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INVESTOR-STATE DISPUTE SETTLEMENT AND CLIMATE JUSTICE

RESEARCH PAPER
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ABSTRACT

As the Intergovernmental Panel on Climate Change demonstrates more clearly than ever that the window is closing to avoid the most catastrophic and irreversible effects of climate change, measures taken by States for both mitigation and adaptation fall far short of what would be required to respond to this existential threat to nature, people, prosperity and security. Despite this, coal, oil and gas companies and those that invest in them or their investor-state dispute settlement (ISDS) claims are increasingly using ISDS to block these measures and extend the fossil fuel era. There is, however, a way forward that takes into account the short time remaining and that could make solidarity, the enlightened self-interest of States and the common interest of humanity prevail: the unilateral withdrawal by States of their consent to submit to arbitration ISDS claims brought against them in relation to foreign investments in fossil fuels and of the right of their domestic investors to bring such claims against other States parties to treaties to which they are themselves party, combined with the defence of the state of necessity.

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1. What is investor-State dispute settlement (ISDS)?

International investment agreements (IIAs) usually include investor-State dispute settlement (ISDS) clauses, which allow foreign investors to sue governments before international arbitral tribunals for loss of profits, including potential loss of future profits.[1] They do not, in practice, grant States the reciprocal right of access to arbitration to sue foreign investors.[2] 3,264 such agreements are currently in force between various combinations of States.[3] ISDS lawsuits can also be based on the investment protection chapters of free trade agreements (FTAs), domestic investment legislation or contracts.

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[1] On ISDS generally and Canada's role as one of the first defendants in an ISDS case based on an environmental protection measure, see Maude Barlow and Raoul Marc Jennar, "*Le fléau de l'arbitrage international*" (The Scourge of International Arbitration), *Le monde diplomatique*, February 2016: https://www.monde-diplomatique.fr/2016/02/BARLOW/54744, consulted on May 27, 2023.

[2] *Inter alia* because IIAs, including bilateral investment treaties (BITs), are agreements between States, to which foreign investors are not Parties, and both parties to a dispute must give their consent for it to be submitted to arbitration. The consent of States has been presumed to have been given in advance in many ISDS cases, for a variety of often dubious reasons.

[3] UNCTAD Policy Hub, International Investment Agreements Navigator:: https://investmentpolicy.unctad.org/international-investment-agreements, consulted on June 2, 2023.

2. What is climate justice?

According to the Centre for Climate Justice at the University of British Columbia, this concept recognizes that "climate change is [...] experienced highly unevenly, with the most severe impacts often falling on those who have least contributed to the crisis. For these reasons, efforts to address climate change have the potential to alleviate or exacerbate existing inequities and injustices, and a climate justice perspective is relevant to climate responses at all scales".[4]

3. Climate change, fossil fuels and ISDS

The goal of the 2015 Paris Agreement on Climate Change is to limit global warming to well below 2 degrees Celsius and preferably 1.5, compared to pre-industrial levels.[5] In 2018 the Intergovernmental Panel on Climate Change called for urgent action to phase out the use of fossil fuels, a key requirement to limit global warming to 1.5°C.[6]

Yet, most governments, including Canada's, are failing to implement an energy transition. Instead of banning new permits for exploration or extraction of fossil fuels, limiting or rescinding existing licenses, cutting subsidies to coal, gas or oil, or taxing their production, a 2019 UN report warned that "governments are planning to produce about 50% more fossil fuels in 2030 than would be consistent with limiting warming to 2°C and 120% more than would be consistent with limiting warming to 1.5°C".[7]

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[4] University of British Columbia Center for Climate Justice Guiding Principles: https://climatejustice.ubc.ca/about/guiding-principles/, consulted on May 31, 2023.

[5] United Nations Climate Change, "What is the Paris Agreement?": https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement, consulted on May 28, 2023.

[6] Summary for Policy Makers of the Special Report on Global Warming of 1.5°C: https://www.ipcc.ch/sr15/chapter/spm/; Matthew Taylor, Matthew Weaver and Helen Davidson, "IPCC climate change report calls for urgent action to phase out fossil fuels", The Guardian, October 8, 2018: https://www.theguardian.com/environment/live/2018/oct/08/ipcc-climate-change-report-urgent-action-fossil-fuels-live, both consulted on May 30, 2023.

[7] United Nations Environment Program *et al*, "The Production Gap: The discrepancy between countries' planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C or 2°C": http://productiongap.org/wp-content/uploads/2019/11/Production-Gap-Report-2019.pdf, consulted on May 28, 2023.

As a result, almost eight years after the Paris Agreement was signed, the commitments formalized by States are still woefully inadequate and could lead the planet on a path of 3-to-4-degree Celcius warming by the end of the century. In this scenario, the IPCC warns that the world as we know it would become unrecognizable, with declining life expectancy and quality of life. The state of health and well-being of the world's population would be substantially reduced and would continue to deteriorate over the following decades, aggravated by major increases in food prices, conflict and climate migration.[8]

A 2021 report by the International Energy Agency (IEA), which operates under the aegis of the Organization for Economic Cooperation and Development (OECD), makes the implications clear: "Beyond projects already committed as of 2021, there are no new oil and gas fields approved for development in our pathway, and no new coal mines or mine extensions are required."[9] In other words, if we are to avoid catastrophic climate change, all coal, oil and gas projects that are not yet in production must be abandoned.[10]

In another report released in 2021, the IPCC once again showed how human activities, mainly the use of coal, oil and gas, are causing a disruption in the

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[8] Alexandre Shields, *Les bouleversements climatiques menacent de rendre le monde «méconnaissable»* (Climate change threatens to make the world "unrecognizable »), *Le Devoir*, October 9, 2020, https://www.ledevoir.com/societe/environnement/587527/les-bouleversements-climatiques-menacent-de-rendre-le-monde-meconnaissable?utm_source=recirculation&utm_medium=hyperlien&utm_campaign=corps_texte. More recently, the IPCC has found in its Synthesis Report for the Sixth Assessment Report (AR6), released in March 2023, that « Global GHG emissions in 2030 implied by nationally determined contributions (NDCs) announced by October 2021 make it likely that warming will exceed 1.5°C during the 21st century and make it harder to limit warming below 2°C.": https://www.ipcc.ch/report/ar6/syr/resources/spm-headline-statements, both consulted on May 30, 2023.

[9] International Energy Agency, "Net Zero by 2050: A Roadmap for the Global Energy Sector": https://iea.blob.core.windows.net/assets/4719e321-6d3d-41a2-bd6b-461ad2f850a8/NetZeroby2050-ARoadmapfortheGlobalEnergySector.pdf, consulted on May 28, 2023.

[10] Alexandre Shields, *« Il faut interdire les nouveaux projets d'énergies fossiles, prévient l'Agence internationale de l'énergie »* (New fossil fuel projects must be banned, warns the International Energy Agency), *Le Devoir*, May 19, 2021: https://www.ledevoir.com/societe/environnement/602402/il-faut-interdire-les-nouveaux-projets-d-energies-fossiles-previent-l-agence-internationale-de-l-energie, consulted on May 30, 2023.

climate of such speed and scale that it threatens the necessary conditions for human life on Earth.[11] That's why, according to UN Secretary General António Guterres, that report "must sound a death knell for coal and fossil fuels, before they destroy our planet."[12]

It is thus abundantly clear that climate change, fueled by the use of coal, oil and gas, constitutes an extremely grave and imminent peril threatening the essential interests of all States and the whole of mankind.

However, research has shown that 75% of coal power plants worldwide that involve foreign investment and need to be retired early to align with the Paris Agreement objective of keeping warming below 1.5C are protected by at least one treaty that gives foreign investors access to ISDS.[13] The value of fossil fuel infrastructure protected by the Energy Charter Treaty is €344.6 billion in the EU, the UK and Switzerland alone.[14] More generally, the value of the potentially stranded assets represented by proven reserves of coal, oil and gas, which could lead to 3,000 billion tonnes of CO_2 emissions, has been estimated at approximately US$1,600 trillion.[15]

It should therefore come as no surprise that, as the existential threat posed by climate change increasingly focusses attention on their unsustainability, coal, oil

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[11] *Idem*, *Le naufrage climatique est en vue, prévient le GIEC* (Climate disaster in sight, warns IPCC), *Le Devoir*, August 10, 2021: https://www.ledevoir.com/societe/environnement/623712/le-rechauffement-s-accelere-alerte-rouge-pour-l-humanite-selon-le-rapport-du-giec, consulted on May 30, 2023.

[12] United Nations, "Secretary-General Calls Latest IPCC Climate Report 'Code Red for Humanity', Stressing 'Irrefutable' Evidence of Human Influence", August 9, 2021: https://www.un.org/press/en/2021/sgsm20847.doc.htm, consulted on May 30, 2023.

[13] Kyla Tienhaara and Lorenzo Cotula, "Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets", International Institute for Environment and Development: https://pubs.iied.org/17660iied, consulted on May 30, 2023.

[14] Oliver Moldenhauer and Nico Schmidt, "ECT data analysis: Results and Methods", Investigate Europe, February 23, 2021: https://www.investigate-europe.eu/en/2021/ect-data/, consulted on May 29, 2023.

[15] Kim Stanley Robinson, "Optopia: From Fiction to Action on Climate Change", November 30, 2021: https://www.berggruen.org/events/possible-worlds-optopia-from-fiction-to-action-on-climate-change/, consulted on May 30, 2023.

and gas companies and those who invest in them or their ISDS claims are increasingly using ISDS to block climate action.[16]

4. The moral hazards of ISDS

There have so far been over 1,250 known ISDS lawsuits.[17] These cases are decided by three lawyers, in large part corporate lawyers, acting as arbitrators. Most of these arbitrators (there are, of course, exceptions)[18] tend to defend private investor rights above public interest, revealing an inherent pro-corporate bias. Several prominent arbitrators have been members of the board of major multinational corporations, including some that have filed cases against

[16] Lea Di Salvatore, "Investor–State Disputes in the Fossil Fuel Industry", International Institute for Sustainable Development, December 2021: https://www.iisd.org/system/files/2022-01/investor–state-disputes-fossil-fuel-industry.pdf; see also, *inter alia*, RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands (ICSID Case No. ARB/21/4), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/4 ; Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands (ICSID Case No. ARB/21/22), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/22 ; Kyla Tienhaara, "The tale of the dead oil pipeline and the zombie trade agreement", The Monitor, December 3, 2021, https://monitormag.ca/articles/the-tale-of-the-dead-oil-pipeline-and-the-zombie-trade-agreement; *Idem*, "The fossil fuel era is coming to an end, but the lawsuits are just beginning", The Conversation, December 18, 2018, https://theconversation.com/the-fossil-fuel-era-is-coming-to-an-end-but-the-lawsuits-are-just-beginning-107512; and Glen Moody, "Canadian-Based Company Sues Canada Under NAFTA, Saying That Fracking Ban Takes Away Its Expected Profits", Techdirt, October 4, 2013, https://www.techdirt.com/articles/20131004/07500724750/canada-hit-with-another-massive-investor-state-dispute-settlement-demand.shtmlm, all consulted on May 30, 2023.

[17] UNCTAD Policy Hub: Investment Dispute Settlement Navigator: https://investmentpolicy.unctad.org/investment-dispute-settlement, consulted on May 28, 2023.

[18] As was pointed out by one of those exceptions, professor Georges Abi-Saab, at paragraphs 272-274 of his 2011 dissenting opinion in *Abaclat and Others v. Argentina*, "the tendency of certain ICSID tribunals to consider any limitation on their jurisdiction [...] as an obstacle in the way of achieving the object and purpose of these treaties, which they interpret as being exclusively to afford maximum protection to investment, notwithstanding the legitimate interests of the host State [...] is the worst disservice that can be rendered to the very positive movement that has characterized the last two decades towards increasing resort to adjudication and the multiplication of adjudicative fora on the international level.": https://www.italaw.com/sites/default/files/case-documents/ita0237.pdf, consulted on May 28, 2023. ICSID is the International Center for the Settlement of Investment Disputes.

developing nations. Nearly all share businesses' belief in the paramount importance of protecting private profits.[19]

Arbitrators are chosen by the investor and the State it chooses to sue. Unlike judges, who have permanent jobs and are paid an annual salary by the State, arbitrators are paid a fee by the parties to each dispute and the arbitral tribunal ceases to exists after it issues its award, or the case is settled (which is why they are sometimes called *ad hoc* tribunals, as opposed to permanent ones). In a one-sided system in which only foreign investors can bring claims, this creates a strong incentive for arbitrators to side with them rather than States, because investor-friendly rulings pave the way for being named as an arbitrator again in future lawsuits, thus generating more income.[20]

In a 2021 talk on the powers and duties of arbitrators, professor Catherine Kessedjian stressed the impact of their decisions, not just on the parties to the dispute, but on society at large. That's why, in her view, arbitrators should not be working for themselves, for the pleasure of making money or being famous.[21] That an esteemed member of the select group of international investment arbitrators (and one of the few women among them) would make such a remark shows the goal of self-enrichment has risen to the level of a systemic problem.[22]

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[19] Cecilia Olivet and Pia Eberhardt, "Profiting from injustice: How law firms, arbitrators and financiers are fueling an investment arbitration boom", Transnational Institute, November 27, 2012: https://www.tni.org/en/briefing/profiting-injustice, consulted on May 28, 2023.

