



SCHOOL OF
ENVIRONMENTAL
STUDIES

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Re: the COP 30 Presidency Roadmap on the Transition Away from Fossil Fuels in a Just, Orderly and Equitable Manner; and

Dear COP30 Presidency,

I am writing in my capacity as an academic researcher, with expertise on the intersection between international investment law and climate policy. Please find attached a submission with my responses to the questions outlined in the Invitation to Submit Contributions.

Kind regards,

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

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(a) What are the most critical barriers — whether physical, economic, financial, institutional, technological or social— preventing a transition away from fossil fuels?

International investment treaties pose a substantial barrier to a just transition away from fossil fuels. There are currently more than 2600 international investment treaties in force. Most of these treaties provide foreign investors access to international arbitration through 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 (i.e., a subsidy) (Sachs, Johnson and Merrill 2020; Gaukrodger 2022).

To date, there have been more than 350 ISDS cases related to fossil fuel investments resulting in compensation of at least US\$82.8 billion paid to the industry (Di Salvatore, Cotula, Nanda, and Wang 2023). Numerous fossil fuel investors have used ISDS to challenge policies related to the energy transition (see Table 1). The Netherlands, Germany, Canada and Australia have been sued over coal power phase-out policies or rejections of proposed power plants. Canada, Colombia, the UK and Australia are all currently facing cases related to coal mining. Canada is also defending the decision to reject a proposed LNG terminal, and the US has faced two cases related to the Keystone XL oil pipeline. It is anticipated that the number of climate-related ISDS cases will rise as governments begin to take more direct action to limit fossil fuel supply (Arcuri, Tienhaara and Pellegrini 2024). Tienhaara et al. (2022a) estimate that cancelling upstream oil and gas projects that are not aligned with a 1.5°C pathway could cost governments upwards of US\$340 billion in ISDS claims.

The cost of losing a single ISDS case, where awards average in the range of US\$500-600 million in the extractives sector and can reach into the billions, is high (Clemence and Damji 2023). This, coupled with the uncertainty around outcomes, can lead governments to delay, modify or abandon policies (‘regulatory chill’) (Tienhaara 2018). For example, in 2017, the Canadian oil firm Vermillion threatened the French government with an ISDS case over a law aimed at ending hydrocarbon extraction in the country (Sachs et al. 2020). The law was subsequently weakened (Vaudano, 2018). Additionally, New Zealand’s former climate minister has acknowledged that the country did not take more aggressive action to phase-out oil and gas production, in part, due to concerns about potential ISDS claims (Meager 2022). While these examples are from the global North, the potential for regulatory chill is highest in states with substantial debt and fiscal constraints, which are often also the states most vulnerable to climate change.

In addition to obstructing government efforts to transition away from fossil fuels, investment treaties and ISDS can also hamper initiatives aiming at ensuring that the benefits of new green investments are equitably shared (Tienhaara 2025). For example, the current global rush to acquire critical minerals like lithium and cobalt that are used in batteries is intensifying mining operations across the global South. This risks a new era of ‘green

extractivism' wherein resource exploitation that deepens inequality and harms local communities is justified by the urgency of the climate crisis (Dietz 2024).

According to one survey of mining companies, lawyers, and arbitrators, the number of ISDS cases in the mining sector (which is already substantial) is likely to continue to rise, and while in the past, most mining cases concerned gold, "base metals" are likely to dominate future disputes "as the green energy transition shifts investment in the mining sector" (Charles River Associates 2023). UNCTAD (2025) reports 51 ISDS cases relating to critical minerals required for the energy transition with six arising in 2024 alone.

Disputes between mining investors and states often begin as conflicts between the investors and local communities (Williams 2016). These conflicts frequently stem from community concerns about dispossession and environmental degradation, which are two of the displacement effects of critical mineral extraction that Kramarz et al. (2021: 2) describe as part of the "dark side of renewable energy." When claims about critical minerals projects are brought to arbitration, a further displacement effect occurs as local communities are largely shut out of the process. Tribunals have discretion to choose whether they will accept *amicus curiae* (friend of the court) briefs and whether they will consider their content seriously. In many cases, neither occurs. Additionally, while arbitrators have broad discretion to interpret investment treaties, they tend to be averse to looking outside of investment law for guidance on issues that may arise during a dispute. ISDS tribunals do not view themselves as being bound by international agreements on climate change, human rights, or Indigenous rights. As Perrone (2023) argues, addressing this lack of recognition is more difficult than opening arbitration to greater participation.

In addition to cases related to conflicts between local communities and mining companies, there will also be ISDS cases that arise when governments make changes to their mining regimes to extract greater economic and development benefits for their countries. These claims can emerge from investors that have only conducted exploration and have not reached the stage of extraction and may not even have acquired all necessary permits to do so (e.g., environmental approvals). Nevertheless, ISDS tribunals may award damages to these investors based on the assumption that they would have made substantial profits in the future. Tribunals in these cases will be deliberating on the distribution of benefits from the energy transition (*distributive justice*). In doing so, they may contribute to a final displacement identified by Kramarz et al. (2021: 6) which is the "entrenchment of development pathways that lock local, regional, and national economies into low-value forms of primary resource extraction and waste disposal."

