

# FREE PEOPLE OVER FREE MARKETS: ADDRESSING THE SUPPRESSION OF ENVIRONMENTAL DISSENT THROUGH TRADE AGREEMENTS IN MEXICO AND THE UNITED STATES

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- I. INTRODUCTION
- II. FOREIGN DIRECT INVESTMENT AND THE SUPPRESSION OF DISSENT
  - A. Environmental Defenders in Mexico and the U.S.
  - B. Role of Foreign Direct Investment in Suppressing Dissent
    - i. Violence and Impunity
    - ii. Criminalization and Stigmatization
    - iii. Procedural Barriers
- III. GOVERNING ENVIRONMENTAL DEFENDERS, STATES, AND FOREIGN DIRECT INVESTMENT
  - A. Public Law: Rights and Responsibilities
    - i. International Right to Environmental Dissent
    - ii. Regional Right to Protection
    - iii. Domestic Implementation
  - B. Private Law: The Rights of Foreign Direct Investment
- IV. INCREASING THE PROTECTION OF ENVIRONMENTAL DEFENDERS THROUGH IIAs
  - A. Include Interpretive and Enforceable Obligations
  - B. Incorporate an Independent and Specialized Review Mechanism
  - C. Eliminate Investor-State Dispute Settlement
- V. CONCLUSION

## I. INTRODUCTION

On the evening of January 15, 2023, Ricardo Arturo Lagunes Gasca, a renowned human rights lawyer, and Antonio Díaz Valencia, an Aquila Indigenous leader, went missing hours after leaving an anti-mining community meeting in western Mexico.<sup>1</sup> The pair were

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1. *Disappearance of Human Rights Defenders Antonio Díaz Valencia and Ricardo Arturo Lagunes Gasca*, FRONT LINE DEFS. (Jan. 19, 2023), <https://www.frontlinedefenders.org/>

prominent environmental defenders critical of the nearby Ternium ore mine and its associated pollution.<sup>2</sup> Later that same evening, their truck was found riddled with bullets.<sup>3</sup> While their loved ones demanded accountability from Ternium,<sup>4</sup> the company announced its plans to build another mill in Mexico worth \$2.2 billion.<sup>5</sup> As Ternium continues its production and pollution, Ricardo Arturo Lagunes Gasca and Antonio Díaz Valencia have joined a tragic statistic: four human rights defenders are murdered every week.<sup>6</sup>

Unfortunately, the murder of human rights defenders (“HRDs”)<sup>7</sup> and the suppression of environmental dissent is all too common in today’s globalized world. Throughout the past decade, 1,700 HRD killings have been reported,<sup>8</sup> averaging one every other day.<sup>9</sup> The number of attacks will likely increase with the climate crisis and as “more land is grabbed, [and] more forests are felled in the interest of short-term profits.”<sup>10</sup> The world needs environmental defenders now more than ever, but as their importance increases, so do the

en/case/disappearance-human-rights-defenders-antonio-d%C3%ADaz-valencia-and-ricardo-arturo-lagunes-gasca-0; see also *Ternium Complex Still Ground to a Halt Over Disappearance of Activists*, BNAMERICAS (Feb. 7, 2023), <https://www.bnamericas.com/en/news/ternum-complex-has-been-paralyzed-for-16-days-in-protest-of-the-disappearance-of-activists>; *Ternium is Collaborating with Mexican Authorities in the Case of Messrs. Antonio Diaz Valencia and Ricardo Arturo Lagunes Gasca of the Community of Aquila*, TERNIUM (Feb. 20, 2023), <https://us.ternum.com/en/media/news/aquila-eng--06455353923>.

2. BNAMERICAS, *supra* note 1; see also *Environmental Impact of Steel*, THE WORLD COUNTS, <https://www.theworldcounts.com/challenges/planet-earth/mining/environmental-impact-of-steel-production> (last visited Apr. 15, 2023) (asserting that the mining of ore causes air, water, and acid pollution, which could lead to cancer).

3. BNAMERICAS, *supra* note 1.

4. See *Mexico: Defenders’ Families Believe in Alleged Involvement of Mining Company Ternium in Their Disappearances*, BUS. & HUM. RTS. RES. CTR. (Jan. 20, 2023), <https://www.business-humanrights.org/en/latest-news/mexico-defenders-families-believe-in-alleged-involvement-of-mining-company-ternum-in-their-disappearances>.

5. See *New Projects on the Horizon*, TERNIUM (Feb. 15, 2023), <https://www.ternum.com/en/media/news/new-projects-on-the-horizon>.

6. See *Global Witness Reports 227 Land and Environmental Activists Murdered in a Single Year, the Worst Figure on Record*, GLOB. WITNESS (Sept. 13, 2021), <https://www.globalwitness.org/en/press-releases/global-witness-reports-227-land-and-environmental-activists-murdered-single-year-worst-figure-record>.

7. Although this paper focuses on environmental defenders, data gathered on violence against defenders is based on the broader category of HRDs.

8. *Decade of Defiance: Ten Years of Reporting Land and Environmental Activism Worldwide*, GLOB. WITNESS, Sept. 2022, at 16, <https://www.globalwitness.org/en/campaigns/environmental-activists/decade-defiance> [hereinafter *Decade of Defiance Report*]; *At What Cost? Irresponsible Business and the Murder of Land and Environmental Defenders in 2017*, GLOB. WITNESS, Jan. 2019, at 11, <https://www.globalwitness.org/en/campaigns/environmental-activists/at-what-cost> [hereinafter “At What Cost?”] (explaining that this number is likely an underestimate because the “strict set of criteria” to categorize a killing as an HRD killing is not always obtainable through newspapers or local contacts).

9. See *Decade of Defiance Report*, *supra* note 8, at 16.

10. *Last Line of Defence* [sic], GLOB. WITNESS (Sept. 13, 2021), <https://www.globalwitness.org/en/campaigns/environmental-activists/last-line-defence>.

risks.<sup>11</sup> From 2015 to 2021, the rate of HRDs murdered rose from three a week to four a week.<sup>12</sup>

Foreign direct investment (“FDI”) plays a central role in the violence.<sup>13</sup> Almost 70% of the HRDs killed in 2017 were defending land, environment, and indigenous rights, and nearly all of them were defending against an extractive industry or big business mega project.<sup>14</sup> In a global economy based on transnational corporations, small and vulnerable communities are pitted against an extensive and powerful value chain.<sup>15</sup>

Rampant killings are just the tip of the iceberg. Environmental defenders routinely confront “violent attacks and threats to their families, enforced disappearances,<sup>16</sup> illegal surveillance, travel bans, blackmail, sexual harassment, judicial harassment, and use of force to dispel peaceful protests.”<sup>17</sup> In addition to physical violence, criminalization is often directed against defenders around the world

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11. See *Second Report on the Situation of Human Rights Defenders in the Americas*, INTER-AM. COMM’N H. R., OEA/Ser.L/V/II, doc.66, Dec. 31, 2011, at 132–33 ¶ 311 [hereinafter “IACHR Second Report”] (“[D]efenders play an essential role in ensuring the balance between environmental protection and the development of the countries of the region.”).

12. See *On Dangerous Ground*, GLOB. WITNESS, June 20, 2016, at 4, <https://www.globalwitness.org/en/campaigns/environmental-activists/dangerous-ground>; see also *Decade of Defiance Report*, *supra* note 8, at 10, 39 (explaining that this number is also likely to be higher as many murders go unreported).

13. See Adam Hayes, *Direct Foreign Investment (FDI): What It Is, Types, and Examples*, INVESTOPEDIA (Mar. 27, 2023), <https://www.investopedia.com/terms/f/fdi.asp> (“Foreign Direct Investment (FDI) is an ownership stake in a foreign company or project made by an investor, company, or government from another country.”).

14. Andrew Anderson, *What is Happening Now Across the World is Nothing Less than a Systematic Attack on Peasant Communities and Indigenous People*, THEY SHOULD HAVE KNOWN BETTER: FRONT LINE DEF. BLOG, <https://www.theyshouldhaveknownbetter.com/blog-front-line-defenders> (last visited Apr. 9, 2023).

15. Nicola Phillips, *Power and Inequality in the Global Political Economy*, 93 INT’L AFF. 429, 431, 432 (2017), (discussing how a global economy based almost entirely [80%] on the value and production chains of transnational corporations is organized around an inherently unequal system where powerful economic and political interests “exploit vastly asymmetrical power relations between firms and other actors within value chains, in order to control how, where and by whom value is created, and how, where and by whom it is captured”).

16. *About Enforced Disappearance*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/en/special-procedures/wg-disappearances/about-enforced-disappearance> (last visited Apr. 15, 2023) (“An enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”).

17. U.N. Secretary-General, *Situation of Human Rights Defenders*, ¶ 30, U.N. Doc. A/71/281 (Aug. 3, 2016).

and can constitute intimidating legal threats,<sup>18</sup> costly legal battles, and controlling the media to tarnish reputations.<sup>19</sup>

State parties are often incentivized to put profits first as well.<sup>20</sup> In many instances, state parties are legally bound by international investment agreements that restrict their ability to make significant policy changes that would protect people but cut into profits.<sup>21</sup> Unlike human rights treaties, the legal obligations contained in these economic treaties include enforceable financial damages.<sup>22</sup> When states are obligated to prioritize business interests, their citizens become “obstacles instead of [] citizens with needs.”<sup>23</sup> This means state parties are “more swayed by powerful economic interests than by the life chances of their citizens” and are choosing to “shoot the messenger” by criminalizing nonviolent protest rather than protecting dissenters.<sup>24</sup>

Due to the deep-rooted connection between profit and violence, this article examines the relationship between investment agreements protecting FDI and abuse directed at environmental defenders through the lens of Mexico and the United States’ trade relationship. Part II analyzes the wide range of challenges and threats environmental defenders face and the role FDI plays in perpetuating violence. Part III reviews the rights of environmental defenders, the obligation of states, and the rights of FDI under the current Investor-state dispute settlement (“ISDS”) regime. Part IV proposes assigning liability for abuse against environmental defenders directly in international agreements, incorporating an independent and specialized review mechanism, and eliminating the ISDS system in international agreements.

## II. FOREIGN DIRECT INVESTMENT AND THE SUPPRESSION OF DISSENT

Despite environmental defenders’ essential role in protecting the planet and its people, abuse and attempts to silence them are increasing.<sup>25</sup> Part II defines environmental defenders and the

18. Ali Hines, *Responsible Sourcing*, 17 SUR-INT’L J. HUM. RTS. 109, 111 (2020) (asserting that because the legal resources are asymmetrical, even simple suits can greatly interfere with an environmental defender’s work).

19. *Id.*

20. *Id.* at 110.

21. See discussion *infra* Part II.B.

22. See generally Tamlyn Mills & Andrew Battison, *Recognition, Enforcement and Recovery of Investment Treaty Awards: Part I*, INT’L ARB. R. (May 2022).

23. Moira Birss, *Criminalizing Environmental Activism*, 49:3 NACLA REPORT ON THE AMERICAS 315, 316–317 (2017).

24. Matthew Taylor, *Environment Protest Being Criminalized Around the World, Say Experts*, THE GUARDIAN (Apr. 29, 2021), <https://www.theguardian.com/environment/2021/apr/19/environment-protest-being-criminalised-around-world-say-experts>.

25. IACHR: *Increased Violence Against Human Rights Defenders During the First Four Months of 2022 Makes It More Urgent for States to Protect Their Lives and Work*, ORG. OF AM. ST. (May 25, 2022), [https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media\\_center/preleases/](https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/)

relevance of the trade relationship between Mexico and the United States as a case study and then explains the role FDI plays in various methods of suppressing environmental defenders.

### A. *Environmental Defenders in Mexico and the U.S.*

The work of those who defend our most basic freedoms is “fundamental for the universal implementation of human rights, the existence of full and lasting democracies, and the consolidation of the rule of law.”<sup>26</sup> An HRD includes any individual, group, or association that peacefully “promotes or seeks the realization of human rights and fundamental freedoms at the local, national and/or international levels.”<sup>27</sup> When an HRD works to protect environmental or land rights, they are more narrowly defined as an environmental defender.<sup>28</sup>

Environmental defenders work to prevent pollution that impacts the environment, the rights of indigenous groups to their territory, the right to water, and other issues that threaten the land, the environment, livelihoods, and health.<sup>29</sup> Environmental defenders who oppose land-intensive industries<sup>30</sup> are three times more likely to be attacked than other HRDs.<sup>31</sup> Of the HRDs killed in 2018, 77% were protecting indigenous peoples, land, and environmental rights.<sup>32</sup>

In addition to the high number of environmental defenders targeted, vulnerable groups experience a disproportionate number of attacks.<sup>33</sup> Indigenous environmental defenders are

2022/114.asp.

