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Arild Vatn

Suing the environment? An analysis of Investor-State Dispute Settlements impact on achieving International Environmental Agreements

Caroline Herlofson
Master of Science
International Environmental Studies

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carolineherlofson@gmail.com

Noragric Department of International Environment and Development Studies

P.O. Box 5003

N-1432 Ås Norway

Tel.: +47 67 23 00 00

Internet: https://www.nmbu.no/en/faculty/landsam/department/noragric

Declaration

I, Caroline Herlofson, declare that this thesis is a result of my research and findings. Sources of information other than my own have been sited and a reference list has been appended. This work has not previously been submitted to any other university for award of any type of academic degree.

Date……..…….22.02.2022….……

Signature…Caroline Herlofson…..

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Abstract

In acknowledgement of the dire need for comprehensive global action and societal transformation, states have come together in formulation of several International Environmental Agreements (IEAs) outlining goals and commitments to tackle climate change and ecological collapse. Achieving these goals often entail prematurely downscaling industries and sectors with large ecological footprint, such as the fossil fuel sector. It is however important to recognize that a variety of foreign investments are protected in a majority of today's International Investment Agreements (IIAs), through provisions granting access to the so-called Investor-State Dispute Settlement (ISDS) mechanism. ISDS allows foreign investors to sue states based on policies conflicting with their investments and seek high monetary compensation for potential economic losses. Thus, ISDS is increasingly seen as hindrance to states' efforts of environmental policymaking, and it is suggested that it may have a chilling effect discouraging states from adopting environmental policies, due to the risk of having to pay investors millions in compensation. States are already being sued for adopting phase-out policies necessary for achieving IEAs, and similar cases are likely to increase in numbers as stronger environmental policies are paramount. With this backdrop, this thesis examines six ISDS cases with varying status (settled, decided, pending and threat of arbitration), by analyzing what the experiences from these cases may tell us with regards to countries' efforts to form national environmental policies, and address the possible impacts ISDS may have on states achieving IEAs. The Environmental Governance Systems (EGS) framework (Vatn, 2015) is applied as to investigate the governance structure of ISDS and used to structure the analysis of power dynamics between the actors and institutions involved. Findings show that through access to ISDS, IIAs contributes to strengthen foreign investor's relative power over states, and that ISDS may have a chilling effect on states environmental policymaking which also may shrink their regulatory capacities. Furthermore, states may experience a conflict of interests with regards to addressing strong civil society demands, their commitments to provide a healthy environment, and their obligations in the IIAs. Thus, the study suggests that states will continue to introduce environmental policies in the future, but these are likely to be challenged by investors seeking to recoup their financial losses. The risk is reduced effectiveness of such policies and the prospects of achieving IEAs in time will be significantly reduced as long as foreign investors have the right challenge legitimate environmental policies. It may therefore be hypothesized whether the ISDS system is creating structural barriers for the realization of environmental justice.

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Abbreviations

BIT – Bilateral Investment Treaty

BUND – Friends of the Earth Germany

CAFTA/CAFTA-DR – Dominican Republic-Central America Free Trade

CBD – Convention on Biological Diversity

CEO – Corporate Europe Observatory

CIEL – Center for International Environmental Law

ECT – Energy Charter Treaty

EGS – Environmental Governance Systems (framework)

GHG – Greenhouse Gas Emissions

GJN – Global Justice Now

ICSID – International Centre for Settlement of Investment Disputes Convention

IEA – International Environmental Agreements

IGO – International Governmental Organizations

IIA – International Investment Agreements

IISD – International Institute for Sustainable Development

IPCC – International Panel on Climate Change

ISDS – Investor-State Dispute Settlement

MMT - Methylcyclopentadienyl Manganese Tricarbonyl

NAFTA – North American Free Trade Agreement

NDCs – Nationally Determined Contributions

OECD – Organization for Economic Co-operation and Development

TNI – Transnational Institute

UN – United Nations

UNCTAD – United Nations Conference on Trade and Development

UNFCCC – United Nations Framework Convention of Climate Change

UNICTRAL – United Nations Commission on International Trade Law

WWF – World Wildlife Fund

1 Introduction

Evidence of a continuously changing environment is regularly put forward by the scientific community, particularly the International Panel on Climate Change (IPCC). Their prediction for the future climate calls for great concern, and justifies the need for comprehensive action and societal transformation in order to limit the effect of a warming planet (Leichenko and O'Brien, 2019). In acknowledgement of the urgency of the situation, states have come together and formulated increasingly ambitious commitments to mitigate and adapt to climate change under International Environmental Agreements (IEAs) such as the Convention on Biodiversity (CBD) or Paris Agreement (Henin, 2019). The latter, which objective is to keep global temperatures well below 2° C compared to the preindustrial period, requires signatory parties to submit their plan of action through 'Nationally Determined Contributions' (NDCs). These are revisited and updated regularly, an important premise of the Paris Agreement suggesting that commitments have to continuously increase and surpass previous goals. This transition suggests that some sectors, such as the fossil fuel sector must be rendered obsolete (Teske and Pregger, 2019; Henin, 2019). Combating climate change and protecting the environment implies economically premature downscaling of the fossil fuel industry through phase out plans, which in turn will create stranded assets and expropriation of businesses (Cotula and Tienhaara, 2020). For this to be lawful, most International Investment Agreements (IIAs) outlines compensation standards, and many governments will likely compensate fossil fuel businesses to strand their assets. However, it's debated whether full compensation is fair given the purpose of the stranding, or even feasible given the scale and pace of transformation needed, vis-à-vis states limited public funds. It's thus fair to assume that some fossil fuel companies may view this to be insufficient (Caldecott and Mitchell 2014). By resorting to the protective mechanisms in the International Investment Regime, foreign investors may seek compensation for their losses from their host states through the so-called Investor-State Dispute Settlement mechanism (ISDS), which allows them to take disputes to an international arbitration tribunal (Rimmer, 2021).

Today there are more than 2600 investment agreements granting investors privileged access to dispute resolution through ISDS (Cotula and Tienhaara, 2020). According to UNCTAD (2021), the total number of ISDS cases reached over 1100, with a surge in cases in recent years. The ISDS system is increasingly seen as hindering states' efforts for effective environmental governance, and ability to regulate against climate change and for the protection of environment (Vaaranmaa, 2021). Especially considering fossil fuel companies' ability to use

IIAs to lock in fossil investments when actually the opposite is required (Rimmer, 2019). However, the likelihood for more ambitious and robust environmental regulations or measures, which most states in the world has committed to is unavoidable. This may suggest that when stricter environmental policies are put in place, more and more adversely impacted companies with high climate footprint, will likely resort to ISDS for compensation, and more threats of lawsuits against states environmental policies will likely appear (Vaaranmaa, 2021). A great concern, is whether states, knowing that ISDS arbitration might be a possibility, will be reluctant to implement environmental policies in the first place knowing that ISDS arbitration might be a possibility, thus fearing costly disputes in the ISDS court (Tienhaara, 2018). Simultaneously, international agreements and public pressure to regulate might also weigh heavily on states, which may lead to decisions of implementing regulations, despite knowing it may lead to ISDS arbitration from investors whose investments are negatively affected.

Lawsuits based on achieving commitments outlined in IEAs is not a hypothetical concern (Vaaranmaa, 2021). The German energy companies Uniper and RWE have already confirmed that they will take legal actions against the Netherlands for its plan to phase out coal production within 2030. This is the political result of a climate lawsuit where the environmental group Urgenda took the Dutch Government to court over not doing enough to prevent global climate change (Urgenda, 2021). The court ruling of phasing out coal by 2030 has occurred within the context of achieving the commitments in the Paris Agreement, and there is reason to assume that environmental policies and regulations may increasingly form the basis of future disputes (Henin, 2019). With this backdrop, it is worth discussing what ISDS provisions in International Investment Agreements (IIAs) implies for protection of the environment and fight against climate change, and whether the system of arbitration undermines states efforts to protect the environment by allowing investors to challenge national states efforts to implement effective policies and regulations meant to limit the effect of climate change and environmental degradation.

The hypothesis of regulatory chill may contribute to the understanding of this issue, as it suggests that states will fail to regulate in the public interest, due to the threat of arbitration. It may therefore be hypothesized whether IIAs with ISDS has a chilling effect on states implementing environmental policies and be speculated whether we are creating structural barriers for the realization of social and environmental justice, by giving investors' privileged protection through the ISDS mechanism. Through examining of a number of ISDS cases, some concluded and some still ongoing, this study investigates what the experiences from these cases may tell us with regards to countries' efforts to form environmental policies. It will also

investigate what the possible impacts of achieving IEAs may be, as we simultaneously allow for the existence of a system of arbitration that challenges and undermines states efforts to implement environmental policies. In order to do this, this study will investigate the governance structure of the ISDS mechanism, and the power relations between the actors involved. This thesis contributes to the wider debate on the relevance of the ISDS mechanism in international investment agreements, and its effect on environmental governance.

1.1 Research objectives and research questions

The objective of this research is to analyze how the ISDS mechanism in international investment agreements may undermine environmental policies meant to reduce global greenhouse gas emissions and the achievement of IEAs. In order to approach this issue, two research objectives are outlined as a means to guide the research and provide structure to the thesis, with their related research questions (RQs), which are as follows;

Objective 1: Investigate the governance structure of the ISDS mechanism

1a) Which main actors and institutions are involved?

1b) What characterizes the power relations between these?

Objective 2: Investigate how the ISDS mechanism may influence the introduction of environmental policies and achievement of international environmental agreements.

2a) What can the selected cases tell us with regard to how ISDS influence countries' efforts to form environmental policies?

2b) What may the possible impacts of the ISDS mechanism for the achievement of international environmental agreements be?

Objective 1 relates to the governance structure of the ISDS mechanism, where the Environmental Governance Framework (Vatn, 2015) has been applied to identify the actors and institutions involved and characterize the power relations at play between the actors. Objective 2 aims to investigate how the ISDS mechanism may influence the introduction of environmental policies and how this may impact the achievement of IEAs. The research questions 1a and 1b are what Nygaard (2008) terms descriptive research questions, as they seek to describe a phenomenon and presumes that a relationship exists, namely the governance structure of the ISDS mechanism, and the power relations within. Research question 2a and 2b, on the other hand, are explanatory in their nature as they seek to explain and understand the phenomenon of ISDS and environment and its relation to the achievement of IEAs. The research conducted in

this thesis is qualitative based on a multiple case study design. This is reflected through the selection of six ISDS cases, where the literature on these cases is examined in order to answer the research questions. This implies that secondary sources play a central role in providing data, insights and information for the analysis and discussion. The secondary sources collected is what constitutes the data sample.

1.2 Thesis structure

The thesis is structured as follows. *Chapter one* introduces the topic and rationale of the thesis, as well as presenting the research objectives and research questions. Then follows *chapter two*, the contextual background, which first gives a brief introduction to the issue of climate change and the need for IEAs (section 2.1) and thereafter introduces the international investment regime and the ISDS mechanism, by outlining the rationale for it, the procedural traits of ISDS and some of the main critiques of it (section 2.2). In c*hapter three,* presents the theoretical framework of the thesis. Given the objectives and research questions I focus on three topics: the Environmental Governance Framework (section 3.1), the concept of power (section 3.2), and lastly the regulatory chill hypothesis (section 3.2). The latter is included because the hypothesis suggests that states faced with ISDS arbitration may fail to regulate in the public interest. *Chapter four* outlines the methodology of the thesis, where section 4.1 presents the research strategy which is based on a qualitative multiple-case study design. The following section 4.2 presents the research methods of the thesis, outlining the sampling strategy, case selection, operationalization and data collection, the use of thematic analysis and coding procedure. Finally, in section 4.3, the limitations, challenges, trustworthiness and validity of the research will be addressed. *Chapter five* presents the findings and analysis of the research. Here the RQs will be addressed starting with 1a (section 5.1), where I identify the main actors and institutions involved in the governance structure of the ISDS mechanism. Then follows section 5.2 where I respond to RQ 1b addressing the power relations between the actors and institutions. Section 5.3 addresses RQ 2a, outlining what the selected cases can tell us with regards how ISDS influences countries' efforts to form environmental policies. These three sections cover the empirical findings of the analysis, whereas the following *chapter six* presents the discussion of the research where RQ 2b will be answered, by discussing what the possible impacts of ISDS for the achievement of IEAs may be. Finally, the thesis closes with summarizing findings and main messages in *chapter seven.*

2 Contextual background

This chapter provides the contextual background of the thesis, starting with section 2.1 which gives a brief introduction to the issue of climate and environmental change and IEAs as means of limiting the effect of global warming and environmental degradation. Section 2.2 gives an overview of the international investment regime and ISDS mechanism, by emphasizing historical aspects and the rationale of IIAs with ISDS provisions, as well as outlining some of the procedural traits of arbitration, and some of the main critics of the investment regime and ISDS.

2.1 Climate and environmental change, and International Environmental Agreements

Climate change is transforming the world we know today and is indisputably one of the greatest challenges presented to mankind, posing an existential threat to people and livelihoods (Leichenko and O'Brien, 2019). IPCCs Sixth Assessment Report concluded that "it is unequivocal that human influence has warmed the atmosphere, ocean and land" at an unprecedented rate (IPCC, 2021:5). Crutzen (2002) has termed the present human-dominated geological period the Anthropocene, suggesting that mankind is now acting as an environmental force transforming the earth and its functions. Along with the socio-economic transformation of our societies, humans have fundamentally changed the socio-ecological interactions through constant pressure on land, soil, water and air, through various forms of use, resource extraction, as well as waste generation (Haberl et al., 2011), which has caused irreversible changes. According to the IPBES (2019) report, nature encompassing both biodiversity and ecosystems are deteriorating worldwide, and the rate of biodiversity loss is increasing so fast that some are calling it the 'Sixth Mass Extinction', "the first such event caused entirely by humans" (Cowie, Bouchet and Fontaine, 2022). The cause of this extinction may be attributed trends is agricultural production, alterations of land surface, land fragmentation and pollution (Vatn, 2015; IPBES). Climate change is also a significant driver exacerbating the impacts on nature, where increased concentration of greenhouse gases (GHG) in the atmosphere has caused rising global temperatures and pushed the limits for weather extremes (IPCC, 2021).

The predictions of the future climate presented in the IPCC (2021) report, the estimations of the rate and impact of future biodiversity loss (IPBES, 2019), the ever-rising rate of world consumption and pressure on increasingly limited resources that put further pressure on land, soil, water and clean air gives cause for concern (Steffen et al., 2015). For instance,

according to IPCC (2021), every additional increment of global temperature beyond the 1.5°C and 2°C degree limit will result in increased weather extremes, sea level rise, droughts and heatwaves, thus reaffirming the near-linear relationship between greenhouse gas emissions and global warming. While the loss of biodiversity and well-functioning ecosystems are fundamental for the human species as we depend on this for food production, medicines, clean air and water, health, wellbeing and identity (IPBES, 2019). Thus, limiting the rate and scope of these scenarios is fundamental if we are to avert the possibility of catastrophic climate change and mass degradation of the environment, and dramatically justifies the need for comprehensive climate action and transition (Leichenko and O'Brien, 2019).

In order to address the urgency of the situation and strengthen the response to climate and environmental change, states have come together and formulated international environmental goals and commitments through the adaptation of agreements and conventions such as the Convention on Biological Diversity (1992), the Kyoto Protocol (1997) and Paris Agreement (2015) (Henin, 2019), to mention a few. The latter serves as a good example of an agreement outlining international environmental goals and commitments in this study, due to its objective of limiting global warming by implementing efforts that keep global average temperatures well below 2°C, preferably limited to 1.5°C, compared to preindustrial levels (Rogelj et al., 2016; Henin, 2019). In order to achieve this goal, all signatory parties are required to submit their plan for action through their NDCs. These are regularly revisited and updated with increasingly ambitious goals and commitments, suggesting they have to continuously surpass previous goals (UNFCCC, 2021; Henin, 2019). In line with these agreements, states are increasingly adopting environmental policies, regulations, requirements and measures in order to contribute to the transformation needed to avert catastrophic climate and environmental change (Sachs, Johnson and Merrill, 2020).

Achieving these agreements may have existential implications for some sectors, such as the fossil fuel sector. Assessments from the international scientific community maintains that 80% of the global proven fossil fuels reserves must remain unexploited (ibid.), suggesting that policies aiming to reduce global emissions will create stranded economic assets due to the size of capital invested in the fossil fuel sector (Cotula and Tienhaara, 2020). It is paramount that strengthened goals such as the NDCs, are adopted, and that climate policies are radical, timely and effective, in order to achieve IEAs. Sectors with large ecological footprint must therefore be met with policies that clearly signals that further investments are unwelcome (Van Harten, 2015). It is however important to recognize that the regime governing international investments may (unintentionally) work against the objective of limiting climate change (Marshall, 2010).

Many of the IIAs "include provisions to provide legal protection for all forms of foreign investment, including investment in sectors that must eventually be rendered obsolete to prevent warming beyond the 2°C limit set by the Paris Agreement" (Tienhaara, 2018:230). These are protective measures such as the ISDS mechanism, which is the topic of this thesis. Both the international investment regime and the ISDS mechanism will be explored in the following sections.

2.2 The International Investment Regime and ISDS

The International Investment Regime may be viewed as a rather decentralized network of rules that govern and promote foreign direct investment across the world, often referred to as investment treaties or International Investment Agreements (IIAs)[1] (Berge and Berger, 2020). These are agreements containing provisions where the main objective is the protection of foreign investment. As such, the IIAs grant investors from each state substantive and procedural *rights* when operating in the territory of the host state, while proscribing *obligations* for the host state. These are reciprocal in the sense that investors from either party enjoy the same rights, and states equal obligations (Bonnitcha, Poulsen and Waibel 2017, Brauch 2020). Typical rights, or investment provisions, found in the IIAs are; a) Protection against *indirect or direct expropriation* – which commits states to not expropriate investments without adequate compensation, unless it is for a public purpose, b) *fair and equitable treatment (FET)* – obliging states to treat their investors in a fair and equitable manner, c) *national treatment* – an obligation for states to always treat the investors no less favorable than domestic investors, and d) *most favored nation treatment (MFN)* – which obliges states to treat all foreign investors equally (Marshall, 2010; Brauch 2020). In addition to these rights, the majority of IIAs contains clauses on procedural rights in the case of disputes arising between the investor and the host state, namely the Investor-State Dispute Settlement (ISDS) mechanism. Access to ISDS allows investors to take their disputes to an international arbitration court and seek monetary compensation for potential financial losses imposed on them, due to the host state's violation of the investors' substantive rights in the IIA (Brauch, 2020).

Provisions on protection of investments and property abroad may however be found in agreements dating back to the late eighteen century, built upon similar principles as today (Vandevelde, 2005). At that time dispute resolution was largely handled between the home state

[1] IIAs between two states are bilateral, multilateral when signed between more than two states, regional when applied to a region, or sectoral when applies to a specific sector, i.e., the energy sector.

and host state, turning commercial disputes into diplomatic conflicts between states, where investors had to depend on their home states goodwill (Bonnitcha, Poulsen and Waibel, 2017). 'De-politicizing' disputes was therefore one of the objectives when establishing the International Centre for Settlement of Investment Disputes (ICSID) in 1965, which removed the investment disputes from the "realm of diplomatic protection in favor of a juridical forum subject to legal rules and a pre-formulated settlement process" (Kaufmann-Kohler and Potestá 2020:18), and as such making disputes less political. In addition, Kaufmann-Kohler and Potestá (2020) argue that the main reasons for the inclusion of ISDS in IIAs, is that it serves as an enforcement mechanism that grants direct means of enforcement to the investor on the international arena, as opposed to the domestic arena. Additionally, there was demand for an alternative to domestic courts, as these were viewed as inadequate for solving investment disputes considering concerns of independency and lack of expertise on international law (Kaufmann-Kohler and Potestá, 2020).

