Journal of World Energy Law and Business, 2022, 00, 1–14
doi: 10.1093/jwelb/jwac028
Article

The impact of the COVID-19 pandemic on foreign investment and investment arbitration: from energy transition disrupted to the path forward to a greener future

Carolina Arlota *

ABSTRACT

Foreign investment in the energy sector is complex during the best of times. The challenges posed by the COVID-19 pandemic (and its intertwined economic crises) increased competition for foreign investment and strengthened the perennial quest for climate justice. The pandemic added complexity to both domestic and international spheres of governance, which led to calls for a suspension or even a cancellation of arbitration claims involving foreign investments. As developing and developed countries compete for financial resources to transition to a carbon-neutral society, such a suspension or cancellation is of academic and practical interest. Accordingly, this article discusses the impact of the pandemic on foreign investment in the energy sector, focusing on investment claims. It assesses competing views involving the proposed revisions (namely, suspensions and cancellations) and their consequences based on a law and economics perspective. This article also examines how foreign investments that align with the United Nations Sustainable Development Goals may foster the transition to a greener future. Ultimately, this article offers relevant insights that are likely to be applicable to critical future disruptions, whether they occur due to global economic crises or climate-related emergencies.

1. INTRODUCTION

Foreign investment in the energy sector is complex during the best of times. When the World Health Organization declared COVID-19 a pandemic,[1] countries across the globe implemented stringent measures involving wearing masks, engaging in social distancing, and closing all non-essential businesses in a joint effort to contain the virus. Against this background, an economic crisis developed based on the drop in oil prices due to a price war between Russia and Saudi Arabia.[2] This crisis aggravated the competition for foreign

* Carolina Arlota, College of Law, University of Oklahoma, OK, USA. Tel: 405. 325. 4702; Fax: 405.325.0389; Email: carolarlota@ou.edu. The views presented here are those of the author.

1 World Health Organization, *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19* (World Health Organization, 11 March 2020) <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> accessed 17 March 2021.

2 International Energy Agency, *An Unprecedented Global Health and Economic Crisis* (IEA 2020) < https://www. Iea.org/topics/covid-19> accessed 14 January 2020 (contending that global oil and gas markets were facing an unprecedented situation of collapsing demand with an already abundant supply that continued to increase because of the pandemic).

investment.[3] It also strengthened the perennial quest for climate justice,[4] adding complexity to domestic and international spheres of governance and leading to calls for a suspension or cancellation of claims involving foreign investments.[5] As developing and developed countries compete for financial resources to help them transition to carbon-neutral societies, the revision (suspension or cancellation) of investment claims is of academic and practical interest.

The debate about the changes is illustrative of the complexity of energy law[6] and, more specifically, international energy law. The latter is a dynamic legal field, given the intrinsic geopolitical considerations and market-driven regulations regarding best practices in the energy sector, which promote flexibility and harmonization within an intricate legal framework.[7] Traditional international investment treaties, such as the Energy Charter Treaty (ECT),[8] are undergoing a long revision process[9] aimed at mitigating the potentially adverse effects of investment protection on the sovereignty of national states. Meanwhile, the market-based mechanisms of the Paris Agreement on Climate Change,[10] as implemented at the 2021 Conference of the Parties,[11] the limited improvement in global energy efficiency[12] and carbon dioxide's peak in May 2021 increase interest in international energy law.[13] This scenario, coupled with a new cycle of nationally determined contributions[14] and the re-engagement of the USA in climate governance,[15] is likely to increase pressure on countries to reduce their greenhouse gas (GHG) emissions, as verified in the Conference of the Parties of the United Nations Framework Convention on Climate Change (COP 26).[16] Because the energy sector is

3 UN Conference on Trade and Development (UNCTAD), *World Investment Report: UNCTAD* (UN 2020) X.

4 This quest for climate justice stretches across the globe. For an account based on the United States' experience, see eg Carolina Arlota, 'The United States' Climate Change Polices and COVID-19: Poisoning the Cure' (2021) 41 Pace L Rev, 94.

5 See eg Seattle to Brussels Network, *Open Letter to Governments on ISDS and COVID-19* (Seattle to Brussels Network 2020) <http://s2bnetwork.org/sign-the-pen-letter-to-governments-on-isds-and-covid-19/> accessed 11 May 2021 (with 659 international and national signatories); Columbia Centre on Sustainable Investment, 'Call for ISDS Moratorium During COVID-19 Crisis and Response' (*Columbia*, 27 June 2021) <http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/> accessed 12 May 2021. ('We call on the world community for an *immediate moratorium* on all arbitration claims by private corporations against governments using international investment treaties, and a *permanent restriction* on all arbitration claims related to government measures targeting health, economic, and social dimensions of the pandemic and its effects.' This call was made by world renowned economists, law professors and lawyers, led by Jeffrey D Sachs.)

6 Raphael J Heffron and Kim Talus, 'The Development of Energy Law in the 21st Century: A Paradigm Shift?' (2006) 9(2) J W Energy L 189 ('Energy law concerns the management of energy resources. This is a simple definition, and disguises that it is arguably one of the more complex areas of law.')

7 Alexandra Wawryk. 'International Energy Law: An Emerging Academic Discipline' in Paul Babie and Paul Leadbeter (eds), *Law as Change: Engaging with the life and Scholarship of Adrian Bradbrook* (University of Adelaide 2014).

8 The Energy Charter Treaty (Lisbon, 17 December 1994) 2080 UNTS 95, entered into force 16 April 1998.

9 'Public Communication on the Third Negotiation Round on the Modernisation of the ECT' (*The Energy Charter*, 6 November 2020) <https://www.energycharter.org/media/news/article/public-communication-on-the-third-negotiation-round-on-the-modernisation-of-the-ect-publichn/> accessed 11 May 2021 (mentioning further negotiations in 2021).

10 United Nations Paris Agreement (Paris, 12 December 2015) 54113 U.N.R.N. 88 art 6 (hereafter 'Paris Agreement').

11 The United Nations Climate Change Conference of the Parties has just occurred in Glasgow, UK (1–12 November 2021). United Nations Climate Change Conference of the Parties (COP 26) <https://ukcop26.org/> accessed 27 November 2021.

12 International Energy Agency, *Global Energy & CO2 Status Report: Emissions* (IEA 2019) 7.

13 Robert Monroe, 'Coronavirus Response Barely Slows Rising Carbon Dioxide' (*Scripps*, 7 June 2021) <https://scripps.ucsd.edu/news/coronavirus-response-barely-slows-rising-carbon-dioxide> accessed 27 May 2021.

14 Nationally determined contributions (NDC) are voluntary targets determined by each country every 5 years. Paris Agreement (n 10) art 4.

15 The Biden–Harris administration announced that the USA would re-join the Paris Agreement on their first day in office and issued a comprehensive list of climate policies aimed at mitigating GHG emissions. Exec Order No 13990, 82 Fed Reg 7037 (25 January 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/> accessed 21 July 2021.

