Summary Note on Regulatory Chill

This note has been prepared by Baldon Avocats as a compilation of the most relevant excerpts on the issue of regulatory chill in the context of investment treaties and the ECT.

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1. Acknowledgement of the existence of regulatory chill by international bodies and governments.

IPPC Working Group III, contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, "Climate Change 2022: Mitigation of Climate Change" (2022), Full Report

Available at : https://report.ipcc.ch/ar6wg3/pdf/IPCC_AR6_WGIII_FinalDraft_FullReport.pdf

"Investment agreements, which are often integrated in FTAs, seek to encourage the flow of foreign investment through investment protection. While international investment agreements hold potential to increase low-carbon investment in host countries (PAGE 2018), **these agreements have tended to protect investor rights, constraining the latitude of host countries in adopting environmental policies** (Miles 1 2019). Moreover, **international investment agreements may lead to 'regulatory chill', which may lead to countries refraining from or delaying the adoption of mitigation policies, such as phasing out fossil fuels** (Tienhaara 2018). More contemporary investment agreements seek to better balance the rights and obligations of investors and host countries, and **in theory** offer greater regulatory space to host countries (UNCTAD 2019), although it is **unclear to what extent this will hold true in practice."**

"For international investment agreements, various other suggestions have been put forward **to accommodate climate change concerns.** These include incorporating climate change through ongoing reform processes, such as reform of investor-state dispute settlement under the UN Commission on International Trade Law (UNCITRAL); **modernisation of the Energy Charter Treaty**; the (re)negotiation of international investment agreements; and the adoption of a specific treaty to promote investment in climate action (Brauch et al. 2019; Tienhaara and Cotula 2020; Yamaguchi 2020; Cima 2021)."

"Despite improvements in the international governance of energy, it **still appears that a great deal of this is still concerned with promoting further development of fossil fuels.** One aspect of this is the development of international legal norms. A large number of bilateral and multilateral agreements, **including the 1994 Energy Charter Treaty**, include provisions for using a system of investor-state dispute settlement (ISDS) **designed to protect the interests of investors in energy projects from national policies that could lead their assets to be stranded.** Numerous scholars have pointed to ISDS being **able to be used by fossil-fuel companies to block national legislation aimed at phasing out the use of their assets** (Bos and Gupta 2019; Tienhaara 2018)."

"Given the complexity of global energy governance, it is impossible to make a definitive statement about its overall contribution to mitigation efforts. **Three statements, do however, appear to be robust.** [...] Third, the realignment is far from complete, and **there are still examples of international cooperation having a chilling effect on climate mitigation, particularly through financing and investment practices, including legal norms designed to protect the interests of owners of fossil assets.**"

"Recent phase-out deals tend to aim for a (partial or full) compensation rather than no relief for losses. [...] In particular, transactions **in the energy sector** show a **high level of investor protection also against much needed climate action** which is also **well illustrated by share of claims settled in favour of foreign investors under the Energy Charter Treaty** and investor-state dispute settlement (Bos and Gupta 2019)."

United Nations, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Human rights-compatible international investment agreements, A/76/238 (July 2021)

Available at : https://www.ohchr.org/en/documents/reports/a76238-report-human-rights-compatible-international-investment-agreements

"[S]ome tribunals have interpreted the "fair and equitable treatment" clause in such agreements very broadly, which in turn may undermine States' ability to pursue legitimate public policy goals. [...] As far as the effect of arbitration claims on States' right to regulate is concerned, reference may be made to the fossil fuel companies relying on the Energy Charter Treaty to challenge government measures aimed at mitigating climate change. [...] Even if the States concerned had been able to justify their measures in the end, the process entailed spending unnecessary time and resources in defending claims that should not have existed in the first place. **Such claims also tend to create a regulatory chill not only in States involved in such claims but also in bystander States."**

Council of Europe, Resolution 2151, Human rights compatibility of investor-State arbitration in international investment protection agreements (2017)

Available at : https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23488&lang=en

"1. The Parliamentary Assembly notes that investor-State dispute settlement (ISDS) clauses in international investment agreements or bilateral investment treaties allow foreign investors to sue host States before private arbitration panels set up by the parties whenever a dispute on the application of an international investment agreement arises. It **stresses that ISDS has serious implications for human rights, the rule of law, democracy and national sovereignty**, which the proposed Investment Court System (ICS) is intended to address [...]

1.2. the **threat of litigation before non-State dispute settlement mechanisms could discourage governments from taking necessary regulatory measures to uphold the rights of their citizens** against foreign multinational companies, for example by strengthening the protection of the environment and social rights (**"regulatory chill"**);"

European Parliament, Motion for a European Parliament Resolution on the future of EU international investment policy (2021/2176(INI))

Available at : https://www.europarl.europa.eu/doceo/document/A-9-2022-0166_EN.html

"20. Notes that an **increasing number of legal proceedings before investment tribunals target environmental measures; deplores the fact that various countries, including the Member States, are being sued in relation to policies on climate, the phasing out of fossil fuels, or the just transition;**

21. Stresses that global efforts to combat climate change will require a rapid transition to renewable energy and fast government action to reduce reliance on fossil fuels; urges the Commission and the Member States to ensure consistency between IIAs and the European Green Deal, environmental policies, labour rights and human rights, **by excluding from treaty protection investments in fossil fuels or any other activities that pose significant harm to the environment and human rights** [...]

23. Points out that **even in the absence of legal proceedings, the explicit or implicit threat of recourse to investment lawsuits can enhance the position of investors in negotiations with states (the 'chilling effect')**; stresses in this regard that recent EU IIAs stipulate the principle that governments have the right to regulate for legitimate public policy objectives, including in a manner that may negatively affect the operation of an investment or an investor's expectation of profits; [...] is **concerned that policy decision-making might therefore be delayed or decisions watered down.**

24. Underlines that, as a result, more public funds may be spent on compensating the fossil fuel sector than would be the case without the threat of investment litigation, **making it more costly and thus more difficult for states to undertake energy transition measures, and representing an overall subsidy provided by taxpayers to the fossil fuel sector.** [...]

40. Is **concerned that many [ECT] contracting parties seem not to share EU ambitions in the field of climate change mitigation**, sustainable development and energy transition, despite the fact that all of them are also signatories of the Paris Agreement; urges the Commission to ensure the alignment of the ECT with the Paris Agreement and the objectives of the European Green Deal, **while preserving the EU's ability to develop public policy measures consistent with its commitment to become the first climate neutral continent by 2050**;

42. Urges the Commission to **ensure that a revised ECT protects the right of states to regulate**, is in line with EU law and EU investment policy, **that it immediately prohibits fossil fuel investors from suing contracting parties for pursuing policies to phase out fossil fuels in line with their commitments under the Paris Agreement**;"

European Parliament, Modernisation of the Energy Charter Treaty – At a Glance (22 April 2022)

Available at : https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/729379/EPRS_ATA(2022)729379_EN.pdf

"**EU concerns over the ECT have been growing**, especially the provisions relating to investment protection, which allow companies headquartered in any member country to sue the government of another member country if it harms their existing energy investments. The rulings of international arbitration tribunals are rarely in the public domain, and there is little awareness about the real costs involved (e.g. legal fees, damages awarded). Moreover, there are few opportunities for legal redress and oversight of arbitration decisions via national courts and the European Court of Justice (ECJ)."

In some ways, the EU's climate ambition sits uneasily with its ECT membership. The **European Green Deal involves a huge transformation in EU energy markets**, including a vast scale-up in the promotion of renewable energy sources and energy efficiency measures, and **an almost total phase-out of fossil fuel use by 2050.** The ECT framework was devised for energy systems driven largely by fossil fuels. **By strongly protecting existing energy investments, the ECT could make it harder and riskier for Member States to embark on a green transition.** An important caveat is that the ECT does cover renewable investments (i.e. it is not specific to particular energy sources), and its provisions have been invoked by renewable energy companies opposed to adverse and retroactive regulatory changes by governments such as Italy and Spain. Yet whereas ECT arbitration decisions over investment protection are binding, the energy efficiency and environmental protection measures in the ECT (listed in a separate Protocol) are mostly voluntary and non-binding, and **do not reflect the more recent global climate goals set out in the Paris Agreement.**

MEPs and MPs, Statement on the modernisation of the Energy Charter Treaty (8 September 2020)

Available at : http://www.endfossilprotection.org/sites/default/files/documents/Statement of European Parliamentarians on the modernization of the TCE.pdf

"The European Green Deal and the proposed EU Climate Law are some of the most ambitious known policy instruments to combat climate change. However, the little-known Energy Charter Treaty (ECT) is threatening the climate ambition of the EU domestically and internationally. [...] Today, **the ECT is a serious threat to Europe's climate neutrality target and more broadly to the implementation of the Paris Agreement.** By protecting foreign investments in fossil fuels by means of the highly controversial Investor-State-Dispute-Settlement (ISDS) mechanism, the ECT protects foreign investments in greenhouse gas emissions and multiplies the cost of the ecological transition. EU citizens are democratically calling for ambitious climate action, but are unknowingly funding the life insurance that the ECT provides to fossil fuels investors. By 2050, **cumulative greenhouse gas emissions protected by the ECT, if fossil fuels are not phasedout, would be equivalent to one-third of the remaining global Carbon budget for the period 2018-2050.**

The Energy Charter Treaty is neither consistent with the European Green Deal, nor with the proposed EU climate law and national carbon neutrality targets, nor with the EIB energy lending policy and the EU taxonomy for sustainable investment. Phasing-out fossil fuels from the ECT investment protection mechanism is for us a prerequisite for the negotiations on the modernisation of the ECT."

