

54. Außenwirtschafts-Vorlesung

“Environment and Investment Agreements:
Together, apart?”

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Environment and Investment Agreements: Together, apart?

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Investments – Definition

“Considering the need for international cooperation for economic development, and the role of private international investment therein;”

(ICSID Convention preamble)

“The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (...). In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.”

Salini case/criteria (disputed)

ISDS and Environment

- at least 175 ISDS cases related to protection of the environment
- at least 192 ISDS cases brought by investors in the fossil fuel sector
- 80 cases 2012-2022 in the renewable energy sector

“A large number of bilateral and multilateral agreements ... include provisions for using a system of investor–state dispute settlement (ISDS) designed to protect the interests of investors in energy projects from national policies that could lead their assets to be stranded. Numerous scholars have pointed to ISDS being able to be used by fossil-fuel companies to block national legislation aimed at phasing out the use of their assets ...”

Climate Change 2022 Mitigation of Climate Change, Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change



UN Secretary General Antonio Guterres

“we are at least a decade late in our efforts to combat global warming. Investment in renewable energy in developing countries is therefore essential and often the most economical way to bridge the energy gap. But while the transition to renewable energy is a global priority, investments in energy infrastructure and efficiency still fall far short of what is needed”



Rebeca Grynspan
Secretary-General of UNCTAD

“International investment in renewable energy has tripled since 2015. But ... much more is needed. The growth of cross-border investment in the sector has been strongest in the economies that are least dependent on it. In developing regions, it has barely outpaced overall FDI and GDP growth ...”

OECD



UNCITRAL

UN General Assembly: UNCITRAL crucial in *“generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship”*

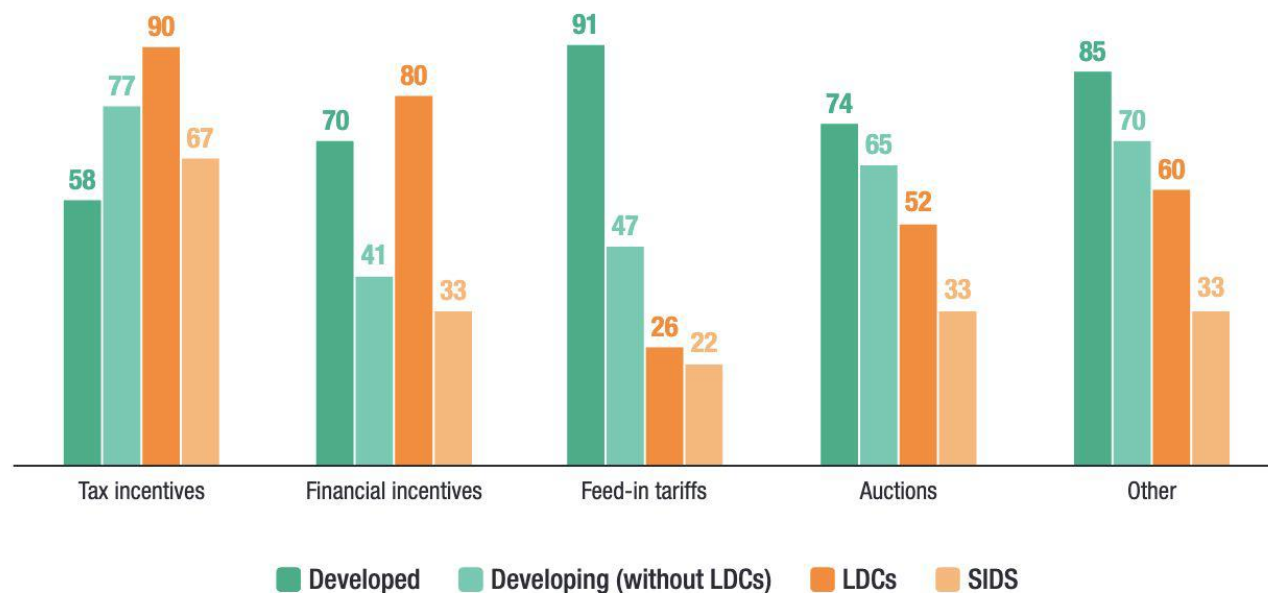
“For policy coherence for sustainable development, an excessive or exclusive focus on some areas to the detriment of other areas that are less visible should be avoided; reforms should be of an inclusive and comprehensive nature; and institutional reforms should not be undertaken at the expense of legislative reforms or without any necessary legislative underpinning.”

