LCF
The London Centre for Commercial and Financial Law

WESTMINSTER LAW SCHOOL

MANCHESTER 1824
The University of Manchester
Law

COMMERCIAL LAW RESEARCH GROUP

The Future of the Commercial Contract in Scholarship and Law Reform

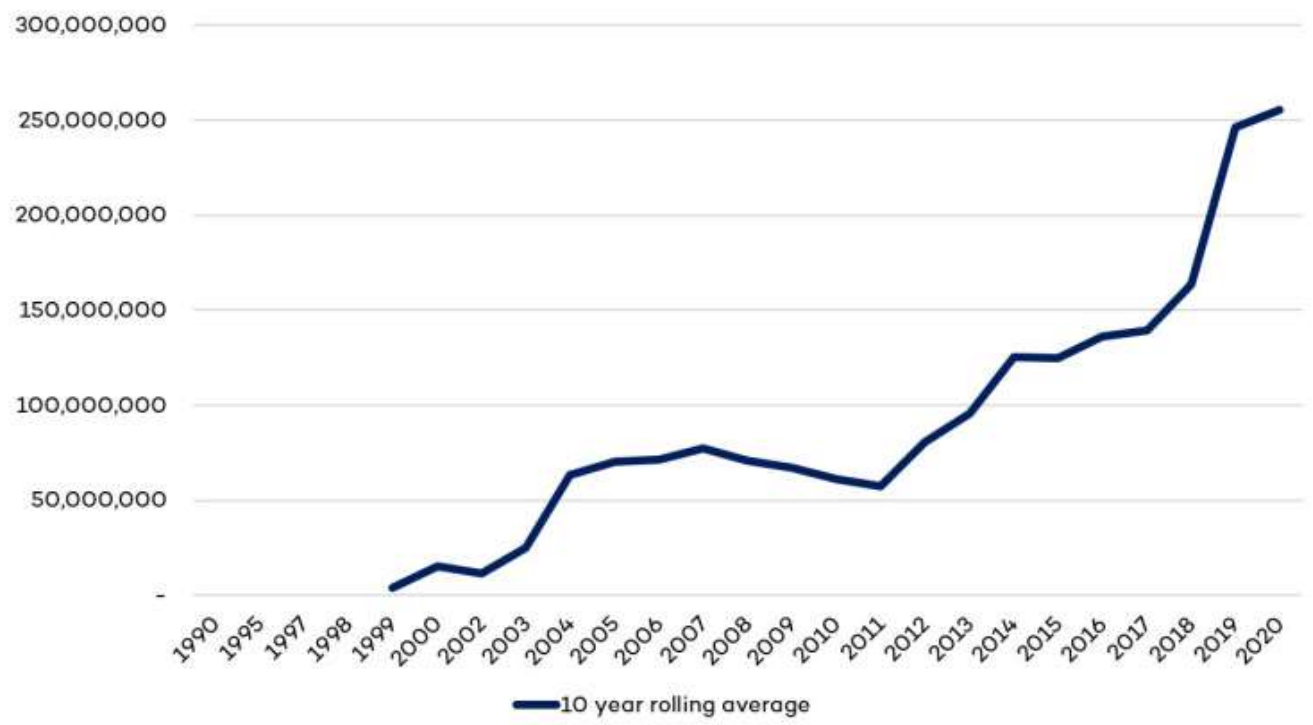
# CONTRACTUAL CLAIMS VERSUS TREATY CLAIMS IN INVESTOR-STATE DISPUTES

Leonardo Carpentieri
LMS Legal LLP
Friday, 15 October 2021
11.20am-11.40am BST

LMS

# Compensation under investment treaties: a growing trend

Figure 1. Arbitral awards 1990 to 2019 - Rolling 10-year average (USD)




*Data source: UNCTAD & Italaw.*

# Parallel proceedings

- Claimants may rely both on contractual route and on treaty route to seek compensation for losses

- In investor-state context, certain conditions must be met:
  - From an investor / investment compliance perspective
  - From an eligibility perspective for contractual claims

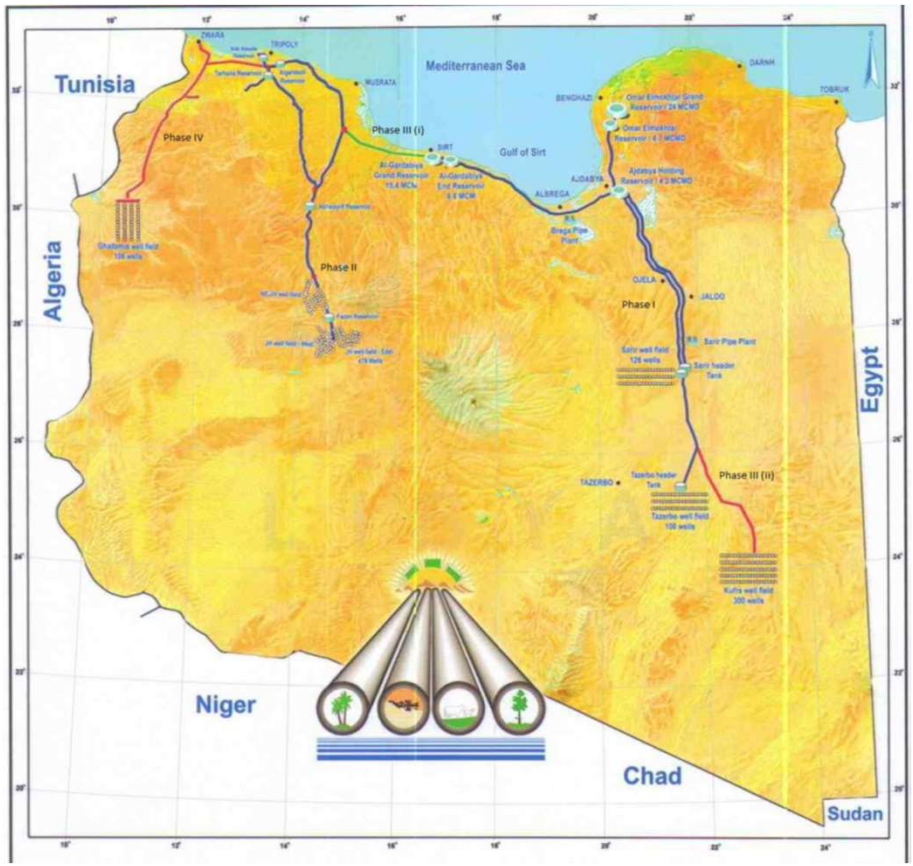
- This may lead to contractual claims being brought as part of investor-state proceedings (where possible), but also to parallel contractual and treaty arbitration proceedings

# Libya

- Project: water infrastructure in the Libyan desert started in early 1980s aiming to bring water from southern aquifers to northern coastal belt

- Various international contractors carrying out construction work

- Employer: Libyan state entity



# Libya

- Arab Spring hit Libya in February 2011 leading to civil war, unrest, looting, emergency evacuations

- Damages to pipelines and project equipment; local government taking over operation of the pipeline

# Libya

- After a series of unsuccessful negotiations, contractors started bringing legal action against state-owned entities and/or the State of Libya

- In one particular case:

  - A set of arbitration proceedings on the basis of contractual breaches, against both the state-owned entity and the State; and

  - A set of arbitration proceedings against the State of Libya on the basis of breaches of relevant BITs

# Contractual claims v. treaty claims – overview

"*Seul l'Etat, en tant que puissance publique, et non comme contractant, a assumé des obligations au titre de l'Accord bilatéral*"

*Consortium RFCC v Royaume du Maroc*, ICSID Case No. ARB/00/6, Arbitral Award of 22 December 2003, at p. 34

# Contractual claims v. treaty claims – overview

- Context: foreign direct investments are often made in the form of direct contractual arrangements between:
  - A foreign investor; and
  - The host State's relevant agency or state-owned entity

- Same investment may lead to claims of different nature however contractual breaches are in principle independent of treaty breaches

# Contractual claims v. treaty claims – key principles

- Rule: “treaty” tribunals have no jurisdiction over pure contract claims

- There are however sources of jurisdiction over contract claims:

  - Umbrella clauses
  - Fork-in-the-road clauses
  - Broad treaty dispute resolution clauses, potentially including contractual violations

# Umbrella clause – hidden protection?

**Article 4**
**Most-favoured-nation Provisions**

1. Each Contracting Party shall accord to investments of investors of the other Contracting Party full security and protection, which in any case shall not be less than that accorded to investments of investors of any third State. Each Contracting Party shall observe any obligation it may have entered into with regard to investments.

*Finland-Turkey BIT, signed 13 May 1993, in force since 23 April 1995*

# Umbrella clause – mechanism

- Much debate about these provisions carved in the 1950s to improve the protection of investor-State contracts: do they elevate contractual breaches to treaty breaches?