UNCTAD, World Investment Report 2018, p. 112

Available at : https://unctad.org/system/files/official-document/wir2018_en.pdf

“The various ways in which the IIA regime interacts with other bodies of international law give rise to several distinct, but often interrelated, challenges (table III.8). These challenges can be placed in three broad categories: **reduction of regulatory space,** administrative complexity and uncertainty about dispute settlement.

The reduction of regulatory space manifests itself in several interrelated ways. Most prominent in the public debate is the risk that IIAs can constrain policymakers in the pursuit of important public policy objectives in a manner that was not anticipated. **Such constraints could have a chilling effect on future, non-investment related national or international law-making** (van Harten; Bonnitcha et al.). For example, in the wake of the (ultimately unsuccessful) tobacco-related disputes brought against Australia and Uruguay, **several developing countries claimed an inability to enact strong tobacco control laws given the threats that multinational tobacco companies might bring international investment claims.”**

D. Gaukrodger, “The balance between investor protection and the right to regulate in investment treaties: A scoping paper”, OECD Working Papers on International Investment, No. 2017/02, OECD Publishing, Paris

Available at : https://doi.org/10.1787/82786801-en

“In some contexts, it has been suggested in general terms that damages remedies do not affect regulatory autonomy because the government can still regulate providing it pays for the associated costs. If accepted in full, this view would suggest that the right to regulate issue could be eliminated by the simple expedient of limiting remedies to damages. Some broad and unqualified statements by governments that treaties do not affect the right to regulate because arbitrators cannot override policy decisions may be based on this unstated premise.

One issue with regard to this premise is that damages are generally recognised to be a powerful dissuasive tool. Many regulatory and legal regimes rely on the power of damages liability to affect corporate behaviour. Regimes for fines in competition policy or corporate liability for bribery are remedies designed to dissuade certain behaviour. Tort liability for damages often has a similar dissuasive purpose.

In the specific field of government liability for damages, a **UK Law Commission report outlined the concerns -- frequently expressed by courts -- that government damages liability for regulatory action would dissuade regulatory action.** As was noted in the ISDS Scoping Paper, the UK courts "frequently refer to a number of policy arguments against state tort liability in damages. Potential liability is seen as likely to harm the quality of administration by (i) leading public bodies and their employees to take an unduly defensive approach to their work; (ii) diverting scarce resources away from the primary functions of public bodies and towards efforts to avoid litigation and defensive measures; and (iii) potentially leading to a great number of lawsuits and vexatious claims, further reducing the available resources for public bodies." [...] Moreover, it seems clear that, as a matter of good policy, governments should consider possible damages liability as part of their cost-benefit analysis of potential regulation. Good regulatory policies, including as recommended by the OECD, include the careful weighing of the costs, benefits and risks of proposed regulation.

Government administrative costs are a core component of cost-benefit analysis. Expected litigation costs and possible government liability including for future lost profits of affected regulated entities are undoubtedly important costs to be considered in this context. **Thus, potential damages liability should dissuade regulatory action that generates risks of government damages liability.**"

UNCITRAL Working Group III Report, 36th Session, A/CN.9/964 (6 November 2018), § 111

Available at : https://documents-dds-ny.un.org/doc/UDOC/GEN/V18/075/12/PDF/V1807512.pdf?OpenElement

"111. **Concerns expressed [by governments]** during the previous sessions of the Working Group with regard to cost and duration of ISDS proceedings were reiterated. The resource-intensive nature of ISDS proceedings, where respondent States and claimant investors alike had to devote extensive time and cost, was highlighted. It was stated that **costs were particularly significant for developing States with scarce financial and human resources and that ISDS proceedings were often accompanied with significant reputational harm and the risk of undue regulatory chill.** It was also mentioned that the high cost of ISDS cases were of particular concern to small and medium-sized enterprises with limited financial resources, which might limit their ability to access ISDS."

UNCITRAL Working Group III Report, 36th Session, A/CN.9/964 (6 November 2018), § 111

Available at : https://documents-dds-ny.un.org/doc/UDOC/GEN/V18/075/12/PDF/V1807512.pdf?OpenElement

"Regulatory Chill

10. There is also **evidence to suggest that the threat of ISDS can lead to a "regulatory chill", where governments become hesitant to undertake legitimate regulatory measures within the public's interest for fear of claims, thus hindering the government's right to regulate.** Any time a government changes or promulgates new regulations, it exposes itself to potential legal claims by investors. **The fear that international arbitration panels decide in favour of the investors may affect governments' action in carrying out legitimate policy changes in the future.** As a result, governments risk losing their policy space and limiting their right to regulate for fear of being put through litigation or facing threats from discontent investors."

UNCITRAL Working Group III Report, 37th Session, A/CN.9/970 (9 April 2019), § 36

Available at : https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/075/12/PDF/V1807512.pdf?OpenElement

"36. The regulatory chill effect of ISDS was mentioned as an aspect that warranted consideration by the Working Group. It was said that ISDS or the mere threat of using ISDS had resulted in regulatory chill and **discouraged States from undertaking measures aimed to regulate economic activities and to protect economic, social and environmental**

rights. The inherent asymmetric nature of the ISDS system, costs associated with the ISDS proceedings and **high amount of damages awarded by tribunals were mentioned as some of the elements that could undermine the States'** ability to regulate. It was noted that States were in the process of reforming their investment agreements to preserve their sovereign right to regulate."

UNCITRAL Working Group III, Submission from the Government of South Africa, A/CN.9/WG.III/WP.176, para 63

"Regulatory chill – Exclusions/Carve outs to ISDS should be introduced.

63. Often, investors use ISDS strategically, publicly and repeatedly filing cases to coerce governments to agree on favourable terms for their investments, rather than turning to ISDS as a measure of last resort. Even though IIAs do not in themselves directly limit the legislative or regulatory powers of States, they may lead governments to thread more cautiously – and hence potentially insufficiently from a public-interest perspective – when planning and designing regulation. As such, **governments might refrain from imposing regulatory measures in the public interest due to the threat of investment arbitration and the high damages it entails."**

Margaret Chan, Director General of the World Health Organization (WHO), "Chan to world: stand with Australia" (22 March 2012)

Available at : https://www.who.int/news/item/22-03-2012-chan-to-world-stand-with-australia

"The high-profile legal actions targeting Uruguay, Norway, Australia and Turkey are **deliberately designed to instil fear in countries** wishing to introduce similarly tough tobacco control measures."

US Trade Representative Robert Lighthizer, "Brady-Lighthizer ISDS Exchange" (International Economic Law and Policy Blog, March 2018)

Available at : https://worldtradelaw.typepad.com/ielpblog/2018/03/brady-lighthizer-isds-exchange.html

"We are skeptical about ISDS for a variety of reasons which I would like to go into if I have a second to do it. [...] **But more importantly we've had situations where real regulation which should be in place which is bipartisan, in everybody's interest, has not been put in place because of fears of ISDS.** So I think it is something we have to think about very carefully."

Chrystia Freeland, Canadian Foreign Minister, "Trudeau, Freeland speak about new NAFTA deal, now known as USMCA" (Youtube, 1 October 2018),

Available at : https://www.youtube.com/watch?v=UIWxCobKvSs (transcript)

"Known as ISDS it has cost Canadian taxpayers more than 300 million dollars in penalty and legal fees. ISDS elevates the rights of corporations over those of sovereign governments. **In removing it, we have strengthened out government's right to regulate in the public interest** to protect public health and the environment for example."

Henrik Horn, SIEPS (Swedish government authority), "Energistadgefördragets nytta för EU" (Executive Summary) (December 2021)

Available at : https://www.sieps.se/publikationer/2021/energistadgefordragets-nytta-for-eu/:

"The costs of protecting investment in the EU. The ECT protection of investment in the EU has distinct and significantly more complex consequences for the EU than its protection of EU outward investment. Several reasons suggest that ECT provides protection beyond what investors would still have through the legal systems of the Member States and the EU. These legal systems are designed to balance different societal objectives, such as providing sufficient investment incentives while allowing authorities policy space for, for example, regulation. The protection provided by ECT therefore generates expected costs for the EU; costs that take different forms. First, due to ECT protections EU countries may have to pay compensation to investors when undertaking certain policy interventions. **Second, EU countries may choose to change their policy interventions to avoid such payments. [...] The agreement therefore imposes costs on EU countries by distorting investment incentives.**

My view is that the **ECT is clearly harmful**. In making that judgement I am particularly relying on the following :

(1) The value for the EU of investment protection in most other ECT countries appears to be largely limited by the climate problem. So far, only 1 of the 33 disputes between EU investors and other ECT countries appear to have concerned renewable energy. It seems unlikely that this investment pattern will change significantly in the foreseeable future

(2) The ECT will probably enable EU investors to bring disputes against EU countries by setting up letterbox companies in other ECT countries. This will entail **significant costs for the EU as the number of disputes is likely to be high in the future :**

- It **will require major political interventions in the energy sector to implement the EU climate targets.** These changes **will reduce the profitability of investments already made.**
- **Very large investments will be needed in non-fossil energy and strong financial incentives will be required to bring them about.**
- As always, **when major economic policy changes are undertaken, policy mistakes are likely.**
- The conditions underlying these policy decisions are likely to change, for instance due to unforeseen developments of the climate problem, technological changes, or changes in government finances.

