Improving Environmental Protection in Investor-State Dispute Settlement

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Investor-state dispute settlement (ISDS) is an arbitral mechanism included in many international investment and trade agreements. Defenders of ISDS argue that it spurs international investment and economic growth in the Global South, but much debate has arisen over the impacts of ISDS on the capacity of low- and middle-income countries to protect their environmental interests. Opponents of ISDS contend that the system heavily favors investors, thereby discouraging states from pursuing environmental regulation for fear of risking a suit in ISDS, and that the lack of transparency in ISDS makes it nearly impossible to assess the environmental impacts of awards and settlements. This Note argues that ISDS must be reformed to better protect states' environmental interests and proposes two mechanisms to do so: first, requiring a "fairness hearing" for all ISDS awards and settlements implicating environmental interests and, second, requiring that arbitral panels consider and disclose the environmental impacts of ISDS awards or settlements. These reforms are necessary to level the playing field for investors, states, and all other actors impacted by international investment.

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I. INTRODUCTION

Investor-State Dispute Settlement (ISDS) is the dispute-settlement mechanism included in most international investment agreements (IIAs).[1] When a treaty obligation is breached, ISDS permits an investor to avoid the host state's domestic courts and instead sue the host state of the investment in international arbitration. This mechanism encourages investment in nations where investors may not trust the state legal system by providing the parties a supposedly independent forum to settle agreement disputes. On the other hand, there is little transparency surrounding ISDS proceedings and results, and the process has often been accused of being a means by which wealthy investors can extract huge awards at the expense of local interests, including environmental interests.

The chilling effect of ISDS provisions in IIAs is exacerbated by the difficulty of securing impartial judgment in international arbitration. Only investors are allowed to initiate ISDS proceedings against states; states cannot sue an investor or even bring a counterclaim after an investor has brought suit. Furthermore, the arbitral panel's review is limited to whether the state's conduct violated the terms of the investment treaty; arbitrators are generally not permitted to consider domestic law or refer to other legal instruments.[2] As a result, the ISDS process has few legal mechanisms that prevent arbitral decisions or settlement agreements from violating domestic environmental laws or otherwise negatively impacting domestic environmental interests.[3] This is especially concerning as ISDS

1. COLUM. CTR. ON SUSTAINABLE INV., PRIMER: INTERNATIONAL INVESTMENT TREATIES AND INVESTOR-STATE DISPUTE SETTLEMENT 1 (2019), *available at* https://perma.cc/RL4C-A93X [hereinafter *Primer*].

2. Arbitral panels generally do not consider whether a challenged action is legal under domestic or international law when deliberating, but rather look only at the terms of the investment treaty; arguing that a challenged action was required under a domestic or international law is generally not an acceptable defense if that action violated the investment treaty. *Id.* This is problematic, as many suits brought under ISDS are actually based on claims under domestic law instead of treaty violations, but ISDS allows investors to bypass the domestic court system for a system that is widely acknowledged as more favorable to their interests.

3. *Id.*

arbitral decisions can rarely be appealed; the panel's decision binds the parties and has the force of international law.[4]

This Note argues that ISDS must be reformed to better protect states' environmental interests, and suggests two specific reforms: first, a requirement that subjects ISDS awards and settlements implicating environmental interests to "fairness hearings," and, second, a requirement that tribunals consider and disclose the environmental impacts of ISDS awards or settlements. These solutions are aimed at addressing two environmental problems raised by ISDS: first, the lack of transparency around environmental impacts of ISDS awards and settlements; and second, the threat to environmental justice[5] posed by many investments facilitated by IIAs and ISDS, particularly in the extractive industries.[6] Part II of this note provides background on ISDS and discusses those environmental concerns raised by current ISDS mechanisms and the consequences of ISDS, as well as why now is a good time for a serious discussion about reforming ISDS. Part III of this note introduces the models for two proposed improvements for the ISDS process based on existing U.S. environmental law: a fairness hearing and an environmental impact disclosure requirement. Part IV of this note discusses how those mechanisms could be implemented, how the proposed mechanisms would work in several case studies, and what impact these mechanisms could have on the overall ISDS system.

4. *Id*.

5. Environmental justice is defined by the United States Environmental Protection Agency as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. This goal will be achieved when everyone enjoys the same degree of protection from environmental and health hazards, and equal access to the decision-making process to have a healthy environment in which to live, learn and work." *Environmental Justice*, EPA, *available at* https://perma.cc/HTC6-F7GS (last visited Oct. 2, 2020).

6. *See generally* LISE JOHNSON & JESSE COLEMAN, COLUM. CTR. ON SUSTAINABLE INV., INTERNATIONAL INVESTMENT LAW AND THE EXTRACTIVE INDUSTRIES SECTOR INVESTMENT (2016), *available at* https://perma.cc/H4UC-PRXU.

II. BACKGROUND

A. Overview of ISDS

A claim under ISDS is considered by an ad hoc tribunal of three arbitrators.[7] Each of the disputing parties appoints one arbitrator, who then together choose a third arbitrator.[8] The panel either issues a decision in favor of the state and dismisses the claim, or finds in favor of the investor and awards damages.[9] Alternatively, parties may settle their dispute before an arbitral decision is issued.[10] Once a settlement agreement has been reached, the parties may ask the arbitral panel to enter the agreement, or they may simply withdraw the dispute from the panel.[11]

States have entered into more than 3,300 IIAs, including both bilateral (BITs) and multilateral investment treaties (MITs).[12] The United Nations Conference on Trade and Development's International Investments Agreements Navigator has mapped 2,576 treaties, 2,443 of which included ISDS in the treaty terms.[13] The first ISDS case was filed in 1987, and by 2018, 942 cases had been brought.[14] Half of these cases were brought between 2012 and 2018, and the number of cases has continued to rise.[15] As of July 2019, 983 treaty-based ISDS cases were known to have been concluded with another 332 pending.[16] Of 647 ISDS cases analyzed, 230 (36%) were decided in favor of the state, 191 (30%) were decided in favor of the investor, 212 (33%) were either settled or discontinued, and the remaining fourteen were decided in favor of neither party.[17] However, the true number of cases is likely much higher because

7. See *Primer*, *supra* note 1.
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*.
12. *International Investments Agreements Navigator*, UNCTAD, *available at* https://perma.cc/YJ4H-GN3X.
13. *Id*.
14. *Supra* note 12.
15. *Primer*, *supra* note 1.
16. *Investment Dispute Settlement Navigator*, UNCTAD, *available at* https://perma.cc/6EJX-7B48.
17. *Id*.

ISDS allows parties to keep everything confidential—including the existence of a dispute.

Two institutions that have promulgated rules to regulate and administer IIAs are the International Centre for the Settlement of Investment Disputes (ICSID), a World Bank institution, and the United Nations Commission on International Trade Law (UNCITRAL), a United Nations body.[18] ICSID provides arbitration services, as well as support for drafting and implementing treaties. In contrast, UNCITRAL, as an institution dedicated to trade and development more generally, only offers guidance and legal tools meant to guide parties engaging in international arbitration.[19] ICSID Rules for Arbitration provide that parties to an arbitration may, at any time before proceedings are concluded and an award is rendered, jointly petition the arbitration panel to discontinue proceedings if they have reached a settlement agreement or for any other reason have decided to discontinue proceedings.[20] Parties have the option to submit their signed settlement agreement to the panel, which the panel can memorialize as an award. This would trigger any transparency regulations that normally apply to ISDS awards. However, if parties elect not to go through the arbitration panel, their agreement becomes a private agreement between two parties and is thus exempt from any ISDS oversight. Similarly, UNCITRAL Rules allow the parties to discontinue arbitration proceedings for any reason, including reaching a settlement agreement. UNCITRAL Rules also permit the panel to either issue an order terminating proceedings or an order enshrining the settlement terms in the form of an award.[21]

18. Julia G. Brown, Note, *International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?*, 3 W. J. OF LEGAL STUDIES 1, 2 (2013).

19. *Id*.

20. International Centre for the Settlement of Investment Disputes [ICSID], Rules of Procedure for Arbitration Proceedings, Ch. V, r. 43(1) (Apr. 10, 2006), *available at* https://perma.cc/XV4Y-CSX2.

21. G.A. Res. 31/98, Arbitration Rules of the United Nations Commission on International Trade Law, § IV, art. 34(1) (Dec. 15, 1976), *available at* https://perma.cc/VQ4R-AE6Y.

B. Goals of IIAs/ISDS

Proponents of IIAs argue that they increase international investment, depoliticize disputes between states and investors, promote the rule of law, and ensure compensation for harms done to investors.[22] ISDS is seen by its advocates as providing a fair forum for investors to resolve disputes, and its proponents argue that it has the potential to boost investment in countries with legal systems that are inadequate or corrupt, or in which investors for other reasons believe they would be treated unfairly. Investors may seek compensation in ISDS for a number of state behaviors, including state discrimination against foreign-owned companies (which has been interpreted liberally), failure to provide foreign investors with "fair and equitable treatment," restricting the movement of capital into or out of the country, and expropriation of the assets of foreign-owned companies.[23] In the early 2000s, a new property right emerged in ISDS consisting of investors' "legitimate expectations" regarding their own business prospects and future government behavior.[24] Founded in the legal doctrine of estoppel, ISDS "tribunals have created and restated a rule that specific representations or assurances given by government representatives can give rise to investors' 'legitimate expectations,' which are protected under the treaty's FET [Fair and Equitable Treatment] obligation from government interference."[25] Arbitral panels have typically cabined the application of "legitimate expectation" to the government's explicit, specific commitments, but determining what receives the protection of a legitimate expectation remains highly subjective.[26]

Defenders of ISDS contend that it spurs international trade, thereby offering benefits to both the investor and the host state.

22. *Primer*, *supra* note 1.

23. *Id*.

24. Lise Johnson, *A Fundamental Shift in Power: Permitting International Investors to Convert Their Economic Expectations into Rights*, 65 UCLA L. REV. DISCOURSE 106 (2018).

25. Lise Johnson & Lisa Sachs, *The Outsized Costs of Investor-State Dispute Settlement*, 16 ACAD. OF INT'L BUS. INSIGHTS 10 (2016), *available at* https://perma.cc/5EZQ-XJRJ.