- They only appear in 40% of investment protection treaties

- Umbrella clauses provide that host States shall "*observe*" (or "*respect*", "*comply with*", "*fulfil*" or "*ensure the observance of*") "*obligations*" (or "*undertakings*" or "*commitments*") they have "*entered into*" (or "*assumed*" or "*incurred*") with regard to investments

- Umbrella clauses must be interpreted in accordance with its own particular terms: interpretation varies

# Umbrella clause – what future?

- New generations treaties: views diverge

- **For**:
  - More attractiveness for investors as providing wider protection, especially in “challenging” jurisdictions
  - Better drafting will reduce legal uncertainty and minimize jurisdictional challenges

- **Against**:
  - Legal uncertainty as to reliance on contractual claims
  - Should international / treaty law be used to solve commercial disputes?
  - Growing public opposition

**Leonardo Carpentieri**
Counsel
LMS Legal LLP
4 New Street Square
London EC4A 3BF
United Kingdom
Tel: +44 (0)7990010133
leonardo.carpentieri@lmslex.com


# Successes of the emissions trading system and the importance of settling outstanding issues under the Paris Agreement Art 6

The Future of the Commercial Contract in Scholarship and Law Reform

Sixth Annual Conference

Friday, 15 October 2021

**David Freestone**

# Outline

- **Evolution of Carbon Trading**
- 1997 Kyoto Protocol “Flexibility Mechanisms”
  - Joint Implementation Art 6
  - Clean Development Mechanism Art 12
  - Assigned Amount Trading Art 17
- **Role of The World Bank**
- **European Emission Trading System**
- **2015 Paris Agreement**
  - Article 6 (2)
  - Article 6 (4)
  - Article 6 (8)
- **Outstanding Funding/Financing Issues for the Glasgow COP**
    - Paris Rule Book: Accountability and Article 6



# 1992 UNFCCC;
# 1997 KYOTO PROTOCOL

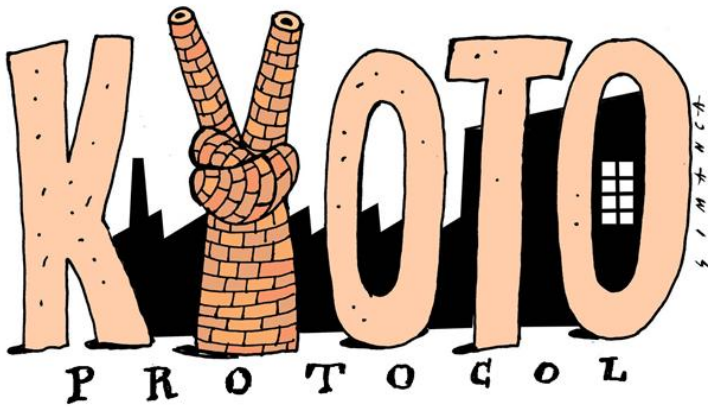
Source: UNFCCC website

# 1997 Kyoto Protocol

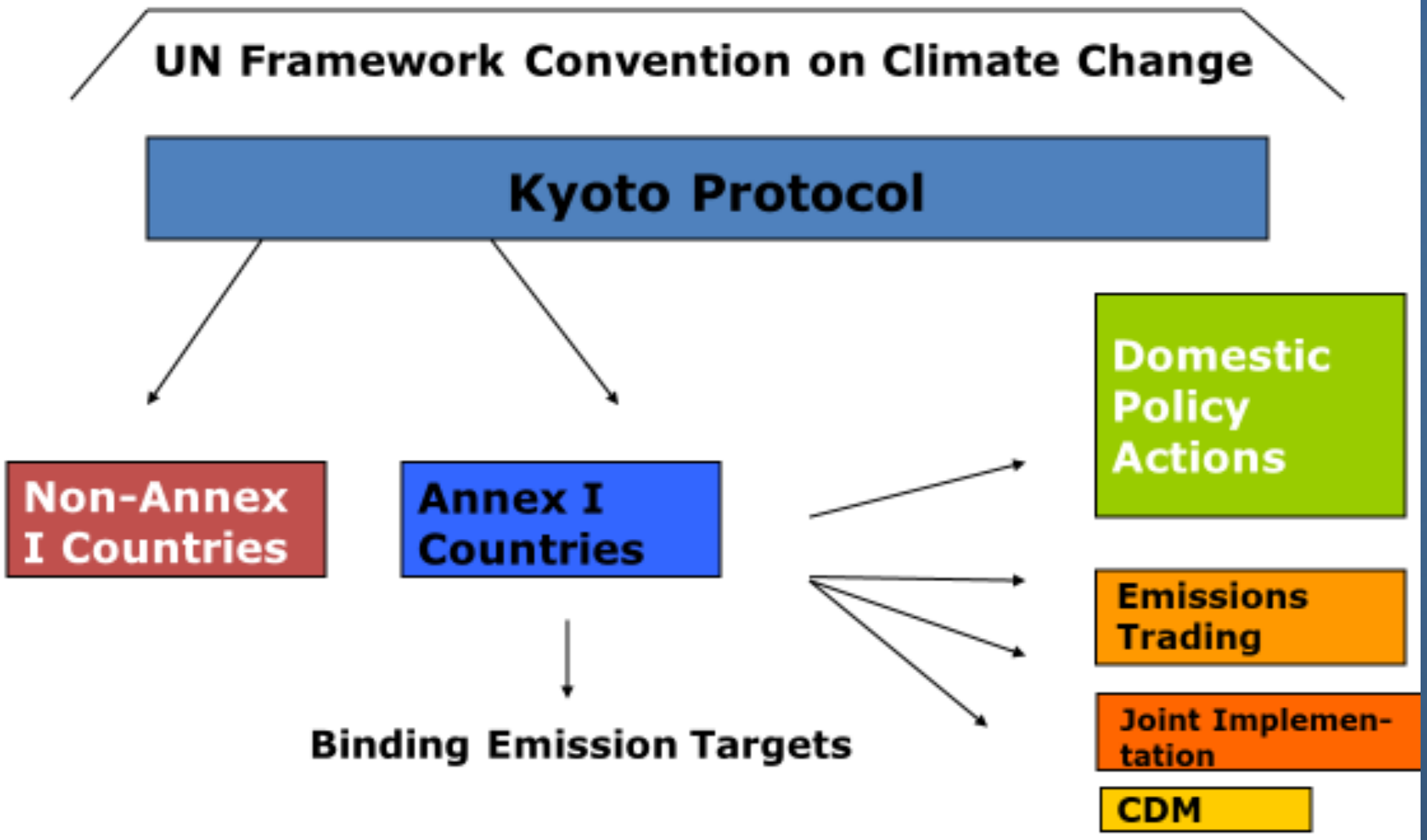
- Signed: Dec 1997; entry into force: Feb 2005
- 2001 COP7 Marrakesh Accords ("rulebook")
- **First Commitment Period,** Kyoto 1997 (2008-2012)
  - Annex I countries pledged a GHG reduction of about 5.2 % from 1990 level over the 1st commitment period
  - No emission targets for Non-Annex I countries
- **Second Commitment Period**, Doha 2012 (2013-2020)
  - New reduction targets
  - Without Russia, Japan, Canada, Japan, New Zealand …
  - Did not come into force until Dec 2020

# 1997 Kyoto Protocol (II)

- Legally binding emission targets for Annex I parties
- Emphasis on reducing domestic emissions
- Unique feature is Flexibility built in through three mechanisms:
  - ➢ Clean Development Mechansim (CDM)
  - ➢ Joint Implementation (JI)
  - ➢ International Emission Trading (IET)



# UNFCCC/KP CONTEXT



# Kyoto Protocol Trading Mechanisms

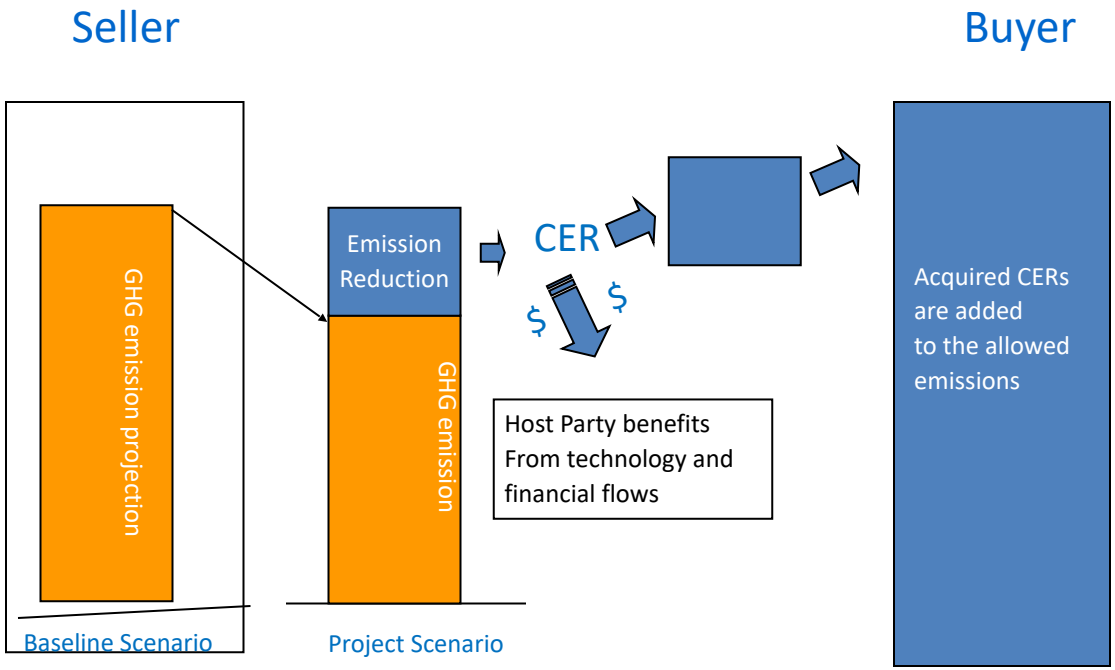
Annex I Country commitments could be met by:

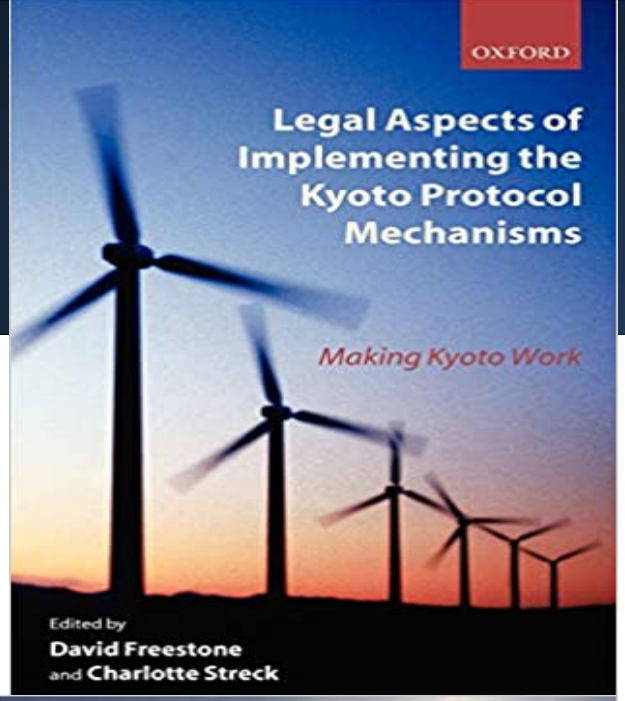
- Reducing domestic emissions and **supplementary** use of Kyoto Protocol 'Flexible' Mechanisms
- Two were Project Based:
  - **Joint Implementation**
    - Purchasing from a JI project in a country with an economy in transition 'Emission Reduction Units' (**ERUs**)
    - **Project based Cap and Trade**
  - **Clean Development Mechanism**
    - Purchasing from a CDM project in a developing country 'Certified Emission Reductions' (**CERs**)
    - **Baseline and credit**
    - "Prompt start"
- Assigned amount trading
  - Purchasing 'Assigned Amounts Units' (**AAUs**) under from other Annex I countries –classic **'Cap and trade'**

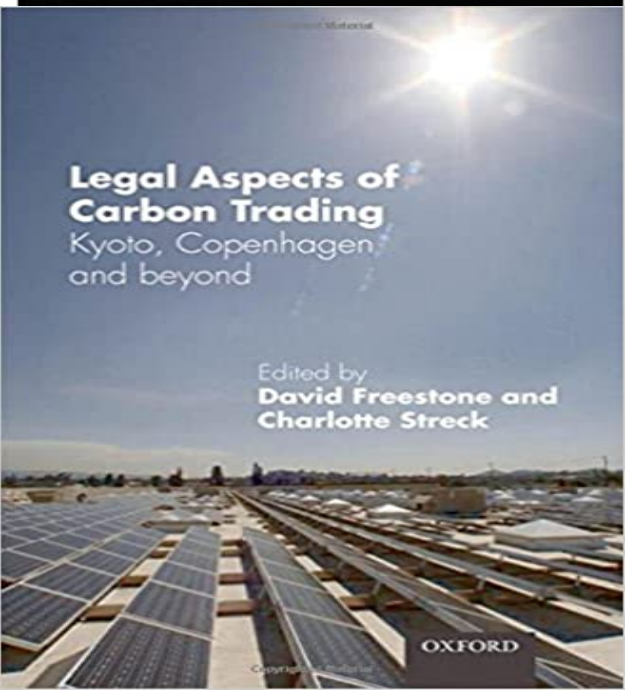
- Purchases of CERs through the CDM required payment of
  - Administrative fee
  - **2% "Share of the Proceeds"** to Adaptation Fund

# Carbon Trading and growth of Carbon Markets

# The Concept:
# Emissions Trading under the Kyoto Protocol






# Role of World Bank

- 1998-2000 Developed Prototype Carbon Fund
- Mobilized first $180 m fund
- Convened series of Legal Expert Workshops on Modalities
- 1999 Developed the first Emission Reduction Purchase Agreement (ERPA)

# The World Bank Kyoto Carbon Funds

- First generation of World Bank managed carbon funds under Kyoto Protocol (**approx. 2.3 billion USD**)

**Prototype Carbon Fund**
- Operational since 2000
- First carbon fund pioneering KP mechanisms
- 180 million USD

**Community Development Carbon Fund**
- Small projects that measurably benefit poor communities
- 118 million USD

**Netherlands Clean Development Mechanism Facility**
- 220 million EURO
- Closed (since 2016)

**Umbrella Carbon Facility – Tranche 1**
- Focused on two China HFC 23 projects – closed in September 2013
- 775 million EURO

**Umbrella Carbon Facility – Tranche 2**
- 105 million EURO

**Carbon Fund for Europe**
- Design to help European countries to meet their KP and EU ETS obligations

**BioCarbon Fund (Tranches 1 and 2)**
- Afforestation projects in developing countries
- 86 million USD (Carbon Fund)
- 6 million USD (TA; BioCF plus)
- First issuance of carbon credits for forest projects under the CDM

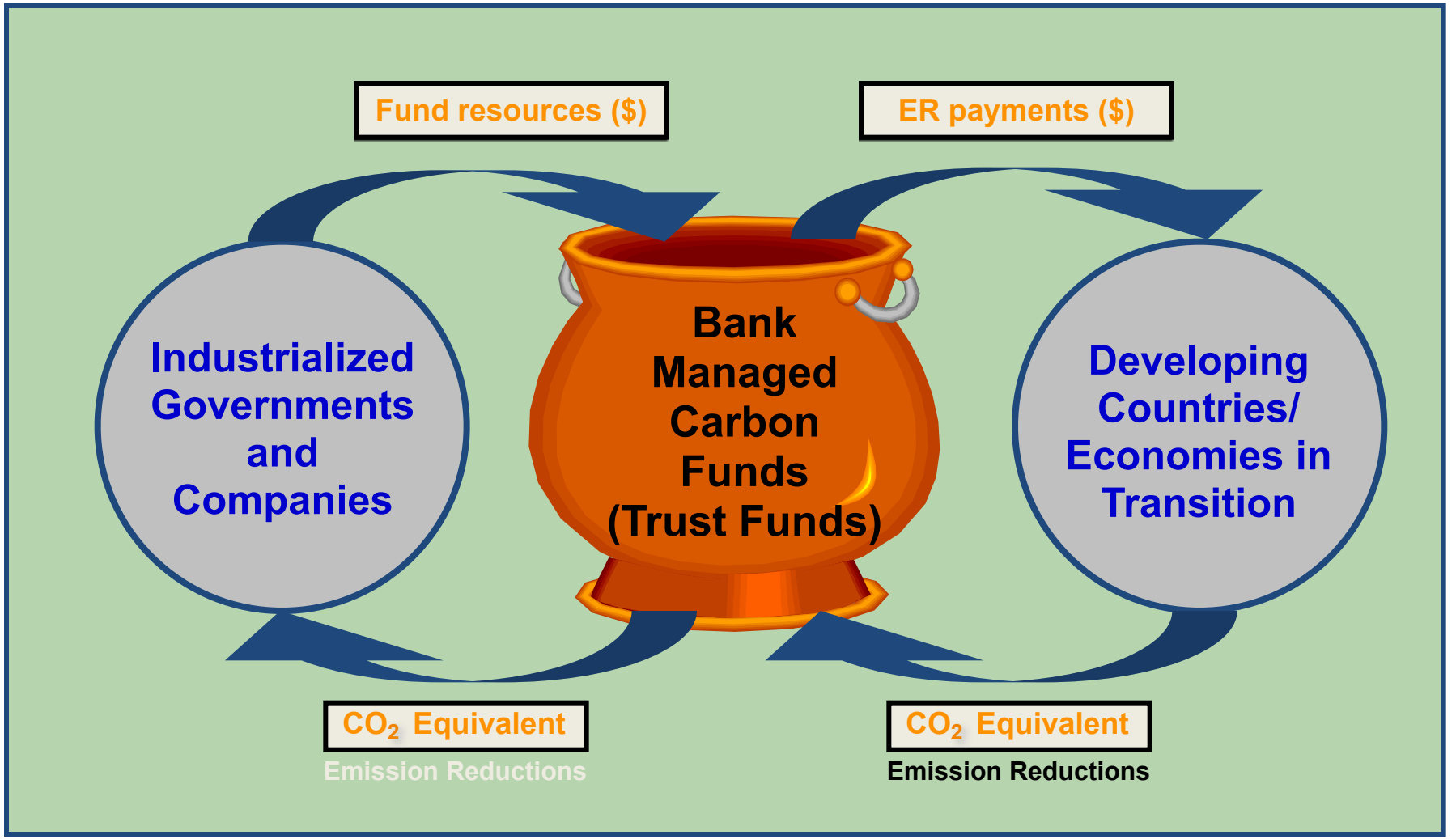
**Spanish Carbon Fund**
- Focused on CDM
- 278 million USD

