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Future of Investment Treaties Track 1 -- Investment Treaties and Climate Change

Methods to align investment treaty benefits for energy investment with the Paris Agreement and net zero

Note by the Secretariat

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Session 3 of the Conference will address “Investment treaties and energy investment choices”. The agenda for the Conference and a description of Session 3 are available on the Conference webpage.

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1. Introduction¹

1. This paper outlines methods to align investment treaty benefits for energy investment with the Paris Agreement and net zero.
2. At COP28 in December 2023, 198 countries called for a transition away from fossil fuels and a tripling of renewable energy by 2030. These goals are set out in the intensively-negotiated Global Stocktake under the Paris Agreement.
3. The Global Stocktake commitments on fossil fuels and renewables reinforce the urgency of OECD work on the Paris and net zero alignment of investment treaties.²
4. The methods for alignment set out below address investment protection benefits. They are the core provisions of most existing investment treaties. In response to the COP28 call, the methods focus on fossil fuels, but they affect renewables. The detrimental impact of benefits for fossil fuels on renewables has long been criticised.³ Reduced benefits for fossil fuels can help to achieve the necessary energy transition and tripling of renewables.
5. Only benefits are at issue here.⁴ Some continued fossil fuel investment is generally seen as necessary, notably for some existing projects. Those needs are recognised for example in the IEA Net Zero pathway. The ability of investors to make or maintain that investment (or other fossil fuel investment) is not at issue here. Market access for fossil fuel investment is not at issue.⁵ Divestment is not at issue. Decisions by developing countries to exploit their fossil fuel resources are also not at issue. The discussion here involves only removing benefits and returning certain investment risks for fossil fuel investment to the market.
6. Government climate action in related fields is continuing. It can provide inspiration for investment treaties. For example, starting in November 2023, the German government is aligning its investment guarantees abroad with the Paris Agreement: “The aim of th[e] climate strategy is to bring the projects of German investors abroad -- covered by Investment Guarantees -- in line with the Paris Climate Agreement ...”.⁶ “Red” projects that are not aligned with the 1.5 degree pathway

¹ This note does not necessarily reflect the views of the OECD or of the governments that participate in work on investment at the OECD, and it should not be construed as prejudging ongoing or future negotiations or disputes pertaining to investment treaties.

² Work in this area constitutes “Track 1” of OECD work on the Future of investment treaties. It is the first sustained multilateral effort to consider climate policies for investment treaties. See oe.cd/foit.

³ See, e.g., [OECD and IEA recommend reforming fossil-fuel subsidies to improve the economy and the environment](#) (4 Oct. 2011) (“Phasing out fossil-fuel subsidies will also provide an impetus for investment, growth and jobs in renewable energy and energy efficiency”).

⁴ It is routine to recognise that investment treaties provide benefits to selected covered investors and investments. Many investment treaties expressly recognise this in clauses allowing the “denial of [those] benefits” under certain circumstances.

⁵ Improving market access for climate-friendly investment was the subject of Track 1 work in 2022. See [Background note for November 2022 meeting on Investment treaties and climate change](#), DAF/INV/TR1/WD(2022)5/REV2.

⁶ See Investment Guarantees of the Federal Republic of Germany, [Focus climate strategy: Principles](#). As under the general approach to the Paris alignment of financial services, alignment will be measured using the greenhouse gas (GHG) footprint associated with the portfolio of investment

are barred from benefits; “white” projects can receive benefits while “green” projects are granted extra benefits. Climate accountability for the provision of insurance services has also seen important developments.⁷

7. The balance of this paper first provides background information and then sets out sample methods for alignment in annexes. The background information includes information relevant to estimates of the value of investment treaty benefits; a description of the general approaches used in the methods; an overview of the methods; and the value of technical consideration and policy consideration of the methods.

2. The value of investment treaty benefits for fossil fuels

8. From the perspective of beneficiaries of investment treaties, investment treaty protection benefits appear as financial services akin to insurance or investment guarantees: (i) covered risks are identified; (ii) occurrences of the risk generate an entitlement to compensation; (iii) there are mechanisms to obtain binding decisions over whether there was an occurrence and the amount of loss; and (iv) further mechanisms are available to compel payment of the amount awarded. There is a market and other suppliers of similar services.
9. Investment treaty benefits are often described as political risk insurance – a service -- provided without cost to beneficiaries. They thus have a hybrid character as both services and benefits.
10. The market price of similar services is worth considering for several reasons. First, it can underpin estimates of the value of benefits provided by investment treaties to fossil fuels. Second, it can give some idea of the comparative cost numbers that could become part of the basis for decisions about sectors for investment. Currently, “all assets” investment treaties exclude treaty-related cost/benefit consequences of sectoral choices for investment. In contrast, if investment treaty benefits for fossil fuels are eliminated or reduced, the cost of substitutes would normally become part of the mix of analysis that lawyers and advisers provide to decision-makers for their choices of energy investment sectors. Third, the insurance-type benefits for fossil

guarantees (all greenhouse gas emissions associated with federally insured investments abroad). The GHG footprint of the German investment guarantee portfolio is to be reduced to net zero in advanced economies by 2045 and in developing and emerging economies by 2050.