16 Richard Black and others, *Taking Stock: A Global Assessment of Net Zero Targets* (2021 Energy & Climate Intelligence Unit and Oxford Net Zero) (Countries, cities and companies are committing to net zero timelines). For an assessment of the COP 26 commitments: International Energy Agency, *COP 26 Climate Pledges Could Help Limit Global Warming to 1.8 Celsius, But Implementing Them Will Be the Key* (IEA 2021) <https://www.iea.org/commentaries/cop26-climate-pledges-could-help-limit-global-warming-to-1-8-c-but-implementing-them-will-be-the-key> accessed 30 November 2021.

the main source of global emissions, the energy sector 'holds the key to responding to the world's climate challenges.'[17]

Accordingly, all eyes are on how effectively countries implement their GHG reduction policies, steering their economies towards greener societies as soon as possible to secure comparative advantages in relation to others whilst benefiting from the rewards of their own reduced emissions. Foreign investment is of paramount importance in implementing this strategy. However, it is not an unequivocal concept. Foreign investment often refers to a transfer of capital abroad to create a subsidiary or joint venture, but it can also mean buying shares of an existing company.[18] Multinational corporations' interest in foreign investment is informed by supply and demand considerations, and they are comfortable with high political risks as long as the potential reward is attractive.[19] Host states, meanwhile, benefit from foreign investment capital (including the transfer of technology).

International investment disputes arise out of commitments made by the host state based on their own domestic laws, contracts with the foreign investor, bilateral investment treaties (BITs) or multilateral investment treaties.[20] Consent to host state jurisdiction is almost always included. Foreign investment disputes are characterized by the uniqueness of having a fully sovereign state, which is subject to international law, submit to international arbitral proceedings that involve a private party, the foreign investor. In other words, international investment arbitration is marked by the hybrid nature of international investment disputes, as state parties submit themselves to mechanisms generally used for private dispute resolution.[21] This unique nature of investment disputes is at the core of the current debate about moratorium (also referred to as suspension) and cancellations of claims of foreign investment in the aftermath of the COVID-19 pandemic.

Such pandemic significantly disrupted foreign investment, producing a supply, demand and policy shock.[22] Lockdown measures slowed existing investment projects, and the current global recession is expected to prompt multinational enterprises to re-assess new projects.[23] Policy measures taken by governments during the pandemic include new investment restrictions.[24] Lower profit in foreign affiliates is expected to lead to lower reinvestment earnings, a key component of foreign investment.[25] In addition, the behaviour of foreign investors during the pandemic is likely to induce stock-return volatility.[26] The pandemic has already affected treaty-making dynamics, disrupted the flow of capital and caused the postponement or cancellation of several negotiating rounds for BITs and treaties with investment provisions, and produced the lowest number of international investment agreements (IIA) signed since 1985.[27]

In such a context, this article offers several original contributions. First, it investigates the current impact of the COVID-19 pandemic on foreign investment in the energy sector, focusing on investment arbitration. Secondly, it assesses competing views involving the moratorium or cancellation of foreign investment claims and their consequences, using a law and economics approach. Thirdly, it discusses how foreign investment made in accordance with the United Nations Sustainable Development Goals (SDGs) can aid the transition

17 International Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector* (IEA 2021) <https://www.iea.org/reports/net-zero-by-2050> accessed 27 November 2021.

18 Ralph H Folsom and others, *International Business Transactions* (West 2012) 20–25.

19 Michelle Flores, 'A Practical Approach to Allocating Environmental Liability and Stabilizing Foreign Investment in the Energy Sectors of Developing Countries' (2001) 12 Colo J Intl Envtl L & Policy 141, 146.

20 Chin L Lim, Jean Ho and Martins Paparinskis, *International Investment Law and Arbitration* (CUP 2018) 86—94 (details the breakthrough contributions of Jan Paulsson and the phenomenon of arbitration without privity in investment disputes, as consent can take many forms, including an application for investment authorisation).

21 Somesh Dutta, 'Will "Investor-State Arbitration" Survive the COVID-19 Crisis?' (*Opinio Juris*, 7 May 2020) <http://opiniojuris.org/2020/05/07/will-investor-state-arbitration-survive-the-covid-19-crisis/> accessed 18 June 2021.

22 UNCTAD (n 3).

23 ibid.

24 Suborna Barua, 'Understanding Coronanomics: The Economic Implications of the Coronavirus (COVID-19) Pandemic' (*SSRN*) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3566477#references-widget> accessed 20 July 2021.

25 ibid.

26 Anya Khavthavit, 'Foreign Investors' Abnormal Trading Behavior in the Time of COVID-19' (2020) 7 J Asian Fin Econ & Bus 9.

27 UNCTAD (n 3) 11.

to a greener world. Finally, this article offers relevant insights applicable to critical future disruptions, whether they occur due to global economic crises or climate-related emergencies.[28]

This article is organized as follows. Section 1 presents the impact of the pandemic on foreign investment and investment arbitration. Section 2 details the protection of foreign investment through investment arbitration claims, examining current arbitration cases. It discusses the current debate about the suspension and cancellation on foreign investment claims based on a law and economics methodology. It also outlines the role SDGs might play in steering the energy transition. Section 3 reveals that if global incentives are properly coordinated, foreign investment will play a key role in securing a greener future.

2. SETTING THE STAGE: THE OVERALL IMPACT OF THE COVID-19 PANDEMIC ON FOREIGN INVESTMENT AND INVESTMENT ARBITRATION

Foreign investment, as discussed, is not an unequivocal concept. It is not defined in the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID),[29] although clauses routinely explain its meaning in bilateral investment treaties. The decisions of arbitral tribunals and case law involving the ICSID Convention have considered innumerable definitions of 'foreign investment', including its application to oil exploration and production projects, mining operations, the construction and operation of factories, and even the issuance of promissory notes and loans to develop a country's infrastructure.[30] In the landmark *Salini* arbitration the tribunal identified five criteria as indicative of foreign investment: substantial commitment or contribution to the host state; duration of time; assumption of the risk by the investor; contribution to economic development and regularity of profit and return.[31] These criteria are controversial, with different tribunals interpreting them differently, specifically in matters regarding what constitutes a contribution to the host state, and whether the assumption of risk falls exclusively on the investor or if the host state should be required to assume risk as well.[32]

Foreign investment in the energy sector is currently experiencing significant changes, which adds another complex dimension to the determination of a definition. Traditionally, investment treaties targeted the protection of foreign investment whilst remaining neutral on the impact of that investment.[33] Therefore, they were perceived as discouraging measures that would not promote climate-friendly projects.[34] Due to the pandemic, however, countries are now focusing on providing investment-protection standards and fostering investment flows whilst 'increasingly addressing conditions for the entry of investment into their territories, the obligations of investors and their investments once established, as well as the regulatory powers of governments over such investments.'[35]

Reconciling traditional investment-protection standards and financial flow with a more active regulatory role of the host state is a contemporary phenomenon that warrants increased attention due to the pandemic.

