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RESEARCH ARTICLE

# Climate obstruction and capital accumulation by feigned victimization: TC Energy and the political economy of investor-state dispute settlement

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**Abstract**

The international investment regime provides generous protections for foreign investors against adverse legal changes in host states, and unusually strong procedural rights to enforce those protections in investor-state dispute settlement (ISDS). Scholars have observed that the regime enables corporate capital accumulation and raises the costs of climate action, potentially deterring states from adopting ambitious climate policies. Building on this literature, we locate a key source of these concerns in the asymmetric treatment of state and investor behavior in ISDS, which allows investors to depict themselves as innocent victims of "unfair" and "unforeseeable" "political" processes, despite themselves being active political players and sophisticated political risk managers—a tactic we call *feigned victimization*. This tactic is employed by fossil fuel companies to achieve capital accumulation and climate obstruction goals. We illustrate our argument through an empirical case study of TC Energy's US$15 billion ISDS claim against the United States in relation to the Biden Administration's revocation of a permit required to construct the Keystone XL oil pipeline. Our case study also illustrates a method by which states can expose feigned victimization tactics by investors and incorporate evidence of this into their legal defenses in ISDS.

**Keywords:** Foreign investment; fossil fuels; climate policy; climate obstruction; investor-state dispute settlement

## Introduction

The international investment regime comprises over 3000 investment treaties signed between two or more states, which provide reciprocal protection for investment in their territories. Many investment treaties confer on investors substantive rights, such as the right to fair and equitable treatment (FET), which are more advantageous to investors than those typically available under domestic laws. Investment treaties also provide investors with unusually generous procedural rights to bring claims against states before private arbitral tribunals—bypassing the host state's domestic court system—in a process known as investor-state dispute settlement (ISDS). When an arbitral tribunal finds that a treaty has been breached, it will typically direct the state to pay monetary damages to compensate the investor for the value of the investment—often calculated using the controversial Discounted Cash Flow (DCF) method of valuation[1]—as well as potential "lost future profits."[2] The average award over the decade 2014–2023 was US$256 million.[3]

Scholars of global environmental politics and international investment law, international organizations, and several governments have drawn attention to the dangers posed by the regime's protection of fossil fuel investments to the achievement of the objectives of the Paris Climate

[1]Boué 2023.
[2]Fisher, Johnson and Fritzsche 2017; Bonnitcha and Brewin 2020.
[3]UNCTAD 2024. This does not include the interest that may be awarded which can significantly increase the total amount owed. It is also worth noting that the average award is higher in cases concerning fossil fuel investments (see Di Salvatore 2021).

Agreement.[4] Research has highlighted two main concerns. The first concern is *capital accumulation* by the industry: winning speculative lost future profits in any ISDS case can provide firms with additional capital that can then be re-invested in further projects that are incompatible with a 1.5 or 2°C pathway. This is precisely what happened when the British firm Rockhopper won over €250 million in damages and costs after the Italian government banned offshore oil developments when it had only invested around €36 million in exploration.[5] Following the issuance of the award, the firm quickly announced that it would direct its winnings to oil exploration in the Falkland Islands.[6] 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.[7] Importantly, ISDS need not be formally invoked to lead to accumulation. The shadow of arbitration can distort the power dynamics in negotiations between investors and states regarding compensation for the early retirement of fossil fuel assets (e.g., coal-fired power plants), leading to higher compensation than would otherwise be expected.[8] Given this context, it is unsurprising that many investors (and their counsel) see ISDS as a means by which they can profit from government climate action.[9]

The second concern is that investors can use the threat of large ISDS claims as a *climate obstruction* strategy. Climate obstruction has been defined as "intentional actions and efforts to slow or block policies on climate change that are commensurate with the current scientific consensus of what is necessary to avoid dangerous anthropogenic interference with the climate system."[10] The fact that investor protections and ISDS raise the costs of climate law reform itself makes their invocation in cases of climate regulation obstructive; the fact that the threat of such increased costs can have a regulatory chilling effect,[11] reducing the likelihood or ambition of climate laws, makes them all the more obstructive.