(3) There are **reasons to believe that the ECT may slow down the EU's transition towards renewable energy,** as the agreement protects investments in fossil energy. For instance, no disputes with EU countries over renewable energy appear to have led to the reintroduction of withdrawn support for renewable energy. But **these disputes have probably made countries more cautious about introducing forms of aid that they are not entirely sure will be permanent."**

2. Observation of the regulatory chill by researchers

(i) Academic studies on the regulatory chill

K. Tienhaara "Regulatory chill in a Warming World : The Threat to Climate Policy Posed by Investor-State Dispute Settlement" (2018), Transnational Environmental Law 7(2)

Available at : https://www.cambridge.org/core/journals/transnational-environmental-law/article/regulatory-chill-in-a-warming-world-the-threat-to-climate-policy-posed-by-investorstate-dispute-settlement/C1103F92D8A9386D33679A649FEF7C84, 229-250

"ISDS is expected to have an effect on states because of **the substantial financial risk involved [...] as well as the difficulty in predicting outcomes.** [...] [T]he regulatory chill hypothesis suggests that in some instances (not all, or there would be no ISDS cases) governments will **fail to enact or enforce bona fide regulatory measures (or modify measures to such an extent that their original intent is undermined or their effectiveness is severely diminished) as a result of concerns about ISDS."**

"The fact that investors brandish ISDS as a threat is indisputable; law firms actively advertise ISDS as a useful tool 'to assist lobbying efforts to prevent wrongful regulatory change'."

"And yet, it has the **potential to frustrate initiatives designed to implement national and global environmental objectives'.** One example of threat chill that has been detailed in the literature, and more recently in the media, is Indonesia's decision to allow open-pit mining in protected forests following a threat of arbitration. In-depth case studies of this nature are **often dismissed as anecdotal.** [...] However, it is true that results have sometimes been inconclusive because researchers are unable to find a smoking gun. Government officials are **wary of disclosing information about ISDS threats** for a variety of reasons and would be understandably reluctant in many cases to admit that they abandoned a bona fide measure that was in the public interest out of fear of ISDS."

"In the case of Uruguay, the government has acknowledged that it would not have been able to defend itself in ISDS without the financial support of a foundation set up by Michael Bloomberg. The country's success in the case, therefore, does not disprove regulatory chill. Instead, it reinforces the notion that the **high cost of ISDS can be sufficient to dissuade a government from defending a policy that would ultimately be determined to be compliant with international investment law."**

"Cross-border chill. Investors pursue this type of chilling effect when a government adopts a policy that affects a form of investment common to many jurisdictions, is easily transferable, and is highly likely to be emulated by other governments. The most effective way to induce this type of chill is to actually launch an ISDS case in one or more jurisdictions (preferably the first jurisdiction that adopts a policy if an investment treaty is accessible). The aim from the investor's perspective in launching a case is not necessarily to prevent or delay the take-up of a policy in the jurisdiction in which the claim is brought [...] **but in all other jurisdictions in which the investor is active."**

K. Tienhaara, "Regulatory chill and the threat of arbitration: A view from political science" in C. Brown and K. Miles (eds), Evolution in Investment Treaty Law and Arbitration (2011), 611

"Given the current state of flux, it is unsurprising that researchers are largely preoccupied with analysing arbitral awards. However, it is important that scholars recognise that many conflicts between investors and states will never reach the stage of formal arbitration proceedings. Arbitration is a high-risk, high-cost option for both governments and investors. In contrast, **the threat of arbitration is cheap and potentially very effective,** even in cases where experts might predict that a state would be successful if it took its chances with a tribunal."

C Tietje et al., "The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership" (June 2014), 39 et seq

Available at : https://www.eumonitor.eu/9353000/1/j4nvgs5kjg27kof_j9vvik7m1c3gyxp/vjn8exgvufya/f=/blg378683.pdf

"The most important part of this definition is the limitation to "bona fide" measures [...] because **some measures are meant to be "chilled."** Indeed, the purpose of investment law is to "chill" the promulgation of measures designed with discrimination and protectionism in mind.

Regulatory chill can be grouped into three categories, or kinds of "chill." First is what we call **anticipatory chill**, where policy-makers take into account potential disputes with foreign investors before they begin drafting regulatory or legislative changes for the public interest. [...] We term [the second kind of regulatory chill] specific response chill: chilling of a specific regulatory measure once policy-makers have become aware of the risk of an investor-state dispute. **This can result from actual, threatened, or perceived disputes.** The key is that the state actor will stop or change its regulatory course because of a threat to a particular regulation. [...] The third kind of regulatory chill, what we term precedential chill, occurs when state actors change a regulation in response to a settled or resolved investor-state dispute because they fear future arbitrations based on the same regulation. [...]

Proponents of the regulatory chill theory use both anecdotal evidence of governmental acts and case studies from arbitration cases to demonstrate that governments believe investment arbitration is a threat to policy space. First, **one can look to statements made by government official for evidence that they actively consider ISDS.** For example, in 2005,a legal adviser for the Sri Lankan Ministry of Foreign stated:

Sri Lanka believes that an expansive interpretation of regulatory measures could circumvent the national policy space hindering the government's right to regulate, creating a risk of "regulatory chill", with governments hesitant to undertake legitimate regulatory measures in the public interest for fear of claims for compensation being preferred by investors.

Others point out that other countries have withdrawn or threatened to withdraw from the ICSID Convention because of perceived biases in ISDS. In an extreme case, South Africa has started terminating existing BITs with countries like Belgium, Luxembourg, Germany, and Switzerland. In March 2014, Indonesia announced its plans to terminate more than 60 BITs with countries such as China, France, Singapore and the UK– and it has in the meantime terminated its IT with The Netherlands, taking effective force from July 2015."

Lorenzo Cotula, "Do Investment Treaties Unduly Constrain Regulatory Space?" (2014) 9 Questions of International Law, 19-31

Available at : http://www.qil-qdi.org/wp-content/uploads/2014/11/03_Regulatory-Powers-IEL_COTULA.pdf:

"What is clear is that, although monetary compensation is by far the most common remedy for breaches of investment treaties, meaning that states can still take public-interest measures so long as they pay compensation, **the issue is not just about the distribution of the costs of public action.** Given the large amounts awarded by arbitral tribunals to investors, **the cost of regulation could in principle skew incentives for public action and discourage regulation, and it could do so beyond the state directly involved in the dispute**; the government of New Zealand is waiting for the outcome of the Philip Morris arbitration before enacting comparable anti-smoking legislation. [...]

Unlike national law safeguards, IIL seeks to insulate foreign investment from the evolving social contract prevailing in a given society. [...] Investor-state arbitration creates a unique space for international review of state conduct; tribunals usually comprising three private individuals review the conduct of democratically elected governments or legislatures, or of national courts, based on broadly formulated treaty standards that leave much discretion to arbitral tribunals." While much international law is marred by enforcement problems, IIL is backed by multilateral instruments that facilitate the enforcement of pecuniary awards. **Therefore, the restrictions that IIL places on regulatory space can have particularly far-reaching repercussions."**

T. Laudal Berge and A. Berger, "Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity" (2021) Journal of International Dispute Settlement 12(1), 1-41, 25

Available at : https://academic.oup.com/jids/article/12/1/1/6261107?login=true (based on World Bank, Rigorous and impartial public administration):

"We find robust evidence suggesting that the relationship between pending ISDS cases and respondent state regulation is contingent upon bureaucratic capacity in respondent states. **An increase in pending ISDS cases is most negatively associated with environmental regulation in states with high bureaucratic capacity.** This negative effect on regulation from pending ISDS cases however, only holds the first few years after a case is brought."