26. Johnson, *supra* note 24.

Investors profit from increased protection and privileges granted to them in IIAs, including participation in ISDS, and are increasingly structuring their investments to take advantage of those protections.[27] IIAs also benefit host states by providing a conduit for foreign direct investment (FDI). FDI can be particularly beneficial to host states by promoting economic growth, including job growth, technology and capital transfer, and increased productivity.[28] However, doubts remain about IIAs and ISDS' ability to deliver on the promised economic benefits of FDI to host states. When FDIs are procured by incentives, the benefits to the host state may not outweigh the costs of attracting the investment (for instance, lost revenue from tax breaks meant to entice investors). Studies on whether investment treaties have increased investment flows are inconclusive.[29] A 2014 UNCTAD review of thirty-five published and unpublished studies showed that, while a majority of the studies did find a positive relationship between an investment treaty and increased FDI, a significant minority found the opposite to be true.[30] Further, a separate review of published studies found contradictory results regarding the underlying conditions which would lead to an investment treaty having a positive impact on FDI.[31] This makes it difficult to determine the true relationship between investment treaties and FDI flow. Overall, academic literature suggests that investment treaties have some positive effect on increasing the flow of FDI into developing countries, although the effect seems to be relatively small and so varied as to be difficult to consistently identify.[32]

Given the uncertain effects of IIAs on FDI flows, the costs to host states of agreeing to ISDS provisions may outweigh the

27. DECHERT LLP, HOW TO PROTECT INVESTMENTS IN INDONESIA DESPITE THE TERMINATION OF ITS BILATERAL INVESTMENT TREATIES (2015), *available at* https://perma.cc/BZE3-ZUTM.

28. Lise Johnson, Brooke Skartvedt Güven & Jesse Coleman, *Investor-State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get Us There?*, CCSI BLOG (Dec. 11, 2017), *available at* https://perma.cc/6F8K-TTLQ.

29. JONATHAN BONNITCHA, INT'L INST. FOR SUSTAINABLE DEV., ASSESSING THE IMPACT OF INVESTMENT TREATIES: OVERVIEW OF THE EVIDENCE 3 (2017), *available at* https://perma.cc/P2SB-VL3B.

30. *Id.*

31. *Id.*

32. *Id.*

benefits. The ISDS system allows foreign investors to bypass a host state's domestic legal system in favor of one with "fewer procedural barriers and greater substantive protections," even though many claims adjudicated through ISDS are actually claims under domestic law rather than alleged treaty violations.[33] Importantly and unusually, most treaties do not require that investors exhaust all domestic remedies before resorting to arbitration.[34] Even as ISDS claims become more common, the amount of money damages sought and awarded continues to increase.[35] The International Bar Association asserts that claimant investors are awarded, on average, less than half of the amounts claimed.[36] However, this does not reliably indicate the reasonableness of investors' claims. For example, claimants may make unreasonably large claims as a negotiating tactic to increase the overall amount awarded by the arbitration tribunal.

Once rendered, ISDS decisions are nearly impossible to overturn. ICSID rules provide that an award may be challenged only when new information has come to light that would have changed the panel's deliberations or when there is a conflict over the interpretation of the award.[37] Another available avenue is annulment, but an award can only be annulled on procedural grounds, not on the merits of the case.[38] There is no formal appeals mechanism for review of the law at issue.[39]

C. Environmental Impact of ISDS

ISDS has impacted "climate action, protection of water resources, environmental impact assessments, and

33. *Id.* at 11.

34. *Primer*, *supra* note 1.

35. U.N. CONF. ON TRADE AND DEV., FACT SHEET ON INVESTOR-STATE DISPUTE SETTLEMENT IN 2018 (2019), *available at* https://perma.cc/ZFQ9-NFUJ.

36. DAVID W. RIVKIN ET AL., INT'L BAR ASS'N, INVESTOR-STATE DISPUTE SETTLEMENT: THE IMPORTANCE OF AN INFORMED, FACT-BASED DEBATE, *available at* https://perma.cc/DP5B-ZDE7 (last accessed Oct. 2, 2020).

37. *Award - ICSID Convention Arbitration*, ICSID, *available at* https://perma.cc/H9K7-V4HR.

38. *Id.*

39. *Id.*

communities' rights to representation and access to justice."[40] ISDS even threatens states' ability to respond to climate change. The world needs to drastically reduce its dependence on fossil fuels to contain the effects of climate change, yet ISDS protects international investments in mining and transporting the very same fossil fuels driving climate change.[41] Perhaps the best-known example of ISDS in a fossil fuel project was when President Barack Obama denied a key permit for construction of TransCanada's Keystone XL Pipeline after concluding that the project "would not serve the national interests of the United States."[42] The Keystone XL pipeline would have extended an existing oil pipeline from Alberta, Canada, through the American states of Montana, South Dakota, and Nebraska.[43] TransCanada initiated ISDS proceedings against the United States pursuant to the North American Free Trade Agreement (NAFTA), claiming $15 billion to recover sunk costs and lost profits it would have gained had the pipeline been approved. However, TransCanada suspended the suit and settled the case after newly sworn-in United States President Donald Trump reversed the American position and signed an executive order allowing the project to go forward.[44]

ISDS cases also have implications for clean water. In 2013, Romania declined to issue a clean water permit for Gabriel Resources' planned gold and silver mine out of concern for cyanide pollution. In response, Gabriel Resources filed a claim against Romania for $4.4 billion in damages, alleging Romania breached its treaty obligations.[45] Also in 2013, Lone Pine Resources, Inc. sued Canada in ISDS for $100 million after the

40. Lisa Sachs et al., *Environmental Injustice: How Treaties Undermine the Right to a Healthy Environment*, WOLTERS KLUWER: KLUWER ARB. BLOG (Nov. 13, 2019), *available at* https://perma.cc/2J2L-VEMS.

41. *Id.*

42. Bill Chappell, *President Obama Rejects Keystone XL Pipeline Plan*, NAT'L PUB. RADIO (Nov. 6, 2015), https://perma.cc/XQM5-9N83.

43.TransCanada Corp. v. United States, ICSID Case No. ARB/16/21, *available at* https://perma.cc/BG4E-KPYU.

44. Ethan Lou, *TransCanada's $15 Billion U.S. Keystone XL NAFTA Suit Suspended*, REUTERS (Feb. 28, 2017), https://www.reuters.com/article/us-canada-pipeline-lawsuit/transcanadas-15-billion-u-s-keystone-xl-nafta-suit-suspended-idUSKBN1671W1 (last accessed Aug. 8, 2020).

45. Gabriel Res. Ltd. v. Romania, ICSID Case No. ARB/15/31, *available at* https://perma.cc/SZ5V-PQE4.

Government of Quebec instituted a moratorium on fracking below the St. Lawrence River and revoked permits previously issued to Lone Pine for petroleum and natural gas exploration.[46] The outcomes of both cases are still pending.

ISDS has affected the way environmental impacts of projects are evaluated, particularly with respect to environmental impact assessments (EIAs). In 2008, Clayton and Bilcon of Delaware, Inc. sued the Government of Canada in ISDS after being denied a permit to operate a quarry and marine terminal after a non-binding EIA recommended the permit be denied. The tribunal held that in considering "'community core values' as it evaluated the environmental impact of the project, the [panel charged with preparation of the EIA], to the prejudice of the Investors, denied the ultimate decision makers in government information which they should have been provided."[47] The panel ultimately ruled in favor of investors.[48]

In 2009, Ecuadorian plaintiffs sued Copper Mesa Mining and the Toronto Stock Exchange in Canadian court for injuries they suffered at the hands of a private security firm contracted by Copper Mesa for publicly opposing the mine.[49] As violence in connection with the protests escalated, the government of Ecuador revoked Copper Mesa's permit for failing to properly consult with the community.[50] When the case in Canada was dismissed for lack of jurisdiction, Copper Mesa sued Ecuador in ISDS, alleging that the revocation of the permit violated treaty terms.[51] Copper Mesa was awarded $19 million.[52]

46. Lone Pine Res. Inc. v. Canada, ICSID Case No. UNCT/15/2, *available at* https://perma.cc/9LQK-ZZ9C.

47. Bilcon of Del. v. Gov't of Can., Case No. 2009-04, Award on Jurisdiction and Admissibility, ¶ 535 (Perm. Ct. Arb. 2015), *available at* https://perma.cc/TY9T-RFMC.

48. *Id*.

49. *Copper Mesa Mining Lawsuit (re Ecuador)*, BUS. & HUM. RTS. RES. CTR. (Mar. 25, 2012), *available at* https://perma.cc/V4D3-CJNL.

50. Matthew Levine, Ecuador Ordered by PCA Tribunal to Pay $24 million to Canadian Mining Company, INV. TREATY NEWS (Dec. 12, 2016) https://www.iisd.org/itn/2016/12/12/ecuador-ordered-by-pca-tribunal-to-pay-24-million-to-canadian-mining-company-copper-mesa-mining-corporation-v-republic-of-ecuador-pca-2012-2/ (last accessed Feb. 13, 2020).

51. *Id*.

52. Press Release, Copper Mesa, *Copper Mesa Mining Corporation Reaches U.S. $30 Million Settlement with Republic of Ecuador*, MKTS. INSIDER (Aug. 2, 2018), *available at* https://perma.cc/695H-FVAD.

D. Problems With ISDS

Irrespective of whether ISDS provides the economic benefits its proponents contend, it poses significant problems for national sovereignty and fairness. ISDS purports to even the playing field for foreign investors who fear unequal treatment by host country legal institutions. However, rather than resulting in a level playing field, ISDS has tilted too far in the other direction. The outcome is a system in which foreign investors have increased rights and privileges over domestic companies and the states in which they invest.[53] ISDS incentivizes state governments to prioritize the interests of foreign investors over those of other actors, or else risk those foreign investors bringing suit in ISDS.[54] ISDS also implicates social justice. The majority of ISDS claims are brought against lower- and middle-income countries, while companies worth more than $1 billion in annual revenue and individuals worth more than $100 million have been awarded 94.5% of all ISDS-ordered money transfers.[55] The average amount claimed is $300 million, while the average ISDS award is over $120 million.[56] Critics of ISDS allege that compelling middle- and lower-income countries to pay these large damage awards to wealthy companies and individuals merely exacerbates existing economic inequality.

