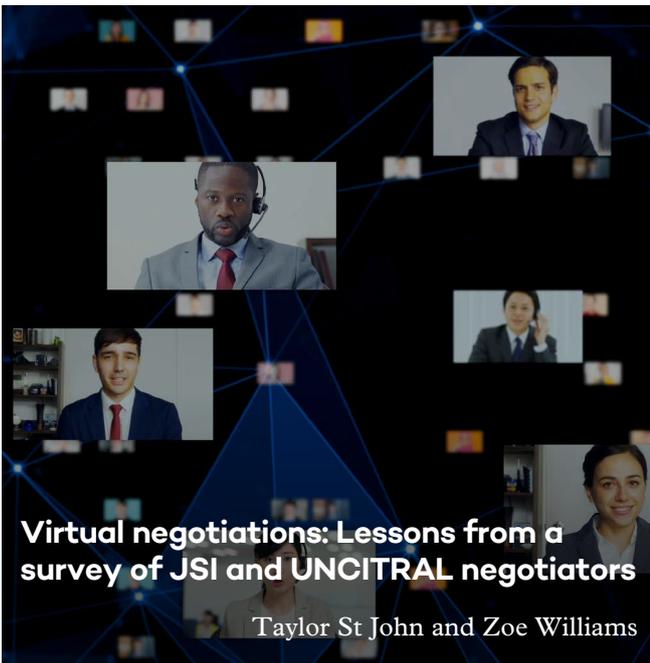




## AN ONLINE JOURNAL ON INVESTMENT LAW AND POLICY FROM A SUSTAINABLE DEVELOPMENT PERSPECTIVE

ISSUE 2. VOLUME 12. JUNE 2021



**Virtual negotiations: Lessons from a survey of JSI and UNCITRAL negotiators**

Taylor St John and Zoe Williams



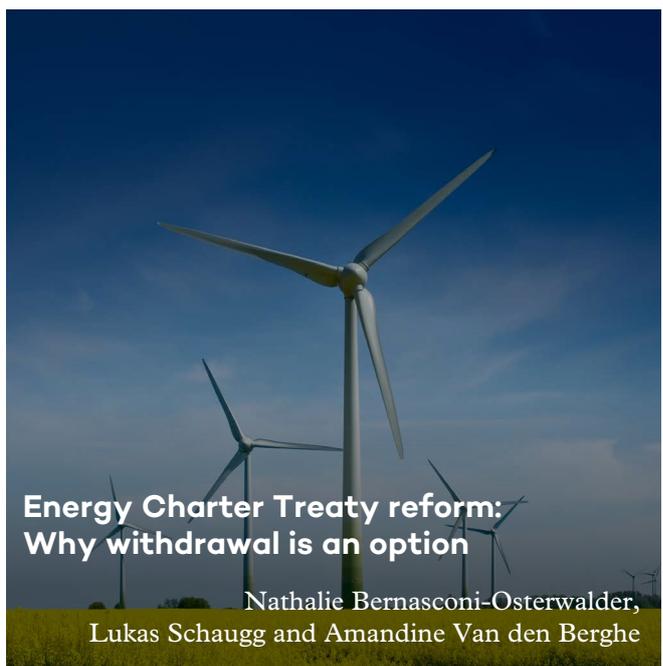
**An interview with Nicolás Perrone on *Investment Treaties and the Legal Imagination: How Foreign Investors Play By Their Own Rules***

Nicolás M Perrone



**Stabilization clauses and implications for human rights and gender equality**

Sangwani Patrick Ng'ambi



**Energy Charter Treaty reform: Why withdrawal is an option**

Nathalie Bernasconi-Osterwalder, Lukas Schaugg and Amandine Van den Berghe





# Contents

<b>INSIGHT 1</b> Virtual negotiations: Lessons from a survey of JSI and UNCITRAL negotiators.....	4
<b>INSIGHT 2</b> An interview with Nicolás Perrone on <i>Investment Treaties and the Legal Imagination: How Foreign Investors Play By Their Own Rules</i> .....	8
<b>INSIGHT 3</b> Stabilization clauses and implications for human rights and gender equality.....	13
<b>INSIGHT 4</b> Energy Charter Treaty reform: Why withdrawal is an option.....	16
<b>NEWS IN BRIEF</b> .....	21
Progress is made in structured discussions on investment facilitation .....	21
UNCITRAL WGIII reconvenes to discuss work and resourcing plan; Civil society observers raise concerns .....	21
Outlook for the EU-China comprehensive agreement on Investment unclear, as EU parliament votes to suspend ratification efforts .....	22
European energy disputes update .....	22
Canada publishes 2021 model foreign investment promotion and protection agreement .....	23
<b>AWARDS AND DECISIONS</b> .....	24
Tribunal rules in favour of claimants in another spanish solar dispute; Dissenting arbitrator argues that tribunal nonetheless over-emphasized Spain's "right to regulate" .....	24
<b>RESOURCES AND EVENTS</b> .....	27

## INVESTMENT TREATY NEWS

International Institute for the Sustainable Development  
International Environment House 2  
9, Chemin de Balexert, 6th Floor  
1219, Chatelaine, Geneva, Switzerland

Tel +41 22 917-8748  
Fax +41 22 917-8054  
Email [itn@iisd.org](mailto:itn@iisd.org)  
Twitter [iisd\\_news](https://twitter.com/iisd_news)

**IISD Senior Director – Economic Law & Policy**  
Nathalie Bernasconi

**Managing Editor**  
Zoe Phillips Williams

**French Editor**  
Suzy Nikiéma

**Spanish Editor**  
Marina Ruete

**French Translator**  
Isabelle Guinebault

**Spanish Translator**  
María Candela Conforti

**Communications and Editorial Manager**  
Sofía Baliño

**News in Brief**  
Cesar Henrique Arrais

**Design (PDF)**  
PortoDG



## LIST OF ACRONYMS

<b>ASEAN</b>	Association of Southeast Asian Nations
<b>BIT</b>	Bilateral Investment Treaty
<b>CETA</b>	Comprehensive Economic and Trade Agreement
<b>CJEU</b>	Court of Justice of the European Union
<b>COMESA</b>	Common Market for Eastern and Southern Africa
<b>CPTPP</b>	Comprehensive and Progressive Trans-Pacific Partnership
<b>CSR</b>	Corporate Social Responsibility
<b>EAC</b>	East African Community
<b>EC</b>	European Commission
<b>ECJ</b>	European Court of Justice
<b>ECOWAS</b>	Economic Community of West African States
<b>ECT</b>	Energy Charter Treaty
<b>EU</b>	European Union
<b>FDI</b>	Foreign Direct Investment
<b>FET</b>	Fair and Equitable Treatment
<b>FTA</b>	Free Trade Agreement
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>ICC</b>	International Chamber of Commerce
<b>ICS</b>	Investment Court System
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>ICSID Convention</b>	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
<b>IIA</b>	International Investment Agreements
<b>IISD</b>	International Institute for Sustainable Development
<b>ILO</b>	International Labour Organization
<b>ISDS</b>	Investor–State Dispute Settlement
<b>ITN</b>	Investment Treaty News
<b>MFN</b>	Most-Favoured Nation
<b>MIC</b>	Multilateral Investment Court
<b>NAFTA</b>	North American Free Trade Agreement
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>PCA</b>	Permanent Court of Arbitration
<b>PPP</b>	Public–Private Partnership
<b>RCEP</b>	Regional Comprehensive Economic Partnership
<b>SADC</b>	Southern African Development Community
<b>SCC</b>	Stockholm Chamber of Commerce
<b>SDG</b>	Sustainable Development Goal
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>USMCA</b>	United States–Mexico–Canada Agreement
<b>VCLT</b>	Vienna Convention on the Law of Treaties
<b>WTO</b>	World Trade Organization



## INSIGHT 1

# Virtual negotiations: Lessons from a survey of JSI and UNCITRAL negotiators

Taylor St John and Zoe Williams



After the COVID-19 pandemic was declared in early 2020, large global negotiations moved online. While virtual negotiations and discussions were an immediate necessity given the circumstances, they may endure long past the pandemic given the climate emergency and longer-term trends toward more virtual meetings and heavier reliance on digital technologies.

Virtual negotiations create new challenges for officials, as well as new opportunities. To learn more about the consequences of moving online, we surveyed negotiators involved in two ongoing processes: the Joint Statement Initiative (JSI) on investment facilitation “structured discussions” undertaken by a group of WTO member states, and UNCITRAL WGIII on ISDS reform. We asked officials about the challenges they face with both in-person and virtual negotiations and talks; how they prepare for both types of meetings; who attends in-person and virtual negotiations and whether this differs; how communication and the conduct of negotiations has changed with the shift online; overall views on the benefits and drawbacks of virtual negotiations; and what negotiating arrangements delegates would prefer moving forward. This article is based on a longer paper discussing the results of that survey, which has also served as the basis for an IISD webinar.

In short, we find that while the basic “outline” of negotiations has not drastically changed with the move online, the colour has been drained from the picture—delegates miss getting to know their colleagues,

discussing informally, and reading reactions in the room. While these intangible elements may seem superficial, they are essential for the compromises and cooperation that underpin successful multilateral negotiations. In addition, challenges facing some delegations, such as dealing with time zones or unreliable internet, will need to be addressed if virtual negotiations are to be inclusive and accessible.

## The Survey

Our survey was sent to potential respondents—negotiators in both the UNCITRAL and JSI processes—who were given the option to complete the survey in English, French, or Spanish. The survey was sent to 171 developing country negotiators and 16 OECD negotiators involved in the UNCITRAL process. From this group, we received 45 responses for a response rate of 26%. We additionally sent the survey to 53 developing country officials involved in the JSI process and received 18 responses (a response rate of 34%). We received survey responses from officials representing 40 countries and three regional organizations. These respondents came from a range of ministries and agencies, including economy and finance, trade and industry, investment and investment promotion, foreign affairs, attorney general offices and investment dispute defense teams, as well as from permanent delegations to the WTO.

## Barriers to participation

We first asked our respondents if they faced any barriers to participating in or attending in-person negotiations and meetings, and if so, what those barriers were. The most frequently selected option was “sufficient funds for travel and accommodations” (30%), followed by “obtaining ministry approval for travel and participation” and “learning about meetings with adequate notice” (14% each).

Virtual negotiations and meetings seem to address two of these concerns, but the move online also creates new challenges. The most frequently selected barriers to virtual participation were time zones and “competing priorities at work”—many delegates were expected to



complete day-to-day work or attend meetings since they had not travelled for the negotiations. Technical challenges were also relatively frequently cited as problems respondents face.

## Preparation and participation

We asked respondents about how they prepare for meetings and about how much time they spend preparing for in-person versus virtual meetings. While how they prepare did not change dramatically, the amount of time spent on preparation for online meetings was lower—significantly so for some delegates.