28 Owen Jones, 'Why Don't We Treat Climate Crisis with the Same Urgency as Coronavirus' *The Guardian* (5 March 2020) London <https://www.theguardian.com/commentisfree/2020/mar/05/governments-coronavirus-urgent-climate-crisis> accessed 18 June 2021 (arguing that whilst the coronavirus is 'understandably treated as an imminent danger, the climate crisis is still presented as an abstraction whose consequences are decades away').

29 'Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' [ICSID Convention] (Washington, 18 March 1965), 575 UNTS 159; 17 UST 1270; TIAS No 6090, entered into force 14 October 1966. Hereafter 'ICSID Convention' (arts 25–27 establishes the jurisdiction of the ICSID).

30 R Doak Bishop, James R Crawford and William M Reisman, *Foreign Investment Disputes* (Wolters Kluwer 2014).

31 *Sallini v Morocco* (ICSID Case No Arb/00/04) (Decision on Jurisdiction, 23 July 2001).

32 Bishop, Crawford and Reisman (n 30) 10.

33 Rachel Thrasher, 'Room to Move: Building Flexibility into Investment Treaties to Meet Climate-Change Commitments' Columbia FDI Perspectives: Perspectives on Topical Foreign Direct Investment Issues, No 296 (25 January 2021) <http://ccsi.columbia.edu/files/2018/10/No-296-Thrasher-FINAL.pdf> accessed 27 June 2021.

34 ibid.

35 Crina Baltag, 'From Investment Promotion and Protection to Investment Regulation' Columbia FDI Perspectives: Perspectives on Topical Foreign Direct Investment Issues, No 293 (14 December 2020), <http://ccsi.columbia.edu/files/2018/10/No-293-Baltag-FINAL.pdf > accessed 24 June 2021.

Countries have enacted numerous investment policies in response to COVID-19 and its related economic crises, including speeding up investment approval procedures, increased use of online tools, incentive schemes for health-related research and development, state acquisition of capital (equity) from domestic key companies under stress, and state loans and guarantees for domestic suppliers in value chains.[36] Australia, for example, did not freeze foreign investment, but rather subjected it to an approval review, as the Australian government sought to protect distressed assets from the pandemic crisis.[37]

In their responses to the pandemic, host states have engaged in actions that conflict with the protections outlined in investments treaties, which may lead to claims by foreign investors.[38] As states may resort to defences based on *force majeure* and state of necessity to justify their behaviour, such defences may not be successful.[39] Globally renowned scholars have argued otherwise; they contend that most COVID-19 measures are covered by international defences.[40] That said, the success of defences based on taxation and sovereign debt crises is difficult to predict.[41] Police powers (and general regulatory autonomy to protect the health, safety and welfare of a country's citizens) enacted though non-discriminatory measures of general applicability do not entail compensation.[42] Nonetheless, scholars have argued that, in the aftermath of the pandemic, host states may be exposed to a large number of claims from shareholders. In addition, any entity in the corporate chain of ownership may have rights to investor–state arbitration claims against the parent companies.[43] These claims are likely to have serious and wide-ranging consequences for the public, as they will impose more financial burdens on countries that are already under severe stress due to the pandemic.[44]

Experts recommended that governments should unite across borders to suspended treaty-based investor state arbitration for all COVID-19 related measures and to clarify the application of international law defences during the pandemic.[45] Meanwhile, the Institute for Sustainable Development has directed host countries to withdraw their consent from investor–state dispute settlement (ISDS) treaties to avoid multiple lawsuits arising out of the pandemic.[46] More specifically, calls have been made for a moratorium or cancellation of claims arising out of foreign investments under multilateral treaties (which includes disputes under the ICSID Convention and the ECT, for example) and BITs, which are signed between two states to protect the flow of investments towards the receiving country, ie the host state.[47]

36 UNCTD, *Investment Policy Responses to the COVID-19 Pandemic* (UN 2020) <https://investmentpolicy.unctad.org/publications/1225/investment-policy-monitor-special-issue–-investment-policy-responses-to-the-covid-19-pandemic> accessed 18 June 2021.

37 Amy Remeikis, 'Australian Authorities to Check Every Proposed Foreign Investment During Coronavirus Crisis' *The Guardian* (29 March 2020) London <https://www.theguardian.com/world/2020/mar/29/australian-authorities-to-check-every-proposed-foreign-investment-during-coronavirus-crisis> accessed 25 February 2021.

38 Patricia Randald, 'COVID-19 Pandemic Slows Global Trade and Exposes Flaws in Neoliberal Trade Policy' (2020) 85 J Aus Pol Econ 108, 111.

39 ibid.

40 Julien Chaisse, 'Both Possible and Improbable—Could COVID-19 Measures Give Rise to Investor-State Disputes?' (2020) 13 Contemp Asia Arb J 99.

41 ibid.

42 Nicholas J Diamond, *Pandemics, Emergency Measures and ISDI* (Kluwer 2020) <http://arbitrationblog.kluwerarbitration.com/2020/04/13/pandemics-emergency-measures-and-isds/> accessed 5 July 2021.

43 Pia Eberhardt, 'Cashing in on Covid' (2020) 85 Socialist Lawyer 31.

44 ibid.

45 Nathalie Bernasconi-Osterwalder, Sarah Brewin and Nyaguthii Maina, 'Protecting Against Investor-State Claims Amidst COVID-19: A Call to Action for Governments' (14 April 2020) <https://www.iisd.org/articles/protecting-against-investor-state-claims-amidst-covid-19call-action-governments?q=library/investor-state-claims-amidst-covid-19> accessed 18 June 2021.

46 ibid.

47 Columbia Centre on Sustainable Investment (n 5). (Such calls for a moratorium or cancellation of debts pledge: 'We call on individual countries to advance this effort, and the United Nations and specialized agencies, the World Bank Group, the Organisation for Economic Co-operation and Development, and other multilateral organizations to implement it. We similarly call on all people of conscience—including lawyers who initiate and arbitrators who decide these arbitration cases—to put the lives of people ahead of corporate interests at this dire moment facing humanity.').

The rationale of such a moratorium is 3-fold. First, all countries are facing an unprecedented situation, and if foreign investors are allowed to claim lost expected profits, everyone in every country might be allowed to do so due to the pandemic.[48] Secondly, the threat of ISDS lawsuits may be detrimental to a host state's actions to slow the pandemic.[49] Host states have a duty to act without concern of such lawsuits by foreign investors or shareholders.[50] Thirdly, international awards involving the energy sector against the host state, which often rise to millions or billions USD,[51] may aggravate the economic crisis triggered by the pandemic, hurting recovery efforts of the host state as such awards are likely to comprise a significant percentage of their budget.[52]

Recommendations to suspend awards involving foreign investment face opposition because they may jeopardize the flow of money across borders. Gary Born emphasizes the importance of a reliable ISDS system and compares the current attempts at reforming the system to Nazi efforts in 1933 to prevent arbitration between private parties and the German state.[53] As illustrated, foreign investment is marked by complexity and shaped by different stakeholders. The next section of this article elaborates on this topic.