**Italian Carbon Fund**
- Focused on CDM
- 155.6 million USD

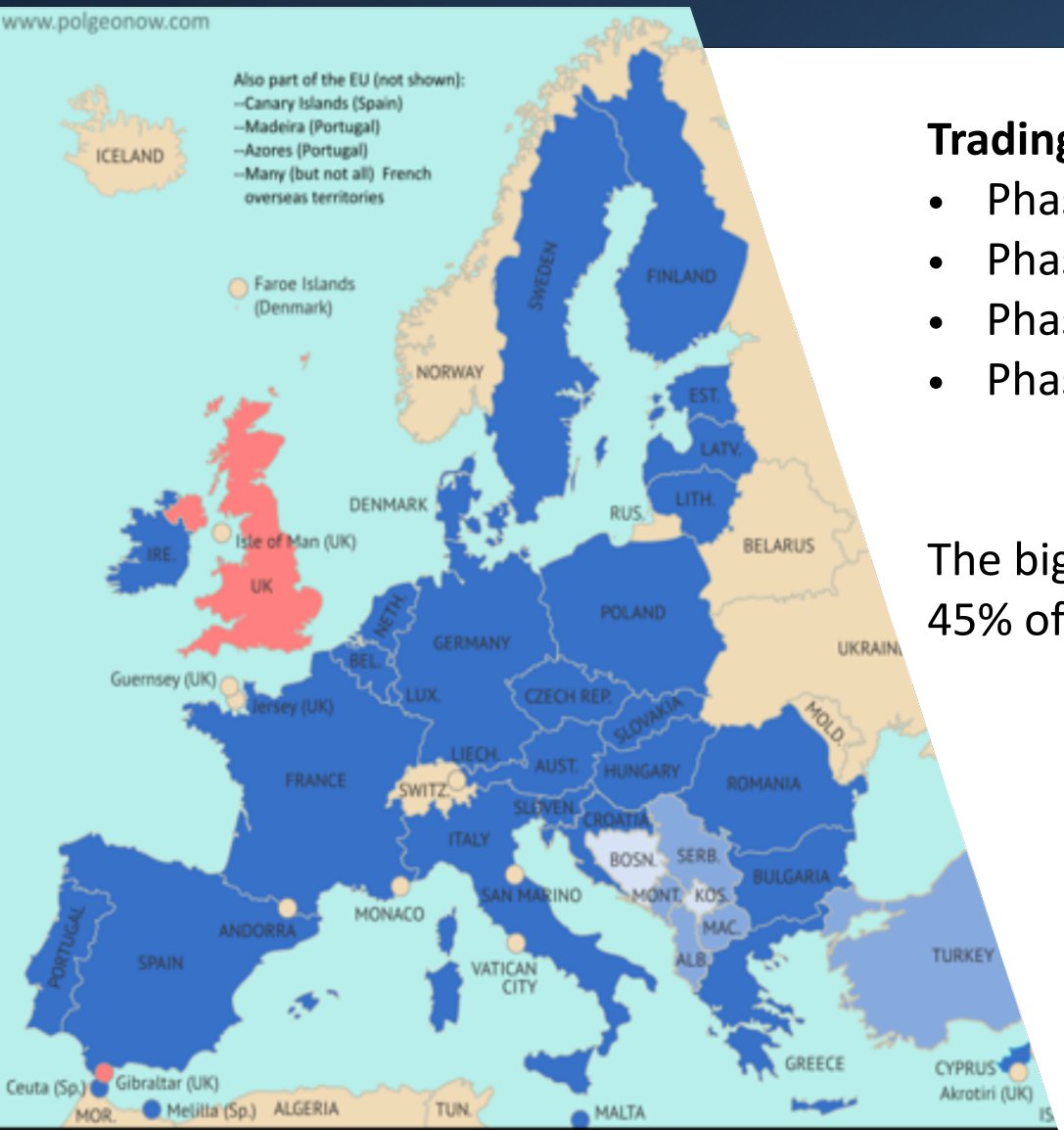
**Danish Carbon Fund**
- Focused on CDM
- 90 million EURO

**Netherlands European Carbon Facility**
*(jointly managed with IFC)*
- Focused on Join Implementation credits
- 51.6 million EURO

# How Carbon Funds Work



# European Union Emissions Trading System




**Trading periods**

- Phase I (2005-2007), “trial” period
- Phase II (2008-2012), “Kyoto” period
- Phase III (2013-2020), “Post-2012” period
- Phase IV (2021-2030), “Paris” period

The biggest emissions trading system trading 45% of EU emissions

| Carbon Market Evolution, values ($ billion), 2004–10 | | | | | | |
|---|---|---|---|---|---|---|
| | EU ETS Allowances | Other Allowances | Primary CDM | Secondary CDM | Other Offsets | Total |
| 2005 | 7.9 | 0.1 | 2.6 | 0.2 | 0.3 | 11.0 |
| 2006 | 24.4 | 0.3 | 5.8 | 0.4 | 0.3 | 31.2 |
| 2007 | 49.1 | 0.3 | 7.4 | 5.5 | 0.8 | 63.0 |
| 2008 | 100.5 | 1.0 | 6.5 | 26.3 | 0.8 | 135.1 |
| 2009 | 118.5 | 4.3 | 2.7 | 17.5 | 0.7 | 143.7 |
| 2010 | 119.8 | 1.1 | 1.5 | 18.3 | 1.2 | 141.9 |


# PARIS 2015

# 2015 Paris Agreement

## Goals

- Keep global temp increase “well below 2°C” – efforts to limit to 1.5 °C
- Increase resilience and adaptation efforts
- Mobilize financing

## Key Provisions:

- Emissions to peak asap; Net-zero after 2150
- Each party to declare Nationally Determined Contributions (NDC) to this goal – include mitigation and adaptation targets
- Reviewed (and improved) every five years
- “Global Stocktake” every five years (first in 2023)
- Finance Mitigation and Adaptation at $100 bill pa by 2020 – then increased
- Public funding to play significant role  but also
- Market (and non-Market) Mechanisms in Article 6

# Paris Agreement, Article 6: Overview

- **Article 6.2:**
  - Voluntary cooperation on “internationally transferred mitigation outcomes” (ITMOs) towards NDCs
  - to “promote sustainable development and ensure environmental integrity and transparency” and “apply robust accounting to ensure the avoidance of double counting”
- **Article 6.4: “ Sustainable Development mechanism”**
  - Establishes a mechanism to trade credits from emissions reductions generated through specific projects to “contribute to the mitigation of [GHGs] and support sustainable development”
  - Aims to facilitate the participation “by public and private entities”
  - To deliver “an overall mitigation in global emissions”
  - “a share of the proceeds from activities under the mechanism […] is used […] to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation”
- **Article 6.8:**
  - Non-market approaches

# While We Wait For The Paris Rule Book …

- Pilot activities specifically intended to be linked to Article 6
  - E.g., Japan Joint Crediting Mechanism
    - 17 bilateral arrangements

- What happens to the CDM and other Kyoto initiatives ?

- International carbon market regimes outside the UNFCCC

- **Voluntary Carbon Market Dashboard -Climate Focus**

"a newly developed initiative aiming to provide corporates, investors and project developers with consolidated data on relevant carbon market metrics, as reported by the leading carbon standards."

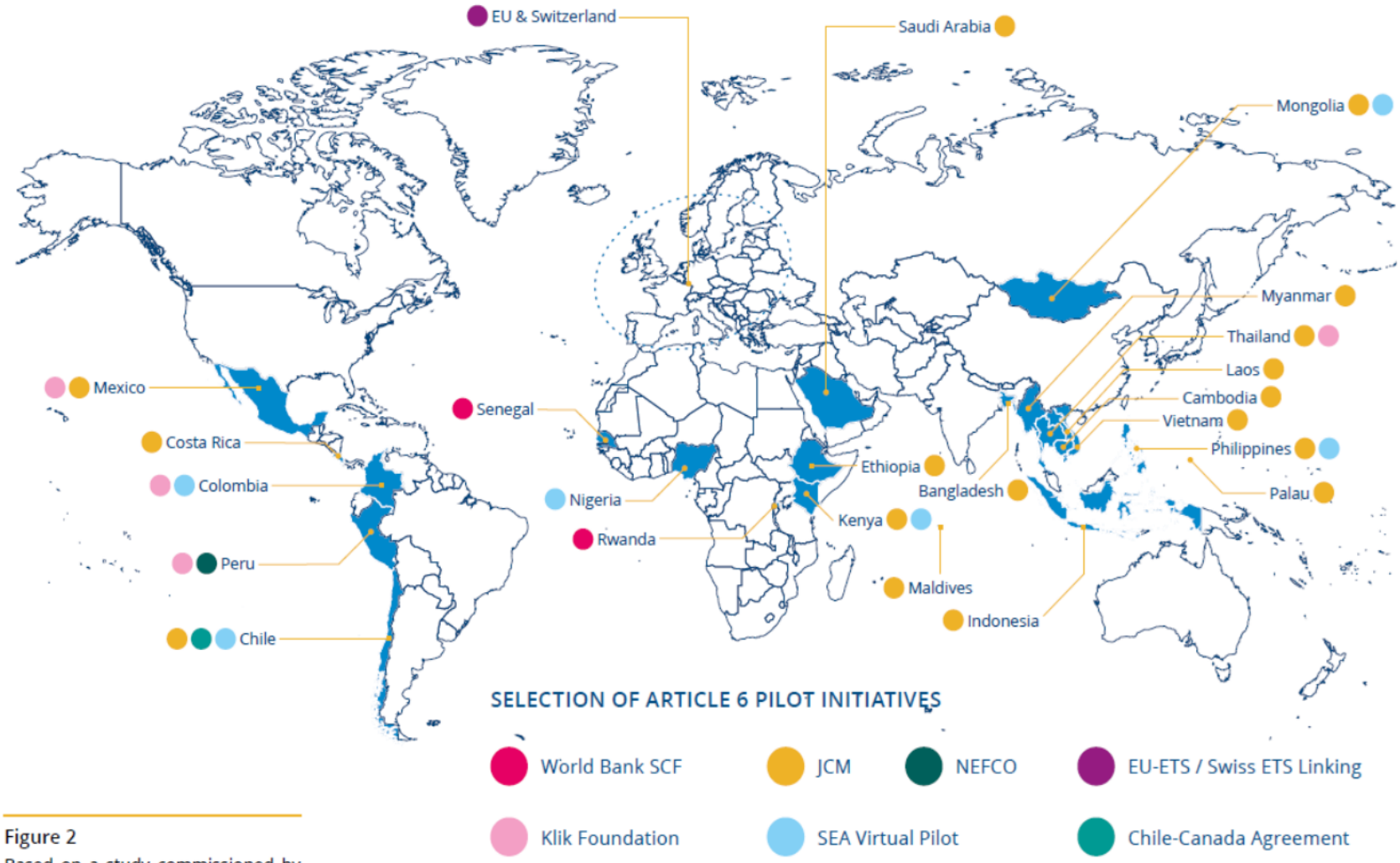



Figure 2
Based on a study commissioned by the Nordic Initiative for Cooperative Approaches (NICA) on Article 6 Landscapes (prepared by Climate Focus)