[20] Lora Verheecke, Pia Eberhardt, Cecilia Olivet and Sam Cossar-Gilbert, "When corporations ransack countries: a primer on investor-state dispute settlement", in "Red Carpet Courts: 10 Stories of How the Rich and Powerful Hijacked Justice", Friends of the Earth Europe and International, the Transnational Institute and Corporate Europe Observatory , July 2019: https://10isdsstories.org/isds-primer/, consulted on May 28, 2023.

[21] Catherine Kessedjian, "Comments", ILA-Canada Biennial Conference, International Arbitration: Charting the Path Ahead, May 20, 2021: https://www.youtube.com/watch?v=LJbTeYH3mNQ , consulted on January 16, 2022.

[22] For an elaboration of professor Kessedjian's views on the matter, see "Is arbitration a service to business or to the legal profession?": https://brill.com/display/book/edcoll/9789004190047/Bej.9789004182912.i-452_019.xml, consulted on May 28, 2023.

That select group is notoriously lacking in diversity. Studies show nearly all of the most prominent and repeatedly appointed arbitrators in ISDS cases are men from the Global North with significant prior experience in such cases. In 2012 just 15 arbitrators, nearly all from Europe, the US or Canada, had decided 55% of all known investment-treaty disputes.[23] Rather than being seen as fair, just, and devoid of bias, decisions are sometimes suspected to be the products of adjudicators who share a particular world view.[24]

Another problem with this system is double-hatting, whereby the same individual acts simultaneously as an arbitrator in one ISDS proceeding and as counsel in another. This raises obvious questions about independence and impartiality, and at least apparent, if not actual, conflict of interest.[25]

As an example of how lucrative this system can be, in the case of a highly publicized 2014 award (which was issued 9 years after the arbitration was initiated and represents more of an outlier than an average) the arbitrators' fees were as follows: €103,537 for Daniel Price, the arbitrator initially appointed by the claimants; €1,513,880 for Charles Poncet, who replaced Mr. Price; €2,011,092 for Judge Stephen Schwebel, who was appointed by Russia; €1,732,937 for L. Yves Fortier, the Chairman; and €970,562 for Martin J. Valasek, the Assistant to the Tribunal.[26]

ISDS is not only lucrative for arbitrators. Lawyers are also making a killing. Legal and arbitration costs average over US$8 million per investor-State dispute, exceeding US$30 million in some cases. Elite law firms charge as much as US$1,000 per hour, per lawyer – with whole teams handling cases. Since

[23] Olivet and Eberhardt, *op. cit. supra*, note 19.

[24] Andrea K. Bjorklund *et al*, "The Diversity Deficit in International Investment Arbitration", June 2020, The Journal of World Investment & Trade 21(2-3), 410-440: https://www.researchgate.net/publication/342443861_The_Diversity_Deficit_in_International_Investment_Arbitration, consulted on May 28, 2023.

[25] See, e.g., Malcolm Langford, Daniel Behn and Runar Hilleren Lie, "The Ethics and Empirics of Double Hatting", 6:7 ESIL Reflection (2017): https://esil-sedi.eu/post_name-118/, consulted on May 28, 2023.

[26] *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (PCA Case No. AA 227), Final Award, 18 July 2014, paragraphs 1860-1863 : https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf, consulted on May 28, 2023.

governments are being sued, these costs often end up being paid by taxpayers, including in countries where people do not even have access to basic services.[27]

There is a revolving door between investment lawyers and government policy-makers, mostly in developed countries, that bolsters the ISDS system. Several prominent investment lawyers today were once chief negotiators of IIAs (or FTAs with investment protection chapters) and defended their governments in investor-State disputes. Others are actively sought as advisers and opinion-makers by governments and influence legislation.[28]

The damages awarded to foreign investors by arbitral tribunals can be so high that ISDS is becoming increasingly integrated with the financial world through third-party funding, where investment funds invest in investor-State disputes in exchange for a share in the award or settlement. This financialization of investment arbitration includes proposals to sell packages of lawsuits to third parties, similar to the disastrous credit default swaps behind the 2008 global financial crisis.[29]

ISDS arbitral tribunal decisions are binding and immediately enforceable. They usually ignore the public interest concerns motivating the government's intervention, or the fact that the companies and those who invest in them may well have been fully aware of the risks when they invested.[30]

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[27] Olivet and Eberhardt, *op. cit. supra* note 19. For example, the Philippine government spent US$58 million defending two cases against German airport operator Fraport. That money could have paid the salaries of 12,500 teachers for one year or vaccinated 3.8 million children against diseases such as tuberculosis, diphtheria, tetanus and polio.

[28] *Ibidem.*

[29] *Ibidem.* See also Justin Villamil, "Rich Investors Are Now Betting on Legal Cases. What Could Go Wrong?", Jacobin, May 2, 2023 : https://jacobin.com/2023/05/rich-investors-legal-cases-litigation-finance-international-law-argentina, consulted on June 2, 2023.

[30] *Ibidem.*

5. How ISDS is used to block climate action

There is increasing concern about ISDS obstructing measures taken by host States, i.e., those receiving foreign direct investment (FDI), to address climate change. IIAs are powerful weapons for fossil fuel corporations. They enable them to attack any measure that could reduce their profits, including those enacted to deal with the climate emergency. Governments attempting to prevent projects that further lock-in fossil fuel dependence and accelerate climate change can thus be held liable for billions of dollars in damages.[31]

This leads to regulatory chill, where governments scale back their efforts to fight climate change to avoid ISDS claims. While this phenomenon had long been suspected to be operating in the shadows, since it's hard to prove something that didn't happen, the climate ministers of Denmark and New Zealand have publicly admitted that the threat of investor-State lawsuits has prevented their governments from being more ambitious in their climate policies.[32]

Using ISDS clauses in IIAs, coal, oil and gas companies and those who invest in them or their ISDS claims can deter governments from advancing climate legislation, or make steps towards an energy transition extremely expensive. Environmental lawyer Amandine Van Den Berghe sums up the problem as follows: "fossil fuel companies may seek to use ISDS to shift their losses from

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[31] Harpreet Kaur Paul and Dalia Gebrial, "Trade & investment blockading New Deals", in "Perspectives on a Global Green New Deal", Rosa Luxemburg Stiftung London Office and The Leap, 2021: https://global-gnd.com/wp-content/uploads/2021/03/GGND-Booklet-DIGITAL-withlink-single.pdf, consulted on May 28, 2023. For example, in the *Yukos* award cited at footnote 26 above, the arbitral tribunal ordered the Russian Federation to pay Russian oil company Yukos and others claimants over US$50 billion in damages. *Yukos Universal v. Russia,* Judgment of the High Court of Justice of England and Wales [2021] EWHC 894, para. 2: https://jusmundi.com/en/document/decision/en-yukos-universal-limited-isle-of-man-v-the-russian-federation-judgment-of-the-high-court-of-justice-of-england-and-wales-2021-ewhc-894-wednesday-14th-april-2021#:~:text=By%20final%20arbitration%20awards%20of,were%20unlawfully%20expropriated%20by%20Russia, consulted on May 28, 2023.

[32] Elizabeth Meager, "Cop26 targets pushed back under threat of being sued", Capital Monitor, January 14, 2022: https://capitalmonitor.ai/institution/government/cop26-ambitions-at-risk-from-energy-charter-treaty-lawsuits/, consulted on May 30, 2023.

stranded assets onto States and seek unmerited compensation for poor business decisions".[33]

The Energy Charter Treaty (ECT) has been described as "the world's most dangerous investment agreement",[34] due to its wide geographical reach and its extremely broad and generous investor privileges. Adopted in 1994 to protect foreign investors in the energy sector, it has since been used in at least 158 cases by such investors to sue States.[35] Several of these lawsuits were initiated by fossil fuel companies attempting to undermine governmental efforts to fight climate change.[36]

In 2017, Italy was sued by the British oil and gas company Rockhopper after cancelling its concession to drill oil in the Adriatic Sea.[37] This followed a decade of struggle by Italian coastal communities who denounced the danger of coastal drilling, which had already caused earthquakes and threatened new ecological disasters. The oil company used the ECT to demand 300 million euros in compensation - seven times the amount the company initially invested.[38]

Fossil fuel companies are also using the threat of billion-dollar lawsuits to dissuade governments from taking effective climate action. Canadian oil and gas company Vermillion, which extracts almost 75% of all French oil, used the threat

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[33] Kaur Paul and Gebrial, *op. cit. supra* note 31.

[34] Corporate Europe Observatory and the Transnational Institute, "Energy Charter Treaty's Dirty Secrets": https://energy-charter-dirty-secrets.org, consulted on May 28, 2023. The *Yukos* award cited at footnote 26 above was made under the ECT.

[35] ECT Secretariat, Statistics of ECT Cases (as of 1/5/2023): https://www.energycharter.org/fileadmin/DocumentsMedia/Disputes/20230501_-_Statistics_-_Cases_under_the_Energy_Charter_Treaty.pdf, consulted on May 28, 2023.

[36] Kaur Paul and Gebrial, *op. cit. supra* note 31.

[37] Jennifer Thompson and Cat Rutter Pooley, "Oil and gas explorer Rockhopper in legal fight with Italy", The Financial Times, March 23, 2017: https://www.ft.com/content/183ae12e-0fb4-11e7-b030-768954394623, consulted on May 31, 2023. See also "Dirty Oil Attacks Action on Fossil Fuels: Rockhopper vs Italy" in Verheecke, Olivet and Cossar-Gilbert, *op. cit. supra* note 20: https://10isdsstories.org/cases/case9/, consulted on May 31, 2023.

[38] Kaur Paul and Gebrial, *op. cit. supra* note 31.

of an ECT lawsuit to dissuade the French government from legislating to phase out fossil fuel extraction. The bill was shelved and replaced by a watered-down law that continues to allow it.[39]

More recently, German coal giant Uniper threatened to sue the Netherlands for up to €1 billion over a new law banning the use of coal for electricity production by 2030. The threat was made when the law was being discussed by the Dutch Parliament in 2019. Even though the threat didn't stop the proposal from becoming law, the intent to chill legislation was clear.[40] The company made good on its threat in 2021 and filed a dispute against the Netherlands under the ECT. In 2022, the German government decided to bail out and nationalize Uniper to deal with financial difficulties faced by the company as a result of the energy price crisis and war in Ukraine. As part of the deal, Uniper agreed to withdraw the arbitration case against the Netherlands. A similar ICSID arbitration case by RWE against the Netherlands is still pending.[41]

These three cases are but a small sample of known instances in which fossil fuel and other companies are using ISDS and the threat of arbitral awards so devastating for States that many respond to a case, or even the mere threat of one, by offering vast concessions, such as rolling back their laws.[42]

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[39] "Blocking Climate Change Laws with ISDS Threats: Vermilion vs France", in Verheecke, Olivet and Cossar-Gilbert, *op. cit. supra* note 20: https://10isdsstories.org/cases/case5/, consulted on May 28, 2023.

[40] Megan Darby, "Coal generator uses investment treaty to fight Netherlands coal phaseout", Climate Home News, May 21, 2020: https://www.climatechangenews.com/2020/05/21/uniper-uses-investment-treaty-fight-netherlands-coal-phaseout/, consulted on May 28, 2023.

[41] Climate Change Litigation Databases, Uniper v. the Netherlands: http://climatecasechart.com/non-us-case/uniper-v-netherlands/, consulted on May 28, 2023.

[42] Verheecke, Olivet and Cossar-Gilbert, *op. cit. supra* note 20: https://10isdsstories.org/report/, consulted on May 25, 2021. For more examples drawn from the same report, see "Suing To Force Through a Toxic Goldmine: Gabriel Resources vs Romania" (https://10isdsstories.org/cases/case1/), "How Big Pharma Sabotaged the Struggle for Affordable Cancer Treatment: Novartis vs Colombia" (https://10isdsstories.org/cases/case2/), "Bypassing Courts and Local Democracy To Build a Gated Community for the Rich: Razvoj Golf & Elitech vs Croatia" (https://10isdsstories.org/cases/case3/), "Destructive Mining Trumps Local Health and Environment: Kingsgate vs Thailand" (https://10isdsstories.org/cases/case4/), "Undermining the Indigenous Right To Land and Perpetuating Colonial Wrongs: Border Timbers & Von Pezold vs Zimbabwe" (https://10isdsstories.Org/Cases/Case6/), "When Arbitrators Reward Mining Corporations' Human

It isn't only States in the Global South who succumb to such intimidation tactics. They also work in the Global North, as demonstrated by the decision of France, a G7 member, to water down its climate law in response to Vermillion's threat to launch an ISDS lawsuit if it was passed as initially proposed by renowned environmentalist Nicolas Hulot, then Emmanuel Macron's Minister of the Environment, in an attempt to make the words of the Paris Agreement a reality.