Working Group III, Investor-State Dispute Settlement Reform: multilateral instrument on ISDS reform (MIIR)

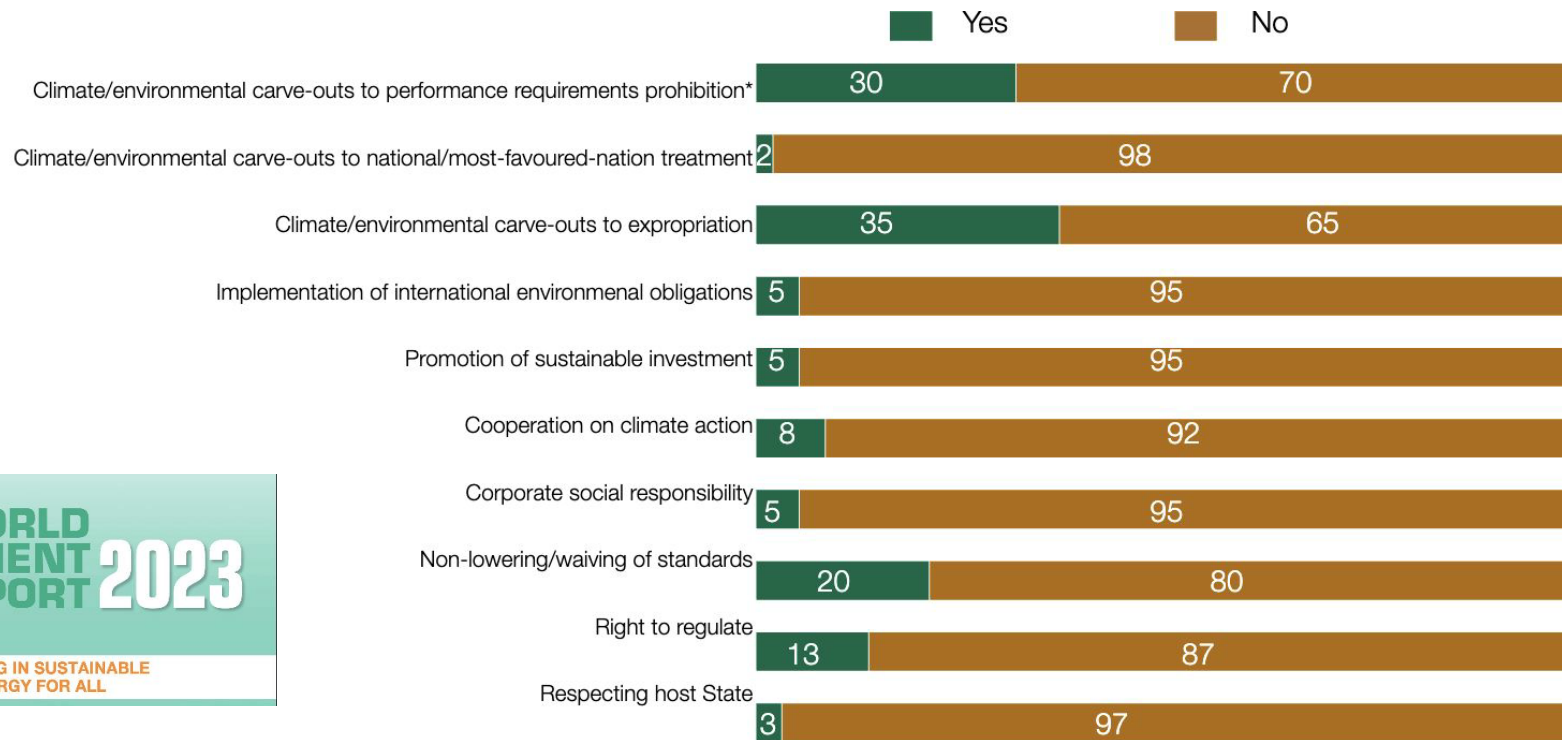
**WORLD
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INVESTING IN SUSTAINABLE
ENERGY FOR ALL