We also asked respondents whether who attends virtual meetings might differ from those in-person. Notably, 39% said their country was more likely to attend a virtual negotiation or meeting than an in-person one, largely due to questions of cost. In addition, 50% of respondents also answered that their delegation was likely to be made up of representatives of multiple ministries. In other respects, such as gender or seniority, they did not expect virtual delegations to be different from in-person delegations.

## Communication with other delegations

During in-person negotiations, significant communication takes place in the margins, as negotiators chat informally with each other during coffee breaks or over lunch. In these spaces, they share valuable information and figure out who might be possible allies. Are these informal chats recreated in a virtual space? To what extent have delegates found ways to communicate informally with other delegations during virtual meetings?

Most respondents reported that speaking informally with other delegates and meeting new officials were high priorities during in-person meetings. We asked respondents to think of a time they identified like-minded countries and decided to cooperate. Nearly half of all responses said they identified like-minded countries and decided to cooperate during a coffee break or other informal discussion. According to one respondent, “discussion during breaks is fundamental to the negotiating process” which “are necessary to coordinate positions but also to ‘read the room,’ anticipate problems, anticipate new positions, read reactions using body language, adjust interventions along the way.”

We followed up by asking whether this cooperation would have taken place in an online context. Most UNCITRAL respondents answered that it would not, for example, because it would be difficult to identify

who to cooperate with and figure out how to contact them. In the words of one respondent, “No! Virtual meetings can also be distracting as you’re free to work on other work and are less immersed in the discussion/conversation. In addition, you lose out on seeing faces, following up directly with other states on issues or concerns, especially given that contact information may not be readily available.”

Another respondent also noted that the shift online served to further formalize communications, as delegations are more likely to rely on written positions. This has the effect of limiting discussion of different possibilities, because “When something is written it becomes a precedent and therefore states try to only write their official positions. To reach consensus requires a safe space to discuss, in which parties are free to express new positions or new visions.”

While most respondents report using e-mail and text messaging to communicate during both in-person and virtual meetings, many respondents noted that they contact other delegations less frequently since the move online.

Overall, it seems that communication during online discussions lacks some of the intangible elements that make for effective negotiation.

## Conduct of negotiations

The move online has also changed the conduct of negotiations and meetings. One of the strongest findings from the survey is that many respondents feel that they are not able to focus fully, as they are expected to complete other day-to-day work at the same time. As one respondent noted, “in virtual negotiations the attention of each participant is divided between the meeting and its activities, and day-to-day work.” Indeed, nearly 50% of respondents reported that they were less focused during virtual negotiations than when they attend in person.

While fulfilling other duties alongside negotiations presents a challenge, the presence of government officials who might not otherwise attend negotiations can be both positive and negative for delegates. On the one hand, the presence of high-level officials might exert a chilling effect on negotiators, making them more likely to “posture” for the benefit of domestic audiences. On the other hand, virtual negotiations may be more accessible to—and provide a learning experience for—junior officials. This appears to be the case for at least some delegations: around half of all respondents said that there were no changes in who is likely to provide input, while the other half responded



that junior officials, officials based in their capital, and/or female officials were likelier to provide input when negotiations were held virtually.

## General reflections

We then asked respondents for their general reflections about what had changed with the move online. Their responses can be grouped into three themes.

The first is that virtual negotiations limit opportunities for informal discussions. Several respondents echoed this theme, with one noting, “The biggest difference is that informal discussions—which are very important—happen spontaneously at in-person negotiations, and by contrast, need to be facilitated in virtual negotiations.” Another observed that “it is easier to get conversations going” at in-person meetings.

**"The biggest difference is that informal discussions—which are very important—happen spontaneously at in-person negotiations, and by contrast, need to be facilitated in virtual negotiations."**

Respondents also noted that there were fewer opportunities, if any, to get to know the other negotiators and build relationships with them. This makes the discussions feel more formal or “more serious,” less personable, and like “more work.” One respondent put it plainly: “no new relationships are built in virtual negotiations.”

Finally, respondents highlighted that there is less time for negotiations. For example, UNCITRAL WGIII sessions were cut from six to four hours per day in the move online. The lunch or dinner time that negotiators might spend talking to each other also disappears.

## Benefits and drawbacks of virtual negotiations

We also asked respondents to identify the benefits and drawbacks of the move online. Most frequently, respondents noted lower costs as a positive, and relatedly, the opportunities for more participation. Indeed, many respondents mentioned these together, with one

respondent putting it particularly succinctly: “Less expense, more delegates.”

On the other hand, the lack of informal communication and relationship building was seen as a significant downside. Many respondents elaborated on why this type of contact is integral to successful negotiations, noting how important getting to know other officials was for building trust, sharing information, and reaching compromises. As one respondent explained, “Social interaction with other delegates is important. It is not the same to interact with them on a daily basis during in-person meetings than to interact through online platforms. It lacks the personal touch by participants.” This also leads, according to respondents, to less persuasion “because there is not enough space to convince others or to be convinced” and fewer learning opportunities.

In addition, many delegates believe they get less information from a virtual negotiation. As one respondent noted, “we understand less” and “time is very limited.” In part this is because of the absence of informal conversations and the inability to read the room, but a few respondents also noted that “virtual meetings have a way of sidelining less active members.”

Finally, the effect of time zones also falls unevenly on delegations, which could contribute to a narrower range of speakers in virtual negotiations. A few respondents stated that “time zones are the biggest drawback” or “main inconvenience.”

## Moving forward

To end the survey, we asked respondents to think about which aspects of virtual negotiations work well, and how they would like negotiations to be carried out in the future. Overall, respondents felt that earlier or preparatory stages as well as more technical stages of negotiations could be carried out effectively online, while hammering out the details and achieving compromise in later stages was best carried out in person.

Finally, with a view to longer-term negotiations, we asked, “Once in-person meetings are possible again, would you prefer fully in-person negotiations, hybrids, or a continuation of virtual negotiations? Why?” UNCITRAL respondents split evenly between in-person negotiations and hybrid negotiations. All but one of the JSI respondents preferred some form of hybrid negotiation (taken to mean that some phases would be carried out online, others in person). No respondent preferred a continuation of virtual-only negotiations.



## Conclusions

We end the longer paper with a series of recommendations for governments, delegates, and secretariats for how, based on what we've learned conducting this survey, to make virtual or hybrid negotiations more effective. These include concrete suggestions like ensuring officials have headsets and minimizing distractions or competing priorities for officials. They also include more experimental suggestions of steps that might help enable informal contact in a virtual environment.

We also raise a few considerations and cautions. Another form of hybrid negotiations, in which some delegates attend in person and others are attending online, could introduce a new type of inequality by creating a "two-tier" system in which the governments represented virtually are sidelined from the discussions. Since participants from some countries are likely to be vaccinated earlier or may be subject to different travel restrictions, this would exacerbate existing inequalities and could undermine the inclusiveness of the negotiations.

Additionally, everyone involved in negotiations should be aware of the shift in dynamics that may come with virtual or hybrid negotiations. On the one hand, more participation and monitoring from senior officials or other ministries may curtail the discretion of negotiators, limiting their ability to reach compromises. On the other hand, wider participation from individuals within the government could have the consequence of widening interest in the negotiations within the government and bolstering support for it.

Ultimately, virtual or hybrid negotiations lower the financial and environmental costs of international negotiations and make them more accessible. These are important benefits. However, at the same time, crucial elements of successful negotiation like reading facial expressions or informal exchanges are lost in the move online. Therefore, while virtual negotiations are likely to grow in frequency and importance, governments may wish to save their seat at future in-person meetings too.

## Author

**Taylor St John** is a Lecturer in International Relations at the University of St Andrews. She attends UNCITRAL Working Group III as an observer from iCourts, University of Copenhagen.

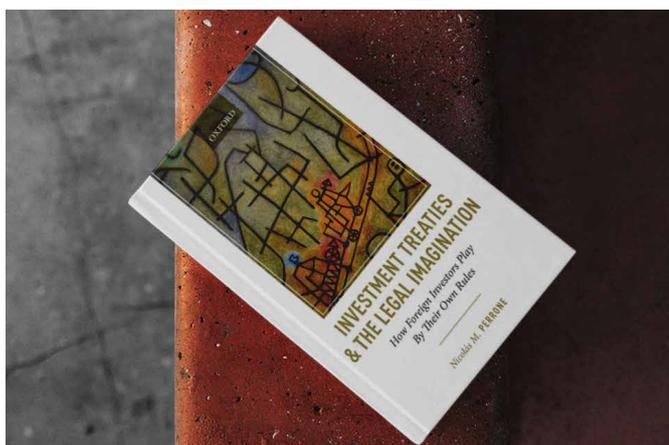
**Zoe Williams** is the managing editor of *Investment Treaty News*.



## INSIGHT 2

## An interview with Nicolás Perrone on *Investment Treaties and the Legal Imagination: How Foreign Investors Play By Their Own Rules*

Nicolás M Perrone



*Investment Treaties and the Legal Imagination: How Foreign Investors Play By Their Own Rules*, Professor Nicolás Perrone's newly published book on the international investment regime, was published by Oxford University Press in April 2021. The book pushes us to think about the ways in which the origins of the regime—the people who imagined it and the circumstances in which they did so—shape how it operates today. More importantly, it highlights the narrowness of this founding vision, which leads practitioners today to ignore the fundamentally social and political aspects of investor–state relations. The following is a lightly edited conversation between ITN editor Zoe Williams and Professor Perrone about some of the central ideas of this book.

### What prompted you to write this book? What gap in our understanding of investment law and ISDS were you trying to fill?

The book aims to bring together some intuitions that I have had for more than a decade.

First, the debate around investment treaty law goes beyond the tension between foreign investor rights and states' right to regulate. Framing the discussion in these terms assumes that these rights are either self-defining or easy to interpret. The truth, however, is that property and contract rights are central pieces

of social organization, and there is a lot at stake in their interpretation. The question is not only how to balance these two rights but also what you are balancing. Moreover, foreign investment relations are not only about investors and states; you have home states, national elites, and local communities. Importantly, investors and states (or national elites) often work together to advance a project. So, the premise that there is always tension between states and foreign investors is a misrepresentation.

Second, ISDS practice is not a coincidence but the somewhat expected result of a project of multinational actors involved in the natural resource sector, particularly investors and their lawyers. I was always suspicious of the claim that the development of ISDS practice was unpredictable. There is, in fact, a remarkably similar pattern of interpretation that dates back to the early discussions around IIAs. I refer to this as the legal imagination: the relationship between these legal discussions and the world-making project of these individuals. Abs, Shawcross,<sup>1</sup> Royal Dutch Shell, the ICC, the American Bar Association (ABA) and others defined the canon of imagination, and we continue operating within this canon.

