

OECD**Public consultation on investment treaties and climate change**

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We would like to congratulate the OECD Investment Committee on launching this public consultation. We are pleased to share our reflections on how investment treaties can be improved, in order to ensure better consistency with climate policies.

We are two postdoctoral researchers at the Faculty of Law at the University of Copenhagen, researching the role of international investment law and human rights in enhancing climate action. In our work, we explore the role of human rights as a tool to foster the integration of climate considerations in investment treaties and investment arbitration. Responding to this public consultation, we would like to share our proposals to support the important work carried out by the OECD Investment Committee on the future of investment treaties.

As a starting point, we would like to note that international investment treaties, while often considered an obstacle to climate action,³ can also be a powerful enabler for the achievement of international climate goals. Article 2(1)(c) of the Paris Agreement requires that finance flows be consistent with a pathway towards low greenhouse gas emissions and climate-resilient development. By providing for regulatory stability and predictability, international investment law can support the achievement of this goal, and foster the allocation of capitals by private investors towards climate-friendly projects. In this connection, the potential of investment law is well exemplified by the numerous claims brought under the Energy Charter Treaty by investors in renewable energy, in response to retroactive policy changes in renewable energy support schemes.⁴

At the same time, in their current form international investment treaties are not well equipped to respond to the need for decarbonization, which is largely due to the lack of distinction between the protection of carbon-intensive and climate-friendly investments. Therefore, investment agreements can be invoked also by companies aiming to defend their investments in carbon-intensive sectors, which may be negatively affected by climate policies.⁵ This is

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³ See, for instance, Kyla Tienhaara, 'Does the Green Economy Need Investor-State Dispute Settlement?' in Kate Miles, *Research Handbook on Environment and Investment Law* (Edward Elgar Publishing 2019).

⁴ See, among many others, *The PV Investors v. Spain*, PCA Case No. 2012-14; *Eskosol v. Italy*, ICSID Case No. ARB/15/50.

⁵ This lack of differentiation between sustainable and unsustainable investments has been addressed by the proponents of a 'Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation'. See Martin Dietrich Brauch and others, 'Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation: Aligning International Investment Law with the Urgent Need for Climate Change Action' [2019] *Journal of International Arbitration* 7.

demonstrated by the recent claims brought by investors Uniper and RWE against The Netherlands, in response to the adoption of a national coal phase-out policy.⁶

In order to address these challenges, it is essential to increase the role of public participation in investor-State dispute settlement, to expand regulatory space for climate measures, and to enable counterclaims by host States against investors based on climate change obligations. With regard to all the three areas, human rights law can serve as an important tool to contribute to the greening of investment treaties

Public participation

First, better alignment between climate goals and investment treaties can be achieved by strengthening the possibility for public participation in investor-State disputes, especially in the form of amicus curiae briefs. This concern should be taken into particular consideration in the context of the ongoing negotiations for Investor-State Dispute Settlement Reform, within UNCITRAL Working Group III. In this connection, it is useful to take note of examples arising from human rights-based climate litigation. Amicus curiae briefs submitted by interest groups and experts are frequently admitted in such claims. Examples can be found in several jurisdictions, such as in *Duarte Agostinho and others v Portugal and others*,⁷ currently pending before the European Court of Human Rights, as well as in *Future Generations v Ministry of the Environment and Others*, decided by the Supreme Court of Colombia.⁸ Amicus curiae briefs can be crucial in providing scientific evidence regarding the link between a state's GHG emissions and the impacts of climate change, the understanding of which non-specialised judges and adjudicators may otherwise lack. By contrast, the admissibility of amicus curiae briefs is much more challenging in international investment disputes. For instance, in the recent case *Odyssey Marine Exploration v Mexico*, an amicus curiae brief submitted by the Center for International Environmental law (CIEL) has been declared inadmissible by the tribunal.⁹ The introduction of amicus curiae briefs can be particularly important in disputes concerning climate change, given the need to ensure that adjudicators develop a sound understanding of climate science. In a matter like climate change, where science is fundamental to the adoption of appropriate policy responses, an understanding by investment adjudicators of the relevant scientific background can ultimately lead to more climate-friendly outcomes. Therefore, in order to enhance consistency with climate goals, facilitating amicus curiae interventions in investment disputes should be a priority in the ongoing efforts to reform investor-State dispute settlement.

⁶ See, respectively, *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22; *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4.

⁷ *Duarte Agostinho and others v Portugal and others*, European Court of Human Rights, ECHR Application No. 39371/20.

⁸ *Future Generations v. Ministry of the Environment and Others*, Supreme Court of Colombia, Case n. STC4360-2018.

⁹ *Odyssey Marine Exploration v Mexico*, ICSID Case No. UNCT/20/1.