Figure II.13. Prevalence of private investment promotion instruments, by type
(Per cent of countries)



Source: UNCTAD and Climate Change Laws of the World database.



Source: UNCTAD, based on IHEID International Economic Law Clinic Report “IIAs and Climate Action”, May 2022.

Note: The survey analysed 347 IIAs signed between 2010 and 2021, with available texts.

Policy objective	Type of reference	Example
Encourage international co-operation	General promotion of progress in environmental protection and co-operation	EU-Singapore FTA (2018), Arts. 7.1, 12.11 (Trade and Sustainable Development)
	Commitment to co-operate on environmental matters	USMCA (2018), Art. 24.25 (Environment)
Reinforce domestic law	Explicit safeguards or enhancements of international environmental agreements	CARIFORUM-EU FTA (2008), Art. 72
	Non-lowering of environmental standards for the purpose of attracting investment	Japan – Jordan BIT (2018), Art. 20
Preserve domestic policy space	Explicit affirmation of environmental regulatory power of host state	Korea – Uzbekistan (2019), Art. 17
	Carve-out clauses for environmental measures with respect to treaty provisions	China – Australia FTA 2015, Art. 9.8
	Exclusion of non-discriminatory environmental measures from ISDS	China – Australia FTA 2015, section B
Influence investor conduct	Investor obligations related to environmental protection	Morocco – Nigeria BIT (2016), Arts. 14(1), (3); 18(1), (4), 24(1)

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“If IIAs are to be an effective tool to aid countries in the sustainable energy transition, far more is needed. Reliance on the nascent approach of including proactive promotion and facilitation elements for sustainable investment in IIAs needs to be significantly expanded. The same is needed with regard to provisions on corporate social responsibility and technology transfer, including associated know-how that is crucial to supporting a sustainable energy transition.”

UNCTAD toolbox for promoting sustainable energy investment

IIA toolbox for promoting sustainable energy investment

Promoting and facilitating sustainable energy investment

Incorporate IIA provisions that aim at actively promoting and facilitating sustainable energy investment

Provide for preferential treatment of sustainable energy investment

Establish institutional mechanisms for cooperation on R&D of sustainable technologies

Commit to technical assistance on the adoption of investment facilitation measures for sustainable energy

Technology transfer and diffusion

Encourage transfer of low-carbon and sustainable technologies, including related know-how

Make efforts to create an enabling environment for receiving technology

Allow certain kinds of performance requirements relevant to the energy transition

Ensure that the protection of intellectual property rights does not unduly impede the diffusion of technology

UNCTAD toolbox for promoting sustainable energy investment

Right to regulate for climate action and the energy transition	Refine the content of investment protection standards and reform ISDS with regard to energy investments
	Acknowledge the need for regulatory flexibility
	Include general exceptions related to climate change and the energy transition
	Clarify provisions on compensation and damages
Corporate social responsibility	Include binding obligations relating to CSR
	Specifically oblige energy investors to comply with requirements for sustainable investment (e.g. by requiring environmental impact assessments and maintenance of an environmental management system)

UNCTAD toolbox for promoting sustainable energy investment

- Promoting and facilitating sustainable energy investment
 - Incorporate IIA provisions that aim at actively promoting and facilitating sustainable energy investment
 - Provide for preferential treatment of sustainable energy investment
- Right to regulate for climate action and the energy transition
 - Refine the content of investment protection standards and reform ISDS with regard to energy investments
- Corporate social responsibility
 - Include binding obligations related to corporate social responsibility
 - Specifically oblige energy investors to comply with requirements for sustainable investment