After a period characterized by restrictive attitudes towards foreign investors during the 1960s and 1970s, the investment environment began to change in the 1980s (Bonnitcha, Poulsen and Waibel, 2017). Vandevelde (2005) points to two major causes for this. First cause was the victory of marked ideology after the fall of the Soviet Union and the economic success demonstrated in some Asian economies in the 1980s. The second cause was the debt crisis in 1982 which led to a reduction of private lending to countries in need of capital. While developed countries saw IIAs as means for protecting investments abroad, developing countries began to see IIAs as important tools for attracting foreign investment in order to increase development and promote economic growth (Bonnitcha, Poulsen and Waibel, 2017). In addition, signing IIAs signaled that developing countries had a friendly and attractive investment environment (Berge and Berger, 2020; Tienhaara 2008), and according to Bonnitcha, Poulsen and Waibel (2017), the main reason IIAs became so widespread was developing countries desire to attract foreign investments.

Between the 1960s and 1990s most IIAs were signed between high-income developed countries, and low-income developing countries (Berge and Berger, 2019), but since the 1990s has there been an increase of IIAs between developing countries (Marshall 2010). The first IIA was the Bilateral Investment Treaty (BIT) between Germany and Pakistan, signed in 1959. The pace remained slow until the 1990s, since then there has been a surge of IIAs, with more than 100 BITs signed yearly between 1992 and 2010. As Figure 1 below illustrates, there was a rapid increase in IIAs signed in the 1980s and 1990s, while slowing down from the early 2000s (Bonnitcha, 2014). Today the number of IIAs in force is at least 2646, with a total number of

about 3300 IIAs when also accounting terminated agreements (UNCTAD 2021). The first IIA including access to ISDS was the BIT between Italy and Chad from 1969 (Tienhaara, 2017), marking a transformation of international investment law as IIAs now became enforceable (Bonnitcha, 2014). In the following decades an increasing number of IIAs began to include ISDS provisions, thus the 'modern' IIA was complete (Bonnitcha, Poulsen and Waibel 2017).

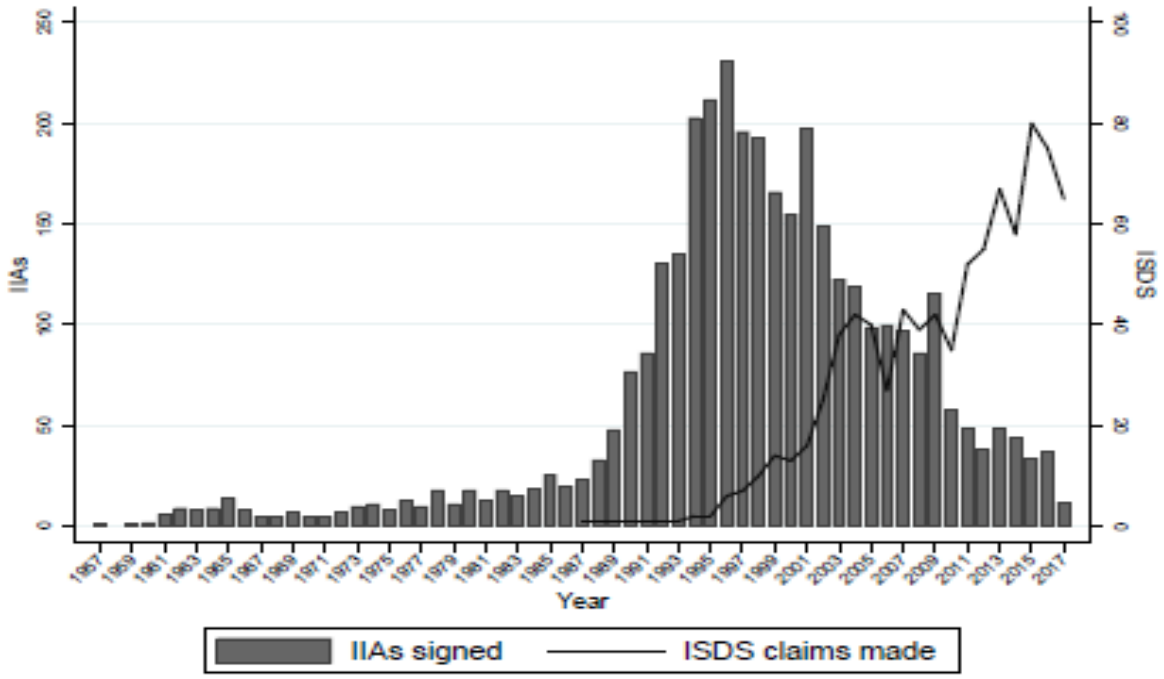
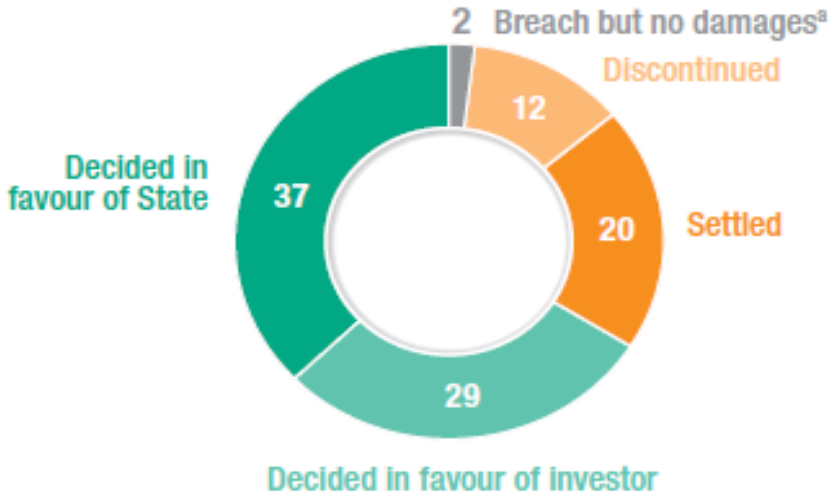


Figure 1: IIAs signed and ISDS claims made per year, 1957-2017 (Berge and Berger, 2020)

Although being in place since 1969, it was not until decades later, in 1987, that the first ISDS claim was filed (Bonnticha, 2014; Berge and Berger, 2020). Since then, the caseload has increased exponentially, as illustrated in Figure 1, from only 50 cases until 2000, to 500 between 2000 and 2014 (Weghmann and Hall, 2021). As of today, 1,104 known ISDS cases has been registered in the UNCTAD database (UNCTAD, 2022). However, as UNCTAD themselves reports, some ISDS cases may be kept confidential, especially the most recent ones, suggesting that the actual number of cases is likely higher (UNCTAD, 2021).



Source: UNCTAD, ISDS Navigator.
[a] Decided in favour of neither party (liability found but no damages awarded).

Figure 2: Results of concluded ISDS cases (per cent), 1987-2020 (UNCTAD, 2021)

With regards to the distribution of outcome of the ISDS cases, Figure 2 above show the results of concluded cases (that are known) for the period 1987-2020, with a total number of at least 740 cases concluded in 2020 (UNCTAD, 2021). The figure suggests 37% of the cases has been decided in favor of the state, while 29% were decided in favor of the investor and 20% of cases were settled, meaning that the disputing parties reached an agreement and settled the case without the tribunals ruling. The 2% represent cases decided in favor of none of the disputing parties, and where no financial award was issued. At first glance, it may seem like states win more cases than they lose when an ISDS case is brought against them. However, according to Ciocchini and Khoury (2018) this is misleading. They argue that cases that settle often is a result of a settlement agreement where some form of compensation has been paid to the investor, the issue causing the dispute is reversed or changed, in return for settling the dispute.

According to Bonnitcha, Poulsen and Waibel (2017), ISDS is central to the International Investment Regime. It's a mechanism operating outside state's own legal system that allows foreign investors to seek binding monetary compensation from host states and is unique with regards to international law as it does not require the exhaustion of domestic courts (ibid.). In practice, any dispute an investor may have with the host state, may be brought to an ad hoc ISDS tribunal for monetary compensation (Weghmann and Hall, 2021). Claims are typically based on alleged economic damages to the investment, where the expectations of future profits

may be obscured due to changes introduced in the host country. The claims vary to a great extent, as many types of behavior from the host state may be classified as breaches, such as changing of laws, introduction of measures or regulations, revoking or not granting permits, or cancellations of contracts (Gertstetter and Meyer-Ohlendorf, 2013). A more through description of the procedural traits is provided in the description of the ISDS governance structure in sub-section 5.1.5.

2.2.1 Critique of the International Investment Regime and ISDS

The legitimacy and fairness of the investment regime has raised much debate and scrutiny, both within and outside academic circles, often directed at the failure of IIAs to achieve its objectives. It's often questioned whether it actually promotes foreign investments to developing countries, and whether there actually is an effect of foreign investment flows and access to ISDS (Berge and Berger, 2019). Not surprisingly, studies on these issues have diverging conclusions; from strong evidence to weak correlation, while others find no effect at all, specifically with regards to investments from OECD countries (Kaufmann-Kohler and Potestá, 2020; Schill, 2016).

In the critique of Weghmann and Hall (2021:6), they argue the ISDS must be viewed as a post-colonial mechanism, introduced as a tool replacing the "unreliable and 'politicized' legal systems of non-Western countries" and "dysfunctional domestic courts in countries with weak rule-of-law", as ISDS cases has historically been overwhelmingly brought against the Global South, by investors from the Global North. In their view, it wasn't until ISDS cases began to be directed at the West that political consternation against the ISDS system arose (ibid.). Critique of the asymmetries related to IIAs is also put forward by Tienhaara (2008). She argues that despite being reciprocal in the sense that both parties may act as host state, the skewed distribution of investment flows, often from the North to the South, suggest that in practice only one state has actual obligations, thus only one of the parties bear the heaviest burden of risking ISDS claims. Another critique questions whether it actually has served to de-politicize disputes, suggesting that one of the main arguments and justifications for the ISDS mechanism may be incorrect (Gertz, Jandhyala and Poulsen, 2018).

There is also an increased view that IIAs in their current design, limits states' ability to regulate in the public interest as the protective measures within IIAs and access to ISDS in practice constrains states autonomy and sovereignty (Milner, 2014). This may be considered one of the most controversial and highly debated facets of IIAs, as it has severe implications for democracy (Bonnitcha, Poulsen and Waibel, 2017). Especially in relation to environmental

protection, where critics argue that IIAs with ISDS provision may actually undermine states efforts to mitigate climate change and introduce environmental regulations (Tienhaara, 2008; Marshall, 2010). The concern, both in academia and civil society, is that the "risk of large adverse awards may dissuade states from adopting measures that are non-compliant with investment treaties" (Bonnitcha, Poulsen and Waibel, 2017:17). This issue relates to the concerns about the chilling effect of ISDS or threats of ISDS, called 'regulatory chill' which suggests that governments, in fear of arbitration or threat of arbitration, will fail to regulate or adopt policies in the public interest (Tienhaara, 2018). This concern is particularly relevant to this study, as failing to regulate in the name of environment and climate change mitigation, may hinder states in achieving their commitments in IEAs which at this point is necessary in order limit global warming to 2°C (Marshall, 2010; Cotula and Tienhaara, 2020).

In addition, the financial aspect of arbitration is the cause of heated debates, as investors typically demand several millions in compensation for alleged breach of obligations and are awarded compensation typically between double digits to triple digit millions of US dollars. Additionally, the legal fees of arbitration may mount up to US$ 4-5 million paid by each party of the dispute (Bonnitcha, Poulsen and Waibel, 2017). The role of the arbitrators is furthermore under heavy scrutiny, criticized for having strong commercial and personal ties to large multinational corporations, and that the arbitrators themselves are profiting from the ISDS system. They are often accused of prioritizing the rights and interests of the investors over democracy, and of conflict of interest. Due to their changing roles, they may be arbitrators in one case, offering legal counsel in another, or advice governments and legislators drafting IIAs. Because of the limited group of arbitrators dominating the field of ISDS, they are accused of lacking neutrality, fairness and independency (Olivet and Eberhardt, 2012).

The issue of transparency and confidentiality of investment disputes is also heavily criticized, as very little knowledge about disputes, especially ongoing disputes are publicly known, and many decisions are not published at all (Gertstetter and Meyer-Ohlendorf, 2013; Ariz, 2021). Critiques claim that lack of transparency and absence of precedence has led to little consistency between different case decisions, and contradicting interpretations of the law on cases of similar nature. These issues may be attributed the vagueness of the provisions found in the IIAs, and the broad interpretations of the arbitrators (Kohr, 2018; Ariz, 2021; MacLachlan, 2021). ISDS is also criticized for not having an appeal mechanism, which makes decisions and awards final (Kohr, 2018). Lastly, there is the concern that ISDS may create 'negative spillovers' to other regimes, such as impede the goals of the regime of international environmental governance (Cotula and Tienhaara, 2020; Marshall, 2010).

3 Theory

This chapter is dedicated to the theoretical foundation of this research. I start out by presenting the Environmental Governance Systems (EGS) framework developed by Vatn (2015; 2021), which will serve as the theoretical framework for the analysis. Next follows a presentation of the concept of power, where I will rely on the understandings of Robert A. Dahl (1957). Lastly I will present the 'regulatory chill hypothesis' mainly leaning on the work by Kyla Tienhaara (2008; 2011; 2018).

3.1 The Environmental Governance Systems framework

3.1.1 An overview of the framework

By drawing upon insights from political economy, political science, sociology, anthropology, ecological economics, political ecology and natural sciences, the EGS framework provides an interdisciplinary tool for the study of environmental governance systems (Vatn, 2015). It's necessary to explain the concept of governance before describing and the EGS framework further. According to Vatn (2015:133) governance refers to 'steering', and as such has an element of authority involved. Bevir (2012) adds that governance refers to all forms of interaction, be they through laws, norms, power or language, undertaken by a governing body, such as a government, state, the market, corporations, or other networks and groups.

Vatn (2015:133) emphasizes two key aspects of governance; processes and structures. Process refers to how priorities are shaped, how goals are formulated, conflicts are acknowledged and handled, and coordination of actions on different levels. It may take place locally, nationally and internationally, encompassing the steering of private as well as public activities. These processes happen within structures. According to Vatn (2015) structures refer to how processes are organized and administered, through different types of actor constellations and procedures for decision-making. The large variety of actors, institutions, forms of interaction, interests, and objectives also implies that the degree of formalization may vary.

The EGS framework presents a structure that helps us study interaction between the different processes identified in the framework (Vatn, 2021). Vatn (2015) argues that if we are to thoroughly study environmental governance, analyzing economic processes and the institutions governing these is required. This is so as the economy and economic policies are equally important for understanding environmental issues as studying a specific environmental policy itself. The EGS framework must therefore be understood as a framework for analyzing economic structures and processes (Vatn, 2021). I will in the following introduce all the elements of the framework, starting with the concept of *resource regimes*.

The concept of a resource regime refers to the various institutions that govern the rules of access to productive resources and the rules of interaction between, as well as within actor constellations. Both rules of access and interaction are fundamental concerns in any given economy and lies at the basis of the EGS framework. It is therefore also the point of departure when describing the framework (Vatn, 2021). Rules of access may encompass property and use rights which defines the degree and type of access to a resource. These rights come in various forms; they can be private, state, common property or open access, and they may be formalized e.g., through sanctions, or be governed by norms and conventions (Vatn, 2015:158). Vatn (2015:139) emphasizes that one must be aware of the source of authority, meaning the possibility that institutions may either compete or reinforce each other, and that underlying interests are key to understand the dynamics. Resource regimes also encompasses rules of interaction, which refers to the rules of coordination between actors. It can be rules regarding the use of resources, as well as the side-effects resulting from that use. Interaction rules also comes in different forms, such as trade, command, community rules and no rules (Vatn 2021). The relevant resource regimes in this study are the IIAs and the ISDS mechanism, as these set the rules of interaction between states and investors, both in terms of establishing rules for trade and investment, and for how to resolve conflicts. The Paris Agreement may be viewed as another resource regime established by states, which set the rules for how to limit global warming.

The next level in the framework represents the various actors and institutions important to the formulation of the resource regimes. Institutions refer to the formal and informal rules, and practices, that facilitate interaction and define the policy process between the actors. These institutions are resource regimes as described above, the *political institutions* such as the constitution and collective-choice rules, and the *institution of civil society* itself (Vatn, 2021). As such, institutions are key in determining the degree of power actors have with regards to protect their interests (Vatn, 2015). The actors are identified as *political actors*, *economic actors* and *civil society actors*. These actors often have different, and sometimes conflicting, set of goals and motivations. As well as different rights, responsibilities and capacities, which is defined by the various institutions at play (Vatn 2015). The EGS framework in Figure 3 illustrates how both political and economic activities are embedded within the civil society (mid circle), which grant legitimacy to political and economic decision-making. Together these actors and institutions constitute what Vatn (2021) refers to as the *governance structure*. In addition to the abovementioned elements is *results*, such as resource use, income and waste, and *technology and infrastructure* included. The full framework illustrates how the economy is

embedded within civil society, that the legitimacy of political actors and institutions are founded within civil society, which in turn is embedded within nature, the outer circle. Nature represents the biophysical environment, underlining the premises that society and economy operates within the boundaries of nature.

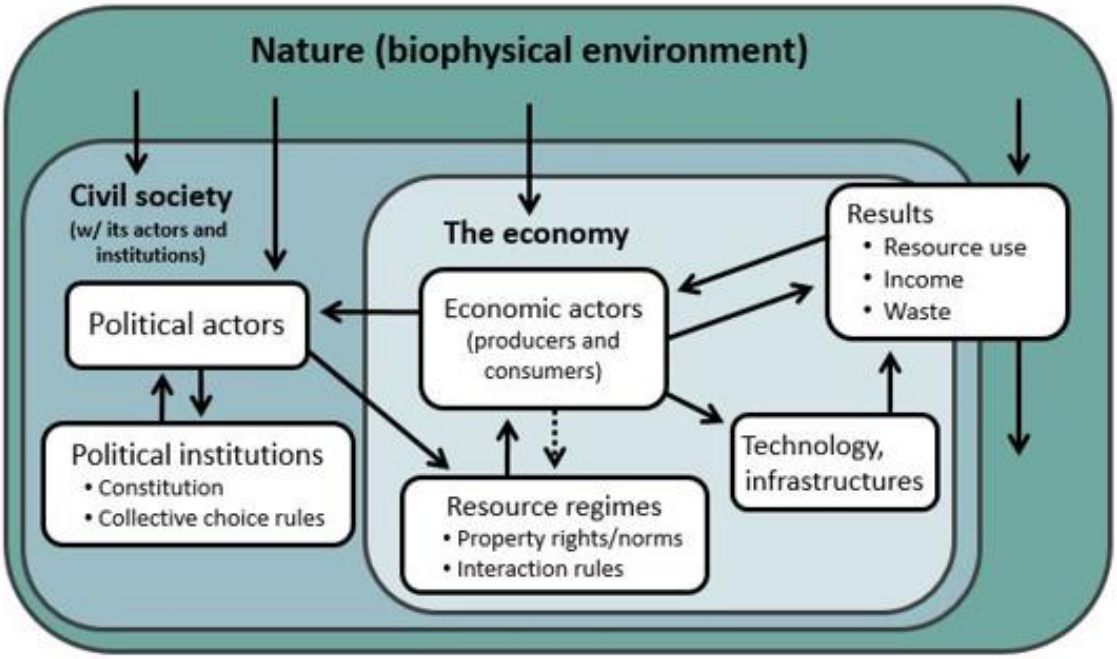


Figure 3: The Environmental Governance Systems framework developed by Vatn (2021), translated from Norwegian to English by me (28.10.2021).