26. *Towards Effective Integral Protection Policies for Human Rights Defenders*, INTER-AM. COMM’N ON HUM. RTS. OEA/SER.L/V/II, DOC. 207 REV., Dec. 29, 2017, at 22.

27. *Id.* at 21 (finding that HRDs include people from a wide variety of backgrounds such as journalists, lawyers, indigenous leaders, government workers, community leaders, and anyone else who monitors, reports, disseminates, educates, advocates, or defends human rights).

28. *Who are Environmental Defenders?*, U.N. ENV’T PROGRAMME <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights> (referring to environmental human rights defenders (EHRD) as those who, “in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, including water, air, land, flora and fauna.”); see generally JUDITH VERWEIJEN ET AL., *Environmental Defenders: The Power/Disempowerment of a Loaded Term*, ENVIRONMENTAL DEFENDERS: DEADLY STRUGGLES FOR LIFE AND TERRITORY 37 (Mary Menton & Philippe Le Billon eds., 2021).

29. See generally VERWEIJEN ET AL., *supra* note 28.

30. See Daniel Braaten, *Why Environmental Defenders are Under Threat*, POL. VIOLENCE AT A GLANCE (Aug. 5, 2022), <https://politicalviolenceataglance.org/2022/08/05/the-vulnerabilities-land-and-environmental-defenders-face-and-how-to-counteract-them>.

31. *UN Resolution Recognizes Environmental Defenders*, INT’L NETWORK FOR ECON., SOC. AND CULTURAL RTS. (Apr. 10, 2019), <https://www.escri-net.org/news/2019/un-resolution-recognizes-environmental-defenders>.

32. *Id.*

33. Braaten, *supra* note 30.

disproportionately attacked due to their resource-rich lands.<sup>34</sup> Although indigenous people only make up about 5% of the global population, they suffer about 40% of the fatal attacks against environmental defenders.<sup>35</sup> Similarly, communities of African descent are vulnerable because they have inadequate access to resources and occupy valuable land.<sup>36</sup> Women also face distinct challenges in their advocacy work, including exclusion from land ownership and negotiations, criticism and ostracization for deviating from domestic care, domestic violence, and threats of divorce from the men in their communities for their activism.<sup>37</sup> Furthermore, the attacks on women are often sexualized, and rape is used as a form of social control.<sup>38</sup> Despite challenges, these groups commonly serve as activists for the environment.

The experiences of environmental defenders in Mexico and the United States are used in this article as case studies because of the importance and volume of trade between the two countries and their relevant successes and failures in defending free speech. Due to the United States-Mexico-Canada Agreement (“USMCA”) and geographical proximity, Mexico and the United States are frequent trading partners.<sup>39</sup> Mexico is the United States’ second-largest export market and third-largest trading partner in goods and services.<sup>40</sup> Bilateral trade between the two countries has grown almost 500% in the past three decades, and the United States is Mexico’s top source of FDI.<sup>41</sup> Recent reforms liberalized FDI access to Mexican markets, which piqued the interest of international oil companies and indicates the probable growth of the extractives sector.<sup>42</sup> Not only does Mexico host a great deal of FDI from the United States, but the

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34. See *The Role of Business and States in Violations Against Human Rights Defenders of Land Rights, the Right to Territory and Rights Related to the Environment*, INT’L SERV. FOR HUM. RTS., Oct. 2015, at 18–19, 55 [hereinafter “*The Role of Business*”] (noting that especially as the extractive industry expands to more remote locations, indigenous land is increasingly violated).

35. Gillian Caldwell, *Environmental Defenders are Under Threat. Here’s What USAID Can Do to Help*, LANDLINKS (Jan. 17, 2023), <https://www.land-links.org/2023/01/environmental-defenders-are-under-threat-heres-what-usaid-can-do-to-help>; see also Braaten, *supra* note 30 (suppressing indigenous opposition to land management concerns is especially troubling considering that the forests indigenous and tribal peoples manage communally are better conserved, improve food security, and combat climate change. Much of the world’s remaining biodiversity is on indigenous land and they “are often the last line of defense against the exploitation of land that serves important biodiversity functions and/or operates as significant carbon sinks.” Instead of receiving protection for this important role, they are “subject to intimidation and violence to get them to move off their land or acquiesce to the demands of global capital”).

36. *The Role of Business*, *supra* note 34, at 39.

37. See *Decade of Defiance Report*, *supra* note 8.

38. *The Role of Business*, *supra* note 34, at 38.

39. See *2021 Investment Climate Statements: Mexico*, U.S. DEP’T OF STATE (2021), <https://www.state.gov/reports/2021-investment-climate-statements/mexico>.

40. *Id.*

41. *Id.*

42. *Id.*

United States—which brought one-fifth of all ISDS claims from 2011 to 2020—also actively uses the protections its investors enjoy.<sup>43</sup>

In terms of dissent, both nations have increased criminalization and Mexico has seen rampant murders of environmental defenders.<sup>44</sup> Despite signing an international treaty to protect defenders, the number of killings in Mexico continues to rise.<sup>45</sup> It is consistently one of the deadliest countries for human rights defenders with 131 killings between 2017 and 2021, two-thirds of which took place in regions with significant foreign mining investments.<sup>46</sup>

Similarly, despite being the “land of the free,” criminalization of environmental defenders is increasing in the United States, and the first environmental defender killing in the country occurred in January 2023 when an environmental activist was shot fifty-seven times while defending a forest in Georgia.<sup>47</sup> These economic and reputational factors combine to make Mexico and the United States’ treatment of environmental dissenters in connection with FDI a helpful focus point for this global issue.

### *B. Role of Foreign Direct Investment in Suppressing Dissent*

Although states are the usual suspect in free speech and human rights abuses, private interests drive and share in the abuse with increasing force.<sup>48</sup> The IACHR observed that harassment and targeting of defenders has become more pronounced where “there are serious tensions” between extractive industries which “have enormous economic interests at stake.”<sup>49</sup> One study found that global demand for resources was one of the three factors behind the growing vulnerability of environmental defenders, while another associated higher levels of FDI, mineral rents, and forest rents with environmental defender killings.<sup>50</sup> Considering that large scale

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43. See U.N. Conference on Trade and Development, *Investor-State Dispute Settlement Cases: Facts and Figures 2020*, IIA ISSUES NOTE, ISSUE 4 (Sept. 2021).

44. See *Last Line of Defence*, *supra* note 10.

45. See *Decade of Defiance Report*, *supra* note 8.

46. *Id.*

47. See generally Nick Valencia et al., *Climate Activist Killed in ‘Cop City’ Protest Sustained 57 Gunshot Wounds, Official Autopsy Says, But Questions About Gunpowder Residue Remain*, CNN (Apr. 20, 2023, 7:57 PM), <https://www.cnn.com/2023/04/20/us/cop-city-activist-killed-dekalb-county-medical-examiner/index.html> (describing how Tortuguita [the chosen name of Manuel Esteban Paez Terán] was shot by police officers on January 18, 2023 while camping to protect a local forest from “cop city,” which is a \$90 million police training complex in Atlanta).

48. *Last Line of Defence*, *supra* note 10, at 16–17.

49. IACHR Second Report, *supra* note 11, at ¶ 312.

50. See Daniel Braaten, *A Triangle of Vulnerability: Global Demand for Resources, Political Marginalization, and a Culture of Impunity as Causes of Environmental Defender Killings*, 44 HUM. RTS. Q. 537, 541, 544 (Aug. 2022) (recognizing that another two factors

investments can cost billions of additional dollars if operations are disrupted by local opposition, there is a substantial amount of money at stake.<sup>51</sup> The extractive model of mining, logging, and oil and gas production “overwhelmingly prioritizes profit over human and environmental harm,” and environmental defenders “are seen as a threat to profit as well as power.”<sup>52</sup> The connection between FDI and increased environmental defender risk is clear: areas with more extractive or development projects correlate to more attacks.<sup>53</sup>

This is especially true in Mexico, where foreign-owned institutions control 70% of the total assets.<sup>54</sup> Two-thirds of the lethal attacks in Mexico are linked to conflicts over land and mining and in 2019 alone, there were 572 threats and attacks towards human rights defenders working against “business-related activities.”<sup>55</sup>

Despite states looking to extractive industries to increase development, the wealth gained from foreign investment is highly concentrated and does not benefit the people who bear its burden.<sup>56</sup> One estimate found that, on average, only one job is created for every million dollars invested into mining.<sup>57</sup> Regardless of the minimal direct benefit to local people, large-scale economic projects have continued to expand rapidly.<sup>58</sup> Governments and public actors are

behind the growing vulnerability of environmental defenders are the marginalization of affected populations from the political process and a culture of impunity).

51. See *Responsible Sourcing: The Business Case for Protecting Land and Environmental Defenders and Indigenous Communities' Rights to Land and Resources*, GLOB. WITNESS (Apr. 28, 2020), <https://www.globalwitness.org/en/campaigns/environmental-activists/responsible-sourcing> (illustrating the risks of large-scale investments, with the example of the Dakota Access Pipeline which cost an additional \$4.4 billion as a result of protests by the local indigenous community).

52. *Last Line of Defence*, *supra* note 10, at 17; *At What Cost?*, *supra* note 8, at 38.

53. See Amiel Ian A. Valdez, *Defending the Defenders: Upholding the Right to Effective Remedy of Environmental Defenders in the Philippines*, 66 ATENEO L. J. 176, 184; see also *Business and Human Rights Defenders in Colombia*, BUS. & HUM. RTS. RES. CTR. (Feb. 24, 2020), <https://www.business-humanrights.org/en/from-us/briefings/business-and-human-rights-defenders-in-colombia> (describing attacks on Colombian defenders who were raising concerns about businesses); see also *Decade of Defiance Report*, *supra* note 8, at 19 (describing the killings in the Philippines in the past decade relating to protests of company operations).

54. See 2021 *Investment Climate Statements: Mexico*, *supra* note 39.

55. See Paloma Muñoz Quick et al., *Safeguarding Human Rights Defenders: Practical Guidance for Investors*, BUS. & HUM. RTS. RES. CTR. 4 (Apr. 28, 2020), [https://media.business-humanrights.org/media/documents/files/Safeguarding\\_Human\\_Rights\\_Defenders\\_Practical\\_Guidance\\_for\\_Investors\\_FINAL.pdf](https://media.business-humanrights.org/media/documents/files/Safeguarding_Human_Rights_Defenders_Practical_Guidance_for_Investors_FINAL.pdf); *Mexico Was the Deadliest Country for Environmental Activists in 2021*, MEX. NEWS DAILY (Sept. 29, 2022), <https://mexiconewsdaily.com/news/mexico-was-the-deadliest-country-for-environmental-activists-in-2021>.

56. See *Honduras: The Deadliest Place to Defend the Planet*, GLOB. WITNESS 5 (Jan. 2017), <https://www.globalwitness.org/en/campaigns/environmental-activists/honduras-deadliest-country-world-environmental-activism>.

57. *The Time is Ripe for a Global Tax Agreement on Extractive Industries*, U.N. ECLAC (May 25, 2021), <https://www.cepal.org/en/news/time-ripe-global-tax-agreement-extractive-industries-eclac>.

58. *The Role of Business*, *supra* note 34, at 7.

incentivized to collude<sup>59</sup> or engage in outright corruption<sup>60</sup> when exploiting natural resources in the pursuit of development. Therefore, governments, bilateral aid and trade partners, private banks, development banks, and pension funds that finance projects contribute to and are also culpable for the human rights abuses FDI brings.<sup>61</sup>

### i. Violence and Impunity

Environmental defenders' work is often suppressed by threats of murder, extrajudicial killings, and forced disappearances, where the victim may be kidnapped and murdered in their home, while driving along the highway, or even while seeking protection from authorities.<sup>62</sup> Both public and private security forces actively support the corporate agenda of violence against dissenters.