Action to align investment guarantee portfolios is particularly important for the evaluation of investment treaty climate alignment policies. For example, Germany has long recognised the close overlap between investment guarantees and investment treaties. It typically conditions the availability of its attractive investment guarantees on foreign government agreement to coverage of similar risks (and others) in German investment treaties.

⁷ The Partnership for Carbon Accounting Financials (PCAF) has developed a methodology for evaluating real economy emissions associated with insurance services including political risk insurance. See [PCAF launches the Global GHG Accounting and Reporting Standard for Insurance-Associated Emissions](#) (allowing measurement and disclosure of GHG emissions associated with insurance underwriting portfolios).

For a discussion of investment treaties and insurance, see [Investment treaties and climate change: The Alignment of finance flows under the Paris Agreement](#) (2022), paras. 31-37.

fuels under investment treaties could conceivably be made available only for a price as a method for alignment.⁸

11. There is limited information on the pricing of similar services. However, the Multilateral Investment Guarantee Agency (MIGA) has indicated that its fees for investment guarantees average approximately one percent of the insured amount per year.⁹ It may be illuminating to consider the annual premium costs that would be necessary to obtain rights to bring some ISDS claims. It is noteworthy in this regard that fossil fuel interests bring the largest claims and obtain the largest awards in ISDS.¹⁰
12. At the average MIGA rate, investors seeking coverage for claims at issue in ISDS would need to pay substantial annual amounts:
 - USD 7 million/year for coverage sufficient for a possible average ISDS claim of approximately USD 700M;
 - USD 20 million/year for coverage sufficient for a possible USD 2 billion claim;
 - USD 270 million/year for coverage sufficient to allow the pending ISDS claim against Australia for AU41.3 billion (USD 27 billion) by a shareholder of a coal company for alleged improper failure to grant a permit for a greenfield thermal coal project.¹¹

⁸ Pricing investment treaty benefits for fossil fuels could assist in aligning the portfolios of investment benefitting from the treaties. It would reduce demand for benefits for high-carbon activities. It would exclude grants to unwitting beneficiaries. It would generate funds that could be used to support renewable investment. It would also likely constrain average claim amounts in ISDS.

Under the general approach applied to the alignment of financial services, a price for benefits for fossil fuels would assist but not be sufficient for alignment: financial services provided on a profit-making or break-even basis are also subject to alignment goals. Art. 2.1c of the Paris Agreement sets forth the goal to align finance flows generally with climate goals. Eliminating the free benefit element of current investment treaty benefits for fossil fuels, however, would likely be seen to reduce mis-alignment.

⁹ See MIGA, [Providing Political Risk Insurance and Credit Enhancement Solutions](#) (2015), p. 3. More information can be sought from public and private sector suppliers of political risk insurance.

¹⁰ The preponderance of fossil fuel claimants in the largest claims and awards in ISDS has increased. They now account for eight of the ten largest awards (previously seven). All those plus two others are each for more than USD 1 billion. Public attention is naturally attracted to the political conflicts inherent in ISDS claims and to the often huge amounts at stake. (Under domestic law, most cases of improper regulation are subject only to non-financial remedies.) ISDS generates debate over investment treaty impact on government regulation and government budgets.

The quieter context of investment decisions gets less attention. In ISDS cases, investment decisions, for example between fossil fuels and renewables, have generally been made long before the case arises and are not at issue. But every fossil fuel case or potential case involves an earlier investment choice of fossil fuels.

¹¹ The same shareholder has issued a Notice of intention to file a separate claim under a different investment treaty arising out of the same situation. The Notice indicates an intent to seek AU69 billion (approx. USD 44 billion) in damages. At the MIGA average rate, the cost for that level of coverage would be USD 440 million/year.

As for other insurance under a pricing system, premiums sufficient to allow claims would be paid by all potential ISDS claimants, not only actual ISDS claimants.

13. Coverage for claims of this size is not available in the public or private political risk insurance market. There are also risks covered in investment treaties, such as coverage for unfair treatment, that other insurers see as too broad and too vague for coverage. Investment treaty benefits for fossil fuels have advantages not available elsewhere, adding to their value.