OECD Public Consultation, Investment Treaties and Climate Change (13 April 2022), Submission by the Centre for Research on Multinational Corporations (SOMO), at 200,

Available at : https://www.oecd.org/investment/investment-policy/OECD-investment-treaties-climate-change-consultation-responses.pdf

"11. These financial awards **can be a significant burden on public budgets, particularly in less wealthier countries.** Governments **could feel compelled to drop or water down climate policy measures in fear of expensive and unpredictable ISDS arbitration,** or they could end up paying more compensation than anticipated because of negotiations taking place under the shadow of ISDS. While it remains difficult to establish the precise effects of such (perceived) threats, **the existence of such 'regulatory chill' effect has been widely recognized by governments, international institutions, academics, and even among arbitrators themselves."**

R. Howse, "Spain meets the ICSID grand inquisitor: the Eiser case" (IELP Blog, 23 August 2017),

Available at : https://worldtradelaw.typepad.com/ielpblog/2017/08/spain-meets-the-icsid-grand-inquisitor-the-eiser-case.html

"Basically, Eiser **shows how the current investment regime with ICSID-clique ISDS makes it difficult for states to address new regulatory challenges in areas like climate and environment, especially using untried, innovative approaches :** in these circumstances, a lot of experimentation may be needed, and the regulatory framework **may need to change course in important ways, and sometimes reasonably quickly. And in exactly those circumstances, arbitrators like these will force payouts** in the hundreds of millions of dollars on states, merely for acting with dispatch in the public interest."

Climate Change Counsel, The Energy Charter Treaty, Climate Change and Clean Energy Transition: A Study of the Jurisprudence (2022)

Available at : https://www.climatechangecounsel.com/_files/ugd/f1e6f3_d184e02bff3d49ee8144328e6c45215f.pdf

"The report observes that the numerous claims brought against states such as Spain and Italy over their renewable energy incentive schemes shows that the ECT "could impact energy transition" by creating a **"disincentive for states to pass bold energy transition policies"** – also known as "regulatory chill"."

Prof. Dr. Christina Eckes and Dr. Laurens Ankersmit, "The compatibility of the Energy Charter Treaty with EU law" (21 April 2022)

Available at : https://www.clientearth.org/media/2n2po04j/report-on-ect-compatibility-with-eu-law.pdf

"Regulatory chill thus also covers those forms of chill of regulation because of threats to use ISDS (threat chill) or other forms of preventive action by the government in order to avoid claims. The Dutch government, for instance, has refused to take stricter measures in phasing out the use of coal in the Netherlands to combat climate change, because of 'significant legal risks in the context of current claims'. These claims refer to ISDS-proceedings brought by Uniper and RWE on the basis of the Energy Charter Treaty against the Dutch government's decision to phase out the use of coal by 2030. Internalisation chill, for instance, refers to decision-makers taking into account the potential of investment disputes before drafting policy, pre-empting disputes in a more general way, and thereby 'prioritizing the avoidance of such disputes over the development of efficient regulation in the public interest'. This happens even before threats for claims arise. What is more, the Court's understanding of regulatory autonomy also does not concern the effects of awards, claims or threats of claims in relation to third countries can have on the regulatory process. **Such cross-border chill occurs where a government fails to enact or enforce a measure, or modifies a measure that is contemplated and easily transferrable in several jurisdictions, because of an investment arbitration claim against another country.** A clear example of this form of chill is New Zealand's decision to delay its plain packaging legislation for tobacco products until the investment arbitration case initiated by Philip Morris against Australia had been resolved."

OECD Public Consultation, Investment Treaties and Climate Change (13 April 2022), Submission by Dr Elizabeth Sheargold, at 193

"2. Climate change mitigation policies, such as phase outs of coal-fired electricity generation, have already been the subject of investor-state dispute settlement (ISDS) cases, and this submission proceeds from the assumption that in future more investors are likely to allege that climate change mitigation policies breach the protections found in investment treaties. If an investor is successful in an ISDS claim, the usual remedy provided is damages. While an award of damages may not directly prevent a state from regulating to reduce greenhouse gas emissions, it does 'affect the way the costs of public interest action are distributed between states and businesses.' In addition to the actual cost of paying damages to a successful claimant, it has frequently been argued that the **mere threat or potential for ISDS claims can cause 'regulatory chill' and deter states from adopting public interest regulations** such as climate change mitigation policies."

OECD Public Consultation, Investment Treaties and Climate Change (13 April 2022), Submission by Kyla Tienhaara, Rachel Thrasher, B. Alexander Simmons, Kevin P. Gallagher, at 214

"8. The problem is that it is unclear, and it is likely to remain unclear for some time (given the average duration of cases), whether arbitral tribunals will accept these lines of defence. **In the interim, there is a risk of regulatory chill, particularly in countries with limited capacity to defend policies in arbitration and pay awards** (Tienhaara 2018). Although it is difficult to definitively prove that threats of arbitration have led to delay or weakening of climate policies, there is some preliminary evidence to this effect. In 2017, the Canadian oil firm Vermillion threatened the French government with a ISDS case over its fossil fuel phase-out plan. The law was subsequently weakened (Vaudano 2018). Earlier this year, it was reported that both Denmark, one of the initiators of BOGA, and New Zealand had designed their oil and gas phase-out plans, at least in part, to minimize the impact on leaseholders that are protected by investment treaties (Meager 2022)."

K. Tienhaara et al., "Investor-state disputes threaten the global green energy transition" (2022) Science

Available at : https://www.science.org/doi/10.1126/science.abo4637

"[...] Increasingly, there is a **tendency for tribunals to use projections of an investment's expected future income across its entire life cycle as the basis of compensation,** using discounted cash flow as the method of calculation. The result has been hugely inflated monetary awards in the hundreds of millions and even billions of dollars. In some cases, the amount of compensation awarded has been described as "crippling" because it is incommensurate to the state's capacity to pay. Governments don't always lose, but the rules are sufficiently vague to make it difficult to predict outcomes. **This, combined with the risk of a very large award, can create a chilling effect. [...] Expensive awards or settlements could lead to states pulling out of climate commitments and rolling back regulations out of fear of more ISDS cases.** [...]

International treaties that provide protection to investors and access to ISDS increase the power of the fossil fuel industry to resist the implementation of policy measures that are crucial for the global green energy transition. **When investors launch claims for compensation under ISDS, or threaten to do so, this can result in the delay of policy action, extension of deadlines for moratoria,** or exemptions and payment of far greater compensation to leaseholders than would be available under domestic remedies. For example, fears of ISDS prevented New Zealand from becoming a full member of BOGA and committing to a Paris-aligned phase-out of oil and gas. [...]

Given that the ECT protects far more oil and gas production than any other treaty, it should be prioritized for termination. This could reduce the global price tag of oil and gas project cancellations by $5 billion to $20 billion, or more. Yet although several European members are considering termination or coordinated withdrawal, 32 additional countries number and production volume of treaty-protected oil and gas projects without a final investment decision by 6% and 25%, respectively, and the total NPV of these new protected projects could increase the global ISDS price tag by 19 to 24% ($12–45 billion). **Terminating the ECT would thus substantially reduce existing financial risks and eliminate additional future risks from expansion.**

Although wealthy nations, such as the United Kingdom, Denmark, and Ireland, would benefit most from the avoided financial losses that would come with ECT termination, **the threat of ISDS claims through other treaties for low- and middle-income countries would remain a major concern, particularly for countries vulnerable to severe climate change impacts and struggling to escape the debt crisis.** The high end of our liability estimate ($340 billion) is more than the total level of public climate finance globally in 2020 ($321 billion) (15). **Potential litigation risks are even greater if coal mining and midstream fossil fuel infrastructure are considered.** We cannot afford to divert such a substantial amount of public finance from essential mitigation and adaptation efforts to compensate investors in fossil fuels."

(ii) In-depth case studies for New Zealand, Canada, Indonesia and Germany and analogy with fossil fuels

a) New Zeland

Eric Crosbie and George Thomson, "Regulatory chills: tobacco industry legal threats and the politics of tobacco standardised packaging in New Zealand" (2018) N Z Med J. 131(1473), 25–41

Available at : https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6490166/pdf/nihms-960898.pdf

"In 2011, the New Zealand Government announced the goal of becoming a smokefree country (reducing smoking prevalence to 5%) by the year 2025, and considered adopting SP. In April 2012, the Government announced it would introduce SP, but tobacco companies threatened the Government with litigation in international courts for violating investment and intellectual property rights. In response, the Government adopted a 'wait and see' approach, waiting until two legal challenges against Australia's SP law were resolved before it enacted its legislation in September 2016. [...] Interviews with policymakers and health advocates **confirmed these threats helped produce a regulatory chill, delaying the policymaking process by three years.**"

"[...] recent studies have examined the political implications of trade agreements on tobacco control policies. This emerging literature highlights **how tobacco companies have used trade agreements to try and block innovative public health proposals and how the threat of legal action can help dissuade governments from implementing progressive policies.**"

“A series of delays to SP occurred from November 2010 to September 2016. **All 23 interviewees (policymakers and advocates) confirmed that industry legal threats were either the most significant or a primary reason for delays** (Supplementary Table 1).”

