8th Annual Conference on Investment Treaties

Investment treaties, the Paris Agreement and Net Zero: Towards alignment?

Preliminary draft agenda

11 April 2023, 9:30 -18:00 (CET)

OECD, Paris, France

Context: A Conference to take stock of government action, commitments and debates since the May 2022 OECD Conference on investment treaties and climate change

Governments at the OECD have initiated the first major multilateral effort to consider climate policies for investment treaties. This responds to growing demands to take action on the climate impacts of the investment treaty regime. In its 2022 report, for instance, Working Group III of the United Nations' Intergovernmental Panel on Climate Change (IPCC) expressed concern about the role of existing investment treaties and investor-state dispute settlement for fossil fuel regulation. As climate considerations increasingly permeate other areas of international economic governance – most notably within the world of finance, from central banks and securities regulators to export finance – climate concerns with an investment treaty regime closely associated with high-carbon investment have intensified.

The 2022 OECD Investment Treaty Conference considered the question of how to align investment treaties with the Paris Agreement and Net Zero. The 2023 Conference will return to consider those issues one year later, against a backdrop of growing climate action, new challenges and increasing public attention. The 2023 Conference will benefit from the government thinking and action prompted by and reported in the first-ever survey of climate policies for investment treaties. The Conference will thus support work within and across governments to incorporate climate commitments into their investment treaty networks and policies.

The Conference will be held in person with a degree of hybrid participation. It will be an important opportunity for joint work on key climate policies.

OECD work on the Future of investment treaties

Following a decade of inter-governmental work, in 2020, the OECD Investment Committee decided to launch broader government-led consideration of the Future of investment treaties with the regular participation of experts and stakeholders. The new work program was launched at the sixth annual OECD Investment Treaty Conference in March 2021.

With strong government support, one of the two tracks of the work program (Track 1) is focused on investment treaties and climate change.[1] A January-March 2022 public consultation on Investment treaties and climate change generated a broad range of analysis and proposals from different sources (Compilation of submissions). Together with the consultation, the 2022 Investment Treaty Conference, analytical papers, additional meetings between government and stakeholders, and the survey of climate policies for investment treaties have improved understanding and increased public interest.

Date, time and venue for the Conference

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1 Track 2 of the work program on the Future of investment treaties is considering whether it would be better if specific substantive provisions of older investment treaties were more similar to those used in newer treaties.

Background

Climate change is a defining challenge for government policy makers and our societies. What was once mainly considered an environmental issue now has existential economic and security implications.

Over 190 countries have signed the 2015 Paris Agreement, which establishes a global framework for combating climate change. The Agreement sets out two fundamental and innovative goals for government climate policies. First, governments set for the first time the clear objective of less than 2 degrees Celsius warming, with the stretch objective of 1.5 degrees. In the years since the Paris Agreement was signed, the need to limit warming to 1.5 degrees has become even stronger. In recent years, more than 130 countries have announced their ambitions to reduce emissions to net zero with many setting legally binding targets.

Second, governments expressly agreed on the objective to make "finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development". Paris Agreement, art. 2.1(c). This core objective, set out in the same article as the temperature goals, has two elements – a focus on finance flows and the aim to align them to low emissions. Art. 2.1(c) is the orienting goal for a concerted effort to align "all forms of finance – public and private, domestic and international – and all instruments", as underlined by the recent Report of the Independent High-Level Expert Group on Climate Finance.[2]

Investment treaties are government policies that promote very substantial fossil fuel and other high-carbon finance flows. The treaties typically make ad hoc arbitration in investor-state dispute settlement (ISDS) available to investors claiming injury from discriminatory or "unfair" government action; as of May 2022, over 230 ISDS cases involved fossil fuel-related investors – constituting close to 20% of the total known number of cases.[3] Seven of the ten largest ISDS damages awards against governments under investment treaties have involved fossil fuel investor claimants, each for over USD 1 billion and all in the last 15 years.[4]

In this context, Paris alignment of investment treaties may require urgent priority attention to alignment of the scope of covered investment and associated finance flows. Attention to coverage is important not only to align covered investment with low-carbon taking account of art. 2.1(c)[5], but also for climate "policy space"; continuing high levels of uncertainty about interpretation characterise the substantive protection provisions in many investment treaties – whether in long-standing formulations or untested new ones.