The book brings together these two intuitions using history, socio-legal analysis and legal theory (transnational law, property law), trying to be faithful to ISDS practice and representing the field as honestly as possible.

<sup>1</sup> Hermann Abs, director of Deutsche Bank and Hartley Shawcross, General Counsel for Royal Dutch Shell, together wrote the “Abs-Shawcross Draft Convention on Investments Abroad” in 1959, which laid out standards of investment protection that appear in thousands of IIAs today.



**You argue that the current state of the international investment regime rests on "a meta-language of international investment law that is still influential today" What are the basic elements of this meta-language? Why is it important to understand international investment law from this perspective?**

This is very important. My claim about a legal imagination is that the norm entrepreneurs developed a vocabulary, a meta-language, to talk about foreign investment relations, and we are trapped in it. Of course, this vocabulary is not entirely new; the norm entrepreneurs built on discussions from the late 19th and early 20th century with the legalist empire practices of the United States and its investors and key international arbitrations during the interwar period.

This vocabulary represents foreign investment relations as transactions, puts foreign investors and states at the same level, and normalizes the premise that states grant incentives to investors, the idea of political risk and arbitration as a way to resolve disputes, and that IIAs can attract FDI. But the norm entrepreneurs never had empirical evidence to support these claims, and some of the examples they give of arbitrary state behaviour were actually cases of terrible investors who paid bribes and interfered in domestic politics.

None of this suggests that states never behave arbitrarily, but the core of foreign investment relations shows investors extracting incentives and enjoying better treatment than domestic investors. Abs, Shawcross, the ICC were in the business of convincing states to offer incentives, rely on their natural resources to develop their economies, and forget about industrialization. Regulatory givings (incentives broadly defined) are as relevant to investment treaty law as regulatory takings, but we have chosen to talk only about the latter.

This meta-language also obscures or renders irrelevant how states ensure foreign investment will benefit the host country, how we facilitate a fair distribution of benefits, costs and risks, or how we handle asymmetric bargaining power. It also occludes the implications of not having exhaustion of local remedies, the importance of performance requirements. Further, it makes the local community invisible, portraying the investment site as a sort of *terra nullius* where you find only a foreign investor and a state capable of granting licences.

**Your story begins with a group of "norm entrepreneurs" in the 1950s and 1960s. What was their goal? Did they get what they wanted?**

These norm entrepreneurs were a group of European and U.S. financiers, lawyers and business leaders who raised the alarm after the nationalizations in Iran, Indonesia, and Egypt. Shawcross claimed that states could not expropriate if they had committed not to in concession contracts and that states could give up their right to eminent domain through contract. In this respect, the norm entrepreneurs lost.

But they were also concerned that Global South countries could rely on the doctrine of partial compensation, which was developed by influential international lawyers in the interwar period. We are told that Latin American countries rejected the prompt, adequate, and effective formula, and the United States and Europe insisted on it. The reality was that European countries nationalized entire industries post-World War II. This example was dangerous for investors who feared Global South countries would imitate it as they did, for instance, with the Chilean copper nationalization. Here, the norm entrepreneurs were successful, and compensation in ISDS practice tends to be much higher than in domestic courts.

Their other worry was that states were intervening in the economy too much. So, they defended legal notions such as indirect expropriations and the protection of undertakings (including the protection of legitimate expectations) to discipline this kind of intervention. This way of talking about investment law is remarkably similar to ISDS practice today.

**You write "Property can be embedded in social, political and economic organizations that may or may not coincide with states ... The notions of private and public express the tension between foreign investor rights and states' right to regulate, but fail to distinguish this other level of struggle." Can you expand on the importance of "the local" for your analysis, and as you mention, the way the regime constructs "good" and "bad" property?**

This is a critical point, and I think that the literature has not paid enough attention to embeddedness. The private-public tension is only one dimension of what occurs within property or contract rights. The



global–local is another relevant dimension. As with the private–public, there is no clear definition or distinction but rather some accommodation that is never final or entirely peaceful. I’ve made the mistake in the past of referring to foreign investor rights as commodity rights, as if they were not embedded in social relations, but this isn’t true. Foreign investors’ rights highlight transnational social relations within the firm, other firms, transnational capitalist elites, or the global market. So, there is a process of accommodation and negotiation between the global, the national and the local. Foreign investors’ rights always have a global and local dimension, as much as a private and a public one.

**"The pattern of interpretation we find is that the global is good and the local is bad. The global represents progress, deserves to be protected and illustrates something reasonable, whereas the local is backward, is arbitrary and should not be protected—or should receive less protection"**

The relevance of the global–local dimension is that it allows us to see that formally, rights may be domestic, such as an environmental licence, but they may be embedded in the business plan of the foreign investor. This situation is something that ISDS practice takes into account. Essentially, and I am generalizing here, the pattern of interpretation we find is that the global is good and the local is bad. The global represents progress, deserves to be protected and illustrates something reasonable, whereas the local is backward, is arbitrary and should not be protected—or should receive less protection. At the same time, it is never purely one or the other; the question for legal scholars—and it is also relevant from a political economy perspective—is what that balance is and its normative implications.

**We've published several articles about local communities and ISDS,<sup>2</sup> and what you call the "invisibility of local communities" in investment law is an issue that is getting more attention. You write that this invisibility "hinges on the premise that states represent local interests in dealing with foreign investors." Why do you think this premise is mistaken?**

The claim of invisibility rests not only on the basis that communities have no legal standing in ISDS or rights under IIAs. It also relies on the fact that neither investment treaty law nor most of the political economy literature discuss their role. Of course, there are references to local communities in previous work. Still, I think the situation started to change with Lorenzo Cotula and my work, both relying on a property heuristic, which shows that local communities were not being heard but still are central to the factual fabric of ISDS cases.

I think we cannot assume that states represent local interests. Investment treaty law represents relations between foreign investors and states as if they always struggled to obtain the best possible distribution of benefits, costs, and risks. The cases I analyze in the book, however, illustrate that their relations are sometimes very cooperative. Those governments advanced the project and investors' interests until the situation escalated into social unrest or prompted generalized violence.

The development literature shows that coalitions favouring extractive projects usually consist of national extractive elites, who sometimes happen to be in government, and foreign investors. In this context, assuming that states are on the side of the community and not of the investor may be empirically and normatively wrong. Extractive elites have a different vision for their countries—for the land and people—than local communities and developmental elites.

<sup>2</sup> Cotula, L. (2021, March 23) Rethinking investment law from the ground up: Extractivism, human rights and investment treaties. *Investment Treaty News*. <https://www.iisd.org/itm/en/2021/03/23/rethinking-investment-law-from-the-ground-up-extractivism-human-rights-and-investment-treaties-lorenzo-cotula>; and Sands, A. (2020, Dec. 29). Does the investment treaty regime promote good governance? The case of mining in Santurbán, Colombia. *Investment Treaty News*. <https://www.iisd.org/itm/en/2020/12/19/does-the-investment-treaty-regime-promote-good-governance-the-case-of-mining-in-santurban-colombia-anna-sands/>.



## **Who are the relevant "norm entrepreneurs" today? How do they shape the ongoing discussions on reform of the regime?**

In the conclusion of the book, I refer to a chapter by David Schneiderman in which he talks about the present norm entrepreneurs. The interests favouring ISDS and IIAs are still there; extractivism is significant in the Global South. At the same time, it is clear that the entire global business community does not care that much about this regime. ISDS makes the most sense for those investors who invest in immobile resources, such as natural resources or infrastructure.

Strong defenders of IIAs and ISDS shape the regime in similar ways today, reproducing a canon of imagination where investors and states are the main actors, where the main problem is political risk, where international investment law is essentially foreign investor rights and ISDS. The main difference between the earlier norm entrepreneurs, and those today, is that many of the latter are also arbitrators and interpret the law.

These individuals may accept some marginal change that seems progressive. For example, John Blair (of Shell and the ICC) championed the idea of voluntary obligations or responsibilities in the 1970s. Today, those who defend ISDS may accept that local communities participate in the proceedings or even that they submit cases against investors. Again, this position would not go against the canon of imagination, and, in fact, it was envisioned in the 1960s, as I point out in the book.

**You write "Once we widen our perspective, however, to also concentrate on the social relations that ownership creates among people or how contracts affect third parties and a given society, the autonomy and expectations of other owners and non-owners can hardly be concealed."**

**This is a powerful articulation of how limited the traditional understanding of investor rights (and state obligations) is, and any true reform of our approach to foreign investment must take this into account. However, it seems to me that this may be outside the scope of what international investment law (or perhaps international law altogether)**

**can address. I think the tendency of a lot of actors involved in the reform process (and other tangentially related work on human rights and business) is to add international law-based rights and obligations for communities and business, respectively, in an attempt to "re-embed" international law. In 2018, IISD organized an expert meeting to consider exactly this question.**

**Do you agree with this characterization and think this is the right approach? If not, what does it miss, and what might an alternative be?**

I think you are spot on. When you press on this point, you get the intuition that there is a problem. If the issue is that states have given up too much sovereignty, is the solution to ask them to give up even more by internationalizing foreign investor obligations? Foreign investors should comply with domestic law, and obligations should be defined and enforced domestically.

**"If the issue is that states have given up too much sovereignty, is the solution to ask them to give up even more by internationalizing foreign investor obligations? Foreign investors should comply with domestic law, and obligations should be defined and enforced domestically."**

The problem is that, in legal theory terms, we have disrupted the balance of rights and obligations based on assumptions that are often wrong, such as that foreign investors are likely to be mistreated by states. Rights, obligations, and privileges are all related to each other and make a legal system. If you elevate only foreign investors' rights and get a pattern of interpretation like in ISDS (and also states which generally promote foreign investors' interests), local communities have limited options but to go international or transnational. They need to catch up with foreign investors. In addition to the book, I have developed this point further in a recent chapter titled International Investment Law as Transnational Law.



But this strategy is risky. Those who defend ISDS see this as an opportunity to consolidate the legal regime, as Blair saw it as an opportunity to expand it in the 1970s. He was a strong defender of corporate social responsibility. If you have vague or voluntary foreign investor obligations, you increase the regime's legitimacy and strengthen foreign investor rights (because the corresponding obligations are weaker). These obligations would be less specific than under domestic law, and local communities would never have the same legal representation as investors or states in an international setting. Hearings would be far from the community, and the adjudicators would likely be more embedded with the global than the local.

## "There are two alternatives I can think of, and they can be traced back to the competing imaginations of the 1970s."

There are two alternatives I can think of, and they can be traced back to the competing imaginations of the 1970s. One is to reinstate the exhaustion of the local remedies requirement. ISDS tribunals' work would be entirely different if there was a final decision of the host state judiciary. Amongst others, foreign investors would enforce their rights in the local jurisdiction against the background of their obligations to the state and other actors. That final decision may be arbitrary, but then they could go to ISDS. In this scenario, the primary standard of protection would be denial of justice. Of course, you may have direct recourse for uncompensated direct expropriations, but other than that, this should be it. This way of handling the situation considers the conclusions of the [UN Group of Eminent Persons and the Charter of Economic Rights and Duties of States](#). Defenders of ISDS have characterized the latter as a direct attack on private enterprise. Still, if you read the views of those who drafted the charter, you realize that the critique was political, not technical.

