate a bilateral investment treaty (BIT) and when such termination takes effect. See Bernasconi-Osterwalder, N.; Brewin, S., “[Terminating a Bilateral Investment Treaty](#),” (2020).

27. See UNCTAD, Investment Policy Hub, [Most Recent IIAs](#).

analysis of the imbalance of the investment treaty regime, the assessment that the treaty in question undermines efforts required to meet sustainable development and Paris Agreement objectives, adverse experiences with ISDS claims, concerns over sovereignty, and the need for policy coherence.<sup>28</sup> For instance, eight European Union Member States have announced their withdrawal from the Energy Charter Treaty (ECT) – the treaty that has generated the highest number of ISDS cases (157 cases). Meanwhile, a withdrawal of the EU itself from the ECT is increasingly likely and supported by the European Commission and the European Parliament. The withdrawal of South Africa and Ecuador from the ICSID Convention is another example.<sup>29</sup>

Furthermore, States have adopted strategies to limit or neutralize the effect of sunset clauses, which would otherwise provide for the continued protection of existing investments even after withdrawal or termination.<sup>30</sup> In some instances, sunset clauses were simply superseded by a new treaty, effectively nullifying the clause.<sup>31</sup> In other instances, the protection periods were specifically shortened in a new treaty<sup>32</sup> or side letters. Moreover, there is also an emerging practice of States altering or extinguishing sunset clauses upon the termination of bilateral investment treaties (BITs).<sup>33</sup>

#### D. Obstacles faced by States participating in international processes intended to reform ISDS mechanisms.

States are firmly engaged in several initiatives to reform international investment policy at the international, regional, bilateral, and national levels. However, these efforts – still not featuring prominently on the agenda of high-level political decision makers – are hindered by several factors.

- 1. Lack of a coordinated approach:** There is growing consensus that reform is necessary; however, divergent views persist as to the scope (e.g., qualifying substantive provisions by adding exceptions vs. termination) and the nature of reform.<sup>34</sup> Additionally, the multiplicity of forums, with varying mandates and nuances in subject focus areas, poses severe challenges for coordinated, streamlined, and resource-efficient reform efforts.
- 2. Additional obstacles resulting from the legal requirements for the reform of International Investment Agreements (IIAs):** While reform efforts are underway, legal barriers presented by the very architecture of treaties undermine States' timely solutions to addressing ISDS (for further details, see CIEL, IISD, and ClientEarth's [joint submission to the Organisation for Economic Co-operation and Development \(OECD\) on investment agreements and climate change](#)).
- 3. Treaty negotiations are significantly complex and involve a risk of trade-offs between investment and other policy areas:** Treaty negotiations are costly and require significant human resources and specialized know-how given their increasing interaction and need for coherence with other international law regimes like environment and human rights. This need poses additional challenges for developing countries whose resources are severely constrained and limited. Compounding this challenge is that reform processes often take many years and lead to insufficient outcomes. For example, after fifteen rounds of negotiations, the proposed new ECT is still not

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28. OECD Public Consultation, "[Investment Treaties and climate change](#)," (2022).

29. Albania has also recently threatened to withdraw from the ICSID Convention following an unsuccessful request for revision of an arbitral award. See Vladislav, D., IA Reporter (2023).

30. Letizia, V., "[The EU Termination Agreement and Sunset Clauses: No 'Survivors' on the Battlefield](#)," Kluwer Arbitration (2022).

31. An example is the new Uruguay–Australia BIT that has provisions that terminate and replace the old BIT.

32. See for e.g., Art. 30.8 of CETA.

33. Bernasconi-Osterwalder, N., "[Energy Charter Treaty Reform: Why withdrawal is an option?](#)," IISD (2021).; see also Zarowna, A., "[Termination of BITs and Sunset Clauses](#)," Hogan Lovells, Kluwer Arbitration Blog (2017).

34. CIEL, IISD, and ClientEarth, "[Submission to the Organization of Economic Co-operation and Development on Investment Agreements and Climate Change](#)," (2022).

consistent with the International Energy Agency's widely recognized scenario to limit global warming to 1.5°C above pre-industrial levels and is still an obstacle to the effective implementation of the Paris Agreement, the UN Framework Convention on Climate Change (UNFCCC), and international human rights in the context of climate change.<sup>35</sup>

## **II. While investment treaties have negligibly demonstrated positive effects on foreign investment flows, their ISDS mechanisms engender disproportionate negative impacts on human rights and the environment.**

In addition to what has been mentioned in the section above, there are other points of relevance for the right to a healthy environment, IIAs, and ISDS.