Expanding regulatory space for climate policies

Over the last two decades, provisions ensuring regulatory space for environmental measures have found their way into more investment treaties. Although in several treaties references to the environment are not legally binding,¹⁰ a number of agreements also contain substantive provisions that explicitly make room for a right to regulate to protect the environment. For example, Article 2.2. of the 2019 Dutch Model BIT provides that ‘The provisions of this Agreement shall not affect the right of the Contracting Parties to regulate within their territories necessary to achieve legitimate policy objectives such as the protection of public health, safety, environment [...]’.¹¹ Yet, even in such cases, it is difficult for a State to justify normative measures adopted on climate grounds when they impact foreign investments. This is largely due to the fact that the Paris Agreement does not impose climate change mitigation targets for specific countries or specific sectors, despite the binding 2°C (aiming at 1.5°C) temperature goal.¹²

Hence, claims like those brought by the investors Uniper and RWE raise the important question of how States can justify the measures that they take as part of their coal phase-out policy. This question is independent of whether the agreement under which the disputes are raised, in those two cases the Energy Charter Treaty, confers the right to regulate for environmental purposes on states. In fact, analogous challenges would arise if claims were raised under an agreement explicitly providing for a similar right, such as the Dutch Model BIT under its Article 2.2. This is because of the lack of sufficiently precise obligations in international climate agreements, which undermines the possibility for host States to argue that a specific climate measure, which may impinge upon investors’ rights, is required for compliance with international obligations.

Conversely, more specific obligations for climate change mitigation can be constructed on the basis of international human rights law. While the core international human rights treaties do not contain any provisions explicitly on climate change, human rights law has been undergoing a greening over the last two decades. As such, it is now well established that human rights law imposes obligations on states with respect to climate change. In particular, human rights litigation has been used to elaborate states’ obligations to mitigate climate change. A prominent example is given by the *Urgenda* case, in which the Dutch Supreme Court found that the Dutch state was required to reduce its GHG emissions by at least 25% by 2020 compared to 1990 levels. Human rights turned out to be decisive in the Supreme Court’s judgment, as it found that the rights to life and private and family life entailed an obligation on the State to take preventative mitigation measures to prevent interferences with those rights.

Given this use of human rights law to flesh out mitigation obligations, human rights provisions in investment treaties can play a pivotal role in climate-related investment arbitration. However, the current practice of investment arbitration tribunals indicates a widespread reluctance to take normative instruments beyond the applicable investment treaty, as well as

¹⁰ See Kathryn Gordon and Joachim Pohl, ‘Environmental Concerns in International Investment Agreements: A Survey’, vol 2011/01 (OECD 2011) OECD Working Papers on International Investment 2011/01 11.

¹¹ Netherlands Model Investment Agreement (2019).

¹² Paris Agreement, Article 2.1(a).

decisions by domestic and international courts and tribunals, into consideration.¹³ Consequently, when assessing possible options for investment treaty reform, it is key to ensure that international legal instruments beyond investment treaties, and particularly international and regional human rights treaties, can be taken into account to a greater extent in investment disputes.

Climate-related counterclaims

A final option to strengthen the consistency between climate change and investment law is by expanding the possibilities for States to bring counterclaims against investors, due to the harm caused by the GHG emissions of the latter. Indeed, this possibility is primarily exploratory at present, given that investors do not typically have any obligations to reduce or limit their GHG emissions. Nevertheless, human rights-based climate litigation again send encouraging signals. In *Milieudefensie v. Shell* a Dutch court found, for the first time and by relying on human rights arguments as interpretative aid, that specific GHG emissions targets can also be imposed on corporate actors.¹⁴ While this decision is currently an outlier, it is plausible that similar climate lawsuits against private companies will be brought in coming years in other jurisdictions. Indeed, in light of the business and human rights movement, corporate human rights responsibilities have become increasingly accepted at the international level. Therefore, should it become more established in human rights jurisprudence that private investors have specific obligations with regard to climate change mitigation, it will be important to ensure that similar outcomes also be transposed into international investment disputes. This might enable States to raise counterclaims against investors.

In order to reach this objective, it will be important to expand the possibility for States to invoke investors' human rights obligations in their counterclaims. So far, this has rarely been the case in the jurisprudence of investment arbitration tribunals, with the notable exception of the dispute *Urbaser v. Argentina*, in which the arbitral tribunal admitted a counterclaim by the State, based on the investor's human rights responsibilities.¹⁵ Therefore, further enabling States' counterclaims against investors is an important aspect, on which efforts to futureproof investment treaties should focus. Doing so would have a twofold set of advantages, also in the context of climate action. First, it might deter investors from challenging States' climate measures at all, in order not to be targeted by potential host State's counterclaims. Second, it would increase investors' accountability for GHG emissions that are not consistent with international and national climate policies.

¹³ See, for instance, the dismissal of objections based on the European Court of Justice's *Achmea* and *Komstroy* decisions, for example in *Mainstream Renewable Power Ltd and others v. Federal Republic of Germany*, ICSID Case No. ARB/21/26, Decision on Respondent's Application under ICSID Arbitration Rule 41(5); *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on the Kingdom of Spain's Request for Reconsideration.

¹⁴ See Harro van Asselt et al, 'Shell-shocked: a watershed moment for climate litigation against fossil fuel companies', in CCEEL blog, 28 May 2021 <<https://sites.uef.fi/cceel/shell-shocked-a-watershed-moment-for-climate-litigation-against-fossil-fuel-companies/>>.

¹⁵ *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, para. 1155. However, it ought to be noted that the counterclaim was ultimately rejected by the tribunal, concluding that the relevant legal obligations under human rights law could not be construed as binding for the private investor.