“[...] As part of the executive policy process, Associate Health Minister Turia sent a report on SP on November 27, 2012 to the Cabinet Social Policy Committee. **It expressed concerns over a potential legal challenge as a significant risk that “would require significant investment of resources”, estimating $3–$6 million for investment arbitration.** The report **acknowledged that risks would be significantly mitigated upon conclusion of the Australian legal disputes.** It therefore proposed developing “policy details to enable legislation to be considered for introduction by August/September 2013.” Consequently, the Government developed a ‘wait and see’ approach reliant upon the two Australian legal challenges for “greater legal certainty” before proceeding with SP in New Zealand. [...] The New Zealand case **illustrates how the threat of a potential international lawsuit can create a chilling effect by delaying public health policies.”**

J. Kelsey, “Regulatory chill: learnings from New Zealand's plain packaging tobacco law” (2017), QUT Law Review 17(2), 21-45

Available at : http://classic.austlii.edu.au/au/journals/QUTLawRw/2017/14.pdf

“The ‘chilling effect’ is a well known concept in the relation to free speech, where the legitimate exercise of rights is inhibited or discouraged by threats or attacks by opponents of an idea. Regulatory chill describes the reluctance of policy makers to adopt legislation or other regulation after factors external to the merits of the proposal are injected into the decision-making process with the intention of influencing the regulatory outcome. The most common examples are **direct threats of, or actual, legal action or warnings that proceeding would cause undesirable economic or reputational harm. The grounds are usually speculative or rely on untested legal arguments. A more systemic form of chill occurs when similar considerations are internalised through the policy criteria,** procedures and bureaucratic hierarchy of the government’s own processes.” (p. 23)

“Overall, the pure ‘legal compliance’ argument is unconvincing. The publicly available policy **documents show the government was concerned about the potential for litigation and its effects, not just the legality of its actions.** For example, the paper for the Cabinet Committee in November 2015, entitled ‘Update and Next Steps’, focused on international developments. The headings show the officials provided assessments of the hearings in the WTO dispute against Australia. That was followed by a large redacted section on litigation risk, which officials said informed their advice on the timeline.” (p. 35)

“Six years from the first tentative policy announcement, New Zealand’s plain packaging legislation had been passed but was not in force. There is **no doubt that the threat of litigation under New Zealand’s trade and investment**

agreements played a significant role in this delay. The tobacco industry and its allies used every available opportunity to wield their considerable influence. Even with redactions, it is clear from official documents that threats of trade and investment litigation, reputational factors and flow-on effects to other export industries induced caution throughout the process. The centrality of these arguments meant the policy advice on plain packaging became more heavily influenced by MFAT than by the Ministry of Health." (p. 44)

b) Canada

G. Van Harten & D. Nadine Scott, "Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada" (2016) 7(1) Journal of International Dispute Settlement, 1-25

Available at : https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1150&context=olsrps

"In this paper, we report empirical findings on ISDS and regulatory chill. Our study focused on whether ISDS contributed to changes in internal vetting of government decisions related to environmental protection in the province of Ontario, Canada. Our main source of information was 51 interviews, conducted on a confidential basis with insiders, mostly current or former officials in ministries with an environmental or trade mandate. We aimed to advance understanding of litigation risk and government decision-making in general with a particular focus on ISDS. Our first set of findings are as follows :

1. **Government ministries have changed their decision-making to account for trade concerns including ISDS.**
2. Government lawyers play a key role in assessing trade and ISDS risks. [...]
7. Officials referred occasionally to specific situations where trade or ISDS concerns were considered and, **in some cases, where they led to changes to a proposal."**

K. Tienhaara, "Regulatory chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement" (2018), Transnational Environmental Law 7(2), 229-250

"Van Harten and Scott also conducted interviews with regulators in Canada, but at the provincial level (a significant percentage of ISDS cases in Canada have arisen over subnational government measures). They found that government ministries have changed their decision making to account for concerns about ISDS and that government legal advisers play a key role in assessing ISDS risks. The findings of Van Harten and Scott suggest that, while the everyday regulator may have no awareness of ISDS (as suggested by Côté), practices developed within government to ensure that policies are vetted by lawyers with expertise in investment law prior to adoption could lead to regulatory chill."

c) Indenosia

C Tietje et al., "The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership", 39 et seq

"78. A further example considers a measure adopted by Indonesia in 2002 to regulate certain open-pit mines. In 2002, Indonesia considered a measure to ban open-pit mining in protected forests and listed 23 companies (of 150 total mining companies) impacted by the designation of protected forests. A group of foreign-owned mining companies then reportedly threatened the Government of Indonesia with international arbitration pursuant to BITs if the measure would be adopted. The House of Representatives and Ministry of Forestry then "agreed in principle" to change the forest designation of three locations from "protected" to "production", essentially exempting certain foreign companies from the measure. This has led commenter to observe, that "the timing of the government's actions, statements to the media and other factors suggest that the government was strongly motivated to remove the threat of arbitration.""

d) Germany's coal phase out agreement

Fabian Flues (Powershift), "Coal ransom: How the Energy Charter Treaty drove up the costs of the German coal phase-out" (22 April 2022), pp. 4-7

Available at : https://www.globaljustice.org.uk/wp-content/uploads/2022/04/CoalRansom_ECTGermanCoalPhaseout_Apr2022.pdf

"In part to rule out such lawsuits under the Energy Charter Treaty or other investment treaties, the German government chose a contract with the operators of the coal-fired power plants as the instrument for the coal phase-out. A 2019 internal assessment by the Federal Ministry of Economics to the Chancellor's Office states that "the introduction of regulatory law is likely to increase the risk of lawsuits." Accordingly, it is "to be expected that companies will seek international arbitration in addition to national legal action." Furthermore, the ministry points to Uniper's threat of legal action against the Dutch coal phase-out (at that time Uniper had not yet filed suit, which it did in 2021, see Box 5). One reason for rejecting a regulatory phase-out was thus explicitly in order to avoid ECT lawsuits.

Instead, the German government negotiated a contract with the coal companies. In this contract, the companies explicitly waive their right to sue under the Energy Charter Treaty (§24 of the contract). [...]

The negotiation of the contract gave the coal companies much greater influence over the outcome than would have been the case with a law or regulation. In the latter case, the coal companies would have been one of many interest groups in the regular legislative process, which would have taken place with the participation and scrutiny of the parliament and the public. Instead, they were the only partner in the confidential contract negotiations, with a successful outcome depending on their approval. The coal companies knew how to use this favourable negotiating position to their advantage. [...]

2. The environmental think tank Öko-Institut has also taken a close look at the compensation payments. The researchers conclude that LEAG's high compensation of €1.75 billion in particular cannot be justified by the circumstances of the coal phase-out. The Öko-Institut's analysis shows that the phase-out path agreed for LEAG's power plants was barely accelerated by the payments. An expert report commissioned by the Federal Ministry of Economics concludes that the additional mine rehabilitation costs for LEAG resulting from the coal phase-out amount to a maximum of €35 million."

e) Analogy with fossil fuels

K. Tienhaara, "Regulatory chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement" (2018), Transnational Environmental Law 7(2), 229-250

"What is likely to occur in the future. It is argued here that the **strong parallels between the tactics used by the tobacco industry** and the fossil fuel industry in response to proposed regulation suggest that when countries begin to ramp up action on climate change, fossil fuel corporations will employ ISDS in the same way that Philip Morris has."
"In recent years, a number of authors have charted the collaborations between the tobacco and fossil fuel industries and commented on the use by both industries of 'merchants of doubt': scientists or faux experts willing to argue against scientific consensus for a fee [...] all of these efforts for the past 50 to 60 years have been **focused primarily on delaying regulatory action.**

A number of parallels can be drawn between the tobacco and fossil fuel industries that explain their focus on stalling policy development. They also show why ISDS is a viable tactic for achieving this in addition to the tried-and-true methods of misinformation and lobbying. The first parallel is that both industries face 'existential threats' and are 'fighting for survival'. This is not the case for all industries faced with increased regulation, which often only translates into increased costs and possibly lower profit margins. Tobacco cannot be made healthy, nor can burning fossil fuels be made environmentally friendly (unless one believes the fantasy of 'clean coal'). If a government or the public decides that putting an end to lung cancer or climate change is a priority, then this means that the tobacco or fossil fuel industries must be regulated out of existence. [...] The continued desire of corporations in these industries to hold on for as long as possible means that they will use every strategy at their disposal, including ISDS. This is true even if they know that they are highly unlikely to win a case, because the years during which proceedings are ongoing **may deliver them considerable profits in other jurisdictions.**"

"Furthermore, the minutes of a meeting in April 2014 between unnamed Chevron executives and European Commission officials (obtained by The Guardian under access to information laws) note that Chevron believes that 'the mere existence of ISDS is important as it acts as a deterrent'. However, while tobacco and fossil fuel corporations both recognize the power of ISDS, the fossil fuel industry has **far more experience with the process in practice than the tobacco industry does.** [...] Applying this tactic to the new area of climate change policy will be fairly straightforward."