The selection of arbitrators who serve on the panels deciding ISDS cases is also controversial. The international arbitration industry has become dominated by a few elite law firms, with few restrictions on who can serve as an arbitrator and little guidance on conflicts of interest among arbitrators. As of 2012, fifteen arbitrators had decided nearly 55% of all known investment treaty disputes.[57] Lawyers specializing in international arbitration act as counsel in some cases,

53. Johnson & Sachs, *supra* note 25.

54. Lisa Sachs & Lise Johnson, *Investment Treaties, Investor-State Dispute Settlement, and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities*, in INTERNATIONAL RULES AND INEQUALITY: IMPLICATIONS FOR GLOBAL ECONOMIC GOVERNANCE, 112, 112-42 (José Antonio Ocampo, ed., 2019).

55. *Primer*, *supra* note 1.

56. *Id.*

57. Cecilia Oliver & Pia Eberhardt, *Profiting from Injustice: How Law Firms, Arbitrators, and Financiers Are Fueling an Investment Arbitration Boom*, CORP. EUR. OBSERVATORY & TRANSNAT'L INST. (Nov. 2012), *available at* https://perma.cc/5NS9-S8UW.

arbitrators in others, and call fellow arbitrators as witnesses.[58] In such a small field, arbitrators may have an incentive to be agreeable with their co-arbitrators and maintain a good reputation in the arbitration industry, leading to a conflict of interest in their judgment. Another concern is "double-hatting," in which a lawyer acts simultaneously as counsel in one case and arbitrator in another. An obvious ethics issue arises if the outcome of the second case could improve the lawyer's chances as counsel for the other.[59] Such "double-hatting" is not formally forbidden, but it remains a questionable practice given IBA Guidelines on Conflicts of Interest in International Arbitration, which requires an arbitrator to decline appointment if the arbitrator feels unable to be "impartial or independent."[60] The Guidelines further specify that doubts are justifiable if a third person could reasonably conclude that the "arbitrator may be influenced by factors other than the merits of the case as presented by the parties."[61]

Another significant concern is a lack of transparency in ISDS proceedings. Of the 2,442 treaties which include ISDS, only fifty require that documents be made available to the public, thirty-nine require hearings to be open to the public, and thirty-nine regulate amicus curiae submissions by non-disputing third parties.[62] Thirty-five require all three of the above transparency measures; sixteen of these are bilateral investment treaties (BITs) with Canada as one of the parties.[63] The Trans-Pacific Partnership is among the most high-profile of these treaties. It was signed in 2016 but has not yet entered into force.[64] While an investor may be incentivized to publicly threaten an ISDS suit,[65] both investors and states often have bigger incentives to

58. *Id.*

59. Malcolm Lanford et al., *ESIL Reflection: The Ethics and Empirics of Double Hatting, ESIL SEDI: Turn to Empiricism Series*, EUROPEAN SOC'Y OF INT'L L., *available at* https://perma.cc/WH4S-VK2A.

60. IBA Council, *IBA Guidelines on Conflicts of Interest in International Arbitration* Section 2(a), (rev. 2015), *available at* https://perma.cc/W95W-7X6J.

61. *Id.* at Section 2(c).

62. International Investments Agreements Navigator, *supra* note 12.

63. *Id.*

64. *Trans-Pacific Partnership*, U.N. CONF. ON TRADE AND DEV., *available at* https://perma.cc/E6FS-TS7V.

65. Legal threats are a time-honored tactic used to attempt to intimidate an opponent into taking or refraining from taking an action that might be harmful to business or

keep ISDS proceedings secret. For instance, a company may want to keep information about company conduct confidential, and a state may fear that a pending ISDS case may hurt its reputation for fostering a good environment for investors.

Recently, the international community has taken several steps to increase transparency in ISDS proceedings. UNCITRAL rules on transparency apply as a default to all treaties concluded after April 1, 2014, unless the parties to the treaty agree otherwise.[66] These rules require that notice of the commencement of arbitration proceedings be deposited in a publicly available central repository; make documents relating to the arbitration, including hearings, expert reports and witness statements, available to the public; and allow interested third parties to apply to make submissions to the arbitration, similar to an *amicus curiae* brief.[67] However, these rules do not apply to arbitration initiated pursuant to the more than 3,000 international investment treaties concluded before that date.[68] The rules also allow for documents to be withheld if there is a need to protect confidential information or "the integrity of the arbitral process," which has been interpreted liberally.[69]

Additionally, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (also known as the Mauritius Convention) represents an important step towards greater transparency in ISDS proceedings. Adopted in 2014 and entered into force in 2018, the Mauritius Convention provides a mechanism by which parties can amend existing treaties concluded before April 2014 to adopt UNCITRAL's optional Rules on Transparency in ISDS.[70]

other personal interests, or to intimidate them into taking a less favorable bargaining position. When carried out, these lawsuits are often called SLAPP (Strategic Lawsuit Against Public Participation) suits. *What is a SLAPP?*, PUBLIC PARTICIPATION PROJECT, *available at* https://perma.cc/GLR9-YFFV.

66. MARTIN A. WEISS ET AL., CONG. RES. SERV., INTERNATIONAL INVESTMENT AGREEMENTS (IIAS): FREQUENTLY ASKED QUESTIONS 19 (2015), *available at* https://perma.cc/728M-AFYK.

67. UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration, UNCITRAL, https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf (last accessed Feb. 13, 2020).

68. Weiss, supra note 66.

69. *Id.* at art. 7 §§ 1-7.

70. LISE JOHNSON, COLUM. CTR. ON SUSTAINABLE INV., THE MAURITIUS CONVENTION ON TRANSPARENCY: COMMENTS ON THE TREATY AND ITS ROLE IN INCREASING

However, the Mauritius Convention allows states to stipulate reservations excluding certain aspects of the treaty; this has the potential to render toothless key provisions of the convention and circumvent its purpose.[71] Further, the Mauritius Convention has only been ratified by five states: Cameroon, Canada, Gambia, Mauritius, and Switzerland. This severely limits its efficacy.[72]

Finally, ISDS undermines the authority of domestic institutions and disrupts the separation of powers. ISDS claims are brought against a national government, which must weigh many different competing interests as it evaluates its arbitration strategy. This leads to the national executive branch making decisions for the country as a whole, although the impacts are often limited to one geographic area. Particularly in resource extraction cases, the environmental harm of the investment is felt on the local level by the community, but the benefit is received by the national government in the form of tax revenue or other monetary gains.[73] Without adequate representation, local environmental interests are easy to sacrifice to national economic benefits.

E. Current Attempts at Reform

The explosion of ISDS cases and the attendant problems have not gone unnoticed; there have been significant attempts to reform the ISDS system. UNCITRAL formed Working Group III to consider potential to reform the ISDS system.[74] A report from the Working Group's 37th session, which took place in April 2019, indicated that the Working Group's mandate was to (1) identify areas of concern regarding ISDS, (2) consider whether reform might be desirable, and (3) should it be desirable, to provide recommendations to UNCITRAL.[75] The working group

TRANSPARENCY OF INVESTOR-STATE ARBITRATION 2 (2014), *available at* https://perma.cc/5LL2-ZG8J.

71. *United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration*, Dec. 10, 2014, *available at* https://perma.cc/L4FZ-TLGM.

72.*Id*.

73. Johnson & Sachs, *supra* note 25.

74. *Working Group III: Investor-State Dispute Settlement Reform*, UNCITRAL, https://uncitral.un.org/en/working_groups/3/investor-state (last visited Jan. 11, 2021).

75. Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019), https://documents-dds-

has proposed several reforms concerning adjudicator conduct, institution of an appellate mechanism, and the selection of ISDS tribunal members, which are to be discussed at the 40th session in February, 2021.[76]

The replacement for NAFTA, the United States—Mexico—Canada Agreement (USMCA), ratified by the United States Senate on January 16, 2020 and entered into force July 1, 2020, also reforms its approach to ISDS.[77] The USMCA eliminates the use of ISDS between the United States and Canada and restricts claims between the United States and Mexico to "covered sectors," including oil and gas, power generation services to the public, telecommunications services to the public, transportation services, and "ownership or management of roads, railways, bridges, or canals that are not for the exclusive or predominant use" of the government.[78]

Furthermore, the inclusion of ISDS mechanisms in the proposed Trans-Pacific Partnership between the United States and eleven other Pacific Rim countries generated fierce opposition in United States Congress. In 2014, several Democratic House leaders wrote to President Obama to protest the inclusion of ISDS, and three Senators wrote a separate letter to voice their concerns about its potential impact on United States financial regulations.[79] Senator Elizabeth Warren penned an op-ed in *The Washington Post* condemning the inclusion of ISDS, arguing that it would benefit large multinational corporations while undermining United States sovereignty.[80] Inclusion of ISDS in the proposed Transatlantic

ny.un.org/doc/UNDOC/GEN/V19/024/04/PDF/V1902404.pdf?OpenElement (last visited Jan. 13, 2021).

76. *Id.*

77. Steve Scherer & Kelsey Johnson, *Trudeau Wants USMCA Deal Ratified Quickly, Opposition Says Not So Fast*, REUTERS (Jan. 21, 2020), *available at* https://www.reuters.com/article/us-usa-trade-usmca-canada/trudeau-wants-usmca-deal-ratified-quickly-opposition-says-not-so-fast-idUSKBN1ZK21C.

78. Agreement between the United States of America, the United Mexican States, and Canada, Ch. 14, Annex 14-E, Office of the United States Trade Representative, *available at* https://perma.cc/LK5N-DNPN.

79. Vicki Needham, *Democrats Urge Officials to Leave Out Investor-State Dispute Provisions in Major Trade Deals*, THE HILL (Dec. 18, 2014), *available at* https://perma.cc/LVS6-8HG9.

80. Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), *available at* https://perma.cc/7798-Q4VB.

