

Submission to the OECD Public Consultation on Possible Positive Contributions of Investment Agreements to Achieving Climate and Environmental Goals¹

September 2025

1.0 Introduction

In July 2025, the International Court of Justice (ICJ) delivered its landmark Advisory Opinion on states' obligations with respect to climate change. The court confirmed that international law requires states to take ambitious, science-based measures to limit the adverse impact of climate change, including regulation of private actors, the ending of harmful subsidies, and an orderly phase-out of fossil fuel production. Although advisory, ICJ opinions carry significant authority. Against this backdrop, investment governance must evolve to enable—not impede—states' fulfilment of their binding climate obligations. Delivering a just, orderly, and science aligned [energy transition](#) will require sustained public leadership, accelerated capital deployment, and treaty frameworks that reinforce the measures international law demands.

Track 1 of the OECD Work Programme provides a timely forum for broad stakeholder engagement and cross-fertilization with adjacent economic governance work. The process has been characterized by openness to interdisciplinary input and civil society participation, its transparency, and a focus on a positive agenda that aligns with the Institute for Sustainable Development's (IISD's) ongoing work on the [rethinking of investment treaties](#). By encouraging a shift toward policy-driven and evidence-based [treaty design](#), Track 1 lays the groundwork for a forward-looking investment governance architecture—one that responds to the climate crisis and, IISD hopes, continues to evolve through inclusive and sustained dialogue.

This submission sets out a problem-driven approach to treaty design and proposes practical options for how investment treaties can genuinely support climate and environmental goals. It draws on IISD's ongoing research and insights from our [open consultation](#) on

¹ Attention to the positive agenda in this submission should not be taken as endorsement of current approaches in investment treaties or of the relative effectiveness of new approaches versus reform or termination of existing ones.



rethinking investment treaties, which received more than 50 contributions from governments, international organizations, academia, the private sector, and civil society across regions. It also leverages the experience of participants of the Investment Policy Forum, the world's only summit of investment negotiators and policy-makers exclusively from developing countries, of which IISD has hosted 16 annual editions.

2.0 Problem-Driven and Evidence-Based Treaty Design

[Investment treaties](#) should not be treated as static instruments requiring marginal adjustment, but as legal and policy tools whose design must be rethought in light of today's most pressing challenges. Rather than presuming the continued relevance of existing treaty models, a forward-looking approach should ask what specific climate policy problems investment law ought to help solve, and whether treaties are the right tools to address them. This opens the door to designing agreements that do not merely reduce harm but contribute actively to climate and environmental objectives.

This approach must be grounded in policy relevance, empirical evidence, and a clear understanding of a specific design's effectiveness. [Investment treaties](#) have traditionally focused on protecting foreign investors from adverse state action, based on the assumption that such protections would catalyze increased investment and, by extension, development, particularly in low- and middle-income countries. However, the empirical evidence underpinning this rationale is inconclusive (e.g., Bonnitcha, 2017; Brada et al., 2021), and the costs associated with [investor–state dispute settlement](#) and unbalanced treaty obligations have become increasingly apparent (Poulsen & Gertz, 2021; Tienhaara et al., 2022).

In the context of accelerating climate and environmental crises, such design flaws have raised growing concerns about the compatibility of investment treaties with states' duties to [decarbonize their economies](#), end harmful subsidies, and safeguard human rights and the environment. The contested debate regarding the modernization of the [Energy Charter Treaty](#) has shown the urgency of factoring climate change into investment governance and the need for a more evidence-based and policy-driven approach to treaty making. Currently, investment treaties also sit within a [broader risk-allocation ecosystem](#): Akin to investment guarantees, export credits, and political risk insurance, they shift investment risk from investors to the public. Policy-makers should factor these effects, and how treaties interact with adjacent tools, into the design or reform of agreements.

Against this backdrop, a [constructive reimagining of the role of investment treaties](#) invites states to explore whether and how such instruments might contribute to addressing a wider set of climate-related policy challenges—from aligning investment flows with climate objectives and phasing out fossil fuel subsidies, to promoting responsible business conduct, enhancing transparency, tackling tax base erosion, and fostering sustainable development through international cooperation. Grounding treaty design in clearly defined policy problems opens space for innovation and coherence across governance regimes. With that foundation, the following paragraphs set out a three-step proposal for developing a positive agenda for investment treaties.