"In summary, fossil fuel corporations are faced with an existential threat to their business model; they have the resources to engage in ISDS and no good reason not to. Critically, they do not need to believe that they will win the cases that they launch, simply that **dragging a policy through ISDS in one jurisdiction might delay its adoption in another.**"

3. Acknowledgement of the chilling effect by leading arbitration practitioners

George Kahale III, Global Head of International Arbitration at Curtis (in Submission to the OECD Public Consultation on Investment Treaties and Climate Change (13 April 2022), p. 144, at 147)

“**Anyone familiar with states’ policy-making processes appreciates that the threat of an ISDS claim has a chilling effect on state action.** The chill actually **increases in accordance with the knowledge and experience of the state actors.** Naturally, **the more one is aware of a risk, the more concerned one becomes**. This means that informed state officials around the world are factoring into their decision-making processes in virtually all matters that could have an impact on foreign investors the risk of an ISDS claim.”

Financial Times, “European energy groups seek €4bn damages over fossil fuel projects” (21 February 2022)

Available at : https://www.ft.com/content/b02ae9da-feae-4120-9db9-fa6341f661ab

“A sixth case, for an unknown sum, was brought against Romania by the Austria-based Petrochemical Holding over a petroleum development contract.

Petrochemical Holding legal counsel Andrew Savage, a partner at global law firm McDermott Will & Emery, **warned Romania's "stated desire to move away from fossil fuels ... may lead to further claims".** [...]

Dmitri Evseev, a partner at law firm Arnold & Porter, agreed the legal action **"may have a chilling effect, undoubtedly, on all kinds of policy change".** "Investor-state arbitration is the biggest stick that investors have," he said. [...]

One of the lawyers representing Italy in the case brought by Rockhopper — after the state's refusal to permit the development of the Ombrina Mare oilfield in the Adriatic Sea — said a defeat would be "extremely serious", as it would give other companies "the desire to emulate Rockhopper".”

Toby Landau, one of the world's leading arbitration lawyers, as arbitrator and counsel (in J. Hill, "ISDS: The Devil in the Trade Deal", ABC Radio National, Background Briefing, 26 July 2015

Available to : https://www.abc.net.au/radionational/programs/backgroundbriefing/isds-the-devil-in-the-trade-deal/6634538

"Without doubt, **"regulatory chill", in my view, definitely exists, and there's palpable evidence of it,** he says. 'There are those who deny it, but I can say that in my role as counsel, on a number of occasions now I've actually been instructed by governments to advise on possible adverse implications or consequences of a particular policy in terms of investor-state (ISDS) cases.' [...]

'It's an area where there is no system of precedent, where the rules are very vaguely, broadly drafted, where there have been many inconsistent decisions already on the same issue, and it depends on who the arbitrators (judges) are,' he says.

'As a result, the chill effect, in my view, is much broader than other areas of law because a government that wants to be careful and prudent, and avoid any risk of an investor-state case, is **likely to shift away from a particular policy if there's any risk of a claim.** And the advice it's likely to get is, "One cannot discount the risk.""

Prof. Philippe Sands, (in Odyssey Marine Exploration, Inc. (USA) v. United Mexican States, ICSID Case No. UNCT/20/1, Procedural Order No. 6, Professor Sands' Dissenting Opinion, para. 2

Available to : http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8573/DS17216_En.pdf

"It is now well-recognised that investment treaty arbitration can have a significant impact on domestic regulatory regimes, even where compensation is the only remedy awarded. It is therefore entirely possible that a finding that the Respondent has breached the treaty could lead to regulatory changes, which directly affect the interests of the Cooperativa, either immediately or in the future. The Majority's decision fails to recognise or take account of the broader impacts of investment treaty arbitration"

Prof. Philippe Sands, in RENERGY S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/14/18, Dissent on Liability and Quantum, paras 47-48

Available to : http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8573/DS17216_En.pdf

"47. In the absence of evidence, the **decision of the Majority will be seen as prioritising the interests of foreign investors over and above the interests of all other social actors.** That it does so on the basis of a wholly concocted understanding of "reliance", and an evidentiary record that offers no evidence of the Claimant's actual expectation, or reliance upon such an expectation, is a matter of considerable concern. The Majority has **treated the ECT rules on FET as being akin to a modest insurance mechanism,** one that allows the Claimants to benefit from a regulatory framework that was widely seen to be generous in creating windfall profits in the face of an unprecedented economic crisis and historically low rates of interest.

48. The case-law confirms that in the absence of a specific promise or representation made by the State to the investor, "the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework". The expectation of a relatively (or absolutely) immutable rate of return identified by the Majority is not supported by the evidence or the case-law. It is an approach that is neither legitimate nor reasonable, and **will only serve to foster a greater distrust in the system of investor-state arbitration, one seen in many quarters as favouring the interests of lawyers and arbitrators**, and banks and those working in the financial services sector, but not many others or the public good. It also has **the unfortunate effect of setting in soft stone a regulatory framework that must necessarily be allowed to change in the face of technological changes that reduce reliance upon greenhouse gas emitting fossil fuels.** In this way, I fear that the Majority's approach (which is by no means an isolated one) **tends to undermine efforts to allow states to take the actions necessary to address the serious threat of global warming and climate change.** By making certain technologies more expensive than they need be, the approach offers **support for those who see the ECT as setting out obsolescent rules that reflect a bygone era, a legal carbuncle negotiated in an earlier age that will limit efforts truly to transform energy supply systems and offer protections to our common environment."**

Professor Donald McRae, in Clayton and Bilcon of Delaware Inc. v. Government of Canada, PCA Case No. 2009-04, 14 May 2015, Dissenting Opinion of Professor Donald McRae, para 51

Available to : https://www.italaw.com/sites/default/files/case-documents/italaw4213.pdf

"[...] 51. This result may be disturbing to many. In this day and age, the idea of an environmental review panel putting more weight on the human environment and on community values than on scientific and technical feasibility, and uconcluding that these community values were not outweighed by what the panel regarded as modest economic benefits over 50 years, does not appear at all unusual. Neither such a result nor the process by which it was reached in this case could ever be said to "offend judicial propriety". Once again, a chill will be imposed on environmental review panels which will be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment in case the result is a claim for damages under NAFTA Chapter 11. In this respect, the decision of the majority will be seen as a remarkable step backwards in environmental protection."

Stuart Gross, partner at law firm Gross & Klein in Grid News, "The fossil fuel industry has a trillion-dollar secret weapon to kneecap climate action" (5 May 2022)

Available to : https://www.grid.news/story/climate/2022/05/05/the-fossil-fuel-industry-has-a-trillion-dollar-secret-weapon-to-kneecap-climate-action/

"Even just the threat of such a suit is enough to halt or roll back such efforts by host states," said Stuart Gross, a partner at law firm Gross & Klein who has worked on ISDS cases in the past. "Because of structural flaws in the way these disputes are adjudicated, the ease of enforcing any resulting awards, and the scale of the awards relative to host country financial resources, the threats can be very effective even if they lack legal merit."

4. Recent evidence of regulatory chill

a) Netherlands

Financial Times, "European energy groups seek €4bn damages over fossil fuel projects" (21 February 2022)

"When the Dutch minister and state-secretary of economic affairs and climate were asked last year **about accelerating the decommissioning of coal and gas** fired power stations, they said "further intervention in the coal sector entails **major legal risks in the context of pending claims".**"

Urgewald, Meet the Energy Charter Treaty (2020)
Available to : https://www.urgewald.org/sites/default/files/media-files/Investorenbriefing_EnergyCharterTreaty_Web.pdf

"In the Netherlands, the planned coal phase-out will end in 2030; a more timely phase-out date than Germany. However, the date should have been more ambitious, as climate experts and civil society organizations have pointed out. Dutch politicians clearly had the ECT on their mind when they decided not to set a more ambitious and effective timeline for the Dutch coal phase-out."

b) Denmark

Capital Monitor, "Cop26 targets pushed back under threat of being sued" (14 January 2022),

Available to : https://capitalmonitor.ai/institution/government/cop26-ambitions-at-risk-from-energy-charter-treaty-lawsuits/

"At last year's Cop26 climate talks in early November, Denmark – which has Europe's biggest pool of ECT-protected assets (€15.9bn), after the UK, with €140bn – and Costa Rica jointly launched the Beyond Oil & Gas Alliance (Boga).

Boga says its members should, at a minimum, be "implementing the guidance of the International Energy Agency to cease development of new oil and gas fields". [...]

The Danish government has set a 2050 deadline for ceasing exploration projects, which is expected to affect just one fossil fuel licensing agreement. **Had it set an earlier target of 2030 or 2040, it would have to pay "incredibly expensive" compensation to the companies that have invested in plants and equipment under fossil fuel deals, on top of revenue the Treasury would have lost, said climate minister Dan Jørgensen.**

The intention is clear. A Danish energy ministry spokesman tells Capital Monitor by email: "The ministry is aware of examples of companies suing governments for fossil fuel phase-out laws and seeking compensation **under the ECT.** This is not something we expect in terms of the decision to phase out North Sea oil and gas production **by 2050**."
Denmark's commitment to only end new licensing rounds "means there will be very little or nothing to sue about", the chief sustainability officer of a Nordic region oil and gas-focused private equity firm tells Capital Monitor.""

c) New Zealand

Capital Monitor, "Cop26 targets pushed back under threat of being sued" (14 January 2022)

New Zealand, too, could not join Boga as a full member because by doing so it **"would have run afoul of investor-state settlements"**, James Shaw, the country's climate change minister, told Capital Monitor on January 19.

