

INVESTOR-STATE DISPUTE SETTLEMENT

Raising the cost of climate action

Dr Kyla Tienhaara

Canada Research Chair in Economy & Environment
Queen's University, Kingston



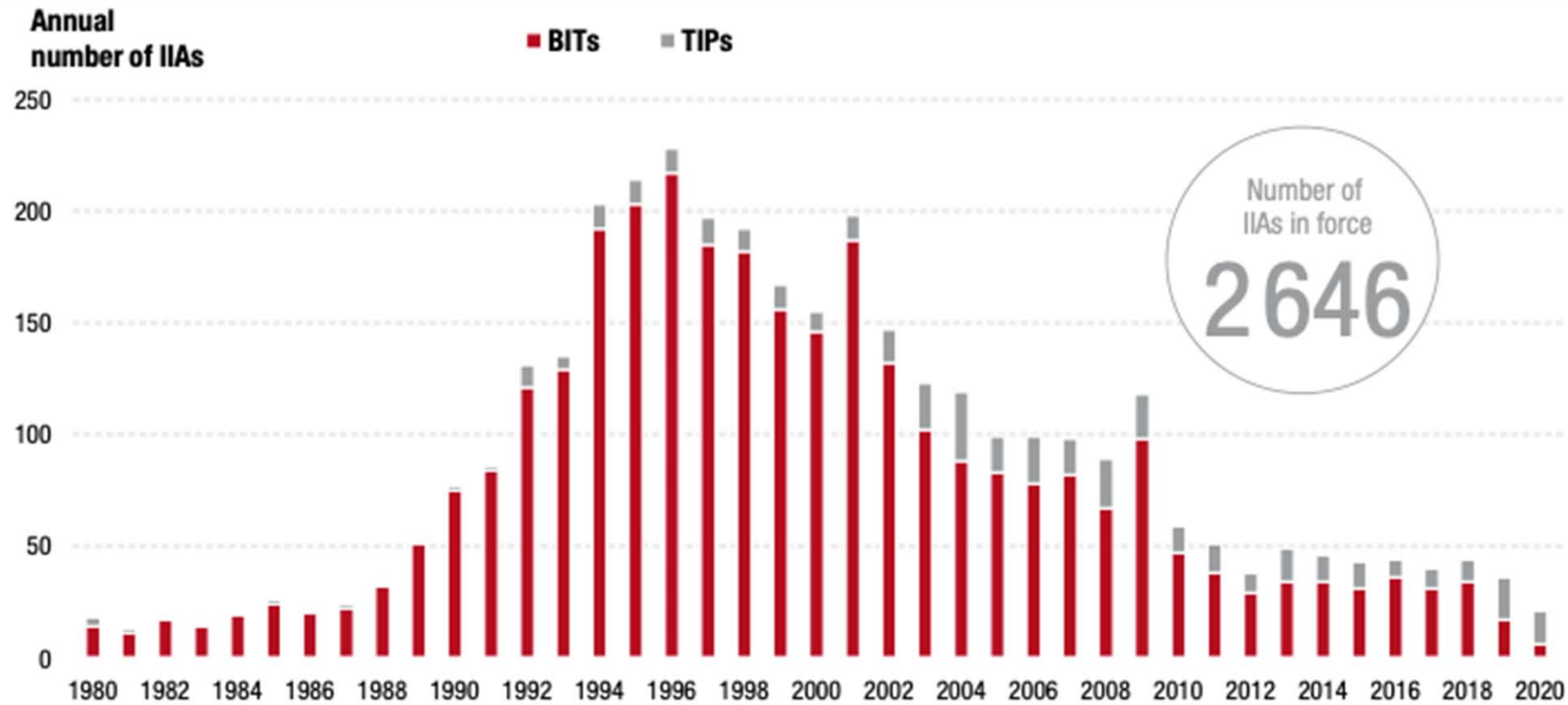


3 QUESTIONS:

1. Should fossil fuel investors receive any compensation when their assets are stranded as a result of government policies?
2. If there are circumstances in which they should be compensated, who should decide what amount is appropriate?
3. Do we need to reform compensation rules in international investment law?

INTERNATIONAL INVESTMENT TREATIES

Figure 1. Number of IIAs signed, 1980–2020



Source: UNCTAD, IIA Navigator.

Note: This includes treaties (i) unilaterally denounced, (ii) terminated by consent, (iii) replaced by a new treaty and (iv) expired automatically.

