OECD

7th Annual Conference on Investment Treaties

Investment Treaties and Climate Change:

Paris Agreement and Net Zero alignment

Agenda

10 May 2022, 12:30 -16:00 (Paris time)

Virtual Conference

Register online

Context: A Conference that will contribute to on-going government, stakeholder and expert work at the OECD on investment treaties and climate change

The seventh annual OECD Investment Treaty Conference, to be held in an open format to provide an opportunity for broad public consideration, will address Investment treaties and the climate crisis. It will contribute to on-going government-led consideration of the Future of investment treaties under a recently-initiated work program at the OECD.

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.

The overriding importance of confronting the climate crisis forms a core part of the work, which will include a series of meetings under Chatham House rules over two years. The role of investment treaties, as well as alternative or complementary policy options, will be examined with regard to three goals:

- Contributing to sustainable development by encouraging sustainable investment and preserving sufficient policy space.
- Improving or maintaining market access including in key areas such as green and health technology.
- Considering a broader and flexible range of implementation mechanisms such as state-to-state dispute settlement with non-pecuniary or negotiated remedies, expert reports, dispute prevention, as well as implementation of possible business obligations or responsibilities.[1]

A January-March 2022 public consultation on Investment treaties and climate change has generated a broad range of analysis and proposals from different sources (Compilation of submissions). An April 2022 meeting under Chatham House rules dedicated to Investment treaties and the climate crisis has helped prepare for this Conference. While the work to date has principally focused on sustainability, work later in the 2022 will address market access and implementation mechanisms.

Date, time and venue

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Virtual Conference via Zoom → Register online

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[1] A second track 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 now almost universally 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.

The 2015 Paris Agreement includes two key innovations among many others. First, governments set the clear objective of less than 2 degrees Celsius warming, with the stretch objective of 1.5 degrees. It is generally recognised that to achieve 1.5 degrees, global greenhouse gas emissions will need to be 'net zero' by 2050. Second, governments expressly identified 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) (emphasis added).

In its 2021 report, the IPCC concluded that humanity may struggle to adapt to the consequences unless emissions are quickly reduced. "Any further delay in concerted anticipatory global action… will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all."[2] The report, approved by 195 governments, found that the dangers from climate change are bigger and unfolding faster than previously expected. Yet, global emissions continue to accumulate rapidly, with 2021 emissions expected to be only slightly lower than the record 2019 levels – while UNEP reports that a 55% reduction in emissions by 2030 en route to zero in 2050 is needed to remain on track.

The recognised urgency for public policy interventions has generated a broad range of government commitments to take action on climate, albeit with still limited effects on emissions to date. Attention has expanded from environment ministries to finance ministries, trade ministries, and central banks. Major economies have committed to integrate climate action across their foreign, security and trade policies. For example, in January 2021, the Council of the EU (composed of all EU Member State Foreign Ministers) stressed that the EU "will ensure that its trade policy and its trade agreements are consistent with its climate ambition,"[3] the coherent pursuit of external policy goals is identified as crucial for the success of the European Green Deal. In the United States, President Biden has announced a "whole-of-government approach to put climate change at the center of our domestic, national security, and foreign policy".[4] Further important climate commitments were made by many governments in the lead up to the UNFCCC COP26 in November 2021.

In 2019, leaders from Costa Rica, Fiji, Iceland, New Zealand and Norway launched the 'Agreement on Climate Change, Trade and Sustainability' (ACCTS) initiative, agreeing that achieving the Paris Agreement's goals requires using all policy levers, including "trade policy, rules and architecture", to drive the transformation to low-emissions, climate-resilient and sustainable economies.[5] The Beyond Oil & Gas Alliance (BOGA) is an international alliance of

2 IPCC Working Group II Sixth Assessment Report, "Climate Change 2022 – Impacts, Adaptation and Vulnerability – Summary for Policymakers".

3 European Council conclusions, 10-11 December 2020.

4 Remarks by President Biden Before Signing Executive Actions on Tackling Climate Change, Creating Jobs, and Restoring Scientific Integrity, 27 January 2021.