The other alternative is to create an international organization where states could discuss and coordinate solutions to general problems related to investment, like COVID-19, and address specific issues or disputes. This institution could have a dispute settlement mechanism (again, available to investors after exhausting local remedies). An advantage of such an organization (like a WTO of investment) would be that states could present complaints on behalf of their foreign investors, in a more transparent setting. Diplomatic channels are obscure, and it is difficult to know what is going on. So, rather than claiming that we will *depoliticize* investment disputes like Broches and Shihata did, which is impossible because foreign investment is a very political question, we could improve the level of the discussions, make them more transparent, and bring more actors to the table. I can see states discussing foreign investors' rights and obligations in a setting like this without generating the problems that ISDS does, but I am not saying it would be a panacea either.

### Author

**Nicolás M Perrone** is a Research Associate Professor of International Law at Universidad Andrés Bello, Chile. He is the author of *Investment Treaties and the Legal Imagination: How foreign investors play by their own rules* (Oxford University Press, 2021).



## INSIGHT 3

# Stabilization clauses and implications for human rights and gender equality<sup>1</sup>

Sangwani Patrick Ng'ambi



FDI projects, particularly in the extractive sector, are often governed by concession contracts between states and investors. These contracts may include stabilization clauses, under which states agree to refrain from using their legislative or administrative prerogatives in a manner that adversely affects the investor. Investor–state case law suggests that these clauses are typically respected and upheld.

A rigid application of such clauses may dissuade the host state from developing or implementing new human rights legislation if compliance adds to the operating expenses of the investor. These concerns may be particularly acute when it comes to extractive projects, which can have far-reaching, negative impacts on neighbouring communities.

This article illustrates the ways in which stabilization clauses included in concession contracts for extractive projects can undermine states' efforts to promote gender equality through domestic legislation. It also looks at two sets of principles published in the last decade by the Office of the High Commissioner for Human Rights (OHCHR) and the OECD that

provide a framework for states looking to avoid these types of situations by integrating human rights and sustainability concerns into their contracts with foreign investors.

## Stabilization clauses

Stabilization clauses are contractual provisions contained in concession agreements. In these clauses, host states undertake that they will not utilize their administrative or legislative prerogatives in a manner that adversely affects the investor. The most far-reaching form of stabilization clause is the freezing clause, which has the goal of freezing the law with respect to the investment for as long as the concession is in place. As such, no provision in the concession agreement can be overridden by the use of state prerogatives without the express consent of the investor. Other types of stabilization clauses include economic equilibrium clauses that seek to maintain the economic equilibrium between the parties at the time of a contract's conclusion. Rights arising from stabilization clauses are frequently upheld by tribunals in investor–state arbitration, often resulting in a finding of a breach and leading to an obligation on the host state to compensate the investor.<sup>2</sup>

## Implications for gender equity and equality

Stabilization clauses insulate the investor from non-commercial risks associated with long-term concessions. However, the fact that they are upheld so rigidly by arbitral tribunals may impede the development of new regulations.

<sup>1</sup> This article builds on Ng'ambi, S.P., & Chisanga, K-M.G. (2020). *International investment law and gender equality: Stabilization clauses and foreign investment*. Routledge.

<sup>2</sup> See, for example, the cases of *Texaco v Libya* (1978) 17 ILM 1; *Aminoil v Kuwait* (1981) 21 ILM 976; *Societe des Mines de Loulo S.A. (Somilo) v. Mali*, ICSID Case No. ARB/13/16.



Indeed, they have far-reaching potential implications for the development of gender equity and equality laws. This is because the state may be rendered liable if it passes new gender equity and equality laws and compliance with these new obligations adds to the operating costs of the foreign investors. If stabilization clauses are rigidly applied, the host state would have to compensate the investor for these additional costs. The prospect of having to do so may deter host states from developing gender equity and equality laws.

What types of laws, concretely, might come into conflict with a stabilization clause in a concession contract?

An illustrative example is the *Zambian Gender Equity and Equality Act*,<sup>3</sup> passed in 2015, which introduces a number of obligations that could add to the operating costs of mining companies.

The Zambian government privatized its mines in the 1990s, and the process of investment in the mines by foreigners was fostered through development agreements mainly signed in 2004. Those development agreements contained stabilization clauses. While the extent and reach of such clauses will always depend on their exact wording, it nevertheless may be that changes in the law of Zambia that adversely affect the rights of mining companies could qualify as a breach of a stabilization clause and be a source of liability for the government of Zambia.

The *Gender Equity and Equality Act* creates various obligations for investors. For example, Section 18(1) of the Act requires private entities to “develop equity and equality plans, codes of practice, regulatory mechanisms and other appropriate measures for the effective promotion of gender equity and equality in the area of its operation.” In addition to this, private entities must also enforce and monitor these and make regular reports to the Ministry of Gender, and any other relevant monitoring bodies. Moreover, Section 19 of the Act imposes obligations on both private and private bodies to undertake the following:

- Change the conditions and circumstances which hinder the achievement of sustainable and substantive gender equity and equality
- Mainstream gender in all “strategies, policies, programmes and budgets” in order to empower and benefit both sexes

- Ensure accommodation of the needs and interests of both sexes
- Establish appropriate and special measures that are designed to recognize and support the multiple roles of women.

Section 27(1) also prohibits discrimination against women in social and economic life. As such, there must be full development and advancement of women on an equal basis with men. This is further augmented by Section 31 of the Act, which states that women are to have access to employment opportunities “on the equal basis with a man.” This includes inter alia “equal remuneration, benefits and treatment in respect of work of equal value as well as equality of treatment in the evaluation of the quality of work.” Failure to abide by this attracts a fine or imprisonment or both.

The *Employment Code Act, 2019*, also creates new obligations. Section 41 of the Act, for example, grants 14 weeks maternity leave to female employees; prior to this, women were entitled to only 90 days maternity leave. Furthermore, a female employee who suffers a miscarriage or stillbirth in the third trimester of pregnancy is now entitled to 6 weeks leave on full pay immediately after the miscarriage or stillbirth.

These new obligations, although progressive and long overdue, will certainly increase the operating costs of investors. For example, the obligation to establish appropriate and special measures that are designed to recognize and support the multiple roles of women is cast in very wide terms. Other obligations highlighted therein may also require the employment of a gender focal point or specialist within organizations to ensure compliance. An increase in maternity leave may also increase the operating costs of investors.

While it is difficult to assess specific impacts on government policy-making, stabilization clauses may contradict government ambitions on gender equity and equality in the Republic of Zambia, creating legal uncertainty and jeopardizing policy coherence.

## Guiding Principles for “Durable” and “Responsible” Contracts

Two sets of principles for investment contracts have been developed during the last decade, with the aim of assisting host state governments in writing contracts that allow for the enactment of *bona fide* regulatory standards and to ensure that investment projects contribute to sustainable development and respect human rights. In light of these goals, both sets of principles adopt a cautious stance toward stabilization clauses.

<sup>3</sup> The Gender Equity and Equality Act, 2015 <https://zambia.ii.org/zm/legislation/act/2015/22/gender-equity-and-equality-bill-2015.pdf>



The OHCHR's 2015 Principles for Responsible Contracts<sup>4</sup> were developed by Special Representative of the Secretary General John Ruggie through a multi-stakeholder consultation process as part of a broader effort on developing guiding principles for business and human rights. The introduction to the Principles recognizes that investment contracts are an important instrument through which “states and investors can affect the human rights impact of business operations.”<sup>5</sup> Principle 4 focuses on stabilization clauses: while recognizing investors’ need for financial stability, the Principles underscore that stabilization clauses have the potential to restrict states’ policy space in areas of human rights, and that developing countries have, to date, negotiated contracts with much broader stabilization clauses.

Thus, the Principles recommend that if stabilization clauses are included in contracts, they should be “carefully drafted so that any protections for investors against future changes in law do not interfere with the State’s bona fide efforts to implement laws, regulations or policies, in a non-discriminatory manner, in order to meet its human rights obligations” and should additionally not contemplate economic penalties for states that enact non-discriminatory policy changes.<sup>6</sup>

Similarly, the OECD’s Guiding Principles for Durable Extractives Contracts<sup>7</sup> recognizes that investment projects have the potential to contribute to sustainable development if governed by “durable” contracts that align with the long-term development strategy of the host state, and “optimise the value from resource development for all stakeholders, including economic, social and environmental outcomes.”<sup>8</sup>

With regard to stabilization clauses, these Principles note that they may not be necessary to attract the investment of “technically and financially capable investors.”<sup>9</sup> However, if a state does deem them necessary, the OECD recommends that stabilization clauses be designed to minimize their impact on general tax policy by limiting their application to specific fiscal terms and a specific timeframe.<sup>10</sup>

More broadly, the OECD recommends that contracts be “consistent with applicable laws, applicable international and regional treaties, and anticipate that host governments may introduce bona fide, non-arbitrary, and non-discriminatory changes in law and applicable regulations, covering non-fiscal regulatory areas to pursue legitimate public interest objectives.”<sup>11</sup>

If states are able to integrate these principles into their approach to contracts with extractive industry investors, they should not have to fear contract-based arbitration following the introduction of non-discriminatory regulation aimed at protecting human rights or ensuring sustainable development, including laws related to gender equality.

## Conclusion

In mineral-rich nations that rely on foreign investment in the extractive industries, FDI projects are often governed by concession agreements that can remain in place for 30 years or more. Investors often insist on the insertion of stabilization clauses that can clash with governments’ actions to advance human rights and sustainable development if these actions adversely affect the investor.

Such clauses are designed to encourage investor confidence in that they shield the investment from future regulatory changes that may affect profits, potentially leading to not only compensation for sunk costs but also lost future profits. This could have a chilling effect on states wishing to develop and implement new human rights or gender equality laws if compliance adds to the operating expenses of the investor.

In light of these concerns, international organizations have, in recent years, developed principles that aim to guide states in the development of investment contracts that preserve domestic policy space to pursue objectives such as gender equality. Nevertheless, the onus is not just on states to propose these terms, but for investors to accept them. Thus, states need to have sufficient bargaining power when proposing such terms.

## Author

**Sangwani Patrick Ng’ambi** is a Lecturer of Law at the University of Zambia, School of Law.

<sup>4</sup> OHCHR. (2015). *Principles for responsible contracts: Integrating the management of human rights risks into state–investor contract negotiations – Guidance for negotiators* (A/HRC/17/31/Add.3). [https://www.ohchr.org/Documents/Publications/Principles\\_ResponsibleContracts\\_HR\\_PUB\\_15\\_1\\_EN.pdf](https://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf)

<sup>5</sup> *Ibid* at 3.