In much of the literature, the cause of these problems is identified as the investment treaties themselves. While we do not doubt that investment treaties pose problems for climate mitigation,[12] we argue in this paper that much of the concern about capital accumulation and climate obstruction results from the more specific conjunction of two practices: (i) arbitrators' investor-friendly interpretations of the vague substantive protections in those treaties, which afford opportunities for (ii) strategic political behavior by investors, including the fossil fuel industry. With regard to the first factor, our argument focuses on the asymmetric treatment of politics in arbitration, whereby the conduct of states and investors is measured against very different standards: arbitrators tend to be skeptical of policies that have been influenced by groups representing broad public interests (e.g., non-governmental organizations); yet arbitrators are reluctant to scrutinize whether the investor conducted due diligence or had influence over the policy process. With regard to the second factor, we argue that the prevailing asymmetric treatment of the political process by arbitrators allows investors to portray themselves as innocent victims of "unfair" and "unforeseeable" "political" processes, despite themselves typically being active political players and sophisticated political risk managers—a tactic we call *feigned victimization*. These practices are not limited to cases involving the fossil fuel industry, though we focus on that industry here because it has historically been the largest beneficiary of the international investment regime, and because of our particular concern with the climate implications of capital accumulation and climate obstruction by the industry.

4 Tienhaara et al. 2022; UNCTAD 2022; Boyd 2023; Lee and Dilworth 2024. In 2023 and 2024 the EU and several EU Member States withdrew from the Energy Charter Treaty (ECT), partially over concerns that the protection of fossil fuel investments under the treaty was incompatible with the Paris Agreement and the EU Green Deal.

5 Arcuri, Tienhaara, and Pellegrini 2024.

6 Rockhopper 2022.

7 Di Salvatore et al. 2023.

8 Flues 2022; Tienhaara and Cotula 2020.

9 Kahale 2022.

10 Brulle and Roberts 2024, 6.

11 Tienhaara 2018; Baldon Advocats 2022.

12 In this respect, it is important to note the work of Gaukrodger (2022) who has cogently argued that investment treaties act as a form of political risk insurance provided freely by the state (i.e., public finance) and should be aligned with the Paris Agreement, particularly Article 2.1(c).

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The paper is structured as follows. In section 2, we establish our claim that investment arbitrators tend to treat politics asymmetrically, to the benefit of investors, drawing on relevant arbitral jurisprudence and scholarly literature. We further argue that this asymmetric treatment is problematic in light of firms' incentives and capabilities to engage in strategic political behavior and regulatory capture. This asymmetry, we argue, creates opportunities for investors to engage in feigned victimization, which we theorize as a form of corporate "organized hypocrisy." In section 3, we provide an empirical illustration of feigned victimization through an in-depth study of TC Energy's US$15 billion arbitral claim against the United States. Although the tribunal dismissed TC Energy's claim at the jurisdictional phase in July 2024 (and there are very limited options for the company to challenge this decision), the case, nevertheless, remains useful for our objectives, foremost among which is to illustrate the tactic of feigned victimization. Additionally, the case study allows us to demonstrate a methodology for exposing the inconsistencies between the behavior of an investor and the way it portrays itself in legal pleadings. The long history of this dispute provides a particularly rich opportunity to observe such inconsistencies. In section 4, we conclude by summarizing our argument, suggesting avenues for future research, and providing recommendations for states that are faced with an FET-based ISDS claim from a fossil fuel investor.

Our study presents new insights into empirical, theoretical, and methodological areas, making important contributions to scholarship on both business politics and global environmental politics. Empirically and theoretically, we illuminate the political tactics employed by fossil fuel companies to advance their narrow financial interests via the ISDS process. In so doing, we contribute to ongoing multidisciplinary theoretical inquiries into corporate mechanisms of capital accumulation[13] and climate obstruction[14] in the neoliberal era. We also contribute to scholarship on the political economy of the investment regime. Although there is a rich literature on why states include or omit ISDS clauses in their treaties[15], there is relatively little work on the politics of arbitration.[16] This lacuna is unfortunate because that process is both highly consequential and highly politicized, providing investors in general, and the fossil fuel industry in particular, with richly rewarding opportunities for strategic political behavior in pursuit of their capital accumulation and climate obstruction goals. Methodologically, we innovatively combine normative critique, legal analysis, and qualitative political economy analysis. This combination of methods enables us to illuminate how spaces for strategic political behavior by firms arise from legal processes in which adjudicators have wide normative discretion, and to document that behavior. As noted, we also pioneer a methodology for exposing the inconsistencies in investor behavior that constitute feigned victimization, which states can utilize in legal defenses against ISDS claims.