5 Joint Leaders' Statement on the launch of the 'Agreement on Climate Change, Trade and Sustainability' initiative (Sept. 2019). An October 2021 meeting of ACCTS Trade Ministers (also including Switzerland)" recognise[d] the need for urgent action to reach the Paris Agreement's long-term temperature goal". Joint statement: Agreement on Climate Change, Trade and Sustainability (ACCTS) Trade Ministers' meeting (October 2021).

governments and stakeholders, chaired by Costa Rica and Denmark, working together to facilitate the managed phase-out of oil and gas production in order to deliver on the Paris Agreement.[6]

However, even as the need to use every policy lever is recognised, the practical meaning of commitments to the Paris Agreement and making foreign and trade policies consistent with climate policies remains unclear with regard to investment treaty policies. In its two thematic sessions, this Conference will explore aspects of the possible alignment of investment treaty policies with the Paris Agreement.

A first discussion will consider Paris and net zero alignment from the perspective of the agreed art. 2.1(c) Paris Agreement objective to make finance flows consistent with a pathway towards low greenhouse gas emissions. The need for investment to address the climate challenge is enormous, but to be valuable investment must be consistent with climate needs. The discussion will consider approaches to the definition of covered investment and other investment treaty provisions relevant to the consistency of the finance flows promoted by investment treaties with a net zero pathway.

A second discussion will address the issue of the impact of investment treaties and their interpretation on government policy space and incentives to engage in climate policies. In light of specificities of the climate context including the Paris Agreement, the discussion will examine recent reforms and reform proposals, and whether investment treaties could play a growing role in strengthening domestic climate policies.

Schedule

12:30 – 12:35	**Opening remarks**
	Carmine Di Noia, Director, OECD Directorate for Financial and Enterprise Affairs
12:35 – 12:45	**Overview by Prof. Lauge Poulsen, Chair of OECD meetings on Investment treaties and Climate change**
	As noted above, the Conference will contribute to on-going government-led consideration of the Future of investment treaties and the work on climate change in that context. The Chair of the discussions under Chatham House rules will provide an overview of work so far, the themes for consideration during the Conference and further elements to be integrated into the climate-related discussions going forward.
12:45 – 13:25	**A Climate Conversation with Roger Cox and Philippe Sands**
	This session, moderated by Emiliya Mychasuk, Climate Editor at the Financial Times, will allow participants to benefit from insights on climate policy from two leading figures in climate policy and law. Roger Cox, a Dutch lawyer, has been the lead lawyer in ground-breaking climate cases including Urgenda v. The Netherlands and Milieudefensie v. Shell. He is the author of Revolution Justified.

6 Beyond Oil & Gas Alliance, Redefining Climate Leadership.

Philippe Sands QC is the author of seventeen books on international law, including Principles of International Environmental Law (1995, 2003, 2012, and 2019), and East West Street: On the Origins of Genocide and Crimes against Humanity (2016). He has been an arbitrator in a number of ISDS cases and frequently appears in major cases before international courts. He is Professor of Laws and Director of the Centre on International Courts and Tribunals at University College London.

13:25 – 14:30 **Paris Agreement and Net Zero alignment of finance flows associated with investment treaties**

This session will consider the application to investment treaties of the Paris Agreement – and in particular the agreed objective to make "finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development". Paris Agreement, art. 2.1(c) (emphasis added).

Investment treaties directly address and promote finance flows. Treaty-covered investors (counterparties) are frequently financial investors. Shareholders are covered. Lenders are often covered. More broadly, international transfers of capital are the trigger for application of investment treaty provisions. All such transfers involve finance flows. The evolution of ISDS has also generated its own set of finance flows.

Investment treaty coverage is currently unaligned with emissions and often includes finance flows associated with high-carbon activities. For example, over 100 ISDS cases and seven of the top ten USD 1 billion-plus damages awards involve fossil fuel interests.[7]

Led by the Financial Stability Board (FSB) and its Task Force on Climate Disclosure (TCFD), governments, business and many others have intensively focused their work since the Paris Agreement on finance flows and the climate. Recently, better disclosure and a heightened sense of urgency have led to growing public and private sector commitments to net zero and Paris alignment. Mark Carney, former governor of the Bank of England and chair of the FSB, has pointed to the growing centrality of net zero:

> *Since Paris, the concepts of Net Zero, Paris Aligned, and a 1.5 degree target have moved from the climate cognoscenti into the mainstream. Net zero is now an organizing principle that is cascading from the global to the country and the company… The combination of forward-looking climate disclosure, net zero plans, and portfolio alignment metrics will pull forward investment, especially if there are credible and predictable climate policies from governments.*[8]

Government net zero commitments have advanced from 30% of emissions in 2019 to over 85% percent today.

