



SCHOOL OF
ENVIRONMENTAL
STUDIES

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Re: Sharm el-Sheikh dialogue on Article 2, paragraph 1(c), of the Paris Agreement and its complementarity with Article 9 of the Paris Agreement (FCCC/PA/CMA/2023/L.12, para. 11)

Dear co-chairs of the Sharm el-Sheikh dialogue,

I am writing in my capacity as an academic researcher. Please find attached a submission on my views on the issues to be addressed during the workshops in 2024 and 2025.

Kind regards,

A handwritten signature in black ink, appearing to read "Kyla Tienhaara".

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Sharm el-Sheikh dialogue on Article 2, paragraph 1(c), of the Paris Agreement and its complementarity with Article 9 of the Paris Agreement

This submission proposes that international investment treaties should be addressed during the Sharm el-Sheikh Dialogue workshops on the scope of Article 2, paragraph 1(c), and its complementarity with Article 9, of the Paris Agreement.

As noted by David Gaukrodger, a senior legal advisor at the OECD, “Investment treaties form an important part of the public policy framework for finance flows with climate consequences” (Gaukrodger 2022). The importance of aligning investment treaties with the Paris Agreement has been recognized by the IPPC (2022) and in stakeholder engagements conducted by the UNFCCC Standing Committee on Finance (2023). In a recent speech, Mary Robinson, Chair of The Elders, noted that “aligning investment treaties with the Paris Agreement, could scarcely be more urgent” (Robinson 2024).

There are currently more than 2500 international investment treaties in force. Most of these treaties provide foreign investors access to international arbitration through a process known as investor-state dispute settlement (ISDS). This process allows foreign investors to rely on vague treaty provisions to make claims for compensation, including for ‘lost future profits’, from a government if a policy change impacts their investments. Investment treaty protection can be thought of as akin to political risk insurance that is provided to foreign investors by governments, free of charge (Sachs et al. 2020; Gaukrodger 2022).

To date, there have been at least 349 ISDS cases related to fossil fuel investments resulting in compensation of US\$82.8 billion paid to the industry (Di Salvatore, Cotula, Nanda, and Wang 2023). Only a small number of cases involving fossil fuel investments have been initiated directly in response to climate policies (see Table 1), but the provision of free public risk insurance is a form of public support for the fossil fuel industry, even prior to any policy matter being in dispute.

It is also anticipated that the number of climate policy ISDS cases will rise as governments begin to take more direct action to limit fossil fuel supply (Arcuri et al. 2024). For example, the rejection of a specific project or a blanket ban on new coal, oil, or gas extraction could be challenged by an investor holding an exploration permit. If governments decide to buy out fossil fuel assets such as power plants in order to retire them early, the level of compensation could be challenged in ISDS or the threat of ISDS could be used to influence negotiations with a government. A prominent lawyer has even suggested that many investors (and their counsel) see ISDS as a means by which they can *profit* from government action on climate (Kahale 2022).

Table 1: Fossil Fuel Industry ISDS claims related to environmental/climate policies