## The asymmetric treatment of politics in investment arbitration

ISDS is an ad hoc process whereby a panel of three arbitrators (one chosen by the state, one by the investor, and the third either agreed to by both parties, or appointed by an arbitral institution) decides whether an investment treaty has been breached and, if so, determines how much monetary compensation to award the investor. A wide range of concerns, from a lack transparency to a lack of consistency in decisions (a result of a lack of precedent and a very limited appeals process) have been expressed about ISDS.[17]

FET is the most invoked, and arguably the most consequential, standard in investment treaties. It is, therefore, the primary lens through which tribunals scrutinize state conduct. The standard is open to a significant amount of interpretation: what do "fair" and "equitable" mean in this context? When would a state's pursuit of good faith law reform in the public interest be *un*fair and *in*equitable to investors? These questions have fallen largely to arbitral tribunals to resolve.

[13]Pistor 2020; Slobodian 2018.
[14]Brulle 2021; Downey 2015; Ekberg et al. 2023.
[15]Lugg et al. 2024; Calvert 2022; Calvert and Tienhaara 2023; Barfield 2017; Reddie 2017; Poulsen 2015.
[16]Williams 2022 is a notable exception.
[17]Bonnitcha, Poulsen and Waibel 2017; Dietz, Dotzauer and Cohen 2019.

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Many arbitral tribunals have interpreted the FET standard as requiring states to respect the "legitimate expectations" of investors, even though treaties rarely, if ever, use this language.[18] The standard entailed in this legitimate expectations doctrine, which exists in some domestic legal systems, is subject to considerable philosophical and legal confusion and controversy.[19] There are multiple different ways in which the doctrine (if it is to form a part of the FET standard at all), could be interpreted and applied. Indeed, investment arbitration tribunals have found legitimate expectations to have been violated by a range of different state actions, implying that investors are protected from a wider or narrower range of state conduct, depending on the interpretation. At the narrower end of the spectrum, legitimate expectations have been held to arise only on where a specific representation or inducement was made by the host state to the investor in the course of their interpersonal interactions.[20] In the widest interpretation of the concept, investors have been deemed to have a legitimate expectation that the host state's legal regime at the time of the investment decision would remain entirely stable for the economic life of the invested asset.[21] Lying in between these extremes, and of particular interest to us here, investors have also frequently claimed a general expectation that government decision-making will be rational and impartial and not "politically" motivated. Bonnitcha and Williams find that "many tribunals seem to regard . . . political influences [by broad interest groups] over government decision-making as inherently illegitimate."[22] Two examples that they cite are *Tecmed* v *Mexico* and *Bilcon* v *Canada;* in both cases, the tribunals agreed with investors that the deference to local concerns by decision-makers contributed to the breach of the FET standard. In the *Rockhopper* case, the tribunal found that an expropriation had occurred rather than a breach of FET but was similarly critical of the influence that local community opposition to offshore oil production had on the government.[23]

The more investor-friendly approaches (at the very least) can be criticized on normative grounds. Arguably, "reasonable" investors should be required to assume ordinary "policy risks," i.e., risks that a government law or policy that is material to the value of the investment will change during the life of the investment for a wide range of reasons, such as electoral cycles, cabinet reshuffles, new information, and responsiveness to public-interest concerns, including those raised by interest groups vying to shape policy.[24] Were such policy risks to be, as a matter of law, allocated to investors, that would preclude investor claims that they *legitimately* expected legal stability or "apolitical," technocratic administrative decision-making. Moreover, since investors themselves are often among the actors engaged in political conflict aimed at influencing policy outcomes, it is implausible to think that they actually *expected* these outcomes at all. Where such political activities by investors are observed, tribunals should thus infer that investors did not in fact "expect" stable laws or "apolitical" decision-making, and this finding alone should invalidate any claim to the investor's legitimate expectations.[25]