<sup>6</sup> *Ibid* at 15.

<sup>7</sup> OECD (2019). *Guiding principles for durable extractive contracts*. [https://www.oecd.org/dev/Guiding\\_Principles\\_for\\_durable\\_extractive\\_contracts.pdf](https://www.oecd.org/dev/Guiding_Principles_for_durable_extractive_contracts.pdf)

<sup>8</sup> *Ibid* at 1.

<sup>9</sup> *Ibid* at 14.

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid* at 11.



## INSIGHT 4

# Energy Charter Treaty reform: Why withdrawal is an option

Nathalie Bernasconi-Osterwalder,  
Lukas Schaugg and Amandine Van den Berghe



## Introduction<sup>1</sup>

The Energy Charter Treaty (ECT) faces criticism for its outdated investment provisions and the threats it poses to the energy transition. ISDS claims brought pursuant to the ECT by fossil fuel investors demonstrate that these threats are imminent and real. Moreover, they are likely to increase as governments take more ambitious climate action. Most recently, in 2021, the German companies RWE and Uniper<sup>2</sup> each initiated arbitration proceedings against The Netherlands, challenging the Dutch government's decision to phase out fossil fuels by 2030. Taken together, the two investors are claiming damages of more than EUR 3.5 billion.<sup>3</sup>

Meanwhile, the ECT's compatibility with EU law is uncertain following recent rulings of the CJEU,<sup>4</sup> and Belgium has asked the Court to clarify whether the draft modernized ECT is compatible with the European Treaties. The request is still pending.<sup>5</sup>

In parallel, the EU and its member states have since 2019 been engaged in the wider multilateral process of "modernizing" the ECT. Recognizing the urgent need for reform, the EU initially intended to align the treaty with the EU approach to international investment law and the EU's climate objectives. However, it is increasingly clear that these objectives will be difficult to achieve, since any amendment of the treaty's text would require unanimity by all 56 contracting states.<sup>6</sup> To date, many non-EU contracting states remain reluctant to make significant changes, and no compromise has been reached.

Given this current state of play, we examine what withdrawal could mean for the EU and its member states, along with its impact on the energy transition in general.

## The EU proposal and attempts to amend the ECT

The EU's proposals—though more ambitious than those of other ECT members<sup>7</sup>—have been criticized as jeopardizing the climate agenda because they continue to allow fossil fuel companies to challenge climate

<sup>1</sup> This analysis draws in many respects from a study by Nicolas Angelet commissioned by ClientEarth.

<sup>2</sup> Uniper is a subsidiary of the Finnish state-owned company Fortum. While Finnish government officials have said that they were following the issue closely and are aware of any political implications, they frequently point to Fortum's fiduciary duty under Finnish corporate law to minimize losses from stranded assets: see Darby, M. (2020, May 22). *Not appropriate: Uniper seeks compensation for Dutch coal phase-out*. Euractiv. <https://www.euractiv.com/section/energy/news/not-appropriate-uniper-seeks-compensation-for-dutch-coal-phase-out/>.

<sup>3</sup> See Bohmer, L. (2021, February 3). *The Netherlands is facing its first ICSID arbitration, as German energy giant RWE makes good on earlier threats*; Bohmer, L. (2021, April 27). *Uniper lodges treaty-based claim against The Netherlands*. IAREporter. <https://www.iareporter.com/articles/uniper-lodges-treaty-based-claim-against-the-netherlands/>.

<sup>4</sup> See European Union. (2020, May 29). *Agreement for the termination of bilateral investment treaties between the member states of the European Union*. [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:2020A0529\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:2020A0529(01))

<sup>5</sup> In another ongoing proceeding related to the ECT before the CJEU, Advocate General Szpunar furthermore indicated a possible answer to the Belgian request when taking the opinion that ISDS under the ECT is not applicable within the European Union: See Opinion by AG Szpunar in Case C-741/19, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=238441&pageIndex=0&doclang=FR&mode=req&dir=&occ=first&part=1&cid=3329784>.

<sup>6</sup> See Article 36 of the ECT.

<sup>7</sup> See The Energy Charter Secretariat. (2019, October 6). *Decision of the Energy Charter Secretariat*, pps. 2–57, <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201908.pdf>



action through ISDS.<sup>8</sup> Indeed, only the most recent proposal has differentiated between different types of economic activities, carving some fossil fuel projects out from the ECT's investment provisions.<sup>9</sup>

Specifically, the EU suggested distinguishing between existing and future fossil fuel investments. According to the EU, the ECT's investment protection provisions, including access to ISDS, should continue to apply to existing fossil fuel investments for a period of 10 years after entry into force of the amendment.<sup>10</sup> This would allow fossil fuel investors to bring ISDS claims for the entirety of this period. The EU suggests that future fossil fuel investments be excluded from the scope of application of the ECT's investment protection provisions as of the entry into force of the amendment with a major exception: gas-related investments made before the end of 2030 will be covered if they remain below a specific carbon threshold.<sup>11</sup> This cut-off date is extended to 2040 for investments that concern the conversion of powerplants for the burning of natural gas. Civil society organizations have criticized this lack of ambition,<sup>12</sup> pointing out that the proposed carbon threshold for gas investments is significantly higher than what the EU internally defines as "sustainable" use of natural gas.<sup>13</sup>

Besides the proposal's insufficient ambition, the lack of progress during the first four rounds of the modernization talks shows that success is far from certain; Luxembourgish energy minister Claude Turmes said that progressive states continue to face resistance from Japan, Norway, Switzerland, and the United Kingdom.<sup>14</sup> Some governments and parliamentarians have called on the EU to explore

alternatives to a unanimous amendment<sup>15</sup> and the EU Commission itself no longer rules out a coordinated withdrawal of all member states.<sup>16</sup> It is therefore timely to examine the legal rules applicable to withdrawal from the ECT, the practical consequences of a withdrawal of a group of ECT contracting parties, and its effectiveness from a climate perspective.

## The option of withdrawal and the survival clause

### a. Withdrawal

Withdrawal, which is sometimes also called denunciation, can be understood as the "procedure initiated unilaterally by a State to terminate its legal engagements under a treaty."<sup>17</sup> In other words, withdrawal puts an end to the participation of the withdrawing parties but without terminating the treaty itself, and the provisions of the treaty will remain in force among the non-withdrawing parties.

Article 54 of the VCLT stipulates that a state may withdraw from a treaty pursuant to the specific conditions for withdrawal that the treaty sets out. In the ECT, these rules are contained in Article 47, which provides that a contracting party may withdraw from the ECT at any time by serving written notice to the depositary. The withdrawal takes effect one year after the date of the receipt of such notice by the depositary. Pursuant to this rule, withdrawal could occur unilaterally or be coordinated, such as in case of a withdrawal of all EU member states.

<sup>8</sup> See for example Climate Action Network Europe. (2021, February). *Analysis of the EU proposal to change the definition of Economic Activity in the Energy Sector as part of the modernisation of the Energy Charter Treaty*. [https://caneurope.org/content/uploads/2021/02/Analysis-of-the-COM-proposal-for-ECT-modernisation-on-the-Definition-of-Economic-Activity-in-the-Energy-Sector\\_February-2021.pdf](https://caneurope.org/content/uploads/2021/02/Analysis-of-the-COM-proposal-for-ECT-modernisation-on-the-Definition-of-Economic-Activity-in-the-Energy-Sector_February-2021.pdf).

<sup>9</sup> See EU Commission. (2021, January 25). *EU text proposal for the modernisation of the Energy Charter Treaty*. [https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc\\_159436.pdf](https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159436.pdf).

<sup>10</sup> See *ibid.*, page 2.

<sup>11</sup> See *ibid.*; the proposed carbon threshold is 380g "fossil" CO<sub>2</sub>/kWh.

<sup>12</sup> See *supra*, note 7.

<sup>13</sup> See *ibid.*

<sup>14</sup> See Minister Claude Turmes' intervention at the event "Should EU Member States fix the Energy Charter Treaty or withdraw from it?" jointly organized by ClientEarth, EEB, FoE Europe, and CAN Europe on March 30, 2021, at minute 40:13. <https://www.youtube.com/watch?v=I9sPFBfXA0Y>

<sup>15</sup> France's government has signalled its willingness to withdraw if swift and meaningful reform fails: see, Simon, F. (2021, February 3). *France puts EU withdrawal from Energy Charter Treaty on the table*. Euractiv. <https://www.euractiv.com/section/energy/news/france-puts-eu-withdrawal-from-energy-charter-treaty-on-the-table/>; MEP and Chair of the European Parliament's INTA Committee Bernd Lange recently called for a coordinated withdrawal of the EU from the ECT: See Lange, B. (2021, April 28). *Die EU muss raus aus der Energiecharta*. *Frankfurter Rundschau*. <https://bernd-lange.de/meldungen/gastbeitrag-fr-die-eu-muss-raus-aus-der-energiecharta>. 139 European and national parliamentarians urged the EU Commission to withdraw in a letter dated September 8, 2020. <https://www.ernesturtasun.eu/ecologia/statement-the-modernisation-of-the-energy-charter-treaty/>.

<sup>16</sup> See Answer given by Executive Vice-President Dombrovskis on behalf of the EC: European Parliament. (2020, December 2). [https://www.europarl.europa.eu/doceo/document/P-9-2020-005555-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/P-9-2020-005555-ASW_EN.html).

<sup>17</sup> See United Nations. (2003). *Final clauses of multilateral treaties handbook*, p. 109. <https://treaties.un.org/doc/source/publications/fc/english.pdf>



## b. The survival clause

Withdrawal from the ECT faces an additional layer of complexity, as it would trigger the survival clause contained in Article 47(3). This article states:

*The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date.*

According to this clause, if one or more contracting states withdraw, the investment protection provisions of the treaty will continue to apply to all previously protected investments for 20 years after the withdrawal takes effect. Compared to state practice in different IIAs, this 20-year period is relatively long. 85% of IIAs containing a survival clause refer to a period of less than 20 years; most provide for 10 years or less.<sup>18</sup> Importantly, the survival clause in the ECT grants protection only to investments made before the withdrawal, allowing these investors to continue to use ISDS under the ECT to challenge climate policies and seek compensation. In practice, investors have used the ECT's survival clause to that effect: since its unilateral withdrawal from the treaty in 2016, Italy has faced at least seven arbitration claims based on the survival clause, with cumulative amounts in compensation claimed exceeding USD 400 million.<sup>19</sup>

The 20-year survival clause could put the urgent action needed to achieve Paris commitments at risk. At the same time, if ECT parties spend years debating a modernized text, this may lead to a similar outcome. If such a text were to follow the EU's most recent proposal and given the current lack of progress at the negotiations, existing fossil fuel investments would be protected for a period of well over 10 years. Neither of these options is sufficient to reach the climate objectives that ECT parties have committed to.