3. ANALYSIS

Foreign investment may generate positive collaborations for the host state because it is a source of financing, and the potential exchange of technology exists. As outlined in the previous section, foreign investment is safeguarded by international investment treaties, which offer protections and benefits for investors that are usually enforceable through ISDS,[54] reducing the risk and uncertainty of prolonged litigation. Nonetheless, the positive outcomes generated by foreign investment may come at a significant price—fiscal incentives and relaxed or waived social and/or environmental regulations.[55] This article will now turn to the analysis of key factors in this debate in the context of the global pandemic and its impact on energy transition.

The big picture: Investment arbitration and the protection of foreign investment

Investment protection is achieved in various ways. An authoritative review[56] of the most relevant clauses protecting foreign investors in IIAs include 'scope and definition' clauses, which affect whether public–private partnerships are covered by an IIA; 'in accordance with domestic law' clauses and 'anti-corruption' clauses, which may strengthen investor responsibility by outlining specific legal consequences for investor behaviours; 'umbrella clauses', which elevate non-treaty commitments (eg contractual obligations assumed by the host state) to the treaty level, authorizing the foreign investor to bring an ISDS case should an obligation be breached; 'ISDS clauses', which allow investors to initiate international arbitration against the host state in case of an alleged breach; and 'fair and equitable treatment' clauses,[57] which obligate the host state to provide

48 ibid.

49 See Figure 1 for the Distribution of ICSID cases categorized by economic sector.

50 ibid.

51 Tim Hart and Rebecca Vélez, 'Study of Damage Awards in Investor-State Cases' (Transnational Dispute Management 3, 2021) 'This study, encompassing 241 foreign investment awards (excluding peak outliers), found the average claim in such disputes is 910.6 million USD, and the average award is 298.3 million USD.'

52 Columbia Centre on Sustainable Investment (n 5).

53 'Born Startles with Reference Nazi History' (*Global Arbitration Review*, 2021) <https://globalarbitrationreview.com/born-startles-reference-nazi-history> accessed 7 June 2021.

54 Lise Johnson, Lisa Sachs and Nathan Lobel, *Briefing Note: Aligning International Investment Agreements with Sustainable Development Goals* (Columbia Centre on Sustainable Development 2020) 2.

55 ibid.

56 UNCTAD, 'Mapping of IIA Clauses' (*UNCTAD Investment Policy Hub*, 2021) <https://investmentpolicy.unctad.org/pages/1031/mapping-of-iia-clauses> accessed 7 May 2021.

57 ibid.

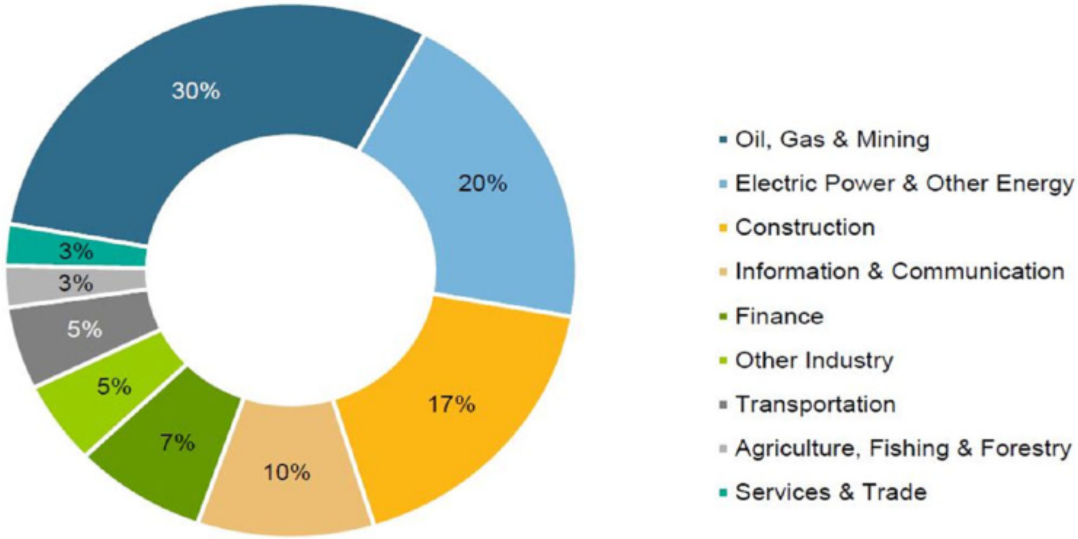

Figure 1. Distribution of ICSID cases categorized by economic sector (2020 fiscal year) [ICSID, *The ICSID Caseload Statistics Issue 2020.2* (World Bank 2020) 12 <https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20 Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.pdf> accessed 7 April 2021].

due process, adopt proportionate measures and refrain from actions against the legitimate expectations of investors.[58]

Arbitration of international investment is marred by controversy due to the potential lack of independence and impartiality of arbitrators, inconsistency in investment dispute case law and costly proceedings exceeding, on average, 8 million USD per party.[59] In 2017, the United Nations Commission on International Trade Law (UNCITRAL) formed a working group to study options for possible ISDS reform, which is ongoing and now takes the global pandemic into consideration.[60] The trend before COVID-19 suggested a shift from 'investment protection' to 'investment cooperation and facilitation',[61] as evidenced by the Investment Cooperation and Facilitation Treaty between the Brazil and India,[62] which provides for state-to-state arbitration, returning to the concept of diplomatic protection.[63] In addition, reformist trends include calls for a standing international investment court and replacing ISDS with domestic dispute resolution.[64]

Such reformist trends are likely to persist, as recent calls for a moratorium on foreign investment claims build on the general sense that the system itself is unfair to host states, namely, countries receiving the investment. However, this unfairness is an oversimplification, as foreign investment also generates positive

58 Matteo Fermeglia and others, '"Investor-State Dispute Settlement" as a New Avenue for Climate Change Litigation' (*Climate Law Blog*, 2 June 2021) <http://blogs.law.columbia.edu/climatechange/2021/06/02/investor-state-dispute-settlement-as-a-new-avenue- for-climate-change-litigation/> accessed 17 April 2021.

59 ibid.

60 UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform on the work of its resumed fortieth session (Vienna, 4–5 May 2021) <https://uncitral.un.org/sites/uncitral.un.org/files/wg_iii_resumed_40th_session_ final_003.pdf> accessed 8 April 2021 (discussing the purposes of the reform and noting damages are a controversial issue).