Climate Focus (2019), available: here

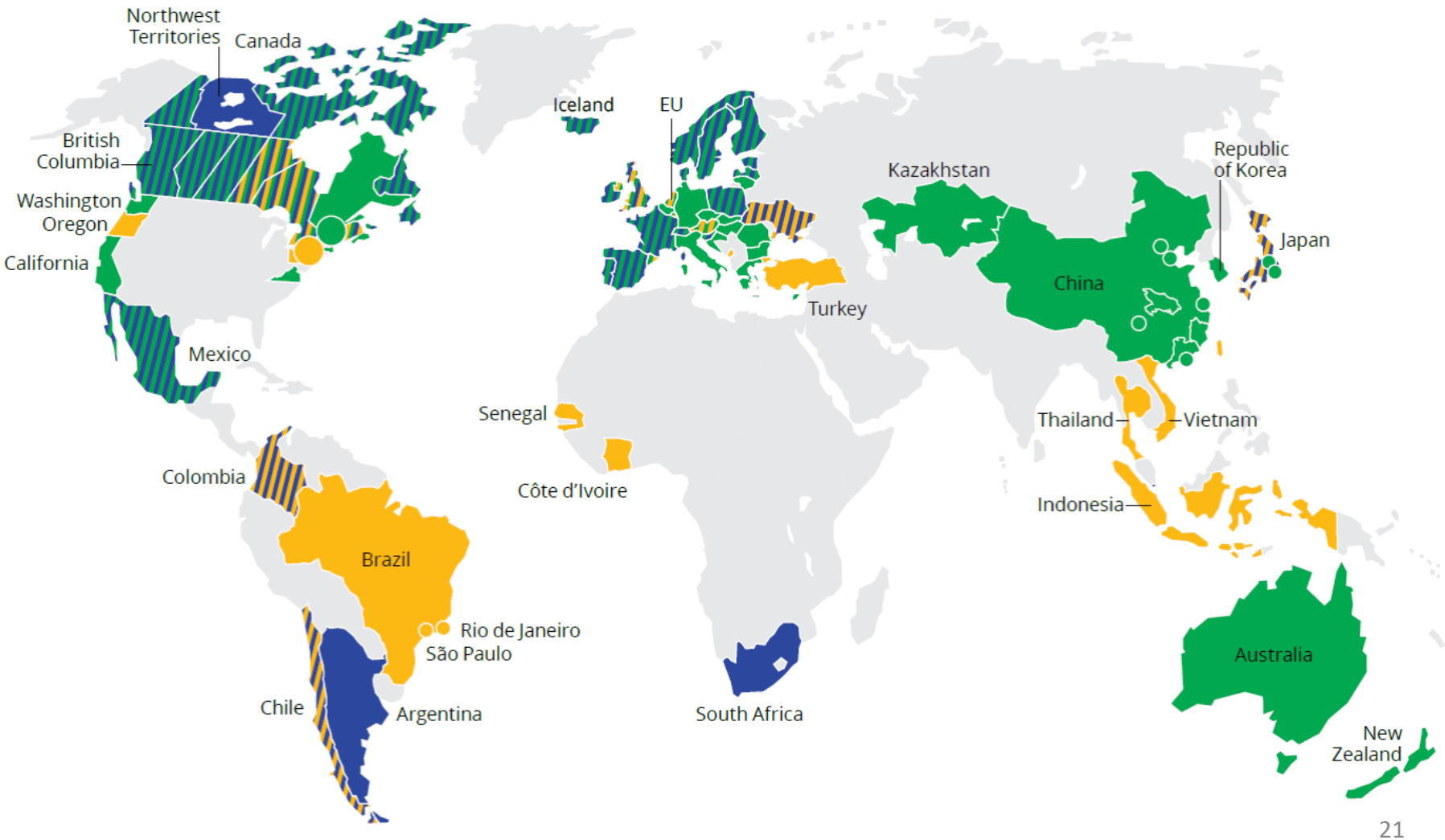
# Clean Development Mechanism is still functioning



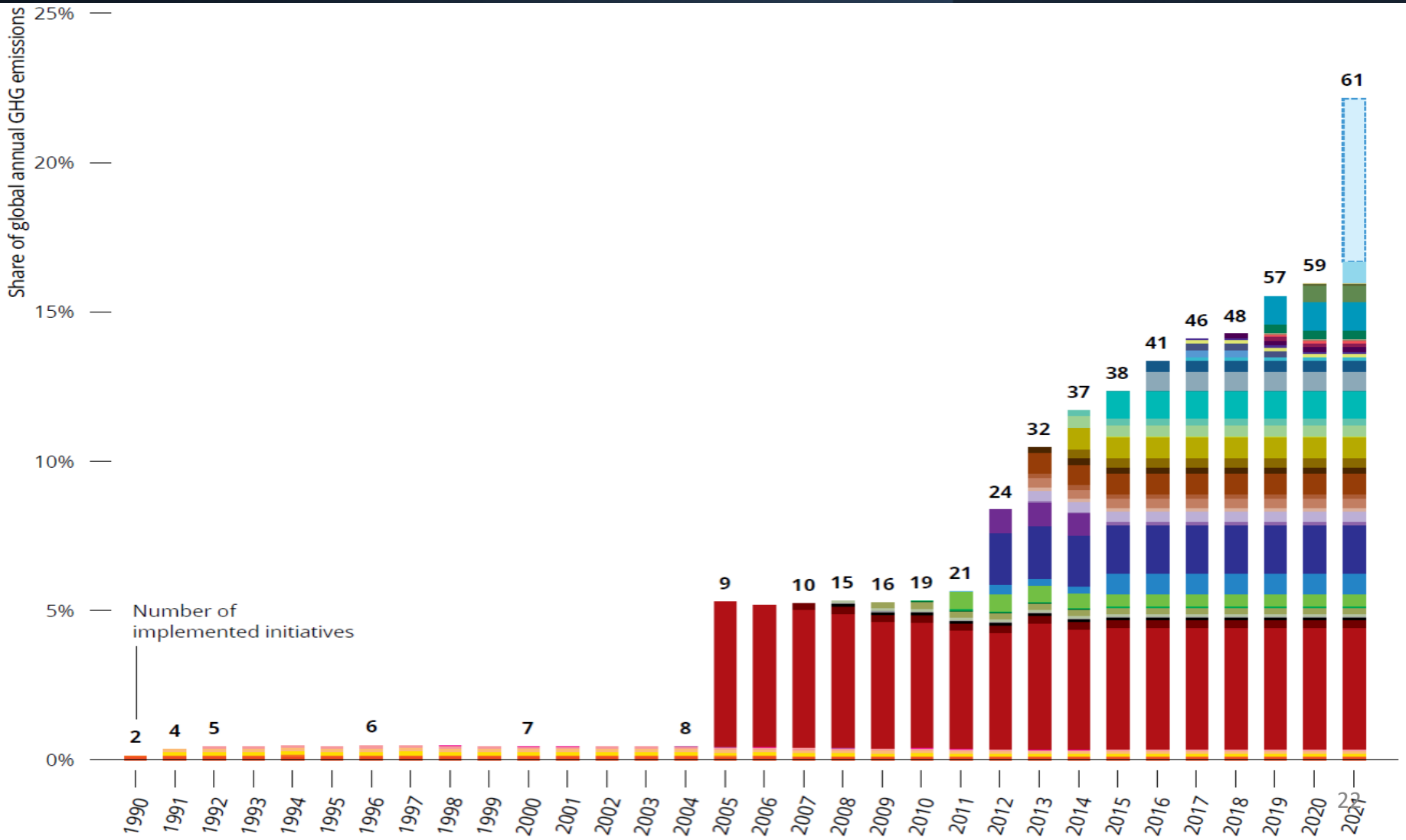
- "True Up" period will finish in 2022/3
- Recently awarded in 2 Billionth Credit
- Will be an ongoing need for offsets
- CORSIA – Carbon Offsetting and Reduction Scheme for Civil Aircraft
- Other niche markets

# Carbon Pricing Initiatives

## implemented, scheduled, under consideration (ETS/carbon tax)



# Share of Global Emissions covered by Carbon Pricing initiatives



# Outstanding Article 6 Issues for the Glasgow COP26

# Key Outstanding Financing Issues for COP 26

- Transparency requirements
  - No mechanism to track progress regarding Art 2(1)(c) “Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.“
- Financing Climate Action: $100 billion pa target
- Loss and Damage
- Determining how Carbon Markets will work under Article 6

# Operationalizing Article 6

- **Art. 6.2:**
  - accounting, sustainable development and environmental integrity, and
  - governance to be addressed
- **Art. 6.4:**
  - Nature and governance, scope, overall mitigation, share of proceeds, and participation of private entities are the key issues to be addressed
  - Relationship between Art. 6.2 and Art. 6.4 needs to be clarified
  - Is the CDM model for 6.4 SDM ?
  - Does "Share of proceeds" apply to 6.2 and 6.4 – Adaptation Fund
- **Art 6.8**: anything and everything?
- Robust methods and procedures to adjust NDCs and avoid double counting
- Transitioning of Kyoto Protocol projects (CDM/JI) into Paris Agreement ?