Some tribunals have considered the reasonableness of investor expectations through an examination of whether the investor engaged in adequate due diligence.[26] For instance, the Award in *Methanex* demonstrates that it is entirely possible for a tribunal to not only consider whether the investor was aware of the risk of policy change in the jurisdiction and sector in which it was investing but also to show deference to domestic political processes:

> Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of

[18]Gaukrodger 2017.
[19]Brown 2017; Green 2020.
[20]Perrone 2021, 47.
[21]See, e.g., *Tecmed v Mexico*, Award, 29 May 2003, [154].
[22]Bonnitcha and Williams 2020, 92.
[23]Arcuri 2023.
[24]Bonnitcha and Aisbett 2021, 283–284; Green 2020.
[25]Green 2020.
[26]Sattorova 2018.

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> chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons. Indeed, the very market for MTBE in the United States was the result of precisely this regulatory process. Methanex appreciated that the process of regulation in the United States involved wide participation of industry groups, non-governmental organizations, academics and other individuals, many of these actors deploying lobbyists. Methanex itself deployed lobbyists.[27]

Unfortunately, the approach taken by the tribunal in *Methanex* is not the norm. As with the general lack of consistency in investment arbitration, tribunals differ on the role of due diligence and the criteria that should be used to assess it.[28]

Meanwhile, arbitrators tend not to scrutinize investor influence over policymaking unless such influence clearly involved fraud or corruption.[29] This tendency is especially troubling since it is well-established that one of the ways multinational business corporations maximize profits is by seeking to influence the existence, content and enforcement of government policies, laws, regulations and administrative decisions—for instance, through lobbying, donations to political campaigns, and maintaining a flow of staff between the firm and the government.[30] Because of their extensive resources, multinational corporations are typically able to engage the services of lobbyists, lawyers, consultants and public relations professionals in order to expertly shape their political environment.[31] Moreover, because firms affected by a given regulatory domain tend to be relatively few in number, they are better able to overcome coordination barriers to collective political action than the general public.[32] In particular, firms in more heavily regulated industries are often able to "capture" law-makers, regulators and administrative bodies, which come to systematically privilege the interests of the regulated firms over the public interest.[33] It is also well-established that multinational firms strategically utilize investment treaties to exert political pressure on host governments to abandon policies and regulations that would hurt their bottom line.[34]

Tribunals' lack of insistence on firm due diligence and blindness to firms' strategic political activity seem all the more unrealistic in the context of climate policy, which is characterized by intense distributive conflict between climate policy proponents and opponents.[35] Any reasonable investor in the fossil fuel sector would be aware of the risk of policy change. Moreover, new information on climate change is constantly being provided to governments, from advances in climate science to evolving international norms in forums such as the Conferences of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC). Voters and civil society groups signal their concerns about the impacts of fossil fuel activities to governments through communications, protests and other forms of collective action that are evolving rapidly.[36] The risk of changes in policy have also been laid out clearly by, for example, the Task Force on Climate-Related Financial Disclosures.[37] Indeed, the long campaign of climate denial, delay and obstruction by the fossil fuel industry demonstrates that companies have been keenly aware of climate policy risks for some time and have been actively managing those risks at the expense of the planet.[38]

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[27] *Methanex* v. *United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 2005, Part IV - Chapter D - Page 5.

[28] UNCTAD 2021; Levashova 2020.

[29] Johnson 2020.

[30] Hillman and Hitt 1999.

[31] Bakan 2005.

[32] Olson 1965; Stigler 1971.

[33] Stigler 1971; Bó 2006.

[34] Baldon Advocats 2022.

[35] Aklin and Mildenberger 2020; Colgan, Green and Hale 2021.

[36] Buzogány and Scherhaufer 2023.

[37] The Task Force has recommended that "an organization should assess its value chain over a reasonable time frame as it relates to the following: climate-related risks including (1) transition risks such as policy constraints on emissions, imposition of carbon tax, water restrictions, land use restrictions or incentives . . . " (2021: 11).