For financial actors that influence finance flows – such as insurers – climate accountability and net zero are based on their portfolios. For example, UN Secretary General António Guterres has insisted on the need for net zero alignment of insurance portfolios: "We need net zero commitments to cover

7 See UNCTAD, Investment Dispute Settlement Navigator.

8 Mark Carney, Clean and Green Finance: A new sustainable financial system can secure a net zero future for the world, Finance and Development (IMF) (Sept. 2021).

your underwriting portfolios, and this should include the underwriting of coal -- and all fossil fuels." Members of the UN-convened Net-Zero Insurance Alliance (NZIA), launched in mid-2021, have committed to transition their respective insurance and reinsurance underwriting portfolios to net zero and to set science-based targets every five years.

Following criticism from parliaments, business organisations, academics and NGOs, a broad range of national export credit agencies (ECAs) are committing to end insurance and other support for certain projects involving coal, to apply the TCFD framework to their portfolios or to achieve net zero. ECAs have recognised their responsibility for their financed and insured emissions. For example, UK Export Finance recognises that "[UKEF's] biggest greenhouse gas emissions impact is from … the emissions produced from the support we provide through our lending, guarantees and insurance products. We collectively refer to these as our portfolio emissions."

These efforts target the climate alignment of counterparties in portfolios – encouraging the green transition by business - and are unconnected to government policy space for regulatory action.

Investment treaties are frequently seen as functionally equivalent to political risk insurance provided by insurance companies and ECAs. As a conceptual matter, pursuant to investment treaties, governments make financial payments to individual institutional units that are exposed to certain risks upon the occurrence of specified events.

As other public sector financial actors that provide insurance services are seeking to align with the Paris Agreement and net zero, attention to net zero may also be overdue for investment treaties. Recent editorials and articles in the business press have explicitly called for a rethink of investment treaty policies seen as interfering with the alignment of finance flows with climate goals:

> *The prospect of "bailing out" fossil fuel projects risks disincentivising the steps needed now, from both markets and government, to secure swift decarbonisation. … As figures from Mark Carney to John Kerry have made clear, any hope that we have of transitioning away from carbon at the necessary pace will rely on private markets. Capital must be allocated quickly towards renewables. … [G]overnments will confuse things if they pay up in a way that means fossil fuels cannot lose. While renewables will remain the safe play long-term, the pace of capital's shift away from fossil fuels may decrease.*[9]

The discussion in this session will consider whether portfolios of counterparties in investment treaties need to be aligned with the Paris Agreement and net zero, current degrees of alignment of portfolios as seen by governments, experts and stakeholders, and possible areas for action. The discussion can include consideration of the comparative importance of Paris alignment for governments and for private entities.

A Secretariat background note for this session will be made available on the Conference website.

[9] Financial Times editorial board, Governments should not foot the bill for stranded assets: Treaties that lead to fossil fuel bailouts need a rethink (21 Feb. 2022).

	Issues for discussion • Should governments commit to Paris and net zero alignment of their investment treaties? Is the absence of climate quality criteria or underwriting a necessary component of investment treaty policies? • What lessons can investment treaty policy makers draw from the net zero alignment activities of other actors with influence on finance flows? • What steps would be needed for better or complete Paris and net zero alignment of investment treaties in the short term and medium term?
Moderator	**Lauge Poulsen**, University College London
Speakers	**Jessica Green**, University of Toronto **Butch Bacani,** Programme Leader, UNEP Principles for Sustainable Insurance Initiative **Philipp Censkowsky**, Perspectives Climate Group **David Gaukrodger**, OECD

14:30 – 14:40 ***Coffee Break***

14:40 – 15:50 Investment treaties and policy space for climate policies

In its April 2022 report, Working Group III of the United Nations' Intergovernmental Panel on Climate Change (IPCC) expressed concern that much of international governance still promotes fossil fuels and pointed to the impact of investment treaties on policy space.[10]

The discussion in this session will principally examine recent reforms and reform proposals on policy space taking account of specificities of the climate context. It will also consider whether investment treaties could play a role in strengthening domestic climate policies.