To avoid these outcomes, contracting states would first have to agree to “neutralize,” i.e., extinguish, the legal effects of the survival clause in the ECT.<sup>20</sup>

While a unanimous decision to neutralize might be unachievable, this could be done amongst a group of the ECT's contracting parties. In the following section we analyze the legal basis and practical consequences of such a neutralization.

## c. Neutralization of the survival clause

The neutralization of survival clauses in IIAs is not without precedent. However, so far, states have only neutralized survival clauses in bilateral, not multilateral, treaties. This was done through an agreement by the two parties to amend the treaty, followed by termination. Proceeding in this way, states have altered or extinguished survival clauses in at least eight instances. In some cases, they decided to shorten the period of additional protection.<sup>21</sup> In other instances, they extinguished the survival clause altogether.<sup>22</sup> To date, no claims have been based on a neutralized survival clause, and no arbitral tribunal has thus been confronted with the question of jurisdiction in such circumstances.<sup>23</sup> This fact is not conclusive as to whether arbitral tribunals will uphold or reject jurisdiction because of neutralization. However, evolving state practice is an indicator that neutralization is effective, as it manifests the will of the contracting parties and decreases the likelihood of success of claims for the investor when pursuing arbitration, thereby increasing the risk associated with initiating expensive arbitration proceedings.

Neutralization of a survival clause in a bilateral treaty by way of amendment is different from the neutralization of the survival clause in a multilateral treaty among only a group of the contracting states. For the case of a withdrawal from the ECT, the latter scenario is most relevant. From a public international law perspective, such a partial neutralization finds support in the international law rules for the modification of treaty provisions. According to these rules, to extinguish the effect of the survival clause, states may negotiate a modification or so-called inter se agreement. Contrary to

<sup>18</sup> Data retrieved from the UNCTAD International Investment Agreement Database, <https://investmentpolicy.unctad.org/international-investment-agreements>

<sup>19</sup> See *ibid.*

<sup>20</sup> If this were the desire of all ECT parties, such neutralization could be achieved through a unanimous amendment. Given the slow progress and lack of compromise at the modernization talks, such a unanimous solution may, however, be difficult to achieve.

<sup>21</sup> See for example the incorporation of the Argentina–Chile FTA into the Chile–Mercosur Agreement in 2017; termination of the Australia–Mexico BIT; termination of the Australia–Viet Nam BIT; termination of the Australia–Peru BIT.

<sup>22</sup> See for instance the termination of the Argentina–Indonesia BIT in 2016; termination of the Australia–Indonesia BIT in 2020; termination of the Australia–Hong Kong BIT in 2020; the 2019 Uruguay–Australia BIT that terminated the previous agreement and overrode its survival clause.

<sup>23</sup> See Tropper, J. (2020). *The treaty to end all investment treaties*. *Völkerrechtsblog*. <https://voelkerrechtsblog.org/de/the-treaty-to-end-all-investment-treaties/>.



an amendment, for which the ECT requires unanimity, a modification amounts to the “variation of certain treaty provisions only as between particular parties of a treaty, while in their relation to the other parties the original treaty provisions remain applicable.”<sup>24</sup>

#### d. Neutralization through modification

The ECT does not expressly mention modification, which is therefore governed by the default rule in Article 41 of the VCLT. This rule provides that “[t]wo or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone.” Modification is subject to two conditions aimed at safeguarding the basic integrity of the original treaty regime.

##### i. First condition—Safeguarding third-party rights

According to Article 41 (b)(i) of the VCLT the modification must “not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations.” There is academic consensus that the first condition depends on the legal nature of the rights and obligations that a treaty creates, and specifically, whether these rights and obligations are of a *reciprocal*, *interdependent*, or *integral* nature.<sup>25</sup> A multilateral treaty is reciprocal in nature if it is “providing for a mutual interchange of benefits between the parties, with rights and obligations for each involving specific treatment at the hands of and towards each of the others individually.”<sup>26</sup> This must be distinguished from interdependent or integral treaty undertakings that create obligations *erga omnes*.

As evidenced by the *Travaux Préparatoires* that led to its conclusion, the ECT was adopted as a “package deal” consisting of a bundle of reciprocal bilateral relations.<sup>27</sup> Rather than creating obligations that are binding *erga omnes partes*, obligations under the treaty

operate bilaterally. In practice, if the actions of host state A violate the rights under the ECT of an investor from home state B having invested within the area of host state A, only this investor or home state B have standing to bring a claim.<sup>28</sup> It follows that the rights and obligations in the ECT are reciprocal in nature. An *inter se* modification to extinguish the survival clause would not therefore affect other parties’ rights contrary to the first condition in Article 41(b)(i) of the VCLT. An *inter se* neutralization hence meets the first condition.

##### ii. Second condition—Safeguarding the object and purpose of the treaty

In addition, modification must “not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole” (Article 41 (b)(ii) of the VCLT). This condition is widely viewed to be substantially similar to, if not a reiteration of the first condition.<sup>29</sup> In ensuring that subsequent agreements do not affect the rights of third parties, both conditions follow the same rationale. The International Law Commission’s *Travaux Préparatoires* for the VCLT suggest that where an *inter se* agreement alters only bilateral relations it should be permissible. In this case, it would not be “incompatible with the effective execution of the object and purpose of the treaty.” Comparable rules of public international law indicate that only a derogation from interdependent rather than bilateral obligations would fail to meet the second condition. This might be the case where a subsequent *inter se* agreement “radically changes the position of every other party.”<sup>30</sup>

<sup>24</sup> See United Nations. (n.d.). *Glossary of terms relating to treaty actions*. [https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1\\_en.xml#amendment](https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml#amendment)

<sup>25</sup> See Odendahl, K. (2012). Article 41. In O. Dörr & K. Schmalenbach (Eds.), *Vienna Convention on the Law of Treaties*. Berlin Springer. §18; see Fitzmaurice, G. G. (1958). *Third Report, Yearbook of the International Law Commission, II*. pp. 43–44, paras. 88–89; see Wood, M.M. et. al. (2009). *The International Law Commission 1999–2009, vol. 5*, page 742.

<sup>26</sup> Fitzmaurice, G.G. (1958). *Third Report on the Law of Treaties*. UN doc. A/CN.4/115, YILC, Vol. II, 20, 27, Art. 18, para. 2

<sup>27</sup> Indeed, this seems to have been a decisive factor to allow signatories to find sufficient consensus, see Doré, J. (1996). Negotiating the Energy Charter Treaty. In T. Wälde (Ed.). *The Energy Charter Treaty: An east-west gateway for investment and trade*. Kluwer, p. 151.

<sup>28</sup> This also finds support in the International Court of Justice’s ruling in the Barcelona Traction case, where the Court held that obligations relating to the diplomatic protection of foreign investments were not binding *erga omnes partes*: see ICJ. (1970). *Barcelona Traction, Light and Power Company, Judgment*, I.C.J. Reports, §33 ff.

<sup>29</sup> See Pauwelyn, J. (2003). *Conflicts of norms in public international law: How WTO law relates to other rules of international law*, at 436; Vidigal, G. (2013, November). From bilateral to multilateral law-making: Legislation, practice, evolution and the future of *Inter Se* agreements in the WTO. *European Journal of International Law*, 24(4), pps. 1027–1053, here: 1042; Sadat-Akhavii, S.-A. (2003). *Methods of resolving conflicts between treaties*. Graduate Institute of International Studies (Series), Vol. 3. Brill Academic Publishers.

<sup>30</sup> Article 60 (2)(c) of the VCLT; also see article 42(b)(ii) of the ILC Draft Articles on State Responsibility (2001).



As has been established above, the ECT consists of a bundle of bilateral relations. The alteration of some of these relations among a group of the contracting parties would not adversely impact the rights of intra-ECT third parties, i.e., those of non-modifying states and their investors. For instance, if all EU member states decided to withdraw from the ECT and neutralize the survival clause amongst themselves, nothing would prevent an investor from a non-EU party from bringing a claim against the withdrawing states. An *inter se* neutralization would therefore also meet the second requirement in Article 41(b)(ii) of the VCLT.

## Conclusion

There is a legal basis for a withdrawal from the ECT with an *inter se* neutralization of the survival clause. In contrast to the continued protection of existing and certain future fossil fuel investments under the EU's amendment proposal, such a withdrawal would put an immediate end to treaty-based fossil fuel protection and ISDS among all withdrawing states. In the short term, this would significantly reduce ISDS risks, given that 60% of the cases based on the ECT are intra-EU. It would also enable the EU and its member states to comply with the EU's climate objectives and EU law. If further contracting states were to join, the ISDS risk to strong climate action would be further reduced and could pave the way for a fresh, unencumbered negotiation of a truly modern energy treaty that would support the expedited phase-out from fossil fuels and the transition to renewable energy.<sup>31</sup>

## Authors

**Nathalie Bernasconi-Osterwalder** is executive director of IISD Europe and Senior Director, Economic Law and Policy, IISD.

**Lukas Schaugg** is an International Economic Law Fellow at IISD and a PhD-researcher in investment law at Osgoode Hall Law School, Toronto, Canada.

**Amandine Van den Berghe** is a Trade & Environment Lawyer at ClientEarth.

<sup>31</sup> See The Creative Disrupters. (2018). *Treaty on sustainable investment for climate change mitigation and adaptation*, prepared as part of a submission to the Stockholm Treaty Lab Prize. <https://stockholmtreatylab.org/wp-content/uploads/2018/07/Treaty-on-Sustainable-Investment-for-Climate-Change-Mitigation-and-Adaptation-1.pdf>



## NEWS IN BRIEF

### Progress is made in structured discussions on investment facilitation

WTO members involved in the “structured discussions” on investment facilitation met on several occasions during the first quarter of 2021. These meetings culminated with the circulation of the “Easter Text,” an important milestone in the talks that brings together several earlier drafts and texts in one document. This text will serve as the main basis for drafting any ultimate agreement on investment facilitation.

At the [January meeting](#), delegates discussed the entry and temporary stay of businesspeople in the host state of investment; proposals related to provisions regarding compliance with domestic law and international obligations; health, labour, environmental, and safety standards; and social and environmental responsibility.

[Meetings in early March](#) laid further groundwork for the eventual “Easter Text.” In these meetings, participants discussed the possibility of a firewall that would insulate the investment facilitation agreement from IIAs. A [summary](#) of the meeting discussions states that most delegates are in agreement that it is desirable to avoid situations in which a future investment facilitation agreement is invoked in the context of an investment arbitration. To this end, some members proposed the inclusion of a non-importation clause. Delegates also discussed clarifying the concept of treatment under MFN clauses. Finally, all participating members concurred that any disputes arising under agreement would be resolved under the auspices of the WTO Dispute Settlement Understanding (DSU).

