

Task Force 3: Environment, Energy and Sustainable Development

Ending the Era of Investor-State Dispute Settlement

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Key Points

- Governments need policy space to effectively address concerns about competitiveness, ensure economic security and increase investment in low-carbon industries.
- International investment agreements (IIAs) enforced through investor-state dispute settlement (ISDS) constrain policy space.
- A growing number of ISDS cases concern energy policy and the threat of further cases could deter governments, particularly but not only in the Global South, from regulating many strategic and carbon-intensive sectors.
- G7 countries, many of whom have already expressed concerns about ISDS, should initiate the negotiation of a plurilateral agreement aimed at removing ISDS from IIAs.
- The G7 countries, as significant participants in the IIA regime, are well positioned to demonstrate leadership on this issue, and in so doing can modernize investment rules, reduce distortions and establish a new basis for global investment governance.

Statement of the Issue

Most of the world's countries have renewed their interest in leveraging industrial policies to address concerns about global competitiveness, economic security and much needed investment in low-carbon technologies. Indeed, to combat climate change, the world needs rapid, diverse and experimental action by all nations, regardless of development or income level. To enable such action, the current international investment regime must be overhauled to remove obstacles to policy change and facilitate economic restructuring toward more regional and local production in the new low-carbon economy. At the core of the regime, which is composed of thousands of international investment agreements (IIAs), is a problematic enforcement mechanism known as investor-state dispute settlement (ISDS). ISDS cases have consistently posed threats to countries regulating in accordance with their domestic priorities. Moreover, cases related to the energy investments are on the rise and the monetary awards against states that may accrue as a result are substantial. Experts across international organizations, national governments and academic institutions have argued that the investment regime is not fit for the purpose of managing today's global economy and especially the energy transition.

What Is ISDS?

ISDS allows foreign investors to bring claims directly against a host state when new policies or regulations affect the value of their investment or undermine their expectations. Foreign investors invoke vague provisions in IIAs, claiming that new regulations amount to 'indirect expropriation' and violate 'fair and equitable treatment', before three arbitrators chosen by the parties. When these arbitrators find a treaty breach, they typically direct the state to pay damages to compensate the investor for the full value of the investment. This is often calculated using the controversial and highly speculative Discounted Cash Flow (DCF) method of valuation (Bonnitcha and Brewin 2020; Boué 2023). The average award (pre-interest) over the last decade was US\$385 million (UNCTAD 2024). For cases involving oil and gas or mining investments, the average award was US\$609 million and US\$527 million

respectively in the period 1990-2022 (Clemence and Damji 2023). The sizes of these awards have been criticized for their excessiveness and crippling impact on respondent states (Bonnitcha and Brewin 2020; Paparinskis 2021). ISDS has also been critiqued for being secretive, excluding relevant stakeholders, overlooking conflicts of interest, producing inconsistent rulings, and lengthy and costly proceedings (Van Harten, Porterfield and Gallagher, 2015; Bonnitcha, Poulsen and Waibel 2017).

Policy Flexibility and Sovereignty

In the last decade, the number of ISDS cases has more than doubled (UNCTAD 2024). Investors involved in extractive industries and the energy sector are the most frequent users of ISDS (UNCTAD 2024). It is widely anticipated that the number of disputes in these sectors will grow, with the law firm Freshfields (2023: 17) noting that “disputes flourish in times of transition.”

Several investors have already challenged policies related to the energy transition. The Netherlands, Germany, Canada and Australia have been sued over coal power phase-out policies or rejections of proposed power plants (*RWE v Netherlands* 2021; *Uniper v Netherlands* 2021; *AET v Germany* 2023; *Westmoreland v Canada* 2020 and 2023; *Zeph Investments v Australia IV* 2024). Canada and Australia are facing cases related to coal mining (*Riversdale Resources* and *Hancock Prospecting v Canada* 2024; *Zeph Investments v Australia II* 2023 and *III* 2024). Canada is also defending the decision to reject a proposed LNG terminal (*Ruby River v Canada* 2023), and the US has faced two cases related to the Keystone XL oil pipeline (*TC Energy v USA* 2021; *APMC v USA* 2023).

There have also been at least 123 ISDS claims brought by renewable energy investors (UNCTAD 2024). In many of these cases, investors have challenged government management and modification of economically unsustainable incentive programs. Spain, Italy, Bulgaria, Romania and the Czech Republic have all faced similar suits (e.g., *Tubo Sol v. Spain*, *Encavis v. Italy*, *ACF Renewable Energy v. Bulgaria*, *LSG Building Solutions v. Romania* and *Antaris v. Czech Republic*) (Thrasher 2019). This illustrates that, through ISDS, investors will seek to defend their bottom line against policies that states implement for financial stability, public health and safety as well as environmental regulations.