3. General approach to methods

3.1. A focus on fossil fuels as a class

14. The Global Stocktake agreed in December 2023 calls for a transition away from fossil fuels as a class, without limitation. Following the Stocktake, the methods below address benefits for fossil fuels as a class.
15. Specific attention to fossil fuels is also warranted. The concrete treatment of fossil fuels is increasingly becoming a decisive test for judging climate policies. There are expanding government efforts to require accurate disclosure of climate policies and address risks of greenwashing.¹² Discrepancies between climate claims and benefits or services provided to fossil fuels have attracted attention in this context.
16. In a report requested by the European Commission, for example, the EU insurance industry supervisory authority noted concerns about potential greenwashing where sustainability claims are mismatched with insurance services provided to fossil fuel activities:

– Example of potential greenwashing

An insurance undertaking outlines its sustainability credentials publicly by running a television advertisement highlighting the increasingly sustainability-oriented behaviour of its clients, or by communicating about a philanthropic fund dedicated to sustainability factors, while continuing to underwrite risk for large companies developing new oil and gas fields as well as new fossil fuel infrastructure. The mismatch at entity level between the way the insurer is portraying itself and its clients publicly – i.e., conscious of sustainability aspects – and its underwriting activities – i.e., underwriting in fossil fuels – could constitute a potential greenwashing practice.¹³

17. Free benefits under investment treaties may be seen as providing more support for fossil fuels than insurance underwriting for profit. This may increase concern about potential mismatches with sustainability claims.

¹² For example, the degree of taxonomy-alignment of an insurer's underwriting activities is a required Key Performance Indicator under the EU Taxonomy Regulation. See EU Taxonomy Regulation (Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088), art. 8; Commission Delegated Regulation (EU) 2021/2178 of 6 July 2021 supplementing Regulation (EU) 2020/852, art. 6.

¹³ European Insurance and Occupational Pensions Authority, [Advice to the European Commission on Greenwashing – Progress report](#) (2023), p. 22, box 3.

18. Investment treaties also currently provide benefits to other high-carbon activities, such as cement. Methods developed for fossil fuels may assist in addressing other high-carbon sectors.

3.2. The value of visibility

19. It is important to make climate policies for investment treaties more visible. The visibility of climate policies is encouraged through numerous provisions in the Paris Agreement.¹⁴
20. Visibility about a government's climate policies and performance can encourage it to do more. It informs the market about key policies. It can allow outside constituencies to evaluate and compare performance between countries as well as between governments and other climate actors. Other countries can participate in this process through peer review processes, widely applied at the OECD including in broad 100+ jurisdiction regimes.¹⁵ Transparent information also provides input into regular stocktake processes that analyse progress or gaps in action to achieve the 1.5 degree goal. More broadly, OECD work has suggested that visibly effective action on climate can affect levels of trust in democratic government.¹⁶
21. Governments recognise the value of climate policy visibility for others as well as themselves. They are encouraging or mandating more visibility for climate action by business and financial actors.
22. Investment treaty benefits for fossil fuels today are obscured. Benefits are provided to fossil fuels under an "all assets" rubric. But they are becoming more visible in part due to the expanding high-value fossil fuel claims and awards noted above.
23. Visibility is briefly addressed in the methods below. Additional sample provisions to address visibility of benefits can be developed including by reference to established systems.

3.3. Taking account of the need for plurilateral and multilateral climate action

24. The urgency and global nature of the climate crisis makes it vital from the outset to take into account the need for plurilateral and multilateral climate action in developing methods for alignment. With its broad range of participants, work at the OECD is well-positioned for this purpose. Several aspects merit consideration: (i) the value of plurilateral and multilateral climate policies; (ii) the existence of successful examples of plurilateral treaties to allow agreed changes to

¹⁴ For example, Article 4.12 of the Paris Agreement provides that Nationally Determined Contributions (NDCs) communicated by Parties shall be recorded in a public registry maintained by the UNFCCC Secretariat. See United Nations, [NDC Registry](#). Under the Paris Agreement's Enhanced Transparency Framework (ETF), all countries are required to report on GHG emissions projections as part of their Biennial Transparency Reports. There are numerous other provisions.

¹⁵ For example, the Global Forum on Transparency and Exchange of Information for Tax Purposes monitors and peer reviews the implementation by over 170 jurisdictions of international standards for the exchange of information on request and automatic exchange of information. See [Global Forum on Transparency and Exchange of Information for Tax Purposes: Peer Reviews](#).

¹⁶ See OECD, [Building Trust and Reinforcing Democracy: Preparing the Ground for Government Action](#) (2022), ch 4 (Governing Green: Gearing up government to deliver on climate and other environmental challenges).

be applied to existing treaties; (iii) potential government interests in entry into force being conditioned on plurilateral application; and (iv) the importance of interim plurilateral political action.