# Three Key Issues still outstanding

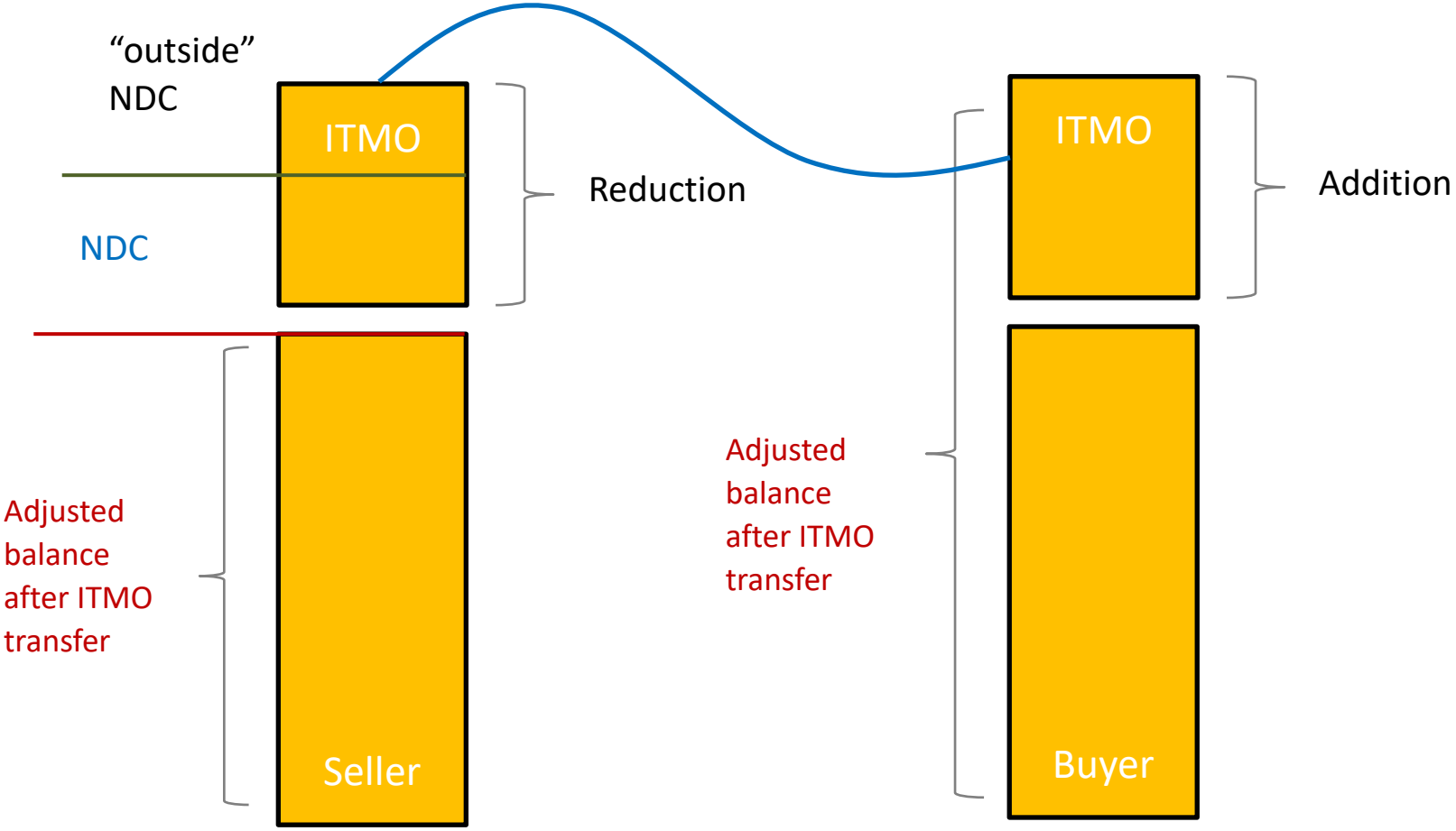
**Norway and Singapore invited by UK led inter-sessional negotiations**

- **Integrity of Article 6 (4)**
  - Agreed Accounting, Reporting and Review processes
  - How to avoid double counting if NDC use different metrics?
  - Metrics to be harmonized by 2031

- **Should Pre 2020 Emission Reductions be counted for Paris**
  - Transitioning or not of Kyoto Protocol projects (CDM/JI) into Paris Agreement
  - if so how and for how long ?

- **How will Art 6 support Adaptation?**
  - Art 6(4) requires Share of Proceeds payment to Adaption Fund
  - No mention of Share of Proceeds in Article 6(2) –
    - will this be a disincentive to use 6(4) ?
  - Can adaptation be financed in Art 6

# “Corresponding Adjustments”



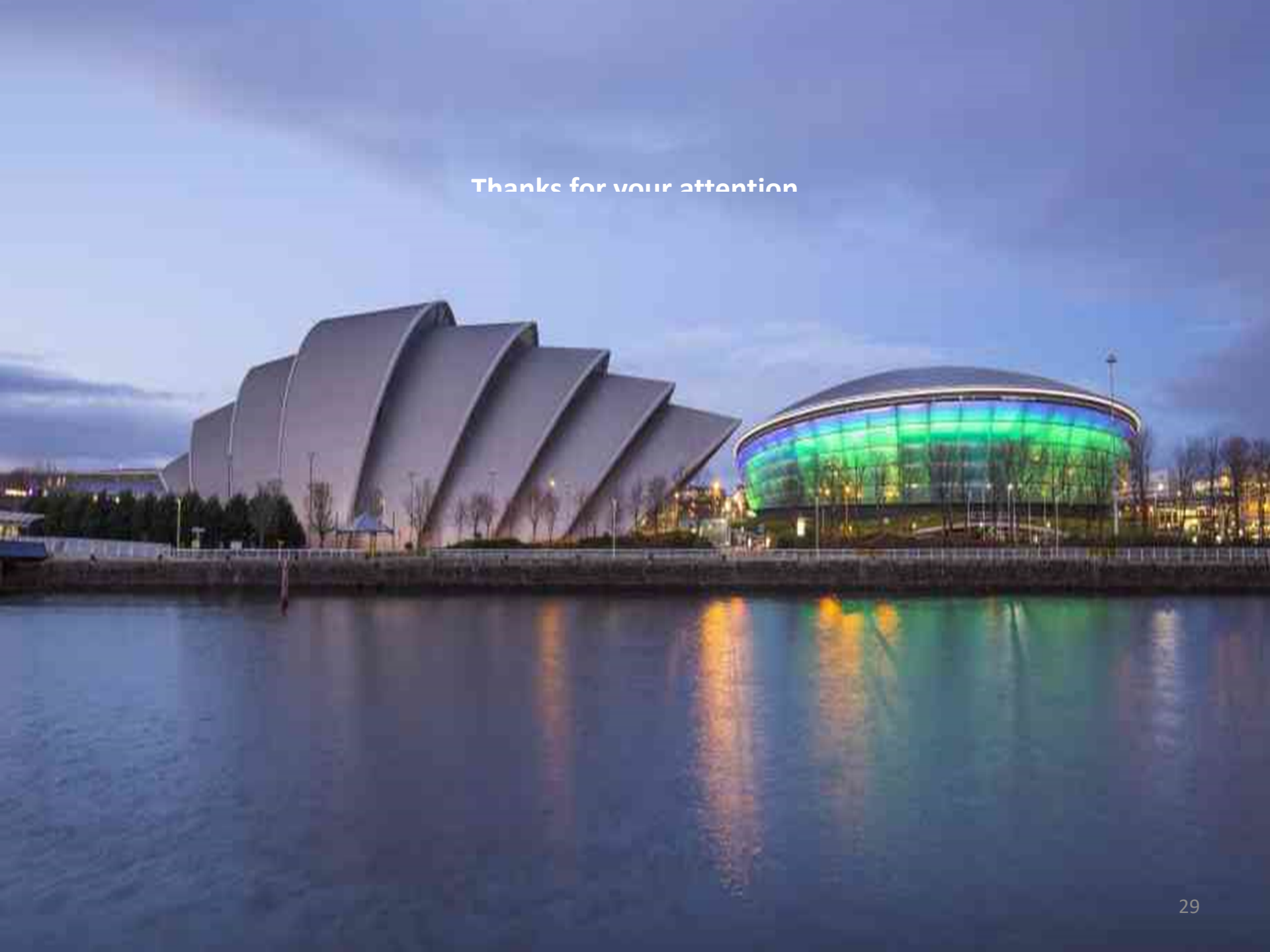
# Operationalizing Article 6: COP 26 Next Steps?