[38] Oreskes and Conway 2010; Supran and Oreskes 2017; Franta 2021.

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While some tribunals have considered an investor's misconduct as contributing to its own losses ("contributory fault"), in such cases the finding does not necessarily cancel out the breach of the treaty; instead, tribunals often decide (in a very arbitrary manner) to reduce the quantum of damages awarded.[39] Common tactics of climate obstruction such as lobbying, donations to political campaigns, and exploitation of the revolving door between government and industry would not be captured in a typical tribunal analysis. For example, in the *Rockhopper* Award there is no mention of lobbying, however, Arcuri argues that there are "important indications" that it was relevant to key changes made in Italy's legal framework for offshore oil production which, in turn, created the company's expectations around its investment.[40]

While it is beyond the scope of this paper to explain why arbitrators have tended to adopt such an asymmetric, investor-friendly approach to politics in their interpretations and applications of the FET standard, it is worth highlighting that a combination of conflicts of interest and more subtle socialization mechanisms may be at work.[41] The fact that it is possible for an individual to act as legal representative for an investor in one ISDS case, while acting as an arbitrator in another ("double-hatting") is particularly significant, as this is not an acceptable practice in domestic legal regimes.[42] Conflicts of interest that arise from double-hatting or other circumstances can be challenged by a party to the dispute under the applicable arbitral rules, but the vast majority of such challenges are dismissed.[43] Furthermore, while direct conflicts of interest are particularly egregious, it is also worth noting that there is potential for more subtle structural bias in the system. Both Yackee and Miles highlight that the key actors involved in ISDS can be described as an epistemic community.[44] As Yackee points out, the members of this community "share certain normative and causal beliefs".[45] In addition to beliefs about the benefits of foreign investment, there is evidence of a general distrust of domestic political processes.[46]

The bulk of existing research on the socialization and selection of arbitrators has looked at these issues at a broad level, without considering the potential for certain industries to have more influence in the system. However, a few key archival studies have demonstrated the central role played by legal representatives of major oil and gas firms such as Shell in the early development of the investment regime.[47] Fossil fuel firms are also frequent users of arbitration: the industry generates almost one fifth of ISDS cases.[48] There is also evidence that fossil fuel investors are more successful than other investors, winning 72% of cases decided on the merits.[49] Additionally, several examples of conflicts of interest involving fossil fuel company-nominated arbitrators have been documented.[50] Finally, in a 2022 survey of the arbitration industry 41% of respondents agreed that "arbitrator bias and issue conflicts would present a major challenge" for resolving climate change related disputes.[51]

Further work in this area is certainly merited. However, our focus here is not on further establishing or explaining arbitrators' asymmetric treatment of politics, but rather in highlighting that it creates opportunities for investors to engage in *feigned victimization*. Feigned victimization is a tactic by which

[39] Marcoux and Bjorkland 2020; El-Hosseny and Devine 2020.
[40] Arcuri 2023, 12.
[41] Langford, Behn and Malaguti 2023; Brekoulakis and Howard 2023; Behn et al. 2021; Gáspár-Szilágyi and Létourneau-Tremblay 2020; Donaubauer, Neumayer and Nunnenkamp 2018; Puig and Strezhnev 2017.
[42] Langford, Behn and Lie 2018. A Code of Conduct for Arbitrators in International Investment Dispute Resolution, adopted by UNCITRAL and ICSID in 2023, regulates but does not outright prohibit double-hatting.
[43] Behn et al. 2021.
[44] Yackee 2012; Miles 2013. It is worth highlighting the limited diversity in this community. Arbitrators are overwhelmingly male and from the global North (ICSID 2024). Most of them have been trained in OECD countries and 60% of them are practicing lawyers (Waibel and Wu 2017).
[45] 2012, 401.
[46] Van Harten 2013; Williams 2022.
[47] Boué 2023, Batselé 2023; Perrone 2021; St. John 2018.
[48] Di Salvatore et al. 2023.
[49] Di Salvatore 2021.
[50] Eberhardt and Olivet 2012; Amazon Defense Coalition 2012.
[51] Pinsent Masons and Queen Mary University London 2023: 7.