The arrows illustrate various forms of interaction between the elements in the framework, identified as interacting variables producing patterns of interaction and outcomes (Vatn, 2015). The arrow from 'economic actors' to 'political actors' may represent their influence on political processes, while 'political actors' are central in forming the 'resource regimes'. These then influence 'economic actors' by steering and regulating their activities. 'Economic actors' do however have some capacity to also formulate and influence 'resource regimes' directly. 'Technology/infrastructure' is created by economic actors, while 'resource regimes' may influence its direction. There are also arrows from the biophysical environment to the different elements in the framework. These represent flows of resources and/or information about the environment. The result of the flow of resources for 'economic actors' may for instance be income as seen in the 'results' box, while the arrow back to 'economic actors' may represent how the outcomes influences action. Lastly, the arrows from 'results' represents waste such as pollution and (uneconomical) by-products. (Vatn, 2021).

The EGS framework serves as a tool enabling me to structure the analysis of this study by identifying the different actors and institutions/resource regimes involved, how they interact, and help me identify the power dynamics within. It must however be noted that this study does not seek to analyze a specific environmental governance system in itself, rather it takes the approach of analyzing the ISDS mechanism and its relation to environment, and potential impact to national environmental governance. Which in this study is encompassed by the possible obstacles states face in the implementation of environmental policies and the challenge of achieving IEAs. The EGS framework is nevertheless suitable as it focuses on understanding the underlying structures and processes that causes an environmental issue, with a special emphasis on the role of the economy and actors involved. I will in the following sub-section outline the main actors relevant for this study, as identifying these will build a solid base for understanding the different mechanisms play in the ISDS governance structure.

3.1.2 Main actors within the EGS framework

Economic actors

In the EGS framework, economic actors are identified as producers and consumers (Vatn, 2021). With relation to the ISDS governance structure, 'producers' are of most relevance, as they may be identified as the foreign investors and enterprises in this study. Producers are, according to neoclassical theory, interested in maximizing profits, and it should be noted that a wide range of institutions, such as the institution of the investment regime (see section 2.2), has over time developed mechanisms that enables the actors owning the means of production to accumulate more capital. Producers may be identified as firms, ranging from small family businesses to large multinational corporations, which most commonly are organized as stock holding companies and are often structured in ways that serves the profit maximizing interests of the owners (Vatn, 2015).

Political actors

As illustrated in the EGS framework above, the political actors are governed by the political institutions, which in the EGS-framework are identified as the constitutions and collective choice rules – e.g., domestic and regional laws and regulations regarding how to make decisions. These have over time been formulated through political processes and defines the relationship between state and society – for instance how political actors are elected and the rules of governance (Vatn, 2021). Once the political actors are elected, they have the power and authority to define and formulate 'resource regimes' and initiate political processes, as well as

having decision-making power on issues concerning constitutional and collective-choice rules. They are however also regulated themselves by the same rules. Additionally, it must be noted that political actors operate on different levels. It can be on the local level such as in municipalities, on the national level such as the parliament, or on the international level such as in the UN (Vatn, 2015; Vatn, 2021). The EGS framework distinguishes between two types of political actors: namely public authorities within states, and International Governmental Organizations (IGOs). These are constituted by national governments, created in order to enhance international cooperation, and are governed through rules formulated by its members (Chasek and Downie, 2020). According to Chasek and Downie (2020), IGOs have an important role especially with regards to international environmental politics as they provide information and guidance, contributes to set the agenda, and may influence the development of norms, laws and policies.

Civil society actors

Considering the concept and understanding of civil society is constantly evolving (Edwards, 2009), it's necessary to clarify what I mean when referring to civil society actors in this study. Civil society may be understood as the collective name for all groups and networks operating outside the household, independent from the state and private sector. It may be viewed as the 'public sphere' and is often called the 'third sector' (VanDyck, 2017; Edwards, 2009). Which according to Edwards (2009:64) is "the arena for argument and deliberation as well as for association and institutional collaboration". It's where "societal differences, social problems, public policy, government action and matters of community and cultural identity are developed and debated" (McClain and Fleming, 2000 in Edwards, 2009:64). The role of civil society as an arena for participation and influence is therefore important as it contributes to develop and shape societies and has a fundamental role in political and democratic processes. The health of democracies is often thought to depend on the extent to which civil society thrives, i.e., that all voices are heard (Edwards, 2009).

Civil society illustrated in the EGS framework in Figure 4, is depicted as a sphere where the normative basis for society lies. We are all part of civil society as individuals and citizens, and may encompass different roles in different situations, thus political actors and economic actors has their 'origin' here. Civil society may also constitute of groups representing issues such as environment, human rights and religion, it may be political parties, NGOs, communities, advocacy groups, media and labor unions operating on the local, national and international level. It must however be noted that the power, strength and influence of these

actors varies to a great extent, giving some more space and influence than others, and since they have their own specific interests or agendas they cannot be perceived as neutral actors (Vatn, 2021). There are two aspects of civil society relevant to this study; first aspect is its role in providing information and insight to the challenging landscape of ISDS, i.e., what I have termed civil society literature which will be addressed in chapter four. The second aspect concerns the power, role and influence of civil society in the actual ISDS disputes, which will be addressed chapter five.

3.2 Power

A central aspect of understanding and analyzing how the ISDS mechanism in IIAs may influence the achievement of IEAs is power. Emphasizing power and power relations may explain the actions and capacities of the actors involved, and the dynamics between both actors and institutions. I will in the following elaborate on the concept of power that will form the base for the analysis.

Power can be many things and come in different forms. It can be voluntary, e.g., based on someone's authority, or coercive. It can appear in terms of actor's relations to each other and be viewed in terms of decision making and exchange. With power comes also an element of control and access to resources of different kinds, meaning that access to resources may help achieve their interest. At its core, power may be viewed as the ability to achieve one's goals (Østerud, 2014). This position leads us to Robert Dahl's definition of power; "*A* has power over *B* to the extent that he can get *B* to do something that *B* would not otherwise do" (Dahl, 1957:202-203). Dahl describes this as his intuitive idea of power and proceeds to establish a premise of power as a relation between actors, be they individuals, roles, groups, organizations, governments or states (Dahl, 1957). Here I would also add the power of institutions such as resource regimes, as they establish rules that actors must adhere to which influences actions and decisions of the actors involved.

Dahl's definition of power has created much debate, it's both widely accepted and criticized (Baldwin, 2015). It's argued that this view of power is concentrated to behavior and decision-making, in cases where there is a visible conflict of interests (Lukes, 2005), as such criticized for being too narrow. Bachrach and Baratz (1962, in Østerud 2014) therefore introduces a second face of power relating to 'non-decision-making'. This refers to actor's power to prevent decisions being made in the first place and keeping issues away from the public agenda is equally important as decisions being made (Østerud, 2014). Their view of

power thus emphasizes successful control to include A securing B's compliance by hindering or suffocating potential issues and as such defending A's interests or securing the 'status quo' (Lukes, 2005). The 'third dimension of power', argues that A also exercises power over B by influencing, forming or determining B's wants, thoughts, interest or preferences. This view addresses the power of manipulation and that B's actual interests may be different from B's preferences (Lukes, 2005). It must however be noted that there are also those who oppose the notion of Dahl's definition as being too narrow, i.e., Baldwin (2015:218) who argues it's "broad enough to include changing B's behavior by controlling agendas or suppressing issues as well as affecting B's behavior by manipulating his consciousness", thus encompassing both the second and third dimension it has been criticized for lacking.

3.3 The Regulatory Chill Hypothesis

The regulatory chill hypothesis is founded upon the proposedly chilling effect ISDS may have on states and their regulatory capacities, whether it's because of the actual arbitration or the threat of arbitration. Bonnitcha, Poulsen and Waibel (2017:6) propose that regulatory chill "refers to the possibility that investment treaties discourage states from adopting legitimate regulatory measures in practice". Thus, the regulatory chill hypothesis suggests that governments, out of the fear of arbitration, will fail to implement regulations in the public interest that is both timely and effective, as needed for the environmental transition if we are to achieve IEAs (Tienhaara 2018). According to Tienhaara (2011) states course of policy development and decision-making power may be influenced by the institution of investment arbitration. It is therefore a common perception that the phenomenon of regulatory chill has a negative impact on a state's powers to act as a welfare state (Shekhar, 2016). It must however be noted that the debate on the extent that IIAs causes regulatory chill is controversial, and with diverging viewpoints (Bonnitcha, Poulsen and Waibel, 2017; Moehlecke, 2020).

Tienhaara (2018) proposes three distinct types of regulatory chill. First, *internalization chill* proposes that the fear of future arbitration is internalized to such an extent that governments may take this into account when drafting policies. The implications of this is that regulatory progress across all sectors and areas that may affect foreign investors may be dampened, and that policymakers instead prioritize the avoidance of arbitration at the expense of developing policies that are in the public interest. A great weakness of the internalization chill hypothesis, and the regulatory chill hypothesis as a whole, is that it is difficult to measure and thereby prove. The evidence found in the literature is therefore limited and mixed, as

"counterfactual evidence about the regulations that would have existed in the absence of the purported chilling" (Bonnitcha, 2014 in Tienhaara 2018:234) is required.

Second, is the more familiar *threat chill,* which concerns the chilling effect of specific regulatory measures following an investors threat of arbitration as a reaction to regulatory changes that may affect them negatively (Tienhaara 2018). Threat chill occurs after the host state has become aware that the regulatory measures run the risk of arbitration, which states may risk losing. This may entail payment of monetary compensation, high legal fees and proceedings that may last several years (Tienhaara, 2011). However, it must be noted that a threat alone cannot fully explain why regulators may abandon or water down a regulatory measure. Lobbying efforts, fear of industrial flight, reputational concerns internationally which may result in reduced inflow of investments, and threat of job losses may be other factors accompanying the threat of arbitration (Tienhaara, 2011; Shekhar, 2016).

Third, *cross-border chill* refers to the chilling effect that may arise in one state, from observing an investor launching or threatening to launch an ISDS claim in another state, where same type of regulations or policies affecting similar investment are under way. Cross-border chill thus suggests that other states may scale down or abandon their policies as a consequence of observing ISDS claims rising in another state (Tienhaara, 2018). It further suggests that investors may purposely pursue arbitration in one state as a way of signaling to other states considering similar types of regulations that such a move will be challenged with ISDS arbitration (ibid.).

These three variations of regulatory chill points to the same issue; that power is an important component of the hypothesis considering one actor's power (the investor) may influence the regulatory powers of another actor (the state). Picking up on the concept of power described in the section above, regulatory chill suggest that the foreign investors also have the power influence the non-decisions of states, as it may cause them not to regulate or introduce policies, despite being in the interest of the public. From the hypothesis, it may also be observed that ISDS equip the foreign investors with a tool that they may use to exercise their will and influence states in their direction, and as such making the state do something it otherwise would not do.

4 Methodology

This chapter describes the methodology of the thesis, encompassing which methodological choices were made and how I went on analyzing and answering the research questions. First, I will present the research strategy, followed by a description of the scope of the study. Then I present the research design, methodological choices and lastly discuss limitations and trustworthiness of the study.

4.1 Qualitative research strategy and multiple-case study design

Research strategy refers to the type or nature of the research, usually distinguished between quantitative and qualitative research. Selecting a research strategy is formed by the research objective – what the researcher wants to find out (Bryman, 2016). This research intends to investigate what existing ISDS cases may tell us with regards to how the ISDS mechanism may impact national environmental policymaking and achievement of IEAs, by drawing upon secondary sources from various disciplines and formats. Given that I intended to use literary sources, I found that a qualitative research strategy was best suitable for this study, and as Bryman (2016) notes, qualitative research typically emphasizes words and concepts rather than numbers and quantification when collecting data. Another important aspect of this study is that it may be characterized as research based on secondary sources, also referred to as a literature study or 'desk-top study'. This has implied that information from the secondary sources collected have a central role as data, insights and information, as opposed to collecting primary data. As such, secondary data may be described as data collected for a different research purpose and reused in order to address another research question (Hox and Boije, 2005). Naturally, this has some implications, which will be discussed in section 4.3.

Research design concerns the choice of framework deployed for collecting and analyzing data and refers to how the research strategy is implemented. As such, the research design "represents a structure that guides the execution of a research method and the analysis of the subsequent data" (Bryman, 2016:40). The choice of research design deemed suitable for this research was multiple-case study design, considering I wanted to examine what existing ISDS cases may tell us with regard to countries' ability to form environmental policies, and the possible impacts this may have for achieving IEAs. Bryman (2016:60) notes that the basics of a case study "entails the detailed and intensive analysis of a single case". A multiple-case study merely suggest that the case study examines more than one case, and preferably more than two cases, in order to develop a better understanding of the phenomenon than one single case may provide (Mills, Durepos and Wiebe, 2010). A multiple-case study design allows for examining

processes and outcomes across several cases, as well as demonstrating issues across a more varied range of conditions and circumstances (ibid.). Another aspect of the multiple-case design is in relation to the understanding of causality. Within critical realism, the understanding of causation relates to the objective of seeking out generative mechanisms which may explain the observable regularities in the social world that the researcher wants to explain. Using a multiple-case study design enables me to examine causal mechanisms across several cases, which also allows for more generalization on the issue (Bryman, 2016). It must be noted that this generalizability enhances the more cases are examined.

4.2 Research Method

Research method refers to the specific technique, or combination of techniques used to collect data as well as how data is analyzed and interpreted (Bryman, 2016). This section outlines a thorough description of the sampling strategy, case selection process, what I considered relevant secondary sources, how I went on selecting them and how I collected the secondary data is required.

4.2.1 Sampling Strategy

The sampling strategy deployed was purposive sampling. According to Bryman (2016:408) this is a "non-probability form of sampling", meaning that the sampling is done in a strategic way, with emphasis on the research questions and objectives in mind. Purposive sampling was considered the best option for collecting secondary sources as it may ensure greater variety within the sample. Purposive sampling suggests that certain criteria must be set to determine the inclusion or exclusion of the unit. The sampling process took place in two phases. The selection of ISDS cases represents phase one (section 4.2.2), where the sampling method deployed was *criterion sampling,* which may be defined as sampling of units that meet specific pre-defined criteria. These criteria have a delimiting purpose, which helps define the boundaries of the research, suggesting the researcher must make decisions on what to include and exclude (Simon and Goes, 2013). The procedure of the case selection will be addressed in the following section.

Phase two represents the selection of the secondary sources for each case (section 4.2.3), and the methods used was a combination of criterion sampling as described above, *theoretical sampling* and *snowball sampling*. Theoretical sampling may be defined as a sampling process where data is collected, coded and analyzed as an ongoing process. The aim of this strategy is

identifying thematic categories which guides the further sampling process. Snowball sampling may be defined as a sampling technique where the researcher first samples a small group of units relevant to the research questions, which in this study was selected through the criterion sampling, and then uses this unit to find new units (Bryman, 2016). Using snowball sampling to collect secondary sources, implied active use of the bibliography and identification authors frequently referenced or cited. The second phase of the sampling process will be addressed in section 4.2.3.

4.2.2 Case Selection

The selection of cases represents phase one of the sampling process, where criterion sampling was deployed. A selection of ISDS cases had to be selected for further examination, and may be characterized as exemplifying cases, which refers to cases selected because they exemplify a broader category of cases, and/or provides a suitable context for the research questions to be addressed (Bryman, 2016). The first criterion regards the scope of the research, thus ISDS cases with an environmental dimension was deemed relevant, which was further delimited by selecting cases relating to sectors such as energy and mining, or concerning issues such as environment, pollution, climate change and climate policy, environmental policymaking, governance and regulation. The second criterion concerns the status of the ISDS case. I decided that selecting cases with varying status would be useful to address the research questions, as this would represent the variation of cases. The statuses identified are 'settled', 'decided in favor of the state', 'decided in favor of investor', 'pending' and 'dismissed'. The criteria for including a non-concluded ISDS case was that enough information on the case itself was available, which to a large extent depended on the attention and coverage the case has been given in the public. The cases were also selected based on their relevance to the research questions, especially research question 2a, which emphasizes ISDS cases where states forming environmental policies is the cause of the dispute. These abovementioned criterion resulted in the case selection listed in the overview below, which were initially identified by using the ISDS case map provided by www.isds.bilaterals.org, and the campaign page www.isdscorporateattacs.org. Both these provided easy access and introduction to the relevant ISDS cases. When identified, the cases were cross-examined by using the UNCTAD Investment Dispute Settlement Navigator, to determine whether the case was suitable for this study.

Table 1: Overview of the selected ISDS cases[1]

No.	Case (year of initiation)	Arbitral inst.	Treaty, sector	Subject/cause of dispute	Status/ outcome
1	Vattenfall I v. Germany (2009)	ICSID	ECT, Energy	Introduction of additional environmental restrictions on coal power plants and accusations of delaying the issuance of construction permit of the Moorburg coal-fired power plant.	**Settled**, environmental conditions rolled back, settlement amount not disclosed
2	Ethyl Corporation v. Canada (1997)	UNIC-TRAL	NAFTA, Energy	Ban on MMT[2] import, a gasoline additive used to improve gasoline performance, due to concerns for its potential risk to health and environment.	**Settled,** ban lifted, investor paid US$ 13 million
3	Clayton/ Bilcon v. Canada (2008)	UNIC-TRAL	NAFTA, Mining	Canada's rejection of Clayton/Bilcon's proposed quarry mine, based on the recommendations from an environmental and socio-economic assessment panel.	**Decided in favor of the investor**, awarded US$ 7 million
4	Pac Rim v. El Salvador (2009)	ICSID	CAFTA, Mining	Refusal of granting Pac Rim its mining concession as a result of Pac Rim failing to meet the requirements in the mining law, as well as a *de facto* ban on mining.	**Decided in favor of the State**, awarded US$ 8 million
5	Rockhopper v. Italy (2017)	ICSID	ECT, Energy	Italian government's reintroduction of a temporary ban on oil exploration within 12 nautical miles of the coast of Italy, revoking Rockhopper's Ombrina Mare permit.	**Pending**, compensation demanded US$ 350 million
6	Vermillion v. France (2017)	No arbitr-ation	ECT, Energy	Drafting of the proposed 'Hulot law' which would entail banning fossil fuel extraction on all French territory by 2040.	**Dismissed,** threat of arbitration leading to fundamental changes in the proposed law

[1] See Appendix I for a more detailed description of the subject of dispute for each case.
[2] Methylcyclopentadienyl Manganese Tricarbonyl, a toxic fuel additive used to enhance car engine performance

4.2.3 Operationalization and data collection

After determining the ISDS cases, the second phase of the sampling process could begin, namely selecting the literature which ultimately would constitute the sample unit, the methods applied were criterion sampling, theoretical sampling and snowball sampling. The first inclusion criterion was determined by the six ISDS cases outlined above, which naturally

guided the search for secondary sources. Thus, I was interested in literature that reviewed, examined or discussed the selected cases, in addition to collect case literature that addressed IEAs or emphasized the achievement of these, and literature that addressed the cases in relation to states regulatory capacities with regards to forming environmental policies. However, these last criterions were not meant to exclude literature that did not address these issues.

