

## Developments in Investor-State Dispute Settlement 2022

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# Principal Theme of 2022?

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I. ICSID Rules Reform

II. UNCITRAL Reform Process

III. Climate Change and Investment Treaty Reform

# Reform

# I. ICSID Rules Reform

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Process begun in 2016.

Rule changes adopted in March 2022. Effective as of 1 July 2022.

## 1. Amendments:

- ICSID Arbitration Rules
- ICSID Additional Facility Arbitration Rules
- ICSID Conciliation and Fact-Finding Rules

## 2. New Rules on Mediation

# ICSID Arbitration Rules Amendments

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## Incremental changes

1. Disclosure of third-party financing
2. Guidelines on cost allocation; greater flexibility to order security for costs
3. Various mechanisms for improving cost-efficiency and timeliness of proceedings
  - Amended Rule 41 on claims manifestly lacking legal merit
  - Time limits to render decisions
4. Expedited arbitration

# Other ICSID Rules Reform

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## 1. New Rules on Mediation

- For disputes that (a) relate to an investment, (b) involve a State or a regional economic integration organization (REIO), and (c) which the parties consent in writing to submit to ICSID.

## 2. Amended Rules for Conciliation and Fact-Finding

- Additional flexibility. Fact-finding rules completely revised.

## II. UNCITRAL ISDS Reform Process

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- Working Group III: Procedural reform of ISDS.
- Began 2017. Scheduled for completion in 2026.
- Since 2021, three formal sessions/year and three informal intersessional meetings/year.



# Continuum of ISDS Reform Options in UNCITRAL

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## Incremental

Incremental improvements to existing system of ad hoc investor-state arbitration

*e.g.:*

- United States
- Russian Federation
- Japan

## Partly Structural

Structural improvements to ad hoc investor-state arbitration (“appellate mechanism”)

*e.g.:*

- China
- India
- Argentina

## Fully Structural

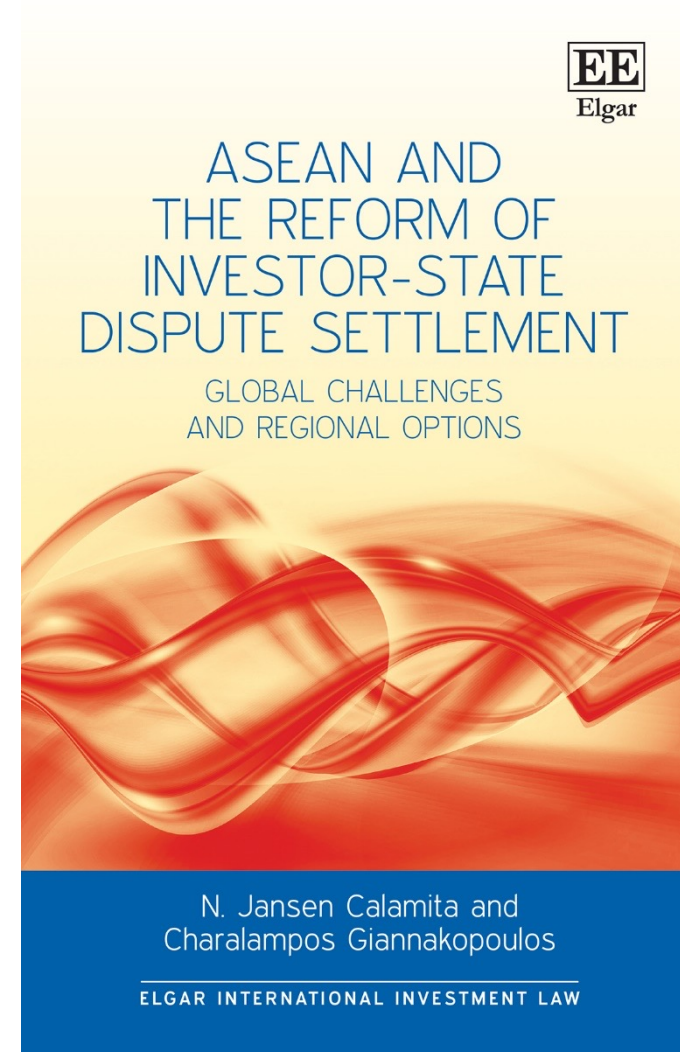
Replacement of ad hoc investor-state arbitration with Multilateral Investment Court