In an era of climate crisis, governments are subsidizing fossil fuels more than ever. In 2022, global fossil fuel consumption subsidies doubled from the previous year to an all-time high of USD 1 trillion.[43] If they start to cut subsidies to coal, gas or oil, it is likely that States will see an avalanche of investment lawsuits. As of 2022, Spain had received a total of 51 claims under the ECT over cuts to renewable energy subsidies, of which 27 had been resolved, 21 of them in favor of the investor.[44] Cuts to subsidies of any type of energy could unleash the same result.

The costs of investment lawsuits, which run into tens of millions of US dollars, could bring the budgets of most countries, particularly in the Global South, to the breaking point. By the end of 2018, States worldwide had been ordered or agreed to pay foreign investors a staggering USD$88 billion due to ISDS cases. This money could otherwise have been spent on climate adaptation and energy transition, not to mention public health, education, access to food and job creation.[45]

Rights Abuses: Copper Mesa vs Ecuador" (https://10isdsstories.org/cases/case7/), "Making Profits but Refusing To Pay Taxes: Conoco Phillips & Perenco vs Vietnam" (https://10isdsstories.org/cases/case8/) and "Golden Profits Undermine People's Right To Clean Water: Eco Oro vs Colombia" (https://10isdsstories.org/cases/case10/), all consulted on May 28, 2023.

[43] International Energy Agency, "Fossil Fuels Consumption Subsidies 2022": https://www.iea.org/reports/fossil-fuels-consumption-subsidies-2022, consulted on May 31, 2023.

[44] Lucía Bárcena and Fabian Flues, "From solar dream to legal nightmare: How financial investors, law firms and arbitrators are profiting from the investment arbitration boom in Spain": https://www.tni.org/en/publication/from-solar-dream-to-legal-nightmare, consulted on May 28, 2023.

[45] Cecilia Olivet, Lucia Bárcena, Bettina Mueller, Luciana Ghiotto and Sara Murawski, "Pandemic Profiteers: How foreign investors could make billions from crisis measures": https://longreads.tni.org/fr/pandemic-profiteers, consulted on May 28, 2023.

To put this in perspective, as of 2021 the Adaptation Fund, one of the main multilateral climate funds, had committed to USD$ 720 million for different projects since 2010. That was less than 1% of what governments had to pay foreign investors as a result of ISDS cases.[46]

The fossil fuel industry is the most litigious industry in the ISDS system by number of cases, accounting for almost 20% of total known cases across all sectors. The majority of known fossil fuel cases are decided in favour of foreign investors, who succeeded in 76% of all cases at the merits stage. Moreover, the average amount awarded in fossil fuel cases - over US$600 million - is almost five times the amount awarded in non-fossil fuel cases.[47]

6. But aren't IIAs and ISDS good for attracting investment?

IIAs were largely signed, and ISDS clauses included in them, because governments believed both would help attract FDI. Years of research and ample experience has shown that IIAs are not a determining factor in attracting FDI, including clean energy investment as is sometimes claimed.[48] A 2018 OECD study found no empirical evidence that investment protection increases FDI.[49] A meta-analysis of 74 studies also found that the effect of IIAs on increasing foreign investment "is so small as to be considered zero".[50]

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[46] Kaur Paul and Gebrial, *op. cit. supra* note 31.

[47] Di Salvatore, *op. cit. supra* note 16.

[48] *Ibidem.* See also Pia Eberhardt, Fabian Flues and Cecilia Olivet, "Busting the myths around the Energy Charter Treaty": https://www.tni.org/en/publication/busting-the-myths-around-the-energy-charter-treaty, consulted on May 28, 2023, and Verheecke, Olivet and Cossar-Gilbert, *op. cit. supra* note 20.

[49] J. Pohl, "Societal benefits and costs of International Investment Agreements : A critical review of aspects and available empirical evidence", OECD Working Papers on International Investment, n° 2018/01: https://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en, consulted on May 28, 2023.

[50] Josef C. Brada, Zdenek Drabek and Ichiro Iwasaki, "Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis", Journal of Economic Surveys, September 30, 2020: https://onlinelibrary.wiley.com/doi/10.1111/joes.12392, consulted on May 28, 2023.

Even if IIAs were a determining factor in attracting FDI, one might legitimately ask: at what cost? Most arbitral awards in ISDS cases provide a clear answer: at the cost of the surrender by the host State of its capacity to adopt laws in the collective interests of its citizens that restrict the profit-making ability (not even necessarily the actual profits) of foreign investors.

7. The international movement to stop ISDS

For these and other reasons, some States and courts have been pushing back. In 2007, Bolivia became the first member State to leave the International Centre for the Settlement of Investment Disputes (ICSID).[51] In 2011, Australia announced it would no longer include ISDS clauses in its trade agreements. Ecuador and Venezuela terminated several IIAs and withdrew from ICSID. Argentina, which was swamped with investor claims related to emergency legislation in the context of its 2001-2002 economic crisis, refused to pay arbitration awards. South Africa announced in 2012 that it would neither enter into new IIAs nor renew old ones due to expire.[52]

Italy withdrew from the ECT in 2016, more than a year before the Rockhopper claim was registered, but the ECT protects foreign investors for 20 years after a country withdraws from it,[53] thereby ensuring that foreign investor interests prevail over popular political will.

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[51] Fortier, L. Yves "Long Live the Golden Summer: Arbitration, Courts, & Colas," American University Business Law Review, Vol. 9, No. 3 (2020), at 318: https://digitalcommons.wcl.american.edu/aublr/vol9/iss3/1/, consulted on May 28, 2023. Created under the auspices of the World Bank in 1966 (https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview), ICSID was largely dormant until BITs started to proliferate after the end of the Cold War (Canada's first BIT was signed with the USSR in 1989, the year the Berlin Wall fell). Today about 90% of ISDS cases take place under ICSID.

[52] Olivet and Eberhardt, *op. cit. supra*, note 19. For an overview of countries that have terminated BITs without negative effect on their FDI inflows, see Public Citizen Global Trade Watch, "Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows", April 2018: https://www.citizen.org/wp-content/uploads/pcgtw_fdi-inflows-from-bit-termination_0.pdf, consulted on May 28, 2023.

[53] Kaur Paul and Gebrial, *op. cit. supra* note 31. On the Energy Charter Treaty and Italy's withdrawal, see Corporate Europe Observatory and the Transnational Institute, *op. cit. supra* note 34.

By the end of 2018, 173 IIAs had been terminated.[54] Also in 2018, the European Court of Justice (ECJ) ruled that EU law (specifically articles 267 and 344 of the Treaty on the Functioning of the European Union)[55] precludes investor-State arbitration clauses in intra-EU bilateral BITs.[56] As a result, in 2020, 23 EU Member States signed an agreement for the termination of intra-EU bilateral BITs.[57]

In January 2019, 200 civil society organizations from across Europe came together to call for an end to ISDS through a petition that eventually garnered 847,000 signatures.[58] As a result, in the runup to the 2019 European Parliament elections, hundreds of candidates pledged to vote against all forms of ISDS and for binding corporate accountability rules.[59]

In the months preceding a November 2022 meeting of the Energy Charter Conference, Belgium, France, Germany, Luxembourg, the Netherlands, Slovenia, Spain and Poland announced their intention to withdraw from the ECT, dissatisfied with the outcome of five years of negotiations because the resulting "modernised" version of the ECT did not make sufficient progress towards environmental protection.[60]

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[54] Verheecke, Olivet and Cossar-Gilbert, *op. cit. supra* note 20.

[55] [2008] OJ C115/13: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2008:115:TOC, consulted on May 28, 2023.

[56] *Slovak Republic v. Achmea B.V.*, 2018 E.C.R. 158, at para. 60: https://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=404057, consulted on May 28, 2023.

[57] European Commission, "EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties", May 5, 2020: https://ec.europa.eu/info/publications/200505-bilateral-investment-treaties-agreement_en, consulted on May 28, 2023.

[58] Rights for People, Rules for Corporations - Stop ISDS: https://stopisds.org, consulted on May 3, 2021.

[59] Verheecke, Olivet and Cossar-Gilbert, *op. cit. supra* note 20.

[60] Raquel Galvão Silva, "Modernising the ECT: Stalemate whilst EU prepares to withdraw": https://www.linklaters.com/fr-fr/insights/blogs/arbitrationlinks/2022/november/modernising-the-ect, consulted on May 28, 2023.

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8. ISDS reform efforts

Other efforts have also been made in recent years to reform ISDS. For example, the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, which entered into force provisionally in 2017, contains a proposal for a permanent investment court, the Investment Court System (ICS), which would replace traditional *ad hoc* party appointments with fixed-term institutional ones.[61]

Other bilateral efforts have led to the increasingly frequent inclusion in IIAs of general public policy exceptions, in an effort to balance investment protection with other policy concerns. In 2016, for example, every third newly concluded IIA contained such a clause.[62]

Multilateral attempts at reform have been taking place in Working Group III (WG III) of the United Nations Commission on International Trade Law (UNCITRAL), which is mostly focused on procedural aspects and where the EU has proposed the creation of a Multilateral Investment Court (MIC).[63]

Unilateral efforts have also been made by some States, including Canada, which included ISDS-related changes in its revised model Foreign Investment

[61] Comprehensive Economic and Trade Agreement (CETA), Can.-Eur., art. 8.29, Oct. 28, 2016, 2017 O.J. (L 11). On January 29, 2021, the CETA Joint Committee adopted Decision No 001/2021 setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal, including, *inter alia*, a nine-year term for its six members: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/appellate-tribunal-dappel.aspx?lang=eng, consulted on May 28, 2023.

[62] Wolfgang Alschner and Kun Hui, “Missing in Action: General Public Policy Exceptions in Investment Treaties”, in Lisa Sachs, Jesse Coleman, Lise Johnson (eds.), Yearbook on International Investment Law and Policy, New York: Oxford University Press, 2018: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3237053, consulted on May 29, 2023.

[63] For an analysis of why, because UNCITRAL’s current focus on procedural aspects of the ISDS system is too narrow, the reform risks missing an opportunity to address the global challenge of climate change, see Ksenia Polonskaya, “Metanarratives as a Trap: Critique of Investor–State Arbitration Reform”, Journal of International Economic Law, Volume 23, Issue 4, December 2020, Pages 949–971: https://academic.oup.com/jiel/article-abstract/23/4/949/6017819?redirectedFrom=fulltext, consulted on May 28, 2023.

Promotion and Protection Agreement (FIPA) that will serve as the basis for its future FIPA negotiations.[64]

9. Are these reform efforts sufficient?

None of these efforts will prevent coal, oil and gas companies and those who invest in them or their ISDS claims from continuing to use ISDS to sue and threaten to sue governments who dare to advance legislation and other measures to address the climate emergency.

It took almost four years from the provisional entry into force of CETA to negotiate the decision "setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal", on which agreement was reached in 2021, but the ICS is still nowhere in sight.

Similarly, the EU presented its general overview of the problems it sees with the ISDS system in UNCITRAL WG III in 2017, put forward its proposal for an MIC in 2019 and, forty-five sessions later,[65] agreement is also nowhere in sight.

A systematic analysis of the first wave of cases interpreting and applying general public policy exceptions in IIAs has found them missing in action. Respondents in ISDS lawsuits fail to raise them appropriately and tribunals either ignore them or adopt interpretations that lessen their impact. As a result, the numerous and complex interpretive issues raised by these exceptions remain unresolved and their impact on investment jurisprudence remains modest at best.[66]

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[64] Global Affairs Canada, "Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model": https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng, consulted on May 28, 2023.

[65] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-fifth session (New York, 27–31 March 2023), United Nations General Assembly Document A/CN.9/1131, 14 April 2023: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V23/024/83/PDF/V2302483.pdf?OpenElement, consulted on May 29, 2023.

[66] Alschner and Hui, *op. cit. supr*a note 62.

Some of the ISDS-related changes in Canada's model FIPA could, over time, and subject to future negotiations based on this Canadian starting position, eventually be reflected in Canadian treaties that do not yet exist. This of course leaves open the problem of what to do with all the treaties that do and will never include them, either because they were not concluded by Canada or because Canada will not convince its existing treaty partners to amend them to that end.

The task of amending the 2,583 IIAs currently in force[67] between various combinations of States has been described as "the work of a generation".[68] Withdrawing from them is cumbersome and, in some cases, claims can still be brought under their ISDS clauses long afterwards (for example, 20 years under the ECT).[69] Neither approach therefore offers a realistic hope of preventing fossil fuel interests from continuing to use ISDS to sue governments for climate change action.

In sum, what has been aptly described by professor Armand de Mestral, a long-time expert observer of ISDS, as the "mind-bogglingly complex proposals for reform"[70] of this system of obligations and institutions are moving far slower than

[67] UNCTAD Policy Hub: International Investment Agreements Navigator: https://investmentpolicy.unctad.org/international-investment-agreements, consulted on May 29, 2023.

[68] Gus Van Harten, "Distinctions between international commercial arbitration and international investment arbitration", ILA-Canada Biennial Conference, International Arbitration: Charting the Path Ahead, May 20, 2021, https://www.youtube.com/watch?v=LJbTeYH3mNQ, consulted on January 16, 2022.

[69] Martin Dietrich Brauch, *Should the European Union Fix, Leave or Kill the Energy Charter Treaty?* Columbia Centre for Sustainable Investment, February 9, 2021, https://ccsi.columbia.edu/news/should-european-union-fix-leave-or-kill-energy-charter-treaty, consulted on May 31, 2023.