Another important criterion throughout the sampling process was to sample a variety of sources addressing the selected cases, in order to ensure that a variety of views and positions would be represented and to increase triangulation in the sample. This does not imply that I aimed to select literature with equal amount of positions positive or negative to ISDS. Rather, the objective was to sample literature that would enable me to get as much insight to each as possible, in order for me to analyze the cases in relation to the RQs. This is justified by the notion that not all literature arguing for one side may be evidence-based or rightfully constructed, and by the fact that most literature addressing ISDS, and environment have a critical approach or perspective to the ISDS mechanism as a whole. The type of literature constituting the sample unit was peer reviewed academic articles, books and book sections, dissertations, reports from IGOs and civil society organizations (e.g., think tanks and advocacy groups), campaign and information material from advocacy groups, and media articles or opinion pieces. I have classified the case literature into three main groups of sources: academic literature, civil society literature and media articles/ opinion pieces. It must be noted that academic literature not specifically addressing the cases has also been applied throughout the research. Bryman (2016) notes that theoretical sampling emphasizes saturation, meaning that the sampling process ceases when a category has been saturated with data and no new relevant data seems to emerge. This method was employed in the sampling process, and the final sample unit ended up with 7-9 secondary sources sampled for each case, the total sample size was 45 secondary sources analyzed. The concrete steps of how I analyzed and coded the data will be described in the section below.

Regarding evaluating literature, Stewart and Kamins (1993) stresses that information obtained from secondary sources is not always reliable or valid and may be biased. For instance, literature obtained from civil society organizations may often have a certain agenda or predetermined perspectives on certain issues. This does not suggest they are to be excluded, but calls for careful evaluation, based on a few evaluative questions[2], and healthy skepticism

[2] Stewart and Kamins (1993:17) propose six evaluative questions that should be reviewed to ensure the eligibility of the secondary literature, these are the following; *(1) What was the purpose of the study? (2) Who collected the information? (3) What information was actually collected? (4) When was the*

A large portion of the literature was sampled through the *Oria* database provided by NMBU and Oslo Metropolitan University respectively, in addition to Google Scholar. The majority of the sources was sampled through general Google searches. The overall sampling process may be characterized as dynamic in the sense that both sample selection and analysis occurred interchangeably, typical for theoretical sampling. I selected the sources that fitted the criteria addressed above and research objectives the most, then immediately reviewed the abstract and/or introduction, guided by the evaluation questions listed above. Bibliographies was also reviewed, in addition to identifying authors frequently referenced or cited, which was how snowball sampling was conducted, which was used to a large extent in the second phase of the sampling process.

4.2.4 Thematic analysis and coding

The method considered best suitable for analyzing the literature was thematic analysis. Clarke and Braun (2017:297) defines it as "a method for identifying, analyzing, and interpreting patterns of meaning ('themes') within qualitative data", and it offers an organized and structured method for dealing with the selected literature. Further they note that it provides accessible and systematic procedures for the generation of codes, which are the building blocks for themes and represents features of the data that appears interesting to the analyst (Braun and Clarke, 2006). As such, data was collected by identifying themes in the selected literature, which then were converted into codes, and served as a method of labeling and categorizing my data (Bryman, 2016). According to Bryman (2016), coding is a key process in most qualitative data analysis strategies, it is however sometimes accused of fragmenting and decontextualizing text, which was important to keep in mind during the analysis. Additionally, it must be noted that thematic analysis is traditionally associated with primary research. I have nevertheless considered it suitable for secondary research, as a tool for synthesizing already existing information, and as a way of integrating and assessing this knowledge and research findings, with the aim of increasing access to that knowledge and/or generating new knowledge (Wyborn et al., 2018).

I chose a 'theoretical' approach to thematic analysis, meaning that I have coded in order to specifically address the research questions (Clarke and Braun, 2017). Thus, I identified themes that could address how the ISDS proceedings influenced countries' efforts to form

information collected? (5) How was the information obtained? (6) How consistent is the information with other sources?

environmental policies, and themes that could be identified as possible impacts of ISDS for the achievement of IEAs. Identifying these themes was an ongoing process throughout the analysis, as new themes and thus new codes constantly emerged when new literature was analyzed. In the first phase of the process, I primarily identified themes that was related to the theoretical framework, such as power and issues that addressed power relations. This could be related to actions by either the state, investor or civil society where they exercised their power and capacities. This led me to discover the themes 'opposition/contestation' and 'concerns' which most notably came from civil society or the states. Regarding regulatory chill, I looked for issues or notions that could be identified as having a chilling purpose or a chilling effect. Additionally, I looked for environmental aspects in the literature, such as the arguments of the host-country to introduce the environmental policy causing the dispute. This, for instance, allowed be to identify the themes 'precautionary principle', 'conflict of obligations/interests/commitments' and 'legitimacy'. Coming up with suitable codes was a bit challenging in the beginning, and many themes had to be coded. I started color coding the themes addressing similar aspects which then would constitute a final code. For instance, the themes 'claimed breaches' and 'compensation demanded' were coded as 'investor claims', identified by the color yellow. The themes 'state power', 'investor power', 'civil society power' and 'tribunal/jurisdictional power' was coded as 'power/power relations' and was identified by the color green. The same was done with the codes 'opposition', 'civil society concerns' and 'state concerns', which all were color coded with the color teal and labeled 'opposition'. With other themes identified this was not necessary, for instance with the theme 'conditions/outcome', which was coded identically and assigned the color code grey.

4.3 Limitations, challenges and trustworthiness

This section outlines some of the issues relating to limitations, shortcomings, challenges and weaknesses of this study. It's important to address these issues as it may strengthen the overall trustworthiness, validity and reliability of the thesis.

4.3.1 Limitations, shortcomings and challenges

The first limitation relates to my own academic background. When the research began, I soon encountered challenges relating to the juridical lingo in several of the literary sources, especially the academic literature. This meant that I had to become familiar with juridical terms and definitions on my own and based on this try to interpret the juridical language and their

meanings. This was challenging considering I have no former experience with law as an academic field, and I must humbly admit that academic training in this field is necessary to properly understand the juridical language. This shortcoming led to the decision of not including the juridical case documents in my final sample, such as notice of arbitration and the tribunal's award, which gives a detailed juridical overview of the proceedings. However, these documents were sometimes used to cross-check the literature in the sample, which may have contributed to strengthen the credibility, but relying upon them in my analysis was deemed unfeasible. Primarily due to the risk of misinterpreting or misunderstanding these documents, but also because lacking training in the field of law would entail that reading and analyzing these documents would be time consuming and a challenge in itself.

With regards to the selection of cases, this process was guided by the objectives and RQs of the research, which delimited the study by so select ISDS cases that had an environmental dimension. During the case selection process, I did not review all potential ISDS cases where investors pursued arbitration in order to challenge a state's environmental measures, as this would require too much time allocated for this process. Instead, I was guided by the ISDS case map and the ISDS campaign page provided by two civil society actors, as described in section 4.2.2. There were several benefits in doing so, but it may undoubtedly have excluded other cases that could be highly relevant to answer the RQs, as only a handful of cases are represented there. Later in the research process I did actually discover that some cases could have been a better selection compared to some of the cases I did end up with, which suggests that more time allocated for this process could potentially reduce the risk of this happening. Additionally, the environmental delimitation may also have excluded cases that could have potential transfer value to this study despite not directly addressing an ISDS case with an environmental dimension. This delimitation was nevertheless necessary in order to make this study feasible.

Another issue regards the representativeness of the cases I ended up with, especially with regards to other ISDS cases where states environmental measures have been challenged. It's difficult for me to determine this, as I did not review all the potential cases, but the choice of selecting cases with varying outcome may however enabled be to broaden the representativeness of this study as a whole. It must also be emphasized that the cases presented in the ISDS case map represents cases where substantial information is available online, which was an important criterion for the selection of the cases considering this study is founded upon secondary research.

With regards to the choice of research design, namely multiple case design, several benefits may be identified, most particularly that it allowed me to examine, analyze and compare multiple cases, which in turn enabled me to generalize to a larger extent. The disadvantage is however that the more cases selected, the less in-depth analysis of each case is feasible. Considering the time constraint, a deep and detailed examination of each case was not possible, thus some points may have been missed or overlooked. In order to avoid this, the amount of cases could have been reduced while increasing the number of secondary sources reviewed per case. Furthermore, although I stated above that generalization may be enhanced with multiple case design, this must be done with caution and the findings in this study should not be regarded as 'absolute truths' but instead as potential understandings of what ISDS cases may entail for the environment, as I find that too few cases were selected in order to make broad generalizations. Additionally, the variation of status of the cases may suggests that one must be careful to generalize, as too few cases in the sample have similar status. In order to avoid this, I could have opted for only selecting cases with equal status, preferably concluded cases as these would have more information publicized. Such cases would however only be generalizable to concluded cases and would exclude the important insights of ISDS cases that are settled or never reach arbitration, but still have implications for states environmental governance. This approach would also entail that I would be in a weaker position to address the research objectives and RQs, especially RQ 2b.

Bryman (2016) notes that qualitative research often considers the world to be socially constructed, that facts about reality is based on actor's perceptions, and that social phenomena are the result of action and interaction, opposed to being pre-given. Reflecting upon these positions has been useful, considering I am using secondary sources as my source of data. This has implied that the original material has been collected, synthesized and summarized by someone else, who may have other positions and perceptions of the world, and then reinterpreted by me. This has called for caution, as the research may be subject to the original researcher(s) as well as my own biases. Thus, I had to be careful to not interpret the original meaning into something it was not addressing. Reflecting upon these issues have also been important during the coding process, as it's sometimes accused of both fragmenting and decontextualizing data (Bryman, 2016). Another disadvantage of doing secondary research is associated with the fact that the original data was collected with other purposes in mind, suggesting that the secondary data ultimately collected may not always be the most appropriate for the study I am conducting. It may also become an issue that the secondary data may be old and outdated (Stewart and Kamins, 1993). Lastly, it must be noted that the one doing secondary

research cannot fully know the methodological process of the primary research as there may be many differences in the execution of the methodology, as well as how it's being reported, which in turn may influence the quality of the secondary research (Hox and Boeije, 2005; Stewart and Kamins, 1993).

4.3.2 Trustworthiness and validity

In qualitative research, trustworthiness is related to four factors, namely credibility, dependability, confirmability and transferability (Bryman, 2016). With regards to credibility, this relates to the use of multiple sources when conducting research, which conclusions and generalizations are founded upon. As outlined in section 4.2.2, I collected secondary sources based on academic literature, civil society literature and media/opinion pieces. This gave access to a broad field of literature which allowed me to cross-check information across multiple sources, which contributes to increase the credibility of the findings. However, concerning the use of civil society literature requires me to address the issues of objectivity and subjectivity of such sources. It cannot be overstated enough that the civil society literature, provides information that is founded upon a certain view and perception of ISDS. As described in section 2.2.2, civil society often represent one of the main critiques of ISDS, thus the reports, articles and campaign materials that encompasses the civil society literature in this study represents certain perspectives and often have a specific agenda which overwhelmingly showcases the negative and critical aspects of ISDS. This one-sided emphasis suggests that the information must be read and interpreted with much caution and awareness of this aspect, and that cross-checking with other sources has been important to evaluate the information presented.

Dependability, or reliability, relates to whether a study is repeatable (Bryman, 2016). In order to achieve this, I have sought to be as transparent as possible, by describing the different processes of the research in as much detail, as outlined in the sections above. Additionally, considering my findings are derived from secondary literature, I chose to enhance the transparency of my findings by citing the sources throughout the sections where my findings are presented, namely section 5.1, 5.2 and 5.3. This approach will hopefully contribute to the overall repeatability of the study and allow other researchers to evaluate the outcomes of this research.

Confirmability concerns the overall neutrality of the research, i.e., the objectivity and subjectivity of the researcher. It's challenging, and nearly impossible to achieve full objectivity in qualitative research, but the criterion relates to whether it can be assessed that the researcher acted in 'good faith', meaning that personal values, attitudes and perceptions has not

intentionally influenced the research results (Bryman, 2016). As someone active within civil society, I did have my own views and perceptions of the ISDS mechanism and its relation to environment. Thus, I have tried my best to set aside and reflect upon my own position throughout the research. It has definitely been challenging but being aware of this is important in order to reduce possible biases, as preconceptions should not influence the collection or analysis of data.

Regarding transferability, or the external validity of the research, which concerns whether the results can be generalized and useful to understand other contexts (Bryman, 2016), I have already contended in the section above that my findings should not be generalized, considering too few ISDS cases were selected for this study. On the other hand, the idea from the start has been to say something general about what ISDS cases may entail for achieving IEAs, thus this study may give an idea of what the possible impacts of achieving these may be and as such guide other researchers to conduct similar studies.

5 Findings and analysis

We may now turn to the analysis and presentation of the main findings. Chapter five is divided into the three sections, where research objective one is addressed in section 5.1 and 5.2, and research objective two is partly addressed in section 5.3. Section 5.1 addresses RQ 1a through the application of the EGS framework and presents the ISDS governance structure. Section 5.2 addresses RQ 1b, by describing the power relations between the actors and institutions within the governance structure, while section 5.3 addresses RQ 2a by identifying the experiences and lessons from the ISDS cases and their impact on states environmental policymaking.

5.1 The ISDS governance structure

Figure 4 below presents the EGS framework applied to this study and has been named the 'ISDS governance structure'. It depicts the actors and institutions operating within the structure, which spheres they belong to, and the patterns of interaction represented through the arrows. Within the political sphere four main actors and institutions operates; these are 'national political actors', 'national political institutions', 'arbitrational tribunals' which are identified as an actor within the ISDS governance structure, and lastly 'institutions for the international level'. Within The Economy, 'economic actors' operates. These are regulated by the 'resource regimes' which encompass property rights and states environmental policies and regulations. The civil society sphere represents the civil society actors identified in the six cases, these are amongst other citizens, interest groups, NGOs, local communities and religious institutions.

Lastly, the two 'shaded' boxes must be commented. In the original EGS framework 'results' represents the relations between the economy, economic actors and nature, whose activities implies resource use, which then generates income and waste. While 'technology, infrastructures' influences the state of these results. As earlier emphasized, the EGS framework is applied to structure the analysis of the ISDS mechanism and its potential impact on national environmental policymaking, not an environmental governance system in itself. The shaded boxes are of little relevance, as the analysis focuses on the potential implications of ISDS on environmental policymaking. In the following sub-sections, the most relevant actors and institutions for the analysis are addressed, these are 'economic actors', 'national political actors', 'civil society actors', 'IIAs' and 'arbitrational institutions'. Other aspects, such as arbitral tribunals' is addressed with 'arbitrational institutions' while 'resource regimes' is emphasized throughout the sections.

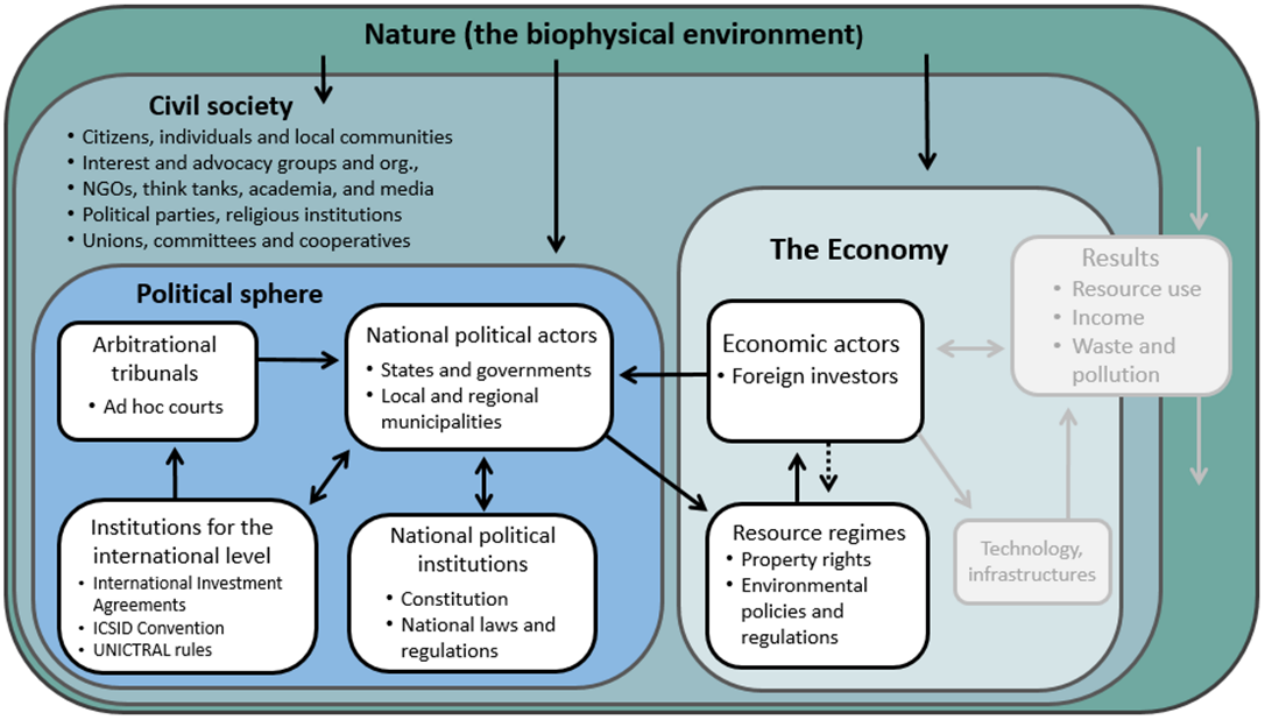


Figure 4: The ISDS governance structure, applied from the EGS framework (Vatn, 2021).

5.1.1 Economic actors

The specific investors examined in this study are the Swedish energy firm *Vattenfall*, the US chemical company *Ethyl Corporation,* the American mining company *Bilcon of Delaware,* the Canadian gold mining company through its *Pac Rim Cayman LLC,* the Canadian oil and gas company *Vermilion Energy,* and the British oil and gas company *Rockhopper Exploration Plc.* The type of industries the investors are engaged in (i.e., mining, oil extraction and energy) and the high amount they claim compensated, suggest that the economic actors are medium to large multinational corporations. In some of the cases more than one investor is registered as Claimant, such as in the Vattenfall and Rockhopper cases where both are joined by two local subsidiary firms, and in the Clayton/Bilcon case where Clayton refers to the *Clayton family*. As the ISDS term indicates, the investors have a central role in arbitration cases. It is therefore natural that investors are identified as the main economic actors in this study.

UNCTADs (2004) definition of an investor is two-fold; it can either be natural persons, such as the members of the Clayton family, or legal entities, such as enterprises. An investor itself may be understood as someone or an entity that puts money into a project in order to generate future profits and maximize the return of their investments, which in turn may be considered the main objective of many multinational corporations. Defining *who* is an investor

is therefore important in the context of ISDS disputes, as the rights established in the IIAs only applies to investors who qualify for coverage (Yannaca-Small, 2008). A key qualification concerns nationality, and only investors obtaining the nationality of the signatory state can benefit from protection of that specific treaty (Nikièma, 2012). For legal entities nationality is often determined based on where the company is registered, or the nationality of the ownership (UNCTAD, 2004). The jurisdictional decisions in the Pac Rim case are a good example addressing this issue. When Pac Rim first filed for arbitration, the company argued it was protected by the CAFTA (The Dominican Republic (US)-Central America free trade agreement), due to its shift in incorporation from the Cayman Island to Nevada in the US, prior to filing for arbitration (Schererer, 2018). El Salvador argued that there was no doubt that Pac Rim had restructured in order to gain treaty protection, stressing that changing nationality after a dispute has arisen in order to qualify for treaty protection is Abuse of Process" (Tucker, 2011:para 17). Ultimately, the tribunal denied Pac Rim protection under CAFTA due to two cumulative conditions set in the CAFTA; first, concerned the observation that Pac Rim in fact had no actual business activities in the US which disqualified for protection. Secondly, despite that Pac Rim now had postal address in the US, the actual owners were not US nationals. Thus, the ICSID tribunal denied Pac Rim protection under CAFTA as a result of thoroughly assessing the nationality of the investor. However, the ICSID upheld that the case could be brought under El Salvador's investment law, which it ultimately did (Schacherer, 2018a).