The policy space debate over investment treaties is long-standing and stated positions can appear entrenched even as treaty networks evolve. Several climate specificities, however, may invite revisiting some elements of the debate: (i) there is a recognised need for many profound and rapid regulatory changes to address the climate crisis; (ii) the long-term nature of many climate threats, powerful lobbies and a range of other factors make the political economy of climate measures particularly challenging; and (iii) emissions anywhere have global impact. Each government concerned with climate change has an interest in the entire network of more than 2,500 investment treaties.

A first climate-specific question for consideration with regard to policy space is whether the Paris Agreement may bear on high or excessive levels of investment treaty interference with climate policy space. The need to integrate the Paris Agreement into policies may invite reconsideration and reporting on attitudes to requests from treaty partners for climate policy space or requests for renegotiation of treaties to increase climate policy space. It may also call into question the traditional passivity of many governments with broad treaty networks with regard to expansive arbitral interpretations in claims involving other governments.

10 See Working Group III Contribution to the IPCC Sixth Assessment Report, IPCC AR6 WG III (April 2022), sections 14.5.1.3 and 14.5.2.2.

Second, the climate context may invite more intensive efforts to identify possible objective criteria to evaluate government claims that at least some treaties successfully achieve a clear preservation of sufficient policy space for climate measures. Possible general benchmarks for consideration in the discussion could include (i) whether stated risks are sufficiently clear to be insurable in the private sector insurance market; or (ii) an evaluation of government confidence in exposing climate policies to ISDS under the standards at issue as revealed by the evolution of treaty networks. Neither angle is conclusive, but they may provide additional perspectives on a critical issue.

Preferential treatment is a third area where climate specificities may justify particular action. Investment treaties are frequently interpreted in ISDS to provide preferential treatment for covered investors over domestic investors, for example for shareholders. From a political economy perspective, domestic interests may seek to block or delay valuable non-discriminatory climate action if it is seen as likely to generate special compensation for covered foreign investors alone. Domestic companies may fear impact on their competitiveness or even survival. Voluntarily improving the treatment of domestic investors to expected ISDS standards to achieve support for necessary climate policies may be possible for some wealthy states, but may be politically or financially unfeasible for many others.

Recent treaty practice and the January-March 2022 public consultation have shed light on proposed and recent reforms that address policy space. These include the use of State-to-State dispute settlement (SSDS) rather than ISDS either generally or for claims under FET and other potentially broad provisions; carve-outs from ISDS for bona fide climate measures, activated by joint government or expert action; modified remedies including non-pecuniary remedies or caps on damages; or greater attention to exclusion clauses. To address the need for impact on emissions by 2025, proposed immediate actions such as joint interpretations of FET or other clauses frequently used for claims have also been proposed.

Investment treaties may also play a growing role in strengthening domestic climate policies. In a competitive market for investment, governments may have an incentive to maintain weak regulatory standards or enforcement, or resist improved regulation, if they consider that this may help attract or keep certain business activities. This can affect the global interest in climate policies. Commitments to the Paris Agreement have become important components of some recent treaties and negotiations.[11]

Issues for discussion

- How do the specificities of climate affect consideration of policy space issues?
- What reforms have been proposed to provide greater policy space for climate-friendly policies? How can climate-friendly policies be identified?
- What new policies have governments included in their treaties to address concerns about policy space? Do these take account of climate

11 The EU-UK Trade and Cooperation Agreement (TCA) is the first trade and investment agreement to make explicit that withdrawal from the Paris Agreement by one Party would permit the other Party to partially or completely suspend or terminate the treaty. See European Commission, EU-UK Trade and Cooperation Agreement – Questions and Answers, p. 15, available at Questions & Answers: EU-UK Trade and Cooperation Agreement (europa.eu).

	specificities? How effective have they been? Are new policies under consideration?
Moderator	**Federico Ortino**, King's College London
Speakers	**Anne van Aaken**, University of Hamburg **Joshua Paine**, University of Bristol **Suzy Nikiema**, IISD

15:45 – 16:00	**Concluding session**
	This session will gather themes from the discussion and identify possible areas for action. It will also outline how work at the Conference will be carried forward.
Speakers	**Lauge Poulsen**, University College London **Andrew Prag**, Senior Project Manager - Horizontal Project on climate and economic resilience, Environment Directorate, OECD **Ana Novik**, Head of Investment Division, OECD

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