Additional subjects of discussion included a “business obstacle alert mechanism,” issues related to responsible business conduct, corruption, proposals on general exceptions, security exceptions, and financial exceptions.

Finally, delegations [met in April](#) to begin working on the Easter Text and to agree on a schedule for meetings in May, June, and July leading up to the WTO’s Twelfth Ministerial Conference (MC12) in November–December 2021.

### UNCITRAL WGIII reconvenes to discuss Work and Resourcing Plan; Civil society observers raise concerns

The UNCITRAL WGIII convened, with delegates able to attend virtually or in-person, from May 4–5, 2021 for the resumption of its 40th session. On the agenda was consideration of the draft work and resourcing plan.

The [workplan](#), circulated in April, sets out a detailed schedule of meetings and the areas of reform to be discussed. These now include alternative dispute resolution mechanisms and dispute prevention; selection and appointment of arbitrators; arbitrator code of conduct, third-party funding; ISDS procedural rules and reforms; a multilateral advisory centre; an appellate mechanism; the multilateral permanent investment court; and a multilateral instrument to implement reforms.

Draft notes on the establishment of an advisory centre, third-party funding, and the arbitrator code of conduct have all been [made available](#).

[Commentary](#) on the work plan notes that adjustments and changes can be made as discussions progress. The commentary further notes that some of the issue areas identified in this plan have been kept purposefully broad, in order to capture “a number of cross-cutting issues” that have been raised in discussions to date.

In total, the workplan proposes 56 days of meetings over the next four years, with these sessions coming to an end in 2025. However, some reform proposals may be subject to “approval in principal [sic]” before that time.

Both the work and resourcing plan have raised concerns of civil society organizations involved in the ISDS reform process.

A recent IISD [blog post](#) notes the reality of, and potential for greater, tension between more reform-minded delegations and those that prefer to maintain the status quo. Indeed, there appears to be perhaps less consensus than we may have assumed about the need for reform, as “a few delegations, private lawyers and industry groups indicated that the current system of investor–state arbitration is working well enough for



their purposes, and they oppose meaningful reform, even though WGIII had previously agreed that reform was desirable.”

Similarly, in a recently published [blog post](#), the Columbia Center on Sustainable Investment raised the alarm that reform options that would significantly diminish the role of ISDS in the investment protection regime are being sidelined in favour of more technical fixes.

The next session of UNCITRAL WGIII is scheduled for November 15–19, 2021.

## Outlook for the EU-China Comprehensive Agreement on Investment unclear, as EU Parliament votes to suspend ratification efforts

On May 20, 2021, the European Parliament voted to suspend ratification efforts of the “in principle” Comprehensive Agreement on Investment (CAI) with China.

The deal must be approved by the European Parliament and the EU Council, which consists of all 27 heads of state, before it can become law.

Announced in December 2020 after seven years of negotiations, the EC paused the deal’s ratification following Beijing’s sanctions of five European officials. These sanctions were themselves a reaction to sanctions of Chinese officials by several Western countries in response to the Chinese government’s treatment of the Uighurs in Xinjiang.

According to [EuroNews](#), earlier in the month, the EC released the following official statement: “In this context, Chinese retaliatory sanctions targeting Members of the European Parliament and an entire parliamentary committee are unacceptable and regrettable. The prospects for the [investment deal’s] ratification will depend on how the situation evolves.”

The German chancellor, Angela Merkel, [said that the CAI](#) is an “important undertaking” despite “all the difficulties that will certainly arise in the ratification process.” During her participation in a digital conference of the Union Party parliament group, Merkel also noted that “we will neither be able to cope with climate change nor solve WTO issues or other global issues without or against China.”

## European energy disputes update

As we [reported](#), German-owned energy company Uniper put the Netherlands on notice of an investment dispute last year, following the announcement of the country’s plan to phase out coal-burning power plants by 2030. Alongside RWE, another German energy company, Uniper made good on that threat earlier this year; both companies [initiated ICSID claims](#) lodged under the ECT this spring.

Subsequently, the Netherlands has [reportedly](#) asked German courts to review the legal basis of these claims, on the grounds that the ECT dispute settlement mechanism contravenes EU law, following the CJEU’s *Achmea* decision.

*Editor’s note:* A longer discussion of Belgium’s questioning of the ECT’s legality under EU law can be found [here](#). Moreover, in this issue, we argue that withdrawal from the ECT is an option worth considering.

### Germany reaches settlement with Vattenfall in long-running dispute over nuclear phase-out

Putting an end to a decade-long dispute, the government of Germany has agreed to compensate four major energy companies for its decision—following the 2011 disaster in Japan’s Fukushima nuclear plant—to phase out nuclear power by 2022. Announced on March 5, 2021, the agreement sets out a payment totalling EUR 2.8 billion to Swedish-owned Vattenfall as well as several domestic companies and it settles all legal disputes with them.

Vattenfall had, in 2021, initiated an international arbitration under the ECT before ICSID, claiming EUR 4.7 billion due to losses suffered from the nuclear energy phase-out.

In 2016, Germany’s Constitutional Court ruled that the phase-out was lawful but that the companies affected should nevertheless be compensated. Vattenfall won a federal court case in November 2020, arguing the German Government failed to implement the 2016 decision. The ICSID proceedings hearing Vattenfall’s claim against Germany were [suspended](#) on March 11, 2021.

Vattenfall, which operated two nuclear power plants in Brunsbüttel and Krümmel in northern Germany, will be compensated EUR 1.43 billion, subject to taxation.



## Canada publishes 2021 Model Foreign Investment Promotion and Protection Agreement

On May 13, 2021, Canada announced that it had finalized its 2021 Model Foreign Investment Promotion and Protection Agreement (FIPA), which will replace the 2014 version. According to Global Affairs Canada, the agreement is the result of “extensive public consultations initiated in 2018 with a broad range of stakeholders, including from civil society and labour unions, legal experts, representatives of all sizes of Canadian business, representatives of provinces and territories, and Indigenous partners.”

Several changes have been made to the text, including tightening definitions of key definitions and substantive provisions, and some changes to the arbitration proceeding. Many of these changes are inspired by trends in recent bilateral and regional investment treaties, and are already reflected in the recently-concluded CETA.

For example, the new agreement’s definition of investment adds that an investment must “involve the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” The new agreement also requires the “enterprise of a Party” to have “substantial business activities in the territory of that Party.” However, the new agreement retains an asset-based definition of investment, with an exhaustive list of exceptions.

Provisions on national treatment (NT) and MFN are maintained in the new FIPA, and still cover the establishment, expansion and acquisition phases of investment (commonly called pre-establishment rights). However, the new model clarifies that for each provision, “like circumstances” pertains to “the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public policy objectives.” The definition of MFN also excludes from its scope both dispute settlement provisions and substantive obligations found in other agreements.

Other additions include changes to the minimum standard of treatment (MST) provision, which no longer includes a reference to FET and provides an exhaustive list of measures that constitute a violation. and a clarification that indirect expropriation does not include non-discriminatory measures that were adopted “in good faith to protect legitimate public welfare objectives, such as health, safety and the environment.”

The criteria for assessing compensation in the event of direct or indirect expropriation, however, remain unchanged and are based on the fair market value of the investment.

The 2021 FIPA has added new articles, including an article on the right to regulate to achieve “legitimate policy objectives, such as with respect to the protection of the environment and addressing climate change; social or consumer protection; or the promotion and protection of health, safety, rights of Indigenous peoples, gender equality, and cultural diversity.”

The 2021 FIPA has also added an article on responsible business conduct, which references, in hortatory terms, the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights. The obligation for investors to respect the laws of the host state is reaffirmed. Notably, with regard to fiscal measures, that all measures taken “by a Party to ensure compliance with the Party’s taxation system or to prevent the avoidance or evasion of taxes” that are non-discriminatory are excluded from the scope of the agreement.

Throughout the preamble and the body of the agreement, references are made to gender equality, SMEs and the rights of indigenous people. With regard to the latter, the new agreement adds a general exceptions clause specifying that nothing in a FIPA will prevent Canada from adopting or upholding measures aimed at fulfilling Aboriginal treaty rights.

Notably, the agreement includes a new section on investment promotion and facilitation that, for example, requires that authorization procedures adopted or maintained by the Parties “do not unduly complicate or delay the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in the territory of a Party.”

The agreement maintains access to ICSID, ICSID AF, and UNCITRAL arbitration. However, the 2021 FIPA represents some changes to arbitration procedure including the requirement that parties seek consultation before the submission of a request for arbitration; the encouragement that parties “consider greater diversity in arbitrator appointments, including through the appointment of women”; the adoption of the UNCITRAL Rules on Transparency; an article on third-party funding, which requires the disclosure of any funding agreement; and an Arbitrator Code of Conduct, which is provided in the agreement.



## AWARDS AND DECISIONS

### Tribunal rules in favour of claimants in another Spanish solar dispute; Dissenting arbitrator argues that tribunal nonetheless over-emphasized Spain's "right to regulate"

*Spain RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*

**Lukas Schaugg**

In another renewables case against Spain, an ICSID tribunal awarded over EUR 28 million to two subsidiaries of the German company RWE (jointly, RWE). The tribunal dismissed Spain's intra-EU objection to jurisdiction and found it to be in breach of the FET standard under Article 10(1) of the ECT. The award was rendered on December 18, 2020.

#### Background and claims

From 1997 to 2007, Spain enacted a set of legislative measures ("initial measures"), including Royal Decree (RD) 661/2007, to incentivize the development of the renewable energy sector by way of a special financial regime ("Special Regime"). Pursuant to these measures and subject to prior registration, renewable energy generators received a premium or, alternatively, a fixed feed-in tariff (FIT) at an above-market rate for the electricity they produced. Between 2001 and 2011, RWE acquired stakes in four hydroelectric plants and 16 wind farms in Spain to which the Special Regime was applicable.

In the wake of the 2008 financial crisis, the tariff deficit of the Spanish electricity sector became increasingly unsustainable. To address this deficit, Spain enacted a series of urgent legislative measures (the "disputed measures") between 2012 and 2014. It imposed a 7% levy on all income obtained by generators, including those in the renewable energy sector (in law 15/2012). It also replaced the FITs and premiums of the Special Regime with a guarantee of a reasonable return, which was set at 7.398% before tax.

In reaction to the disputed measures, RWE filed a request for arbitration with ICSID in December 2014, contending that by enacting the disputed measures

Spain had violated Article 10(1) of the ECT. RWE specifically alleged a breach of legitimate expectations, as well as a failure to provide regulatory stability, FET, reasonableness, and transparency.