3.0 Three Steps Toward a Positive Agenda for Investment Treaties

Step 1

Assess What Treaties Can and Cannot Do in Investment Governance

Investment treaty reform must begin with a realistic [understanding](#) of what treaties can—and cannot—achieve. In practice, their impact may depend less on drafting and more on implementation, monitoring, and embeddedness in domestic institutions. Past experience with old-generation agreements shows the risk that treaties may be adopted but have little effect on actual decision making when officials are unaware of them or when domestic legal and administrative systems do not follow through (Bonnitcha & Williams, 2024; Calamita & Berman, 2022; Ostránský & Pérez Aznar, 2023; Sattorova, 2018). As states consider new treaty tools for climate and environmental goals, realism and evidence-based, actionable design are essential.

Treaties may exert influence in multiple ways. They can impose binding obligations, ranging from regulatory commitments to cooperation or reporting duties, whose effect depends not only on legal enforceability but also on the degree to which they are internalized and operationalized within domestic systems. Treaties may, further, enable or clarify the permissibility of certain measures under international law, such as support for green industrial policy or requirements for technology transfer, thereby empowering governments to act with greater confidence. Treaties can create institutions and forums for ongoing dialogue, technical cooperation, or independent monitoring—mechanisms that can help sustain momentum and build trust. They can articulate common principles, set shared goals, and develop consensus in contested areas such as [fossil fuel subsidy reform](#) or corporate accountability. These diverse functions should guide any consideration of how investment agreements might support climate and environmental objectives, recognizing both the opportunities and the inherent limitations of treaty-based tools.

Encouraging and enabling climate-aligned investment is a pressing policy challenge. However, not all tools used to promote such investment are well-suited to be embedded in international treaties. In key areas such as investment liberalization, promotion, and facilitation, [domestic](#) or regional legal frameworks are often more flexible, targeted, and responsive than treaty-based approaches.

States can liberalize market access for sustainable investments—for example, by removing restrictions on foreign participation in green technology sectors—through unilateral legislative or regulatory action, without needing binding treaty commitments. Similarly, efforts to directly incentivize sustainable investment through fiscal or financial instruments are best handled at the domestic level, where governments retain control over design, implementation, and monitoring. While treaties may provide a platform for cooperation on collective action challenges, such as harmful subsidies or high borrowing costs, as discussed above, they are unlikely to serve as the primary vehicle for directly delivering investment incentives.



The case for embedding investment facilitation measures in treaties should be viewed as targeted rather than sweeping. Treaties can add value when they create a practical framework for cooperation and capacity building—focal points, joint committees, information sharing, and home-state support—yet many of these tasks can also be delivered through development cooperation or sector-specific platforms (Paine, 2025). Any use of treaty provisions should, therefore, be selective and flexible, with review clauses and assistance built in, and should avoid locking in untested “best practices.” The implementation burden remains a central concern, especially for developing countries where administrative and institutional capacity may already be stretched.

Step 2

Identify the Climate-Related Policy Problems to Solve

The next step consists of clearly identifying the unique set of investment policy problems that the climate crisis is generating. This requires moving beyond broad, high-level objectives and anchoring treaty design in concrete governance challenges that have demonstrable implications for climate action. These problems surface at multiple levels, from misaligned investor incentives and regulatory fragmentation to institutional gaps that slow the rollout of critical infrastructure, and to investor–state disputes that chill or delay climate measures.

In some cases, the investment governance challenges that matter most for climate action are sector-specific. Energy is a clear example: [decarbonization](#), access, and resilience goals coincide with long-standing investment shortfalls. A sector or issue-specific approach could make treaty commitments more targeted, operational, and measurable, thereby enhancing their potential to deliver on clearly defined policy objectives.

In the energy sector, recurring bottlenecks include fragmented permitting and licensing regimes for renewables, weak coordination among national energy and electricity authorities, inconsistencies in cross-border power market rules, barriers to regional electricity trade, and uncertainty regarding the enforceability of long-term power purchase agreements. Carefully designed investment treaties could help harmonize technical standards, foster regional infrastructure planning, establish cooperation platforms for blended finance and clean energy technology transfer, and institutionalize dialogue on subsidy reform, land-use regulation, and supply chain integrity.