61 Dutta (n 21).

62 Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, Brazil-India BIT (signed on 25 January 2020) < https://dea.gov.in/sites/default/files/Investment%20Cooperation%20and%20Facilitation%20Treaty%20with%20Brazil%20-%20English_0.pdf> accessed 18 April 2021.

63 Dutta (n 21).

64 See eg UNCTAD, 'International Investment Agreements: Issues Note' (March 2019) <https://unctad.org/system/files/official-document/diaepcbinf2019d3_en.pdf> accessed 19 May 2021.

outcomes. A more nuanced view acknowledges the tension between the host-country/home-country dichotomy: Governments of both host and home countries formulate their national and international foreign investment policies by considering 'national' objectives, whilst knowing that international investors seek to maintain (or increase) their competitiveness in an 'international' context.[65] The pandemic produced increased interest in this tension, as explained in the next subsection.

The current scenario

The COVID-19 pandemic adds complexity to the host-country/home country tension that informs foreign investment. The United Nations Conference on Trade and Development (UNCTAD) defines the impact of the pandemic:

> The pandemic is likely to have lasting effects on investment policy making. It may strengthen and solidify the ongoing trend towards more restrictive admission policies for foreign investment in industries considered to be of critical importance for host countries. At the same time, the pandemic may trigger increased competition for attracting investment in other industries as economies seek to recover from the downturn and disrupted supply chains need to be rebuilt.[66]

Along those lines, a study by the International Energy Agency (IEA) concludes that international efforts to secure investments in emerging and developing countries are of paramount importance to advance energy transition.[67] The pandemic may also have increased incentives for parties to seek relief through international investment arbitration as foreign investment disputes have increased. Third party funding for ongoing disputes has also risen.[68] The recent UNCTAD dataset measuring disputes over foreign investment shows 1061 disputes through July 2020.[69] These disputes, scattered amongst different arbitration forums, encompass known international arbitration cases initiated by investors against states pursuant to an IIA, also known as treaty-based ISDS cases.[70]

The ICSID caseload is more helpful when analysing energy transition because it organizes data by economic sector. The 2020 ICSID caseload has spiked due to the pandemic.[71] The ICSID Convention (and its additional facilities) registered 303 cases, the highest number of disputes since 1972.[72] The vast majority

65 Karl P Sauvant, 'Improving the Distribution of FDI Benefits: The Need for Policy-Oriented Research, Advice, and Advocacy' (2021) 4 J Intl Business Policy 1.

66 UNCTAD (n 36).

67 International Energy Agency, *Financing Clean Energy Transitions in Emerging and Developing Economies* (IEA 2021) 13 <https://iea.blob.core.windows.net/assets/6756ccd2-0772-4ffd-85e4-b73428ff9c72/FinancingCleanEnergyTransitionsinEMDEs_WorldEnergyInvestment2021SpecialReport.pdf.> accessed 7 April 2021 ('An unprecedented increase in clean energy spending is required to put countries on a pathway towards net-zero emissions . . . By the end of the 2020s, annual capital spending on clean energy in these economies needs to expand by more than seven times, to above USD 1 trillion, in order to put the world on track to reach net-zero emissions by 2050. Such a surge can bring major economic and societal benefits, but it will require far-reaching efforts to improve the domestic environment for clean energy investment within these countries – in combination with international efforts to accelerate inflows of capital.').

68 Caroline Simson, 'Third-Party Funders' Business Is Booming During the Pandemic' (*Law 360°*, 8 April 2020) <https://www.law360.com/legalethics/articles/1261213/third-party-funders-business-is-booming-during-pandemic> accessed 23 April 2021.

69 UNCTAD, Investment Dispute Settlement Navigator: full data release as of 31/07/2020 (excel format) <https://investmentpolicy.unctad.org/investment-dispute-settlement> (released February 2021). The legal disputes include UNCITRAL, ICSID, ad hoc and unknown international arbitrations and is a good proxy to demonstrate how active foreign investors were in 2020, with 59 cases so far. The data set started in 1987.

70 UNCTAD, *UNCTAD Releases Data on Over 1,000 Investor-State Arbitration Cases* (UNCTAD, 11 February 2021) <https://unctad.org/news/unctad-releases-data-over-1000-investor-state-arbitration-cases> accessed 22 April 2021.

71 ICSID, *ICSID Releases Fiscal Year 2020 Caseload Statistics* (World Bank 2020) <https://icsid.worldbank.org/news-and-events/news-releases/icsid-releases-fiscal-year-2020-caseload-statistics> accessed 17 April 2021.

72 ibid.

of legal disputes include the oil, gas and mining sectors (30 per cent) and electric power and energy sources (20 per cent).[73]

Insights from law and economics literature

Current interest in foreign investment in the energy sector increased due to the global pandemic, and law and economics insights are helpful in analysing the interplay of investment arbitration and the dynamics of foreign investment. This discussion is premised on the understanding that foreign investment defeats Manicheism-based simplifications, as there are no 'good guys' or 'bad guys'. A complex global system directs the flow and allocation of investments to where they are needed most. The pandemic disrupted the return of current investments as well as the availability of capital globally, increasing transaction costs for all actors involved in the energy sector.

In addition, law and economics shed light on the incentives and interests of the parties. On the one hand, foreign investors are profit-oriented enterprises, searching to maximize their returns whilst minimizing their risks. Other things being equal, foreign investors will choose to invest wherever more protections exist, including reassurances.[74] On the other hand, host states face increasing challenges in competing for foreign investments. In future negotiations, scarcity of investments will pressure host states to draft contracts that may not be in their best interest at the time of writing, as negotiation of contracts involving energy is traditionally difficult.[75] Governments will be more eager to attract foreign investment in a post-COVID-19 world due to the related economic crises. It is now easier for them to recognize that their countries would immediately benefit from a faster energy transition due to the less polluted air and increased energy efficiency leading to improved overall health of their population and therefore fewer deaths and fewer sick days.[76] This has increased host states' interest in foreign investment that will help them transition to a carbon-neutral society.

The pandemic also triggered substantial uncertainty as to how a host state's policy-related reactions to the pandemic would be judged by different arbitral tribunals. These reactions can be excused as *force majeure* (or exceptions based on public policy or national security or indirect expropriation) or they may be considered a breach of the rights of foreign investors.[77] These rights, as explained in the previous section, are protected by investment treaties clauses that often involve the obligation for a state to compensate an investor in full for direct or indirect expropriation (known as 'regulatory taking' in US parlance), equitable and fair treatment of foreign investors to afford them full protection and security, and to not treat those investors less favourably than national or other foreign investors.[78]

This subsection now turns its attention to the main controversies of investment arbitration and the current pandemic, examining them through law and economics lenses. Supporters of investment arbitration contend that if police powers (including regulations to protect the health, safety and welfare of the population) are exercised, investment arbitration should not threaten governments.[79] Host states hit by the COVID-19 pandemic still have a myriad of valid defences against investment arbitration

73 ibid.