**Decades of research have failed to establish that legal protections contained within investment treaties have a noticeable impact on promoting foreign investment flows.**<sup>36</sup> Today, it is widely recognized that there is inconclusive evidence of a causal link between the existence of investment treaties and foreign direct investment (FDI) uptake.<sup>37</sup> On the other hand, the termination of bilateral investment treaties has not negatively affected countries' FDI inflows.<sup>38</sup>

However, IIAs and ISDS have resulted in serious costs and undermine States' ability to protect their populations' right to a clean, healthy, and sustainable environment.

**Indiscriminate investment protection turns the polluter pays principle on its head.** Additionally, IIAs generally do not differentiate between the investments or activities they protect. This means IIAs can protect environmentally sound activities as well as activities that can have negative environmental and human rights impacts. This lack of differentiation can lead to protecting and compensating companies that pose a threat to the right to a healthy environment and effectively means paying polluters rather than making polluters pay (i.e., polluters pay principle).<sup>39</sup>

**Further, investment awards have weakened the implementation of international and national environmental law, international human rights law, and national social rights requirements and obligations.** As the number of investor claims has risen, the threat of costly arbitration has led to (i) the disincentive to adopt or enforce regulations for fear of legal action or (ii) the tendency to forgo regulatory action to avoid investor backlash.<sup>40</sup> Concerns over ISDS disputes following environmental measures have proliferated in the last few years, and the Intergovernmental Panel on Climate Change (IPCC), the UN Conference on Trade and Development (UNCTAD), and several States have highlighted the constraints resulting from IIAs and ISDS on States' efforts to adopt climate and environmental policies.<sup>41</sup> Importantly, in many cases, tribunals have amalgamated the treatment of purely domestic and internationally induced

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35. Van den Berghe A.; Schaugg L.; de Anzizu H., "[The New Energy Charter Treaty in Light of the Climate Emergency](#)," Jus Mundi (2022).

36. Brada, J.C.; Drabek, Z.; Iwasaki I., "[Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis](#)", Wiley Online Library (2020).

37. Ibid. "Investment treaties "have an effect on [FDI] that is so small as to be considered as negligible or zero." p. 58.; See also "the empirical evidence on the basis of a meta-analysis suggests that the FDI promotion effect of [bilateral investment treaties] seems to be economically negligible", at Bellak, C. "Economic Impact of Investment Agreements", Department of Economics Working Paper Series No. 200 (2015), p. 19.

38. Mehranvar, L.; Sadmal, S., "[The role of investment Treaties and Investor-State Dispute Settlement in Renewable Energy Investments](#)", Columbia Center on Sustainable Investment (2022); See also, Di Salvatore, L., Bernasconi-Osterwalder, N., Schaugg, L., "[Despite consensus on the ECT's incompatibility with the global climate agenda, claims that are well-suited for the clean energy transition persist](#)", Investment Treaty News 3(12), IISD (2021), p. 19.

39. See for e.g. *Rockhopper v. Italy*, in which last August, the arbitral tribunal ruled in favor of British oil company Rockhopper in its dispute against Italy due to the denial of an offshore oilfield license. The tribunal awarded Rockhopper over €240 million, including interest, as compensation. Marzal, T., "[Polluter Doesn't Pay: the Rockhopper v. Italy award](#)", EJIL:Talk! (2023).

40. Aikaterini, T., "The right to regulate in international investment law", Nomos Verlagsgesellschaft, Baden-Baden (2014), p. 20. On regulatory chill, See also Tienhaara, K., "[Regulatory Chill and the Threat of Arbitration](#)", Chester Brown and Kates Miles, Cambridge University Press (2011).

41. Capital Monitor, "[COP 26 targets pushed under threat of being sued](#)", (2019); See also IPCC, "[Climate Change 2022 Mitigation of Climate Change: Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change](#)", (2022), p. 133.; See also UNCTAD, "[Treaty-based Investor-State Dispute Settlement Cases and Climate Action](#)", (2022).

measures.<sup>42</sup> Environmental measures have been perceived as suspicious instead of acknowledging the concurrent duties and obligations of States outside the realm of international investment law. This leads to erroneous applications of international environmental and human rights law and increasing legal fragmentation.<sup>43</sup> Moreover, focusing on States obligations under investment treaties, international investment awards have sidelined the competing legal obligations that bind the State beyond the investment law regime.<sup>44</sup> In entering into an investment agreement, a State cannot be assumed to have renounced, abrogated, or waived sub silentio its existing international obligations under human rights law – in fact, certain human rights obligations are non-derogable.<sup>45</sup>