OECD

- FDI Qualities Initiative
- FDI Qualities Policy Toolkit
- FDI Qualities Indicators
- FDI Qualities Recommendation
- OECD Roundtable on Investment and Sustainable Development
- FDI Qualities Network
- FDI Qualities Guide for Development Co-operation

OECD FDI Qualities Policy Toolkit, Chapter 5

2. Ensure that domestic and international investment regulations are aligned with and reinforce national climate objectives, including commitments under the Paris Agreement.
- join major agreements and conventions promoting decarbonisation and setting domestic environmental standards for investments
 - align IIAs and trade agreements with climate objectives + allowing for sufficient domestic policy space
 - laws and regulations that level the playing field for climate-friendly investment, including by ensuring an open and non-discriminatory environment for foreign investors in low-carbon technologies, strengthening competition in electricity markets, and ensuring intellectual property protection for low-carbon innovations.

https://www.oecd-ilibrary.org/policies-for-improving-fdi-impacts-on-carbon-emissions_bb662a1a-en.pdf?itemId=%2Fcontent%2Fcomponent%2Fbb662a1a-en&mimeType=pdf

OECD Recommendation of the [OECD] Council on Foreign Direct Investment Qualities for Sustainable Development

adopted by the OECD Council at Ministerial Level on 10 June 2022

“first multilateral instrument that provides guidance to governments on leveraging foreign investment to finance the SDGs, fulfil the commitments made in the Paris Agreement, and optimise the strength and quality of post-crisis recovery”

Aim: supporting governments *“in maximising FDI contribution to sustainable development”*

OECD Recommendation of the [OECD] Council on Foreign Direct Investment Qualities for Sustainable Development

- Governance
- Domestic policy and legal frameworks
- Financial and technical support
- Information and facilitation services
- Development co-operation

<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0476>

Danke für Ihre
Aufmerksamkeit!

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Investitionsschutzabkommen und Gestaltungsspielraum für Umweltschutzmaßnahmen

Einblicke in die Praxis der EU

Enikő Illés
Bundesministerium für Arbeit und Wirtschaft
Wien, 11. Juni 2024

Bilaterale Abkommen der EU – EUSIPA, EUVIPA, CETA, EU-Chile AFA*

- „Right to regulate“ (R2R)

„Die Vertragsparteien bekräftigen ihr Recht, zur Erreichung legitimer politischer Ziele wie [...] Schutz der Umwelt in ihrem jeweiligen Gebiet Regelungen zu erlassen.“ (Art. 2.2 Abs. 1 EUSIPA; gleichlautend Art. 2.2 Abs. 1 EUVIPA, vgl. Art. 8.9 Abs. 1 CETA, Art. 10.14 Abs. 1 EU-Chile AFA)

„ Zur Klarstellung: Die bloße Tatsache, dass eine Vertragspartei — auch durch Änderung ihrer Gesetze — Regelungen in einer Art und Weise trifft, die sich auf eine Investition negativ auswirkt oder die Erwartungen eines Investors, einschließlich seiner Gewinnerwartungen, beeinträchtigt, stellt keinen Verstoß gegen eine Verpflichtung aus diesem Kapitel dar.“ (Art. 2.2 Abs. 2 EUSIPA, vgl. Art. 2.2 Abs. 2 EUVIPA, Art. 8.9 Abs. 2 CETA, Art. 10.14 Abs. 2 EU-Chile AFA)

* Alle Abkommen unterzeichnet, aber noch nicht in Kraft. Grundsätzliche Einigung erreicht: Modernisierung des EU-Mexiko Globalen Abkommens

- **Konkretisierte Investitionsschutzstandards, wie**

- Gerechte und billige Behandlung

„Eine Vertragspartei verstößt gegen die Verpflichtung zu der [...] gerechten und billigen Behandlung, wenn eine Maßnahme oder Reihe von Maßnahmen Folgendes darstellt...“ (Art. 2.4 Abs. 2 EUSIPA, Art. 2.5 Abs. 2 EUVIPA, Art. 8.10 Abs. 2 CETA, Art. 17.17 EU-Chile AFA)