Trade and Investment Partnership (TTIP) between the United States and the European Union (EU) sparked such outrage it led EU Trade Commissioner Cecilia Malmstrom to call ISDS "the most toxic acronym in Europe."[81]

The growing international recognition of environmental rights also signals that greater environmental protections should be incorporated into the international investment system. More than one hundred national constitutions now provide a constitutional right to a healthy environment, and 155 states have a binding legal obligation to protect the environment through constitutional protection, national protection, or membership in international agreements committing them to protect the environment.[82] Further, successful negotiation of the Global Pact for the Environment (Global Pact) would establish an internationally-recognized right to a clean environment and a corresponding duty to care for the environment.[83] A 2018 U.N. General Assembly resolution in support of the Global Pact was adopted with 142 countries voting in favor of the resolution and only thirteen voting against or abstaining from voting.[84] Increasing criticism of ISDS and growing legal support for the environmental rights movement suggest that the time is ripe to introduce measures to strengthen environmental protections in ISDS.

III. MODELS FOR PROPOSED LEGAL MECHANISMS TO PROTECT ENVIRONMENTAL INTERESTS

This section introduces two proposed legal mechanisms to improve the protection of environmental resources during the ISDS process: fairness hearings and disclosure of environmental impacts of proposed settlements. For each proposed mechanism,

81. Paul Ames, *ISDS: The Most Toxic Acronym in Europe*, POLITICO (Sept. 17, 2015), https://perma.cc/RP7U-YKTM.

82. U.N. Secretary-General, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/73/188 (Jul. 18, 2019), *available at* https://perma.cc/CQY2-4PTU.

83. *Content*, GLOBAL PACT FOR THE ENV'T, *available at* https://perma.cc/C5HB-9Y4A.

84. *Where Are We Now?*, GLOBAL PACT FOR THE ENV'T, *available at* https://perma.cc/UVA8-JB4Z. The United States, Russia, Syria, Turkey, and the Philippines voted against the resolution, and Saudi Arabia, Belarus, Iran, Malaysia, Nicaragua, Nigeria, and Tajikistan abstained.

this section discusses why the mechanism would improve ISDS and explores models found in United States law that could be adapted to the ISDS system. First, this section uses the model for a fairness hearing proposed by Cohen, Wolfson, and DalCortivo in the *Seton Hall Law Review* as one way to balance competing interests in land use litigation: the judicial preference for the settlement of litigation on the one hand, and the need to fully protect the public interest implicated in the litigation.[85] Second, this section looks at how fairness hearings are used in class action suits. Finally, this section looks at how U.S. Department of Justice settlement guidelines seek to ensure that a settlement is fair to parties beyond those represented in court.

A. Fairness Hearings Prior to Approval of ISDS Award

1. What is a Fairness Hearing?

A fairness hearing is frequently required in litigation when a judgment would affect the rights of persons not before the court. In such circumstance, a judge may order a fairness hearing in order to ensure that those persons are treated fairly. In the United States, fairness hearings are commonly found in the settlement of class action suits. The fairness hearing is not a plenary hearing and does not result in a ruling on the merits of the case.[86] The court's role is instead to determine whether the settlement is "fair and reasonable," or in other words, whether it adequately protects the interests of those on whose behalf the suit was brought.[87] The "nature and extent" of the hearing that is required to make that determination is within the sound discretion of the court.[88]

In the model proposed by Cohen et al., the first step in a fairness hearing is for the court to determine the extent to which the proposed settlement implicates the public interest and the likelihood of substantial detriment to that interest.[89] Where a

85. Hon. Richard S. Cohen et al., *Settling Land Use Litigation While Protecting the Public Interest: Whose Lawsuit Is This Anyway?*, 23 SETON HALL L. REV. 844 (1993) [hereinafter Cohen].

86. Morris County Fair Hous. Council v. Boonton Tp., 484 A.2d 1302, 1304 (N.J. Super. L. Div. 1984), aff'd, 506 A.2d 1284, 1308 (N.J. Super. App. Div. 1986).

87. Armstrong v. Milwaukee Bd. of Sch. Dirs., 616 F.2d 305, 314-315 (7th Cir.1980).

88. Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977).

89. Cohen at 864.

proposed settlement is illegal or would otherwise violate public policy, the court immediately rejects it.[90] Once the court determines an agreement is not against the public interest, a fairness hearing is scheduled and the public is given notice and the opportunity to participate.[91] The hearing itself resembles a hearing held before a typical zoning board; when a settlement contemplates providing an exemption to a local zoning ordinance or to otherwise alter the zoning regime, the public interest must receive the same consideration as it would be afforded in a typical zoning board hearing.[92] Parties could explain the settlement and their argument for it, and the public could provide its comment in favor of or against the settlement.[93]

In a fairness hearing, intervention is permitted only to determine the settlement's fairness, not to determine the merits of the case.[94] Before any settlement can be agreed to, the judge must determine "the nature and extent to which the litigation's adjudication or dismissal implicates the public interest." [95] The judge reserves the right to "permit, or even guide, the parties to renegotiate specific areas of concern."[96] Finally, the judge may refer the action to the relevant local governing body for the necessary proceedings to implement the settlement, while retaining jurisdiction.[97] This ensures that the settlement is implemented by the appropriate body with the relevant expertise and governing mandate, while the court retains the power to compel compliance with the terms of the hearing and ensure that the public interest is adequately represented.

2. Fairness Hearings Would Improve Environmental Protection

The lack of transparency in ISDS proceedings means that the public may not be aware of any threat to its environmental interests until the arbitral panel has rendered a decision. A

90. *Supra* note 88.
91. Cohen at 865.
92. Id.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 865.
97. Whispering Woods at Bamm Hollow, Inc. v. Middletown Tp. Plan. Bd., 531 A.2d 770, 775 (N.J. Super. L. Div. 1987).

fairness hearing requirement in ISDS would serve to protect a country's ability to govern in the public interest by blocking unfair settlements and changing how parties approach settlement. Parties would be incentivized to consider how the agreement would implicate the public interest, since the court would ultimately evaluate the settlement's fairness.[98]

3. New Jersey Law Regarding Fairness Hearings

New Jersey law typically requires a fairness hearing or other mechanism to ensure adequate representation of the public interest in land use litigation in two contexts: settlements alleging unconstitutional discriminatory zoning practice,[99] and settlements which would illegally intrude on the exclusive zoning power of municipalities.[100] This section discusses the relevant cases describing the required fairness hearing procedures for each type of litigation in New Jersey law.

i. Settlements Alleging Unconstitutional Discriminatory Zoning Practice

In the landmark case *South Burlington County N.A.A.C.P. v. Mount Laurel Township* (*Mount Laurel I*), the New Jersey Supreme Court held that a municipality could not exercise its zoning power to exclude housing accessible to those of low and moderate incomes. The court stated that municipalities "must zone primarily for the living welfare of people."[101] This became known as the *Mount Laurel* doctrine. In *Mount Laurel II*, the court upheld the practice of the "builder's remedy," saying that a builder's remedy should be granted "where a developer succeeds in *Mount Laurel* litigation and proposes a project providing a substantial amount of lower income housing … unless … the plaintiff's proposed project is clearly contrary to sound zoning."[102] The builder's remedy bears a striking resemblance to ISDS. If a court finds that a municipality has

98. Cohen at 864.

99. S. Burlington County N.A.A.C.P. v. Mt. Laurel Tp., 336 A.2d 713 (N.J. 1975) [hereinafter Mount Laurel I].

100. Warner Co. v. Sutton, 644 A.2d 656 (N.J. Super. Ct. App. Div. 1994).

101. Mount Laurel I at 732.

102. S. Burlington County N.A.A.C.P. v. Mt. Laurel Tp., 456 A.2d 390, 452 (N.J. 1983) [hereinafter Mount Laurel II].

not provided its fair share of affordable housing, a builder may sue the municipality for approval of a development proposal that includes affordable housing units, even if the development would not otherwise be permitted under the prevailing zoning regime.[103] So long as the proposed development has a sufficient number of affordable units (typically in a ratio of 15-20% affordable units to 80-85% market-rate units), it is nearly impossible for a municipality to succeed in a builder's remedy lawsuit.[104]

The purpose of a fairness hearing in *Mount Laurel* litigation is to ensure that housing developments approved as part of a builder's remedy protect the rights of low-income citizens on whose behalf the remedy has been sought. The fairness hearing determines only whether the settlement is fair and reasonable and whether the rights of those low-income individuals are being protected.[105] If evidence shows that the construction would meet Council on Affordable Housing[106] criteria, the settlement should be preliminarily approved.[107] A fairness hearing should demonstrate that the proposed settlement "adequately protects interests of lower-income persons on whose behalf affordable units are being built."[108]

The authoritative case on the procedures required for fairness hearings in *Mount Laurel* litigation is *Morris County*

103. *What is Builder's Remedy Lawsuit and How Does It Function?*, BOROUGH OF MONTVALE, N.J., *available at* https://perma.cc/U4UT-BTXN.

104. *FAQs: How likely is it that a municipality can successfully defend a builder's remedy lawsuit?*, MILLBURN TOWNSHIP, *available at* https://perma.cc/4LFT-9JPP.

105. E./W. Venture v. Borough of Ft. Lee, 669 A.2d 260 (N.J. Super. Ct. App. Div. 1996).

106. New Jersey established the Council on Affordable Housing (COAH) in 1985 in the wake of the *Mount Laurel* series of decisions. Cities can also voluntarily apply to COAH for certification that their fair housing plan meets their *Mount Laurel* obligations. Municipalities are immune from suit while COAH reviews their plan and upon certification of their plan. Certification lasts for ten years, but may be withdrawn is a municipality is no longer providing a realistic opportunity for low- and middle-income households to afford housing. NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS, *About the Council*, *available at* https://www.state.nj.us/dca/affiliates/coah/about/ (last accessed Feb. 11, 2020).

107. Livingston Builders, Inc. v. Township of Livingston, 707 A.2d 186, 191-92 (N.J. Super. Ct. App. Div. 1998).

108. *Id*. at 186.