25. Broad climate action is desirable for all. Aligning investment treaty incentives for sectoral choices of both inward and outward investment is important for climate policies. Moreover, because any investment treaty that unduly promotes emissions affects everyone, governments have climate policy interests in every investment treaty, not merely their own. Plurilateral and multilateral action responds to the global interest in reducing GHG emissions.
26. A second aspect is that the legal technology required to back agreed changes into numerous existing treaties is now well-developed. There are several successful examples.¹⁷ The overriding and prior challenge is to achieve agreement on the provisions for potential inclusion in an MLI. The methods set out below address this area.
27. A third aspect is that governments may be more likely to agree to climate policy reforms for their investment treaty networks where a substantial degree of plurilateral application is ensured. Plurilateral application can address competitive concerns. Capital exporting countries may hesitate to renounce the leverage and financial benefits currently provided to fossil fuel interests if similar interests from other countries will continue to benefit. While the extent of investment treaty impact on geographic choices for investment is uncertain, governments convinced of the attraction power may be encouraged to take climate action for their investment treaties if other jurisdictions will take similar action. Plurilateral action also advances government and investor interests in coherence and the clarity of the law.
28. The OECD has experience with designing plurilateral thresholds for the application of international treaties in international business to address these interests. For example, the entry into force of the 1997 OECD Anti-Bribery Convention required ratification by a defined number of states collectively accounting for a defined percentage of OECD exports.¹⁸ This requirement helped reassure Parties that commitments would be made by other major economies.
29. The evolution of the global economy and investment, as reflected notably by the emergence of the G20, would require modified criteria of this type today for entry into force of a plurilateral treaty. But an architecture leading to a reasonably broad

¹⁷ Most recently, in September 2023, the OECD/G20 Inclusive Framework on BEPS concluded negotiations on the “Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule”. Like an earlier 2016 OECD multilateral BEPs treaty, this treaty allows Parties to back agreed changes into the many existing tax treaties. The 2016 BEPS MLI has had a high take-up rate: as of February 2024, over 1900 treaties have been matched for reform under the 2016 MLI. See OECD, [BEPS MLI Matching Database](#) (aggregate statistics on the impact of the BEPS MLI). The Mauritius Convention developed for investment treaties at UNCITRAL has a similar structure.

A possible further multilateral legal instrument (MLI) for investment treaties is under development or discussion at UNCITRAL and at the OECD. MLI is used here for convenience as a generic term for this type of treaty.

¹⁸ See [Convention on Combating Bribery of Foreign Public Officials in International Business Transactions](#) (1997), art. 15(1). The required ratifications were rapidly achieved and the Convention entered into force in 1999.

application across the G20 and major investment treaty jurisdictions in the first instance could be devised.

30. Given broad existing investment treaty networks providing benefits to fossil fuels, plurilateral application requirements would also avoid uncertainty about whether a climate rationale is being invoked selectively, such as for exit primarily from defensive exposure to ISDS fossil fuel claims.
31. A fourth aspect is the importance of interim and guiding political action. A plurilateral commitment to eliminate/reduce investment treaty benefits for fossil fuels could pave the way for accelerated work to operationalise the commitment and allow other countries to consider joining the commitment. The BEPs process, with multiple necessary actions required, was more complicated than a removal of benefits. Accelerated work was possible due to high-level political commitments that guided technical work throughout the process.

4. Overview of the methods

32. The methods generally seek to use existing treaty techniques adapted for purposes of climate goals. This approach should facilitate input from investment treaty, energy and environmental experts that have engaged in treaty negotiations and renegotiations including with regard to similar language. They can contribute their expertise and learning to help develop language suitable for broader use as climate policies. The shared interest in reducing the rapid growth of global emissions should encourage engagement in this area.
33. The annexes below provide sample investment treaty provisions and commentary for discussion. In some areas, sample language remains to be developed (tbd). Methods in three areas are addressed:
 - Defining fossil fuel economic sectors
 - Graduated treatment to eliminate or reduce benefits for Fossil Fuels:
 - Exclusion of investment protection benefits for Fossil Fuel investment
 - Exclusion of Investor-State Dispute Settlement (ISDS) benefits for Fossil Fuel investment
 - Reduced scope of ISDS benefits for Fossil Fuel investment and Certificate of approval requirement
 - Termination of investment treaties to eliminate benefits for Fossil Fuel investment

Some of the methods can be combined or used sequentially.