It is anticipated that the number of ISDS cases challenging climate-related industrial policies will rise as governments begin to take more direct supply-side action to address the climate crisis. In a study published in *Science*, we estimated that cancelling upstream oil and gas projects that are not aligned with a 1.5°C pathway could cost governments upwards of US\$340 billion in ISDS claims (Tienhaara et al. 2022a). Indeed, legal firms and third-party funders have highlighted that climate policy cases are a growth area for the arbitration industry (Norton Rose Fulbright 2021; Freshfields 2023; Burford Capital 2024) and a prominent lawyer has suggested that many investors (and their counsel) see ISDS as a means by which they can *profit* from government action on climate (Kahale 2022).

Uncertainty around ISDS outcomes can lead governments to delay, modify or abandon policy action. For example, in 2017, the Canadian oil firm Vermillion threatened the French government with an ISDS case over a law aimed at ending hydrocarbon extraction in the country (Sachs, Johnson and Merrill 2020). The law was subsequently weakened (Vaudano,

2018). Additionally, New Zealand's former climate minister has acknowledged that the country did not take more aggressive action to phase-out oil and gas production, in part, due to concerns about potential ISDS claims (Meager 2022). Spain, the target of 50 claims by renewable energy investors over modifications to subsidy schemes in the face of financial crisis, has suggested that ISDS "serves to discourage States from promoting energy transition policies for fear of being sued by a foreign investor" (quoted in Boyd 2023).

What is more, countries in the Global South, including those highly vulnerable to climate change, are particularly exposed to ISDS risks (Tienhaara et al. 2022b). The substantial costs associated with defending a case in ISDS also makes the potential for regulatory chill higher in states with substantial debt and fiscal constraints.

The Role of the G7

In response to ISDS claims, G7 countries have taken steps to defend their policy space. Canada and the US excluded ISDS from their relationship under the US-Mexico-Canada Agreement (USMCA). France, Germany, Italy and the UK have all withdrawn (or have indicated that they will do so) from the Energy Charter Treaty (ECT), in part based on its incompatibility with policies such as the EU Green Deal (European Commission 2024; UK Government 2024).

While not every member of the G7 has the same priorities, all members have been stout defenders of their own regulatory freedom to preserve economic sovereignty and stability. To meet the needs of the current global economy and align with increasing use of industrial policies to address the climate crisis, the G7 must now extend this work and reform their investment treaties with partners in the Global South.

The G7 is well positioned to take leadership on this issue. Almost 25% of all IIAs currently in force involve a G7 country (see Table 1). Of the G7 countries, only Japan does not feature in the top 10 home states of investors (see Table 2). For countries with ambitious climate goals, it is also important to highlight that treaties involving G7 countries are currently protecting at least a gigaton of carbon dioxide equivalent (CO₂e) of potential annual greenhouse gas (GHG) emissions (Lee and Dilworth 2024) (see Table 3).

Table 1: IIAs (in force) with G7 members as parties

Member	Total	BITs	TIPs
Germany	177	114	63
France	147	84	63
Italy	115	52	63
United Kingdom	111	85	26
United States	94	39	55
Japan	59	36	23
Canada	56	37	19
Total (no duplicates)	625	447	178

Source: based on data from UNCTAD's International Investment Agreement Navigator (accessed 10 Feb 2025). BITs = bilateral investment treaties, TIPs = treaties with investment provisions.

Table 2: G7 members as home state of investor in ISDS cases

Rank	Member	#ISDS cases
1	United States	232
3	United Kingdom	109
4	Germany	84
6	Canada	68
7	France	67
8	Italy	51
42	Japan	6

Source: based on data from UNCTAD's International Investment Dispute Settlement Navigator (Accessed 3 Feb 2025).

Table 3: GHGs associated with G7 IIA-protected fossil fuel assets

Member	GHGs (Mt CO ₂ e)
United Kingdom	255
Japan	215
France	188
United States	171
Italy	92
Germany	63
Canada	26

Source: Lee and Dilworth 2024

Recommendations

All G7 countries recognize the importance of preserving policy space to effectively address their own domestic priorities – including increasing competitiveness, economic security and investment in low-carbon industries. Most countries also recognize the importance of aligning the investment regime with the Paris Agreement. In a recent speech, Mary Robinson, former President of Ireland and Chair of The Elders, noted that “aligning investment treaties with the Paris Agreement, could scarcely be more urgent” (Robinson 2024).

Reforms that have been implemented to date have proven insufficient. Some countries have introduced clarifying language and exceptions clauses in new treaties which aim to limit the ability of arbitrators to creatively interpret provisions in ways that benefit investors and circumscribe the policy space of governments (UNCTAD 2023). The problem with this approach is twofold. First, it does nothing to address the stock of “old” investment treaties, which are the main source of ISDS cases (Poulsen and Gertz 2021). Second, arbitrators continue to interpret new treaties in much the same way as old ones (Alschner 2022). For example, in *Eco Oro v. Colombia* the tribunal found that a policy to protect an important ecosystem fell under an environmental exception clause in the applicable IIA, but that this did not exempt the government from having to compensate the investor (Ünüvar 2023).