[70] Armand de Mestral, "Two Speed Investment Arbitration: The interplay of new and older BITs and investment chapters in recent trade agreements, Chair's opening remarks", ILA-Canada Biennial Conference, International Arbitration: Charting the Path Ahead, May 20, 2021, https://www.youtube.com/watch?v=LJbTeYH3mNQ, consulted on January 16, 2022. For a detailed explanation of that complexity, see Wolfgang Alschner, Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes, Oxford University Press, 2022: https://global.oup.com/academic/product/investment-arbitration-and-state-driven-reform-9780197644386?cc=ch&lang=en&, consulted on May 29, 2023. The author presents an authoritative empirical analysis of the evolution of investment treaties based on a comprehensive dataset of more

glaciers are melting.[71] Yet, the climate emergency demands an urgent response. That's why, in my view, coal, oil and gas companies and those who invest in them or their ISDS claims can and must be prevented from continuing to use ISDS to obstruct the measures States must take to this end.

10. Is reform even necessary?

Not everyone agrees ISDS should be reformed. In an eloquent and entertaining defence of the *status quo*, L. Yves Fortier, a prominent member of the "noble profession" of arbitrators, as he describes it, argues that, unlike Coca-Cola, the arbitration community should not try to replicate its competitors' products.[72]

Fortier argues that "like Coca-Cola, the arbitration community should continue to do what it has done so well for decades — providing a process that litigants like and want — and not change what we do in order to please people who never wanted us to succeed in the first place."[73]

He calls the EU proposal at UNCITRAL a "confused quest to kneecap an institution that has benefitted its member states for decades"[74] and critics of ISDS "often uninformed about the system."[75] He sees the backlash against investor-state arbitration as "at least partially attributable to those who participate in arbitration but fail to proclaim its benefits",[76] quotes with approval a commentator

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than 3,300 IIAs and shows that, counterintuitively, newly designed investment treaties are interpreted like old ones in investment arbitration.

[71] For example, a single glacier on the northern face of Germany's highest peak, the Zugspitze, is losing 250 liters of water every 30 seconds. "German High Court Hands Youth a Victory in Climate Change Fight": https://www.nytimes.com/2021/04/29/world/europe/germany-high-court-climate-change-youth.html, consulted on May 29, 2023. Ironically, "glacial speed" used to mean slow.

[72] *Op. cit. supra* note 51, referring to the 1980s cola wars, in which Coke initially tried to beat Pepsi by changing its product and that Coke eventually won because it stopped trying to be Pepsi.

[73] *Idem* at 318.

[74] *Idem* at 319.

[75] *Idem* at 328.

[76] *Idem* at 321.

who cites “misperception” as one of the reasons for it[77] and asserts that “the system, as it exists today, works.”[78]

He also asserts a "consistently verified fact that states win more investment cases than they lose" and says the idea the ISDS system is biased against States is an "old canard".[79] These assertions call for two observations.

First, whether a State wins or loses depends on who’s counting and what’s being counted. Even when the State is favored by the tribunal's award, it has to cover its own costs (subject to any cost award) and those of the arbitration. For example, as of May 2015 Ecuador had spent US$118 million for outside counsel to defend 24 ISDS claims, for an average of US$4.9 million per claim.[80] That doesn’t count either the costs of those arbitrations or the time and money spent on them by Ecuador’s in-house counsel and other officials. Therefore, it’s hard to say that the State, who in this one-sided system is always a defendant, ever wins. The best that can be said is that sometimes it doesn’t lose. Some will say that if the award is lower than the amount of damages sought (which is always inflated) or if fewer treaty violations are held to have been committed than alleged, that’s a “victory” for the State. I think it safe to assume the States in question wouldn’t agree.

Second, even if we just stick to the numbers, the evidence shows States lose more often than they win. The 2019 Review of ISDS Decisions by the United Nations Conference on Trade and Development shows that, looking at the totality of decisions on the merits (i.e., where a tribunal determined whether the

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[77] Agnieszka Zarowna, “Veeder and van den Berg on the Future of Investment Arbitration”, GLOBAL ARB. REV. (Apr. 11, 2019): https://globalarbitrationreview.com/veeder-and-van-den-berg-the-future-of-investment-arbitration, consulted on May 29, 2023.

[78] Fortier, *op. cit. supra* note 51, at 323.

[79] *Idem* at 318.

[80] *“Un exceso de los TBI es ceder espacios de solución de conflictos al exterior” (*An excess of BITs is to cede dispute settlement space to the outside world), interview with Piedad Mancero, member of the Citizens’ Commission that audited Bilateral Investment Treaties and the International Arbitration System (CAITISA), El Telégrafo, October 28, 2015: https://www.eltelegrafo.com.ec/noticias/politica/3/un-exceso-de-los-tbi-es-ceder-espacios-de-solucion-de-conflictos-al-exterior, consulted on May 26, 2021.

challenged measure breached any of the IIA's substantive obligations) from 1987 to 2019, 61% were decided in favour of the investor.[81]

Fortier goes on to systematically deconstruct examples of what he calls "the strident criticism of arbitration portraying a weakness that is truly a strength".[82] He musters an impressive number of often highly persuasive arguments in aid of his submission, which he sums up as follows:

> *People who want to go to court can go to court. The people whom the arbitration community serves do not want to go to court. […] for millennia, many people have preferred arbitration to litigation. Disputing parties prefer arbitration not because it is almost like litigation, but because arbitration is different from litigation and all the better for that difference. […] People who want arbitration to be like litigation do not want arbitration. People who like arbitration do not want it to be like litigation.*[83]

With respect, this submission, whether deliberately or not, glosses over the fundamental distinction between commercial arbitration (i.e., between two companies), which is a private law form of adjudication, and investment arbitration, which is a public law form of adjudication.[84] This public/private distinction has important legal consequences that cannot be explained here,[85] but

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[81] UNCTAD, "Review of ISDS decisions in 2019: Selected IIA Reform Issues", IIA Issue Note, January 2021, box 1, page 2: https://unctad.org/system/files/official-document/diaepcbinf2021d1_en.pdf, consulted on May 29, 2023. These numbers exclude cases (i) dismissed by tribunals for lack of jurisdiction, (ii) settled, (iii) discontinued for reasons other than settlement (or for unknown reasons) and (iv) decided in favour of neither party (liability found but no damages awarded). This analysis remains the most current, since it was not updated in UNCTAD's latest review, released in August 2022 and analyzing ISDS decisions in 2020: https://unctad.org/system/files/official-document/diaepcbinf2022d5_en.pdf, consulted on May 29, 2023.

[82] Fortier, *op. cit. supra* note 51, at 326.

[83] *Idem* at 326.

[84] Van Harten, *op. cit. supra* note 68.

[85] I will mention only one, which is that, in commercial arbitration, as Fortier points out at 322: "When the award is issued, the dispute is resolved definitely, except for very limited grounds for annulment or denial of recognition and enforcement. By virtue of the New York Convention

the key point is that, while Fortier's submission is persuasive with respect to commercial arbitration, it does not effectively address the public policy objections to ISDS.

More importantly for the purposes of this paper, it does not provide a convincing rationale for why coal, oil and gas companies and those who invest in them or their ISDS claims should be allowed to continue to use ISDS to block climate action by States.

11. Can we avoid using the "C" word?

Significantly, Fortier observes in his conclusion that "global capitalism is dynamic and relentless", a phrase preceded by this, in my view, uncontroversial statement: "Any perception that certain jurisdictions are unfriendly to foreign businesses will simply encourage those businesses to take their capital elsewhere […]."[86] A few words about capitalism therefore seem necessary.

[https://www.newyorkconvention.org/new+york+convention+texts, consulted on May 28, 2023], arbitral awards can be enforced in the vast majority of countries around the world." This means that for a commercial arbitration award to be enforced in any of those countries, it must first be submitted to a national judge, who will determine if recognition should be denied (if the application is from the winner) or the award should be annulled (if it's from the loser). What Fortier calls "very limited grounds" include New York Convention article V 2. (b), which says that: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: […] The recognition or enforcement of the award would be contrary to the public policy of that country." This doesn't apply to ISDS because, under article 54 (1) of ICSID, *op. cit. supra* note 50: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." In the absence of a role for the national judge, who is to determine if an ISDS award is contrary to public policy? The ISDS arbitral panel itself. And what happens if the ISDS arbitral panel, or a majority of two of its three members, is oblivious to matters of public policy and preoccupied solely with the paramount importance of protecting private profits, as is too often the case? Nothing. Public policy simply gets ignored.

[86] Fortier, *op. cit. supra* note 51, at 333.

Building on the work of their colleague Thomas Piketty,[87] with whom they revolutionized the study of inequality, and Zucman's earlier work,[88] economists Gabriel Zucman and Emmanuel Saez have shown that, even as they became fabulously wealthy, the ultra-rich in the US have seen their taxes collapse to levels last seen in the 1920s, while working-class Americans have been asked to pay more. A comprehensive review of America's tax system leads them to the conclusion that billionaires now pay lower tax rates than their secretaries. They also dissect the choices that led to this radical transformation: the gradual exemption of capital owners, the surge of a new tax avoidance industry and the spiral of tax competition among nations. And they explain how the US turned away from the most progressive tax system in history to embrace policies that only serve to compound the wealth of a few.[89]

In a 2021 interview Zucman extended his analysis to the current state of the world economy and argued that multinational corporations and their shareholders, whose taxes have dropped, are the big winners of globalization, whereas those who have suffered the most from globalization have seen their taxes increase. The rise in inequality in Canada and Europe is not as strong as in the US, since government intervention reduces primary income inequality. It is nonetheless significant because of the decline of tax progressivity in most countries, which Zucman describes as a new motor of inequality. All this leads him to question the sustainability of globalization, since "we cannot continue with an international system that only benefits a certain category of actors."[90]

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[87] *Inter alia,* The Economics of Inequality (1997, http://pinguet.free.fr/piketty2015.pdf), Capital in the Twenty-First Century (2013, https://dowbor.org/wp-content/uploads/2014/06/14Thomas-Piketty.pdf), Capital and Ideology (2019, http://acdc2007.free.fr/piketty2020.pdf) and Time for Socialism: Dispatches from a World on Fire, 2016-2021 (2021, https://yalebooks.yale.edu/book/9780300268126/time-for-socialism), consulted on May 29, 2023.

[88] *Inter alia,* The Hidden Wealth of Nations: The Scourge of Tax Havens (2013) https://gabriel-zucman.eu/files/Zucman2015Slides.pdf, consulted on May 29, 2023.

[89] The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay: https://www.oecd.org/naec/events/multidimensional-well-being/G_Zucman.pdf, consulted on May 29, 2023.

[90] *Forum Saint-Laurent sur la sécurité internationale* (Saint-Lawrence Forum on International Security, *Grande entrevue avec Gabriel Zucman* (Long interview with Gabriel Zucman): https://www.youtube.com/watch?v=439dcmSSR_s&t=193s, consulted on May 29, 2023.

It is these actors, i.e., multinational corporations and their shareholders, who have caused what G7 Climate and Environment Ministers called "the unprecedented and interdependent crises of climate change and biodiversity loss [that] pose an existential threat to nature, people, prosperity and security."[91]

It is these same actors who, in an era of corporate greed and huge illicit capital flows,[92] claim to need the "protection" of IIAs and ISDS against States while they ransack them.[93] It is from these actors, in reality, that climate action by States needs to be protected.

IIAs and ISDS are not just shields that protect the fossil fuel industry; they are powerful swords that empower them to attack governments trying to act on climate change. As professor Gus van Harten succinctly put it: "Public funds should be used to support the shift to clean energy, not to compensate polluters for their lost future revenues when they have not adapted their business model in a timely and responsible way."[94]

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[91] G7 Climate and Environment, "Ministers' Communiqué", London, 21 May 2021: https://www.gov.uk/government/publications/g7-climate-and-environment-ministers-meeting-may-2021-communique/g7-climate-and-environment-ministers-communique-london-21-may-2021, consulted on May 29, 2023. The Communiqué contains an extensive and dispassionate catalogue of the current state of the destruction of our planet's climate, species, forests and oceans, from which it concludes that we urgently need to "reset our relationship with nature." For an earlier and passionate explanation of how the global predatory oligarchy is the main cause of this global crisis, see Hervé Kempf, "How the Rich are Destroying the Earth" (2007, https://books.google.ch/books/about/How_the_Rich_are_Destroying_the_Earth.html?id=fOsdAQAAIAAJ&redir_esc=y), consulted on May 29, 2023.

[92] See, in this connection, *inter alia*, Fred Block, "How Inequality Distorts Economics", Dissent Magazine, Spring 2021: https://www.dissentmagazine.org/article/how-inequality-distorts-economics?utm_source=Dissent+Newsletter&utm_campaign=d787d91f73-EMAIL_CAMPAIGN_The_First_Democratic_Debates_COPY_0&utm_medium=email&utm_term=0_a1e9be80de-d787d91f73-102337648, consulted on May 29, 2023.

[93] Verheecke, Olivet and Cossar-Gilbert, *op. cit. supra* note 20.

[94] Quoted in Corporate Europe Observatory and the Transnational Institute, *op. cit. supra* note 34.

