

## Investor-State Dispute Settlement (ISDS) and a Just Transition Away from Fossil Fuels

### Objectives:

- Improve short term recommendations, develop longer term recommendations for governments
- Identify challenges and opportunities related to the recommendations, how to address, and ways forward
- Identify research gaps, who will work on them

**Co-facilitators: Luciana Ghiotto, TNI and Melissa Blue Sky, CIEL**

### Session 1 10:00-12:00, April 24

#### Part 1: 10:00-11:00

*Framing: Melissa Blue Sky (5 min)*

*Topic:* The imperative for states to address ISDS in the context of the transition away from fossil fuels and the need for collective action

*Questions for discussion:*

Legal questions:

- How do the international legal obligations of States as clarified by the ICJ AO to address climate change translate into an imperative to reduce/eliminate ISDS exposure?
- How might the *erga omnes* obligation owed to all under customary international law to address climate change and the duty to regulate private actors to prevent significant harm to the climate impact ISDS cases?
- How might the clarification that a Right to Climate Action is a new peremptory norm of international law limit the fossil fuel industry access to ISDS?

Government approaches:

- What actions taken by states have been most successful in reducing ISDS exposure and what can we learn from these successes?

Political questions:

- What are the key limitations of unilateral action to reduce ISDS exposure?

- What can be done in the political context? What are the challenges and what can be done short term?

*Facilitator: Samuel de Carvalho, Pace Energy and Climate Center*

*Discussion leads: Alessandra Arcuri (legal), Ladan Mehranvar (government), and Maria Angelica Prada (political) (7 min each for framing of limitations and possibilities, followed by 30 min of discussion)*

## **Part 2: 11:00-12:00 Recommendations framing and brainstorm**

1. Kyla provides overview of short-term recommendations from ISDS Statement (5 min)
  1. Countries explicitly recognize at Santa Marta that ISDS is a barrier to fossil fuel phase out.
  2. Countries officially commit at Santa Marta to not negotiate, sign, or ratify agreements that include ISDS.
  3. Start collaborative work, either on a standalone plurilateral agreement or to integrate provisions into an existing or new agreement, to remove the threat of ISDS in existing investment agreements and contracts.
  4. Develop joint interpretative statements on ISDS and international climate change obligations.
  5. Each country that has not already done so could withdraw from the Energy Charter Treaty, and all countries that have withdrawn could enter into an inter se agreement to neutralize the sunset clause between them.
2. Everyone writes down additional recommendations (short or long term) on sticky notes (1 idea per note) (5 min)
3. In groups (4-5 ppl max), including at least one in Spanish and one on Zoom, people share their ideas and the related sticky notes are clustered together. Wording is refined and final recommendations are written onto flip chart paper (30 min)
4. Each group puts up their flip chart paper around the room, and we go around and one designated speaker from each group shares the recommendations (2 min per group, 20 min).

## **LUNCH 12:00-13:30**

### **Session 2: 13:30-16:00, Friday, April 24**

**Joint Session with Legal Obligations workstream**  Legal Obligations Workstream Draft

### **Session 3: 9:30-12:30, Saturday, April 25**

#### **HYBRID SESSION**

#### **Part 1: 9:30-10:45**

*Kyla recap of sessions 1 & 2 (10 min)*

Recommendation questions to refine or eliminate the short term recommendations and develop long term recommendations:

- What are the benefits of such an approach?
- What are the challenges? Are there any ideas of how they can be overcome?
- How can this approach contribute to or benefit from collective action?
- How is this different from anything that has been proposed before?
- If it's similar to what's been proposed, has it been tried, if not, why?

*30 min: presentations by (online/in person) participants related to recommendations or challenges (5 min intervention each)*

Facilitator: Kyla

Christian Pino Garrido (in person)

Nicolás Perrone, University of Valparaíso, Chile (pre-recorded video)

Anil Yılmaz Vastardis, Essex Law School, UK (online or written statement)

Clara López, King's College London, UK (online or pre-recorded video)

*30 min: Discussion in breakout groups*

## **15 REFRESHMENT BREAK**

### **Part 2: 11:00-12:30**

*Topic:* What are the key obstacles to collective action on ISDS and how can those challenges be addressed/confronted?

Which of the following pose the greatest obstacles to collective action and how have they been overcome in successful efforts (e.g., ECT campaign)?

- Government and policy challenges:
  - Policy silos (trade and investment dealt with separately from climate/environment)
  - Ideology
  - Ingrained beliefs of technocrats that ISDS is beneficial (e.g., attracts FDI)/Concern from government that exiting the system will have political/economic impacts (e.g., affect credit ratings)
  - What alternative dispute prevention and resolution architectures (e.g., state–state dispute settlement, domestic specialized investment courts, ombudsman models, mediation protocols) can credibly substitute ISDS while maintaining investor confidence?
  - Insufficiency of international reforms to address the fundamental problems of ISDS

- Changes in political context/governments (e.g., right-wing parties wanting to lock-in neoliberal reforms through investment treaties)
- Industry challenges:
  - Lobbying from domestic industries that benefit from ISDS when they invest overseas and revolving door with government
  - Lobbying from legal/arbitration industry and revolving door with government lawyers
  - Lack of transparency around contracts and contract negotiations and concern that protecting investments through contracts is worse than through treaties
- Fragmentation of int'l law/minilateralism:
  - Asymmetries in access to justice - the existence of “extractivist laws” (and contracts) in the Global South.
  - What forums are available for countries to discuss collective action and what are the advantages/disadvantages of these forums? Might a Fossil Fuel Treaty be an effective forum?
  - What options should States consider to collectively eliminate ISDS between themselves as an informal coalition, in the context of the Fossil Fuel Treaty, or in a standalone agreement?

*Proposed breakout session co/leads: Lukas Schaugg and Tim Hirschel-Burns (gov't and policy challenges), Bettina Müller, Cleodie Rickard, Melinda St Louis (fragmentation challenges), Ladan Mehranvar, Lorenzo Cotula, Christian Pino Garrido (specific challenges for Latin America/Spanish speaking breakout)*

*45 min: Breakout sessions*

*15 min: Report back*

*15 min: Discussion of how obstacles can be overcome through recommendations, as well as development of research questions needed to support gaps in proposed recommendations*

*15 min: Finalization of uncertainties and trade-offs for inclusion in academic pre-conference report*

#### **Session 4: 14:00-16:30, Saturday, April 25**

*Topic: Refining and finalizing key recommendations for governments (short term and longer term) and priorities for further research*

*Discussion leads:*

#### Session plan

45 min breakout session key recommendations for States - one lead, one scribe, one report back per group

Each group will have 1-2 short term recommendations and 1-2 longer term recommendations to review and refine

Possible groups (more could be added)

- Potential shorter-term actions or research, while a plurilateral agreement or other collective action is under development (Laurence)
- Sectoral or policy based approaches (FF, climate policy) (Lukas)
- Legal approaches Included in a Fossil Fuel Treaty, developed as a standalone agreement, or included as an amendment to an existing agreement (Heli)
- Unilateral actions agreed to by multiple countries, such as not signing new agreements with ISDS and withdrawing or renegotiating existing agreements; collective approach between willing countries re renegotiation/termination, and to non-participating countries re renegotiation (- i.e. how would an 'ISDS-free Alliance' constitute itself?) (Ladan/Melinda)
- Contracts and national laws (Kyla)

Additional group leads: *Lorenzo Cotula*

45 min: Plenary report back and collective refinement/selection of top recommendations

30 min finalizing recommendations and uncertainties and trade-offs to be included in conference report to the SMC high level summit