One option for more substantial reform under discussion at the OECD and elsewhere is to introduce carve-outs of climate policy or the fossil fuel sector (or a combination of the two) from the scope of IIA coverage (Paine and Sheargold 2023; Novik and Gaukrodger 2024). Carve-outs have already been deployed in IIAs to remove protection for other harmful investments and to protect state sovereignty in sensitive areas (e.g., tobacco control, tax policy).

Another option is to carve out ISDS from existing investment treaties (de Anzizu and Reisch 2024). Some countries have effectively achieved this through side letters with treaty partners (e.g., this is the approach taken by New Zealand in the Comprehensive and Progressive Agreement for a Trans-Pacific Partnership/CPTTP and other regional treaties). This is the most comprehensive option for preserving state sovereignty short of treaty termination (see Table 4).¹ The main obstacle to this approach is the persistent (yet false) belief that the protection provided by ISDS is critical to stimulating investment flows. Since facilitating investment in low-carbon technology and other sectors is essential to achieving the energy transition, this belief will need to be corrected. Indeed, decades of research have failed to demonstrate that IIAs in general and ISDS in particular have an impact on investment flows (Brada, Drabak and Iwaski 2021).

Removing ISDS would leave treaties enforceable through the state-state dispute settlement mechanism, as is the case at the World Trade Organisation (WTO). It would not impact ISDS cases that had already been commenced. To accomplish the removal of ISDS efficiently, G7 countries, or some subset of them, could lead the development of a plurilateral agreement to alter all IIAs amongst the parties that sign up to it. The agreement would stipulate that the

¹ Termination may be further complicated by “sunset” or “survival” clauses which protect existing investments for a further 5-20 years.

removal of ISDS (or withdrawal of state consent to participate in ISDS) would be automatically integrated into all covered IIAs (de Anzizu and Reisch 2024). Draft language for such an agreement, prepared by legal experts, is available for consideration (Johnson et al. 2018). The agreement could start among a small group of states and remain open for new joiners to opt-in.

Table 4: Reform options for Paris-alignment of the investment regime

Reform	Advantages	Disadvantages
<i>Carve-out fossil fuels</i>	Straightforward to define what the carve-out covers.	Will not remove risk of climate-relevant claims from non-fossil fuel investors.
<i>Carve-out climate policy</i>	Protects climate policy from investor claims from all sectors.	Difficult to define what the carve-out covers; would require the development of a review process to determine what is a legitimate “climate policy”.
<i>Remove ISDS</i>	Protects climate policy and other areas of public policy from investor claims from all sectors; no difficulty in defining the scope of the carve-out.	Requires effort to dispel the myth that providing access to ISDS will help states to attract climate-friendly investment.

Conclusion

Navigating today’s global economy and meeting the needs of climate and debt crises is a complex challenge requiring substantial policy space. The global system of IIAs, enforced through ISDS, places unacceptable limits on policy space and has a chilling impact on the development of critically important regulations. For the Global South, already vulnerable to climate and debt shocks, the threat of ISDS exacerbates other obstacles to policymaking. G7 countries are in the perfect position to take action that would not only protect themselves from the negative impacts of ISDS but could also pave the way for broader global policy action. The current piecemeal approach to the reform of the investment regime is antithetical to a sustainable, just and inclusive future. Instead, G7 countries should pursue ambitious proposals to remove ISDS risk from all their existing and future IIAs. This will protect state sovereignty in the G7 and beyond.

Author Biographies

Kyla Tienhaara is an Associate Professor and Canada Research Chair in Economy and Environment in the School of Environmental Studies and Department of Global Development at Queen's University. She is the author of several books, including *The Expropriation of Environmental Governance* (Cambridge University Press, 2009), *Green Keynesianism and the Global Financial Crisis* (Routledge, 2018) and *A Green and Just Recovery from COVID-19?* (Cambridge University Press, 2023). She also co-edited the *Handbook on the Green New Deal* (Routledge), published in 2022. She sits on the Scientific Steering Committee for the Earth System Governance Project, a global research network that aims to advance knowledge at the interface between global environmental change and governance.

Rachel Thrasher is the Team Lead for the Trade and Investment rules research stream at the Global Economic Governance Initiative at the Boston University Global Development Policy Center. She holds a JD and a master's degree in international relations, both from Boston University. She works on policy issues related to trade and investment agreements, policy space for development, intellectual property and access to medicines and the climate impacts of trade and investment treaties. She is the author of the book, *Constraining Development: The Shrinking of Policy Space in the International Trade Regime*, published by Anthem Press in 2021. She currently teaches International Economic Law and Climate Change at the Boston University School of Law.

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