Fair Housing Council v. Boonton Township (*Morris County*).[109] The Public Advocate filed suit on behalf of himself,[110] the Morris County Fair Housing Council, and the Morris County Branch of the N.A.A.C.P. against seven municipalities alleging unconstitutional exclusionary zoning that failed to provide a realistic opportunity for low- and moderate-income housing.[111] Morris Township, one of the defendants, reached a proposed settlement with the Public Advocate and one of the developers who was before the court for the settlement's approval and finalization.[112] The court then established the required procedures for a fairness hearing to gain judicial approval of a settlement for class action suits or other representative actions.[113] The *Morris County* court stated that it can safeguard against the improvident approval of settlements in *Mount Laurel* litigation using the procedures utilized by federal courts overseeing proposed settlements of class action suits.[114] When reviewing a settlement in *Mount Laurel* litigation, the *Morris County* court stated that relevant factors may include the time it would take to litigate the case if it were not settled, and whether the settlement would facilitate and expedite the construction of a substantial number of low-income housing units.[115]

ii. Settlements Which Would Illegally Intrude on the Exclusive Zoning Power of Municipalities

Settlements of zoning disputes in New Jersey also often involve fairness hearings. In a typical zoning dispute, a

109. 484 A.2d 1302, 1304 (N.J. Super. Ct. Law Div. 1984), aff'd, 506 A.2d 1284 (N.J. Super. Ct. App. Div. 1986) [hereinafter *Morris County*].

110. Prior to the abolition of the office in 2010, the State Public Advocate was endowed with the discretion to initiate *Mount Laurel* litigation against municipalities when they determine that such litigation served the public interest. N.J. STAT. ANN. § 52:27E-4 (West). The Advocate "had the sole discretion to represent or refrain from representing the public interest," and could do so either by intervening in existing litigation or instituting litigation. N.J. STAT. ANN. § 52:27E-31, 32 (West). The Advocate's decision to file suit was subject to judicial review, but the review was limited to whether the Advocate's decision was arbitrary or capricious. *Morris County*, 484 A.2d at 1249.

111. *See id*.

112. *See generally Morris County*.

113. *Morris County*, 484 A.2d at 1307.

114. *Morris County*, 484 A.2d at 1308.

115. *Id.* at 1309.

developer either petitions the municipality for permission to vary the zoning code to allow a non-conforming use and is denied, or the city sues a developer for a development which fails to comply with the zoning code. Alternatively, citizens may sue or intervene in suits to assert claims that the city's failure to enforce the zoning code regarding a particular development resulted in injury to their interests. Recognizing that the settlement of zoning controversies likely has a significant impact on the public interest and nearby properties, fairness hearings are often required before a settlement is finalized in order to ensure that the public interest is protected. The power to zone is typically delegated to municipalities by state governments, for whom it is a legitimate exercise of their police power to make laws promoting the general welfare. With that justification, zoning disputes necessarily implicate the public interest.[116]

A New Jersey appellate court established the necessary procedures to protect the public interest in a settlement zoning case.[117] In *Warner v. Sutton*, several environmental groups sought to intervene post-judgment to vacate a settlement between a mining company and town planning board that substantially altered "the present zoning ordinance as to permitted use and density."[118] Intervenors alleged that the settlement would intrude "on the exclusive zoning power of the municipality."[119] The court held that a judge may not enter a consent order approving a settlement of land use litigation that substantially alters zoning ordinances without a hearing and without the municipality amending the zoning ordinance to implement the settlement terms.[120]

Suski v. Mayor & Commissioners of Borough of Beach Haven further supports the notion that a settlement may not amend the zoning code unless the municipality agrees to amend the code through statutorily-provided procedures found support in. In *Suski*, the court stated that "an ordinance cannot be amended, repealed or suspended by any act of a governing body

116. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding zoning as a valid exercise of a state's police powers).

117. 644 A.2d 656 (N.J. Super. App. Div. 1994).

118. *Id.* at 657.

119. *Id.* at 659.

120. *Id.*

of less dignity than that which created the ordinance in the first place."[121] The court held that a municipality's duty to exercise its police powers in the interest of public welfare cannot be superseded or curtailed by private agreement.[122] In another case, the court decided that even though a similar "contract zoning" arrangement that failed to follow proper statutory procedures was memorialized in a consent order, it was still an invalid exercise of police power.[123]

The *Warner* court also noted that a backroom deal between a zoning commission and a private party frustrates the right of the public to be heard.[124] The court acknowledged the tension between the public's right to be heard with the clear judicial preference for settlement of litigation.[125] Nonetheless, the court noted the "obvious danger" of the potential for the municipality to bargain away its statutory duties to zone in the public interest "without scrutiny or public accountability."[126] The court pointed to the Cohen article's discussion of fairness hearings as an example of a judicial procedure that would adequately serve the public interest in land use litigation.[127] The *Warner* court did not go so far as to require that a fairness hearing as described in the Cohen article be held for similar future settlements—the terms "fairness" and "fairness hearing" appear in quotation marks throughout the opinion. Rather, the court looked to a fairness hearing as one way to ensure that zoning powers serve the general welfare and are not abrogated by private settlement agreements.[128]

The *Warner* court outlined the steps that a judge overseeing a fairness hearing must take. First, the judge makes a threshold finding as to whether any of the terms of the settlement are void

121. Suski v. Mayor & Comm'rs of Borough of Beach Haven, 132 N.J. Super. 158, 164, 333 A.2d 25 (App.Div.1975) (citing V. F. Zahodiakin, etc. v. Summit Zoning Bd. of Adj., 8 N.J. 386, 86 A.2d 127 (1952)).

122. *Id.*

123. Midtown Properties, Inc. v. Madison Tp., 172 A.2d 40, 45 (N.J. Super. L. Div. 1961), aff'd, 189 A.2d 226 (N.J. Super. App. Div. 1963).

124. *Warner*, 644 A.2d at 660.

125. *Id.*

126. *Id.*

127. *Id.* at 663.

128.*Id.* at 659.

as against public policy or otherwise illegal.[129] Next, the judge must reject any provision of the settlement "under which the Township has bargained away its legislative power to zone or regulate in the future."[130] While retaining jurisdiction, the judge must then remand the settlement to the governing body "for amendment to the Township's zoning ordinance for the purpose of implementing the settlement terms."[131] The township must hold public hearings to provide "interested parties a familiar and convenient forum to express their views."[132] If the zoning ordinance proposed in the settlement is not adopted by the planning board, the plaintiff may then proceed to trial. Any settlement of zoning litigation must be examined in light of the principles and goals of the municipal land use law and the statutory procedures therein in order to be fair.

A New Jersey trial court similarly held that if a settlement would implicate the public interest, parties cannot explore settlement possibilities in a litigated case without a remand to the planning board.[133] In the Whispering Woods case, a developer sued the township planning board after it denied an application to develop a subdivision surrounding a golf course.[134] The Board settled the case by re-stating the original application with several additional requirements.[135] Community organizations opposed to the project moved to intervene. The court found that the settlement must be conditioned on a public hearing just as if a new application were being submitted to the board.[136] As in the *Warner* case, the court did not allow the developer to use litigation as a shortcut.[137] The court held that the public interest has been served if the settlement has been

129. *Id.* at 666.
130. *Warner*, 644 A.2d at 666.
131. *Id.*
132. *Id.*
133. Whispering Woods at Bamm Hollow, Inc. v. Middletown Tp. Plan. Bd., 531 A.2d 770 (N.J. Super. L. Div. 1987) (citing *Edelstein v. Asbury Park,* 143 *A.*2d 860 (App.Div.1958)).
134. *Id.*
135. *Id.*
136. *Id.* at 776.
137. *Id.*

"made known to the public[,] subject to the public voice and voted upon in legal fashion."[138]

The structure of many zoning disputes mirrors that of ISDS cases; a private actor (often a developer or other business seeking a variance to a local zoning ordinance) sues the governmental actor responsible for zoning for discriminatory treatment or some other infraction, with the results of the action affecting absent third parties.[139] However, land use litigation differs from ISDS in that impacted third parties have the ability—and often the right—to participate in proceedings that affect their interest. No such right exists in ISDS and the public may not even be aware of an ISDS case that impacts their interests.

4. Fairness Hearings in Class Action Suits

In a class action suit, the affected parties are consolidated into one "class" represented by one or more members of that group.[140] The judge must consider the interests of those not present in the courtroom. Federal Rule of Civil Procedure (FRCP) 23(e)(2) provides that a court may approve a settlement in a class action case that would bind all members in a class only after a hearing and a finding that the settlement is "fair, reasonable, and adequate."[141] In deciding whether a settlement is fair, the court considers whether the class was adequately represented by counsel, the settlement was "negotiated at arm's length," the relief was adequate (which accounts for the costs and risks of taking the case to trial and subsequent appeal, the effectiveness of any proposed method of delivery of relief to a class, and the payment of attorney's fees as included in the award), and the proposal treats all members of the class "equitably relative to each other."[142] The settlement must also not be "the result of fraud or collusion."[143] This method of accounting for the interests of those not present for the

138. *Id.*

139. *Id.* at 864.

140. *What Is Class Action?*, THE L. DICTIONARY, *available at* https://perma.cc/4NFK-W6QR.

141. FED. R. CIV. P. 23(e)(2).

142. FED. R. CIV. P. 23(e)(2) (A-D).

143. 6A FED. PROC., L. ED. § 12:379.

deliberation is a potential model for environmental protection in ISDS, in which a national government is responsible for representing the interests of an entire country, and the particular interests of those people most impacted by a decision do not receive special attention.

A court must consider both the procedural and substantive fairness of a settlement.[144] According to case law, in determining whether to approve a settlement, courts should evaluate the risk or the existence of fraud or collusion; the likelihood of success on the merits of the case at trial; "the complexity, expense, and likely duration of the litigation"[145]; the class members' reaction to the proposal; whether a government agency involved in the litigation approves of the settlement; the fairness and reasonableness of the formula used to calculate the allocated relief; and the public interest.[146] The inclusion of these criteria in ISDS could help ensure that local environmental interests are not being disregarded by a national government. When a government agency participates in the settlement, courts tend to view the terms of the settlement more favorably because of a presumption that the government seeks to protect the interests of class members.[147] Although FRCP 23 only governs the settlement of class action suits, courts have referred to the principles enshrined in the rule when confronted with similar problems.