12. What should be done?

In 2019, Nobel Prize-winning economist Joseph Stiglitz expressed concern that ISDS cases, which he called "litigation terrorism", risk having a chilling effect on implementing the stringent climate regulations required to fulfill the Paris Agreement. Referring to efforts at the UN to address ISDS shortcomings, he said reform should include lifting the secrecy that clouds ISDS cases, limiting grounds for filing a case, making compulsory the use of domestic courts before ISDS and excluding from damages the loss of expected profits. "Until you resolve all these issues there should be a total moratorium," he said.[95]

As we have seen, the "mind-bogglingly complex proposals for reform" of ISDS are unlikely to produce any result soon and they will certainly not produce the kind of result needed in the kind of timeframe dictated by "the unprecedented and interdependent crises of climate change and biodiversity loss [that] pose an existential threat to nature, people, prosperity and security."[96]

Until these reform efforts resolve the issues identified by Stiglitz and others, therefore, his proposal for a total moratorium, at a minimum on ISDS cases whereby coal, oil and gas companies and those who invest in them or their ISDS claims seek to block climate action by States, seems like a sensible way forward, at least in theory.[97] But how can such an outcome be achieved? As we shall now see, the obstacles to be overcome are daunting, but a combination of two approaches offers what may be a practical way forward.

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[95] Sebastien Malo, "Interview - U.N. reform needed to stop companies fighting climate rules - Nobel laureate Stiglitz", Thompson Reuters Foundation News, May 29, 2019: https://news.trust.org/item/20190529010912-z7rxf, consulted on May 29, 2023.

[96] G7 Climate and Environment, *op. cit. supra* note 91.

[97] Others have called on States to take more radical and comprehensive measures. See, e.g., Olivet, Bárcena, Mueller, Ghiotto and Murawski, *op. cit. supra* note 45, recommending that: "Governments should:

1- Suspend all trade and investment treaty negotiations.
2- Take all necessary steps to terminate (unilaterally or multilaterally) existing treaties.
3- Institute a comprehensive review (cost-benefit analysis) of their current and planned investment agreements.
4- Withdraw consent to ISDS, to limit immediate exposure to investor lawsuits.
5- Default on the payment of outstanding debts as a result of ISDS awards. Or, at least, discuss ISDS debt relief and/or debt restructuring with creditors."

A) Unilateral withdrawal of consent

ISDS, like other forms of arbitration, is based on consent. In commercial arbitration, the consent of both parties is typically provided in a single arbitration agreement. In ISDS, the State usually provides a unilateral offer of consent to arbitration in a treaty, which the investor "perfects" with its own consent by bringing a claim.[98]

According to Aron Broches, the principal architect[99] of the ICSID Convention, by denouncing that Convention a State withdraws its unilateral offer of consent to arbitration and prevents ICSID from asserting jurisdiction over new claims.[100] Broches viewed unilateral offers of consent to ICSID arbitration in BITs and other treaties as similarly subject to withdrawal prior to perfection by an investor. As he put it:

> *[Investment] treaties evidence the consent of one party only, namely, the host State. Accordingly, until the investor has also signified his consent in writing, the prohibition against unilateral withdrawal of consent does not apply, that is to say, the host State's consent is revocable under the Convention.*[101]

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[98] Matthew C. Porterfield, "Aron Broches and the Withdrawal of Unilateral Consent in Investor-State Arbitration", Investment Treaty News, August 11, 2014: https://www.iisd.org/itn/en/2014/08/11/aron-broches-and-the-withdrawal-of-unilateral-offers-of-consent-to-investor-state-arbitration/, consulted on May 29, 2023.

[99] Christoph H. Schreuer,"The ICSID Convention: A Commentary", at p. 2 (2d ed. 2009) (https://www.cambridge.org/core/books/schreuers-commentary-on-the-icsid-convention/25EC81A75F0A0F668A58907470815292, consulted on May 29, 2023), quoted by Porterfield, *op. cit. supra* note 98.

[100]See "History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention", Vol. II-2, at 1009-1010 (1968, https://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf, consulted on May 29, 2023), quoted by Porterfield, *op. cit. supra* note 97. See also Schreuer, *op. cit supra.,* note 99, at p. 1280: "An investor's attempt to accept a standing offer of consent by the host State that may exist under [...] a treaty after receipt of the notice of [...] denunciation [...] would not succeed."

[101] Aron Broches, "Bilateral Investment Protection Treaties and Arbitration of Investment Disputes", in "The Art of Arbitration, Liber Amicorum Pieter Sanders "63, 68-69 (Jan C. Schultz & Albert Jan van den Berg eds., 1982), reprinted in Aron Broches, "Selected Essays: World Bank, ICSID, and Other

Broches noted that revocation of an offer of consent provided in a treaty's ISDS clause could violate the treaty, potentially provoking the investor's home State to seek a retraction of the withdrawal of consent by the host State. Absent such a retraction, however, an attempt by the investor to institute an ISDS claim would be rejected by ICSID or would face a jurisdictional objection from the host State if ICSID registered the claim.[102]

As one commentator has observed,

> *Broches' view that a State may avoid investor-state arbitration under a treaty by withdrawing its offer of consent to arbitration prior to its perfection by an investor rests upon the lack of an arbitration agreement establishing privity between the State and the investor. The duty to provide consent to arbitration is owed under international law to the other State party to the treaty, not to all potential investor-claimants. Accordingly, the issue of whether the withdrawal of the offer of consent violated the treaty could only be addressed through State-to-State proceedings.*[103]

Broches first published his observations concerning the revocability of treaty-based offers of consent to ICSID arbitration in 1982. It later became increasingly common for investment treaties to contain ISDS clauses providing for alternatives to ICSID, such as arbitration under the UNCITRAL rules.[104] Broches' analysis of

Subjects of Public and Private International Law", p. 447-53 (1995), quoted by Porterfield, *op. cit. supra* note 98.

[102] *Ibidem*.

[103] Porterfield, *op. cit.*, note 98, observing that Broches similarly indicated that if a BIT requires a State to provide its consent to arbitration at the request of an investor and the State refuses to do so, that refusal could only be challenged in State-to-State proceedings. See Broches, *op. cit. supra* note 101, p. 449-50.

[104] Antonio R. Parra, "The History of ICSID", p. 199 (2012, https://academic.oup.com/book/8909, consulted on May 29, 2023), quoted by Porterfield, *op. cit.*, note 98. See UNCITRAL Arbitration Rules, https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration, consulted on May 29, 2023.

the ability of States to revoke unilateral offers of consent to ISDS would presumably apply with equal force to these treaties.[105]

As Broches recognized, the home State could employ whatever State-to-State procedures were available to challenge the legality of the host State's withdrawal of consent. Whether such withdrawal would be held to constitute a breach of the withdrawing State's obligations under the relevant treaty would depend on the precise terms of its ISDS clause. Although some treaties contain firm offers of consent to ISDS, others only contemplate that the State may provide its consent at some point in the future.[106]

A State's withdrawal of a treaty-based unilateral offer of consent to ISDS could leave foreign investors without an international forum for asserting the substantive rights provided in the treaty. However, as the tribunal in *ICS v. Argentina* observed,

> *the default position under public international law is the absence of a forum before which to present claims [, which] is thus a normal state of affairs in the international sphere. A finding of no jurisdiction should not therefore be treated as a defect in a treaty scheme that runs counter to its object and purpose in providing for substantive investment protection.*[107]

In other words, because, under public international law, there is not normally a court or other mechanism to adjudicate claims, a finding by an international arbitral tribunal that it doesn't have jurisdiction to hear an ISDS case, because the State against whom the claim is brought has withdrawn its consent to arbitration, doesn't mean the treaty that was the basis for the claim is defective.

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[105] Porterfield, *op. cit. supra* note 98.

[106] *Ibidem*, referring to Broches, *op. cit. supra* note 101, p. 448-450. See also *Planet Mining Pty v. Republic of Indonesia*, Decision on Jurisdiction, ICSID Case No. ARB/12/14 and 12/40, para. 198, 24 February, 2014: "the Tribunal holds that […] the Australia-Indonesia BIT contains no standing offer to arbitrate Planet's claims before ICSID. Planet is therefore only entitled to resort to ICSID arbitration if Indonesia's consent was given through a further act.", https://www.italaw.com/sites/default/files/case-documents/italaw3104.pdf, consulted on May 29, 2023.

[107] *ICS Inspection and Control Services Limited v. The Argentine Republic*, Award on Jurisdiction, UNCITRAL, PCA Case No. 2010-09, para. 281, February 10, 2012, https://www.italaw.com/sites/default/files/case-documents/ita0416.pdf, quoted by Porterfield, *op. cit.*, note 97 and consulted on May 29, 2023.

Moreover, withdrawal of consent to treaty-based arbitration wouldn't mean the end of substantive investment protection. Foreign investors could still ask their home States to take up their claims and make them their own in State-to-State negotiation and adjudication, and they could bring those claims directly before the domestic courts of the host State, as is generally the case for other individuals and entities under international law.

The key point is that States do not consent to treaty-based arbitration of claims against them by foreign investors forever. Just as they have offered that consent unilaterally in a treaty, they can unilaterally withdraw that consent at any time, at least with respect to claims that have not yet been brought at the moment of withdrawal.

ISDS has been described as "an outdated system that is widely acknowledged to be ill-suited for modern investment policy objectives, with increasingly concerning consequences."[108] The Columbia Centre for Sustainable Investment (CCSI) therefore proposed at UNCITRAL in 2018 that States explore the possibility of negotiating a joint instrument on withdrawal of consent to arbitrate, including a commitment not to challenge as a breach treaty parties' decisions to withdraw their consent to ISDS. The same proposal included adding to the negotiating agenda the creation of a multilateral mechanism for efficiently terminating treaties containing ISDS clauses. While neither element of this proposal has been taken up by States, its proponents explicitly recognized that, while coordinated action is preferable, both termination and withdrawal of consent can be done unilaterally.[109]

B) Likely problems

There are, however, a number of problems that could make it difficult for this approach to work in practice, which explain why the CCSI proposed a joint instrument on withdrawal of consent to arbitrate, including a commitment not to

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[108] Lise Johnson, Lisa Sachs, Brooke Guven and Jesse Coleman, "Crucial Ingredients for Meaningful Reform at UNCITRAL: Withdrawal of Consent to Arbitrate and Termination of Existing Treaties", Columbia Centre for Sustainable Investment, April 18, 2018: https://ccsi.columbia.edu/news/crucial-ingredients-meaningful-reform-uncitral-withdrawal-consent-arbitrate-and-termination, consulted on January 16, 2022.

[109] *Ibidem.*

challenge as a treaty breach parties' decisions to withdraw their consent to ISDS. While most of these problems are only possibilities, in light of the approach taken by most investment arbitrators,[110] they are nevertheless likely possibilities.

Coal, oil and gas companies and those who invest in them or their ISDS claims could still file such claims against States who had unilaterally withdrawn their consent with the institutions charged with receiving them by the treaties containing ISDS clauses, such as the International Center for Settlement of Investment Disputes.[111]

Even though the withdrawal of consent option is based on the writings of Aron Broches, the principal architect of ICSID, in the early 1980s, a lot has changed in the ISDS world in the intervening 40 years. There is thus no guarantee that the ICSID Secretariat, or any other arbitral institution charged by treaty with receiving ISDS claims, would reject a claim made against a State that had unilaterally withdrawn its consent. The ICSID Secretariat or other arbitral institution could instead accept the claim and begin the process of constituting a tribunal composed of three arbitrators, based on the relevant treaty's provisions.

These treaties typically provide that arbitrators are appointed as follows: one by the investor, one by the State and the third by the first two. The treaties also typically provide that, if the State refuses to appoint an arbitrator, the arbitral institution will do it. Therefore, in the scenario where a State having unilaterally withdrawn its consent refused to appoint an arbitrator, an arbitral tribunal could still be constituted.

The arbitral tribunal could then consider the fact that the State had unilaterally withdrawn its consent as a matter relating to whether or not it had jurisdiction to hear the merits of the case, and that it had jurisdiction to decide that matter (*la compétence de la compétence*, i.e., jurisdiction to decide whether it has jurisdiction). The arbitral tribunal could then hold an initial phase of the proceedings (written and oral) on the issue of jurisdiction.

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[110] For an insider's list of the most troubling aspects of ISDS, see Keynote Speech by George Kahale, III at the Eight Annual Juris Investment Treaty Arbitration Conference, Washington, D.C., March 28, 2014: https://d20qsj1r5k97qe.cloudfront.net/news-attachments/8TH-Annual-Juris-Investment-Treaty-Arbitration-Conf.-March-28-2014.pdf, consulted on May 29, 2023.

[111] https://icsid.worldbank.org, consulted on May 29, 2023.

If the State having unilaterally withdrawn its consent refused to participate in the jurisdictional phase of the proceedings, the arbitral tribunal could consider the State to be in default and proceed to render a decision on jurisdiction in its absence (*ex parte*). In the absence of arguments made by the State, the tribunal's decision on jurisdiction could be based only on those made by the foreign investor (who would argue that the tribunal did have jurisdiction) and therefore more likely to be favourable to the foreign investor than if the State had appeared to counter the latter's arguments.

