High-level International Investment Agreements Conference 2023

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The challenge

Climate change is a comprehensive global challenge with integrated ecological, social and economic dimensions. The Paris Agreement reflects the global commitment to tackle this challenge. Supporting its implementation requires aligning all areas of public policy with climate goals; investment treaties are no exception.

There are structural misalignments between climate policy and the investment treaty system. For example, the Paris Agreement calls for "making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development"; but investment treaties protect all covered investments and do not differentiate between high and low-carbon activities.

In addition, most investment treaties set high standards of investment protection, partly resulting from the ways in which arbitral tribunals have interpreted them. The Intergovernmental Panel on Climate Change noted that this can make it more costly, and thus difficult, for States to take climate action, with measures potentially shelved or delayed, in full or in part. The large amounts often awarded in damages can also divert public funding from investments in the energy transition and climate resilience.

Reform approaches

Addressing these misalignments requires deepening and accelerating investment treaty reform. This involves dealing with the stock of over 2,500 treaties currently in force. Existing policy proposals include climate change or fossil fuel carve-outs, all the way to the coordinated termination of older treaties negotiated without consideration of climate change.

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[1] Head of Programme – Law, Economies and Justice. For fuller discussion, see Lorenzo Cotula, "International Investment Law and Climate Change: Reframing the ISDS Reform Agenda", 24(4–5) *Journal of World Investment & Trade* 766–791, https://brill.com/view/journals/jwit/24/4-5/article-p766_9.xml.

Taking the climate challenge as the starting point also raises a number of questions for consideration when developing any new treaties. First, it highlights questions about the policy objectives – what is the aim of concluding the treaty and how does it advance climate action? Addressing these questions may involve reflecting on investment policy through the prism of the "just transition" and can inform the preamble or an objectives clause of any new treaty.

Second, a climate perspective highlights questions about the types of investment to promote and regulate in pursuit of these policy objectives, for example with the treaties more explicitly differentiating between climate-harmful and climate-friendly investments.

Third, it involves identifying the empirically documented obstacles that constrain climate-friendly investments, and the policy responses that are most effective in overcoming those obstacles. In this way, treaty provisions would be tailored to specific, concrete problems rather than preconceived assumptions about investment protection.

Insofar as investment protection is part of the policy response, a climate perspective entails ensuring that any investment protection standards safeguard the right and duty of States to regulate in the public interest.

Finally, a climate perspective raises questions related to the terms of investments – from how to ensure compliance with rigorous social and environmental standards, to facilitating access to technologies needed for the low-carbon transition.

Moving forward

International investment law is a decentralised system primarily based on bilateral and regional treaties. But effective responses need collective thinking, open dialogue and coordinated action. This requires nurturing multilateral spaces to explore and implement policy change beyond the confines of existing reform processes.

There is also a compelling case for creating stronger synergies with climate policy processes and addressing investment treaty issues in United Nations climate talks. The climate challenge requires re-embedding discussions about investment treaties within a policy space that places climate at its centre.