Often, multinational corporations use private security companies to engage in violence and threats against environmental defenders who oppose certain projects.<sup>63</sup> Approximately 8,000 of Mexico's total security forces—80%—are private security forces with no oversight.<sup>64</sup> Furthermore, the state has demonstrated it is

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59. See Morgan Simon, *Cops and Donuts Go Together More Than You Thought: The Corporations Funding Cop City in Atlanta*, FORBES (Mar. 14, 2023, 2:26 PM), <https://www.forbes.com/sites/morgansimon/2023/03/14/cops-and-donuts-go-together-more-than-you-thought-the-corporations-funding-cop-city-in-atlanta> (highlighting how state-run projects also often derive their funding from private investors and foundations, further blurring the lines between state interests and private interests. For example, the Atlanta Police Foundation's Board, which is funding the "cop city" in which an environmental defender died trying to stop, is funded by a "who's-who" of corporate Atlanta including Delta, Waffle House, Home Depot, Wells Fargo, Bank of America, and many others who made the project possible).

60. See Braaten, *supra* note 50, at 541 ("They find that strong incentives for governments or public actors to exploit natural resources, marginalization of those who depend on, or live in, the areas where natural resource exploitation occurs, and weak rule of law and corruption lead to greater numbers of environmental defenders being killed."); see also Anderson, *supra* note 14 ("Political and economic power across these countries is controlled and manipulated by an entrenched elite, with close links to the army and the security services, who block reform initiatives to protect their own interests, and are often behind targeted attacks on HRDs who expose their corruption or oppose their exploitation.").

61. See Quick et al., *supra* note 55, at 14–15 (noting there are essentially three categories through which businesses harm human rights: the first is directly through the entity's actions or failure to act, the second is where it contributes to an adverse impact in parallel with another entity—such as the state—and, finally, the third is when the products, services, or business relationships it fosters are linked to an adverse impact).

62. See generally *Decade of Defiance Report*, *supra* note 8 (describing the large number of murders of land and environmental defenders in various countries around the world).

63. See Stefanie Eschenbacher, *Mexico Private Security Boom Adds to Corruption, Use of Force: Study*, REUTERS (Mar. 27, 2018, 6:38 PM), <https://www.reuters.com/article/us-mexico-security/mexico-private-security-boom-adds-to-corruption-use-of-force-study-idUSKBN1H339B>; see also IACHR Second Report, *supra* note 11, at ¶ 51; see also *The Role of Business*, *supra* note 34.

64. Eschenbacher, *supra* note 63; see *The Effect of Unregulated LatAm PMSCs on Crime*, SILENT PROS., <https://silentprofessionals.org/unregulated-latin-american-private-security-companies> (last visited Sept. 22, 2023) (stating that in Latin America more generally, there

more than willing to assist in suppression to protect foreign businesses with the state's own forces by its own volition as well.<sup>65</sup> For example, the United States permitted its public police to be essentially transformed into a private security force through private funding during the Pipeline 3 protests.<sup>66</sup> When justifying the police involvement in protecting the pipeline at the expense of protestors, the County Sheriff stated that "Enbridge is a big taxpayer in Hubbard County and we would be doing an injustice if we didn't support them as well."<sup>67</sup> Through private security or state collusion, professional forces directly engage in silencing environmental dissent.

Furthermore, when a defender is murdered, attacked, or threatened, there is rarely any recourse and the government seldom investigates or prosecutes the crime.<sup>68</sup> Ninety-four percent of crimes in Mexico go unreported, and less than 1% are resolved.<sup>69</sup> Authorities have also been known to actively cover up cases.<sup>70</sup> As the UN Special Rapporteur stated after a 2017 country visit to Mexico, "the failure to investigate and sanction perpetrators . . . sends a dangerous message that such crimes have zero consequences, creating an environment conducive to serial violations."<sup>71</sup> Mexico is one of the only states with a national protection system to respond

are over 16,000 private military and security companies which collectively employ more people than the police).

65. See *At What Cost?*, *supra* note 8, at 36 ("With the expansion of mining and oil extraction, military and police forces have moved in to back up the companies. They use violence and sexual violence to intimidate local women and girls and repress resistance. In some cases, soldiers or police gang-rape women as a form of punishment, [for example] for 'trespassing' on diamond fields that were once their ancestral lands."); *Ecuador-Canada Free Trade Agreement: A New Attack on Communities, Indigenous Peoples, and the Environment*, MINING WATCH CAN. (Mar. 1, 2023, 2:25 PM), <https://miningwatch.ca/news/2023/3/1/ecuador-canada-free-trade-agreement-new-attack-communities-indigenous-peoples-and> (describing how provinces in Ecuador with exploration activities for concession agreements saw increased militarization).

66. See Kaylana Mueller-Hsia, *How an Oil Company Pays Police to Target Pipeline Protesters*, BRENNAN CTR. FOR JUST. (Oct. 7, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-oil-company-pays-police-target-pipeline-protesters> ("Enbridge has given Minnesota law enforcement over \$2 million to crack down on Native American and environmental protesters at Line 3 pipeline construction sites.").

67. Alleen Brown & John McCracken, *Documents Show How a Pipeline Company Paid Minnesota Millions to Police Protests*, EXPOSEDBYCMD (Feb. 9, 2023, 5:45 AM), <https://www.exposedbycmd.org/2023/02/09/documents-show-how-a-pipeline-company-paid-minnesota-millions-to-police-protests>.

68. *Decade of Defiance Report*, *supra* note 8, at 26.

69. *Id.* at 12.

70. See *UN Rights Office Condemns Death of Mexico Anti-Dam Activist*, AP NEWS (Oct. 28, 2022, 1:39 PM), <https://apnews.com/article/mexico-caribbean-climate-and-environment-c63d2093a2e1eb51a2c8f1b2631c2485> (providing that, for example, the UN Human Rights office in Mexico reported that Filogonio Martínez Merino, a key environmental defender, was shot to death in 2022, while the Mexican prosecutors reported there were no signs of violence).

71. *Their Faces: Defenders on the Frontline*, GLOB. WITNESS, <https://www.globalwitness.org/en/campaigns/environmental-activists/their-faces-defenders-frontline/?accessible=true> (last visited Sept. 22, 2023).

to threats and offer protection.<sup>72</sup> Still, it is largely ineffective due to budgetary changes and a lack of resources.<sup>73</sup> Multiple environmental defenders have died while in the program and many—for good reason— “don’t trust the government to protect them” and refuse to use it.<sup>74</sup>

Violent attacks send “a terrible message to those fighting for a better society,” and, unfortunately, the message works.<sup>75</sup> HRDs have, “to a large extent,” refrained from activism, stepped down from the public eye, and left their communities due to violence and threats.<sup>76</sup>

## ii. Criminalization and Stigmatization

In contrast to rampant impunity for aggressors, environmental defenders themselves face widespread criminalization and arbitrary arrest. All over the world, anti-protest laws are expanding to cover more actions and increase penalties.<sup>77</sup> In Mexico, charges such as “crimes against consumption and national wealth” have been filed against environmental defenders, highlighting the connection between lucrative development and state complicity.<sup>78</sup> Research suggests that states respond to the financial incentive of foreign investment by designing commodity-based laws that are “designed to attract investments and financialize the environment” rather than protect the rights of its citizens.<sup>79</sup>

A recent law passed in Tabasco, a Mexican state, includes prison sentences of up to twenty years for “street protesting and

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72. *The Role of Business*, *supra* note 34, at 55.

73. *Id.*

74. *See Their Faces: Defenders on the Frontline*, *supra* note 71.

75. Jan Jarab, *Violence That Does Not Stop, Protection That is Not Enough*, FRONT LINE DEFS. (May 16, 2017), <https://www.frontlinedefenders.org/en/news/violence-does-not-stop-protection-not-enough>.

76. Juan Velez Rojas, *Colombia: Human Rights Defenders Continue to Face Pressure and Attacks*, INT’L COMM’N OF JURISTS (Feb. 3, 2023), <https://www.icj.org/colombia-human-rights-defenders-continue-to-face-pressure-and-attacks>.

77. *See* Jennifer M. Gleason & Elizabeth Mitchell, *Will the Confluence Between Human Rights and the Environment Continue to Flow? Threats to the Rights of Environmental Defenders to Collaborate and Speak Out*, 11 OR. REV. INT’L L. 267, 284 (2009) (noting that after the 9/11 terrorist attacks of 2001, laws around the world began increasing penalties on terrorism and expanding language to include vague definitions which have now “extended well beyond the original intention of targeting terrorists” and can be used against environmental dissenters); *see also* Eleni Polymenopoulou, *Expressing Dissent: Gag Laws, Human Rights Activism and the Right to Protest*, 32 FLA. J. INT’L L. 337, 361 (2021) (providing that for instance, Canada’s Anti-Terrorism Act of 2015 “broadly expanded” the definition of national security to include “the economic or financial stability of Canada,” and Australian lawmakers increased penalties on protesters who disrupt economic activities); *see also* Kristoffer Tigue, *Bold Climate Protests are Triggering Even Bolder Anti-Protest Laws*, INSIDE CLIMATE NEWS (Nov. 22, 2022), <https://insideclimatenews.org/todaysclimate/bold-climate-protests-are-triggering-even-bolder-anti-protest-laws> (finding an increase in an Australian fine from a maximum of \$400 to \$15,000 and two years in jail).

78. *The Role of Business*, *supra* note 34, at 23.

79. Valdez, *supra* note 53, at 209.

blockages.”<sup>80</sup> Furthermore, defenders who protest in front of institutions that happen to have a government official inside can be charged with “illegal deprivation of liberty.”<sup>81</sup> This is especially ironic considering that 141 defenders in Oaxaca, another Mexican state, were arbitrarily detained between 2013 and 2018.<sup>82</sup> The reputational damage to defenders that results from these types of charges—even without any conviction—may “severely curtail, or even render impossible, future environmental defense work.”<sup>83</sup> The time, energy, and resources it takes to defend oneself is a continued obstacle to ongoing work.<sup>84</sup> These conditions environmental defenders work under has been described as “psychological torture.”<sup>85</sup>

In the United States, there has also been a significant trend in increasing anti-protest laws over the past five years.<sup>86</sup> Since 2017, state and federal lawmakers have introduced numerous bills intended to limit the right to protest.<sup>87</sup> Legislative initiatives aiming to criminalize or stiffen penalties for certain forms of protest, or to shield perpetrators of violence against protesters, have been proposed in most states.<sup>88</sup> Specifically, eighteen states have enacted anti-terrorism laws that enhance criminal penalties for “damaging,” “tampering,” or “impeding” critical “infrastructure sites, including oil refineries and pipelines.”<sup>89</sup> The laws focus more on gas and oil because companies, including the previously mentioned Enbridge

80. See Valeria Guarneros-Meza & Gisela Zaremberg, *Mapping Violent Conflicts in the Mexican Extractive Industry*, OPEN DEMOCRACY (Oct. 28, 2019, 12:01 AM), <https://www.opendemocracy.net/en/democraciaabierta/ilustrando-conflictos-en-la-industria-extractiva-de-m%C3%A9xico-en>.

81. *The Role of Business*, *supra* note 34, at 29.

82. See Ligimat Perez, *The Case of Pablo Lopez: A Murder Trial That Could Shape the Future of Mexican Forests*, FRONT LINE DEFS. (Nov. 6, 2019), <https://www.frontlinedefenders.org/en/blog/post/case-pablo-lopez-murder-trial-could-shape-future-mexican-forests>.

83. See Birss, *supra* note 23 at 319–20.

84. See Submission to the UN Special Rapporteur on Human Rights and the Environment, *Environmental Human Rights Defenders and Healthy Ecosystems and Biodiversity*, NOT ONE MORE (May 29, 2020), <https://www.ohchr.org/sites/default/files/Not1MoreInputs.docx>.

85. *Id.*

86. See generally *USA: Penalties for Protestors Increasing*, CIVICUS (Aug. 9, 2021), <https://monitor.civicus.org/updates/2021/09/08/penalties-protestors-increasing-undermining-freedoms-assembly-and-expression>.

87. *Analysis of US Anti-Protest Bills*, INT’L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/post/news/analysis-of-anti-protest-bills> (last updated Feb. 25, 2023).