If the State having unilaterally withdrawn its consent did appear before the tribunal to argue that the latter did not have jurisdiction and lost, it could not later refuse to participate in the phase of the proceedings on the merits on the basis of that argument (the doctrine of *forum prorogatum*).

Whether the State having unilaterally withdrawn its consent refused to participate in the jurisdictional phase of the proceedings or participated and lost, if the tribunal concluded it had jurisdiction, it could then proceed to consider the merits.

If the State having unilaterally withdrawn its consent refused to participate in the phase of the proceedings on the merits, the arbitral tribunal could consider the State to be in default and proceed to render a decision on the merits in its absence (*ex parte*). In the absence of arguments made by the State, the tribunal's decision on the merits could be based only on those made by the foreign investor and therefore more likely to be favourable to the foreign investor than if the State had appeared to counter the latter's arguments.

Whether the State having unilaterally withdrawn its consent refused to participate in the phase of the proceedings on the merits or participated and lost, if the tribunal concluded that the State had violated its obligations towards the foreign investor, it could award the foreign investor damages against the State.

An award for damages against the State can be enforced by the courts of any of the 172 parties to the New York Convention on the Recognition of Foreign Arbitral Awards.[112] Enforcement action could result in the seizure of the State's assets in the territory of any of those parties. As a result, States will likely be reluctant to unilaterally withdraw their consent without at least some reassurance about the

[112] https://www.newyorkconvention.org/list+of+contracting+states, consulted on May 29, 2023.

risk of being condemned to pay multi-million, even billion-dollar damage awards by ISDS tribunals.

In the event that a State having unilaterally withdrawn its consent to arbitration under the ISDS clauses of IIAs to which it is a party was nevertheless the object of an ISDS claim by a coal, oil or gas company or those who invest in it or its ISDS claim as a result of measures taken by that State to fight climate change, and that claim succeeded in proceeding to the merits stage, the State could invoke the state of necessity defence to justify those measures.

C) The state of necessity defence

The doctrine of the state of necessity under international law is an international customary rule "according to which a factual situation of grave and imminent peril for the essential interests of a State would legally justify a breach of an international obligation by such State as the only means to safeguard such essential interests".[113]

A similar defence exists in the criminal law of many States, which contemplates that in extraordinary circumstances the law may "excuse" citizens from criminal liability where they deliberately disobey the law. This defence of necessity has been increasingly invoked, at times successfully, by activists charged before national courts for offences arising out of acts of civil disobedience committed to pressure corporations and governments into taking effective action to protect the climate or reversing decisions that aggravate the climate emergency.[114]

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[113] Attila Tanzi, "Necessity, State of", Max Planck Encyclopedia of Public International Law: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1071, consulted on May 30, 2023.

[114] For example, on September 2, 2014, Abby Brockway, Michael LaPointe, Patrick Mazza, Jackie Minchew, and Elizabeth Spoerri - who became known as the "Delta Five" - trespassed onto a rail yard owned by BNSF Railway in Everett, Washington. They erected a tripod and blocked trains carrying crude oil to protest government inaction on climate change and the special dangers of fossil fuel infrastructure expansion in Washington State. For this, each defendant was charged with second-degree criminal trespass and obstructing or delaying a train. The defendants stood trial in January 2016 and offered testimony based upon a necessity defence, which, at the close of evidence, was denied. See Lance N. Long and Ted Hamilton, Case Comment—Washington v. Brockway: One Small Step Closer to Climate Necessity, 2017 CanLIIDocs 146:

Article 25 of the International Law Commission's (ILC) Draft articles on Responsibility of States for Internationally Wrongful Acts reads as follows:

> *Article 25. Necessity*
>
> *1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:*
>
> *(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and*

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https://www.canlii.org/en/commentary/doc/2017CanLIIDocs146#!fragment/zoupio-_Toc2Page1-Page10/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zgCYAFMAc0ICMjHvwEAGAJQAaZNlKEIARUSFcAT2gByTVIiEwuBMtUbtu-YZABlPKQBCGgEoBRADLOAagEEAcgGFnKVIwACNoUnYJCSA, consulted on June 1, 2023. In January 2020, a judge accepted the defence of necessity in the case of 12 activists who had entered a branch of Credit Suisse in November 2018 dressed up as Roger Federer to protest against investments in fossil fuels by the bank, a key sponsor of the Swiss tennis star. The judge ruled that their actions were legitimate in the face of the climate emergency. That ruling was overturned on appeal, with the higher court holding the activists could have used other legal means. In October 2020, a Geneva court of appeal acquitted a young activist who in 2018 vandalized the headquarters of Credit Suisse in another protest against its fossil fuel investments, citing the state of necessity in the face of the climate emergency. See AFP, Activists On Trial Over Swiss 'Block Friday' Protest, May 25, 2021: https://www.barrons.com/news/activists-on-trial-over-swiss-block-friday-protest-01621942213, consulted on May 30, 2023. On September 21, 2020, the British Columbia Court of Appeal (BCCA) rejected an appeal by persons convicted of criminal contempt after blocking access to Trans Mountain pipeline work sites. The appellants had admitted the offence, but sought acquittals based on the common law defence of necessity. They sought leave to raise that defence and provided the trial judge with an outline of expert evidence they wished to call to establish its factual foundation. The trial judge, whose decision was upheld by the BCCA, found there was no "air of reality" to the defence of necessity: https://www.bccourts.ca/jdb-txt/ca/20/02/2020BCCA0255.htm, consulted on June 6, 2021. For a comment on this case by one of the appellants, see David Gooderham, "No Air Of Reality: The B.C. Court of Appeal, Climate Change, Imminent Peril, and "Moral Choice"": https://dagooderham.com/essays/no-air-of-reality-the-bc-court-of-appeal-climate-change-imminent-peril-and-moral-choice/, consulted on May 30, 2023.

(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the State has contributed to the situation of necessity.[115]

The commentary on this article states, *inter alia,* that:

*(1) The term "necessity" (*état de nécessité*) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. Under conditions narrowly defined in article 25, such a plea is recognized as a circumstance precluding wrongfulness.*

(2) The plea of necessity is exceptional in a number of respects. […] it […] consists […] in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an

[115] International Law Commission, (ILC) "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", 2001, p. 80. Text adopted by the International Law Commission at its fifty-third session and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, as corrected: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, consulted on May 30, 2023.

> *obligation and that it is subject to strict limitations to safeguard against possible abuse.*
>
> *(3) There is substantial authority in support of the existence of necessity as a circumstance precluding wrongfulness. It has been invoked by States and has been dealt with by a number of international tribunals. In these cases the plea of necessity has been accepted in principle, or at least not rejected.*[116]

The ILC then proceeds to examine, at paragraphs 3 to 13, examples of State practice and judicial decisions over a period of 169 years, from which it concludes that, on balance, they "support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25."[117]

One of the decisions examined is a judgment of the International Court of Justice (ICJ)[118] in which the Court carefully considered an argument based on an earlier version of the ILC's draft article, expressly accepting the principle while at the same time rejecting its invocation in the circumstances of that case. As to the principle itself, the Court noted that the parties had both relied on the then curent ILC draft article as an appropriate formulation, and continued:

> *The Court considers [...] that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words […].*

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[116] *Idem*.

[117] *Ibidem*, p. 83, para. 14.

[118] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7 (Gabčíkovo-Nagymaros Project), https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-00-EN.pdf, consulted on June 1, 2023.

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

[...] In the present case, the following basic conditions [...] are relevant: it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law.[119]

D) Applying the conditions for the invocation of a state of necessity to defend measures to combat climate change against ISDS claims by coal, oil and gas companies and those who invest in them or their ISDS claims

i) "Essential interest"

The ILC did not define "essential interest", but its commentary on article 25 says that: "The extent to which a given interest is "essential" depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole."[120]

As we have seen, to meet the goal of the 2015 Paris Agreement of limiting global warming to well below 2 degrees Celsius and preferably 1.5, compared to pre-industrial levels, the IPCC has been calling for urgent action to phase out fossil

[119] *Idem*, pp. 40– 41, paras. 51–52, quoted in International Law Commission, *op. cit. supra* note 114, p. 82, para. 11.

[120] ILC, *op. cit. supra* note 115, p. 82, para. 11.

fuels since 2018.[121] Greenhouse gas emissions have nevertheless continued to rise and we are currently on a path that could lead to 3-to-4 degree Celcius warming by the end of the century, a scenario in which the IPCC warns that the world as we know it would become “unrecognizable”.[122]

Having reacted to the 2021 IPCC report by saying it “must sound a death knell for coal and fossil fuels, before they destroy our planet”,[123] in 2022 UN Secretary General António Guterres agreed with G7 Environment and Climate Ministers that climate change poses an existential threat to mankind[124] and made clear the main source of that threat by stating that “the fossil fuel industry is killing us”.[125]

It is thus amply clear that climate change, fueled by the use of coal, oil and gas, threatens an “essential interest” of all States. This should not be surprising, since in 1997 the ICJ had

> *no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabtikovo-Nagymaros Project related to an "essential interest" of that State, within the meaning given to that expression in Article 33* [25 in the 2001 final version] *of the Draft of the International Law Commission.*[126]

The Court went on to recall that, as early as 1980, the ILC had included among the situations that could occasion a state of necessity, "a grave danger to . . . the ecological preservation of all or some of [the] territory [of a State]" and specified, with reference to State practice, that: "It is primarily in the last two decades that

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121 IPCC, *op. cit. supra* note 6.

122Alexandre Shields, *op. cit. supra* note 8.

123 United Nations, *op. cit. supra* note 12.

124 G7 Climate and Environment, *op. cit. supra* note 91.

125 United Nations, “1.5 degree climate pledge ‘on life support’, Guterres tells leaders during frank exchanges”, September 21, 2022: https://news.un.org/en/story/2022/09/1127381#:~:text=%27Fossil%20fuels%20are%20killing%20us%27&text=On%20mitigation%2C%20Mr.,rise%20by%2014%20per%20cent, consulted on June 1, 2023.

126 *Gabčíkovo-Nagymaros Project*, *op. cit. supra* note 118, p. 41, para. 53.

safeguarding the ecological balance has come to be considered an 'essential interest' of all States."[127]

The Court concluded as follows its examination of the first condition for the invocation of a state of necessity as a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation:

> *The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind:*
>
> > "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." *(Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* pp. 241-242, para. 29.)[128]

ii) "Grave and imminent peril"

The Court then examined the second component element of a state of necessity, i.e., the objective existence of a "peril", stating that:

> *The word "peril" certainly evokes the idea of "risk": that is precisely what distinguishes "peril" from material damage. But a state of necessity could not exist without a "peril" duly established at the relevant point in time: the mere apprehension of a possible "peril" could not suffice in that respect. It could moreover hardly be otherwise, when the*

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[127] ILC, *op. cit supra* note 115, quoted in *Gabčíkovo-Nagymaros Project, op. cit supra*, note 118, p. 41, para. 53.

[128] *Gabčíkovo-Nagymaros Project, op. cit. supra* note 118, p. 41, para. 53.

> *"peril" constituting the state of necessity has at the same time to be "grave" and "imminent". "Imminence" is synonymous with "immediacy" or "proximity" and goes far beyond the concept of "possibility". As the International Law Commission emphasized in its commentary, the "extremely grave and imminent" peril must "have been a threat to the interest at the actual time"* (Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 33)*. That does not exclude, in the view of the Court, that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.*[129]

The last sentence is particularly relevant to climate change, which the IPCC has established is both already happening and will get much worse over time if sufficiently ambitious measures, which will require unprecedented changes in all human societies, are not taken early enough to mitigate it. Therefore, "the realization of that peril, however far off it might be, is not thereby any less certain and inevitable."

Climate change, fueled by the use of coal, oil and gas, constitutes an "extremely grave and imminent" peril threatening the essential interests of all States and the whole of mankind, thus meeting the second condition for the invocation of a state of necessity to preclude the wrongfulness of an act not in conformity with an international obligation.

iii) "Only way"

This third component element of a state of necessity, i.e., that the measure complained of be the "only way" to safeguard an essential interest of the State against a grave and imminent peril, is more problematic when it comes to justifying measures it has taken or proposes to take to fight climate change against claims by coal, oil and gas companies and those that invest in them or their ISDS claims.

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[129] *Ibidem*, p. 42, para. 54.

In *Gabčíkovo-Nagymaros*, the ICJ concluded that,

> *with respect to both Nagymaros and Gabčikovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they "imminent"; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted.*[130]

The Court considered whether a state of necessity could be invoked as a ground for precluding the wrongfulness of measures being challenged in another case, concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[131] Similar to the conclusion reached on the third component element of the state of necessity in *Gabčíkovo-Nagymaros*, in light of the material before it in that case, the Court was "not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction."[132]

Argentina raised the state of necessity defence in a series of international investment arbitration cases involving in connection with its economic crisis of 1998–2001, with varying results.[133] The first (and larger) group includes cases in which the arbitrators did not uphold the possibility for Argentina to invoke a state of necessity under general international law and under the relevant provisions of BITs to justify its conduct. Among such cases are *CMS Gas Transmission Company v. The Republic of Argentina*,[134] *Enron Corporation and Ponderosa*

[130] *Ibidem*, p. 45, para. 57.