New Zealand had banned all new offshore oil exploration in April 2018 but did not cancel any existing contracts, and left the door open to onshore projects. It is not a member of the ECT, but several of its trade agreements include ISDS provisions.

Joining Boga as a full member would have broached an understanding on which companies had invested, Shaw says. "So by saying there's just not going to be any new exploration we weren't challenging any existing rights, and while lots of people complained, it wasn't legally challengeable.""

d) France

Capital Monitor, “Cop26 targets pushed back under threat of being sued” (14 January 2022)

“It is difficult to identify, let alone quantify, the chilling effect of potential litigation. Governments do not tend to say explicitly that they are drafting policy in a certain way due to corporate pressures – but examples do exist.
One of the clearest came in 2017, when a French energy minister outlined plans to phase out fossil fuel extraction by 2040. Canadian oil and gas giant Vermilion, which produces 75% of the oil that France produces itself (although France imports 99% of its oil), **threatened Paris with a billion-dollar suit, leading it to back down.** Canada is not party to the ECT but, as Vermilion pointed out, six of its investors were based in ECT member countries.”

ISDS Red Carpet Courts, “Blocking Climate Change Laws with ISDS Threats: Vermilion vs France”

Available to : https://10isdsstories.org/wp-content/uploads/2019/06/Vermilion-vs-France.pdf

“In the summer of 2017, the French Environment Minister was feeling the heat of the climate crisis and the need for urgent action. He drafted a law to put an end to fossil fuel extraction on all French territory, including those overseas, by 2040 — no more oil or gas was to be extracted from the ground after that year.”

“In August 2017, the Council of State received several lobby letters on the Hulot law. One came from a private law firm, Piwnica et Molinié, on behalf of Canadian oil and gas company Vermilion. With 26 fossil fuel extraction sites in France, including many oil projects in the Paris region, Vermilion is the most important fossil fuel producer on French territory, producing almost 75 per cent of national oil. The company and its lawyers threatened to sue France under ISDS if it pushed ahead with the Hulot law.

The letter argued that Hulot’s proposed ban on renewing oil exploitation permits violated the Energy Charter Treaty (ECT), an international agreement from the 1990s, which includes far-reaching rights for foreign investors [...] It **explicitly says that the Hulot law breaches France’s international commitments under the ECT**, and refers to six rights in the Treaty, such as “fair and equitable treatment of investors” or the fact that signatories “cannot expropriate investments without respecting certain conditions such as the prompt payment of adequate and effective compensation”.”

“After the summer holidays, both a refreshed Hulot, and a transformed Hulot law, returned for discussion. **The September 2017 version allowed for the renewal of oil exploitation permits until 2040, meaning that all current exploration and exploitation projects would continue being developed without any constraints for more than 20 years**. Under certain conditions, the final version of the law even allowed exploitation permits to be renewed after the 2040 deadline. Thus the new law would in fact now have **the opposite effect to its original aim**. And worse, once the new law was passed, Hulot signed more fossil fuels permits than his predecessor in the Environment Ministry.”

e) Slovenia

Friends of the Earth Europe, "Energy Charter Treaty claim pushes Slovenia to weaken fracking rules" (17 January 2022)

Available at : https://friendsoftheearth.eu/press-release/energy-charter-treaty-claim-pushes-slovenia-to-weaken-fracking-rules/

"The Slovenian government decided that low-volume hydraulic fracturing, also known as fracking, will be allowed in Slovenia under amendments to the country's mining rules. This will pave the way for Ascent Resources, a UK company, to frack for gas in the Petišovci gas field in the east of the country. Fracking is known to have strong negative environmental impacts and to result in even higher climate emissions than normal gas exploration. When the Slovenian government announced that Ascent Resources needed to undertake an Environmental Impact Assessment (EIA) and obtain environmental consent for the project, the company objected and launched a claim against the Slovenian government under the Energy Charter Treaty, seeking €100 million of taxpayers' money in damages.
This threat seems to have been successful as the Slovenian government is now laying the ground for the start of the fracking activities. The legislation was adopted just a day after a rival bill that would ban fracking altogether was discussed by a parliamentary committee."

f) Germany

Financial Times, "European energy groups seek €4bn damages over fossil fuel projects" (21 February 2022)

Available at : https://www.ft.com/content/b02ae9da-feae-4120-9db9-fa6341f661ab

"The German finance ministry warned the chancellor's office in 2019 that **using regulation to phaseout coal would create an "increased risk of litigation, especially international litigation based on the ECT"**, according to an email seen by the FT."

Fabian Flues (Powershift), “Coal ransom: How the Energy Charter Treaty drove up the costs of the German coal phase-out” (22 April 2022), p. 4

Available at : https://www.globaljustice.org.uk/wp-content/uploads/2022/04/CoalRansom_ECTGermanCoalPhaseout_Apr2022.pdf

“Vattenfall v Germany I:

In 2009, Swedish energy provider Vattenfall sued Germany for €1.4 billion in compensation after the City of Hamburg imposed strict water requirements for Vattenfall’s coal-fired power plant in Hamburg-Moorburg. Vattenfall only dropped the arbitration claim once the city of Hamburg agreed to ease these requirements. Representatives of the Hamburg state government later said that the high compensation demands were instrumental in persuading the city to reconsider. In 2017, the European Court of Justice ruled against Germany for violating European environmental directives when approving the power plant.”

Climate Home News, “An energy investment treaty has been holding Nord Stream 2 hostage” (24 February 2022)

Available at : https://www.climatechangenews.com/2022/02/24/the-energy-charter-treaty-delayed-nord-stream-2-halt/

“After Russian tanks rolled into Ukraine on Tuesday, German chancellor Olaf Scholz finally decided to halt the certification of the Nord Stream 2 gas pipeline linking Germany and Russia. But **why has the German government delayed this decision for so long?** And why did Scholz merely halt the certification rather than cancelling it? The words of German environment minister Svenja Schulze from last February give a clue. "We also **run the risk of ending up in international arbitration courts with compensation claims if we stop the project,"** she said.”

g) Portugal

Bon Pote, "Traité sur la Charte de l'énergie : le traité qui va tuer l'Accord de Paris" (8 June 2022)

Available at : https://bonpote.com/traite-sur-la-charte-de-lenergie-le-traite-qui-va-tuer-laccord-de-paris/

"La baisse des subventions aux énergies renouvelables a été appliquée sans distinction aux investisseurs nationaux et étrangers sauf au Portugal où les tarifs de rachat de l'électricité éolienne, qui implique principalement des investisseurs étrangers, ont été prolongés jusqu'en 2036 alors que les subventions aux installations solaires, qui impliquent principalement les investisseurs nationaux, ont été ajustées à la réalité du marché.

Certes la décision portugaise a évité le recours comme le prévoit le TCE aux tribunaux d'arbitrage privés pour le règlement des différends entre investisseurs et Etats, mais cette décision qui est le résultat de négociations secrètes avec des investisseurs étrangers, y compris des Chinois qui ont racheté certaines installations éoliennes au moment de la crise financière, a augmenté le coût de la transition énergétique pour les contribuables portugais. En effet, le Portugal est le pays de l'UE où le coût des subventions pour la production de l'électricité éolienne est le plus élevé. Pas étonnant que le Portugal ait fait alliance avec l'Espagne, le pays le plus attaqué par le biais du TCE, pour mettre fin temporairement à l'application des règles du marché commun de l'électricité. Malgré cela, les partisans du traité sur la Charte de l'énergie considèrent la stratégie mise en place par le Portugal pour éviter les litiges comme une bonne pratique."

5. Civil society reports showing the detrimental impact of the ECT on the energy transition

Corporate Europe Observatory (CEO) and the Transnational Institute (TNI), "One Treaty to rule them all" (13 June 2018)

Available at : https://www.tni.org/files/publication-downloads/one_treaty_to_ruled_them_all.pdf

"The ECT is a **powerful tool in the hands of big oil, gas, and coal companies to discourage governments from transitioning to clean energy.** They have used the ECT and other investment deals to challenge oil drilling bans, the rejection of pipelines, taxes on fossil fuels, and moratoria on and phase-outs of controversial types of energy. Corporations have also used the ECT to bully decision-makers into submission. Vattenfall's €1.4 billion legal attack on environmental standards for a coal-fired power plant in Germany forced the local government to relax the regulations to settle

278 civil society organisations, Open Letter on the Energy Charter Treaty (ECT) (9 December 2019)

Available at : https://foeeurope.org/sites/default/files/eu-us_trade_deal/2019/en-ect-open-letter1.pdf

"The ECT protects fossil fuel investments and infrastructure, and is **used to challenge and undermine necessary climate action. [...] We are likely to see more ECT lawsuits against climate action in the future as governments start to develop plans for climate neutrality and a clean energy transition.** There is a real risk of so called 'regulatory chill', where governments are discouraged from taking action when faced with massive compensation claims."