- Voller Schutz und volle Sicherheit

„Zur Klarstellung gilt, dass sich der Ausdruck „voller Schutz und volle Sicherheit“ ausschließlich auf die Verpflichtung einer Vertragspartei in Bezug auf die physische Sicherheit erfasster Investoren und erfasster Investitionen bezieht.“ (Art. 2.4 Abs. 5 EUSIPA, vgl. Art. 2.5 Abs. 5 EUVIPA und Art. 8.10 Abs. 5 CETA, Art. 17.17 Z.4 EU-Chile AFA)

- Enteignungsschutz

„Zur Klarstellung gilt, dass eine diskriminierungsfreie Maßnahme oder eine Reihe diskriminierungsfreier Maßnahmen einer Vertragspartei, die zu dem Zweck konzipiert und angewendet wird, den Schutz berechtigter Gemeinwohlziele wie [...] Umweltschutz zu gewährleisten, keine indirekte Enteignung darstellt...“ (Anhang 1, Z.2 EUSIPA, vgl. Anhang 4 Z.3 EUVIPA, Anhang 8-A Z.3 CETA, Anhang 17-D Z.3 EU-Chile AFA)

- **Investitionsgerichtssystem statt „traditioneller“ ISDS**
 - Beilegung von Streitigkeiten zwischen Investoren und Vertragsparteien
 - » Relevanz von Nachhaltigkeitsbestimmungen bei der Auslegung
 - Gericht erster Instanz und Berufungsinstanz
 - Unabhängige, unparteiliche, durch die Vertragsparteien ernannte Mitglieder (Richter:innen)
 - Strenge fachliche und ethische Anforderungen an Mitglieder
 - Transparenz
- **Exkurs:** ISDS-Reform in der UNCITRAL Arbeitsgruppe III
 - **EU-Position:** Multilateraler Investitionsgerichtshof (MIG)

Bilaterale Investitionsschutzabkommen (BIT) der MS

- Seit Inkrafttreten des Vertrags von Lissabon ausschließliche Zuständigkeit der EU für ausländische Direktinvestitionen (exkl. ISDS)
- „Grandfathering–Verordnung“ [VO(EU) 1219/2012]
 - BIT der MS blieben in Kraft, werden aber durch Inkrafttreten der Investitionsschutzabkommen der EU ersetzt
 - MS dürfen mit Genehmigung der EK BIT verhandeln oder ändern

Musterbestimmungen der EK für die (Nach)Verhandlung von BIT der Mitgliedstaaten mit Drittländern

- R2R, konkretisierte Investitionsschutzstandards
- Bestimmungen zu
 - „Corporate Social Responsibility and Responsible Business Conduct“
 - „Investment and Environment“
 - “Investment and Climate Change”
 - “Dialogue and cooperation on investment-related sustainable development issues”
- ISDS ist möglich, soll aber durch den MIG ersetzt werden

Exkurs: der modernisierte Energiecharta-Vertrag

- Agreement in principle (Juni 2022) enthält ua
 - Konkretisierte Investitionsschutzstandards
 - R2R
 - Bekräftigung von Verpflichtungen unter UNFCCC und Pariser Abkommen
 - **Partielle carve-out fossiler Investitionen**

Danke für Ihre
Aufmerksamkeit!

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Veranstaltungshinweise

AW-Curriculum 2023/2024

W4: Das Multilaterale Welthandelssystem – Zukunft der WTO

MMag. Dr. iur., Ralph Janik, LL.M. (Sigmund Freud PrivatUniversität Wien)

am 19. September 2024

FIW-Vorlesung

VO55: Larch Estimating the effects of trade agreements: Lessons from 60 years of methods and data

Prof. Dr. Mario Larch (Universität Bayreuth)

am 10. Oktober 2024

Weitere Veranstaltungshinweise sowie alle Infos und Anmeldelinks auf <https://www.fiw.ac.at/>