5. Department of Justice Settlement Guidelines

The United States Department of Justice (DOJ) is authorized by federal regulation to enter into consent orders.[148] DOJ has promulgated guidelines regarding its entrance into consent orders to ensure the fairness of these orders, and to ensure that the public has the opportunity to raise fairness concerns through public comment and that the court reviews the consent order for fairness according to the criteria discussed in the guidelines. DOJ may only enjoin environmental pollutant

144. City of Colton v. Am. Promotional Events, Inc., 281 F. Supp. 3d 1009 (C.D. Cal. 2017).
145. *Id.*
146. *Id.*
147. 6A FED. PROC., L. ED. § 12:384.
148. 28 C.F.R. § 50.7 (2020).

discharge after persons who are not named parties in the case are given the opportunity to comment before the consent order is entered.[149] When a proposed judgment has been reached in a settlement, the judgment is lodged with the court at least 30 days (or some other number mutually agreed to) prior to the entry of the judgment.[150] DOJ reserves the right to withdraw from the judgment or withhold its consent to the judgment if the comments "disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper, or inadequate."[151] DOJ also reserves the right to oppose any attempt to intervene in the action by any person.[152] The Assistant Attorney General for the Environment and Natural Resources Division is given the authority to promulgate procedures to implement the settlement policy.[153] After determining that the policy does not compromise the public interest, the Assistant Attorney General may then make an exception to the policy "where extraordinary circumstances" require that the comment period be shorter than 30 days or the procedures must otherwise be altered.[154]

A trial court has the discretion to enter a consent decree enshrining a settlement. Settlement is strongly preferred where the government determines that entering into a consent decree would be in the public interest, particularly in cases in which the government sues to obtain compliance with the law.[155] In such cases, while the court's primary consideration must still be "the persuasive power of the proposed settlement," separation of powers concerns also arise. Courts hesitate to second-guess the executive branch's legitimate policy judgment.[156] Because consent decrees merely preserve an agreement reached by the disputing parties, a court cannot modify a consent decree; the court can only enter the consent decree or reject it.[157]

149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153.*Id.*
154. *Id.*
155. U.S. v. Atlas Minerals and Chemicals, Inc., 851 F. Supp. 639, 648 (E.D. Pa. 1994).
156. U.S. v. Cannons Engr. Corp., 899 F.2d 79, 84 (1st Cir. 1990).
157. *Id.*

The regulations governing DOJ's settlement policy were later incorporated into the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, which contains substantially similar language regarding the public's opportunity to comment on proposed settlements. CERCLA authorizes the President to enter into agreements with potentially responsible parties where it is "practicable and in the public interest" and requires that that the public have the opportunity to comment on proposed settlements before a final judgment is entered.[158] CERCLA also statutorily obligates the Attorney General to accept comments from the public and file them with the court, and reserves the Attorney General's right to withdraw from a proposed settlement agreement when comments disclose facts or other considerations which indicate that the settlement is improper.[159]

The court must determine whether the proposed consent decree is "reasonable, fair and consistent with the purposes" that the environmental law is intended to serve,[160] the standard frequently applied for judgments that have the potential to affect persons not represented in the litigation.[161] The "reasonableness" inquiry is fact-sensitive and "depends upon the terms of the decree and the nature of the relief sought and the remedy contemplated."[162] Courts have articulated three measurements for reasonableness: (1) the consent decree's efficacy in remedying the harm and "cleansing the environment," (2) satisfactory compensation to the public for actual and anticipated costs, and (3) the relative bargaining positions of all parties.[163] The most important factor is whether the settlement "is in the public interest and upholds the objectives" of the environmental law under which the suit was brought.[164]

158. 42 U.S.C.A. § 9622 (2018).
159. *Id.*
160. H.R. Rep. No. 253, Part 3, 99th Cong., 1st Sess. 19 (1985).
161. *See supra* Part II (1) (C-D).
162. U.S. v. Atlas Minerals and Chemicals, Inc., 851 F. Supp. 639, 652 (E.D. Pa. 1994).
163. *Cannons* at 89–90.
164. U.S. v. Telluride Co., 849 F. Supp. 1400, 1402 (D. Colo. 1994).

"Fairness" in the context of consent decrees has both procedural and substantive elements.[165] To determine whether a consent decree is procedurally fair, a court considers "the negotiation process and attempt[s] to gauge its candor, openness, and bargaining balance."[166] Settlement negotiations must be conducted "forthrightly and in good faith."[167] The procedural fairness of the negotiations is strongly related to the substantive fairness of a consent decree.[168] When considering substantive fairness, the primary point of contention is whether agencies must consider a specific set of criteria to apportion liability. Courts have warned against strictly binding an agency to specific criteria in CERCLA cases.[169] The complexities of CERCLA litigation suggest that agencies should be allowed to deviate from the standard procedure "wherever the agency proffers a reasonable good-faith justification for departure" and so long as the data the agency uses to apportion liability "falls along the broad spectrum of plausible approximations."[170]

B. Environmental Impact Disclosure Requirement

1. Disclosure of Environmental Impacts of ISDS Awards and Settlements Would Improve Environmental Protection

Before assessing the fairness of ISDS awards and settlements, the award's environmental impacts must be considered and publicly disclosed. The disclosure of environmental impacts should be considered as a separate mechanism from a fairness hearing requirement. If more ambitious reforms were not possible, disclosure could be instituted as a stand-alone reform to ISDS. Based on the United States National Environmental Policy Act (NEPA), this requirement would only be procedural—it would not mandate any specific outcomes. This is important in ensuring that the decisions regarding arbitral awards remain with the selected arbitrators selected by the parties. Rather, it would require that

165. *Cannons*, 899 F.2d at 86–87.
166. *Id*. at 86.
167. *Id*.
168. *Telluride* at 1402.
169. *Cannons*, 899 F.2d at 87.
170. *Id*. at 88.

a proposed settlement or award evaluate and disclose the potential environmental impacts that could arise from that award so that they may be considered before the award is finalized.

2. National Environmental Policy Act

NEPA §102(C) requires that all proposals or reports on proposed federal action with the potential to significantly impact the environment include a detailed statement regarding the environmental impact.[171] Each statement must include the environmental impacts of the action, any adverse environmental effects, and alternatives to the proposed action.[172] The purpose of the Environmental Impact Statement (EIS) requirement is to ensure that decisionmakers are considering the environmental impacts of federal actions.

The Council on Environmental Quality (CEQ) oversees the implementation of NEPA. CEQ regulations require that an agency determine if a proposal will have a significant environmental impact and will require an EIS, or alternatively if there will be no significant environmental impact.[173] If it is not clear whether the proposed action will have a significant environmental impact, agencies are directed to prepare an environmental assessment (EA) and then, based on the EA, to determine whether to proceed with an EIS.[174] Next, if the agency determines that an EIS is not warranted, the agency must make the finding of no significant impact available to the public.[175] A federal agency must determine whether the proposed settlement has "significant" environmental impacts, which requires considering both the extent and intensity of the environmental impacts.[176] The action's significance is analyzed in several contexts, such as society as a whole, the affected region, the affected interest, and the locality.

If an agency determines that an action will likely have a significant environmental impact, it must produce an EIS. An

171. 42 U.S.C. § 4332 (2018).
172. National Environmental Policy Act of 1969 § 102(C), 42 U.S.C. § 4332(C) (2018).
173. 40 C.F.R. § 1501.4(a) (2020).
174. 40 C.F.R. § 1501.4(b) (2020).
175. 40 C.F.R. § 1506.6. (2020).
176. 40 C.F.R. § 1508.27 (2020).

EIS must include a summary of the action, an explanation of the purpose and need for the action, a description and comparative assessment of alternatives to the proposed action, a description of the environment that will be affected by the action, and an analysis of the environmental consequences of the proposal and alternatives.[177] NEPA famously imposes only procedural requirements on parties and does not mandate a specific substantive outcome. For example, NEPA does not require a government agency to choose the option that would have the least environmental impact.[178] Agencies are solely required to take a hard look at the environmental consequences of all potential alternatives. While inaccuracies in scientific data are usually not grounds for annulment of an EIS, a decision that relied on false information without an effort made in objective good faith will not be accepted as a reasoned decision.[179]

IV. APPLICATION OF MODELS TO ISDS

This section discusses the application of the Fairness Hearing and Environmental Impact Disclosure Requirement to ISDS. First, this section recommends that any proposed ISDS award or settlement should survive review by a Fairness Commission to ensure that the decision does not violate any domestic or international laws, and that the decision fairly considers the public interests at stake. Second, this section proposes an additional mechanism in the form of an Environmental Impact Disclosure requirement similar to the U.S. National Environmental Policy Act (NEPA), and examines how it could be applied in the ISDS context to ensure that the environmental impacts of ISDS awards and settlements are known and considered. Third, this section discusses the prospects of implementing these proposed mechanisms to improve ISDS, and considers the impact that these mechanisms could have if they were implemented.

177. 40 C.F.R. §§ 1502.10-1502.18 (2020).
178. Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980).
179. Sierra Club v. U.S. Army Corps of Engineers, 701 F.2d 1011 (2d Cir. 1983).

A. Application of Fairness Hearings to ISDS

1. Establishing Procedural Requirements to Assess the Fairness of ISDS Awards

To ensure that ISDS operates fairly, any proposed award or settlement agreement should be transmitted to an independent body (hereinafter referred to as a Fairness Commission) to determine whether the settlement violates domestic or international laws or otherwise should be void as grossly violative of public policy. This threshold determination would be consistent with United States practice in evaluating consent decrees to ensure that they comport with the constitution and the legislative will; in this case, the award should be consistent with the domestic constitution and laws of the host state and the terms of the IIA.[180] The Fairness Commission should be composed of officers with substantive expertise in the dispute addressed by the award— for example, an environmental law expert could serve on the Commission for a forestry dispute, as opposed to a financial crimes specialist. If the award fails the threshold determination, it should be sent back to the arbitral panel to be revised so as to meet those requirements. Once the award has met the legality threshold, the Fairness Commission should next consider whether the terms of the award are "fair, reasonable, and equitable" so as to protect the public interests at stake.[181] A fairness hearing should incorporate the opportunity for the public to review a settlement and submit comments on the content, and for those comments to be considered by the Fairness Commission.