TYPES OF INVESTMENT TREATY

- BIT = bilateral investment treaty
- TIPs = treaties with investment provisions, usually regional trade agreement – e.g., NAFTA, CPTTP, CETA
- ECT = Energy Charter Treaty (unique investment treaty that only covers energy sector – mainly European countries but also Japan)





PROTECTIONS FOR INVESTORS

Direct and indirect expropriation

(substantial interference in the investment – e.g. regulation – can be considered expropriation)

Most favoured nation and national treatment

(in theory this is about preventing discrimination)

“Fair and equitable treatment”

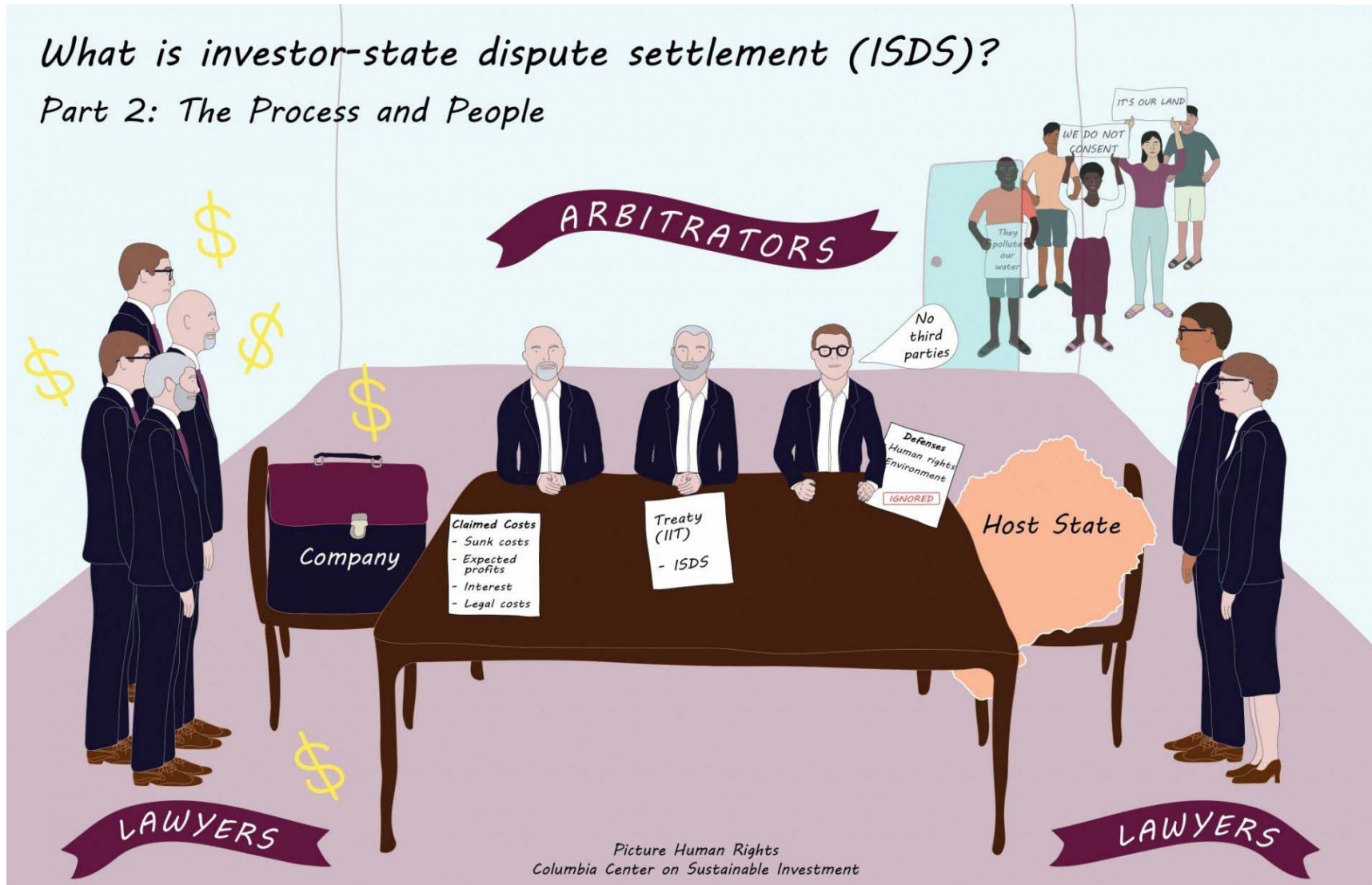
(meeting the “legitimate expectations” of the investor)



Biggest problem!