74 This rationale is based on economic assumptions that human beings are reluctant to change, ie status quo bias, and are generally risk averse. See Daniel Kahneman and others, 'Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias' (1991) 5 J Econ Perspectives 193, 197.

75 Karl P Sauvant and Louis T Wells, 'Obsolescence of the Obsolescing Bargain: Why Governments Must Get Investor-State Contracts Right' Columbia FDI Perspectives: Perspectives on Topical Foreign Direct Investment Issues, No 298 (22 February 2021), <https://ccsi.columbia.edu/sites/default/files/content/docs/fdi%20perspectives/No%20298%20-%20Sauvant%20and%20Wells%20-%20FINAL.pdf> accessed 17 April 2021. (Governments should push for limited stability clauses, anticipating that taxes and environmental as well as social concerns may be contemplated in future regulations.)

76 See eg Intergovernmental Panel on Climate Change, 'Global Warming of 1.5°C' (2018) 11 – 12 <https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf> accessed 27 April 2021 (detailing the increase in number of deaths and other public health costs of global warming).

77 UNCTAD (n 36) (international arbitration analysis in a broader context, beyond the energy sector).

78 Bernasconi-Osterwalder, Brewin and Maina (n 45).

79 Stephan W. Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?' (2007) 24(5) J Intl Arb 469, 470.

claims. In these disputes arising out of claims by foreign investors versus host state defences, law and economics clarify that the higher the uncertainty about a particular rule, the higher the incentive for parties to arbitrate (or litigate, broadly speaking).[80] Because the pandemic is an unprecedented event on a world scale, foreign investors and host states have additional incentive to resolve their disputes in arbitration. The pandemic may be interpreted as a *force majeure* or characterized as a situation in which national security or related doctrines should be invoked, which might be a valid defence for host governments, or it may not be considered an excuse. The pandemic blurred the lines, and there is no a priori legal certainty.

Opponents of investment arbitration consider exposure to expensive investment arbitration claims detrimental to the host state's regulatory actions because these claims may discourage the host government to enact environmental-oriented policies, including transitioning from fossil fuels. Hence, these investment claims would have a chill effect on governmental actions that are crucial to secure an effective and equitable energy transition.[81] However, regulatory action is very complex, and ISDI (and potential exposure to claims of millions or billions) is merely one of many considerations informing governmental policies.[82] Because governments around the globe enacted significant restrictions to contain the pandemic, this reasoning goes, there is little to no evidence of this chill effect currently.[83] This argument denying the so-called chill effect, however, deserves greater analysis, because it is unclear if additional and more stringent regulations could have been enacted sooner if not for this chill effect.

Such analysis must consider the asymmetries of investment arbitration. First, investors can always begin arbitration, but host states can only do so in limited circumstances.[84] Secondly, foreign investors recoup costs in litigation at a significantly higher rate than host states, with successful investors recouping 62 per cent of costs, on average, whilst respondent states are capped at 53 per cent.[85] On the other hand, host states may act strategically when threatened with arbitration.[86] In the energy sector specifically, governments often consider the prospect of litigation in an international investment tribunal 'not as an opportunity and incentive to generate respect for their regimes but rather as a means through which they can lower the initial compensation requested by investors.'[87] In other words, no single party has exclusive superiority in the dynamics of investment disputes.

80 Robert Cooter and Thomas Ulen, *Law and Economics* (Pearson 2016) 400–04 (Legal uncertainty often leads to fewer dispute settlements, increasing litigation. Litigation then increases transaction costs).

81 Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7(2) Transnational Envt L 229, 237 (Concerns include the significant potential risk of the host state's financial liability and the difficulty in predicting outcomes in investment arbitration proceedings).

82 Jeremy Caddell and Nathan Jensen, Columbia FDI Perspectives: Perspectives on Topical Foreign Direct Investment Issued by the Vale Columbia Centre on Sustainable International Investment No 120, Which Host Country Government Actors are Most Involved in Disputes with Foreign Investors? (28 April 2014) <https://academiccommons.columbia.edu/doi/10.7916/D8M32SWK> accessed 11 May 2021 ('Given the low rate of disputes involving legislative branch activity, arguments that investor-state arbitration may encroach on the legitimate prerogatives of domestic governments appear to be overstated. Instead, democratic legislatures should embrace investor-state arbitration as an additional check on executive branch misbehavior.').

83 Rabhash Ranjan, 'COVID-19 and ISDS Moratorium — An Indiscreet Proposal' (*Opinio Juris*, 15 June 2020) <http://opiniojuris.org/2020/06/15/covid-19-and-isds-moratorium-an-indiscreet-proposal/> accessed 8 June 2021.

84 Lim, Ho and Paparinskis (n 20) 87–88 (noting that modern BITs authorize states to pursue arbitration).

85 Matthew Hodgson, Yarik Kryvoi and Daniel Hrcka, *2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration* (BIICL 2021) 5 <https://www.biicl.org/documents/136_isds-costs-damages-duration.pdf> accessed 22 April 2021.

86 RD Cooter, *The Strategic Constitution* (OUP 2000) 9. Strategic thinking is defined as determining a particular course of action in relation to the behaviours of the parties involved. Carolina Arlota, 'The Impact of (Mis)Communication on International Commercial Arbitration' in J Nussbaum (ed), *Oxford Research Encyclopedia of Communication* (OUP 2020) (Analysing strategic thinking during different phases of international arbitration).

87 Guillermo J Garcia Sanchez, 'The Hydrocarbon Industry's Challenge to International Investment Law: A Critical Approach' (2016) 57 Harv Intl L J 475, 480.

Having established such dynamics, the appeal of calls for a one-size-fits-all suspension or cancellation on ISDS compensation[88] mainly rests on avoiding significant arbitration costs. Nonetheless, a suspension, and even more a cancellation, may be too harsh a remedy, potentially disrupting foreign investments around the world. This disruption could grow more severe; as a precedent, it triggers expectations of similar future suspensions in other global crises, regardless of each country's challenges. This is of particular interest now, as the climate crisis is considered a global emergency.[89]

Moreover, such one-size-fits-all suspension or cancellation of foreign investment may benefit governments that do not observe legality and/or good faith principles and related rule of law corollaries. This would be unfair to host states that behave as previously agreed and violations of rule of law do not advance progress.[90] Such general suspension or cancellation would also increase competition for additional foreign investment, to the extent that foreign investors would not have been paid and would be reluctant to invest again. These suspensions and cancellations may also significantly disrupt the flow of foreign invest thus jeopardizing the proper functioning of treaty networks. Supply and demand dynamics that apply to investment treaties networks may reduce transaction costs for the involved parties.[91] Therefore, there is a higher need for these networks to be predictable (and reliable) as to expedite and secure the energy transition. Disruptions are concerning, as the need to divest from fossil fuels is more pressing now than ever, with key international actors in the sector acknowledging so.[92]

Even if compensation for foreign investments is cancelled, it is unclear how much host states would actually benefit from such a windfall. If cancellations do occur, transparency about the numbers and disclosure of complete information about what the funds would be used for should inform the decision. This is highly recommended considering recent waves of populist politicians in developed and developing countries alike.[93] These leaders' cultural, socio-economic and/or anti-establishment beliefs depict workers as mere tools of elitist interests (including foreign investors).[94] Therefore, caution is recommended, as requests for moratoriums and cancellations on foreign investment align with these leaders' playbooks and would increase their own power at the expense of the global flow of foreign investment.