5.1.2 Political actors

Within the ISDS governance structure, the main political actor may be identified as the state or government, which the term ISDS itself contributes to establish, four issues may support this. First and foremost, the state is of importance as it's only the states who has obligations under IIAs, enforced though ISDS. Thus, states' role in disputes is always as the *respondent*, while only investors can be the *claimant*, which is reflected in the title of the cases, e.g., *Ethyl v. Canada.* Second issue relates to states decision-making power on issues of importance to the state. In all the cases examined, disputes arose as a result of states introducing environmental policies that affected the investor's investment. In doing so they exercises their right to regulate, while the investors may exercise their right to challenge that decision. This suggest that for a dispute to arise, there must have been a decision or ruling imposed by the state, and as such there cannot be any ISDS case without the state 'causing' the dispute. Third issue relates to state's role in forming and signing IIAs which are negotiated by government officials representing the interests of the state. While the fourth issue relates to states' role in forming,

and their role as member of International Governmental Organizations (IGOs). Based on the ISDS cases, two main IGOs may be identified, namely the World Bank and the UN, as these facilitates two important arbitrational institutions; the ICSID, which is a part of the World Bank (World Bank Group, 2021), and the UNICTRAL which is part of the UN (UN, 2022). These arbitrational institutions will be further addressed in section 5.1.5. Furthermore, the UN is relevant as many IEAs has their origin here. These are for instance the Convention on Biological Diversity or the Paris Agreements, as emphasized in section 2.2 these actors formulate the climatic and environmental goals and commitments states has pledged to achieve. In almost all the cases examined, reference to achieving IEAs may be identified, indicating the role and influence IGOs have on states.

Local authorities and municipalities are also identified as national political actors. Their role varies, but in some of the cases they have a significant role in the primal stages. Two cases stand out here, namely the Vattenfall and Rockhopper cases. With regards to the first case, it was the local authorities in the City of Hamburg who imposed additional environmental restrictions to Vattenfall's construction permit of the coal-fired power plant (Bernasconi, 2009). As such, local authorities used their decision-making power by introducing these requirements, which ultimately led Vattenfall to initiate an ISDS case against Germany (ibid.). In the Rockhopper case a significant element of the opposition and mobilization against oil-drilling in the Adriatic Sea was the strong support gained from local municipalities, provinces and even the regional government of Abruzzo (Cernison, 2016). The support from these political actors was certainly not the main factor leading to the ban on oil exploration within twelve nautical miles of the Italian coast in 2016, but it's fair to assume that their support played an important role in the Rockhopper case, as it may have given legitimacy to the civil society protests (ibid.).

5.1.3 Civil society actors

ISDS and its implications is widely debated within civil society, and several scholars point to civil society's contribution and their role in putting the ISDS debate on the public and political agenda, as well being advocates for change (Weghmann and Hall, 2021; Kaufmann-Kohler and Potestá, 2020; Gertstetter and Meyer-Ohlendorf, 2013). Civil society actors have written extensively on the issue of ISDS and environment, and fronted campaigns founded upon raising awareness of the implications of ISDS and on individual cases. Thus, drawing international attention to disputes and the local civil society opposition. Additionally, their contribution is important in unmasking and uncovering ISDS disputes for non-legal persons like myself, considering much information on ISDS proceedings is written in heavy juridical language or

characterized of lacking transparency (Gertstetter and Meyer-Ohlendorf, 2013). The main international civil society groups and organizations identified are advocacy and environmental groups such as Transnational Institute (TNI), Corporate Europe Observatory (CEO), Global Justice Now (GJN), Client Earth and Friends of the Earth, in addition to think tanks such as the International Institute for Sustainable Development (IISD). Much of the literature and information about ISDS cases used in this study is obtained from several of these actors as they play an important role in providing insight and knowledge about the ISDS system and its impact on environmental governance. Other civil society actors may be identified as academic scholars, such as Tienhaara (2008; 2017), whose insight and research on the relationship between ISDS and environment is an important contribution to the debate, as well as to this study.

The second aspect of civil society relates to its role within the ISDS cases in this study, here I will briefly address some of the prominent civil society actors to give an indication of who are involved. A characteristic of all the cases in this study, is that civil society represents actors voicing concerns or opposition to a project prior to the actual dispute. For instance, in the case of Vattenfall, one prominent organization was the non-governmental organization Friends of the Earth Germany (BUND) (Romanin Jacur, 2015), in addition to the opposition from local communities in Hamburg. In the Pac Rim case, opposition to mining permeated the whole population, thus such civil society may in this case refer to a large portion of the El Salvadorian population. Some of the key actors may be identified as The Mesa, which was a group of ten civil society organizations, Center for International Environmental Law (CIEL), the Catholic Church and the Association for Economic and Social Development (Holland, 2015; Lander et al., 2021). Similarly, in the Rockhopper case resistance was founded upon strong local opposition from a broad array of civil society actors such as local committees, local chapters of political parties, trade unions, winemakers and wine cooperatives, the Catholic Church and environmental organizations and networks. Prominent actors were the Emergenza Ambiente Abruzzo (EAA), the local WWF, and the blog http://dorsogna.blogspot.com/ where a key activist regularly reported on the oil struggles in Italy (Cernison, 2016). Regarding the Ethyl case, initial concerns of the use of the controversial MMT, a toxic fuel additive used in to enhance car engine performance, came from the scientific health community, whose warnings of the potential harmful consequences of MMT, soon entered the public debate and Canadian politicians (McKinsey, 1998; Guy, 2004), and in the Clayton/Bilcon case the existential concerns for local communities and environment was especially voiced by the neighboring communities (Public Citizen, 2022a). Lastly, in the Vermilion case pressure and support from the public and civil society may be attributed the drafting of the ‘Hulot law’ (Verheecke et al.,

2019). Additionally, the environmental NGO Friends of the Earth France was an important actor uncovering the role of lobbies in watering down the 'Hulot law' (Vaudano, 2018). Advocacy groups such as CEO and TNI has also been important for addressing the implications of the Vermilion case.

5.1.4 International Investment Agreements

IIAs may be identified as one of the 'institutions for the international level'. As the premise of this study implies, the IIAs identified in this study includes access to the ISDS-mechanism which in turn formalizes the rules of protection in the case of breach of contract. With relation to the cases in this study, three IIAs has been identified; the Energy Charter Treaty (ECT), the North American Free Trade Agreement (NAFTA), and the Dominican Republic-Central America Free Trade Agreement (CAFTA)[3]. The two latter are regional agreements facilitating investments in the Americas, while the ECT pertains to the energy sector[4]. The ECT has been claimed breached in three of the cases examined; the cases of Vattenfall, Rockhopper, and Vermilion. While NAFTA was claimed breached in the cases of Ethyl and Clayton/Bilcon, and CAFTA in the Pac Rim case. Here it must be noted that the tribunal of the Pac Rim case did not apply the CAFTA, but instead applied El Salvador's investment law which was also was cited in the notice of arbitration. Nevertheless, Pac Rim did file for arbitration and claimed breached of El Salvador's obligations under the CAFTA (Schacherer, 2018a), which is why I have included it here.

As the analysis of the cases demonstrates, several of the same investment provisions has been claimed breached. Vattenfall claimed Germany had breached its obligation to provide 'fair and equitable treatment', protection against 'indirect expropriation', as well as 'expropriation without due compensation' (Bonnitcha, Poulsen and Waibel, 2017). Ethyl claimed that the MMT import ban would amount to 'expropriation' of their investment in Canada, breach the standard of 'national treatment' and the 'prohibition on performance requirements' (Tienhaara, 2008). While Pac Rim claimed that denying them the mining concession of the El Dorado site breached El Salvador's obligations of 'national treatment', 'most-favored nation treatment', 'minimum standard of treatment' and the provision of 'expropriation and compensation' (UNCTAD, 2022). Regarding the Rockhopper dispute, few details of the case proceedings are available considering it is still pending and no decision has been made. Nevertheless, I find

[3] Also referred to as CAFTA-DR

[4] According to the homepage of the Energy Charter Treaty the ECT is "designed to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources" (International Energy Charter, 2019: para 1).

Rockhopper primarily accusing Italy of breaching the ECT in general and is seeking financial compensation based on the company's loss of future profits, typical for ISDS (Eberhardt, Olivet and Steinfort, 2018), suggesting Rockhopper claims breach of the 'expropriation without due compensation' provision. In the Clayton/Bilcon case, Canada was accused of breaching its obligations of offering 'minimum standard of treatment', the 'most-favored-nation treatment' and 'national treatment' (Schacherer, 2018b).

5.1.5 Arbitrational institutions and tribunals

When filing for arbitration, certain steps must be followed. These are established in the IIAs under chapters outlining the procedures for dispute resolution, but the rules themselves are not established in the IIA. Instead reference to arbitrational institutions is made, usually the ICSID Convention and UNICTRAL Arbitration Rules[5] (Bonnitcha, Poulsen and Waibel, 2017), which are the two arbitrational institutions identified in this study. UNICTRAL rules was deployed in the Ethyl and Clayton/Bilcon cases, while ICSID was deployed in the rest of the cases in the study, except from the Vermilion case. In the context of the ISDS governance structure, these institutions are identified as 'institutions for the international level', and as described in sub-section 5.1.2 the ICSID Convention is subject to the World Bank (World Bank Group, 2021), while UNICTRAL subject to the UN (UN, 2022). As such, they are formed by national states and the rules are formulated in the auspices of the member states to the UN and World Bank, in order to enhance cooperation in the sphere of international investment and commerce by providing rules of how to solve disputes arising between states and foreign investors.

Despite their similar objectives of providing a legal framework for solving disputes the two institutions significantly differ. States may sign the ICSID Convention and become signatory states to the ICSID, which opens up for applying the ICSID Convention for dispute resolution. As such, the ICSID functions as an arbitral institution with a secretariat administering ISDS proceedings under the ICSID Convention, by providing assistance, support and administrative services to the arbitrational tribunal (the ad hoc court), where the actual dispute take place. In addition, the ICSID provides a panel of arbitrators available for the disputing parties (Bonnitcha, Poulsen and Waibel, 2017; World Bank Group, 2021). As such ICSID has an active and participatory role in ISDS proceedings. UNICTRAL on the other hand, does not provide any counsel or legal advice, nor administers or nominates arbitrators. It only provides a legal framework for settling disputes under the UNICTRAL Arbitration Rules.

[5] Sometimes IIAs also reference The Arbitration Institute of the Stockholm Chamber of Commerce (SCC), see for instance the Energy Charter Treaty (International Energy Charter, 2016)

Similarly, to an ICSID tribunal, when UNICTRAL rules are used, an ad hoc tribunal is appointed to facilitate adjudication of the ISDS case (Bonnitcha, Poulsen and Waibel, 2017; UN, 2021). The ad hoc tribunal is established through the appointment of three judges to settle the dispute, one appointed by each party, while the third is either jointly appointed by the parties or appointed by the arbitrators (Cotula and Tienhaara, 2020). Then follows an evaluation of whether the dispute qualifies for coverage of the IIA, by establishing the tribunal's jurisdiction over the dispute. If found to qualify, the case proceeds to arbitration where the tribunal evaluates and determines whether there the IIA in question has been violated. The arbitration process completes when the tribunal issues their decision in the final award of the dispute, which is later followed by determination of the financial award, which in the case of a state is paid the investor "to put them in the same position as if the state had not breached the investment treaty" (Bonnitcha, Poulsen and Waibel, 2017:75). The ad hoc tribunal later cease to exist after the tribunal has rendered their award (ibid.). The arbitrational tribunals are of great importance in this study due to the fact that the interpretations and ruling of the tribunals are final and may have great implications for the disputing parties.

5.2 Power relations in the ISDS governance structure

With the main actors and institutions identified, I may now move on to address the power relations between these, drawing upon the concept of power by Robert Dahl (1957). When analyzing the power relations between the actors and institutions, I have sought to identify what may constitute their power and emphasized their relative power towards each other. This approach is useful to better understand the dynamics of each ISDS case in this study and will contribute to address RQ 2a and 2b. However, I cannot say anything specific about each actors' power relations within the cases as this would require an in-depth analysis of each ISDS case. The findings here are therefore based on generalization.

5.2.1 The power of IIAs

IIAs have a prominent role in this study with regards to the power and influence they have on other actors and institutions, especially on the power relations between states and investors. By granting protection of foreign investments IIAs serves to minimize the associated risks by addressing the 'natural' power imbalance related to being a foreign actor abroad (Tienhaara, 2008). However, the power imbalance has arguably shifted; while IIAs provide investors with privileges and *rights,* states on the other hand have *obligations* (Bonnitcha, Poulsen and Waibel,

2017). As such, states must ensure they behave in a certain manner and follow specific standards in order to fulfill their obligations to the investors. Thus, making IIAs an instrument regulating state behavior, while investors on the other hand receive rights and protection without having to follow any specific requirements. Sornarajah (2003) contends that the creation of obligations in international agreements necessarily implies states limiting their own sovereignty, in order to follow the rules, set out in the agreement and obtain the benefits of imposing such limitations. This is strengthened by the notion that states obligations are enforced through ISDS, while IIAs do not outline any obligations for the investor that can be equally enforced. This exclusive right to protection contributes to imbalance between state and investors, which ultimately may influence the power relations between them (Bonnitcha, Poulsen and Waibel, 2017), and will be further addressed in section 5.2.3.

Another aspect of IIAs relates to the issue of consent to arbitration, again the IIAs contributes to a great power imbalance between state and investor. As will be further discussed in the section below, only investors have the privilege to file for arbitration against the host state, which may be done without the involvement, nor approval by their home state. When receiving the notice of arbitration, the state has by virtue of being part of the IIA in question, given their consent to arbitration in advance, before any disputes has even arisen. While investors on the other hand only consent to arbitration after deciding to initiate arbitration (ibid.). The issue of pre-established consent to arbitration may imply that the IIA reduces states decision-making power when met with claims from investors, leaving them no other choice than accept and go into costly arbitration. In the defense of the investor, may this however be an important enforcement mechanism within the IIAs that ensures that states comply with the IIAs they have signed.

If states find the issue pre-established consent problematic, there is the option for states to 'withdraw' their consent by choosing to terminate or leave the IIA (Bonnitcha, Poulsen and Waibel, 2017). This is however not without its implications. The Rockhopper case illustrates this well, as Italy actually left the ECT in 2016, months before Rockhopper pursued arbitration (Verheecke et al., 2019). The ECT like many other IIAs, contains rules on termination, such as the so-called 'survival clause', which allows investors to file for arbitration even after host state's termination of the agreement, if the investments were made prior termination, typically up to 20 years after termination (Bonnitcha, Poulsen and Waibel, 2017). In a situation like the Rockhopper case, such a clause contributes to weakening the sovereign power of the state, as the decision on temporarily banning oil and gas drilling still could not be taken without

becoming a subject of arbitration. It may therefore be contended that provisions in IIAs contributes to position the agreements above the state, and its decision-making power.

Lastly, there is the power relations between IIAs and other institutions of international environmental protection, such as the Paris Agreement and other environmental conventions, and domestic law. Vatn (2015) contends the importance of emphasizing the possibility that different institutions, may either *compete* or *reinforce* each other. This may have significance for the outcomes, which within this study, is the ability for investors to challenge environmental measures through the ISDS mechanism. As may be seen in some of the ISDS cases examined, is there a notion that these institutions compete and have conflicting objectives. For instance, in the Vattenfall case, the environmental ministry of the municipality of Hamburg referred to the climate warnings in the IPCC report when introducing additional environmental requirements to the Moorburg coal plant (Public Citizen, 2022b). Similarly, with protection of health and environment in mind, Canadian legislators opted for a precautionary approach when they wanted to ban the imports of MMT. Specific reference to the precautionary principle was at the time a part of several domestic laws in Canada. It is a principle enshrined in the Rio Declaration, affirming states right protect the environment in a precautionary manner despite lacking full scientific evidence supporting it will cause environmental harm (Guy, 2004; Chasek and Downie, 2020). The case of Vermilion also makes reference to IEAs. Despite not reaching arbitration, the original proposal of the 'Hulot law' was rooted in addressing the threat of climate change by phasing out fossil fuels and deliver on France's commitments in the Paris Agreement (Verheecke et al., 2019).

In the view of these investors, the efforts to deliver on the commitments in IEAs undermined the commitments in the IIAs, and the examples above show how compliance with domestic law and IEAs not necessarily will excuse a breach of an IIA (Bonnitcha, Poulsen and Waibel 2017). Which ultimately demonstrates how the IIAs in effect may positions itself over domestic law and other international agreements. The difference is however that IIAs are binding agreements with reciprocal obligations and equipped with an enforcement mechanism that may be used, or threatened to be used, as the cases above show (ibid.). While the Paris Agreement for instance, is founded upon 'goodwill' and voluntary commitments with no enforcement mechanism of similar nature (UNFCCC, 2021), meaning that in the event of breach of commitments, states face minimal risk of sanctions.[6] The risk is nevertheless there.

[6] As we have seen in later years, several governments have actually been taken to court in climate lawsuits. These cases revolve around countries lack of commitment to climate action and failure of protecting people from the climate impacts, see the Sabin Center for Climate Change Law (2022) for an overview of cases.

After Vattenfall proceeded with construction of the Moorburg plant, Germany was found guilty of breaching its obligations under the Habitats Directive for granting construction without requiring an appropriate environmental impact assessment to be carried out (Ankersmit, 2017). In sum, IIAs gives investors the means to strengthen their relative power towards the state, as it grants rights and protections to the investor, while formulating obligations for the state. The power IIAs gives the investor may be attributed investors access to ISDS, which will be addressed in the next section.

5.2.2 Power imbalance as a result of privileged access to ISDS

A key factor that characterizes the power relations between investors and states is the investor's contractual right granting access to ISDS. As established in section 2.3, this right may only be enjoyed by investors and not vice versa, an aspect of ISDS often highlighted as a contributor to the inherent asymmetry associated with the mechanism (Bonnitcha, Poulsen and Waibel, 2017; OHCHR, 2015). Some may argue that the existence of ISDS is necessary in order to provide investors protection, as well as a tool for enforcing investment agreements as a whole (Schill, 2016). Critics, on the other hand, argue that the right to file for arbitration may result in adventurous legal suits, and that most investors are privileged enough, making the argument for granting investors right to arbitration unclear (Bonnitcha, Poulsen and Waibel, 2017). The intention here is not to discuss whether ISDS is necessary or not, rather I want to show how the mere existence of the ISDS mechanism in the IIAs covered in this study equip investors with an effective tool to challenge states regulatory capacities, thus strengthening investor's relative position of power in relation to the host state.