[131] Advisory Opinion, I. C.J. Reports 2004, p. 136: https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf, consulted on June 1, 2023.

[132] *Ibidem*, p. 195, para. 140.

[133] Dmitry V. Krasikov, "The Evolving Role of the Human Rights Factor within the State of Necessity Test in Investment Arbitration'", (2020) 13 J Pol & L 12: https://ccsenet.org/journal/index.php/jpl/article/view/0/41630, consulted on June 2, 2023.

[134] ICSID Case No. ARB/01/8: https://www.italaw.com/cases/288, consulted on June 2, 2023.

Assets, L.P. v. Argentine Republic,[135] *Sempra Energy International v. The Argentine Republic,*[136] *BG Group Plc. v. The Republic of Argentina,*[137] *National Grid plc v. The Argentine Republic,*[138] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* [139] and *SAUR International SA v. Republic of Argentina*.[140]

The second group includes cases in which the arbitrators sided with Argentina with regard to exempting it from liability by virtue of the doctrine of the state of necessity.[141] It includes *LG&E Energy Corp., LG&E Capital Corp., LG&E International, Inc. v. the Argentine Republic*, [142] *Continental Casualty Company v. The Argentine Republic*, [143] and *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*.[144]

The arbitral tribunal in *LG&E* decided that:

> *205. The Tribunal's analysis to determine the applicability of Article XI of the Bilateral Treaty is twofold. First, the Tribunal must decide whether the conditions that existed in Argentina during the relevant period were such that the State was*

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[135] ICSID Case No. ARB/01/3 (also known as: Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic : https://www.italaw.com/cases/401, consulted on June 2, 2023.

[136] ICSID Case No. ARB/02/16: https://www.italaw.com/cases/1002, consulted on June 2, 2023.

[137] UNCITRAL: https://www.italaw.com/cases/143, consulted on June 2, 2023.

[138] UNCITRAL: https://www.italaw.com/cases/732, consulted on June 2, 2023.

[139] ICSID Case No. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Re): https://www.italaw.com/cases/1057, consulted on June 2, 2023.

[140] ICSID Case No. ARB/04/4: https://www.italaw.com/cases/1456, consulted on June 2, 2023.

[141] Krasikov, *op. cit. supra* note 133.

[142] ICSID Case No. ARB/02/1: https://www.italaw.com/cases/621, consulted on June 2, 2023.

[143] ICSID Case No. ARB/03/9: https://www.italaw.com/cases/329, consulted on June 2, 2023.

[144] ICSID Case No. ARB/07/26: https://www.italaw.com/cases/1144, consulted on June 2, 2023.

> *entitled to invoke the protections included in Article XI of the Treaty. Second, the Tribunal must determine whether the measures implemented by Argentina were necessary to maintain public order or to protect its essential security interests, albeit in violation of the Treaty.*
>
> *206. The Tribunal reiterates that to carry out the two-fold analysis already mentioned, it shall apply first, the Treaty, second, the general international law to the extent that is necessary and third, the Argentine domestic law. The Tribunal underscores that the claims and defenses mentioned derive from the Treaty and that, to the extent required for the interpretation and application of its provisions, the general international law shall be applied.* [145]

The same tribunal later held that:

> *Claimants contend that the necessity defense should not be applied here because the measures implemented by Argentina were not the only means available to respond to the crisis. The Tribunal rejects this assertion. Article XI refers to situations in which a State has no choice but to act. A State may have several responses at its disposal to maintain public order or protect its essential security interests. In this sense, it is recognized that Argentina's suspension of the calculation of tariffs in U.S. dollars and the PPI adjustment of tariffs was a legitimate way of protecting its social and economic system.*[146]

On the same point, a different arbitral tribunal found in *Continental Casualty* that:

> *Since the text of Art. XI [of the Argentina–U.S. Bilateral Investment Treaty] derives from the parallel model clause of the U.S. FCN [Friendship, Commerce and Navigation] treaties and these treaties in turn reflect the formulation of Art.*

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[145] ICSID Case No. ARB/02/1, *op. cit. supra* note 142, paras 205-206.

[146] *Idem*, para. 239.

> *XX of GATT 1947 [the General Agreement of Trade and Tariffs], the Tribunal finds it more appropriate to refer to the GATT and WTO [World Trade Organization] case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in GATT, rather than to refer to the requirement of necessity under customary international law.*[147]

The same tribunal concluded that "Argentina's conduct in the face of the economic and social crisis conformed, by and large, with the conditions required for derogating from its obligations under Art. XI of the BIT as to the Measures challenged in the present dispute."[148]

Yet another arbitral tribunal held in *Urbaser* that:

> *Claimants rightly raise the point that a State cannot claim a state of necessity exception when it had available other means that would have permitted to avoid a violation of its obligations under international law. The argument, however, has to be taken in observing its reasonable proportions. The international obligations to be weighed against the Argentine Republic's state of necessity are, in Claimants' view, the obligations arising out of the BIT and allegedly breached. The emergency measures and the state of necessity associated with them were events of nation-wide importance. Therefore, the question whether "other means" were available has to be captured in both perspectives: the wide one, taking into account the needs of Argentina and its population nation-wide, and the narrower one of the situation of investors engaged in performing contracts protected by the international obligations arising out of one of the many BITs.*[149]

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[147] ICSID Case No. ARB/03/9, *op. cit. supra* note 143, para. 192.

[148] *Idem*, para. 233.

[149] ICSID Case No. ARB/07/26, *op. cit. supra* note 144, para. 716.

The same tribunal concluded that “there existed a situation of state of necessity as sufficient support for the emergency measures when promulgated in January 2002.”[150]

Bearing in mind that the three previously quoted awards give different weight to general international law, on the one hand, and to the applicable BIT and GATT and WTO case law, on the other, the lessons to be drawn from them with respect to the third component of the state of necessity defence would appear to be the following:

a) it is not necessary for the availability of the defence that the attacked measure or measures be the “the only means available to respond”;

b) it is sufficient that the situation be one “in which a State has no choice but to act”, even though it may have several responses at its disposal to protect its essential interests; and

c) the “no other way” component has to be taken “in observing its reasonable proportions”, i.e., considered in both the wide perspective of the State taking the measures it considers necessary to protect its essential interests and the narrower perspective of the foreign investors performing contracts protected by the international obligations arising out of BITs or other IIAs.

With respect to this third lesson in particular, it should be recalled that the ILC’s commentary on Article 25 of its Draft articles on Responsibility of States for Internationally Wrongful Acts begins as follows: “The term “necessity” (*état de nécessité*) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency (emphasis added).”[151]

Later in its commentary on Article 25, the ILC explains that the second condition for invoking necessity, set out in paragraph 1 (b) (the act ”does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole”) means that “the interest

[150] *Idem*, para. 718.

[151] ILC, *op. cit. supra* note 115, p. 80, article 25, para 1.

relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective."[152]

The ILC commentary also states that:

> *Moreover, the course of action taken must be the "only way" available to safeguard that interest. The plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient. […] The word "way" in paragraph 1 (a) is not limited to unilateral action but may also comprise other forms of conduct available through cooperative action with other States or through international organizations […]. Moreover, the requirement of necessity is inherent in the plea: any conduct going beyond what is strictly necessary for the purpose will not be covered.*[153]

As we have seen, "cooperative action with other States or through international organizations" for ISDS reform is unlikely to produce any result soon and will most certainly not produce the kind of result needed in the kind of timeframe dictated by the climate emergency. None of these efforts will prevent coal, oil and gas companies and those who invest in them or their ISDS claims from continuing to use ISDS to sue and threaten to sue States who advance legislation and other measures in response to the "grave and imminent peril" of climate change.

As we have seen, 75% of coal power plants worldwide that involve foreign investment and need to be retired early to align with the Paris Agreement objective of keeping warming below 1.5C are protected by at least one treaty that gives foreign investors access to ISDS,[154] the value of fossil fuel infrastructure protected by the ECT is €344.6 billion in the EU, the UK and Switzerland alone,[155]

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[152] *Ibidem*, p. 84, para 17.

[153] *Ibidem*, p. 83, para 15.

[154] Tienhaara and Cotula, *op. cit. supra* note 13.

[155] Moldenhauer and Schmidt, *op. cit. supra* note 14.

and the value of the potentially stranded assets represented by proven reserves of coal, oil and gas has been estimated at approximately US$1,600 trillion.[156]

If ISDS remains in place, therefore, transitioning to green energy will be completely unaffordable for States, especially those of the Global South who can ill afford the costs of ISDS.

In the event that a State having unilaterally withdrawn its consent to arbitration under the ISDS clauses of IIAs to which it is a party was nevertheless the object of an ISDS claim by a coal, oil or gas company or those who invest in it or its ISDS claim as a result of measures taken by that State to fight climate change, and that claim succeeded in proceeding to the merits stage, the State could therefore argue that those measures, which entailed the non-performance of international obligations of lesser weight or urgency owed to foreign investors, were the only way for it to safeguard its essential interest in a healthy environment against the grave and imminent peril posed by climate change.

iv) The act does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole

As previously noted, climate change, fueled by the use of coal, oil and gas, is a grave and imminent peril that threatens an essential interest of all States, and therefore of the international community as a whole. Measures to combat climate change, on the other hand, threaten an essential interest of no State, much less the international community.

E) Applying the additional limitations on the invocation of a state of necessity to defend measures to combat climate change against ISDS claims by coal, oil and gas companies and those who invest in them or their ISDS claim

In addition to the conditions for the invocation of a state of necessity contained in its paragraph 1, article 25 of the ILC's Draft articles on Responsibility of States for

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[156] Robinson, *op. cit. supra* note 15.

Internationally Wrongful Acts contains in its paragraph 2 two general limits to any invocation of necessity, as is made clear by the use of the words “in any case”.[157]

i) The international obligation in question excludes the possibility of invoking necessity

This additional limitation concerns two categories of situations, respectively addressed in paragraphs 25 (2) (a) and (b).

On the one hand, the possibility for a State to invoke a state of necessity to justify a wrongful act of which it is the author is excluded when the obligation violated results from a multilateral or bilateral convention, in particular humanitarian conventions, which expressly exclude any possibility of appealing to any "necessity" to justify the adoption by a State of a conduct that is not in conformity with one of the obligations resulting from that convention.[158] In such a case, the applicability of the principle of general international law concerning the excuse of necessity will automatically be excluded with regard to the obligations resulting from that convention.

BITs and other IIAs do not generally contain any clauses expressly excluding the possibility of invoking a state of necessity.

On the other hand, other obligations, without expressly excluding the possibility of invoking a state of necessity, were specifically designed to apply in cases of danger to the State or its essential interests: in such cases, the impossibility of invoking a state of necessity clearly follows from the object and purpose of the rule.[159]

BITs and other IIAs do not contain such obligations.

ii) The State that is the author of the act has not contributed to the occurrence of the state of necessity

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[157] ILC, *op. cit. supra* note 115, p. 84, para. 19.

[158] *Idem.*

[159] *Idem.*

This limitation on the possibility of invoking the state of necessity was examined by the arbitral tribunal in *Urbaser*, who concluded that:

> *the crisis that led to the emergency measures was certainly caused by both external and internal factors. However, this is not sufficient to demonstrate that the Argentine Government made a contribution to the state of necessity of such a nature and importance that would preclude Respondent from invoking this defense.*[160]

This finding was consistent with the part of its commentary on Article 25 of its Draft articles on Responsibility of States for Internationally Wrongful Acts in which the ILC stated that: "For a plea of necessity to be precluded under paragraph 2 (b), the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral."[161]

Human activities, principally through emissions of greenhouse gases (GHGs),[162] have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850–1900 in 2011–2020. Global GHG emissions have continued to increase, with unequal historical and ongoing contributions from both economic sectors[163] and States.

[160] ICSID Case No. ARB/07/26, *op. cit. supra* note 144, para. 710.

[161] ILC, *op. cit. supra* note 115, p. 84, para. 20.

[162] Greenhouse gas emissions include carbon dioxide, methane and nitrous oxide from all sources, including agriculture and land use change. They are measured in carbon dioxide-equivalents over a 100-year timescale. Our World in Data, "Per capita greenhouse gas emissions, 2021": https://ourworldindata.org/grapher/per-capita-ghg-emissions, consulted on June 4, 2023.

[163] IPCC, "Synthesis Report for the Sixth Assessment Report (AR6)", Headline Statement A.1: https://www.ipcc.ch/report/ar6/syr/resources/spm-headline-statements, consulted on June 4, 2023.

Responsibility for these emissions varies greatly across States, both today[164] and historically,[165] in absolute numbers[166] and on a per capita basis,[167] hence the principle of "common but differentiated responsibilities" reflected in the United Nations Framework Convention on Climate Change (UNFCCC).[168]

That principle means, *inter alia*, that whatever their degree of responsibility for the GHG emissions that cause climate change, all States must do their part to combat this grave and imminent peril that threatens the essential interests of all States and the international community as a whole.