There are already examples of the strategic behaviour of countries as a result of the pandemic. Ecuador, which terminated several BITs in 2008, denounced the ICSID Convention on 6 July 2009, and in 2010 its Supreme Court ruled that arbitration provisions contained in BITs with China, Finland, Germany, the UK,

88 Columbia Centre on Sustainable Investment (n 5) (acknowledges their proposal 'should recognize the full and clear scope that governments have, and are required, to take all appropriate actions to save lives and fight global emergencies, even when the result is a loss of profits or business opportunities, including by foreign investors. Furthermore, they should ensure that any damages awarded in ISDS cases should respect the dire financial situation facing governments following the COVID-19 emergency. Short of these clear principles, there will be no basis for restarting ISDS processes. In addition, we call for an ongoing restriction on ISDS claims related to measures taken during the pandemic, including those targeting health, economic, or social dimensions of the pandemic and its effects.').

89 The Economist Intelligence Unit, 'The Cost of Inaction: Recognising the Value at Risk from Climate Change' *The Economist* (2015) London (concluding that approximately 30 per cent of the world's total stock of manageable assets may be vulnerable to climate change).

90 Sanjai Bhagat and Glenn Hubbard, 'Rule of Law and Purpose of the Corporation' (2021) Corp Gov Intl Rev <https://impact.economist.com/sustainability/net-zero-and-energy/the-cost-of-inaction> (finding that the rule of law enables corporations to enhance economic prosperity and diminish income inequality around the globe).

91 Charlotte Ku and Andrew P. Morriss, 'International Financial Centers as a Model: Facilitating Growth and Development by Connecting to International Legal Frameworks' 14 Law & Development Review (manuscript in preparation, 2021) 429.

92 International Energy Agency (n 17); United Nations Environment Programme (UNEP), Emissions Gap Report: The Heat is On—A World of Climate Promises not Yet Delivered (2021); and Intergovernmental Panel on Climate Change (IPCC) 2021: 'Summary for Policymakers' in V Masson-Delmotte and others (eds), *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2021).

93 Jordan Kyle and Limor Gultchin, *A Report on Populist in Power Around the World* (Tony Blair Institute for Global Change 2018) <https://institute.global/policy/populists-power-around-world> accessed 7 April 2021 (Examples include President Trump in the USA, Nigel Farage and his support for Brexit vote, the electoral success of Italy's Five Star Movement, Brazil's President Jair Bolsonaro and the growing support for populist parties across Europe).

94 ibid.

the USA and Venezuela were unconstitutional.[95] On 21 June 2021, Ecuador, eager to attract foreign investments, signed the ICSID Convention again.[96] Meanwhile, Argentina recently released plans to review and replace all BITs as their 'dubious fairness' is considered against the national interest.[97] Nigeria argues that the pandemic (and the negative oil prices of 2020) gave rise to 'unforeseen intervening circumstances'[98] that should excuse Nigeria from its 200 million USD ICC settlement involving the construction of a hydropower plant.[99]

Ecuador, Argentina and Nigeria clearly illustrate different courses of action. As the crisis lingers on, more countries will consider changes in their pre-pandemic behaviour, including (re)joining investment treaties, renegotiating agreements and/or seeking relief from arbitral decisions. From a law and economics perspective, breaches of investment arbitration treaties per se do not necessarily jeopardize the reputation of a host state but refraining from participation in arbitration (including not honouring awards) does.[100] Countries should consider these losses when making their decisions. Determining which course a country should pursue is also contingent on historical factors and current economic circumstances on a case-by-case basis.

Analysing the direction a country should take may benefit from game theory, which suggests the cancellation of foreign investments may lead to isolation of host states and perhaps even retaliatory actions[101] by prospective investors or other parties located in the foreign investors' country. In addition, it would be unsurprising if non-governmental actors consider boycotting products of countries that declare a moratorium on their foreign investment, due to the host country's blatant disregard for the international commitments.

The law and economics analysis developed in this subsection finds that the suspension or cancellation of ISDS compensation should not be based on a one-size-fits-all formula. Instead, it should be tailored to the reality of each country, including an analysis of their obligations based on their own domestic law as well as international instruments. Furthermore, the suspension or cancellation of claims based on foreign investment appears to be appropriate as long as countries are still battling pandemic-related emergencies and their intertwined economic crises. These extraordinary measures can be optimized by reconciling the flow of capital to where it is needed the most with the challenges posed by the pandemic using a case-by-case analysis adhering to the applicable legal framework and the specific needs of each country[102] and lasting for a limited period.[103]

95 Vanessa A Giraud Martinelli, 'Modern Authoritarian Regimes and the Denunciation of the ICSID Convention' in Crina Baltag (ed), *ICSID Convention After 50 Years: Unsettled Issues* (Wolters Kluwer 2017) 504–06 (noting that Ecuador, Bolivia and Venezuela were amongst the Latin American countries that denounced the ICSID Convention whilst under authoritarian governments).

96 ISCID, *Ecuador Signed the ICSID Convention* (World Bank 2021) <https://icsid.worldbank.org/news-and-events/news-releases/ecuador-signs-icsid-convention> accessed 23 April 2021.

97 Felipe Solá, 'Argentina's Minister of Foreign Affairs' (*Twitter*, 15 January 2021) <https://twitter.com/felipe_sola/status/1350229182186463237?s=20> accessed 7 April 2021.

98 Taiwo Adebulo, 'With COVID-19 Pandemic, Nigeria Seeks to Review Sunrise 200 M Settlement' (*The Cable*, 25 April 2021) <https://www.thecable.ng/exclusive-with-covid-19-pandemic-nigeria-seeks-to-review-sunrise-200m-settlement> accessed 17 June 2021.

99 *Sunrise Power and Transmission Company v Nigeria and Sinohydro Corporation*, Jusmundi (January 2020) <https://jusmundi.com/en/document/decision/en-sunrise-power-and-transmission-company-v-nigeria-and-sinohydro-corporation-wednesday-1st-january-2020> accessed 18 April 2021.

100 Rachel Brewster, 'Pricing Compliance: When Formal Remedies Displace Reputational Sanctions' (2013) 54 Harv Intl LJ 259, 261.