34. For several reasons, action to eliminate or reduce investment treaty benefits for investment in fossil fuels can complement other climate policies for investment treaties addressed to policy space. First, investment in climate-aligned sectors today will not require stranding or other regulatory action tomorrow to reach climate goals, reducing the pressure on government policy space. Second, sectoral approaches for fossil fuels are complementary to improved policy space to regulate emissions from other high-carbon activities or for any remaining fossil fuel investments benefitting from investment protection.
35. In addition to the sectoral approaches addressed here, continuing work by two academic contributors to the OECD public consultation on a method for alignment

based on a climate policy space carve-out will be presented and discussed at the 11 March 2024 Conference.

36. Methods to remove or reduce benefits for fossil fuels on a plurilateral basis are also complementary to action on individual treaties. Recent government efforts to address policy space in individual treaties will be considered at the Conference. Attention to individual treaties has value and can generate examples and innovations for broader use. However, its concrete impact is limited by nature. Available action may also be constrained by existing treaty language or political contexts such as the status of ratification processes. Complementary broader action is necessary to align with climate goals across the system; it also reinforces the credibility of individual action.

5. Technical consideration and policy consideration of the methods

37. In each method, the objective is set out. Sample core text is provided. The commentary is essentially descriptive. It is limited to brief information about sources for the text, adaptations to them and the structure of the provision. The methods can be subject to both technical and policy consideration.
38. A first level of technical analysis is whether the sample text would achieve the stated goal, leaving aside political views about the goal. Here the issue is to determine whether the sample language would eliminate or reduce benefits for fossil fuel investment. This involves evaluating the language and considering it in light of other approaches.
39. A second aspect of technical analysis for plurilateral application involves consideration of how the language would operate as an amendment or adjustment to a range of underlying investment treaties. Here it can be assumed for purposes of analysis that the language is incorporated into an MLI-type treaty.
40. Prompt plurilateral climate action over a range of treaties would likely leave some issues of treaty interaction less than perfectly addressed. However, the overall climate policy intent would be clear, it could be expressed and it could guide the application of the treaties. Plurilateral action would also likely require suspending some individual investment treaty drafting approaches to achieve collective climate action using more generic techniques. These issues would benefit from technical input but could also fall to be decided at a policy level.
41. The overriding climate policy at issue -- whether government benefits for fossil fuels should be eliminated or reduced because of their emissions -- is of concern to the investment treaty policy community but also far beyond. Commitments on reducing benefits for fossil fuels at home and abroad are regularly at issue in high-level political fora, taking account of energy and investment elements. It is a fundamental climate policy question -- and COP28 makes clear it is also one of the most urgent.
42. The methods could thus be suitable for consideration in policy discussions, both at technical levels and in broader high-level discussions about reductions of government benefits for fossil fuels. Fossil fuel policies and in particular reducing government benefits for fossil fuels are of interest for a broad range of participants in work in and around COP28 as well as future COPs, but also in the G7, G20 and other fora. The broad reach of benefits for fossil fuels in the investment treaty system, particularly with regard to the energy transition in emerging and developing

countries, suggest that they should be a regular component of general work on reducing government benefits for fossil fuels or on promoting renewables.

6. Conclusion

43. Swift effective plurilateral action can be achieved with political will from major economies in particular. Recent achievements in rapid and substantial reform of thousands of international taxation treaties with broad participation from many countries make that clear. The recent COP28 and Global Stocktake breakthroughs deserve equal if not greater efforts from all policy areas to achieve their effective implementation.

Annexes

Annex A. Fossil Fuel Energy Materials and Products, and Activities

Sample text

Fossil Fuel Energy Materials and Products, and activities shall mean

- 27.01 Coal; briquettes, ovoids and similar solid fuels manufactured from coal.
 - 27.02 Lignite, whether or not agglomerated, excluding jet.
 - 27.03 Peat (including peat litter), whether or not agglomerated.
 - 27.04 Coke and semi-coke of coal, of lignite or of peat, whether or not agglomerated; retort carbon.
 - 27.05 Coal gas, water gas, producer gas and similar gases, other than petroleum gases and other gaseous hydrocarbons.
 - 27.06 Tar distilled from coal, from lignite or from peat, and other mineral tars, whether or not dehydrated or partially distilled, including reconstituted tars.
 - 27.07 Oils and other products of the distillation of high temperature coal tar; similar products in which the weight of the aromatic constituents exceeds that of the nonaromatic constituents.
 - 27.08 Pitch and pitch coke, obtained from coal tar or from other mineral tars.
 - 27.09 Petroleum oils and oils obtained from bituminous minerals, crude.
 - 27.10 Petroleum oils and oils obtained from bituminous minerals, other than crude.
 - 27.11 Petroleum gases and other gaseous hydrocarbons.
 - 27.13 Petroleum coke, petroleum bitumen and other residues of petroleum oils or of oils obtained from bituminous minerals.
 - 27.14 Bitumen and asphalt, natural; bituminous or oil shale and tar sands; asphaltites and asphaltic rocks.
 - 27.15 Bituminous mixtures based on natural asphalt, on natural bitumen, on petroleum bitumen, on mineral tar or on mineral tar pitch (for example, bituminous mastics, cut-backs).
- Electrical energy (27.16) produced from Energy Materials and Products under the subheadings 27.01 to 27.15.
- 2804.10 Hydrogen, with the exception of renewable hydrogen