#### Tribunal dismisses Spain's intra-EU objection but upholds objection to jurisdiction on taxation measures

In its first jurisdictional objection, Spain averred that the tribunal lacked jurisdiction *ratione personae*, due to the absence of investors protected under the ECT. According to Spain, contrary to what was required by Article 26 of the ECT, the claimants were not from the *area* of another contracting state, as Germany and Spain had already been EU member states at the time of ratification of the ECT.

The tribunal dealt with jurisdiction, liability, and some issues of quantum in its decision dated December 30, 2019. In dismissing Spain's first objection, the tribunal held that the definition of "area" was predicated on individual states rather than the entire EU. Nothing in Article 26 of the ECT suggested that Spain was limiting its consent to arbitration to investors from non-EU countries. Had the EU or EU member states wished to deny access to arbitration for intra-EU disputes, they could have included a disconnection clause in the ECT (*quod non*).

The tribunal furthermore dismissed the alleged primacy of EU law over the ECT based on the VCLT emphasizing the principle of *pacta sunt servanda*. EU law was no *lex posterior* under Article 30 of the VCLT, as Article 16 of the ECT established a rule of non-derogation that applied, as it was more favourable to RWE. Further, the conclusion of the EU treaties did not amount to an implied termination or suspension of the ECT among EU member states under Article 59 of the VCLT.

The tribunal also sided with the claimants in holding that the *Achmea* judgment had to be distinguished. Contrary to the present case, *Achmea* concerned a BIT to which the EU was not a party. In any event, no determination of EU law was required to resolve the dispute.



Spain also objected to jurisdiction on taxation measures due to the tax carve-out in Article 21 of the ECT. It contended that, pursuant to this provision, the Tax on the Value of the Production of Electrical Energy, and the Levy on the Use of Mainland Waters for the Production of Electrical Energy implemented in 2012 were exempted from the scope of the ECT. The tribunal agreed and declined jurisdiction on these specific measures.

### Spain did not create legitimate expectations but nevertheless breached FET by acting disproportionately, tribunal holds

The tribunal concluded that Spain had made no specific commitment to maintain the initial system of remuneration that would have been sufficient to create legitimate expectations. The FET standard in the ECT had to be construed restrictively. To establish legitimate expectations, the burden was on RWE to prove that Spain (1) had made a specific commitment (2) on which RWE *de facto* relied, and that (3) such reliance was reasonable.

The tribunal did not agree with RWE's allegation that the initial measures contained a specific commitment that the Special Regime would remain in place. A representation in the form of a domestic law is a norm of general application and could not be elided with a specific promise or contractual commitment. Neither could the administrative registration of the investments. The tribunal also found a lack of evidence that the claimants indeed relied on such a representation, as RWE was aware of the possibility of regulatory changes when making the investments.

However, Spain had nevertheless breached the FET standard by acting disproportionately. The appropriate test to assess proportionality was whether the regulatory changes were (1) suitable and (2) necessary to achieve the legislative intent, and (3) whether they placed an excessive financial burden on the investors. In applying the test, the tribunal accorded a reasonable margin of appreciation to the state. As to the first condition, the tribunal considered that the disputed measures were suitable, and indeed successful, to address the tariff deficit. Furthermore, in finding the second criterion to be met, it rejected RWE's claim that other less restrictive means were available to Spain.

The tribunal nevertheless held that claimants had to bear an excessive financial burden with respect to some plants where the internal rate of return was now well below what Spain itself had decided to be reasonable.

### Claim for failure to afford stable regulatory conditions dismissed

According to RWE, Spain's incremental repeal of the initial measures amounted to a failure to maintain stable regulatory conditions under Article 10(1) of the ECT. Claimants also argued that the dispute measures were retroactive in nature. By contrast, Spain contended that (1) it had maintained the essential elements of previous remuneration models, (2) was permitted to adopt reasonable and proportionate macroeconomic measures based on a public policy, and (3) the disputed measures were not retroactive (paras. 605–609).

According to the tribunal, the relevant test for violation of the stability commitment was “whether there has been some form of total and unreasonable change to, or subversion of, the legal regime” (para. 610). To establish such a change, a key question was whether the measure had an “impermissibly retroactive effect” (para. 613).

Considering that the new legislation essentially maintained key elements of the initial regime, the tribunal found that the disputed measures did not amount to a violation of stability in general. However, on a specific point, it sided with claimants in finding that the *de facto* request by Spain of a repayment of specific sums already paid by 10 plants was in breach of the FET standard.

### Claims of breach of reasonableness, transparency, and the umbrella clause rejected

Agreeing with the approaches taken by the tribunals in *AES v. Hungary* and *EDF v. Romania*, to test reasonableness, the tribunal had to consider whether there was “an appropriate correlation between the state's public policy objective and the measure adopted to achieve it” (para. 644). The threshold for establishing unreasonableness being a high one, the tribunal found the disputed measures to be unreasonable only to the extent that they were also disproportionate. Further, the tribunal rejected RWE's allegation that Spain's conduct was in breach of the transparency requirement in Article 10(1) of the ECT. While accepting that this article indeed created a transparency requirement independent of legitimate expectations or stability, the tribunal also noted that the threshold for a transparency claim was a high one. It was an established principle of arbitral case law that a complete lack of transparency was required to amount to a breach of the FET standard. Given that Spain had published draft legislative texts, conducted



public consultations, and made responsive changes to the disputed measures, the tribunal did not find a breach of the FET due to a lack of transparency.

Lastly, the tribunal disagreed with claimants' allegation that the umbrella clause in Article 10(1) of the ECT did not differentiate between contractual obligations and regulatory measures. In siding with Spain, the tribunal held that a direct consensual link was required to trigger the umbrella clause and that neither the disputed measures nor the registration of the individual plants qualified as such (para. 679).

#### No restitution; Damages and costs awarded

The tribunal rejected RWE's request for restitution, stating that this would place a disproportionate burden on Spain and finding that full reparation could be achieved through compensation.

Moreover, the tribunal dealt with the remaining issues on quantum in its award dated December 18, 2020. With regard to repayments that Spain procured from 10 plants, the tribunal held that claimants were entitled to recover the sums that had actually been paid. It accepted the amount of EU 14.82 million calculated jointly by RWE's and Spain's experts.

With regard to damages for the breach of Article 10(1) of the ECT, claimants submitted that the discounted cash flow (DCF) method was the most appropriate in assessing the loss in fair market value of RWE's investments. The respondents, in turn, contended that DCF would lead to over-valuation and submitted that the tribunal should apply a method based on the cost of assets, "examining whether they are recovered and a reasonable return is obtained" (para. 720).

RWE alleged that the tax shield available to its investments (tax deductions relating to net operating losses, asset impairments, and depreciations) should be taken into account when calculating the damages. The tribunal agreed, stating that it had to seek to "replicate the actual tax situation of the plants."

The tribunal held that a qualified DCF method had to be applied. Accordingly, damages should be calculated on the basis of a "but for" test but with a cap to ensure that no sums were recovered beyond the reasonable return benchmark of 7.398%. It accepted the discount rate of 7.61% that was suggested by RWE's experts.

Accordingly, the tribunal awarded around EUR 28 million plus compound interest for losses caused by Spain's breach of Article 10(1). Furthermore, the tribunal ordered Spain to bear all of the arbitration costs and part of RWE's legal fees.

#### Judd Kessler's separate opinion

In a separate opinion, arbitrator Kessler took the view that Spain had indeed breached RWE's legitimate expectations and that compensation should have been more substantial. He reasoned that Spain had entered into a specific commitment to maintain the initial regime by according financial incentives to foreign investors on specific terms such as remuneration rates and years of effectiveness. In his view, the case tribunal wrongly put an emphasis on Spain's right to regulate stating that the situation that gave rise to the dispute had "nothing to do with a limitation on Respondent's regulatory powers" (para. 61).

*Note:* The tribunal was composed of Samuel Wordsworth QC (appointed by the Secretary-General of ICSID, U.K. national), Judd Kessler (appointed by the claimants, U.S. national), and Anna Joubin-Bret (appointed by the respondent, French national). The award, dated December 18, 2021, and the separate opinion, dated December 1, 2021, are available at [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4065/DS16032\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4065/DS16032_En.pdf). The decision on jurisdiction, liability, and certain issues of quantum dated December 30, 2020, is available at: <https://www.italaw.com/sites/default/files/case-documents/italaw11004.pdf>.

**Lukas Schaugg** is an International Economic Law Fellow at IISD and a Ph.D. researcher in investment law at Osgoode Hall Law School, Toronto, Canada. He holds an LL.M. in international law from King's College London.



## RESOURCES AND EVENTS

### RESOURCES

#### **International Obligations Governing the Activities of Export Credit Agencies in Connection With the Continued Financing of Fossil Fuel-Related Projects and Activities**

This legal opinion, commissioned by Oil Change International, lays out the responsibilities of export credit agencies and governments regarding the financing of fossil fuel projects. [Available here.](#)

#### **The Function of Equity in International Law**

By Catherine Titi, Oxford University Press (2021)

Draws on investment arbitration to make a normative argument about the role of equity in international law. [Available here.](#)

#### **UNCTAD's SDG Investment Trends Monitor (April 2021)**

[Available here.](#)

#### **We Need to Rethink Investment Treaties to Ensure a Rapid and Just Energy Transition**

By Kyla Tienhaara, IIED

[Available here.](#)

#### **Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity**

By Tarald Laudal Berge and Axel Berger, *Journal of International Dispute Settlement* (March 2021)

[Available here.](#)



© 2021 The International Institute for Sustainable Development  
Published by the International Institute for Sustainable Development.

### **International Institute for Sustainable Development (IISD)**

IISD is one of the world's leading centres of research and innovation. The Institute provides practical solutions to the growing challenges and opportunities of integrating environmental and social priorities with economic development. We report on international negotiations and share knowledge gained through collaborative projects, resulting in more rigorous research, stronger global networks, and better engagement among researchers, citizens, businesses and policy-makers.

IISD is registered as a charitable organization in Canada and has 501(c) (3) status in the United States. IISD receives core operating support from the Government of Canada, provided through the International Development Research Centre (IDRC) and from the Province of Manitoba. The Institute receives project funding from numerous governments inside and outside Canada, United Nations agencies, foundations, the private sector and individuals.

### **Investment Treaty News (ITN)**

The views expressed in this publication do not necessarily reflect those of the IISD or its funders, nor should they be attributed to them.

ITN welcomes submissions of unpublished, original works.

Requests should be sent to Zoe Phillips Williams at [zoe.williams@iisd.net](mailto:zoe.williams@iisd.net)

**To subscribe to ITN, please visit: [www.iisd.org/itn/subscribe](http://www.iisd.org/itn/subscribe)**



**Investment Treaty News**



**IISD**

International Institute for  
Sustainable Development