*e.g.:*

- European Union
- (Canada)

# UNCITRAL State of Play

- Slow going.
- Increasingly complex process.
- No consensus appears to be building for any one reform approach.
  - Code of Conduct, e.g.
- The most complicated task may be drafting an implementing convention (or conventions).
  - A multi-track convention?





# III. Climate Change and Investment Treaty Reform

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- Estimated US\$ 130 trillion investment required by 2050 to achieve Paris Agreement 1.5° C goal.
  - Mitigation: preventing or reducing the emission of GHGs enhancing storage of GHGs, e.g., transition from fossil fuel to renewables
  - Adaptation: taking action to prevent or minimize adverse effects of climate change, e.g., defenses to protect against sea-level rise
    - See International Renewable Energy Agency, *World Energy Transitions Outlook 2022*; International Monetary Fund, “How to Scale Up Private Climate Finance in Emerging Economies” (Oct. 2022)

# State Concerns Driving Reform

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- Investor claims based upon regulatory changes away from fossil fuels, e.g.,
  - *Rockhopper v. Italy*: offshore drilling ban -- €190 million award (2022)
  - *RWE v. Netherlands*: coal phase out -- €1.4 billion claim (pending)
  - *Vattenfall v. Germany*: nuclear phase out – € 4.7 billion claim (settled 2021)
  
- Investor claims based upon regulatory adjustments in connection with renewables, e.g.,
  - 90+ cases brought against states under the Energy Charter Treaty regarding renewables: Spain; Czechia; Italy, etc.
  - US\$ 23 billion claimed; US\$ 2.3 awarded (thus far)

# Reform of the Energy Charter Treaty (1994)

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Negotiations concluded (June 2022).

1. Narrower definition of protected investors and investments
2. Optional denial of protection to fossil fuel investments
  - a) existing investments 10 years upon entry into force
  - b) new investments made after 15 August 2023
3. Clarification of standards of protection and greater emphasis of right to regulate
4. Exclusion of intra-EU investment arbitration

# ECT Reform Collapse

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- **October-November 2022:** EU Member States begin to announce plans to withdraw from ECT.
  - Belgium, France, Netherlands, Poland, Slovenia, Spain
  - (Italy prior withdrawal in 2016)
- **18 November 2022:** EU Council rejects approval of revised ECT.
- **21 November 2022:** Postponement of scheduled (22 November) vote on revised text

# ECT Reform Future – Outstanding Questions

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1. Will withdrawing states address the sunset application of the ECT?
  - 20 yr. sunset provision. Possible *inter se* agreement among withdrawing states.
2. Will other (EU) states withdraw? Will the EU itself withdraw?
3. Will states agree to revised ECT text in any case?
  - Decision rescheduled for ECT Ministerial, April 2023

# CIL Webinar Series on Climate Change and Investment

1. “Investment Protection and Climate Change Regulatory Reforms” (13 Dec. 2022)
2. “Compensation and Valuation in Climate Claims under Investment Treaties” (2 Feb. 2022)
3. “Facilitating Private Investment to Fund Climate Change Mitigation and Net Zero Policies” (March 2022)
4. “The Role of Non-State Actors in Supporting Net Zero Investments” (Apr. 2022)
5. “Aligning Investment with Net Zero Goals through Domestic Corporate Laws” (May 2022)
6. “The Role of Trade Law in Aligning Investment Flows with Net Zero” (June 2022)

**CIL**  
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Seminar Series on Climate Change and Investment  
**Investment Protection and Regulatory Reform for Climate Change in Asia**

13 Dec 2022  
5PM – 7PM  
Singapore Time

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