In the first session of the Conference, senior climate, energy and financial policy leaders will provide the latest analysis of the climate crisis, the Paris Agreement, Net zero alignment, emissions from different sectors and other developments relevant to investment policies.

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2 Songwe V, Stern N, Bhattacharya A (2022), Finance for climate action: Scaling up investment for climate and development. London: Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, p. 11.

3 Kyla Tienhaara, Rachel Thrasher, B. Alexander Simmons & Kevin P. Gallagher (2022), Investor-state dispute settlement: obstructing a just energy transition, Climate Policy, DOI:10.1080/14693062.2022.2153102

4 UNCTAD, Investment Dispute Settlement Navigator.

5 Gaukrodger D. (2022), Investment treaties and climate change: The Alignment of finance flows under the Paris Agreement.

The second session of the Conference will identify obstacles to Paris and Net zero commitments for investment treaty policies and how they might be addressed; to this end, it will compare the government action and finance flows associated with investment treaties with other policy areas.

The third session of the Conference will turn to the issue of immediate action and in particular the policy debate and proposals with regard to immediate carve-outs of coverage of fossil-fuel related investment. Recent proposed carve-outs and high-level public decisions to withdraw from investment treaties due to excessive fossil fuel coverage will be considered.

The fourth session will consider complementary policies and proposals for Paris and Net Zero alignment with a focus on climate policy space and treaty implementation mechanisms. While the current close association of investment treaties with fossil fuels and high-carbon investment may require immediate attention to sustain credible claims of alignment, the potential for greater investment treaty contributions to the energy transition and low carbon investment will also be considered.

Schedule

	Opening remarks

Session 1	**The climate crisis and climate commitments relevant to investment policy**

In this session, senior climate, energy and financial policy leaders will provide investment treaty policy makers with analysis of the climate crisis, the Paris Agreement and other government climate commitments. They will discuss the importance of emissions generated or supported by different economic sectors covered by investment treaties, and the development of net zero pathways. They will also describe recent climate policy action and developments relevant to international investment policy, and the urgency of broad-based and consistent climate action across different policy areas.

	Coffee break

Session 2	**Towards Paris Agreement and Net Zero alignment commitments?**

This session will identify obstacles to Paris and Net zero commitments for investment treaty policies and how they could be addressed. It will draw on insights and experiences from other actors and policy areas with influence on finance flows. The nature of government action at issue in investment treaty policies will be considered from the perspective of climate commitments.

Building on work to date at the OECD on art. 2.1(c) of the Paris Agreement and investment treaties, as well as increasing attention to art. 2.1(c) elsewhere, the discussion will consider the finance flows associated with investment treaties, their relation to climate policies and developments in finance flow alignment. The discussion will also draw on the 2022-2023 survey of climate policies for investment treaties.

	Lunch

Session 3	**Debating immediate action: Cutting back the promotion of new fossil fuel investment**

Climate action following Paris or net zero commitments by public and private financial actors includes immediate action in the short-term, normally focused on reducing the provision of services or support to high-carbon activities. Climate action today rather than tomorrow has major long-term climate benefits; delay is correspondingly harmful. The existence of easily-identified unaligned activities can facilitate immediate action, and the need for results by 2030 adds urgency.

Track 1 discussions have taken note of the proposed climate-based sectoral carve-outs and climate-based withdrawal from a major investment treaty due to continued excessive coverage and promotion of fossil fuels. This session will consider policy issues and proposals relating to climate-based carve-outs of fossil fuels.

	Coffee break

Session 4	**Complementary policies for Paris and Net Zero alignment: Climate policy space and investment treaty implementation mechanisms**

Climate action requires substantial regulatory change and faces substantial political economy hurdles: investment treaties should ideally encourage and at least not dissuade necessary government climate action. Attention to policy space and government incentives is thus important for remaining areas of sectoral coverage or for investment treaties with sectoral coverage not yet subject to any alignment.

This session will compare different approaches and proposals to address incentives for government climate action beyond sectoral coverage. The session will consider the potential role of implementation mechanisms for investment treaties in Paris and Net zero alignment. In addition, the recent development of treaty-based investment facilitation will be considered as an additional complementary policy from the perspective of the Paris Agreement.

	Concluding session

The concluding session will gather key ideas from the discussion and consider the way forward.