To address the *Warner* court's concerns about the creation of an ad hoc super legislature,[182] the arbitration tribunals themselves should not oversee the fairness hearing; rather, the hearing should be carried out by Fairness Commission hearing officers with specialized expertise. Further, allowing the panel that made the award to review the fairness of its own decision would raise significant conflict of interest concerns. Given the rotating door of lawyers that alternately comprise most ISDS

180. U.S. v. Seymour Recycling Corp., 554 F. Supp. 1334, 1337 (S.D. Ind. 1982).
181. *Id*. at 1339.
182. Warner Co. v. Sutton, 644 A.2d 656, 665 (N.J. Super. App. Div. 1994).

panels and provide counsel to parties in arbitration, there is no incentive for an arbitrator to admit that their own decision was unfair, nor would they risk losing credibility within the small cadre of arbitrators.[183] In order to avoid the arbitration panel serving as judge, jury, and executioner, a number of other bodies might conduct the review. International organizations which promulgate rules for ISDS proceedings, such as ICSID and UNCITRAL, should establish entities to facilitate of fairness hearings. These entities should have a staff of hearing officers, similar to Administrative Law Judges (ALJs) in the United States, to conduct fairness hearings referred to them by arbitration panels. In addition to facilitating the hearings, the entity should also host a central depository where it can store award information and locate fairness hearing reports and evidence. Fairness Commission officers should be barred from participating in ISDS proceedings in any other manner to avoid the problem of the arbitrators' "double-hatting."[184]

Requiring ISDS settlement agreements to undergo a fairness hearing before the award is finalized by the tribunal would address a major blind spot in current ISDS practice. While finalized awards have some transparency requirements, settlement agreements can (and usually do) remain entirely secret.[185] Thus, settlements pose a significant threat to environmental interests because there is no mechanism for the disclosure of settlement terms or consideration of the public interest, beyond what the parties agree. ISDS settlements have the potential to implicate the public interest to such an extent that this intrusion on a private contract is justified in order to preserve states' ability to govern in the public interest. Once a party chooses to file suit in ISDS, the environmental interest protections should attach to the proceedings and remain active until the matter is concluded, even if that conclusion is reached in the form of a settlement agreement before an award is rendered.

Although US class action jurisprudence views government participation as increasing the legitimacy of a settlement

183. Lanford, *supra* note 59.

184. *Id.*

185. U.N. CONF. ON TRADE AND DEV., INVESTOR-STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2017 (2018), *available at* https://perma.cc/LMV3-PH88.

agreement, this presumption should not apply to ISDS. Unlike ISDS cases, government involvement in United States class action suits is typically by specialized agencies with a specific purpose. For example, the mission of the Securities and Exchange Commission (SEC) is to "protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation."[186] The SEC may fairly be presumed to act in furtherance of that mission by participating in settlement proceedings. On the other hand, a court would not presume that the SEC's participation in settlement proceedings would protect the interests of a class entirely unrelated to investors and markets. Fairness Commissions should understand that the national governments defending ISDS suits represent many divergent interests, and should not assume that national governments have adequately considered and defended all relevant public interests.

2. Substantive Requirements of an ISDS Fairness Hearing

While fairness hearings in class action or *Mount Laurel* litigation typically consider whether the proposed agreement is fair to those on whose behalf the action is brought,[187] the nature of ISDS claims requires a different approach. A significant disparity often exists between the resources of companies and the governments that they sue in ISDS. Given the significant public interest implicated in ISDS awards, environmental justice demands that a fairness hearing concentrate on whether the public interest in local environmental resources has been adequately served.

To measure the procedural fairness of an award, the Fairness Commission should "look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance."[188] Evaluating the reasonableness of the award should involve three factors: (1) the efficacy of the award at remedying the alleged harm, (2) whether the affected public interest has been considered and accounted for, and (3) the relative

186. *The Role of the SEC*, U.S. SEC. AND EXCH. COMM'N, *available at* https://perma.cc/6WC7-TLAA.

187. S. Burlington Cnty N.A.A.C.P. v. Mt. Laurel Tp., 336 A.2d 713 (N.J. 1975).

188. U.S. v. Cannons Eng'g Corp., 899 F.2d 79, 86 (1st Cir. 1990).

bargaining positions of all parties.[189] The relative bargaining position measurement is meant to ensure that "if the case is less than robust, or the outcome problematic, a reasonable settlement will ordinarily mirror such factors."[190]

To ensure that the public interest has been adequately protected, the Fairness Commission should consider what the environmental impacts of the award would be, who would be most affected, and in what manner. The Fairness Commission should provide notice to affected persons that proceedings are underway and give them the opportunity to comment on the settlement. Following the practice of courts in *Mount Laurel* litigation, the body conducting the hearing should only consider whether the award is fair to those whose environmental interests are implicated.[191] The commission should not consider whether the impacts that the award may have on other actors or on other economic sectors is fair. For example, when considering the fairness of a settlement that extends a mining concession near a village in the Peruvian highlands, the commission should focus on the village, and not the economic impacts of cancelling the contract on the mining company's employees in Lima. The potency of the fairness hearing lies in its narrow focus on protecting the public's environmental interests implicated in the ISDS award; broadening the scope of the public interest considered risks diluting those protections.

Additionally, the hearing officers should consider the typical means through which a government would achieve the terms of the award or settlement outside of the context of litigation. A key tenet of the *Warner* court's approach to fairness hearings was the principle that a law should not be altered by a body of less dignity than the entity which is ordinarily charged with administering it.[192] Applying that principle to ISDS, a panel of three undemocratically appointed arbitrators should not be allowed to circumvent the legislative process for the purposes of issuing an award. If an award or settlement agreement proposes to evade the normal statutorily-mandated procedures of the host

189. *Id*. at 89.

190. *Id*. at 90.

191. E./W. Venture v. Borough of Ft. Lee, 669 A.2d 260, 266 (N.J. Super. App. Div. 1996).

192. Warner Co. v. Sutton, 644 A.2d 656 (N.J. Super. App. Div. 1994).

government, an ISDS award or settlement that is given the force of international law should not be allowed to evade those legal requirements. The hearing officers should remand the award to the arbitral panel for revision consistent with the relevant statutory procedures.

3. Hypothetical Case Study: *Copper Mesa v. Ecuador*

To demonstrate how a Fairness Commission could scrutinize an ISDS award or settlement, this section applies the recommendations discussed in this Part to the *Copper Mesa* case[193] described in Part I(D) above. Copper Mesa Mining Corporation sued Ecuador in ISDS for revoking its mining permit after conflicts between the mining company and community members resulted in violence.[194] In ISDS proceedings in the Permanent Court of Arbitration, Ecuador was ordered to pay Copper Mesa $24,000,000 in compensation for expropriating two mineral concessions, even though the revocation of the mining permit complied with all relevant national laws.[195] Information about this suit is publicly available because Copper Mesa, a Canadian company, is a national of a country which has signed onto the Mauritius Convention. However, if Copper Mesa were a national of another country, the details of this suit might never have been revealed.

Had a fairness hearing been held in the *Copper Mesa* case, a Fairness Commission could consider not only the fairness of the numerical amount awarded but also Copper Mesa Mining's continued presence in the community. Further, the fact that Copper Mesa's mining concessions were revoked because of its failure to comport with national law would potentially decrease Ecuador's liability.[196] The passage of the law itself could be scrutinized since Copper Mesa acquired the mineral concession in 2005 and the law was passed in 2008, allowing mineral

193. Copper Mesa Mining Corp. v. Republic of Ecuador (PCA No. 2012-2) (2011).

194. Brett Popplewell, *Copper Mesa Sued for Alleged Assault*, THE STAR (Nov. 22, 2009) *available at* https://perma.cc/WX9E-Q445.

195. A third mineral concession claim by Copper Mesa was dismissed by the tribunal. Matthew Levine, *Ecuador Ordered by PCA Tribunal to Pay $24 million to Canadian Mining Company*, INV. TREATY NEWS (Dec. 12, 2016) *available at* https://perma.cc/WCU8-SV6R.

196. *Id.*

concessions to be cancelled in a number of circumstances.[197] However, Copper Mesa's conduct—which included instigating the violence and hiring the security forces that attacked the members of the community—as well as the fact that the company was warned about the rising risk of violence as a result of company activity, should also be evaluated.[198] Considering all these factors, and especially the violence that took place against the community members in which the mine was located, a fairness hearing may determine that the award was unfair and that the Ecuadorian government was justified in revoking the concession. In that instance, the Fairness Commission may provide nonbinding insight into the specific infirmities of the proposed settlement. The Commission should be limited to determining whether an award was fair, and avoid proposing or recommending alternatives.

B. Application of Environmental Impact Disclosure to ISDS

1. Procedural Requirements of Environmental Impact Disclosure

Using the United States National Environmental Policy Act (NEPA) as a model, the environmental effects of all ISDS awards or settlements that have the potential to significantly impact the environment should be studied and considered before the award is finalized. Similar to fairness hearing procedures, once an award is first announced, it should be referred to an independent body to determine whether the award would significantly affect the environment. If no significant impact will occur, the award can be finalized. If, however, there may be significant effects on the environment, an environmental impact statement (EIS) should be prepared to explore those impacts. The public should have the opportunity to comment on the proposed award or settlement and its environmental impacts, similar to the

197. *Id.*

198. Jennifer Moore, *Canadian Mining Firm Financed Violence in Ecuador: Lawsuit*, THE TYEE (Mar. 3, 2009), *available at* https://perma.cc/94ZC-GRE4 (last accessed Oct. 9, 2020).

opportunity afforded to the public by NEPA.[199] The independent body should complete the disclosure report, compile the public comments, and return this information to the arbitral panel. This process is in line with the purpose of NEPA—to provide information to decisionmakers about the environmental consequences, rather than to demand a certain outcome.[200] The arbitrators should then incorporate the EIS into their decision-making and adjust the award if necessary.