88. See *US Protest Law Tracker*, INT’L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/usprotestlawtracker> (last updated Sept. 25, 2023).

89. Gabriella Sanchez & Rachel Levinson-Waldman, *Police Social Media Monitoring Chills Activism*, BRENNAN CTR FOR JUST. (Nov. 18, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/police-social-media-monitoring-chills-activism> (“The laws — supported by energy companies — generally rely on vague and broad language that could suggest even benign actions, like knocking down safety cones near a critical site, warrant prosecution.”).

Canadian company of Line 3, have been instrumental in lobbying for these laws.<sup>90</sup>

Environmental defenders can also be criminalized in the court of public opinion through efforts to stigmatize them and their work. Authorities can harm environmental defenders' reputations through media and messaging which impairs environmental defenders' ability to garner community support.<sup>91</sup> Environmental defenders are often described as violent, undemocratic,<sup>92</sup> anti-development, anti-capitalist,<sup>93</sup> and "foreign agents."<sup>94</sup> This type of messaging can turn the community away and force the environmental defender to spend time and resources defending their reputations rather than furthering their environmental cause.<sup>95</sup>

### iii. Procedural Barriers

Procedural processes are also weaponized to impede an environmental defender's work. Perhaps the most critical procedural protection against FDI violence is free, prior, and informed consent ("FPIC") which permits indigenous peoples to give or withhold consent to a project that may affect them or their

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90. *See id.*

91. *See* Eduardo Mosqueda, *Making Good on Promises: How Mexico Can Transform the Lives of Environmental Defenders by Implementing the Escazú Agreement*, GLOB. WITNESS (Jan. 24, 2023), <https://www.globalwitness.org/en/blog/making-good-on-promises-how-mexico-can-transform-the-lives-of-environmental-defenders-by-implementing-the-escaz%C3%BA-agreement> (emphasizing that the UN Special Rapporteur on Human Rights has stated that "to control the message is also to control the possibility that these agents of change can do their work").

92. *See Honduras: The Deadliest Place to Defend the Planet*, *supra* note 56, at 16 (providing an example of how the Honduras government described internationally renowned and subsequently murdered activist Berta Cáceres and her colleagues as violent extremists "seeking 'the downfall of the government and of private enterprise'" and then brought a case against them for "attempting to undermine the democratic order.>").

93. *See* Braaten, *supra* note 50, at 538 (explaining the term "red-tagging," which refers to accusing environmental sympathizers as communists).

94. Mark Stevenson, *Mexican President Calls Opponents Foreign Agents, Traitors*, ASSOCIATED PRESS (July 26, 2022, 11:33 AM), <https://apnews.com/article/mexico-caribbean-city-national-security> (providing that President Andrés Manuel López Obrador stated "Pseudo environmentalists come from Mexico City and other parts of the country, financed by the government of the United States"); *see also* Ruairi Casey, *Climate Activists: How States are Cracking Down on Protests*, DW (Dec. 10, 2022), <https://www.dw.com/en/climate-activists-how-states-are-cracking-down-on-protests/a-64049601> (finding that stigmatization of environmental defenders by governments is a global problem. The French Interior Minister accused 4,000 activists protesting water grabbing of being "eco-terrorists" and the German Interior Minister called a protest stopping traffic "Green RAF").

95. *See generally* *How Land and Environmental Defenders Protect the Planet and How We Can Protect Them*, GLOB. WITNESS (June 4, 2021), <https://www.globalwitness.org/en/blog/how-land-and-environmental-defenders-protect-planet-and-how-we-can-protect-them> (discussing the dangers of being an environmental defender).

territories.<sup>96</sup> When communities agree to the project and accept compensation through this process, the environmental engagement is “likely to be non-violent.”<sup>97</sup> In contrast, the absence of FPIC is a “root cause” of the violence against Mexican [environmental] defenders.<sup>98</sup> In 2013, the Inter-American Commission on Human Rights estimated that 2,600 mining concessions were operating on ancestral territories in Mexico without proper FPIC.<sup>99</sup> In the cases FPIC was attempted, it was a mere formality for projects that had already begun.<sup>100</sup> When communities are not consulted, dissent around the project is higher, and violence toward environmental defenders increases.<sup>101</sup>

This is just one procedural mechanism among many that are manipulated and abused to suppress the will of the people. Others include imposing additional procedural requirements such as organizational registrations and fees,<sup>102</sup> surveillance,<sup>103</sup> strategic lawsuits against public participation (“SLAPP”),<sup>104</sup> or some other interference intended to quiet dissent by making an environmental defender’s work harder and more dangerous. This is only a small representation of all the challenges environmental defenders face as space is limited and the tactics employed are endless.<sup>105</sup> Suffice it to say that powerful entities can be creative and effective in

96. See discussion *infra*, Part III.B.; *Guidelines for Applying Free, Prior and Informed Consent*, CONSERVATION INT’L, <https://www.conservation.org/projects/free-prior-and-informed-consent-in-context> (last visited Oct. 2, 2023).

97. Guarneros-Meza & Zarembeg, *supra* note 80.

98. *Their Faces*, *supra* note 71.

99. *Id.*

100. Rep. of the Special Rapporteur on the Situation of Human Rights Defenders on His Mission to Mexico, U.N. Doc. A/HRC/37/51/Add.2, ¶ 69.

101. See generally Arnim Scheidel et al., *Environmental Conflicts and Defenders: A Global Overview*, 63 GLOB. ENV’T CHANGE, 2020 (discussing how violence against environmental defenders may be decreased with more support and better understanding).

102. See generally Polymenopoulou, *supra* note 77 (analyzing illegitimate repression of protest through prior restraints such as permit systems); see Gleason & Mitchell, *supra* note 77, at 277 (analyzing how some countries restrict where a nongovernmental organization’s funding may come from or enact laws that give the government wide discretion to deny registration for organizations).

103. *Mexico to Investigate Alleged Human Rights Abuses by Military After Spying Claims*, THE GUARDIAN (Mar. 15, 2023), <https://www.theguardian.com/world/2023/mar/15/mexico-to-investigate-alleged-human-rights-abuses-by-military-after-spying-claims> (giving an example of how in March 2023, Mexico’s military came under investigation for using Pegasus—a powerful spyware—to spy on prominent human rights activists).

104. Matthew Hale, *The Critical Role of Environmental Rights Defenders—and the Risks They Face*, FREEDOM HOUSE (Nov. 10, 2022), <https://freedomhouse.org/article/critical-role-environmental-rights-defenders-and-risks-they-face> (stating that SLAPP suits or “strategic lawsuit against public participation” are “one of the most-used tools by governments for stymying activists.” It “keep[s] civic organizations tied up in endless lawsuits based on trumped-up charges, usually with the assistance of politicized courts, with the aim of wearing the activists down—their morale or their bank accounts, or both.”).

105. See generally Scheidel, *supra* note 101 (discussing the kinds of challenges environmental protestors can face).

suppressing dissent through formal means when financial interests are at risk.

### III. GOVERNING ENVIRONMENTAL DEFENDERS, STATES, AND FOREIGN DIRECT INVESTMENT

International customary and treaty law is clear: environmental defenders have a right to dissent peacefully.<sup>106</sup> What is less clear is what implementing that right against state parties and corporate entities engaged in FDI looks like. Part III begins by outlining the rights afforded to defenders under public legal systems and the obligations state and private parties have in respecting those rights. The analysis then continues into private international law to explore how the ISDS system constrains state sovereignty and impairs the realization of these critical rights.

#### *A. Public Law: Rights and Responsibilities*

International, regional, and domestic law articulates the right of environmental defenders to carry out their work and imposes mandatory and voluntary obligations upon state parties and private entities to protect, respect, and remedy this established right.<sup>107</sup>

##### i. International Right to Environmental Dissent

The United Nations Declaration on Human Rights Defenders (“UN DHRD”) is the governing framework for environmental defenders.<sup>108</sup> The UN General Assembly adopted its most recent revision, the 1999 Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote Universally Recognized Human Rights and Fundamental Freedoms, by consensus, establishing that “everyone has the right... to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.”<sup>109</sup> This provides certain rights to defenders, such as seeking protection, conducting human rights work, meeting or assembling peacefully, making complaints about official acts and having them reviewed, and benefiting from an effective remedy and protection under national

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106. See Universal Declaration of Human Rights (UDHR), G.A. Res. 217 A, art. 20, Dec. 10, 1948 [hereinafter UN DHRD].

107. See *Environmental Human Right Defenders Must Be Heard and Protected*, U.N. OFF. OF THE HIGH COMM’R (Mar. 9, 2022), <https://www.ohchr.org/en/stories/2022/03/environmental-human-rights-defenders-must-be-heard-and-protected>.

108. See UDHR, *supra* note 106.

109. G.A. Res. 53/144, art. 1 (Mar. 8, 1999).

law.<sup>110</sup> It also imposes on states the responsibility to protect, promote, and implement all human rights, adopt necessary legislative steps, conduct prompt and impartial investigations, and take all necessary measures to ensure protection.<sup>111</sup> Lastly, and unusually, the resolution includes private actors by emphasizing that “*everyone* has duties towards and within the community,” and all have a duty to promote human rights and safeguard democracy, especially those with professions that can affect the human rights of others.<sup>112</sup>

Although the resolution is non-binding, it bases the rights and responsibilities it establishes on international instruments that are legally binding.<sup>113</sup> Namely, it reiterates the rights of freedom of expression, opinion, association, and peaceful assembly enshrined in the International Covenant on Civil and Political Rights (“ICCPR”).<sup>114</sup> The United Nations Special Rapporteur on the situation of human rights defenders observed that, taken together, these rights underpin the right to protest and an extensive list of General Assembly resolutions reiterates that these covenants apply to the protection of human rights defenders.<sup>115</sup>

## ii. Regional Right to Protection

Regional human rights instruments and case law also confirm the right to protest. The Inter-American Commission on Human Rights recognizes that the right to protest is derived from the “collective form of expression” and applies the principles of proportionality and strict necessity to any derogation of that right.<sup>116</sup>

110. *Id.* at arts. 1, 5, 8, 9.

111. *Id.* at arts. 2, 9, 12.

112. *Id.* at art. 18 (emphasis added); Special Rapporteur on the Human Rights Defenders, *Declaration on Human Rights Defenders*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/declaration-human-rights-defenders> (last visited Mar. 24, 2023).

113. Special Rapporteur on the Human Rights Defenders, *supra* note 112.

114. G.A. Res. 53/144, arts. 5, 6, 9 (Mar. 8, 1999); G.A. Res. 2200A (XXI), arts. 19, 21, 22 (Dec. 16, 1966).

115. See Polymenopoulou, *supra* note 77, at 342; G.A. Res. A/HRC/22/6 (May 23, 2013) (explaining that the Human Rights Council “urges States to create a safe and enabling environment in which human rights defenders can operate free from hindrance and insecurity”); see generally G.A. Res. 68/181 (Dec. 18, 2013) (calling on States to prevent abuses against defenders committed by non-State actors); Human Rights Council, Margaret Sekaggya (Special Rapporteur), Rep. of the Special Rapporteur on the Situation of Human Rights Defenders, U.N. Doc. A/HRC/25/55 (Dec. 23, 2013); G.A. Res. 25/18 (Apr. 11, 2014); G.A. Res. 68/181 (Dec. 18, 2014); Org. of Am. States AG/RES.1671 (June 7, 1999); Org. of Am. States AG/RES.1818 (June 5, 2001).

116. See Org. of Am. States, Office of the Special Rapporteur on Freedom of Expression, *The Inter-American Legal Framework Regarding the Right to Freedom of Expression*, at 103, OEA/Ser.L/V/II (Dec. 30, 2009).