Renewable hydrogen means hydrogen produced from renewable sources, with the exception of biomass, resulting in full life-cycle emissions of less than 3tCO₂eq/tH₂.

The capture, utilisation and storage of carbon dioxide in order to decarbonise the fossil fuel energy systems included in this annex.

Commentary

44. This annex identifies fossil fuels energy materials and products, and activities. It is based on the widely-used Nomenclature established under the International Convention on the Harmonized Commodity Description and Coding System, effective from 1 January 2022. The seventh edition of the Harmonized System (HS) nomenclature entered into force on 1 January 2022 and is known as HS 2022. It is used worldwide for the uniform classification of goods traded internationally and has been accepted by all Contracting Parties to the Harmonized System Convention. The HS system is governed by the World Customs Organization (WCO). The WCO represents 185 Customs administrations across the globe that collectively process approximately 98% of world trade.¹⁹
45. The annex describes only fossil fuels. This reflects the specific Global Stocktake consensus on transitioning away from fossil fuels.
46. Most of the number headings above are taken from chapter 27 of HS 2022 entitled “Mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes”. HS 2022 sets out sub-headings for the headings listed above that provide further details about the sectors covered. The [full text of chapter 27](#) is available on the World Customs Organisation website.
47. In addition to chapter 27 of HS 2022, the annex also includes certain types of hydrogen. Hydrogen is classified in chapter 2804.10 of HS 2022. Hydrogen generated using renewable energy is excluded from the scope of the annex.
48. The annex also reflects the sectoral approach used in the Energy Charter Treaty. Participants in the ECT negotiations can assist in explaining the use of the HS nomenclature in that context. The definition of renewable hydrogen and the provision on capture, utilisation and storage of carbon dioxide in order to decarbonise the fossil fuel energy systems are also taken from the recent ECT negotiations.
49. The subsequent methods refer to this Annex 1 list.

¹⁹ See World Customs Organization, [Discover the WCO](#).

A different approach to defining economic sectors is used in the USMCA; it does not use an international system.

Annex B. Graduated methods to eliminate or reduce benefits for fossil fuel investment

Definitions

Sample text

Article 10: Definitions

10.1 “Fossil Fuels” means the items included in Annex 1 “Fossil Fuel Energy Materials and Products, and Activities”.

10.2 “Investment regarding Fossil Fuels” means an investment concerning the exploration, extraction, refining, production, storage, land transport, sea transport, transmission, distribution, trade, marketing, or sale of Fossil Fuels.

10.2 “Climate-Updated Investment Treaty” means an investment treaty updated in light of climate change concerns pursuant to a plurilateral Agreement.

10.3 “Effective Date of a Climate-Updated Investment Treaty” means the earlier of the date of entry into force or the provisional application of the treaty.

Option 1: Exclusion of investment protection benefits for Fossil Fuel investment

Sample text

Article 11: Exclusion of investment protection benefits for Fossil Fuel investment

The substantive investment protection provisions of a Climate-Updated Investment Treaty do not apply in respect of an Investment by an investor of another Contracting Party regarding Fossil Fuels after the Effective Date of the Climate-Updated Investment Treaty.²⁰

Commentary

50. The sample text excludes fossil fuels investment from the scope of investment protection benefits. It excludes benefits and applies for purposes of both ISDS and SSDS.

51. The language applies to the full range of investment protection benefits. Provisions on other issues, such as market access, continue to apply to fossil fuels. This is consistent with the focus on withdrawing benefits for fossil fuels while leaving the ability to investment unaffected.

²⁰ This sample provision and the provisions below apply to new Fossil Fuel investment: they apply to investment “after the Effective Date of the Climate-Updated Investment Treaty”.

The provisions can be adapted to also apply to existing investment. Deletion of the limitation to “after the Effective Date of the Climate-Updated Investment Treaty” makes the provision applicable to Fossil Fuel investment generally. The same or different approaches can be applied to new and existing Fossil Fuel investment.