What is investor-state dispute settlement (ISDS)?

Part 2: The Process and People



<https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement>

LEGITIMATE EXPECTATIONS?

- Requirement to provide regulatory stability lacks basis and is philosophically flawed and should be rejected
- International agreements on climate dating back to 1992
- Denial/policy obstruction by fossil fuel firms



OFFSHORE OIL IN ITALY

- UK firm Rockhopper Exploration challenging Italy over ban on oil operations within 12 nautical miles of the coast
- ECT claim is ongoing, unclear how much the company is seeking



COAL PHASE-OUT IN ALBERTA

- US mining firm argued that it should have received 'transition payment' (as Canadian energy providers did) for Alberta coal phase-out
- NAFTA claim was thrown out on jurisdiction

The Current

U.S. company trying to sue Canada over coal phase-out made a bad bet, says academic



Westmoreland Coal Company wants compensation under NAFTA rules

CBC Radio · Posted: Jan 11, 2019 11:32 AM ET | Last Updated: January 11, 2019



Alberta's plan to phase out coal by 2030 includes close to \$2 billion in compensation for three Canadian companies, but a U.S. company argues it is entitled to a share of that money. (CBC)

COAL PHASE-OUT IN THE NETHERLANDS

- December 2019: decision to ban coal-based power generation by 2030
- February 2021: RWE launches a €1.4 billion claim under the ECT
- April 2021: Uniper launches ECT arbitration claim for up to €1 billion

COAL FEBRUARY 4, 2021 / 9:24 AM / UPDATED 2 MONTHS AGO

RWE seeks compensation for Dutch plans to shut coal-fired plant

2 MIN READ

f t

By Reuters Staff

FRANKFURT, Feb
the Dutch govern
Netherlands as p

April 16, 2021
2:50 AM EDT
Last Updated 6 months
ago

Energy

Uniper seeks court ruling over Dutch coal exit

3 minute read

Reuters



CANCELLATION OF KEYSTONE XL PIPELINE

- Project cancelled by President Biden on first day in office
- Previous cancellation (by Obama) sparked a NAFTA dispute
- Current case is for \$15 billion, NAFTA 'legacy' dispute
- Alberta has launched a separate case

Oil & Gas / FP Energy / Commodities

A 'long and expensive' challenge: Alberta to join TC Energy's \$15B NAFTA claim over Keystone XL rejection

It will mark the first time a level of government is directly involved in a NAFTA dispute as an investor

Geoffrey Morgan

Jul 07, 2021 • July 7, 2021 • 3 minute read • [146 Comments](#)



Table 1. Success by carbon majors (and shareholders) in ISDS

Company	Carbon major rank	ISDS wins	Total awarded (US\$, millions)
Chevron	2 (2017)	2	77.7 + pending award against Ecuador
ConocoPhillips	13 (2017)	1	8,446*
ExxonMobil	4 (2017)	3	1,800
Occidental	55 (2013)	2	1,840
Repsol	45 (2013)	1	5,000**
Total	17 (2017)	1	269.9
Yukos shareholders	48 (2013)	5	1,846 + 40,000 + 8,203 = 50,049***

Sources: UNCTAD Investment Dispute Navigator¹² and Climate Accountability Institute¹¹