If both environmental disclosure and a fairness hearing were required prior to the settlement of ISDS dispute, the EIS should be prepared and considered prior to sending the award for a fairness hearing. The EIS could then be considered in the fairness hearing in order to better inform the independent body of the consequences of the award or settlement. In the absence of a fairness hearing requirement, preparation and consideration of the EIS would be the last step prior to finalization of an award. However, if an EIS were prepared and the environmental consequences were deemed by the arbitral panel to be intolerable, the panel may change its decision and design an award with an acceptable environmental impact.

2. Substantive Requirements of Environmental Impact Disclosure

Given that NEPA only prescribes procedural requirements and does not mandate any outcomes based on the conclusions of the EIS, an environmental disclosure requirement would have few substantive requirements. To uphold the spirit of NEPA, an environmental disclosure must identify, study, and describe the potential environmental impacts that could result from the terms of an award or settlement. The environmental impact disclosure should also include several alternatives to the proposed settlement and the anticipated environmental impacts of those alternatives. In the event that the award must be altered (because the environmental impacts are deemed unacceptable, or for other reasons), the arbitral panel could refer

199. *How Citizens Can Comment and Participate in the National Environmental Policy Act Process*, EPA, *available at* https://perma.cc/Q7KA-SJE6 (last accessed Oct. 9, 2020).

200. Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980).

to the alternatives included in the environmental impact disclosure for guidance in restructuring the award.

3. Hypothetical Case Study: *Gabriel Resources v. Romania*

Requiring an EIS would prove instructive in cases like *Gabriel Resources v. Romania*, discussed in Part I(D). The people of the Romanian town of Roşia Montană succeeded in stopping construction of a proposed gold mine which would have used cyanide to extract the gold.[201] In the aftermath of a large cyanide spill in a river in 2000, the townspeople protested the company's proposal to resettle the population and the risks the mine posed to the surrounding environment. After the government withdrew its support for the project in 2014, Gabriel Resources sued the Romanian government for $4.4 billion USD in 2015.[202] The outcome of the case is still pending. An EIS that took into account the possible effects of the gold mine and the resettlement of the village population on the environment would be useful in determining whether the government was within its rights under domestic law or international human rights standards to withdraw its support from the project, given the nature of the risks involved and the severity of any possible incident.

C. Implementing Proposed Mechanisms

1. Legal Paths Forward

Several options are available to implement the changes this Note proposes. The first task would be to create a Fairness Commission to conduct hearings on the dispute settlement. Such hearings would be used to review the fairness of the settlement or oversee the preparation of an EIS. A Fairness Commission may be housed within UNCITRAL or ICSID, the largest institutions promulgating rules for ISDS proceedings. As a UN body, UNCITRAL would have greater legitimacy. Another option would be for each institution involved in

201. *Gabriel Resources Seeks Damages from Romania in Intl. Arbitration Over Blocking Gold Mine Due to Environmental & Access to Water Concerns*, BUS. & HUM. RTS. RES. CTR., *available at* https://perma.cc/5VC4-DUHP (last accessed Oct. 9, 2020).

202. Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania (ICSID Case No. ARB/15/31) (2015).

international arbitration (including the Stockholm Chamber of Commerce, Cairo Regional Center for International Commercial Arbitration, International Chamber of Commerce, etc.) to create its own Fairness Commissions for ISDS proceedings that comply with their rules. This would spread the burden of administering the Fairness Commissions more evenly, rather than concentrating it within one body. However, one concern with this approach is the potential for the proliferation of Fairness Commissions of varying degrees of scrupulousness. This could result in a "race to the bottom," with each administering institution weakening their Fairness Commission in order to drum up business from parties seeking a less rigorous Fairness Hearing.

Two pathways exist to implement these proposed mechanisms. The first option is to mimic the Mauritius Convention and create a separate legal instrument for countries to ratify. This instrument would automatically incorporate such mechanisms into existing treaties, and provide treaty text for countries to include in all treaties they make going forward.[203] However, this pathway depends on the instrument's ratification by each country and could suffer from low participation, which in turn would decrease the efficacy of the instrument.

The second option would be for national governments to take advantage of the flexibility in the arbitral rules. For example, a country could pass legislation mandating that its government will only agree to settle an ISDS case if provisions are made for the disclosure of the settlement's environmental impacts and if the settlement's fairness will be adequately considered. However, if the investor does not agree to those terms, the country could simply refuse to settle and insist on continuing with arbitration. An arbitral award that did not comply with that national legislation would still have the force of international law, binding the country regardless of its domestic laws. Another way to ensure that these legal mechanisms are included in as many ISDS cases as possible going forward would be to amend each IIA to mandate incorporation of these procedures into all ISDS proceedings. However, this would also be challenging; given that more than 3,000 IIAs exist, amending

203. Weiss et al., *supra* note 66.

each treaty would be extremely time-consuming and the magnitude of the task would be daunting.

2. Convincing Stakeholders

Before these suggestions could be implemented, the first challenge is to convince stakeholders that the ISDS system needs reform. One of the major impediments to changing the ISDS system is inertia on the part of investors and corporations that stand to profit from the status quo. Although they lack the power of sovereign states to alter investment law, they have the power of deciding whether to enter into agreements with countries based on the terms of the IIA with their home country. Investors could foreseeably "vote with their feet" by refusing to invest in countries with more stringent environmental protections or transparency laws than other countries.

However, there are several strong arguments for why investors should back strengthened protections for environmental interests and the disclosure of the environmental impacts of ISDS awards. First, investors make enormous profits from the ISDS system and have an incentive to maintain the system.[204] The improvements proposed in this note would enhance the legitimacy of the system and potentially protect it from increasingly loud calls to abolish the entire system.[205] The inclusion of ISDS in several high-profile MITs, including the Trans-Pacific Partnership and TTIP,[206] have drawn significant attention to the practice. It could be argued to investors that introducing the reforms advocated in this note would address some of the most egregious problems in ISDS while increasing its long-term viability. Second, consumers increasingly value companies that exhibit socially responsible behaviors.[207] The growing trend of corporate responsibility has also seen companies take steps to ensure their actions match up with the

204. *Primer*, *supra* note 1.

205. Both ENDS and War on Want are two organizations prominently calling for ending the ISDS system. *See Rights for People, Rules for Corporations—Stop ISDS!*, BOTH ENDS, *available at* https://perma.cc/L2MF-ET86; *£400 Million "Corporate Court" Case Highlights Need to Abolish ISDS System*, WAR ON WANT (Mar. 22, 2017), *available at* https://perma.cc/6GQY-ZEJ3.

206. *See supra* Part I (5).

207. James Chen, *Corporate Social Responsibility (CSR)*, INVESTOPEDIA (Sept. 17, 2020), *available at* https://perma.cc/978X-LQ5L.

values the company wants to embody.[208] Consumers should pressure investors to acknowledge their significant gains from the ISDS system, which is highly favorable to corporate interests and often abusive of environmental and other public interests. Companies could then be pressured to commit to forgoing a small portion of the profits in order to ensure that the rights of all persons are adequately protected. Finally, issues with the ISDS system have drawn the attention of the media,[209] giving politicians and activists a platform to pressure ISDS stakeholders and advocate for change.

D. What Impact These Mechanisms Could Have

1. Strengthen Protection of Environmental Resources and Environmental Justice

The environmental impact of implementing ISDS reforms would be difficult to measure, particularly because the baseline impact of ISDS on the environment is unknown. However, it is clear these measures would address the lack of transparency in ISDS proceedings, which makes it nearly impossible to determine the global impact ISDS has had on the environment. Requiring the disclosure of the environmental impacts of an ISDS award puts the spotlight on governments and the way that those impacts are considered. It could encourage pressure on both governments and companies to mitigate any environmental damage that may flow from an ISDS award. A disclosure requirement could also provide communities an opportunity they may not otherwise have had to organize opposition to a project that threatens their environmental interests. The knowledge that all ISDS awards and settlements must face additional scrutiny by a Fairness Commission would also incentivize investors to proactively consider the environmental impacts of their ISDS claims.

208. Oxfam's "Behind the Brands" ranked ten large food and beverage companies on their social and environmental policies, based on a scorecard that measures practices necessary for sustainable agricultural production. The purpose of the campaign is to pressure the companies through a "race to the top" to improve their corporate practices and their scores. *See Behind the Brands*, OXFAM, *available at* https://perma.cc/2QDS-A4ES.

209. *See infra*, Section II. E.

A Fairness Commission could also restrict the interpretation of investors' "legitimate expectations" from its current overly-broad definition. A fairness hearing could consider whether a regulation that infringed on investors' legitimate expectations for their investment was actually necessary for the state to effectively govern in the public interest. A finding that the regulation nevertheless impacted investors' legitimate expectations would no longer *per se* mean that the state violated its treaty obligations if the regulation was necessary to protect public environmental interests.

Additionally, the focus on fairness for communities impacted by ISDS awards and settlements would increase the focus on environmental justice on the local level. While there is typically some presumption that governments representing themselves in litigation proceedings also represent the interests of their citizens, the interests of their citizenry as a whole may not align with the interests of those who will be most affected by the terms of an ISDS award. Fairness Commissions and environmental disclosure requirements would ensure that those environmental interests are not abandoned in favor of more politically convenient communities.

V. CONCLUSION

Reform to the ISDS system is necessary to ensure the protection of the environmental interests of people affected by international investments, but who are unrepresented in ISDS proceedings. Introducing a fairness hearing requirement or even requiring that the environmental impacts of an ISDS award or settlement be disclosed and considered would open the door to meaningful change in the ISDS system. The legal mechanisms proposed in this note are aimed at supporting the ISDS system and levelling the playing field for the all actors impacted by international investment, not just the investors themselves. First, a fairness hearing such as the one proposed in this note would help overcome the barriers to considering the environmental impact of an ISDS award on parties other than those before the arbitral tribunal, which is critical to protecting local environmental interests. Second, an environmental impact disclosure requirement would ensure that decisionmakers could

not turn a blind eye to environmental harms inflicted by ISDS awards. With significant attention focused on ISDS due to discussions of recent high-profile proposed IIAs, the infirmities of ISDS are under the microscope. Introducing changes into the ISDS system, like those proposed in this note, could help lay the groundwork for more radical future changes to the way international investment functions.