The contribution of the majority of States to climate change is merely incidental or peripheral,[169] even though vulnerable communities who have historically contributed the least to current climate change are disproportionately affected.[170] These States would therefore obviously not be precluded from invoking the state of necessity to defend their climate measures against ISDS claims by coal, oil or

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164 See, e.g., "Carbon Footprint by Country 2023": https://worldpopulationreview.com/country-rankings/carbon-footprint-by-country, consulted on June 4, 2023.

165 See, e.g., "Who has contributed most to global CO2 emissions?": https://ourworldindata.org/contributed-most-global-co2, consulted on June 4, 2023.

166 See, e.g., "CO2 Emissions by Country": https://www.worldometers.info/co2-emissions/co2-emissions-by-country/, consulted on June 4, 2023.

167 Our World in Data, *op. cit. supra* note 161.

168 United Nations Framework Convention on Climate Change, preambular paragraph 6: https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf, consulted on May 30, 2023.

169 The top three GHG emitters – China, the United States and India – contribute 42,6% of global GHG emissions and the top ten over two-thirds, while the bottom 100 countries account for only 2,9% of that total. Johannes Friedrich, Mengpin Ge, Andrew Pickens and Leandro Vigna, This Interactive Chart Shows Changes in the World's Top 10 Emitters, World Resources Institute, March 2, 2023: https://www.wri.org/insights/interactive-chart-shows-changes-worlds-top-10-emitters, consulted on June 4, 2023.

170 IPCC, *op. cit. supra* note 163, Headline Statement A.2: https://www.ipcc.ch/report/ar6/syr/resources/spm-headline-statements, consulted on June 4, 2023.

gas companies and those who invest in them or their ISDS claims as a result of measures to fight climate change.

Even in the case of States whose contribution to climate change is more substantial, their individual contribution should not be found to be of such a nature and importance to preclude them from invoking the state of necessity to defend their climate measures against such claims.

iii) No violation of *jus cogens*

A final limit to any invocation of necessity is not contained in article 25 of the ILC's Draft articles on Responsibility of States for Internationally Wrongful Acts but in its article 26. It concers obligations arising under a peremptory norm of general international law (*jus cogens*)[171] and is common to all the circumstances precluding wrongfulness provided for in Chapter V of the ILC's Draft articles.[172]

Invoking a state of necessity to defend measures to combat climate change against ISDS claims by coal, oil or gas companies and those who invest in them or their ISDS claims does not create a conflict with any such norm.

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[171] ILC, *op. cit.*, note 115, pages 84-85, paras 1-6.

[172] Article 26 of the ILC's Draft articles on Responsibility of States for Internationally Wrongful Acts provides that:" Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law." The concept of *jus cogens* is defined as follows in article 53 of the Vienna Convention on the Law of Treaties: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. " : https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf, consulted on June 4, 2023)

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F) Concluding remarks on unilateral withdrawal of consent and the state of necessity defence

The existential threat to mankind posed by climate change[173] constitutes, in the words of the ILC, "a grave and imminent peril"[174] that threatens an "essential interest"[175] of "the international community as a whole"[176] and is therefore one of those "exceptional cases" [177] that allows a State "not to perform some other international obligation of lesser weight or urgency",[178] as "the 'only way' available to safeguard that interest".[179]

Given this existential threat, States should unilaterally withdraw the consent they have unilaterally given to foreign investors in IIAs containing ISDS clauses to which they are parties to submit to arbitration claims arising out of measures they have taken or propose to take to combat climate change, at least with respect to claims that have not yet been brought by coal, oil and gas companies and those who invest in them or their ISDS claims at the moment of withdrawal.

Also in light of this existential threat, It stands to reason that States should unilaterally withdraw from their domestic coal, oil and gas companies and those who invest in them or their ISDS claims the right they unilaterally gave them by becoming party to IIAs containing ISDS clauses to sue other State parties to those IIAs for measures those States have taken or propose to take to combat climate change.

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173 G7 Climate and Environment, *op. cit. supra* note 91.

174 ILC, *op. cit.*, note 115, pages 80, para 1.

175 *Ibidem.*

176 *Idem*, page 84, para. 18.

177 *Idem*, page 80, para. 1.

178 *Ibidem.*

179 *Idem*, page 83, para. 15.

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A State could only be sued for withdrawing its consent to have claims against it based on measures it has taken or proposes to take to combat climate change submitted to arbitration under the ISDS clauses of an IIA to which it is a party by another State party to such an IIA.

Instituting State-to-State dispute settlement proceedings is always a highly political act. In the current highly charged political circumstances surrounding both climate change and ISDS, it is in my view highly doubtful that a State's decision to unilaterally withdrawn its consent as recommended above would be legally challenged by other States parties to IIAs.

Given that the obligation created by IIAs to submit claims to ISDS is owed to other States parties to those IIAs and not to foreign investors, such investors could only sue the withdrawing State on the basis of an alleged loss of profits arising out of measures it has taken or proposes to take to combat climate change, not its decision to unilaterally withdraw its consent to have such claims submitted to arbitration.

Foreign investors making such allegations would have brought their ISDS claims whether or not the State had unilaterally withdrawn its consent to being sued, so withdrawal of consent does not increase the withdrawing State's litigation risk vis-à-vis foreign investors.

In the event that a State having unilaterally withdrawn its consent to arbitration under the ISDS clauses of IIAs to which it is a party was nevertheless the object of an ISDS claim by a coal, oil or gas company or those who invest in it or its ISDS claim as a result of measures taken by that State to fight climate change, and that claim succeeded in proceeding to the merits stage, the State could invoke the state of necessity to justify those measures.

There is no guarantee that unilateral withdrawal of consent would prevent ISDS claims based on climate change measures from being brought by coal, oil and gas companies and those that invest in them or in their ISDS claims and, if brought, from leading to an arbitral award in favour of the claimants.

However, this action by States, combined with the state of necessity defence in the event that such a claim succeeded in proceeding to the merits stage, would at least lessen the likelihood that ISDS could continue to be used by coal, oil and

gas companies and those that invest in them or in their ISDS claims to block such measures.

E) A possible G7 initiative

While, for the reasons we have seen, States would be justified in acting individually, "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response".[180] Ideally, the right to unilaterally withdraw their consent to arbitration should therefore be exercised by States in a coordinated fashion to no longer allow coal, oil and gas companies and those who invest in them or their ISDS claims to use ISDS to prevent them from taking climate action.

As we have also seen, the UNFCCC recognizes that this cooperation and participation by all countries should take place "in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions".[181]

The UNFCC states the basis for those common but differentiated responsibilities as follows:

> *Noting that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs.*[182]

The consequence of common but differentiated responsibilities is that "the developed country Parties should take the lead in combating climate change and the adverse effects thereof."[183] In other words, developed countries have caused

[180] UFCCC, *op. cit supra* note 168.

[181] *Ibidem.*

[182] *Idem*, preambular paragraph 3.

[183] *Idem*, article 3(1). See also preambular paragraph 18, which recognizes "the need for developed countries to take immediate action […], as a first step towards comprehensive response strategies".

this problem, so they should be the first to act to address it. Once they have done so, developing countries will join the effort.[184]

Among developed countries, the G7 is an informal grouping of seven of the world's advanced economies: Canada, France, Germany, Italy, Japan, the United Kingdom, the United States and the European Union. Created in 1976 to "discuss coordinated responses to global crises",[185] according to Global Affairs Canada it

> *provides global leadership and plays a powerful catalyst role on issues that are later taken up by other fora with broader global and regional membership. The G7 brings together the world's advanced economies to influence global trends and tackle pervasive and crosscutting issues […] including climate change […].*[186]

It would therefore be consistent with the customary doctrine of the state of necessity, the UNFCCC principle of common but differentiated responsibilities, the G7's role as a "catalyst […] on issues that are later taken up by other fora with broader global and regional membership", as well as the G7 Climate and Environment Ministers' May 21, 2021 communiqué,[187] for G7 leaders to collectively announce they are withdrawing both their consent to ISDS claims by fossil fuel companies and those who invest in them or their ISDS claims arising out of measures to combat climate change and the right of their nationals to lodge such claims against States parties to IIAs to which they are themselves parties.[188]

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[184] This approach is operationalized, *inter alia*, by UNFCCC article 4 (2) (a), which provides in part that each of the "developed country Parties and other Parties included in Annex I […] shall adopt national policies and take corresponding measures on the mitigation of climate change [that] will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention […]."

[185] Global Affairs Canada, "Canada and the G7": https://www.international.gc.ca/world-monde/international_relations-relations_internationales/g7/index.aspx?lang=eng, consulted on May 30, 2023.

[186] *Ibidem.*

[187] G7 Climate and Environment, *op. cit. supra* note 91.

[188] Such an announcement would also reflect the fact two G7 members, the US and the UK, are among the three most frequent home States of claimants in known ISDS cases filed from 1987 to 2020 (the

In so doing the G7 could take the lead and set an example to be followed by other States, with a view to no longer allowing fossil fuel companies and those who invest in them or their ISDS claims to use ISDS to prevent climate action on a worldwide basis.

13. Epilogue

It's too late to stop climate change. The best we can hope for now is to avoid its most catastrophic and irreversible effects.

ISDS is not compatible with the necessary energy transition. Maintaining it will only prolong the fossil fuel era and accelerate catastrophic climate change.

Yet, as this paper was being finalized, another ISDS claim was being threatened on behalf of an oil company, this time against Ireland.[189]

In its latest report, released in March 2023, the IPCC found, *inter alia*, that:

> *Climate change is a threat to human well-being and planetary health (very high confidence). There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (very high confidence). […] The choices and actions implemented in this decade will have impacts now and for thousands of years (high confidence).*[190]

The headline of a newspaper account of that report aptly summarized it as follows: "Humanity burns its last chance to limit global warming".[191]

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third being the Netherlands). See UNCTAD, "Investor–State Dispute Settlement Cases: Facts and Figures 2020": https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf, consulted on May 31 2023.

[189] Caroline Simson, "British Oil Co. Tees Up Ireland Claim Over Axed Project", Law 360, May 22, 2023: https://www.law360.com/articles/1680308/british-oil-co-tees-up-ireland-claim-over-axed-project, consulted on June 1, 2023.

[190] IPCC, *op. cit. supra* note 163, Headline Statement C.1.

[191] Alexandre Shields, *L'humanité brûle ses dernières chances de limiter le réchauffement climatique, Le Devoir*, March 20, 2023:

The IPCC found in the same report that:

> *Projected CO2 emissions from existing fossil fuel infrastructure without additional abatement would exceed the remaining carbon budget for 1.5°C (50%) (high confidence).*[192]

In other words, not only does maintaining the possibility, with only a 50% chance of success, of limiting the increase in global warming to 1.5 degrees Celsius, compared to pre-industrial levels, require that all coal, oil and gas projects that are not yet in production be abandoned, as the IEA told us in 2021,[193] it now also requires that at least some existing fossil fuel infrastructure be shut down.

UN Secretary General Antonio Guterres had already made the implications clear almost four years ago:

> *By the end of the coming decade we will be on one of two paths.*
> *One is the path of surrender, where we have sleepwalked past the point of no return, jeopardizing the health and safety of everyone on this planet.*
> *[…]*
> *The other option is the path of hope.*
> *[…]*
> *A path where more fossil fuels remain where they should be – in the ground […].*[194]

https://www.ledevoir.com/environnement/786019/l-humanite-brule-ses-dernieres-chances-de-limiter-le-rechauffement-climatique, consulted on May 31, 2023.

[192] IPCC, *op. cit. supra* note 163, Headline Statement B.5.

[193] IEA, *op. cit. supra* note 9.

[194] United Nations, Secretary-General's remarks at opening ceremony of UN Climate Change Conference COP25, 2 December 2019: https://www.un.org/sg/en/content/sg/statement/2019-12-02/secretary-generals-remarks-opening-ceremony-of-un-climate-change-conference-cop25-delivered#:~:text=So%2C%20my%20call%20to%20you,action%20plans%20due%20next%20year, consulted on May 31, 2023.

The five largest oil companies posted an unprecedented US$153.5 billion (€143.1 billion) in net profits for 2022 and are approaching the total figure of $200 billion in adjusted net profit, i.e., excluding provisions and exceptional items.[195]

Guterres had earlier slammed the "grotesque greed" of oil and gas companies and their financial backers, and said it was immoral for them to be making record profits from the current energy crisis on the backs of the poorest people and communities, “at a massive cost to the climate".[196]

Instead of protecting profits, law must be used in the service of climate justice. Stopping coal, oil and gas companies and those who invest in them or their ISDS claims from using ISDS to prevent States from taking climate action would be a good place to start.

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[195] Adrien Pécout, « Oil companies earned record profits in 2022”, Le Monde, February 9, 2023: https://www.lemonde.fr/en/economy/article/2023/02/09/oil-companies-earn-record-profits-in-2022-including-19-billion-euros-for-france-s-totalenergies_6014965_19.html#:~:text=The%20five%20largest%20oil%20groups,of%20%24153.5%20billion%20in%202022, consulted on May 31, 2023.

[196] Michelle Nichols, « U.N. chief urges tax on 'grotesque greed' of oil, gas companies”, Reuters, August 3, 2022: https://www.reuters.com/business/energy/un-chief-urges-tax-grotesque-greed-oil-gas-companies-2022-08-03/, consulted on June 1, 2023.