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 state win on jurisdiction.
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. Award annulled, new case pending.
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.	Dismissed on jurisdictional grounds.
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.***
Glencore	Colombia	Switzerland	2021	BIT	Rejection of coal mine expansion.	Pending.
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.
ExxonMobil	NL	Belgium	2024	ECT	Early closure of gas field following fracking-induced earthquakes	Pending.

Woodhouse Investment and West Cumbria Mining	UK	Singapore	2025	BIT	Rejection of proposed coal mine	Pending.
Shell	NL	UK	2026	ECT	Early closure of gas field following fracking-induced earthquakes	Pending.
Agip Caspian Sea B.V. and others	Kazakhstan	NL, Japan, France	2026	ECT, BITs	Environmental fine	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).

(b) What potential levers, whether economic, financial, institutional, social or technological, exist for accelerating the implementation of the transitioning away commitment?

In response to ISDS claims, many countries have taken steps to defend their policy space. Canada and the US excluded ISDS from their relationship under the US-Mexico-Canada Agreement (USMCA). The EU as well as many European countries including France, Germany, the Netherlands and the UK have all withdrawn (or have indicated that they will do so) from the Energy Charter Treaty (the most frequently invoked investment treaty in ISDS cases), in part based on its incompatibility with the Paris Agreement and policies such as the EU Green Deal (European Commission 2024; UK Government 2024).

Withdrawing from or terminating investment treaties is an approach worth serious consideration by all countries that are committed to a just transition away from fossil fuels (Tienhaara et al. 2022a; 2022b; de Anzizu and Reisch 2024). However, the existence of ‘survival’ or ‘sunset’ clauses that extend treaty protections for 5-20 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). For this reason, coordinated termination of treaties (which allows for sunset clauses to be nullified) is preferable to unilateral termination.

Another option is to remove ISDS from existing investment treaties but leave them otherwise intact (de Anzizu and Reisch 2024). Some countries have effectively achieved this through side letters with treaty partners (e.g., this is the approach taken by New Zealand in the Comprehensive and Progressive Agreement for a Trans-Pacific Partnership/CPTTP and other regional treaties). Removing ISDS leaves treaties enforceable through state-state dispute settlement.

Given the large number of investment treaties currently in force, a plurilateral agreement, signed by a coalition of willing countries, would be the most efficient approach to achieving widescale change in the regime. A plurilateral agreement could either provide for termination of treaties among the signatories or stipulate that the removal of ISDS would be automatically integrated into all covered treaties (de Anzizu and Reisch 2024). Draft language for such an agreement, prepared by legal experts, is available for consideration (Johnson et al. 2018). The agreement could start among a small group of states and remain open for new parties to opt-in.

(c) What country, regional or sector roadmap experiences, best practices, and lessons learned can be shared?

It is notable that Colombia has shown leadership in this area by placing ISDS on the agenda of the Santa Marta Conference on Transitioning Away from Fossil Fuels, to be held at the end of April 2026. Additionally, President Petro has recently stated that the country will pull out of its investment treaties (Alsema 2026).

Brazil also has important experience to share, as a country that has never signed an international investment treaty that provides access to ISDS. Brazil's expertise is especially relevant given that the country has had considerable success in attracting foreign investment in the renewable energy sector. In the global South, there is a persistent (yet false) belief that the protection provided by investment treaties is critical to stimulating investment flows and this is hindering many states from moving away from ISDS. Decades of research have failed to demonstrate that investment treaties have a significant positive impact on investment flows (Brada, Drabak and Iwaski 2021) and the Brazilian example also demonstrates that other models are more effective.

Finally, members of the European Union have relevant experience with terminating investment treaties through a plurilateral agreement. An Intra-EU Bilateral Investment Treaty Termination Agreement that was developed in the EU following a court ruling that these agreements are incompatible with EU law (de Anzizu and Reisch 2024; Mehranvar et al. 2024).

(d) How can a just, orderly and equitable transition best reflect the diverse realities of countries at different stages of development and with different degrees of dependence on fossil fuels?

Investment treaties and ISDS affect countries in the global South more severely than countries in the global North due to the asymmetry of investment flows between bilateral investment treaty partners and greater fiscal constraints, particularly in countries burdened by debt. 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 domestic risk. For example, European countries that are withdrawing from the Energy Charter Treaty (a treaty that permits European investors to sue European states) have not taken steps to terminate bilateral investment treaties with countries in the global South. Similarly, the US and Canada have eliminated ISDS within their treaty relationship (USMCA) but have not revised their treaties with other

countries. Australia is an exception, with the current Labor Government pursuing efforts to renegotiate existing bilateral investment treaties to “remove or reform” ISDS provisions as well as rejecting the inclusion of ISDS in any new treaties (Government of Australia, 2026).

The current position of most global North countries on investment treaties and ISDS goes against the common but differentiated responsibilities principle and commitments that have been made to provide climate finance to facilitate the transition away from fossil fuels in the global South. Indeed, flows of climate finance could be negated or even reversed if action is not taken to stop fossil fuel investors—largely based in the global North—from pursuing compensation claims in the hundreds of millions and billions of dollars against governments in the global South.

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