The crown jewel for environmental defenders in Latin America and the Caribbean is the legally binding Escazú Agreement.<sup>117</sup> It was ratified by Mexico and entered into force on International Mother Earth Day on April 22, 2021.<sup>118</sup> It is the first treaty in the world to explicitly provide binding protection to environmental defenders.<sup>119</sup> The stated objective of the agreement is to:

guarantee the full and effective implementation in Latin America and the Caribbean of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, and the creation and strengthening of capacities and cooperation, contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development.<sup>120</sup>

The agreement provides procedural rights to information,<sup>121</sup> public participation,<sup>122</sup> and access to justice.<sup>123</sup> Most importantly for the purposes here, Article 9 explicitly addresses environmental defenders and mandates that state parties “guarantee a safe and enabling environment” so environmental defenders can act “free from threat, restriction and insecurity.”<sup>124</sup> Furthermore, state parties “shall take adequate and effective measures” to recognize and protect the right and “shall also take appropriate, effective and timely measures to prevent, investigate and punish” threats.<sup>125</sup> These obligations are reinforced by the requirement that states adopt necessary laws in their domestic provisions<sup>126</sup> and provide resources to these goals “to the extent of its ability and in accordance with its national priorities.”<sup>127</sup> Lastly, the Escazú Agreement invokes the “principle of permanent sovereignty of States over their natural

117. See generally Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean art. 19 (Apr. 3, 2018) XXVII-18 [hereinafter Escazú Agreement].

118. See Attila Panovics, *The Escazú Agreement and the Protection of Environmental Human Rights Defenders*, 2021 PECS J. INT'L & EUR. L. 23 (2021) (noting this treaty also stands out as a regional environmental treaty in Latin America and the Caribbean and a Multilateral Environmental Agreement under the UN).

119. See *id.* at 24.

120. Escazú Agreement, *supra* note 117, at art. 1.

121. *Id.* arts. 5, 6 (including the principle of maximum publicity to guarantee disclosure that interested parties will be able to access and understand).

122. *Id.* art. 7 (stating that the right to public participation in environmental decision making requires states to guarantee open, timely, and inclusive participation where the decision-maker adequately considers the insights provided).

123. *Id.* art. 8 (stating that the access to environmental justice pillar provides interested parties the right to request precautionary measures to prevent, mitigate or compensate the damages from alleged wrongdoing).

124. *Id.* art. 9.

125. *Id.* (emphasis added).

126. *Id.* art. 4, ¶ 3.

127. *Id.* art. 13.

resources” which calls into question the state’s ability to enter into agreements that actively limit its sovereignty.<sup>128</sup>

Although the Escazú Agreement puts forth significant procedural advancements, the challenge of domestic implementation remains.<sup>129</sup> It is too soon to tell how Mexico will choose to implement the treaty into its domestic law, but initial progress is not encouraging.<sup>130</sup> There were fourteen environmental defender killings in 2018 when Mexico signed the agreement and thirty in 2020 when it ratified the instrument before Congress.<sup>131</sup> Although the treaty requires adequate funds for its protection mechanisms, Mexico subsequently defunded the National Protection Mechanism which works to protect environmental defenders.<sup>132</sup> Ultimately, the Escazú Agreement reinforces the rights that environmental defenders already enjoyed under international law, but that Mexico has historically not protected, respected, or remedied.<sup>133</sup>

State compliance with human rights standards is measured through due diligence.<sup>134</sup> The Inter-American Court of Human Rights held that a state may be liable in international courts if it supports or condones a pattern of abuse, does not take measures to prevent it, or fails to investigate or punish the third party’s action.<sup>135</sup> This applies

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128. *Id.* art. 3(i).

129. See Laura Cahier, *Environmental Justice in the United Nations Human Rights System: Challenges and Opportunities for the Protection of Indigenous Women’s Rights Against Environmental Violence*, 13 GEO. WASH. J. ENERGY & ENV’T L. 37, 54 (2022) (noting that “the biggest challenge of the Escazú Agreement is ensuring its domestic implementation”).

130. See Mosqueda, *supra* note 91.

131. *Id.*

132. See José Miguel Vivanco, *Another Blow to Mexican Journalists and Human Rights Defenders*, HUM. RTS. WATCH (Nov. 3, 2020, 6:40 PM), <https://www.hrw.org/news/2020/11/03/another-blow-mexican-journalists-and-human-rights-defenders> (providing that in 2012, Mexico established the Protection Mechanism for Human Rights Defenders and Journalists, which worked to “quickly and independently decide how and when to assign bodyguards, panic buttons, armored cars, and relocation assistance” to help protect 1,300 people under threat. The little protection it previously provided was severely restricted when Mexico’s Congress voted to close the independent public trusts that funded the program. The vote occurred only a year after the UN Office of the High Commissioner for Human Rights reiterated the importance of sufficient funding for the program); see also José Miguel Vivanco, *Mexican Journalism in Mourning*, HUM. RTS. WATCH (June 11, 2020, 5:28 PM), <https://www.hrw.org/news/2020/06/11/mexican-journalism-mourning> (stating that a UN study found that 90% of crimes against journalists go unpunished in Mexico).

133. Regional Agreement on Access to Information, Public Participation, and Justice in Environmental Matters in Latin America and the Caribbean, ECLAC Implementation Guide, table I.4, 6 Apr. 2022, LC/TS.2021/221.

134. G.A. Res. 56/83, art. 12 (Dec. 12, 2001) (declaring that a state has breached its international obligation “when an act of that State is not in conformity with what is required of it by that obligation.”); see also *Pulp Mills on the River Uruguay* (Arg. V. Uru.), Judgement, I.C.J. Reports 2010, ¶¶ 197, 223 (Apr. 2010) (articulating that the standard of due diligence owed is determined by the primary legal obligation, which is usually established by a treaty but may also be guided by soft law instruments).

135. See Velásquez Rodríguez v. Honduras, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 173–74 (July 29, 1988).

to state actions regarding third parties as well,<sup>136</sup> as outlined by the United Nations Guiding Principles on Business and Human Rights (“UNGPs”), which establishes how states and private entities should pursue the fulfillment of these rights in the context of third parties.<sup>137</sup> The business responsibility established includes “refraining from harming defenders, restricting their rights or interfering with their activities” and “engag[ing] with defenders to identify, mitigate and remedy any adverse human rights violations that may arise from their operations.”<sup>138</sup> However, because the instrument is not binding on private parties and cannot directly regulate FDI, the enforcement and oversight of private parties’ due diligence falls to domestic courts.<sup>139</sup>

The state has a parallel “duty to protect [environmental] human rights defenders from threats and violence by State and non-State actors” and is liable to due diligence principles in international courts.<sup>140</sup> Due diligence includes the following: public support for the work of defenders,<sup>141</sup> a legal, institutional, and administrative framework,<sup>142</sup> strong, independent, and effective national human rights institutions,<sup>143</sup> effective prevention policies and mechanisms, and policies and practices against impunity.<sup>144</sup> In practice, this means that Mexico is not only responsible for its own abuse of environmental defenders, but could also be held liable for a breach of due diligence where it fails to adequately regulate FDI and private parties that abuse environmental defenders.<sup>145</sup>

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136. *Workers of the Fireworks Factory in Santo Antonio de Jesus and their Families v. Brazil*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 407, ¶ 204 (July 15, 2020) (holding that Brazil was responsible for the death of sixty-four workers at a private factory explosion because it did not carry out the proper regulation, monitoring, and supervision of the factory’s activities, despite being aware of the hazardous and dangerous nature); see also IACHR Second Report, *supra* note 11, at ¶ 315 (“Effective enforcement of the environmental protection measures in relation to private parties, particularly extractive companies and industries, is essential to avoid the State’s international responsibility for violating the human rights of the communities affected by activities detrimental to the environment.”).

137. See *The UN Guiding Principles on Business and Human Rights: An Introduction*, OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS. 1, 2–3 (2011), [https://www.ohchr.org/Documents/Issues/Business/Intro\\_Guiding\\_PrinciplesBusinessHR.pdf](https://www.ohchr.org/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf).

138. Hines, *supra* note 18, at 111.

139. See *id.*

140. *The Role of Business*, *supra* note 34, at 14.

141. Margaret Sekaggya, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, ¶ 84, U.N. Doc A/HRC/25/55 (Dec. 23, 2013).

142. *Id.* at ¶ 62.

143. *Id.* at ¶¶ 78–79.

144. *Merits, Reparations, and Costs (Huilca Tecse v. Peru)*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 121, ¶ 82 (Mar. 3, 2005).

145. See *id.*; see generally Sekaggya, *supra* note 141.

## iii. Domestic Implementation

The rights of environmental defenders are protected domestically in law, if not in practice.<sup>146</sup> Article 7 of Mexico's Constitution provides freedom of expression, speech, opinion, and ideas, and Article 9 guarantees the right to peaceful assembly.<sup>147</sup> However, these rights exist where crimes in Mexico suffer a 95% impunity rate and are rarely investigated or prosecuted so are seldom realized.<sup>148</sup>

Similarly, the U.S. Constitution provides for "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."<sup>149</sup> Additionally, international due diligence obligations apply to state conduct that creates effects outside of its borders as well, which means the United States must ensure its citizens—including corporate actors—do not perpetuate abuse abroad.<sup>150</sup> However, this domestic right and international obligation is territorially restricted by the recent narrowing of the Alien Tort Statute, which generally no longer applies to a corporation's foreign conduct.<sup>151</sup> In practice, this means that U.S. corporations engaged in FDI are not subject to suit in the United States for abuses committed against environmental defenders abroad, even if the same actions against U.S. citizens would be actionable.<sup>152</sup>

Between Mexico's almost complete regime of impunity and the United States' refusal to hear claims concerning human rights abuses that corporations commit abroad, Mexican environmental defenders whom FDI projects have victimized essentially have no effective recourse through domestic courts.<sup>153</sup>

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146. See Mosqueda, *supra* note 91 ("Why does this happen in Mexico? Is it because there are no laws? No. This is a country that signs onto almost every international human rights instrument and recognizes human rights at the highest level of law but lacks the capacity[—]and the political will[—]to implement them.").

147. *Mexico's Constitution of 1917 with Amendments Through 2015*, COMPAR. CONSTS. PROJECT (Apr. 23, 2023), [https://www.constituteproject.org/constitution/Mexico\\_2015.pdf](https://www.constituteproject.org/constitution/Mexico_2015.pdf).

148. Albinson Linares, *Violent Crimes Rise in Mexico; 94.8% Go Unpunished*, NBC NEWS (Oct. 12, 2021, 1:21 PM), <https://www.nbcnews.com/news/latino/violent-crimes-rise-mexico-948-go-unpunished-rcna2846>.

149. U.S. CONST. amend. I.

150. See generally Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 MOD. L. REV. 598 (2007) (discussing how actions by large transnational corporations abroad can become the responsibility of the home country).

151. Jacqueline Lewis, *Making the Case for a U.S. Corporate Accountability Agenda*, ICAR (May 19, 2022), <https://icar.ngo/making-the-case-for-a-u-s-corporate-accountability-agenda> ("Additionally, although laws like the Alien Tort Statute (ATS) allow non-citizens to sue in federal court for certain human rights violations, the Supreme Court has interpreted the statute so narrowly over the last 20 years that corporations are often shielded from liability for even the most egregious of abuses.").

152. See *id.*

153. See *id.*; Linares, *supra* note 148.

*B. Private Law: The Rights of Foreign Direct Investment and ISDS*

The main obstacle to realizing the rights of environmental defenders is not a lack of law, as Mexico has signed on to the highest instruments of protection, but rather the political will to implement them.<sup>154</sup> This section seeks to explore the reason for the disconnect between law and practice by analyzing the relevant trade and investment treaties found in private international law that influence domestic implementation.

FDI falls within a complex system of bilateral and multilateral treaties that protect the private right to future profits over a state's sovereignty and community interests.<sup>155</sup> The Inter-American Human Rights Commission concluded that "many of the projects developed by the extractive industries are the result of free-trade agreements and commitments made to increase foreign investment in some [s]tates."<sup>156</sup> These trade deals move states towards a more liberalized economy and places state power in the hands of corporations, at the expense of those who oppose them.<sup>157</sup>

There are 3,300 investment agreements or clauses in treaties where state parties waive their sovereign immunity and provide foreign investors with extensive protections for their investments.<sup>158</sup> Two common inclusions are protections from regulatory takings and the requirement of fair and equitable treatment.<sup>159</sup> The terms of International Investment Agreements ("IIAs") usually differ, but generally, indirect or regulatory expropriation "occurs when a state takes effective control of or otherwise interferes with the use, enjoyment or benefit of, an investment, strongly depreciating its economic value, *even without a direct taking of property*."<sup>160</sup> This vague categorization can be just as broad as it sounds. Regulatory changes such as a higher minimum wage, cancellation of waste disposal contracts, denying mining permits, or implementing environmental standards have all been the basis of multi-million and even billion-dollar claims.<sup>161</sup> Essentially, these clauses take private investor risk and insure it by "grant[ing] . . . investors the right to

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154. See *Their Faces: Defenders on the Frontline*, *supra* note 71.