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a foreign investor disingenuously claims to be an innocent victim of a host state's political decision-making in order to maximize its prospects of success in ISDS proceedings.[52] To be an "innocent" victim, the company would need to both (i) lack knowledge of relevant political/policy risks in the host country and (ii) not be engaged in corporate political activities aimed at influencing political decision-making in the host country. Feigned victimization can be understood as a form of corporate "organized hypocrisy," whereby organizations speak and act in different ways to different stakeholders in order to manage conflicting expectations in their external environment.[53] A more common, neighboring corporate tactic involves telling policymakers that the effect of a proposed legislative or regulatory change will be damaging to their business while reassuring shareholders that the change will be manageable.[54] Feigned victimization is structurally similar, but the audience is an ISDS panel, not a regulator. In a given case, the requisite disingenuousness can be established by providing evidence that the company in fact knew about the political risks (e.g., from statements to investors) and/or itself sought to influence the decision-making process (e.g., from political lobbying or donation records) (see next section).[55]

Investors' use of feigned victimization when constructing ISDS claims can, given the potential for ISDS to be used as a tool of capital accumulation, be theorized as a form of "accumulation by feigned victimization." We are particularly concerned here with the use of such tactics by the fossil fuel industry (to achieve both capital accumulation and climate obstruction goals), given its extensive historical use of ISDS and given the climate implications of such usage. The industry's extensive and highly sophisticated political activities also present a clear opportunity to observe feigned victimization empirically.

## *TC Energy* v. *United States of America*

Although there have been hundreds of ISDS cases initiated by fossil fuel investors, cases that directly concern climate policy have only emerged in the past decade and the pool is currently relatively small.[56] Several cases are pending conclusion, and a few have been discontinued or rejected at the jurisdictional phase.[57] Nevertheless, if one examines the requests for arbitration and memorials submitted by investors, it is evident that government decisions predicated on community concerns about climate impacts are frequently characterized as "politically" motivated and thus unfair and unexpected, in breach of the FET standard. For example, in *Ruby River* v. *Canada* the investor claims that the Québec government (the current co-chair of the Beyond Oil and Gas Alliance) rejected its proposal for an LNG facility because the ruling party was concerned that community opposition to the project would

[52]In principle, the tactic could be used by investors outside the fossil fuel industry, though that industry is our focus here, for reasons we have explained.

[53]Brunsson 2002.

[54]Coleman 2016.

[55]Our method is similar to that employed by Coleman 2016.

[56]There is no consensus on how to categorize climate-relevant ISDS cases. We are primarily concerned with what Fermeglia et al. (2024, 8) refer to as "stranded asset claims" which involve "claims for compensation following the introduction of climate justified policy measures which reduce the value of existing investments." These are distinguishable from cases concerning the roll-back of climate policies, such as incentives for renewable energy investment. Although we acknowledge that climate-relevant stranded asset claims can arise outside of the fossil fuel sector (e.g., *Eco Oro* v. *Colombia*), for present purposes, we are exclusively focused on claims from within the sector.

[57]In addition to the cases mentioned in this section, there was a case concerning the Netherlands coal phase-out brought by German firm RWE that was discontinued following a German court decision that the arbitration was inadmissible under German and EU law. Swiss-owned Azienda Elettrica Ticinese has challenged the German coal phase-out in an ongoing case and US-based Westmoreland has challenged Alberta's coal phase-out in a case that was rejected at the jurisdictional stage. The Swiss firm Glencore has challenged a Colombian court decision rejecting the expansion of a coal mine in an ongoing case. In late 2024, Riversdale Resources and Hancock Prospecting (an Australian firm), launched a claim against Canada over coal mine investments (there were few details available at the time of writing, but this case is possibly concerned with climate policies). Further details of these cases are available in the Global Climate Change Litigation database (https://climatecasechart.com/non-us-climate-change-litigation/) and UNCTAD's Investment Dispute Settlement Navigator (https://investmentpolicy.unctad.org/investment-dispute-settlement).