Throughout the six ISDS cases examined in this study, is it a reoccurring that while states introduce requirements, regulations or policies, which are in the public interest, investors are using their contractual right to challenge these decisions. For instance, when the City Hamburg, imposed additional environmental restrictions to the Moorburg coal-fired power plant awaiting construction, Vattenfall filed for arbitration under the Energy Charter Treaty in order to challenge this decision. One of the requirements of the 'water use permit' required Vattenfall to reduce the use of cooling water in order to keep the water quality of the Elbe River at an acceptable level. Vattenfall argued that the delayed issuance of the permit was intentional, that the restrictions on water use would reduce the generation capacity of the plant, and most importantly make the project uneconomical (de Carvalho, 2020; Baillat, 2017). The dispute was later discontinued, and Hamburg issued a modified 'water use permit' where the environmental standards were considerably lowered (Baillat, 2017). In a similar manner, Ethyl Corporation

challenged the political decision of Canadian legislators to ban the import of MMT. The ban was argued to be a precautionary measure introduced in order to avert the potential risk and consequences for public health and environment, especially considering the long-term, low-dose impact of exposure to MMT was unknown at the time. Additionally, it was argued that MMT was damaging cars emission control systems, thus increasing the pollution of GHGs, as well as releasing manganese when burned which in higher quantities is harmful to people, plants and animals. At the time, Ethyl was the sole importer of MMT, and argued that the ban would expropriate their investments. As the story goes, Canada ultimately settled with Ethyl and reversed the ban on MMT which still is being used in Canada to this day (Guy, 2004; Tienhaara, 2008).

Both examples above illustrate how the foreign investors, Vattenfall and Ethyl, used their right to seek arbitration under their respective IIA, which gave both the necessary leverage to challenge the political decisions of the City of Hamburg, and Canada. In the case of Vattenfall, Hamburg was clearly using its decision-making power and regulatory capacities to introduce restrictions in order to respond to the environmental concerns relating to the condition of the Elbe River. In the case of Ethyl, Canada in a similar manner used their decision-making power to impose an import ban of MMT in order to respond to the potential risk to health and environment. By using the right to ISDS, both investors had the opportunity to effectively challenge the decision-making power and sovereignty of their host states. As such, the ISDS mechanism serves as a tool which equips the investors with the necessary means to strengthening their own position of power when met with political decisions conflicting with their own interests.

The four other ISDS cases in this study similarly illustrates how the ISDS mechanism gives investors the opportunity to challenge host state decisions and power to determine their own policies. In the case against El Salvador, Pac Rim challenged El Salvador's decision to not grant a mining concession claiming it was a result of the *de facto* ban on metal mining in El Salvador (Schacherer, 2018a), and in the case against Italy, Rockhopper seeks to challenge Italy's decision to not grant them the concession for oil drilling on the planned Ombrina Mare project, due to Italy's temporary ban on oil and gas extraction of its coast ((Eberhardt, Olivet and Steinfort, 2018). In the Clayton/Bilcon case, the claim was founded upon Canada rejecting Clayton/Bilcon's proposed mining project based upon an environmental assessment review that made special emphasis on 'community core values'. Clayton/Bilcon claimed this focus fell outside the scope of such assessments, and was therefore arbitrary (Tienhaara and Barral, 2009). With regards to the case against France, Vermilion did not file for arbitration. Here the mere

access and possibility for Vermilion to proceed with arbitration gave them enough power to challenge the French 'Hulot law' (Verheecke et al., 2019). Despite all cases having different outcomes, the premise that investors have the possibility to use ISDS to challenge the host state give them power to strengthen their position when met with policies and decisions conflicting with their operations.

5.2.3 Arbitrational authority

Critics of ISDS often point to the power residing in the arbitrational process and the authority of arbitrators when it comes to ISDS (Tienhaara, 2017). During the arbitrational process the highest authority may be identified as the arbitral tribunal. This is where the disputing parties bring their claims, where facts and legal arguments are considered, and finally decisions rendered, with binding outcome. The core mandate of the tribunal is to resolve disputes, suggesting that when the ISDS procedure starts, the fate of the dispute lies in the hand of the tribunal and their interpretations (Bonnitcha, Poulsen and Waibel, 2017). As there is little tradition of precedent, the tribunal's decisions do not have to be based on past awards. This has led to much inconsistency across similar cases, suggesting that the perspectives and viewpoints of arbitrators matter for the interpretation of the investment law and outcome of the case. Citing past decisions do nevertheless occur, but it's not mandatory, thus allowing for greater freedom of interpretation for the arbitrators (Tienhaara, 2008). Combined with the notion that the final decision of the tribunal is binding, further suggests that the tribunal maintains a great portion of power over the proceedings, and the parties involved in the dispute, i.e., the state and investor. In addition, it's also within the power of the tribunal to determines and evaluate whether the claims of the investor qualify for arbitration (Bonnitcha, Poulsen and Waibel, 2017), as in the Pac Rim case where the tribunal ruled that Pac Rim did not qualify for protection under CAFTA.

With regards to environment, Tienhaara (2008:ix) argues that elements of environmental governance in practice have been taken over by international arbitral tribunals, by granting them "authority to regulate the regulators". Claiming that when investors file for arbitration, private tribunals are given the right and power to determine whether states regulatory measures and power to make decisions on internal matters breaches their obligations towards investors (ibid.). Combined with the lack of precedent of the rulings of tribunals addressed above, the role tribunals play in the case of a dispute arising may in practice make state legislators uncertain what the consequence of their regulations might have for foreign investors operating in their country (Van Harten, 2007 in Tienhaara, 2008), thus supporting the claim that they may regulate the actual regulators, however, in my view unintentionally considering they are no international

authority with no right to regulate or challenge sovereign states. With this being said, my selection of cases nevertheless suggests that while investors have the privilege to file for arbitration, and as such give authority and power to three arbitrators to determine the outcome, states may opt to 'challenge' this authority by initiating negotiations for settlement (ibid.). This, however, maintains that the investor agrees to settle. In the Ethyl and Vattenfall cases, both parties decided to settle rather than proceed with a costly arbitration, as the risk of losing and have to pay a high monetary award was taken into account by both Canada and Germany. Despite this observation of the two cases above, the tribunal still enjoys the most power during proceedings, based on the jurisdictional power granted in cases that reach a conclusion by the tribunal, such as the Pac Rim and Clayton/Bilcon cases.

5.2.4 Civil society's influential power on political actors

Civil society has been a prominent actor in this study. The following text presents the role civil society has had in each of the ISDS cases respectively, illustrating the influence and power civil society have within the ISDS governance structure, but more specifically on the public agenda, legislators and political actors.

In the Vattenfall case the dispute was a result of public opposition, largely from local communities and NGOs, against the construction of the Moorburg coal-fired power plant due to its impact on future carbon emissions and water pollution of the Elbe River (Public Citizen, 2022b). The opposition may be seen as a response of the fourth IPCC-report in 2007, which fueled civil society's growing concern for climate change, and gave rise to voiced criticism towards energy production from coal. The concerns were heard and addressed by the local authorities responsible for the handling of the plant, which in response delayed the issuance of the plants environmental permits, awaiting further environmental impact studies of the plant (Romanin Jacur, 2015; Baillat, 2017).

Regarding the Ethyl case, the use of MMT in gasoline sparked public debate due to its potential threats to health and environment (Tienhaara, 2008). The concerns originated from the scientific health community, warning against the potential health consequences of inhaling MMT, which soon entered the public debate and Canadian politicians (McKinsey, 1998; Guy, 2004). In this case the role of the scientific community was an important factor for putting the MMT-debate on the public agenda (Guy 2004), which Ethyl argued was harming its reputation and public image, as well as the goodwill associated with the company (Tienhaara, 2008). This stresses the threat Ethyl saw in the public debate as it affected the public's view and perception of MMT.

In the El Salvador civil society was elemental to the widespread public opposition against the Pac Rim mining company (Schacherer, 2018a). It must however be seen in the context of decades long opposition against mining in El Salvador resulting in a *de facto* ban on metal mining, which brought together local communities, civic organizations, environmental groups, public sector organizations, and the Catholic Church into a "powerful expression of national 'community' interests against mining" (Lander et al., 2021:140). The opposition against Pac Rim ultimately gained governemntal support which led the El Salvadorian government to refuse granting Pac Rim the mining concession and later banning metal mining all together in 2017 (Schacherer, 2018a).

In Italy, local resistance against the oil drilling in Ombrina Mare, is a defining factor in the Rockhopper case. For several years there has been strong local opposition and effective mobilization against oil drilling in the Abruzzo region. When it became known in 2008 that new exploration plans were underway, local resistance remobilized and organized several protests and demonstrations mobilizing citizens from a broad array of civil society actors in the following years (Verheecke et al., 2019). The campaign against oil drilling gained support from local municipalities and was later successful in campaigning the regional council which unanimously issued a resolution against the Ombrina Mare project. Civil society was in addition continuously pressuring the Italian government and parliament and collected signatures for establishing a National Park as a replacement. The issuance of a governmental decree in 2014, which sought to limit local communities and regions possibilities to oppose extractive projects, accelerated the local resistance to the national level, as civil society across Italy connected their local struggles. In the months that followed, civil society organized several protests and actions which culminated in a demonstration mobilizing up to 60,000 activists, while continuously pressuring politicians and the government (Cernison, 2016. In December 2015 the campaign proved successful. The Italian Parliament accepted several of the proposed modifications of the campaigners and temporarily banned oil and gas projects within 12 nautical miles from the coast, thus obstructing the Ombrina Mare project of Rockhopper (Verheecke et al., 2019).

As these examples show, civil society has played an important role in various ways and four main aspects of its role may be identified; First, and most importantly, it may be observed that civil society is fundamental for *voicing and lifting community concerns* regarding pollution and contamination whether it has already occurred as in the Pac Rim case, is anticipated as in the Rockhopper, Vattenfall and Clayton/Bilcon cases, or perceived as a potential risk not yet identified, as in the Ethyl case. Second, civil society has been crucial for *organizing opposition* in several of the cases, whether they are specifically targeting an investor's project or targeting

a production practice. Public opposition was for instance very important in the Rockhopper, Pac Rim and Vattenfall case. As well as in the Clayton/Bilcon case, where the local communities opposition to the mining project was given special emphasis in the environmental assessment report. Third, in some of the cases civil society been important to *pressure* states directly through means of advocacy and activism. This was especially apparent in the Rockhopper and Pac Rim case. Lastly, civil society has had a *supportive* role towards states, by showing support and encouraging their governments to introduce bans, as in the Rockhopper, Ethyl and Pac Rim case, impose stricter environmental requirements, as in the Vattenfall case, and support the drafting of new laws, as in the Vermilion case. As such, civil society actors have contributed to influence political actors with decision-making power to introduce environmental policies or measures that are in the public interest. This demonstrates the indirect power civil society has within the ISDS governance structure, and that it has a significant role prior to ISDS disputes by contributing to the dispute to emerge in the first place. These findings do however not mean that the states wouldn't regulate in the absence of civil society pressure, only that civil society does have a prominent role in pushing states to regulate and impose policies which are in the public interest, which subsequently has led foreign investors to challenge these policies. Drawing upon the understanding of the role of civil society in the EGS framework, this correlates with the notion that political actors in various ways must answer to civil society demands in order to legitimate themselves.

On the other hand, common to all of the cases is that civil society have minimal power and influence when it comes to the actual case proceedings, which the Pac Rim case illustrates well. When El Salvador denied Pac Rim its mining concession, it was amongst others, supported by the Center for International Environmental Law (CIEL), local communities and several organizations. Together they submitted an amicus curiae[7] to the arbitral tribunal, highlighting the importance of community participation for sustainable development and the right to participation in decisions affecting them. Through the amicus curiae they wanted to bring the perspectives of local communities to the arbitration process, so that the tribunal would take into account the social and environmental risks associated to Pac Rims mining activities. The request was however dismissed by the Pac Rim tribunal, who contended that community participation was not necessary to address the arguments from civil society (Schacherer, 2018a).

[7] Amicus curiae is Latin for 'friend of the court' and refers to someone that is not a party to the dispute, but one that assist the court by contributing with additional information and facts which may support one of the parties in the dispute (Thomson Reuters, 2022).

This example demonstrates how the voices from civil society, on issues of high relevance to them, face difficulties in being heard by the arbitrational tribunals. As far as I have found, no similar attempt was made in the other cases, which implies that I cannot disregard that civil society tried to gain access in the other cases. Nevertheless, the Pac Rim case may suggest that civil society have little power in the dispute process itself. This may be attributed to the fact that in investment arbitration, the tribunals are set to solemnly consider and decide whether there has been a breach of contract based on the principles in the IIA. Other considerations, such as governance implications, or that the cause of the dispute relates to social and environmental consequences, is thus of little importance (Bonnitcha, Poulsen and Waibel, 2017). Arguably, civil society has little relevance with respect to what the cases may tell us with regards to how ISDS influence countries' efforts to form environmental policies. This it true to a large extent, but the role of civil society is too important and fundamental in the context of environmental policymaking to be disregarded or claimed to have no relevance, considering the role of civil society has been an important factor contributing to ISDS in the first place.

5.3 Forming environmental policies in the context of ISDS arbitration

This section presents the main findings from the selected ISDS cases, by highlighting key aspects that may contribute to address RQ 2a regarding how ISDS may influence countries' efforts to form environmental policies.

5.3.1 States' conflict of obligations – investors vs. the environment

The perception that IIAs leads to economic growth and development, which is in the interest of most states, is arguably a significant factor as to why IIAs are so prominent today. In return for foreign investors entering their jurisdiction, states must meet the obligations of IIAs. This may be unproblematic if states are able to balance these obligations with their obligations towards the public, such as ensuring a healthy and living environment. As we may observe in the six cases, states meet this obligation by introducing environmental requirements, imposing bans, drafting laws or by following recommendations. Either as a precautionary measure, or as a result of observed environmental damage. Additionally, it may be observed that state is addressing civil society concerns and demands, by taking into account their viewpoints. However, while meeting their obligations towards the public, states are simultaneously breaching their obligations towards their foreign investors, causing what I have termed a 'conflict of obligations'. This also entails a conflict of commitments and interests, as we must

assume that states are interested in and committed to ensure that the quality of the environment is at an acceptable level.

Examples from the Vattenfall case may illustrate this point. By imposing additional environmental requirements to Vattenfall's coal-fired power plant, the City of Hamburg sought to address the concerns for water quality in the Elbe River and meet their obligation towards the public of ensuring a healthy and stable environment. In the view of Vattenfall, this would violate Germany's obligations towards Vattenfall, mounting to indirect expropriation and violation of their right to fair and equitable treatment. These accusations may have put Germany at a crossroad, as refusing to comply with their obligations outlined in their IIAs would potentially question Germany's commitment to the investment regime. As the case developed, the parties settled the dispute. Vattenfall dropped the arbitration while Germany lowered the environmental requirements, and construction of the plant soon began (Bonnitcha, Poulsen and Waibel 2017). Not long after another conflict of obligations emerged for Germany, which was found guilty of breaching its obligations under the Habitats Directive. Germany was accused for not appropriately conducting an environmental impact assessment prior to approving the construction of the plant, as required under article 6 of the directive, considering it was to be constructed close to the Natura 2000 site[8]. For instance, it was alleged that the "assessment had incompletely and incorrectly determined the effects of the Moorburg plant on the Nature 2000 areas situated upstream" (Ankersmit, 2017:para 4).

5.3.2 If negatively affected, investors will likely challenge environmental policies

As the cases suggests, investors risk being negatively affected by states policies, especially in the wake of increased civil society opposition against projects with potential environmental consequences (Tienhaara, 2008). A key finding throughout the selected ISDS cases suggests that investors will attempt to challenge states environmental policies if they find them to be in conflict or negatively affect their investments. As elaborated in the sections above, this must be regarded as a legitimate right of the investors, enshrined in the IIAs between the home state of the investor and the host state where the investment takes place. A simplified explanation of the case proceedings may illustrate this point; throughout the cases it may be argued that a more or less similar path to arbitration unfolds. First, we may observe that opposition, support or concern is being voiced by the public and civil society, against the specific project of the investor as in the Clayton/Bilcon, Vattenfall and Pac Rim case, or against specific sectors and

[8] The Natura 2000 site is Europe's network of areas protecting vulnerable habitats and species (European Commission website, 2022).

products as in the Rockhopper, Vermilion and Ethyl case. Second, as a way of responding to this, states introduce environmental policies varying from bans, to imposing environmental requirements, to rejection of project proposals or issuance of concessions. Lastly, as a result, international investors resort to ISDS, challenging policies they see as a breach of the host states' obligations and failure of meeting the investors' expectations.

In the situation prior to arbitration, Tienhaara (2008) maintains that investors are faced with three possible strategies. They can either 1) accept the environmental policy by adapting or follow the requirements outlined, as well as accepting the associated costs; 2) relocate their activities to another jurisdictions where such policies are not in place; or 3) challenge the policies through lobbying the state or proceed to arbitration, which is the strategy chosen by the investors in all of the six ISDS cases examined. An interesting question concerns why the investors choses the third strategy, rather than accepting them or simply leaving the jurisdiction. The case literature analyzed reveal little about the investors underlying intentions, but Tienhaara (2008) proposes some interesting perspectives that may explain why investors chose the strategy of challenging the host state through lobbying efforts or arbitration. The first perspective suggests they may seek arbitration due to the large amount of 'sunk costs' in their investment, which entails they cannot leave without suffering significant financial losses. The Vermilion case may arguably exemplify this, as the proposed 'Hulot law' threatened Vermilions oil and gas investments on all French territories, who at the time operated 26 extraction sites that produced almost 75% of all French oil and gas (Verheecke et al., 2019). In this case, Vermilion chose the third strategy, by lobbying the French state and threatening with arbitration, which ultimately was successful. Considering the threat materialized and the 'Hulot law' scaled down.

Changing or reversing a policy is central to the second perspective proposed by Tienhaara (2008), which may contribute to explain investors' intentions with arbitration. In addition to the Vermilion case, changing or reversing the policy may be the issue in both the Ethyl and Vattenfall cases, considering both cases led to settlement with conditions for the state. In the Vattenfall case the environmental conditions in the water permit were rolled back, allowing the construction coal-fired power plant to begin (Public Citizen, 2022b), and in the Ethyl case the ban on MMT import was revoked and the use of MMT could continue (Guy, 2004). The outcome in the three cases above was that it led to a change in the host states' policies, reflecting lobbying aspect of the third strategy mentioned above. It must however be noted that this outcome would unlikely occur if the cases were decided by the tribunal, as tribunals rarely award restitution of the policies that caused the dispute (Tienhaara, 2008).

The third perspective suggests that investors may chose arbitration as means to recoup as much sunken costs from the investment as possible. Arguably, this pertains all six cases, but it's specifically emphasized in the Rockhopper case where a central aspect of the claim concerns compensation of future lost profits resulting from Italy's temporary ban on oil and gas drilling in the Adriatic Sea. In a comment Rockhopper's CEO said they had "strong prospects of recovering very significant monetary damages […] on the basis of lost profits", which according to them mount up to US$350 million (Verheecke et al., 2019:57). Interestingly, Rockhopper receives financial support from a third-party litigation funder, who pays the legal fees in return for a share of the financial award, meaning that the dispute in practice is not costing Rockhopper anything (Eberhardt, Olivet and Steinfort, 2018.). In addition, it must be noted that Rockhopper acquired the Ombrina Mare license only a year before the ban was introduced, at a time when public and political opposition to oil drilling was monumental. Coupled with the fact that the project lacked several approvals at the time makes it tempting to speculate whether Rockhopper bought the license in order to pursue arbitration. This highly speculative claim cannot be supported in my findings, but it's nevertheless worth mentioning as it could be seen as a strategy for recouping as much sunken costs as possible (Verheecke et al., 2019).

The compensation demanded in the Rockhopper case brings me to a central aspect of arbitration, namely the potential costs host states must bear when faced with investors challenging their environmental policies. The ISDS claims forwarded by the investors are typically accompanied with a demand of monetary compensation. Table 2 below outlines the compensation demanded with regards to the ISDS cases in this study.