101 This argument assumes treaties are evidence of true cooperation amongst states, rather than representative of interests that coincide, with states finding themselves in a repeated prisoner's dilemma or a coordination game. See eg Mark A Chinen, 'Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner' (2001) 23 Mich J Intl L 143, 160–70.

102 World Bank, *Debt Service Suspension and COVID-19* (World Bank 2021) <https://www.worldbank.org/en/news/factsheet/2020/05/11/debt-relief-and-covid-19-coronavirus> accessed 9 April 2021. Parallels can be drawn with current actions by the World Bank. It refrained from an unconditional suspension of debt services for the countries with the lowest per capita income (International Development Association [IDA] countries) during COVID-19, explaining the necessity of 'positive net flows.' The Bank explains: 'IDA is accelerating its financing to help countries tackle the effects of the pandemic far beyond what these countries owe to IDA: every $1 in low-cost IDA loans that is repaid will on average be offset by $11 in new low-cost IDA financing flowing to the poorest countries . . . . If the Bank were to simply provide a temporary suspension on IDA debt-service payments, the fresh financing we could provide would be significantly reduced. It could also hurt our ability to provide low-cost funding to IDA countries over the long term.'

103 World Bank, *Communiqué, G20 Finance Ministers and Central Bank Governors Meeting* (World Bank 2020) 10 <https://www.worldbank.org/en/news/factsheet/2020/05/11/debt-relief-and-covid-19-coronavirus> accessed 9 April 2021. (The G20 provided a time-bound suspension of debt services payment for the poorest countries in need)

Foreign investment, sustainable development and the path towards a greener world

The 2021 IEA Report shows that stimulus spending on clean energy is far behind what is needed to ensure a sustainable recovery from the COVID-19 pandemic, emphasizing that several developing nations 'lack the means to pursue expansive recovery strategies, and early signs of inflation in some economies has led to questions about how long the current environment of low interest rates will last.'[104] Also highlighted are the inadequate channels available to steer funds in the direction of sustainable recovery and the absence of intermediaries able to match surplus capital with the sustainability needs of companies and consumers.[105] Another report by the IEA verifies that the pandemic has already jeopardized investments and stalled the pace of the transition to cleaner energies.[106] Considering this scenario, increased disputes involving foreign investment are also likely to endanger a potential green economic recovery.

Such a situation is particularly dire for developing nations. The availability of investment is already shorter in emerging markets and developing countries.[107] This is concerning due to its impact on climate change and the implementation of the United Nations 2030 Agenda for Sustainable Development[108] and its corollary, the SDGs.[109] Although all Member States adopted the Agenda in 2015 and consequently are expected to uphold the SDGs, the pandemic is likely to negatively affect such implementation due to the scarcity of financial resources and reduced interaction amongst countries.[110] Of the 17 goals of the 2030 Agenda, affordable and clean energy (Goal 7), sustainable cities and communities (Goal 11) and climate action (Goal 13) are of particular interest.[111]

SDGs highlight the need for international investment in steering sustainable development.[112] Research shows SDGs can be used as a framework for evaluation of existing foreign investment. A recent study argues that international investment agreements should be evaluated considering whether they: (i) foster and channel investments that advance SDGs whilst withholding benefits from international investment agreements that do not; (ii) steer and maximize investments that promote SDG governance in the domestic sphere; and (iii) promote international cooperation to mitigate challenges to the governance of international investment.[113] These are relevant criteria for a host state's actions when securing foreign investment. These criteria are also aligned with the SDGs, which integrate the UN's roadmap towards fostering recovery of the pandemic.[114] In this way, the pandemic can ignite positive connections and bring effective change to the pre-pandemic business-as-usual scenario, advancing the reduction of GHG gases and related goals of the Paris Agreement.

104 International Energy Agency, *World Energy Investment* (IEA 2021) 8 <https://iea.blob.core.windows.net/assets/5e6b3821-bb8f-4df4-a88b-e891cd8251e3/WorldEnergy Investment2021.pdf> accessed 8 June 2021.

105 ibid 9.

106 International Energy Agency, *The Impact of the COVID-19 Crisis on Clean Energy Progress* (IEA 2020) <https://www.iea.org/articles/the-impact-of-the-covid-19-crisis-on-clean-energy-progress> accessed 18 April 2021.

107 International Energy Agency (n 103) 10 ('In contrast to advanced economies and China, investment in emerging markets and developing economies (EMDEs) is set to remain below pre-crisis levels in 2021, in large part because their twin public health and economic crises are more prolonged. EMDEs outside China account for nearly two-thirds of the global population but only one-third of global energy investment and just one-fifth of clean energy investment.'

108 UN, *Transforming Our World: The 2030 Agenda for Sustainable Development* (UN 2015) <https://sdgs.un.org/2030agenda> accessed 5 March 2021 (defining the 2030 Agenda as a plan for people, the planet and prosperity).

109 UN, *Sustainable Development Goals* (UN 2015) <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed 5 March 2021.

110 Kabir Duggal, Rekha Rangachari and Kanika Gupta, 'Consequences of Crisis and the Great Re-Think: COVID-19's Impact on Energy Investment, Sustainability, and the Future of International Investment Agreements' (2021) J World Energy L & Bus jwab015.

111 UN (n 108).

112 UNCTAD (n 63) 4 (The SDG 17 calls on states to 'promote the rule of law at the national and international levels and ensure equal access to justice for all').

113 Johnson, Sachs and Lobel (n 53) 2.

114 UN Secretary-General, 'We are Only as Strong as the Weakest', Secretary-General Stresses, at Launch of Economic Report on COVID-19 (UN, 31 March 2020) <https://www.un.org/press/en/2020/ sgsm20029.doc.html> accessed 7 April 2021.

4. CONCLUSION

As countries aim to reconcile economic growth and access to energy sources with international obligations to mitigate GHG, the transition to a greener economy is poised to increase competition for foreign investment. This article demonstrates that the pandemic has significantly reduced foreign investment and stalled the pace of such transitions. This article also assesses the calls for suspensions or cancellations of foreign investment claims from a law and economics perspective. It finds that such suspensions or cancellations must be for a limited time and carefully tailored to the circumstances of each country, including their domestic and international legal obligations. A moratorium or cancellation is no panacea; in fact, it may be detrimental to the energy transition, as it disrupts the flow of foreign investment even more.

Accordingly, all actors involved in the intricate system of foreign investment currently have an unprecedented opportunity to advance the energy transition in the aftermath of the pandemic. Effective public policies by host states, rational behaviour of investors and stability of the ISDS system will direct the flow of foreign investment to where they are needed the most, accelerating the much-needed transition to a carbon-neutral economy. To this end, the SDGs are important roadmaps. Ultimately, the pandemic can ignite positive connections and bring effective change to the pre-pandemic business-as-usual scenario. Time will tell if countries, international institutions, including international intergovernmental and non-governmental organizations, and international business actors, specifically foreign investors, will appreciate such opportunities and finally accelerate our path to a greener world.