155. See MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION*, 209 n.36, 221 (2008).

156. IACHR Second Report, *supra* note 11, at 133 ¶ 313.

157. See *id.*

158. See Sarah Lazare, *How Biden Can End Secretive Corporate Tribunals*, *THE AM. PROSPECT* (Feb. 2, 2023), <https://prospect.org/world/2023-02-02-investor-state-dispute-settlement>.

159. *Id.*

160. *A Sustainability Toolkit for Trade Negotiators: Trade and Investment as Vehicles for Achieving the 2030 Sustainable Development Agenda*, IISD, <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-4-safeguarding-policy-space/5-4-4-indirect-expropriation-regulatory-taking> (last visited Mar. 13, 2023).

161. See Lazare, *supra* note 158.

continued profits,”<sup>162</sup> with taxpayers ultimately footing the bill when investors challenge state policies.<sup>163</sup> Colonial ties and neocolonialist effects further exacerbate the injustice of this corporate protection system.<sup>164</sup>

Only investors may bring claims, and they are heard through a private arbitration panel known as ISDS.<sup>165</sup> The average award in ISDS ranges from \$10 to \$100 million dollars, and the investor prevails 56% of the time when the case is decided on the merits.<sup>166</sup> This leads states to favor compliance with investment agreements over human rights treaties because they face financial penalties for noncompliance in investment treaties which are highly enforceable while breaches of human rights treaties are not.<sup>167</sup> For example, Guatemala did not comply with an Inter-American Human Rights Commission order requiring it to shut down a mine for water, health, and indigenous rights reasons because the cost of possible damage awards in ISDS arbitration was prohibitively high.<sup>168</sup> States facing

162. Okechukwu Ejims, *Using Investment Treaties to Hold Companies Accountable: A Case Study of The Morocco-Nigeria Bilateral Investment Treaty*, BUS. & HUM. RTS. RES. CTR. (Oct. 5, 2022), <https://www.business-humanrights.org/en/blog/using-investment-treaties-to-hold-companies-accountable-a-case-study-of-the-morocco-nigeria-bilateral-investment-treaty>.

163. See Jen Moore & Manuel Perez-Rocha, *Extraction Casino: Mining Companies Gambling with Latin American Lives and Sovereignty Through Supranational Arbitration*, INST. FOR POL’Y STUD. 15, Apr. 2019, at 3 (“[T]he low risk that corporations face to gamble on a case valued in the millions, or even billions of dollars, along with the increasing availability of third-party funding and rules biased in their favor, provide strong incentives for ever more outrageous suits.”).

164. See Howard W. French, *Ghana’s ‘Success’ Exposes the West’s Toxic Development Model*, FOREIGN POL’Y, <https://foreignpolicy.com/2022/07/22/ghana-economic-development-mining-gold-cocoa-oil> (last visited Apr. 16, 2023) (“The game of international economics is as heavily rigged in favor of rich countries today as it was when Britain clung to its late-stage empire in the wake of World War II to fund its recovery. The most prosperous nations will continue to source their needs for fuels, minerals, and commodities from the weakest ones—which are heavily concentrated in Africa—driving environmental devastation and predatory economic behavior there that the rich countries would never countenance at home.”); see Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT’L L. J. 215, 222 n.25 (1996) (noting that stabilization clauses, a form of indirect expropriation protection, are especially prevalent in developing states with limited bargaining power).

165. Moore & Perez-Rocha, *supra* note 163, at 5, 11.

166. See Jonathan Bonnitcha et al., *Damages and ISDS Reform: Between Procedure and Substance*, 14 No. 2 J. OF INT’L DISP. SETTLEMENT 213, 219 (2021) (giving the median award for ISDS); Lazare, *supra* note 158 (explaining that large companies worth over \$10 billion have approximately a seventy percent success rate).

167. See Waelde & Ndi, *supra* note 164, at 245–46, 248 n.134 (highlighting the enforceability of investment agreements).

168. See Joseph Ezzo, Comment, *The Marlin Mine, Guatemala: Environmental and Indigenous Human Rights Concerns*, 2 ARIZ J. ENV’T L. & POL’Y 1 (Apr. 2011); see also Lyuba Zarsky & Leonardo Stanley, *Searching for Gold in the Highlands of Guatemala: Economic Benefits and Environmental Risks of the Marlin Mine*, GLOB. DEV. AND ENV’T INST., Sept. 2011, at 12 (“In response to an order to suspend operations, Goldcorp would likely sue for compensation, arguing that the measure was ‘equivalent to expropriation.’”).

pressure from citizens to cancel extractive contracts face a high possibility of expensive payouts if they do and it becomes prohibitively expensive to comply with the democratic process if it does not align with the economic process.<sup>169</sup>

Because of this regime and the damages at stake, states may be reluctant to cancel a permit or impose procedural obligations in the face of community dissent.<sup>170</sup> Mining companies have filed dozens of multimillion-dollar claims in Latin America.<sup>171</sup> Mexico currently faces \$3.5 billion in threatened or pending ISDS suits—roughly 10% of the amount it spent on healthcare at the beginning of the Covid-19 pandemic.<sup>172</sup> It had to pay \$16.7 million after it canceled a mining permit due to pollution concerns and community protests.<sup>173</sup> States are having to pay exorbitant damages for trying to protect their citizens.

One environmental defender explained how “it’s cheaper for governments to throw some human rights defenders in jail than pay for those million-dollar lawsuits.”<sup>174</sup> State parties that respond to protests by taking action against an international corporation’s domestic harm face trade penalties and damages.<sup>175</sup> Even protest itself may be considered a trade impediment justifying compensation “if it impedes the flow of goods.”<sup>176</sup> Where a state does impose environmental restrictions on investors, such as when Ecuador required Chevron to pay \$9.5 billion for remediation and health care for communities suffering from decades of pollution, the ISDS system overturned the domestic finding and invalidated the judgment.<sup>177</sup> To avoid trade disputes from responding to community concerns,

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169. Lazare, *supra* note 158.

170. *Id.*

171. *Id.* (elaborating that Uruguay faces \$3.5 billion in pending or threatened suits and Columbia faces \$18 billion).

172. This number was determined using 2.5% of GDP on health with its 2020 GDP of \$1,090 billion USD to find a health budget of \$27.25 billion. See *Mexico GDP 1960-2023*, MACROTRENDS, <https://www.macrotrends.net/countries/MEX/mexico/gdp-gross-domestic-product> (last visited Apr. 16, 2023); see MND Staff, *Mexico Spends 2.5% of GDP on Health; At Least 6% Is Recommended*, MEX. NEWS DAILY (Aug. 28, 2020), <https://mexiconewsdaily.com/news/mexico-spends-2-5-of-gdp-on-health-at-least-6-is-recommended>; see also Lazare, *supra* note 158.

173. *Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 131 (Aug. 30, 2000), 5 ICISD Rep. 212 (2002).

174. Moira Birss, *When Defending the Land Becomes a Crime*, LAND PORTAL (Sept. 7, 2018), <https://landportal.org/node/76014>.

175. Lazare, *supra* note 158.

176. Birss, *supra* note 174.

177. *Ecuador’s Highest Court vs. a Foreign Tribunal: Who Will Have the Final Say on Whether Chevron Must Pay a \$9.5 Billion Judgment for Amazon Devastation?*, PUBLIC CITIZEN 1, 1 (Dec. 2013), <https://www.citizen.org/sites/default/files/chevron-decision-2013.pdf>; Aldo Orellana López, *Chevron vs Ecuador: International Arbitration and Corporate Impunity*, OPEN DEMOCRACY (Mar. 27, 2019, 12:01 AM), <https://www.opendemocracy.net/en/democraciaabierta/chevron-vs-ecuador-international-arbitration-and-corporate-impunity>.

“governments outlaw protest and criminalize activism” which heightens the danger environmental defenders face.<sup>178</sup>

#### IV. INCREASING THE PROTECTION OF ENVIRONMENTAL DEFENDERS IN IIAs

The robust international legal regime protecting environmental defenders has proven insufficient. Especially when pitted against enforceable and expensive trade obligations to FDI, states continually fail to protect environmental defenders. Current proposals to address the issue encourage corporate actors to respect human rights through voluntary corporate social responsibility commitments and due diligence.<sup>179</sup> They put the onus of doing the right thing on the same private entity that profits enormously by doing the wrong thing.

Corporate social responsibility is based on the private actor’s self-regulation to make a concerted effort to do business in a way that enhances rather than degrades society.<sup>180</sup> The plethora of global corporate social responsibility initiatives, such as the Extractive Industries Transparency Initiative, the Global Compact, and the Global Reporting Indicators are “more effective at public relations than at changing real-life outcomes” because the initiatives depend on voluntary corporate action.<sup>181</sup> Critics have emphasized that these obligations are often ideology-driven, too vague to apply, and, ultimately, that there is no monetary benefit to incentivize or payment to avoid, so corporations do not substantially change their behavior.<sup>182</sup>

Even compulsory corporate standards fall short. Mandatory due diligence laws create binding obligations on companies to manage their processes in compliance with human rights law.<sup>183</sup> However, a process-based focus rather than a results-based focus may only ensure “cosmetic compliance” and shield corporations from liability because a company that goes through the recommended steps but does not resolve the problem can show due diligence compliance (rather than substantive compliance) to avoid liability.<sup>184</sup>

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178. Birss, *supra* note 174.

179. Matthew Genasci & Sarah Pray, *Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice*, 11 YALE HUM. RTS. & DEV. L. J. 37 (2008).

180. See Ejims, *supra* note 162.

181. See Andy Hira, *Corporate Social Responsibility Commitments: All Talk, No Action*, THE CONVERSATION (Oct. 21, 2020, 11:43 AM), <https://theconversation.com/corporate-social-responsibility-commitments-all-talk-no-action-146511>.

182. See *id.*

183. Surya Deva, *Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?*, 36 LEIDEN J. INT’L L. 389, 389 (2023) (“Mandatory human rights due diligence (HRDD) laws in the European Union (EU)—both enacted and in the making—seem to be a promising tool to harden soft international standards in the business and human rights (BHR) field.”).

184. See *id.* at 390.

Furthermore, due diligence laws are once again implemented by the state party and may fall victim to the same domestic enforcement issues described above when faced with international investment pressure.<sup>185</sup>

As this article demonstrates, Mexico and the United States are not fulfilling their own due diligence obligations of providing public support for the work of defenders, establishing strong, independent, and effective enforcement institutions, and engaging effective prevention and investigation policies.<sup>186</sup> The robust set of international protections already in place—and recently added by the Escazú Agreement—signify that the problem of state compliance to regulating harmful and dangerous FDI is not for lack of international obligations or domestic law, but rather a state's inability to effectively implement the law, due in large part to the chilling effect of FDI suits.<sup>187</sup>

The following proposals seek to remedy this through binding obligations that go beyond voluntary commitments and look to alleviate the chilling effect ISDS suits have by separating a state's enforcement and regulation of FDI from ISDS claims. The first two proposals use labor provisions in the USMCA as an example which could be replicated with environmental defender human rights. The first proposal calls for binding obligations and interpretive guidance within the IIA that would obligate states and FDI to adhere to specific standards. The second proposal gives that obligation teeth by integrating an independent and specialized complaint mechanism which includes independent review, public access, and trade penalties. The final proposal is more ambitious, but also more comprehensive: eliminate ISDS in trade agreements to preserve states' sovereignty and improve their ability to meet their due diligence obligations.

### A. Include Interpretive and Enforceable Obligations

Investment agreements and ISDS are “one of the most prominent sources of enforceable hard law for business,” which makes the IIA

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185. *Id.* at 403.

186. See González v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 497 (Nov. 16, 2009); see also IACHR Second Report, *supra* note 11, at 137–38 ¶ 318; Margaret Sekaggya (Special Rapporteur on the Situation of Human Rights Defenders), *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, ¶ 89, U.N. Doc. A/HRC/22/47 (Jan. 16, 2013); Margaret Sekaggya (Special Rapporteur on the Situation of Human Rights Defenders), *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, ¶ 62, U.N. Doc. A/HRC/25/55 (Dec. 23, 2013) (“[E]xistence of laws and provisions at all levels, including administrative provisions, that protect, support, and empower defenders.”).