Company	Host state	Home State	Year	Treaty	Subject of dispute	Outcome
Vattenfall	Germany	Sweden	2009	ECT	Environmental restrictions on coal power plant	Settled
Lone Pine	Canada	US	2013	NAFTA	Ban on gas fracking.	State win.
TransCanada/TC Energy	US	Canada	2016 & 2021	NAFTA*	Cancellation of Keystone XL pipeline project.	First case was discontinued after the government allowed the project to proceed. Second case pending.
Rockhopper	Italy	UK	2017	ECT	Ban on offshore oil exploration within 12 nautical miles of the coast.	Investor win - €190 million plus interest (ca. €240 million) and costs.
Vermilion	France	Canada	2017	ECT	Ban on fossil fuel extraction by 2040.	Case threatened but not launched following changes in proposed legislation.
Westmoreland	Canada	US	2018 & 2023	NAFTA	Compensation for coal power phase-out.	First case dismissed on jurisdictional grounds. Second case pending.
Ascent Resources	Slovenia	UK	2020	ECT	Requirement for environmental impact assessment for gas fracking project.	Pending.
Koch Industries	Canada	US	2020	NAFTA	Cancellation of cap-and-trade program.	State win on jurisdiction.
RWE	NL	Germany	2021	ECT	Compensation for coal power phase-out.	Claim withdrawn**
Uniper	NL	Germany	2021	ECT	Compensation for coal power phase-out.	Claim withdrawn***
Alberta Petroleum Marketing Commission	US	Canada	2022	NAFTA*	Cancellation of Keystone XL pipeline project.	Pending
Ruby River	Canada	US	2022	NAFTA*	Rejection of a proposed LNG project.	Pending
Zeph Investments	Australia	Singapore	2023	ASEAN-Australia-NZ FTA	Refusal to grant coal mining lease.	Pending
Azienda Elettrica Ticinese (AET)	Germany	Switzerland	2023	ECT	Compensation for coal power phase-out.	Pending

Notes:

* NAFTA was terminated in July 2020 and replaced with the USMCA, which does not include ISDS between Canada and the US. It is currently unclear if these claims are permissible as “legacy claims” under the terms of the USMCA because the government actions leading to the dispute occurred after NAFTA had been terminated.

** RWE’s claim was withdrawn following the decision of German’s Supreme Court that intra-EU ISDS awards could not be enforced.

*** Uniper was forced to abandon its ISDS as a condition of a bail-out package from the German government (the company was subsequently fully nationalized).

In a survey of governments conducted by the OECD in 2023, a large majority (78%) of respondents noted that it was very important to make the finance flows associated with investment treaties consistent with Article 2.1(c) (Novik and Gaukrodger 2023). One option for Paris-alignment under discussion at the OECD and elsewhere is to add a carve-out to treaties. This could be a carve-out of climate policy or the fossil fuel sector (or a combination of the two) from the scope of investment treaty coverage (Paine and Sheargold 2023; Novik and Gaukrodger 2024). A fossil fuel carve-out was proposed for a modernized Energy Charter Treaty (ECT 2022). However, the modernization process has stalled, many European countries have officially withdrawn from the treaty and a coordinated exit by the entire EU is under discussion (Schaugg et al. 2023). Withdrawing from or terminating investment treaties is an approach worth serious consideration for Paris-alignment (Tienhaara et al. 2022a; 2022b; CIEL 2024), but the existence of “survival” or “sunset” clauses that extend treaty protections for 10-20 years beyond treaty termination means that only coordinated withdrawal or renegotiation can end protection for fossil fuel investments in a timeframe that is meaningful (i.e., during the most critical period for climate action up to 2030).

At present, investment treaty reform discussions are fragmented across different forums, most of which do not focus on Paris-alignment. The OECD has taken a lead on this issue, but the Secretariat has more expertise on investment treaties than on climate change. Cooperation and sharing of knowledge on these issues between the OECD and the UNFCCC has already been initiated but could be further enhanced.

Finally, it is important that this issue be discussed in a forum that includes all members of the Paris Agreement. The investment treaty regime has the most significant implications for countries in the Global South. At present, many countries in the Global North have adopted a defensive strategy, terminating treaties where they are vulnerable to investor claims but not those that do not present a high risk (due to the asymmetric nature of investment flows). For example, European countries that are withdrawing from the ECT have not taken steps to terminate treaties with countries in the Global South. Similarly, the US and Canada have eliminated ISDS within their treaty relationship (USMCA) but have not similarly revised their treaties with other countries. This defensive approach does not align with Article 2.1(c) of the Paris Agreement. The Sharm el-Sheikh Dialogue workshops could play an important role in facilitating discussion of the Paris-alignment of investment treaties within the broad membership of the UNFCCC and thereby to ensure a global response to what is a global problem.

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