Table 2: Overview over compensation demanded and awarded

Case	Compensation demanded	Compensation awarded
Vattenfall I v. Germany	US$ 1.4 billion	Arbitration costs split
Ethyl v. Canada	US$ 251 million	US$ 13 million (to investor)
Clayton/Bilcon c. Canada	US$ 300 million	US$ 7 million (to investor)
Pac Rim v. El Salvador	US$ 315 million	US$ 8 million (to state)
Rockhopper v. Italy	US$ 350 million	Case pending
Vermillion v. France	Amount not demanded	No arbitration proceedings

The high monetary amount demanded in compensation illustrates what some has suggests are frivolous claims from investors (Vaaranma, 2021). The standout case is without doubt the Vattenfall case, where Vattenfall claimed that the environmental restrictions on the power plant would mount to preliminary loss and damages of US$ 1.4 billion (de Carvalho, 2020). This case was however settled outside the tribunal, and the final amount Germany paid Vattenfall has not been disclosed. In comparison to the Vattenfall case, the other claims may seem less intimidating. They are nevertheless significant demands as well, with the potential to put much pressure on states' budgets.

Bonnitcha, Poulsen and Waibel (2017:17) suggest that while compensation may be costly, "compelling a state to comply with investment treaty obligations is arguably a more intrusive remedy than ordering it to pay compensation", as the award itself does not directly shrink states regulatory power or sovereignty. Furthermore, the Ethyl, Clayton/Bilcon and Pac Rim cases show that the final monetary award is significantly lower than the initial demand. This suggests that, although investors aim high, they are paid much less than initially demanded (Tienhaara 2008). Arguably, aggravated demands from investors may serve as a tool for 'scaring' host states by proclaiming the financial risk at stake, i.e., regulatory chill which will be addressed in the section 5.3.6, or it may serve as a way for investors to achieve the highest award possible by setting the bar high, as suggested in section above.

5.3.3 Tribunals' decisions put minimal emphasis on environmental arguments

That decisions of tribunals put little emphasis on states environmental justifications or arguments is another issue relevant for the later discussion, considering such justifications are legitimate in the context of states obligations to safeguard the wellbeing of the environment. According to Tienhaara (2008) tribunals will unlikely accept the reason a state introduces an environmental measure, rather it will assess its legitimacy, often based on scientific proof, which suggests that regulating based on the principle of precaution is 'illegitimate'. On the other hand, it may be argued that the tribunal's mandate is only to evaluate whether there has been a breach or not, not to evaluate the legitimacy of the breach (Bonnitcha, Poulsen and Waibel, 2017). The Pac Rim and Clayton/Bilcon cases may illustrate this point.

In the Pac Rim case the d*e facto* ban on mining was introduced partly in response to the pollution that already had severely affected areas nearby mining sites, and more specifically contaminated rivers and El Salvador's water supply, and partly due to concerns for how future mining activities would exacerbate these conditions. The ban put all approval procedures on hold, and once it came into effect Pac Rim filed for arbitration (Lander et al. 2021). Despite

massive focus on environmental risks related to mining, which even was observable in El Salvador, environmental arguments seemed to be of little significance to the tribunal. The proceedings and final award put in fact no emphasis on this. Rather, the tribunal ruled that Pac Rim had failed to acquire permission from local landowners and therefore could not legally operate the mine. The result was reached purely based on technical grounds pertaining to Pac Rims interpretation of the El Salvadorian mining law.

The Canadian government similarly denied Clayton/Bilcon approval for their mining project, despite the permit was acquired. The decision was based on recommendations from an expert review panel who argued for rejecting the project, emphasizing the incompatibility and threat of local communities' core values, sense of place and self-reliance, local environment and marine wildlife (Public Citizen, 2022a; Tienhaara and Barral, 2009). Despite legitimate environmental justifications outlined in the review, the tribunal focused on the proceedings of the review, which was considered to fundamentally depart from the standard of the environmental assessment, and thus breached Canada's environmental law (Parlett and Ewad, 2017). The majority of the tribunal thus ruled that local communities' core values was given too much weight and that it failed to determine the viability of the project by accounting for the effect mitigation could have (Davis, 2015). As such, the tribunal significantly disregarded the relevance and legality of local concerns about the risks Bilcon's mine would have on the local environment and livelihoods, when determining the case (Sachs, Johnson and Merrill, 2020). Again, technical and juridical considerations was given considerable thought, ultimately determining the case, not the environmental justifications and arguments outlined in the assessment. It would therefore be interesting to speculate whether the outcome could have been different if the environmental law had not been breached as Clayton/Bilcon claimed it was, and whether the environmental arguments in the assessment would be regarded as legitimate by the tribunal.

5.3.4 Examples of a chilling effect in the cases

Incidents of regulatory chill has been observed in all cases examined, which suggests that states, out of fear of arbitration, will fail to regulate in the public interest and that it may negatively affect states power to adopt legitimate political measures (Bonnitcha, Poulsen and Waibel, 2017; Tienhaara, 2018). The examples presented below suggests that the chilling effect of ISDS on states regulatory capacities and power comes in various forms. In some cases, the chilling effect is very obvious, while in others more subtle. It is nevertheless important as it influences the development of the cases, and most notably their outcome.

In the Vermilion case, Friends of the Earth France was able uncover, and for the first time highlight the pressure and massive lobbying efforts that the French government had been subject to by Vermilion. They found that Vermilion explicitly referred to the ECT, claiming the law would breach France's commitments, and their "legitimate expectation of having its concessions and permits regularly renewed" (Vaudano, 2018:para 6). The Vermilion case depicts a clear example of threat chill, as described in section 3.3, especially considering the 'Hulot law' was an effort to meet France's environmental commitments and contribute to energy transition, thus being in the public interest. The fear of costly arbitration may be seen as successful considering France instead completely changed the 'Hulot law', by drastically weakening the law, to meet the expectations of Vermilion. In return, Vermilion dropped its threats against France (Verheecke et al. 2019). It can however not be concluded as proven that the threat of arbitration led to the watering down of the 'Hulot law', as it is unlikely that the French government would admit that this was the cause, which would ultimately question why France still is a signatory to the ECT.

The presence of regulatory chill may also be attributed the Vattenfall and Ethyl cases, which to some extent follows the same path. In contrast to the Vermilion case, both Ethyl and Vattenfall actually did file for arbitration as a result of Canada and Germany introducing environmental policies they saw as breaches of their investor rights. As the cases developed, both investors reached settlement with their host states outside the tribunal. It may be hypothesized that both states opted for settlement in order to have the possibility to influence the outcome of the settlement rather than proceeding with arbitration and risk having the tribunal decide the financial award. In the Vattenfall case the environmental requirements were lowered in return for Vattenfall dropping the case (de Carvalho, 2020; Guy, 2004). In the Ethyl case, I have found that Canada may have opted for settlement because it was thought that Canada would lose the arbitration, considering it recently lost in a domestic case where the MMT ban was challenged (Tienhaara, 2008). Additionally, it has been speculated that Canada settled due to concerns for the amounts already spent on the case, and the possibility of having to compensate Ethyl a much higher amount than in the settlement. Canada paid Ethyl US$ 13 million and issued a statement saying that MMT was not harmful, neither for health nor environment (Tienhaara 2008; Van Harten, 2015). Both these examples suggest that Canadas and Germany's regulatory sovereignty was successfully challenged, and that regulatory chill did occur as both states failed to regulate in the public interest. It may also be observed here that the financial aspect of arbitration may have had a significant role leading to the settlement, again suggesting that a threat chill may have occurred. Additionally, it has been argued that the

Ethyl case set a precedent in Canada due to the settlement, which in itself may be regarded as a chilling effect of the case (Mann, 2001).

The Pac Rim case displays a more subtle form of regulatory chill than shown in the examples above, but it is nevertheless a significant example that must be addressed, as it may have impactions for the need for environmental policies to be timely and effective. As soon as the d*e facto* ban on mining came into effect, Pac Rim filed for arbitration, and introduced a new source of conflict for the El Salvadorian government, especially considering that the *de facto* ban sought to end the violence and conflict relating to metal mining and its consequences. Over the next years civil society increasingly pressured the government to strengthen the ban further by prohibiting mining all together, while simultaneously being constrained by the ISDS proceedings against Pac Rim, fearing that a prohibition would strengthen Pac Rims case. In the end, Pac Rim lost the arbitration in 2016, and only a couple months later El Salvador passed the law banning mining all together and became the first country to do so. Interestingly, a few years earlier, El Salvador had passed a policy that was less than a ban but which in effect would paralyze mining to a large extent (Lander et al., 2021). This may suggest that El Salvador for a long time was in fact supporting a total ban on mining but was constrained to introduce the ban by the ongoing ISDS case with Pac Rim. Instead, El Salvador had to wait for the case to be concluded before introducing the preferred policy. The risk of losing the dispute against Pac Rim could imply that other mining companies would seek arbitration in the same manner, suggesting that putting the 2017 mining ban on hold was the most reasonable approach (Lander et al., 2021). The Pac Rim case ultimately shows how the ISDS proceedings had a chilling effect on El Salvador's regulatory capacities, which may have postponed the implementation of the mining ban.

Regarding the Rockhopper case, it cannot be determined that regulatory chill is taking place as too little information on the actual case proceedings is publicly known. However, drawing upon insights from the other cases and revisiting the objective of ISDS, it may be suggested that Rockhopper is suing Italy in order to push the Italian government to lift the temporary ban on oil exploration. The ban will be in place until the Italian government finalizes 'the Plan' which will determine where suitable sites for oil extraction will be located, suggesting that all permits incompatible with 'the Plan' will be revoked (Di Bella, 2019). The threat of costly arbitration can for instance be taken into account when evaluating 'the Plan', and a possible scenario may be that Italy feels pressured to put Rockhopper's project within the designated areas of 'the Plan', thus having a chilling effect. Additionally, as the Rockhopper example in the section above suggests, the costs of arbitration are of little concern considering

their legal costs are receiving third-party funding. A plausible, but also highly speculative scenario may suggest that Rockhopper will have the finances to let the case go on for years, thus leading Italy to opt for settlement and pay Rockhopper compensation for revoking their license, rather than continue the proceedings. This argument may support the hypothesis that Rockhopper may simply be interested in recouping as much money as possible, especially considering Rockhopper bought the previous Ombrina Mare license holder just before the ban was introduced, as described in section 5.3.1, and use the strategy of threat by exploiting the chilling effect that ISDS may have on states regulatory capacities (Verheecke et al., 2019).

With regards to the Clayton/Bilcon case, a significant detail was that despite being decided in favor of the investor, it had a strongly dissenting arbitrator. The majority (two thirds) of the tribunal argued that the environmental assessment was conducted without 'due process' and that the "procedures imposed on Bilcon constituted a level of treatment less favorable than other investors in 'like circumstances'" (Behn and Letourneau-Tremblay, 2015:para 6). The dissenting arbitrator on the other hand argued that the Canadas handling of the environmental assessment and its recommendation was not arbitrary (ibid.). The dispute reignited the debate of regulatory chill in Canada, as it in practice opened up for investors to challenge decisions based on environmental review panels (Davis, 2015). Considering the review panel emphasized 'community core values', the dissenting arbitrator argued that the decision would risk chilling future environmental review processes from focusing on the impacts to the human environment as this focus potentially could result in arbitration. McRae further argued that the decision could risk making "failure to comply with Canadian law by a review panel […] the basis for a NAFTA claim" and that this mounted to an intrusion into domestic jurisdiction through ISDS, thus having a chilling effect (Behn and Letourneau-Tremblay, 2015).

6 Possible impacts for the achievement of International Environmental Agreements

On the question of what the possible impacts of the ISDS mechanism for achieving IEAs may be, my findings cannot say anything with certainty, as this would require a lager study. However, the findings presented in chapter five nevertheless points to that the ISDS mechanism does have some impact for the achievement of IEAs, and they give reason to discuss whether ISDS may affect the achievement of these negatively. These aspects will be further discussed in this chapter, which addresses RQ 2b.

6.1 'Pay the polluter' and 'socializing costs'

Two issues have become evident throughout this research and has been specifically pointed out in some of the literature in the sample for this study. The first issue is that the 'polluter pays principle' has been reversed to *'pay the polluter'*, which has been proposed by Tienhaara (2008) and Mann (2001) in their examination of the Ethyl case. The 'polluter pays principle' is a widely accepted environmental principle which maintains that those responsible for causing pollution should also bear the cost of preventing it from damaging health or environment through internalizing these costs by complying with environmental measures and policies, or so that it reflects the negative externalities of the business activities (Tomoko, 2015). The second relates to the issue of *'socializing costs'* or 'cost shifting', which has been particularly discussed by Holland (2015) with regards to the Pac Rim case. Socializing costs and cost shifting suggests that while investors and shareholders profit from their investment, a portion of the costs or side effects is shifted to the public. These costs may for instance relate to negative externalities to health and environment, or other losses and failures which ultimately shifts to the public (Vatn, 2015). Although only specifically addressed in these two cases, my argument is that they may be regarded to pertain all of the cases and may be understood as one of the possible impacts of the ISDS mechanism on the achievement of IEAs, as the discussion below suggests.

The notion of paying the polluter is descriptive for those cases with a final outcome, namely in the Vattenfall, Ethyl, Clayton/Bilcon and Pac Rim cases, which illustrates how host states ultimately were forced to pay the price for environmental pollution. In the Vattenfall case, rolling back environmental restrictions and allowing the construction of the coal plant suggests that the public had to bear the environmental consequences imposed on the Elbe River, as well as suffer from air pollution from burning of coal, which also imposes externalities for future generations. Similarly in the Ethyl case, Canada had to revoke the ban on MMT which originally was introduced as a precautionary measure for potential long-term consequences. As

a result, the Canadian public had, and still have to bear the social and environmental cost of being continuously exposed to the harmful MMT. While Vattenfall wasn't paid any monetary compensation in the settlement, Canada certainly was, perfectly illustrating how the polluter was paid by the public and allowed to continuously to pollute. On the other hand, in both these cases it can be argued that the investors rightfully should be compensated for the host states environmental policies, if it means that the investment activities no longer could be viable. However, this cannot be said to be the case here, as both investors were not constrained by the host states' policies and were still allowed to pollute and continue with business as usual after the settlement.

The Pac Rim and Clayton/Bilcon cases represents two cases where final compensation was awarded. Although having diverging outcomes, it may still be argued that the polluter was paid, and that costs were socialized. In the Pac Rim case El Salvador was awarded US$ 8 million, with the intention of covering El Salvador's juridical costs. Although an important win for El Salvador, it must be noted that it only covered two thirds of what had been spent on legal fees during the proceedings. Suggesting that the public suffers financially while disputes are ongoing, and that costs are shifted to the public in order for states to defend themselves. In the Clayton/Bilcon case the tribunal ruled Canada to pay US$ 7 million in compensation for not allowing Clayton/Bilcon to open the quarry mine, which may be viewed as fair in the perspective of the investor. However, the whole premise of the reward is founded upon paying Clayton/Bilcon not to pollute, and to safeguarding the precautionary principle of the potential externalities of the mine, thus mounting to an example of 'pay the polluter' in order to stop them from polluting. Additionally, following the logic of cost shifting, it may be contended that Clayton/Bilcon's failure of obtaining the approval of the mine simply shifted to the public as taxpayer's money after all financed the award, making society financially responsible for Clayton/Bilcon's losses.

The question of what this may entail for the achievement of IEAs is not clear cut. My study cannot say whether the cost of arbitration and the potential for states having to pay the polluters proves that states will be more reluctant or not to implement environmental policies, as the regulatory chill hypothesis suggests, due to the difficulties of measuring states 'inaction' in practice. It may nevertheless be argued that introducing environmental policies does have the potential to become very costly, as future investors most likely will seek to challenge or claim compensation for environmental policies they see as arbitrary to their investor rights. As stated above, taxpayer's money does after all finances states part of the dispute, thus, the costs of the arbitration proceeding, award or compensation will be the responsibility of the public. The

financial effect of investor's rights to challenge state policies is therefore in practice socializing costs by shifting the financial burden on to the public. A potential consequence of this is that arbitration, and the potential for future arbitration, may significantly raise the actual costs of implementing environmental policies or measures. This is in itself financially burdensome for states, as new technology and instruments necessary for the climate and environmental transition is costly. Faced with the potential of total costs drastically exceeding budgets, state's responses to ISDS may potentially be influenced by this, as seen in the settlement cases of Ethyl and Vattenfall. As such, the arbitration proceedings had a chilling effect on the respondent states, which in turn negatively affected Canada and Germany's proposed environmental measures. This may strengthen the argument that arbitration costs may shape respondent states' ability and willingness to introduce similar policies and measures in the future. This may also be the case for other non-party states as the cross-border chill hypothesis suggests, which may in the long run negatively affect also their prospects of achieving IEAs.

Another potential issue of raising the actual costs of environmental polices is that such policies will have to 'compete' for finances or pressurize state's budgets, if the potential for future ISDS claims are calculated into the expected costs. This may suggest that finances allocated for adopting environmental policies additionally has to be spent on defending these in the case of arbitration. Again, the overall cost of action is socially shifted as the total price for environmental transformation may have to take into account potential arbitration costs. This may ultimately entail that the adoption of environmental policies, measures or regulations will come into force at a much slower pace or be less effective than intended, which potentially may affect state's prospects of achieving IEAs as their environmental goals and commitments may be reached later, rather than sooner.

6.2 ISDS may challenge states right to regulate

The objective of IIAs to protect foreign investors and to minimize the risk investors take when investing abroad has been emphasized at multiple occasions throughout this study. By signing IIAs states may proclaim a safe investment environment and appear attractive to foreign investors. However, as shown in section 5.2 the imbalance between investor's rights and states obligations in IIAs has influenced the power dynamics to the benefit of private investors. While investors may experience that the risk of investing is reduced, it may be argued that this risk has significantly shifted to host states due to the one-sidedness of ISDS, and it may seem like the responsibility of upholding the agreement disproportionally lies in the hand of the state. Thus, for as long as states are subject to IIAs with ISDS provisions the risk of arbitration will

always exist, and as the six ISDS cases examined has shown, it's when states exercise their regulatory powers that investors invoke the ISDS provision if seen as breach of their rights.

States right to regulate in the public interest, must be understood as a customary right of sovereign states, as they have policing powers and is the highest authority (Martinkute and Ugale, 2021). No investment institution categorically rejects states right to regulate, such as for the protection of environment. In matter of fact, IIAs often explicitly confirms this right (Tienhaara, 2008). This is nevertheless what seems to happen in practice through the strong protective powers IIA provide to investors, to the extent that they have the power to challenge and even influence states domestic regulations, as the ISDS cases in this study has shown. It may be argued, as Sornarajah (2003:205) suggests, that "the creation of treaty obligations necessarily involves the surrender of sovereignty", and in the case of IIAs states voluntarily limit their sovereignty by submitting to the obligations outlined in the treaty, as customary in international law. On the other hand, it may be argued that states knowingly have signed up for this, as it is states themselves who sign IIAs, not the other actors within the ISDS governance structure.

The surrender of sovereignty may arguably be viewed as the 'price to pay' in order for states to attract capital and investments they depend on in order to develop and provide services to the public. However, Sornarajah (2003) argues that the rights granted investors in IIAs are more erosive of states sovereignty than other international agreements, due to the fact that investments only can take place within the borders of a host state. Thus, states right to regulate investments in the name of the public or as a response to public demands, naturally becomes an aspect of state sovereignty. As this study has shown, the introduction of policies addressing environmental protection or health concerns that interferes with investor's interests or expectations may be challenged with ISDS, thus manifesting the relinquishment of states sovereignty. This in itself is a major concern for achieving IEAs as its absolutely necessary that states continuously introduces and changes policies, which can only occur by states exercising their policing powers and right to regulate.