**SETBACKS**

- Clarity on the key issues needed – COP24 and 25 did not address all remaining issues
- 31 countries– ***the San Jose Principles for High Ambition and Integrity in International Carbon Markets***
- Pandemic effect

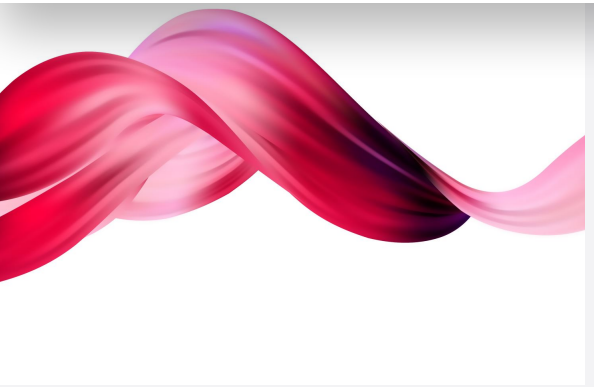
**WHAT IS NEEDED?**

- **Political will – diplomacy to overcome fundamental disagreements** (e.g., the EU and Brazil)
  - Already started: UK leadership had around 80 online Climate Dialogues at the end of 2020
  - COP26 President, Alok Sharma, has emphasized the "*UK's objective of resolving long-standing divisions around Paris' markets-governing Article 6 and agreeing a post-2020 rulebook for international emissions trading*."
- **Robust accounting rules** – lessons learned from the Kyoto mechanisms


Thanks for your attention

# Investment Arbitration and the Rule of Law: Is It Not Time to Bridge the Ethical Gap?

*Dr. Radosveta Vassileva*



**How investment arbitration law has contributed to international rule of law so far:**

-legalization of investment protection (BITs)
-judicialization (establishment of ICSID)

+ a recent move towards **better transparency**

**Transparency in investment arbitration is usually justified by:**

-jurisprudential consistency

-predictability/legal certainty

-public interest in knowing how taxpayers' money is used

**However, greater transparency may:**

-promote the rule of law domestically➔ breaches of investors' rights may signal assaults against the rule of law/overlap with breaches of fundamental rights

[key features of the rule of law: accountability, equality, non-discrimination, access to justice, prevention of misuse of power, etc.]

***How?***

Diagnosis of rule of law decay

Accountability of those who breached investors' rights

Legislative changes to prevent breaches in the future

# Transparency at ICSID

1. ***No general presumption of confidentiality/transparency – the level depends on party choice, the relevant BIT, Mauritius Convention, etc.***
2. ***Since 2006 Arbitration Rule 48(4) on 'Rendering the Award' states:***

The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.

***3. Publication of 'procedural details' on ICSID's website***

***4. Current plans for greater transparency***

**Yet…**

-Missing excerpts, incomplete procedural details, severely disfigured/redacted excerpts

**Why?**

-Loopholes in ICSID's rules/practices which allow States to deceive or even lie about the outcome in ICSID proceedings. For instance, hide that a dispute has been settled

# Three ICSID cases from Bulgaria

-All cases involve alleged wrongdoing by former PM… who deliberately assaulted the country's rule of law

-In all cases, Borissov's government used loopholes in ICSID's procedural rules to deceive public about the outcome

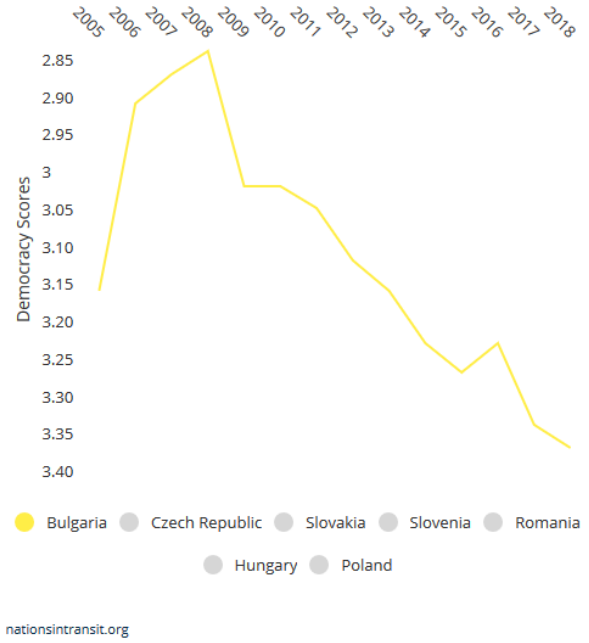
## Rule of Law Index

2019: BG is 54th out of 126 (second worst score in EU after HU)

## Corruption Perceptions Index

2008: BG is 72nd in the world, last in EU

2019: BG is 74th in the world, last in EU


**Source of graph: Nations in Transit Report 2018 (Freedom House)**

## Case Details

**Novera AD, Novera Properties B.V. and Novera Properties N.V. v. Republic of Bulgaria (ICSID Case No. ARB/12/16**

PROCEEDING | MATERIALS | PROCEDURAL DETAILS

| | |
|---|---|
| **Subject of Dispute:** | Waste management services |
| **Economic Sector:** | Water, Sanitation & Flood Protection |
| **Instrument(s) Invoked:** (i) | BIT Netherlands - Bulgaria 1999 |
| **Applicable Rules:** | ICSID Convention - Arbitration Rules |

### (a) Original Proceeding

| | |
|---|---|
| **Claimant(s)/Nationality(ies):** (i) | Novera AD (Bulgarian), Novera Properties B.V. (Dutch), Novera Properties N.V. (Dutch) |
| **Respondent(s):** | Republic of Bulgaria (Bulgarian) |
| **Date Registered:** | July 3, 2012 |
| **Date of Constitution of Tribunal:** | December 13, 2012 |

### Composition of Tribunal

| | |
|---|---|
| **President:** | John M. TOWNSEND (U.S.) - Appointed by the Chairman of the Administrative Council |
| **Arbitrators:** | David D. CARON (U.S.) - Appointed by the Respondent(s)<br>Stephen M. SCHWEBEL (U.S.) - Appointed by the Claimant(s) |

### Party Representatives

| | |
|---|---|
| **Claimant(s):** | King & Spalding, New York, NY, U.S.A. |
| **Respondent(s):** | Minister of Finances, Sofia, Bulgaria<br>Tomov & Tomov, Sofia, Bulgaria<br>White & Case, New York, NY, and Washington, D.C., U.S.A. |
| **Language(s) of Proceeding:** | English |
| **Status of Proceeding:** | Concluded |
| **Outcome of Proceeding:** | August 27, 2015 - The Tribunal renders its award. |

Government says: **victory**

Legal counsel says:

- As co-counsel with White & Case LLP, we successfully represented the Republic of Bulgaria in the ICSID case Novera AD et al. v. the Republic of Bulgaria. The case involves a dispute arising out of waste management concession;

| | |
|---|---|
| October 20, 2014 - October 24, 2014 | The Tribunal holds a hearing on the merits in Washington, D.C. |
| December 5, 2014 | Each party files a statement of costs. |
| March 4, 2015 | The Tribunal declares the proceeding closed in accordance with ICSID Arbitration Rule 38(1). |
| June 24, 2015 | The Tribunal extends the period to draw up and sign its award. |
| August 27, 2015 | The Tribunal renders its award. |

**Yet, in 2021, still no excerpts on ICSID's website. Is ICSID disregarding its own rules? (*Arbitration Rule 48(4) requires 'prompt' publication of excerpts of legal reasoning*)**

**Arbitration Rule 43 on 'Settlement and Discontinuance':**

(1) If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary- General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.

(2) If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.

# *SGRF v Bulgaria*

***ICSID Case No. ARB/15/43***

## *April 2019*

Government says: **"SGRF withdrew its claim"**

Central bank says: **"This proves the legality of our actions"**

Pro-government media: **"We won the case!"**

ICSID's website: **"Case is pending"**

| | |
|---|---|
| June 25, 2018 | The Claimant files a reply on the merits. |
| November 8, 2018 | The Respondent files a rejoinder on the merits. |
| January 31, 2019 | Each party files a submission on costs. |
| February 28, 2019 | Each party files a second submission on costs. |
| June 3, 2019 | The Tribunal declares the proceeding closed in accordance with ICSID Arbitration Rule 38(1). |
| June 10, 2019 | The Respondent files a supplemental submission on costs. |

Yet, ICSID's rules do not allow a claimant to 'withdraw a claim' after it has been registered. There are options for discontinuance ➔ unilateral (Arbitration Rule 44), joint (Arbitration Rule 43), etc.