Option 2: Exclusion of Investor-State Dispute Settlement (ISDS) benefits for Fossil Fuel investment

Sample text

Article 12: Exclusion of Investor-State Dispute Settlement (ISDS) benefits for Fossil Fuel investment

12.1 The provisions on ISDS of a Climate-Updated Investment Treaty do not apply in respect of an Investment by an investor of another Contracting Party regarding Fossil Fuels after the Effective Date of the Climate-Updated Investment Treaty.

Commentary

52. It appears that a conversion from ISDS to SSDS for fossil fuel claims can generally be achieved by deleting provisions on ISDS for those claims. Existing general SSDS provisions remain applicable. A range of recent side letters and agreements between governments to multilateral treaties apply this simple approach.²¹
53. The most significant shift from ISDS to only SSDS for investment protection benefits in an investment treaty negotiation occurred in the USMCA. The USMCA applies to more than USD one trillion in international investment.²² To achieve the conversion to SSDS, the Parties adopted a new investment chapter in Chapter 14 that does not refer to ISDS or to dispute settlement. Without further text, disputes under the chapter are thus subject to the SSDS provisions in chapter 31 applicable generally to the Agreement.
54. An alternative to the simple deletion of ISDS for fossil fuel claims could involve a deletion coupled with the adoption of new SSDS procedures. Recent investment-specific SSDS provisions may be of interest. Brazil has been a proponent of including only SSDS in stand-alone investment treaties. The SSDS-only approach included in the recent [2020 Brazil-India Investment Cooperation and Facilitation Treaty](#) is a recent example of negotiated provisions in this area.

²¹ For example, Chile and New Zealand exchanged letters in February 2023 excluding ISDS from the CPTPP between the two countries. The letter states that no investor of Chile shall have recourse to dispute settlement against New Zealand under the ISDS provisions of the CPTPP; a similar clause applies to investors of New Zealand. See New Zealand Foreign Affairs & Trade, Comprehensive and Progressive Agreement for Trans-Pacific Partnership texts, Side instruments signed by New Zealand and other Parties [Exchange of Letters of 17 Feb. 2023](#).

²² See Office of the United States Trade Representative, [United States-Mexico-Canada Agreement](#) (U.S. foreign direct investment (FDI) in USMCA (stock) was \$569.0 billion in 2022; USMCA's FDI in the United States (stock) was \$623.1 billion in 2022). Beyond these direct investment amounts, USMCA coverage of portfolio investment (both direct and indirect) makes the actual amount of covered investment much higher.

Option 3: Reduced scope of ISDS benefits for Fossil Fuel investment and Certificate of approval requirement

Sample text

Article 14: Reduced scope of benefits for Fossil Fuel investment and Certificate of approval requirement for ISDS benefits

14.1 A claimant seeking dispute settlement over an Investment regarding Fossil Fuels after the Effective Date of the Climate-Updated Investment Treaty may submit to arbitration a claim that the respondent has breached the following provisions:

- a. Direct expropriation;
- b. National treatment; or
- c. Most-favoured nation.²³

14.2 No claim shall be submitted to arbitration under article 14.1 unless a claimant has obtained a Certificate of Approval of Investment Treaty Protection Benefits for a Fossil Fuel Investment by the home and host state in accordance with Annex 14-A. A copy of the Certificate shall be filed with the notice of arbitration.

Annex 14-A: Certificate of Approval of Investment Treaty Protection Benefits for a Fossil Fuel Investment by home and host state (tbd)

Commentary

55. This provision is adapted from provisions in a number of investment treaties. It contains two parts. The first part sets out the provisions that may form the basis of an ISDS claim by a Fossil Fuel investor. It is adapted from the scope of ISDS between Mexico and the United States in the USMCA. The German coalition government program has also called for investment protection benefits to be limited to risks of direct expropriation and discrimination.
56. The second part provides that such claims may only be filed where the Fossil Fuel investor has obtained a certificate of approval of protection from the home and host state. The approval addresses only ISDS benefits; the ability to invest is not affected and investment can proceed without a Certificate.
57. Requirements for transaction-specific approval of ISDS are included in a range of treaties. They generally require approval from the host state. The Certificate in the sample text requires an approval from the home and host state. This reflects the climate policy responsibilities of all Parties to an investment treaty that provides benefits to Fossil Fuel investment.
58. The nature of the Certificate and the process for its grant are defined in an Annex 14-A to be developed. To achieve climate goals, a degree of disclosure of the expected climate and emissions profile of investment could be required. The disclosure could be patterned after some of the many models already in use for enterprises seeking government benefits. In addition to allowing review of climate

²³ Typical limitations and clarifications of sub-paragraphs a-c are omitted for convenience.

and emissions impact for purposes of approval, such information would allow the gathering of statistical information. A central registry could be established to receive Certificates and emissions impact information.