However, it's not so that states are not exercising their right to regulate, considering this is what leads to arbitration in the first place. But the risk or threat of costly arbitration may refrain states from adopting effective environmental policies, as seen in the Vermilion, Vattenfall and Ethyl cases, and may consequently chill states willingness to adopt similar policies in the future, as in line with the regulatory chill hypothesis. Additionally, as seen in the Pac Rim case, a substantial risk factor lies in the uncertainty of the outcomes of arbitration. This uncertainty led El Salvador to wait for the case to be decided by the tribunal before properly

implementing the mining ban, thus chilling El Salvador's regulatory power during the eight years the proceedings lasted. The uncertainty of outcomes may thus contribute to challenge states regulatory capacities, and their right to regulate in the public interest and in the name of environmental protection.

A significant issue ISDS proceedings raise regarding states right to regulate is the power of the tribunal, termed 'arbitrational authority' in section 5.2.3. Arguably, a significant portion of the power during arbitration lies in the hand of the tribunal, who is given the right to evaluate and determine the outcome of disputes. In doing so, the tribunal takes the role of evaluating the justifications and legitimacy of states environmental policies and regulatory powers, by in practice deciding how, when and whether a state rightfully may exercise this right. Considering arbitrators main foci is to evaluate based on the provisions in the IIA, through the lens of investment law and by commercial investment arbitrators, the power granted tribunals may compromise states policing powers and sovereign right to regulate. As a result, the policy causing the dispute is often evaluated based on whether it is 'least inconsistent' with the investors IIA rights. As shown in section 5.3.3 environmental justifications and reasoning, or the simple fact that the policies are in the public interest, seems to be of minimal importance to tribunals, as particularly seen in the Clayton/Bilcon case. Tienhaara (2008) also maintains that tribunals often evaluate whether there exists enough scientific evidence to support the regulations introduced by the state, despite having no relevant training in the field of the environment. Arguably, this also interferes with the precautionary principle much environmental regulation is founded upon, which is necessary for the regulations needed to achieve environmental commitments (Chasek and Downie, 2020).

Having arbitration tribunals determining the legitimacy of environmental policies and regulations, through the lens of IIAs, may suggest that ISDS serves as a forum that challenges states right to regulate. This may arguably be so considering the decisions of tribunals, and the uncertainty related to their decisions, have a chilling effect on states regulatory capacities and willingness to adopt similar or stricter environmental policies, which in turn may affect state's ability to achieve IEAs. On the other hand, it must be noted that the main remedy of ISDS is monetary compensation and that it's very unlikely that a tribunal's award will maintain that the state must revoke or adjust the policy. As such, it may be argued that tribunals cannot challenge states regulatory capacities, at least not in theory. This position, however, disregards the monetary aspect of arbitration, which greatly contributes to the overall chilling effect of ISDS, and it may be argued that this aspect to a large extent influences the decisions of the host states in the ISDS cases of this study. Consequently, this may shrink the policy space for states and

regulators. The risk of arbitration as a result of policies that bear the possibility of negatively affecting international investors may refrain states from adopting the policies in the first place or have them pursue a less effective measure. These aspects of ISDS may consequently contribute to take states off course in their pursuit to achieve IEAs, and as a result fail to promptly avert the irreversible effects climate and environmental change may have on people and the planet.

7 Conclusions

The main objectives of this thesis were to investigate the governance structure of the ISDS mechanism by analyzing a selection of six cases, and to investigate how ISDS may influence the introduction of states environmental policies and achievement of IEAs. By applying the EGS framework and the concept of power, I was able to identify main actors and institutions involved in the ISDS governance structure, and the power dynamics at play. In doing so I found that actors and institutions, to a varying degree, have capacities to exercise power, influence decisions and outcomes. Addressing the power dynamics within the ISDS governance structure has been monumental to the overall understanding of how the ISDS system functions and enabled me to illustrate the interplay between the actors and institutions that may influence and steer the development and outcomes of the disputes. Complemented with the regulatory chill hypothesis, this study has in turn enabled me to discuss what the possible impacts of the ISDS mechanism may be for states environmental policymaking and achievement of IEAs. The aim of this final chapter is to connect the findings of this study and to provide an overview. This chapter is divided into two sections; section 7.1 summarizes the findings and points to some of the main messages to be drawn from these, while section 7.2 presents my final remarks and reflections regarding the ISDS system and its relation to the environment.

7.1 Summarizing the findings and main messages

The analysis of the six ISDS cases revealed that civil society actors have an elemental role in this study, despite having no power or influence what so ever on the proceedings of the dispute. By exercising their power through means such as voicing concerns publicly, organizing opposition, and pressure or support their political actors, civil society has influenced their respective states to introduce environmental policies. These civil society driven policies are what in turn caused the dispute to appear and foreign investors to resort to ISDS in the first place. As such, the power and influence of civil society cannot be disregarded. The force of civil society is rather indirect, but must nevertheless be taken into consideration when evaluating RQ 2a and 2b, as it may be contended that if civil society had not had this influential role, there wouldn't necessary be any environmental policy to challenge in the first place. This could also imply that the prospects of achieving IEAs could be reduced as fewer environmental policies would possibly be introduced. It must be contended that my findings cannot say anything regarding this point, however, speculation on this matter may contribute to the understanding of the importance of civil society in relation to ISDS.

Although passive in nature, IIAs has shown to greatly influence power relations between the host states and investors. As shown in section 5.2 investors are granted rights, while states have obligations, which I have argued strengthens the investors' relative power towards the host state. This power is further strengthened through investors' privileged access to ISDS which equips them with an effective tool to challenge states regulatory capacities and decision-making power. Arguably, this creates a power imbalance between states and investors, where states seem to end up in the weakest position, and risks having to face arbitration without the possibility to oppose this due to the notion of pre-established consent. Furthermore, my findings suggest that once an investor has initiated ISDS, the outcome of the case seems to lie in the hands of the tribunals which have been granted authority to evaluate and decide on the dispute, unless the case is settled outside the tribunal. Thus, the tribunals exercises what I have termed 'arbitrational authority', pointing to their high level of power in relation to the other actors within the ISDS governance structure.

The understanding of the power relations between actors and institutions contributed to address RQ 2a. The first issue I have identified regarding how ISDS influence countries' efforts to form environmental policies, is the notion that states find themselves in a 'conflict of obligations' between safeguarding its citizens by protecting the environment and adhering to their obligations in the IIAs. This conflict of obligations is not necessarily overt, considering legislations may not be fully aware of the potential of arbitration, but as the cases has shown, with regards to environmental policymaking states have to strike a balance between meeting public demands, protecting the environment, addressing IEAs and adhere to the obligations in the IIAs. As the introduction of environmental policies often is a result of either observed or perceived results of environmental degradation, all the states in this study have opted to address the environmental issue by introducing policies that (sometimes unintentionally) have a negative effect on foreign investors. In doing so, states exercise their right to regulate as a sovereign state, but are simultaneously, in the view of the investors, breaching their obligations towards them, and as such find themselves in a conflict of obligations.

Secondly, given the financial size of the investments the six cases, it may be contended that investors who find themselves negatively affected will likely challenge those policies, as the option of accepting them may entail huge financial losses. Thus, investors resorts to ISDS, and as the cases has shown, arbitration or the threat of arbitration may have a chilling effect on states, which the financial aspect of arbitrating particularly explains. For instance, the Vattenfall and Ethyl cases were settled due to the states' perceived risk of losing the arbitration and having to pay costly compensation. These settlement deals did in turn lead to environmental policies

that failed to regulate in the interest of the public. Similarly, in the Vermilion case, the threat of arbitration had a chilling effect to the extent that French legislators were discouraged from adopting a potentially effective environmental law. However, as the concluded and settled cases illustrates, the compensation demanded by the investors significantly departs from the actual settlement price or compensation paid, which suggests the cost of arbitration is less than it first sets out to be. On the other hand, it may seem like the high monetary claims nevertheless have a chilling effect.

Thirdly, the issue of arbitrational authority as mentioned above, has proved to be problematic. My findings suggest tribunals put minimal emphasis on legitimate environmental arguments and justifications for the policies, as well as disregarding the relevance and legitimacy of public concerns. Rather, the cases are determined based on procedural and technical issues, such as 'how the policy was introduced' and whether it could be regarded discriminatory in the light of the IIA. The responsibility of evaluating the necessity of environmental policies is thus in practice determined by arbitrations with no professional training, from a scientific point of view, to evaluate environmental issues. Consequently, this may support the notion that unfit arbitrators in practice are 'regulating the regulators', as their conclusions may potentially influence states future environmental policymaking. This is nevertheless something that cannot be said to be given, but drawing upon the regulatory chill hypothesis it should neither be disregarded as a potential consequence of ISDS.

The main conclusion to be drawn from the cases is that ISDS does have the potential to influence states power and regulatory capacities regarding environmental policymaking. In the cases where investors are not able to change the policies directly, ISDS may be used to recoup financial losses for the investors through payment of compensation in return for the policy to come in effect. Drawing upon the financial aspects of ISDS, as well as the possibility that investors may be successful with their claims and change the policy, has pointed to two potential impacts ISDS may have for the achievement of IEAs. First, it may be argued that ISDS contributes to socialize costs and may be perceived as a mechanism where the polluter is paid to stop polluting. The potential consequence is that the financial burden for states may increase, which may entail that the environmental transformation may be much slower or be less effective than needed, and that states willingness to adopt comprehensive environmental policies may be reduced.

Secondly, ISDS may serve as a tool challenging states right to regulate, which in the context of achieving IEAs is an absolute necessity. As explained in chapter one, states must regularly update and surpass previous environmental goals through their NDCs, in line with the

Paris Agreement. However, yet again drawing upon the regulatory chill hypothesis, it may be argued that the potential cost of arbitration may affect states willingness to adopt similar or stricter environmental policies in the future, due to the risk of facing similar ISDS claims and costly arbitration. The argument is that ISDS may actually shrink states policy space and impact their sovereign regulatory capacities, as states may opt to pursue a less effective and intrusive measure, or even refrain from adopting the policies in the first place. The combination of a shrinking policy space, and the potential that more and more investors demand compensation for their losses (pay the polluter), may in sum contribute to negatively affect state's prospects of achieving their environmental goals and commitments outlined in the IEAs, causing them to be achieved later, rather than sooner.

7.2 Final remarks

Achieving IEAs, as established in the two first chapters of this study, is paramount. There is no discussion whether we should achieve them or not, they must be achieved if we are to sustain a healthy and livable planet for everyone, including future generations. However, there are many obstacles that may be identified in the world today, which may seem to work against or undermine this objective. The system of arbitration may definitely be identified as one of these obstacles, considering foreign investors are given the right to challenge legitimate environmental policies that are in the interest of the public, at the expense of their private economic interests. In the light of achieving IEAs, the system of arbitration may arguably represent a structural barrier in the fight against irreversible climate change and environmental degradation. Most notably considering the necessary environmental policies states must continuously introduce may be in conflict with the interests of many foreign investors, who have invested millions, even billions in large projects abroad. Many of these relates to so-called dirty industries like the fossil fuel industry, which eventually must be phased out if we are to keep global temperatures well below 2° C.

ISDS is a powerful tool for foreign investors, but it must be pointed out that the system of arbitration is a creation of nation states, implying that states ultimately have the power to change those aspect of ISDS and the International Investment Regime that undermines states abilities to address climate change and environmental degradation. State is, after all, sovereign entities and must be viewed as the highest authority with capacity regulate for the public good. Some changes are already looming, and as a consequence of some of the issues addressed in this study, reform of the International Investment Regime has for some time been on top of the agenda, with significant contributions on options for improvement. Most notably, newer IIAs

have become more oriented towards sustainable development by taking into account other international commitments, such as those outlined in IEAs. However, for ISDS to survive as a system, reform efforts must take into account many of the concerns and criticisms that has been raised against the system of arbitration. Most notably, it must find a balance between protecting investor's rights and safeguarding states right to regulate in the name of legitimate environmental protection and achievement of environmental agreements. After all, these have been formed in order to avert catastrophic climate change and environmental degradation, which in ultimately must be tackled if we are to ensure a healthy and livable planet for ourselves and future generations.

The overall contribution of this study has been to highlight the potential impacts of ISDS on states environmental policymaking by drawing upon the experiences from six ISDS cases. The cases have provided rich insights, and been useful to illustrate important aspects of the system of arbitration. It must nevertheless be contended that the findings and conclusions drawn must be read with caution and should not be taken as outright given, as this study has only been able to scratch the surface of the cases examined. Nevertheless, the findings presented here are a useful contribution to the wider debate on the relevance of the ISDS mechanism in IIAs, considering more and more ISDS cases challenging states environmental policies are emerging, and that more are likely to emerge as the deadline to achieve environmental goals by 2030 and 2050 is approaching day by day. The findings of this study may therefore lay the foundations for future research, especially studies further exploring the regulatory chill hypothesis as there is still few studies on this issue, or studies discussing the legitimacy or justifications for the arbitration regime in the context of environmental protection.

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Appendix I

Overview of the selected ISDS cases

Details on cases has been cross-examined with the UNCTAD Investment Dispute Settlement Navigator (investmentpolicy.unctad.org/investment-dispute-settlement) and case documents available on italaw.com.

	Case (year)	Arbit-ral inst.	Treaty, sector	Subject of dispute and outcome	Status
1	Vattenfall I v. Germany (2009-2010)[9]	ICSID	ECT, Energy	In 2008 the City of Hamburg imposed additional environmental restrictions in the final construction permit for Vattenfall's coal-fired power plant, Moorburg, as a result of public opposition and concerns for the environmental consequences on the Elbe River. Instead of complying with the requirements, Vattenfall filed for arbitration in 2009, claiming delays of the issuance of the permit and the environmental restrictions mounted to breach of the Energy Charter Treaty. In order to avoid costly proceedings and arbitral award, Germany settled with Vattenfall in 2010. The City of Hamburg was obliged to withdraw the additional environmental requirements, and issue the required permit. The Moorburg plant proceeded construction as planned and began operations in 2014. In 2017 Germany was found guilty of breaching EU law for allowing the construction without conducting a sufficient environmental impact assessment, and in 2020 the plants phase out plan was announced. Amount demanded: US$1.4 billion.	**Settled**, environmental conditions rolled back, no publicly known compensation has been paid
2	Ethyl Corporation v. Canada (1997-1998)[10]	UNIC-TRAL	NAFTA, Energy	As a response to the concerns of environmental and health risks relating to the use of MMT, a gasoline additive used to improve gasoline performance in cars, the Canadian government imposed a ban on imports and interprovincial trade on MMT in 1997. At the time Ethyl Corporation, an American company, was the sole importer of MMT to Canada. Already two months before the bill was passed, Ethyl filed for arbitration, claiming the ban would breach Canada's obligations under NAFTA. Canada claimed the ban addressed the unknown health and environmental impacts of MMT, as well as their international commitments of reducing such pollutants in the air. In 1998 the tribunal made its jurisdictional decision to hear the case and the proceedings could thus begin. Simultaneously, Canada lost in another domestic case concerning the interprovincial ban on MMT, which may have contributed to concerns of losing the Ethyl case as well. Shortly after Canada settled with Ethyl, paid US$ 13 million, reversed the ban and issue a statement claiming MMT was safe to use. Still to this date Canada depends on voluntary reductions of MMT in gasoline. Amount demanded: US$251 million	**Settled**, ban lifted, investor paid US$13 million.
3	Clayton/ Bilcon v. Canada	UNIC-TRAL	NAFTA, Mining	In 2008 the Clayton family, who owned the Bilcon mining company, was planning to open a quarry mine and a marine terminal in Nova Scotia, but Canada rejected the proposal of the project based on the	**Decided – in favor of**

[9] Public Citizen (2022b), Bonnitcha, Poulsen and Waibel (2017), Romanin Jacur (2015).
[10] Tienhaara (2008), Guy (2004), Public Citizen (2022c).

	(2008-2015)[11]			recommendations from an expert-review panel. The panel was to assess the environmental risks and review the socio-economic concerns from the local communities. The panel concluded the project would significantly threaten local communities' core values and their environment. Clayton/Bilcon filed for arbitration against Canada under NAFTA, claiming the panels' assessment and Canada's decision was arbitrary behavior. The tribunal ruled in favor of Clayton/Bilcon in 2015, arguing that the concerns for the local communities core values was given too much weigh, and was arbitrary. Amount demanded: US$ 300 million	**Investor,** awarded US$ 7 million
4	Pac Rim v. El Salvador (2009-2016)[12]	ICSID	El Salvador Investment Law, Mining (CAFTA)	After years of opposition against mining in El Salvador due to the severe consequences for environment and health, and concerns for further water contamination from the proposed El Dorado mining project, the El Salvadorian government introduced a *de facto* ban on mining. As a result, El Salvador refused to issue Pac Rim its necessary mining concession in 2008, additionally claiming Pac Rim had failed to meet the requirements of the mining law. A few months later Pac Rim filed for arbitration, claiming breach of El Salvador's investment obligations. The tribunal dismissed its jurisdiction over CAFTA, and instead applied the El Salvador Investment Law. The case proceeded for 8 years, and was ultimately ruled in favor of El Salvador, which was awarded US$ 8 million by the tribunal to cover some of the US$ 12 million spent on the case. After first refusing to pay, Pac Rim, then acquired by Oceana Gold, paid El Salvador in 2017. Amount demanded: US$314 million	**Decided – in favor of State,** awarded US$8 million
5	Rockhopper v. Italy (2017-)[13]	ICSID	ECT, Energy	In Italy, civil society had for several years opposed and protested oil extraction in the Adriatic Sea. In 2015 this culminated into the Italian government reintroducing a temporary ban on oil and gas exploration within 12 nautical miles of the coast of Italy. Thus temporarily revoking all exploration permits, until the ban will be replaced by 'the Plan' which will outline all designated areas for oil and gas exploration in Italy. As a result of having their permit revoked, Rockhopper filed for arbitration in 2017, under the Energy Charter Treaty. The case is still ongoing despite signals that an award was close to be issued in 2019. The claimed breaches are yet to be disclosed, other than their intention of being compensated for the loss of their future profits. Rockhopper has claimed they have strong prospects of recovering their damages, and are receiving third-party funding for the dispute. Amount demanded: US$350 million	**Pending**
6	Vermillion v. France (2017)[14]		ECT, Energy	In 2017 the French Minister of Environment, Nicolas Hulot, drafted the so-called 'Hulot law', responding to the growing opposition to oil and gas explorations in the aftermath of COP21. The text proposed a progressive phase-out plan, banning renewal of exploitation permits for oil and gas companies by 2040 on all French territories. The	**No arbitration dispute**, only threat of

[11] Public Citizen (2022a), Schacherer (2022b).
[12] Schacherer (2018a), Lander (2021).
[13] Veerhecke et al. (2019), Di Bella (2019).
[14] Veerkecke et al. (2019), Vaudano (2018).

				proposed law met strong resistance from the Canadian oil and gas company Vermilion Energy, which at the time produced almost 75 per cent of all French oil. Vermillion claimed the law would potentially breach several provisions of the Energy Charter Treaty and their legitimate expectations under the French Mining Cote. Vermillion then threatened to sue France by invoking the ISDS provision in the ECT. The threat materialized and led the French Government to later pass, a second drastically weakened draft, which allowed for the renewal of exploitation permits until 2040, and in certain conditions also after this deadline.	arbitration leading to fundamental changes in the proposed legislation.

Norges miljø- og biovitenskapelige universitet
Noregs miljø- og biovitskapelege universitet
Norwegian University of Life Sciences

Postboks 5003
NO-1432 Ås
Norway