

BLOCKING CLIMATE CHANGE LAWS WITH ISDS THREATS

VERMILION VS FRANCE

When Nicolas Hulot became Minister of the Environment in France in 2017, he gained not only political power but also public support. As a renowned environmentalist, French people believed he could be a much-needed climate champion, who could follow through and deliver on the promise of the Paris Climate Agreement. But this hope was quickly confronted with a huge obstacle: France is a signatory to various investment treaties, and oil and gas companies are prepared to use investor-state dispute settlement (ISDS) to challenge any action on climate change.



DEBOUT ET DÉTERMINÉS POUR LE CLIMAT !

Actions Non-Violentes COP21

system change
— NOT —
climate change



It was supposed to be “the” French law on fossil fuels. 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.¹ France was making steps towards transforming the words of the Paris Agreement into a reality.

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The first draft of the law would have allowed a progressive phase-out of fossil fuel extraction as it banned the renewal of exploitation permits: some oil and gas projects would have ended as soon as 2021, and only a few projects would have still existed by 2030.

**JULIETTE RENAUD,
FRIENDS OF THE EARTH FRANCE²**

But Hulot was not the only power-broker to work hard over the summer of 2017. The “Hulot law”, as it was later called, went through the benches of the French Council of State — a procedure to ensure that the law is coherent with the French Constitution. However, private law firms who make money when investors sue states under ISDS also closely examined the law, but through a very different lens.

Corporate damages or climate change: the choice politicians have to make

In August 2017, the Council of State received several lobby letters on the Hulot law.³ 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,⁴ 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 (see box 11 on page 58 for more information). 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”.⁵

Vermilion’s lawyers knew that a billion dollar ISDS threat could not be ignored. As Pulitzer Prize-winning journalist Chris Hamby wrote after an 18-month investigation on the issue: “ISDS is so tilted and unpredictable, and the fines the arbitrators can impose are so catastrophically large, that bowing to a company’s demands, however extreme they may be, can look like the prudent choice.”⁶ And indeed, the French government seems to have reluctantly bowed to Big Oil’s demands.

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Governments will fail to regulate in the public interest in a timely and effective manner because of concerns about ISDS.

**KYLA TIENHAARA,
QUEENS UNIVERSITY CANADA⁷**

The law to restrict fossil fuels ends up facilitating their expansion

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 law⁸ was passed, Hulot signed more fossil fuels permits than his predecessor in the Environment Ministry.⁹

No one will ever know precisely what level of influence the ISDS threat had in emptying the Hulot law of all its ambitious measures — Vermilion was not the only company active on the issue, with a significant amount of big business lobbying aimed at watering down the regulation taking place. Nevertheless, the ambition of France's much-respected Environment Minister was clearly killed by well-resourced corporate interests that used ISDS as one powerful secret weapon against an urgent and popular goal: combat climate change. A year after the September 2017 version of his fossil fuels law, Hulot resigned. In his resignation interview, he stated that corporate lobbies had too much influence on environmental policy-making.¹⁰

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ISDS cases risk having a “chilling effect” on implementing the stringent climate regulations required to fulfill a pact to curb global warming.

**NOBEL PRIZE-WINNING ECONOMIST
JOSEPH STIGLITZ¹¹**

BOX

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Regulatory chill: the secret threat that can make governments bow to corporate demands

Due to the high financial risks and legal costs to states of ISDS procedures, letters from investors threatening ISDS cases are very powerful political tools. Corporate lawyers regularly brag about how “threatened claims that never go to arbitration” are used “to get things done quietly”.¹²

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On many occasions, if my office evaluated that we would lose the case, our decision changed the Ministry position.

FORMER OFFICIAL IN PERU'S CENTRAL GOVERNMENT OFFICE WHICH DEFENDED ISDS DISPUTES¹³

ISDS acts as a powerful tool to achieve “regulatory chill”: to delay, change or impede new legislation. For instance, faced with an ISDS threat from tobacco giant Philip Morris, Togo dropped its legislative proposal on health and tobacco.¹⁴ While Philip Morris pursued an ISDS case against Uruguay over health-related cigarette adverts, it successfully deterred the adoption of similar tobacco control measures in Costa Rica, Paraguay and New Zealand, among other countries.¹⁵

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The mere existence of ISDS is important as it acts as a deterrent.

VICE PRESIDENT OF CHEVRON¹⁶

References

- 1 Les Amis de la Terre France: "[Mettre fin aux énergies fossiles](#)"? [Décryptage de la loi Hulot](#), 11 September 2017.
- 2 Email correspondence between the author and Juliette Renaud, May 2019.
- 3 Les Amis de la Terre France: [Réponse du Conseil d'Etat à la demande d'accès aux documents sur la loi Hulot](#), 19 July 2018.
- 4 Ministère de la Transition Ecologique et Solidaire: [Situation des titres miniers H](#), 1 April 2019.
- 5 Les Amis de la Terre France: [Réponse du Conseil d'Etat à la demande officielle de documents](#), 19 July 2019, 11-12. French original translated by the authors.
- 6 Chris Hamby: [The Secret Threat That Makes Corporations More Powerful Than Countries](#), BuzzFeed, 30 August 2016.
- 7 Kyla Tienhaara: [Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement](#), *Transnational Environmental Law*, 7:2, July 2018.
- 8 Legifrance: [Loi n° 2017-1839 du 30 décembre 2017 mettant fin à la recherche ainsi qu'à l'exploitation des hydrocarbures et portant diverses dispositions relatives à l'énergie et à l'environnement](#).
- 9 Les Amis de la Terre France: [Premier bilan de l'application de la loi «Hulot» sur les hydrocarbures](#), 2 April 2019.
- 10 BBC News: [French minister Nicolas Hulot resigns on live radio in frustration](#), 28 August 2018.
- 11 Sebastien Malo [INTERVIEW-U.N. reform needed to stop companies fighting climate rules — Nobel laureate Stiglitz](#), Thomson Reuters Foundation News, 29 May 2019.
- 12 Chris Hamby: [The Secret Threat That Makes Corporations More Powerful Than Countries](#), BuzzFeed, 30 August 2016.
- 13 Conversation at an UNCITRAL side event, New York, 1 April 2019.
- 14 Envoyé Spécial: [Multinationale contre Etat: la loi du plus fort](#), 16 November 2017.
- 15 The Guardian: [Who really won the legal battle between Philip Morris and Uruguay?](#), 28 July 2016.
- 16 European Commission internal report about a meeting with Chevron on ISDS in TTIP, dated 29th April 2014. Obtained through an access to documents request via the EU's information disclosure regulation. On file with the authors.

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p36 Paris Light Brigade

This case is part of the report *Red carpet courts: 10 stories of how the rich and powerful hijacked justice*, by Corporate Europe Observatory, the Transnational Institute and Friends of the Earth Europe/International, June 2019. www.10isdstories.org