59. Rather than a Certificate, an alternative approach to requiring a transaction-specific approval of ISDS is used in the USMCA. To obtain access to the broad scope of ISDS similar to that under the NAFTA, extending to claims under the FET provision, a claimant must have obtained a central government contract as defined and have an investment in defined sectors.
60. Claims with regard to fossil fuel investments that do not qualify for ISDS may be brought in SSDS.

Annex C. Eliminating investment protection benefits for Fossil Fuel investment through termination of investment treaties

61. Each country has climate policy responsibilities for its own investment treaty policies and their climate impacts. Where other treaty Parties are not willing to engage in specific action on Fossil Fuels, termination is the only way for a government to eliminate benefits for Fossil Fuels in its treaties. Termination can be achieved by agreement. Where agreement is not possible, termination requires unilateral action. Both contexts are addressed in sequence below.

Agreed termination of investment treaties to eliminate investment protection benefits for Fossil Fuel investment

Sample text

Article 20 - Agreed termination of investment treaties to eliminate investment protection benefits for Fossil Fuel investment

20.1 Investment Treaties listed in Annex 20-A are terminated.

20.2 For greater certainty, Sunset Clauses of Investment Treaties listed in Annex 20-A are terminated in accordance with paragraph 20.1 and shall not produce legal effects.

“Sunset Clause” means a provision that extends the protection of investment made prior to the date of termination.

Commentary

62. The sample text in this annex is adapted for climate purposes from recent investment treaty practice.
63. A recent plurilateral treaty terminated by agreement over 130 investment treaties between countries in the EU due to the development of a new doctrine under EU law.²⁴ The NAFTA Parties terminated the NAFTA by agreement and made substantial changes in a new USMCA.
64. With regard to sunset clauses, governments have made also clear that where policies or legal rules change, benefits under investment treaties can be terminated with immediate effect by agreement among the Parties. While many investment treaties have sunset clauses that prolong benefits for existing investment beyond the termination of the treaty, these are subject to amendment or other action nullifying them where appropriate and agreed.
65. The plurilateral termination agreement cited above terminated intra-EU investment treaties and their sunset clauses with immediate effect in terms similar to those in the sample text.²⁵

²⁴ See [Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union](#) (5 May 2020).

²⁵ See [Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union](#), art. 2.

66. The NAFTA did not include a sunset provision. Governments have adjusted benefits for existing investment under that treaty with immediate effect. The United States and Mexico have indicated that they terminated substantial NAFTA benefits for existing investment immediately upon the entry into force of the USMCA replacing the NAFTA in July 2020. A three year period to bring NAFTA claims applies only to government measures pre-dating the entry into force. Government measures post-dating the entry into force are subject only to the USMCA.²⁶

Unilateral termination of investment treaties to eliminate investment protection benefits for Fossil Fuel investment

Sample text (tbd)

Commentary

67. There is now substantial investment treaty practice on the unilateral termination of investment treaties.²⁷ Recent practice has seen unilateral termination of investment treaty relationships that conflict with climate goals. Several G7, G20 and other governments have taken unilateral termination action on climate grounds with regard to the ECT, each taking action that will terminate treaty relations with approximately 50 other ECT Parties. Continuing or excessive benefits for fossil fuels have been cited as particularly problematic. Earlier South Africa, Indonesia and India among others unilaterally terminated a range of investment treaties.
68. Current investment treaty practice also contemplates agreement by a plurilateral group to each unilaterally terminate investment treaty relations in a coordinated way. The European Commission has proposed that over 20 Parties each agree to terminate unilaterally, in a coordinated manner, their status as a Party to the ECT. The proposed plurilateral agreement thus involves a coordinated approach to unilateral terminations. Both alignment with the Paris Agreement and interests in competitive equality lie behind the proposed action and its plurilateral nature.²⁸ The 20+ Parties have not yet agreed on the proposal.

²⁶ Whether the USMCA achieved the described intent is in dispute in ISDS cases. But such agreed termination action is recognised to be possible and legitimate where appropriate.

²⁷ For convenience, termination of investment treaties is used broadly to include the termination of investment treaty relationships. Such termination action takes the form of withdrawal from a treaty where it is a plurilateral treaty that may remain in force among other Parties.

²⁸ See [European Commission proposes a coordinated EU withdrawal from the Energy Charter Treaty](#) (7 July 2023) (coordinated termination action is required because the “outdated Energy Charter Treaty is not aligned with [the] EU Climate Law and [EU] commitments under the Paris Agreement” and in order “to ensure the equal treatment of investors across the EU and beyond”). The 20+ Parties are the EU, countries that are member states of the EU and Euratom. Some countries that are EU member states have already taken unilateral termination action on their own.