187. See generally Deva, *supra* note 183.

itself the best avenue for enforceable human rights obligations.<sup>188</sup> Rather than promulgate more human rights instruments that depend on discretionary state enforcement, human rights obligations for both investors and state parties should be included in the IIA directly.<sup>189</sup> Including human rights in an IIA can impose obligations onto multinational corporations, offer a robust enforcement mechanism, and ensure that “norm development in [the] business area[] does not undermine human rights issues” by making the corporate rights found in IIAs to be parallel with corporate ethical obligations abroad.<sup>190</sup>

It is beyond the scope of this article to delineate the specific and highly technical ways that environmental defenders could, and should, be protected. The Esperanza Protocol is an eighty-three page document that explicitly lists the way state parties should implement effective investigations and meaningful legal protections for environmental defenders.<sup>191</sup> Rather than reiterate the specific accountability practices that should be implemented, this article seeks to propose a different way of promulgating these principles so that corporate and state actors are more likely to adhere.

There are already efforts to include other human rights obligations in IIAs. The most salient example between the United States and Mexico is the incorporation of labor rights into the recently negotiated USMCA, effective in 2020.<sup>192</sup> Due in part to the United States’ protectionist posture,<sup>193</sup> labor rights have broken the barrier between established human rights obligations in trade and

188. See Barnali Choudhury, *Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements*, 38 U. PA. J. INT’L L. 425, 464 (2017).

189. See *id.* at 465–67 (discussing incorporating the obligation into the preamble to signify the objectives of the treaty, including substantive obligations in the text, requiring human rights impact assessments, due diligence in supply chains, codes of conduct, and remedy systems, etc.); see also Winibaldus S. Mere, *Recent Trend toward a Balanced Business and Human Rights Responsibility in Investment Treaties and Arbitrations*, 4 HOMA PUBLICA 1, 6 (2020) (explaining how the voluntary nature of a due diligence obligation such as the OECD Guidelines and UN Guiding Principle soft laws can be incorporated into investment agreements to become binding).

190. Choudhury, *supra* note 188, at 430.

191. See generally CTR. JUST. INT’L L., THE ESPERANZA PROTOCOL (2021), <https://esperanzaprotocol.net/wp-content/uploads/2022/06/Esperanza-Protocol-EN-2.pdf> (stating the standards that can be used to protect human rights defenders) [hereinafter ESPERANZA PROTOCOL].

192. Agreement Between the United States of America, the United Mexican States, and Canada, ch. 23, July 1, 2020, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [hereinafter USMCA].

193. See Desiree LeClercq, *The Disparate Treatment of Rights in U.S. Trade*, 90 FORDHAM L. REV. 1, 1 (2021) (“[P]olicymakers incorporate some rights into U.S. trade agreements because they view those rights as critical to protecting national industries and citizens from unfair trade conditions.”); see also Alvaro Santos, *Reimagining Trade Agreements for Workers: Lessons from the USMCA*, 113 AM. J. INT’L L. UNBOUND 407, 411 (2019); see also Walter Bonne, Note, *Unresolved Labor Disputes under the USMCA’s Rapid Response Mechanism: Probing the Applicability of the ATS in Light of Nestlé v. Doe*, 19 N.Y.U. J. L. & BUS. 189, 189, 191–92 (2022).

investment treaties.<sup>194</sup> Although protecting workers is not entirely analogous to protecting environmental dissenters because promoting worker rights abroad is thought to preserve equity for domestic workers,<sup>195</sup> the language and approach used to enforce labor rights is a groundbreaking example that illustrates how this practice may be expanded to include protections for environmental defenders.<sup>196</sup>

The USMCA creates substantive obligations on state parties to adopt and maintain the International Labor Organization's labor standards and explicitly states that "it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party's labor laws."<sup>197</sup> It is the first U.S. trade agreement that imposes binding rights and obligations and enables enforcement against private corporations through trade.<sup>198</sup>

To implement a similar structure that protects environmental defenders, states would need to define the binding obligations upon the state parties and investors clearly.<sup>199</sup> There is some concern that outlining specific human rights obligations in thousands of disparate treaties may create fragmentation and risk exporting domestic standards abroad.<sup>200</sup> One of the best ways to work around this is incorporating international guidelines, such as how the International Labor Organization's standards were used in the USMCA.<sup>201</sup>

For protecting human rights defenders, this would mean incorporating the community-led Esperanza Protocol into a binding obligation within the trade agreement.<sup>202</sup> Incorporating the international protocol would be a way to bolster the community-led work that has already been done to create effective standards while providing an effective enforcement mechanism.<sup>203</sup> When a foreign

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194. Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights*, 60 INT'L & COMPAR. L.Q. 573, 581 (2011) ("[I]nnovative trend in the 'new generation' of renegotiated or recently concluded IIAs, where States are 'striking' a balance between maintaining a comprehensive definition of investment . . . [and] address[ing] a broader range of issues . . ." (quoting United Nations Conference on Trade and Development, *Investor-State Dispute Settlement and Impact on Investment Rulemaking* (2007), at 71)).

195. See LeClercq, *supra* note 193, at 4.

196. See Choudhury, *supra* note 188, at 425–26; see also Simma, *supra* note 195, at 581.

197. USMCA, *supra* note 192, arts. 23.3–23.4.

198. LeClercq, *supra* note 193, at 26; Santos, *supra* note 194, at 408.

199. See Choudhury, *supra* note 188, at 426, 453–54.

200. LeClercq, *supra* note 193, at 9, 38–40 (noting that "the unilateral definitions and interpretations assigned to those rights through trade may obstruct cohesive international rights governance").

201. See *id.* at 36.

202. See Choudhury, *supra* note 188, at 425–26; see also *About the Esperanza Protocol*, ESPERANZA PROTOCOL, <https://esperanzaprotocol.net/about-the-esperanza-protocol> (last visited Apr. 2, 2023) ("[P]rovide[ing] useful guidance for government officials, prosecutors, judges, human rights defenders (HRDs), journalists, and others" as well as a "roadmap for establishing public policies to effectively address threats as well as guidelines for the prosecution of threats." It goes beyond "general standards of due diligence to create "concrete guidelines."").

203. See *About the Esperanza Protocol*, *supra* note 202.

company attempts to sue a state party for enforcing free speech and protections for environmental defenders, the state will have a substantive and legitimate counterclaim against the corporation to negate damages.<sup>204</sup>

Ultimately, the most important substantive obligation to include in the IIA regarding human rights provisions is to specify a trade remedy for noncompliance such as an exclusion of the goods, tariffs, or other economic-based trade remedies.<sup>205</sup> By creating substantive obligations with economic damages, investors that benefit from the opening of foreign markets through IIAs will have an obligation to respect, protect, and remedy the human rights of environmental defenders as well.<sup>206</sup>

### *B. Incorporate an Independent and Specialized Review Mechanism*

The second aspect of the labor provisions in the USMCA is the independent and specialized review mechanism that empowers local claims.<sup>207</sup> A similar provision should be replicated to protect against the abuse of environmental defenders tied to FDI. The rapid response mechanism (“RRM”) reviews violations against the “rights of free association, collective bargaining, and other labor rights” apart from the ISDS arbitration system.<sup>208</sup> It is innovative because members of the public may also submit petitions rather than just state parties, and it provides an expedited review process that can result in direct financial damages to the FDI corporation.<sup>209</sup> A claim goes to the Interagency Labor Committee, which has thirty days to determine whether it is “sufficient, credible evidence of a denial of rights.”<sup>210</sup> If it is, then the government of the facility has forty-five days to conduct its investigation.<sup>211</sup> If they do not find a violation, the other party may still request an independent review.<sup>212</sup> This may result in a “consultation period between the parties for remediation” or, where a denial of rights has occurred, in tariffs, penalties, and a denial of entry for the goods.<sup>213</sup>

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204. See Choudhury, *supra* note 188, at 437; see generally ESPERANZA PROTOCOL, *supra* note 192.

205. See Choudhury, *supra* note 188, at 474–75.

206. *Id.* at 464.

207. See LeClercq, *supra* note 193, at 25–26; USMCA, *supra* note 192, at arts. 23.15–23.16.

208. See Bonne, *supra* note 193, at 205.

209. *Id.*

210. *Id.* at 204 (quoting Aaron R. Hutman, *The U.S.M.C.A.’s Rapid Response Mechanism for Labor Complaints: What to Expect Starting July 1, 2020*, GLOB. TRADE & SANCTIONS L. (July 1, 2020),

<https://www.globaltradeandsanctionslaw.com/the-usmca-rapid-response-mechanism-for-labor-complaints>.

211. *Id.*

212. *Id.*

213. *Id.* at 204–05 (“[States] may impose remedies including (a) suspension of preferential treatment of goods manufactured at the covered facility; (b) imposition of

The benefit to the RRM in the USMCA for labor rights is multi-fold. First, it provides access to the ISDS system for non-state parties and an effective remedy that can be enforced directly against the economic actor at fault. The RRM has the advantage of independent monitoring that is not contingent on state parties.<sup>214</sup> Effective monitoring systems will “facilitate a two-way dialogue between the relevant authorities and stakeholders; enhancing transparency and creating opportunities for direct feedback by members of the public . . . .”<sup>215</sup> As previously established, state parties have conflicting interests in their treatment of environmental defenders, but the RRM creates an enforcement mechanism outside of state control and directly against the offending corporation.

By removing state intermediaries, local communities are more empowered to negotiate directly with the FDI firm and sit at the table rather than depend on the state for protection.<sup>216</sup> Furthermore, the obligation also applies to individual economic actors, which increases accountability for the parties directly responsible.<sup>217</sup> Especially because the negligence of FPIC has excluded affected communities from the decision-making process, these communities must be centered in the resolution process.<sup>218</sup> They must have an opportunity to engage with the investor in a setting that encompasses actual remedies for investor non-compliance.<sup>219</sup>

By fashioning a similar mechanism used for labor abuses to environmental defender abuse, those most affected can access more powerful and independent opportunities for redress. Both cases of abuse emerge from the power imbalance FDI enjoys over the local community, resulting in violence and suppression of opposition to

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‘penalties’ on the covered facility; and (c) denial of entry for such goods, which can be invoked if a covered facility has received at least two prior denial of rights determinations.”) (quoting Aaron R. Hutman, *The U.S.M.C.A.’s Rapid Response Mechanism for Labor Complaints: What to Expect Starting July 1, 2020*, GLOB. TRADE & SANCTIONS L. (July 1, 2020), <https://www.globaltradeandsanctionslaw.com/the-usmca-rapid-response-mechanism-for-labor-complaints>).

214. See *id.* at 203–04; see Jennifer Zerk & Rosie Beacock, *Advancing Human Rights Through Trade*, INT’L L. PROG., May 2021, at 41–60 (reviewing previous attempts at monitoring mechanisms in trade agreements and how they can be improved).

215. Zerk & Beacock, *supra* note 214, at 8–9.

216. See *id.* at 44–45.

217. See Mere, *supra* note 189, at 10 (examining a recent ICSID tribunal that dismissed a counterclaim by the state against an investor based on a violation of the right to water because the duty to ensure water is only imposed on the state).

218. See generally Agnes Portalewska, *Free, Prior and Informed Consent: Protecting Indigenous Peoples’ Rights to Self-Determination, Participation, and Decision-Making*, CULTURAL SURVIVAL (Nov. 27, 2012), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/free-prior-and-informed-consent-protecting-indigenous> (discussing the limits of FPIC).