**IAs and ISDS may further obstruct poorer States’ efforts to protect their populations from climate change, the potentially unjust effects of the transition to a low greenhouse gas-emitting economy, and pollution and biodiversity loss,** further exacerbating inequalities between the Global North and the Global South. The global burden of legal and financial risks resulting from IAs and ISDS for fossil fuels-producing countries, if they decide to cancel projects in line with a transition to net-zero by 2040, is indeed highly unjust, as it falls mostly on low- and middle-income countries, including those highly vulnerable to climate change.<sup>46</sup> This situation can potentially reduce the essential public finance in poorer countries needed for climate mitigation and adaptation efforts, programs to assist communities currently dependent on the fossil fuel industry, and assisting those communities already severely impacted by climate change.<sup>47</sup>

**The mere existence of ISDS may adversely affect the development of independent and strong domestic judicial systems.** Shifting investment disputes from the jurisdiction of local courts to supranational ISDS tribunals risks taking away a potential economic incentive (for example, attracting FDI) for countries and their institutional partners to enhance domestic judicial systems and develop robust and specialized bodies when needed.

### III. Recommendations

In light of the above, below are some recommendations that could be included in the Report of the Special Rapporteur:

1. States, UN Agencies, and Arbitral Tribunals should recognize and elevate the existence of concurrent international legal obligations of States, such as:
  - a. The States’ Duty to Regulate, which includes the obligation to take steps to prevent and mitigate foreseeable threats to rights, including the right to life and enjoyment of a life with dignity, posed by degradation of the environment, as recognized by the Human Rights Committee in its General Comment No. 36 (CCPR/C/GC/36) and other authoritative interpretations, statements, and reports of the Human Rights Committee and UN Special Rapporteurs;

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42. Viñuelas, Jorge E., ["The Dormant Environment Clause": Assessing the Impact of Multilateral Environmental Agreements on Foreign Investment Disputes"](#), Graduate Institute of International and Development Studies, Center of International Environmental Law (2012), p. 2.

43. Tribunals often rely on the *lex specialis* doctrine to hold that the IIA, as a specialized legal instrument, prevails over more general rules and principles of international law. See Choudhury, B. ["Human Rights Provisions in International Investment Treaties and Investor-State Contracts,"](#) Investment Protection, Human Rights, and International Arbitration, Edward Elgar (2020).

44. The singular focus of early investment agreements on investment protections, and their silence on how these protections interacted with various areas of public interest law, may have contributed to an impression that the rights and protections accorded to investments were absolute, not limited by other considerations. However, State Parties to investment agreements have parallel legal obligations under other regimes.

45. Non-derogable human rights refers to rights that are absolute and may not be subject to any derogation, even in time of war or emergency. As an example, Article 15(2) of the European Convention on Human Rights (ECHR) provides a list of rights that may not be suspended under any circumstances.

46. Tienhaara, K.; Thrasher, R., Simmons, A. B.; Gallagher, K. P., ["Investor-state Dispute Settlement: Obstructing a just Energy Transition,"](#) Climate Policy (2022).

47. *Ibid.*

- b. The polluter pays principle, which dictates that polluters should bear the costs of preventing and implementing control measures for pollution, instead of compensating polluters for the implementation of those measures;
  - c. The right to a healthy environment;
  - d. Other principles and obligations under international environmental and human rights law.
2. States, UN Agencies, and civil society actors should recognize and elevate the need to terminate old-generation treaties multilaterally or, alternatively, withdraw consent to ISDS to prevent any further harm to needed environmental and human rights policy measures.
3. States, UN Agencies, and multilateral processes should ensure that new and modernized investment agreements do not provide investment protection standards for activities that have adverse impacts on the environment, biodiversity, climate, human rights, and human health.
4. States should conclude a multilateral agreement to carve out climate measures and measures that implement the right to a healthy environment from the scope of ISDS.
5. States, UN Agencies, and multilateral processes should ensure that investment treaty reform and negotiation processes are inclusive. The adverse consequences of ISDS are unevenly distributed. Therefore, for any reform to be viable, it must be inclusive and ensure full representation of all relevant stakeholders.
6. States, UN Agencies, and multilateral processes should ensure that investment treaty reform and negotiation processes are holistic. Cosmetic changes have proven ineffective. Despite introducing new treaty language, arbitral jurisprudence remains consistently the same. Now more than ever, we need to question the adequacy of international investment governance fundamentally. Any reform that does not challenge the foundational premises of this governance regime will fall short of addressing widely recognized concerns.
7. States should primarily rely on their domestic courts to resolve investment disputes. States could also design a Comprehensive and Inclusive Investment-Related Dispute Settlement system at the international level that would include a compliance mechanism in a manner that does not disincentivize the development of strong and independent national judiciaries. Such a system would need to address global challenges, cohere with national judicial systems and local remedies, and adequately balance the access to remedies of all interested stakeholders.