## *August 2019*

Government says: **"We have an Award. Bulgaria won the case"**

Central bank says: **"This proves the legality of our actions"**

*Paid campaign to announce/advertise the victory in the media*

ICSID's website:

| | |
|---|---|
| June 25, 2018 | The Claimant files a reply on the merits. |
| November 8, 2018 | The Respondent files a rejoinder on the merits. |
| January 31, 2019 | Each party files a submission on costs. |
| February 28, 2019 | Each party files a second submission on costs. |
| June 3, 2019 | The Tribunal declares the proceeding closed in accordance with ICSID Arbitration Rule 38(1). |
| June 10, 2019 | The Respondent files a supplemental submission on costs. |
| August 13, 2019 | The Tribunal renders its award. |

## *Arbitration Rule 43*

*(1) If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.*

*(2) If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.*

**Excerpts published only in February 2021:**

- Tribunal notes: 'both Parties agree that the Tribunal shall render an Award dismissing all of Claimant's claims "with prejudice" and deciding on the only pending dispute between the Parties, i.e. the issue of costs…'
- Costs attributed to claimant because "[w]here the principal claims in a case are withdrawn there is no winner and no loser in the way that there is in a case that proceeds to an adjudication on the merits'

**What happened?**

- Tribunal did not rule on merits, just on costs
- It rendered an award pursuant to Rule 43 dismissing all claims upon request of both parties

**The issue?**

- Rule 43 is not mentioned in the procedural details/ excerpts
- Clear settlement disguised as an award in favour of respondent

# Time for Greater Transparency!

- Prompt means prompt – timely publication of excerpts!
- In case of discontinuance, the concrete Arbitration Rule based on which proceedings were discontinued should be clearly indicated in the excerpts of the award + in the procedural details.
- Clearly label the outcome of each case!
- Is an award dismissing all claims upon the request of both parties equivalent to an award in which the tribunal actually ruled on the merits and found the claims unfounded? Time to curtail exotic legal constructs/solutions?

# Picking up the Tab: Commodification of Arbitral Claims/Awards

## Assignment of Investment Arbitration Claims/Awards

Gautam Mohanty

Rituparna Padhy

# Roadmap

1. How assignments can be structured
2. Distinct from TPF and subrogation
3. Ratione Personae
4. Ratione Temporis
5. Other legal considerations
6. Market Dynamics

# Structuring an Assignment

## COMPLETE SALE OF CLAIM

1. The contract which has an arbitration agreement is assigned; or

1. The arbitral claim is directly assigned.

## ASSIGNMENT OF COLLECTION RIGHTS

Made for the purposes of enforcing an existing/future potential arbitral award and collecting the sums.

## TPF: THE RISK IS ASSIGNED AND THE DAMAGES COLLECTED ARE SPLIT BETWEEN ASSIGNOR AND ASSIGNEE

Notably, assignor remains in control of the proceedings, though the influence of the funder may vary on the basis of the commercial arrangement.

# Assignment versus Third Party Funding & Subrogation

**Primary factor:**
***Control over the proceedings***

# Ratione Personae

- “Real” party to the proceedings
- Additional limitations - State consent

1. Blue Ridge Invs., LLC v. Republic of Argentina, 902 F. Supp. 2d 367, 375 (S.D.N.Y. 2012)
2. SODNOC v. Bharat Refineries Ltd., AIR 2007 Mad 251
3. Samincorp, Inc., 78 F.R.D. 504 (S.D.N.Y. 1978)

# Ratione Temporis

1. Which event marks the point of locus standi?
2. Is such determination of standing affected by later actions?
3. Impact of the assignment occurring before the proceedings are instituted and after the claims are filed

1. Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1
2. Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1

# Crucial Legal Considerations Before Assignment

## TREATY SHOPPING

**Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2**

## PUBLIC POLICY CONCERNS

**FG Hemisphere Associates v. Democratic Republic of the Congo and Others, HCMP 928/2008**

# PUBLIC POLICY CONCERNS

1. Enforcement of assigned award without the involvement of the assignor may raise legal issues.
2. Common law v. Civil law
3. Which party (whether the assignor or the assignee) may apply for recognition and enforcement of arbitral awards?

# Market Considerations

1. Do assignees always pursue arbitration or enforcement?
2. Do assignments encourage cross-border investment?

# The future ahead.

6th Annual LCF Conference, 2021

# Automation in Smart Contract Arbitration: Moving Towards New Conceptions of Procedural Fairness?


**Dr Sara Hourani**
Senior Lecturer in Law

School of Law
Middlesex University London


Middlesex University London

# Introduction

- Private dispute resolution on e-commerce platforms (ODR) >>
- ODR systems in public courts>>
- Remote arbitration hearings>>
- New technologies in dispute resolution (blockchain/smart contracts and AI)

# Smart Contracts Functioning

Seller

Wants To Sell

Asset

Wants To Buy

Buyer

No Third Party

Transaction Through

Smart Contracts

No Third Party

Contract Terms/Conditions Are Written Into Codes On Blockchain

Self Execution/Enforcement Of The Contract When Events Are Triggered

If Terms/Conditions Are Met


Sold

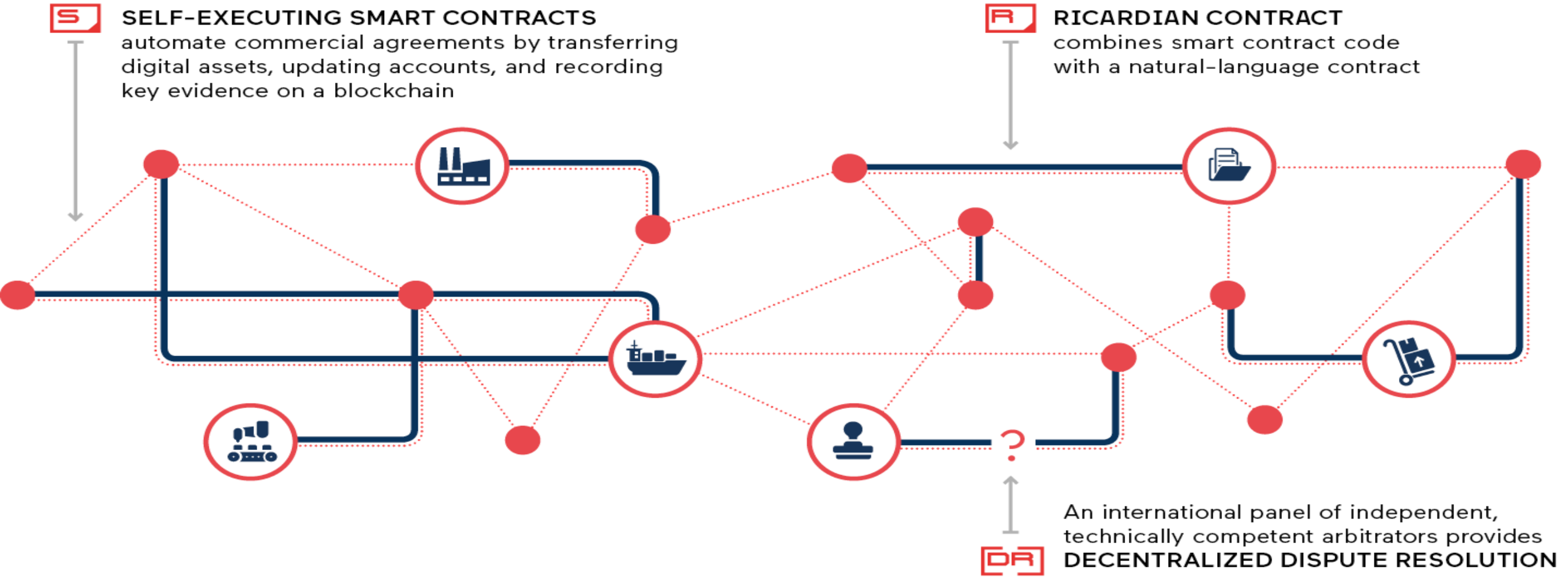
If Terms/Conditions Are Not Met

Cancelled

WallStreetMoj

# Why Blockchain Arbitration?

- Use of smart contracts in supply chain management (for example):



# Comparative Design Automation Analysis

| Provider | Type of Dispute Resolution (on chain/offchain) | Automation at beginning | Automation during proceedings | Automation at end of proceedings |
|---|---|---|---|---|
| **CodeLegit** | Arbitration (possible: on chain) | Yes (grace period given- parties are prompted) | No (not clear re document admin) | Yes (possible to not have it) |
| **Kleros** | Arbitration (crowdjustice system) (on chain) | Yes | No (not clear/possible) | Yes (reimbursement to winning party) |
| **Jur** | Arbitration (on chain and off-chain) | No | No (not clear re document admin) | Yes |
| **UK DDRR** | Arbitration/expert determination (on chain and off-chain) | Possible | No (not clear) | Yes |

# Fairness and Equity in Arbitration

- AT needs to respect rules of due process

- What is due process?

- Art 17 UNCITRAL Rules- parties to be treated with equality.
- Art 14(1)(i) LCIA Rules- give each party a reasonable opportunity of putting its case and dealing with that of its opponent.
- Section 33 English Arbitration Act 1996- mandatory provision.
- AT must base its decision on issues raised/heard by the parties.

# Legal and Fairness Considerations

➢ **Beginning of proceedings:**

- Automation can be fair if there is a system prompt to ask parties if they would like to proceed (there are limitations if there is an objection/error etc).

➢ **During the proceedings:**

- **Crowdjustice system/decentralised justice-** could affect right to an oral hearing. Question of right to an oral hearing.

- **Dutch case (ECLI:NL:GHAMS:2019:192):** blockchain-based proceedings that did not give the parties the chance to voice their arguments before the arbitral tribunal were not valid .

# Legal and Fairness Considerations

➢ **Automated enforcement of the award:**

- **NYC compliance-** no mention re communication/ submission of award.
- UK DDRR Rule 4- automatic dispute resolution.
- But question of compliance with national systems, and fairness standards (limitations under NYC).

# Conclusion

- Automation helps with more efficiency>>possibility to cut costs and deal with high volume, low value caseloads in a shorter timeframe (*e.g. the DDRR allow for the consolidation of multiple arbitration proceedings*).

- In compliance with some legal systems, not with others.

- Could affect fairness- e.g. cases of procedural challenge.

- New norms and procedural design.