Y. Saheb (OpenExp), "Modernisation of the Energy Charter Treaty: A Global Tragedy at a High Cost for Taxpayers" (January 2020)

Available at : https://www.openexp.eu/sites/default/files/publication/files/-modernisation_of_the_energy_charter_treaty_a_global_tragedy_at_a_high_cost_for_taxpayers-final.pdf, pp. 38-39

"**The climate emergency and the continuation of the ECT increase the risk of "regulatory chill" effect through the ISDS threat**. In fact, **setting a carbon neutrality target will inevitably mean governments will have to urgently**

enact and enforce regulations to end the exploration of fossil fuels and to plan for an earlier retirement of existing fossil fuels infrastructures. In other words, the fossil fuel industry is, for the first time, facing an existential threat unless climate policies and regulations are delayed, watered-down or cancelled.

"Importantly, fossil fuel corporations do not have to win any ISDS cases for this strategy to be effective; **they only have to be willing to launch them" or to remind governments of the ISDS provisions** included in the Treaties they have ratified years ago. The latter was the case of the French law on ending the exploration of fossil fuels. ISDS threat under the ECT regime from a Canadian company has contributed to watering-down requirements included in the draft law. Similarly, Germany faced two ISDS cases under the ECT regime from a State-owned Swedish company over the implementation of environmental regulations and the phase-out of nuclear power plants. [...]

The lack of transparency under the ECT regime suggests that there might be many unknown cases of "regulatory chill". It is likely that investors will try to institutionalise the "regulatory chill" in EU Member States to avoid the domino effect of ambitious climate policies. This is particularly true given the low understanding of the ECT and its impacts by government officials and the active lobbying of arbitrators and investors in various international fora to keep the status-quo. Without ending ISDS under the ECT regime, it is unlikely that the proposed "right to regulate" and other "safeguards" would limit the abuse of investors and arbitrators of the ambiguities raised by the binding provisions of the ECT."

CEO, TNI, SEATINI, "Silent Expansion: Will the world's most dangerous investment treaty take the global south hostage?" (April 2020), p. 13 and 18

Available at: https://www.tni.org/files/publication-downloads/ect_silent_expansion.pdf

"But governments which halt dirty power plants or drilling rigs could be held liable for millions if not billions of damages under the ECT. The treaty could also be used to put significant pressure on governments to allow new projects which would accelerate climate change and **further lockin fossil fuel dependence.** [...]

The ECT undermines democracy and **could put a brake on climate action.** It is a tool to bully decision-makers and make governments pay when they act to fight the climate crisis and protect other public interests. This is a particularly worrying threat to the urgently-needed transition away from fossil fuels, which requires bold regulations and will curtail the profits of some of the largest oil, gas, and coal corporations. The ECT has already been used to attack bans on polluting fossil fuel projects, environmental restrictions on dirty power plants, and the coal phase-out.

The ECT limits sovereignty and policy-space **to regulate in the public interest, including for affordable energy prices."**

Urgewald, Meet the Energy Charter Treaty (2020)

Available at : https://www.urgewald.org/sites/default/files/media-files/Investorenbriefing_EnergyCharterTreaty_Web.pdf

"Seeking to align a company's business model with the Paris Agreement and threatening to or filing claims under the Energy Charter Treaty are incompatible – because the latter **risk slowing down and weakening the energy transition,** and making it more expensive for the public. Responsible shareholders need to be clear that Paris-compliant transition plans must include a pledge that the ECT will not be used to prolong the life of fossil assets. [...]

ECT claims can have a **negative impact on governments'** ambitions to adopt progressive climate legislation. Germany's coal exit law, for example, requires a coal phase-out by 2038, a date that is eight years too late to be aligned with the Paris Agreement. The law also foresees the jaw-dropping amount of €4.35 billion in compensation payments to coal companies. This amount is €2 billion higher than the compensation believed to be adequate, based on economic predictions. This high payout was clearly intended to preempt claims under the ECT and other investor-state dispute settlement treaties: in exchange for waiving their right to sue the German state, coal companies such as EPH will receive huge compensation payments from the government."

PowerShift, CEO and TNI, "Busting the myths around the Energy Charter Treaty A guide for concerned citizens, activists, journalists and policymakers" (December 2020), p. 26

Available at : https://www.tni.org/files/publication-downloads/busting_the_myths_around_the_energy_charter_treaty-web.pdf

"The key question in ECT proceedings is not whether states have a right to regulate. They do. Several ECT tribunals have confirmed that. The key question is whether states violate the ECT's investor rights when regulating. In other words: states are free to regulate how they want – but somewhere down the road they can be ordered to pay billions in taxpayer money, if a tribunal finds that a new law treated an investor 'unfairly'. In one of the ECT cases that Spain lost, for example, the tribunal confirmed that "the state has a right to regulate, and investors must expect that the legislation will change". But it still ruled that Spain had violated the ECT when it "radically altered" its support scheme for renewable energy: Spain "crossed the line" and "violated the obligation to accord fair and equitable treatment ... when the prior regulatory regime was definitively replaced by an entirely new regime", the tribunal argued. Re-affirming the right to regulate in the ECT, while keeping its vast investor privileges intact, will neither stop ECT challenges against legitimate public policies nor prevent arbitrators from ruling against states. **This also means that the risk of regulatory chill – avoiding lawsuits by appeasing investors with less regulation – remains, including in the context of the climate emergency."**

End Fossil Protection, Open letter from climate leaders and scientists to signatories of the Energy Charter Treaty (ECT) (December 2020)

Available at : https://www.endfossilprotection.org/en

"The Energy Charter Treaty (ECT) is a **major obstacle to this transition.** It protects investments in energy supply, including coal mines, oil and gas extraction, pipelines, refineries and power stations. The treaty allows energy firms to challenge almost any state measure that impacts the investor's expected profit. [...] Energy firms are **using the ECT to slow down the transition away from fossil fuels.** For example, UK oil company Rockhopper is suing Italy for banning oil extraction in the country's coastal waters, claiming seven times the sum that the company initially invested. British energy firm Ascent Resources is suing Slovenia for demanding the company carries out an Environmental Impact Assessment before starting gas explorations using fracking. In the Netherlands, the operator of a coal-fired power station has started legal proceedings under the ECT against the Dutch government's coal phase-out law, reportedly demanding €1 billion in compensation. **The threat of investment arbitration claims of this kind can be sufficient to dissuade governments** from legislating in the public interest. Therefore, the signatories to this letter see the Energy Charter Treaty as a major obstacle to implementation of the Paris Agreement and the European Green Deal."

IISD / L. Di Salvatore, N. Bernasconi-Osterwalder & L. Schaugg ,
"Despite consensus on the ECT's incompatibility with the global climate agenda, claims that it is well-suited for the clean energy transition persist" (8 October 2021)

Available at : https://www.iisd.org/itn/en/2021/10/08/malgre-le-consensus-quant-a-lincompatibilite-du-tce-avec-lagenda-climatique-mondial-les-arguments-selon-lesquels-il-est-approprie-pour-la-transition-vers-une-energie-propre-persiste-lea-di-salvatore-n/

"There is scientific consensus that in order to limit global warming as defined in the Paris Agreement states must swiftly phase out fossil fuels and transition to low-carbon energy systems. However, given the continued dependency of economies on fossil fuels, such phase-outs and the pursuit of a clean energy transition at a global scale are complex tasks that demand that all institutions and levels of governance work in this direction.

Due to its outdated investment protection provisions and the option for fossil fuel investors to challenge sovereign climate action, **the ECT is widely recognized to be a key obstacle to the clean energy transition."**

Financial Times editorial board, "Governments should not foot the bill for stranded assets: Treaties that lead to fossil fuel bailouts need a rethink" (21 February 2022)

Available at : https://www.ft.com/content/6e480f92-894a-494e-90ee-c60d20ce22f9

"The prospect of "bailing out" fossil fuel projects **risks disincentivising the steps needed now, from both markets and government, to secure swift decarbonisation.** [...] As figures from Mark Carney to John Kerry have made clear, any hope that we have of transitioning away from carbon at the necessary pace will rely on private markets. Capital must be allocated quickly towards renewables. [...] **[G]overnments will confuse things if they pay up in a way that means fossil fuels cannot lose. While renewables will remain the safe play long-term, the pace of capital's shift away from fossil fuels may decrease."**

Reuters, "U.N. reform needed to stop companies fighting climate rules: Nobel laureate Stiglitz" (29 May 2019)

Available at : https://www.reuters.com/article/us-climatechange-trade-stiglitz-idUSKCN1SZ04Y

"Under ISDS, a nation that hurts a company's profits by imposing new rules that add to the cost of building a natural gas pipeline, for example, could be sued by the company, Stiglitz said. ISDS cases **can "instill fear of environmental regulations, climate regulations because you know that it's going to be costly" for governments,** he said. "It's litigation terrorism.""