219. See Chao Wang et al., *International Investment and Indigenous Peoples’ Environment: A Survey of ISDS Cases from 2000 to 2020*, 18 INT’L J. ENV’T RSCH. PUB. HEALTH 7798, 7806 (2021).

their potential profits.<sup>220</sup> Moving enforcement directly onto an FDI entity rather than the state party increases independent review, rather than trying to get unwilling states to risk expensive judgments.<sup>221</sup>

In addition to an independent review body, another important characteristic of the RRM that would need to be included for the protection of environmental defenders is a specialized review body.<sup>222</sup> Traditional investor-state arbitration is conducted by arbitration panelists who have limited experience in public international or human rights law and are, instead, practitioners in trade and investment.<sup>223</sup> Subjecting human rights suits to experts in international economic law may disadvantage those depending on complex and nuanced human rights laws for protection.<sup>224</sup> Instead, the IIA should include a specialized mechanism to hear and resolve these complaints similar to how potential panelists for the RRM are selected for their subject matter background.<sup>225</sup>

By solidifying the articulated rights of the treaty with an independent and specialized review process as well as trade penalties directly applicable to the FDI corporation, private actors would have a greater incentive to comply with recognized human rights standards, and the state party would not be forced to choose between people's rights and protecting investor's profits.<sup>226</sup> This approach is not a panacea to solving all business and human rights abuses, but it would be an innovative way for international law to hold companies directly accountable for their human rights abuses toward environmental defenders and impose enforceable judgments against them using the same treaties that have enabled the abuse for so long.<sup>227</sup>

At the very least, the IIA should include language which declares investors seeking to operate under the protection of the agreement as having presumptively assented to the obligations regarding environmental defenders' human rights.<sup>228</sup> That way, the same investors that benefit from foreign operations will be subject to and

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220. See *The Double Life of International Law: Indigenous Peoples and Extractive Industries*, 129 HARV. L. REV. 1755, 1778 (2016).

221. See *CFIUS Enforcement and Penalty Guidelines*, U.S. DEP'T OF THE TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-enforcement-and-penalty-guidelines> (last visited Oct. 5, 2023) (authorizing the Committee on Foreign Investment in the United State to impose penalties).

222. See Bonne, *supra* note 193, at 205.

223. See Choudhury, *supra* note 188, at 479.

224. See *id.*

225. Kevin Kolben, *Labor Chapters Improve Supply Chain Resilience: The Case of the USMCA*, BROOKINGS (2023), <https://www.brookings.edu/articles/usmca-forward-2023-chapter-7-labor-standards>.

226. See Bonne, *supra* note 193, at 227.

227. See Choudhury, *supra* note 188, at 476.

228. See *id.* at 479.

bound to robust protections towards environmental defenders and to ISDS litigation through *ex ante* consent.<sup>229</sup>

Alternatively, to address the United States' unwillingness to provide accountability abroad, the IIA should specify that FDI will be subject to civil actions for liability in their home state and that the host state "ensures that its laws allow for the adjudication of extra-territorial disputes" regarding the IIA's subject matter.<sup>230</sup> Ultimately, the substantive obligations in the IIA should be bolstered through an embedded enforcement mechanism and/or extended jurisdiction to address the governance gap of enforcing the obligations that currently pervade human rights protections.<sup>231</sup>

### *C. Eliminate Investor-State Dispute Settlement in IIAs*

The link between FDI and suppression of environmental defenders' right to peaceful dissent is well established, and a system that encourages states to disregard threats against environmental defenders for fear of ISDS suit is out of compliance with the binding obligations of the UN DHRD, Escazú Agreement, and customary due diligence.<sup>232</sup> Indeed, the Escazú Agreement specifically identifies the principle of "permanent sovereignty of States over their natural resources" in implementing the agreement.<sup>233</sup> To preserve the state's ability to effectively regulate FDI and uphold their international obligations, ISDS should be eliminated from IIAs. Without the threat of million-dollar suits for interfering with future profits, state officials would regain much-needed independence regarding the FDI industries that are killing, threatening, and suppressing their citizens.<sup>234</sup>

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229. *See id.*

230. *See id.* at 472–73 (describing how the 2015 Indian Model BIT included a provision stating this effect).

231. *See id.* at 481.

232. *See generally* Jessica Evans, AT YOUR OWN RISK: REPRISALS AGAINST CRITICS OF WORLD BANK GROUP PROJECTS, HUM. RTS. WATCH (2015),

[https://www.hrw.org/sites/default/files/report\\_pdf/worldbank0615\\_4up.pdf](https://www.hrw.org/sites/default/files/report_pdf/worldbank0615_4up.pdf) (giving an example of the link between FDI and suppression of the speech rights of environmental activists); *see also* Ari MacKinnon, Katie L. Gonzalez & Gustavo F. Vaughn, *ESG-Related Disputes in Latin America: The Evolution of the Litigation and Arbitration Landscape*, LATIN LAW. (Dec. 16, 2022), <https://latinlawyer.com/guide/the-guide-environmental-social-and-corporate-governance/first-edition/article/esg-related-disputes-in-latin-america-the-evolution-of-the-litigation-and-arbitration-landscape> (explaining the protection for free speech and public participation provided by the Escazú Agreement).

233. Escazú Agreement, *supra* note 117, at art. 3(i).

234. *See* Geoffrey Gertz, *Why Mexico Should Not Fear Losing NAFTA's Investment Rules*, BROOKINGS (Mar. 20, 2018), <https://www.brookings.edu/articles/why-mexico-should-not-fear-losing-naftas-investment-rules> (noting that ISDS is criticized as limiting the sovereignty of nations and preventing them from protecting their environments and natural resources).

There is a growing movement to abolish ISDS provisions.<sup>235</sup> Ecuador, Venezuela, and Bolivia have exited the IIA system altogether.<sup>236</sup> The Biden Administration pledged to stop including ISDS agreements in future disputes<sup>237</sup>, progressive U.S. lawmakers are throwing support behind dismantling the system,<sup>238</sup> and the European Union is renegotiating and considering a coordinated withdrawal from the infamous Energy Charter Treaty and its ISDS clause.<sup>239</sup> Even ICSID, the designated arbitral body in many IIAs, has been searching for reforms due to its legitimacy crisis.<sup>240</sup> Abolishing a system that restricts states' ability to effectively govern around modern emergencies—especially the climate crisis—is no longer a radical proposal.

The most difficult aspect of this solution is the methodology of abolishing ISDS.<sup>241</sup> Unsurprisingly, extracting a state from a mechanism specifically designed to bind it for the benefit of investors is not easy.<sup>242</sup> Even when states withdraw, 95% of IIAs include sunset clauses that preserve the investor's right of action for ten to twenty

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235. See, e.g., Ella Merrill & Martin Dietrich Brauch, *U.S. Climate Leadership Must Reject ISDS: As the United States Faces Another \$15 Billion Suit from the Fossil Fuel Industry, it's Time for President Biden to Take a Decisive Stance*, COLUM. CTR. ON SUSTAINABLE INV. (July 13, 2021), <https://ccsi.columbia.edu/news/us-climate-leadership-must-reject-isds-united-states-faces-another-15-billion-suit-fossil-fuel> (giving an example of the growing movement that rejects ISDS).

236. Choudhury, *supra* note 188, at 477; see also *Number of Land Activists and Environmental Defenders Murdered in Selected Countries in Latin America in 2020*, STATISTA.COM (2023), <https://www.statista.com/statistics/884020/number-activists-murdered-latin-america-country> (showing that despite most killings taking place in Latin America generally, none of the countries that exited the ISDS system were in the top nine in 2020).

237. Lazare, *supra* note 158.

238. See Doug Palmer, Warren, *Fellow Progressives Call for End of Investor-State Dispute Settlement*, POLITICO (Nov. 2, 2023), <https://subscriber.politicopro.com/article/2023/11/warren-and-friends-call-for-death-of-investor-state-dispute-settlement-00124892>.

239. See Carsten Wendler & Laura Lozano, *Spain and Other EU Member States Announce Their Withdrawal From the ECT: What are the Implications for Investors and Arbitrations?*, LEXOLOGY (Nov. 1, 2022), <https://www.lexology.com/library/detail.aspx?g=c90f5c5d-aa48-4728-8ce1-bfa313f8e28b>; see also Tania Voon & Andrew D. Mitchell, *Ending International Investment Agreements: Russia's Withdrawal from Participation in the Energy Charter Treaty*, 111 AM. J. INT'L L. UNBOUND 461, 461 (2017–18).

240. See generally Shuping Li & Wei Shen, *Legitimacy Crisis and the ISDS Reform in a Political Economy Context*, 15 J. E. ASIA & INT'L L. 31 (2022) (providing more information on the ISDS system's changing public opinion and internal direction).

241. See generally Surya Deva & Tara Van Ho, *Addressing (In)Equality in Redress: Human Rights-Led Reform of the Investor-State Dispute Settlement Mechanism*, 24 J. WORLD INV. & TRADE 398 (2023) (noting that the abolishment of ISDS is likely so difficult as to possibly be infeasible).

242. See, e.g., Lise Johnson, Jesse Coleman & Brooke Güven, *Withdrawal of Consent to Investor-State Arbitration and Termination of Investment Treaties*, INVESTMENT TREATY NEWS (Apr. 24, 2018), <https://www.iisd.org/itn/en/2018/04/24/withdrawal-of-consent-to-investor-state-arbitration-and-termination-of-investment-treaties-lise-johnson-jesse-coleman-brooke-guven> (describing the problems with nations attempting to withdraw from ISDS).

years after termination or withdrawal.<sup>243</sup> Mexico has thirteen trade agreements with fifty other countries and would have to individually negotiate withdrawal or termination in each one, exposing itself to the very suits it would be trying to avoid.<sup>244</sup>

But it is not impossible, and the United Nations Conference on Trade and Development (“UNCTAD”) reports that opportunities to revoke IIAs before expiration or to terminate them unilaterally are increasing.<sup>245</sup> State parties can begin by refraining from including it in future trade or investment agreements and seek mutual renegotiation in the standing agreements.

ISDS provisions have been heavily criticized for restricting states’ ability to address environmental harms, namely the climate crisis,<sup>246</sup> and this article strives to add yet another reason to the long list of reasons to seek withdrawal: protecting environmental defenders from suppression and violence. The ISDS system encourages states to listen to foreign investors with a profit-driven agenda rather than its own people. It blocks the state’s ability to respond adequately to public opinion and limits its sovereignty to regulate a private entity that abuses human rights. Unless states work towards abolishing the ISDS system altogether, they will be unable to maintain the level of independence and regulatory power needed to adequately protect environmental defenders, as they are obligated to do under international law.

## V. CONCLUSION

The situation of human rights defenders is increasingly dire. Community leaders seeking to protect their homes and lands are beaten, threatened, killed, criminalized, stigmatized, and barred from justice. The causes of this abuse are increasingly complex as the world continues to globalize, supply chains become more opaque, and multinational corporations become more influential. States have found themselves in a bind: they have international and regional

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243. Antonios Kouroutakis, *SUNSET CLAUSES IN INTERNATIONAL LAW AND THEIR CONSEQUENCES FOR EU LAW* 29–31 (2022).

244. See *2021 Investment Climate Statements: Mexico*, *supra* note 39.

245. See Choudhury, *supra* note 188, at 465; see also, e.g., Anti-Tobacco Trade Litigation Fund, BLOOMBERG PHILANTHROPIES, <https://www.bloomberg.org/public-health/reducing-tobacco-use/anti-tobacco-trade-litigation-fund> (last visited Sept. 19, 2023) (showing that in the past there have been philanthropic efforts to support state parties experiencing increased exposure to ISDS suits, such as here, where Bloomberg Philanthropies initiated a “Anti-Tobacco Trade Litigation Fund” to support middle- and low-income countries passing anti-tobacco laws from costly legal suits initiated by foreign tobacco corporations through financial support, expertise, and resources).

246. See, e.g., *ISDS and Climate Change: What Happens Next?*, WATSON FARLEY & WILLIAMS (Dec. 22, 2022), <https://www.wfw.com/articles/isds-and-climate-change-what-happens-next> (noting that ISDS favors investors and makes it more difficult for nations to address the climate crisis).

human rights commitments to uphold the protection of environmental defenders from private abuse, as well as a legally binding and prohibitively expensive obligation to private parties to do the exact opposite. States are unable or unwilling to respond to public dissent out of financial constraints, so they are increasingly incentivized to help suppress that dissent instead.

But there is an opportunity to use the same binding tools that restrict sovereignty to reinforce human rights obligations. By including binding and interpretive obligations, implementing an independent review system that is directly accessible by those affected, and ultimately restricting the use of ISDS mechanisms in IIAs, states can more effectively protect environmental defenders from profit-driven private entities and fulfill their human rights obligations. To reduce state complicity in environmental defender abuse, we must address a root cause of that priority: FDI and the investment-state dispute resolution mechanisms that protect it.