* Figure adjusted based on analysis of award

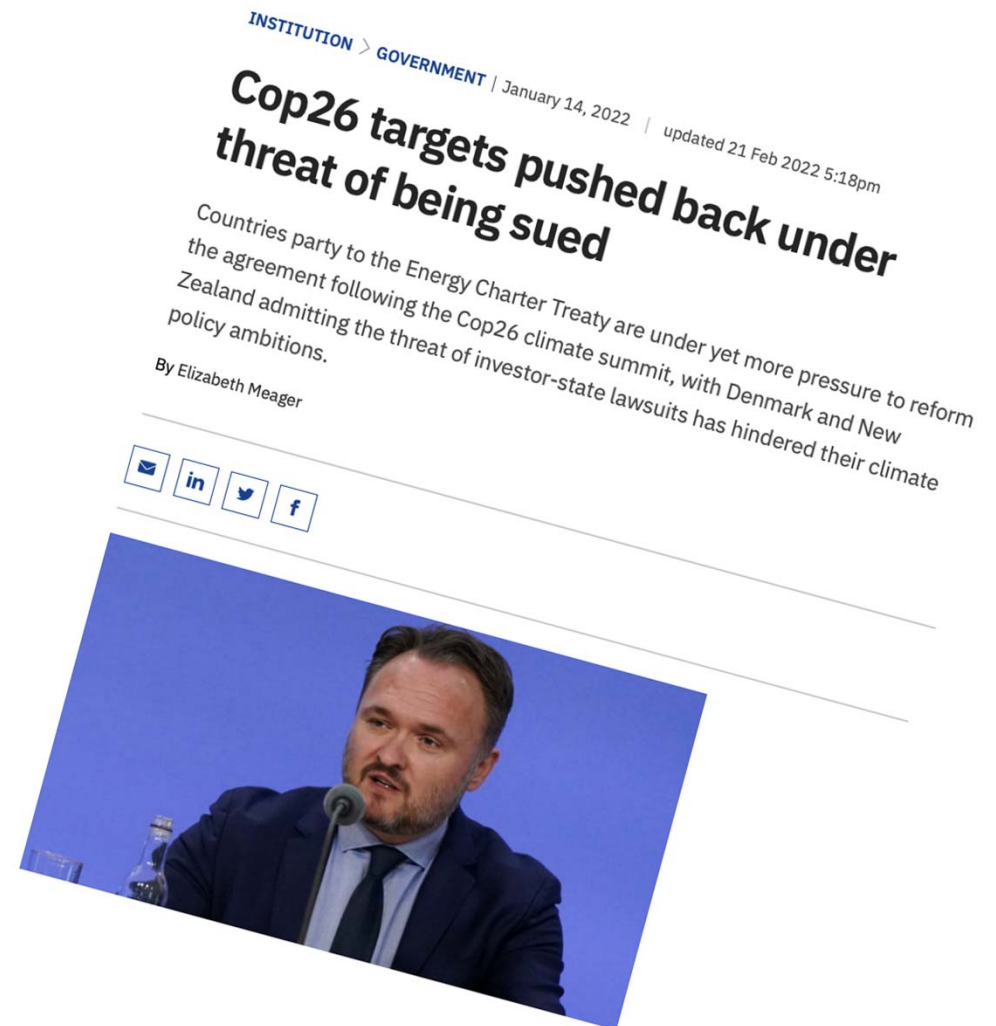
** Awarded through settlement

*** Only includes three largest shareholder awards

REGULATORY CHILL

The idea that governments will fail to regulate in the public interest in a timely and effective manner because of concerns about ISDS

- France oil & gas phase-out: delayed to avoid ISDS?
- Denmark oil & gas phase-out: delayed to avoid ISDS?
- New Zealand: did not join Beyond Oil and Gas Alliance (BOGA) because of fear that Paris-aligned phase-out would spark ISDS claims



RAISING THE COST OF THE ENERGY TRANSITION

When governments follow through on policies, they may end up paying more compensation that they otherwise would have:

- Dutch coal phase-out: 'insufficient' compensation offered → arbitration
- German coal phase-out: excessive compensation?

Germany strikes €44bn deal to phase out coal use in energy supply

Compensation agreed for communities and companies including RWE



RWE alone is set to receive €2.6bn of the €4.35bn compensation package, with the remaining €1.75bn set aside for utilities in eastern Germany © Reuters

Source: Financial Times



3 QUESTIONS:

1. Should fossil fuel investors receive any compensation when their assets are stranded as a result of government policies?
 - No, because there should be no expectation of policy stability and fossil fuel investors have actively created their own expectations that action would not be taken
 - However, a government may decide that it is politically expedient to provide compensation in some circumstances



3 QUESTIONS:

2. If there are circumstances in which they should be compensated, who should decide what amount is appropriate?

- Democratically elected governments are in the best position to decide the appropriate amount of compensation for fossil fuel investors
- However, if investors have access to ISDS, that will influence the amount of compensation that governments offer



3 QUESTIONS:

3. Do we need to reform compensation rules in international investment law?

- Termination of investment treaties is preferable, but in absence of agreement on that, placing hard caps on compensation is advisable
- One option is limiting to sunk costs
- Aisbett & Bonnitcha have an alternative proposal for limiting compensation that could work well in climate context (because in most cases, fossil fuel investors would not be entitled to any compensation)

THANK YOU FOR LISTENING

Email: kt71@queensu.ca

Twitter: [@KylaTienhaara](https://twitter.com/KylaTienhaara)