Some problems are also issue-specific. Cross-cutting challenges include fossil fuel subsidy reform, irresponsible business conduct and lack of due diligence obligations, unclear or absent disclosure and transparency rules for major projects, and a lack of cooperation on the decommissioning and just transition of carbon-intensive assets. Investment treaties could establish clear objectives, time-lines, reporting requirements, and review mechanisms, supported by cooperative functions rather than those focusing on enforcement and sanctions.

In addition to identifying the substantive policy problems that treaties might address, states must also consider the institutional form best suited to doing so. Many existing investment treaties are bilateral and of general scope. This default model may not always be fit for purpose—particularly when the issues at stake are inherently transboundary, regional in nature, or linked to sectoral systems such as energy markets or environmental goods. In such



cases, regional or issue-specific arrangements may offer greater policy coherence, legal clarity, and institutional alignment.

At the same time, the optimal institutional form will likely vary across contexts and regions. Rather than presuming that any one model—bilateral, regional, or multilateral—is universally superior, states could usefully assess which approach is best suited to the problem at hand. By starting from a clearly articulated governance challenge and then asking what kind of treaty, if any, is well placed to address it, policy-makers can ensure that future agreements contribute meaningfully to collective goals, including those of the Paris Agreement.

Step 3

Determine Avenues for a Positive Contribution of Investment Treaties

Having identified the key policy problems, this step consists of determining which of these problems can be usefully addressed in investment treaties. The following paragraphs set out an initial, non-exhaustive list of avenues through which investment treaties could, where appropriate, contribute positively to advancing climate and environmental goals.

One area where treaties might serve a more constructive function is by encouraging **greater transparency and accountability** in the governance of investment projects. Where national frameworks are weak or unevenly applied, treaty provisions could reinforce commitments to public disclosure of investment contracts, environmental and social impact assessments, and financial flows related to major projects. Such provisions would not only strengthen public oversight but also support global efforts to combat corruption, increase policy coherence across jurisdictions, and reduce governance risks that deter responsible investment. Similarly, transparency-enhancing provisions could be linked to regional platforms or institutional mechanisms that monitor implementation and foster peer learning. Similar tools have proven effective in other areas of international cooperation.

Investment treaties could also help articulate **shared norms and principles** that support the green transition in a complementary way. While general climate and environmental obligations remain within separate regimes, the value of investment treaties lies in translating those frameworks into investment governance. Treaties have historically played a role in crystallizing international consensus—whether on trade, human rights, or environmental protection—and they may continue to do so in areas such as fossil fuel subsidy reform, just transition, or access to sustainable technologies. These normative functions may not always produce direct legal effects but can nonetheless shape expectations, influence domestic policy debates, and provide reference points for adjudication and negotiation. As states consider whether and how to pursue a positive agenda in investment treaty design, such norm-setting roles should not be overlooked—but must be accompanied by meaningful mechanisms for review, dialogue, and adaptation over time.

Reimagined treaties might also play a role in requiring **responsible business conduct by foreign investors**. The ICJ's Advisory Opinion confirms that states have binding obligations under customary international law to regulate private actors whose activities contribute to



climate harm. This means that investor obligations to respect internationally recognized standards, such as the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, and due diligence duties to prevent environmental harm, are not optional or aspirational: they flow from states' own duty to prevent significant transboundary harm. Incorporating such obligations into treaty text would strengthen the ability of states to meet their international legal commitments, ensure that investors operate consistently with those commitments, and provide clear standards against which investor conduct can be assessed in dispute settlement. Mechanisms could also be included to give affected communities or other stakeholders a voice in investment-related disputes or treaty implementation processes, thereby contributing to more inclusive and legitimate outcomes. Finally, there is an opportunity to bring home state measures regarding support for responsible and sustainable investment within the scope of reimagined investment treaties.

In addition, states may wish to explore how investment treaties could facilitate forms of **cross-border cooperation** that enable climate-aligned investment. These could include commitments to coordinate approval processes for transboundary infrastructure, harmonize regulatory standards, or jointly manage risks associated with currency volatility or off-taker default. Treaties might also support the creation of joint institutions—such as climate investment platforms, regional guarantee facilities, or technical bodies to develop common environmental standards—especially in regions where existing cooperation frameworks remain underdeveloped. While not all such functions require treaty-based solutions, in contexts where legal certainty and sustained coordination are lacking, a treaty may provide a durable and adaptable framework for cooperation.



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