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negatively impact its chances of re-election.[58] In *Zeph* v. *Australia*, the firm (owned by Clive Palmer—an Australian billionaire and former politician) describes a judge that recommended against the issuance of a coal mining lease "as a political appointee with an anti-coal, pro-climate change activist agenda ... [who has] publicly expressed her support for the extremist climate change action organization 'Extinction Rebellion'."[59] In *Uniper* v *The Netherlands*, the investor argues that both the decision to ban coal power and the timeline that was set for the phase-out of existing plants were based on "political expediency."[60]

In *TC Energy* v *United States of America*, the company behind the proposal for the controversial Keystone XL pipeline argues that the government's decision to deny a key permit was based on "the political desire to prove U.S. leadership credentials to activist opponents of the project and foreign governments."[61] In this section we delve into this case to illustrate that TC Energy has engaged in feigned victimization: while TC Energy portrays itself in arbitration as the victim of a "political" and "arbitrary" decision-making process, the company was well aware of the risks of an adverse decision and was deeply engaged in lobbying and other political strategies to influence the government.

### *The policy process and decision*

TC Energy (previously TransCanada Corporation) first proposed an expansion to the Keystone pipeline in 2008. Keystone XL (hereafter KXL) was initially envisioned as a 1,905 km pipeline with the capacity to transport up to 900,000 barrels of oil a day from Alberta, Canada to delivery points in Oklahoma and Texas.

The mobilization against KXL brought Indigenous communities and ranchers that live along the proposed route of the pipeline together with climate activists from across North America.[62] Opponents expressed a variety of concerns about the project, including the impacts that construction would have on sensitive local ecosystems, the potential for spills, and the implications for climate change. In terms of climate concerns, activists argued that building the pipeline would contribute to carbon lock-in by enabling further extraction from the tar sands, one of the world's most carbon-intensive sources of crude oil.

TC Energy may have initially been caught off guard by the scale of the opposition against KXL, but they quickly mounted a counter-offensive that included extensive advertising and disinformation campaigns.[63] TC Energy also hired Paul Elliott, who was Hillary Clinton's deputy campaign manager during the 2008 election, as their "director of government relations."[64] This "revolving door" is particularly significant given that Hillary Clinton was Secretary of State from 2009–2013 and, as explained below, the State Department played a key role in the dispute.

The regulation of pipelines in the United States is largely the responsibility of individual state governments. However, the federal Bureau of Land Management must approve any construction on federal lands, and if a pipeline crosses an international border a special Presidential Permit is required. The State Department manages applications for this permit and is required to consult with various agencies, including the Environmental Protection Agency (EPA). The State Department performs a review under the National Environmental Policy Act and is required to prepare an Environmental Impact Statement (EIS) if a project may have a significant impact on the environment. Otherwise, the State Department has "wide latitude" to determine "in the manner and at the speed it chooses" whether

[58]Ruby River 2023. This case is currently pending.

[59]Zeph Investments 2023, 5. This case is currently pending.

[60]Uniper 2022, 128 and 142. The withdrawal of this ISDS claim was the result of a condition imposed on the company in a bailout package from the German government.

[61]TC Energy 2021a, 22.

[62]Cheon and Urpelainen 2018.

[63]Swift 2012; "API ads tout support for Keystone", *Politico,* https://www.politico.com/story/2013/07/pipeline-energy-api-keystone-ads-backers-093918

[64]"The Revolving Door, Keystone XL Edition", *MotherJones*, https://www.motherjones.com/politics/2011/09/revolving-door-keystone-xl-edition/

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a pipeline is in the national interest.[65] This can involve consideration of many factors, including energy security, foreign policy, and environmental, cultural, and economic impacts.[66] If any of the agencies consulted by the State Department objects to its decision, the matter is referred to the President for a final decision.[67]

In the case of KXL, an extensive environmental review of the company's first application for a permit was conducted, although it was marred by allegations of collusion with TC Energy. The State Department put out a tender for contractors to conduct the review and write the EIS. TC Energy was allowed to manage the bidding process, and the winning contractor—Cardno Entrix—had TC Energy listed as a "major client" on its website but failed to mention this relationship in its disclosure statement to the State Department. Cardno Entrix wrote in the EIS that KXL would not have a significant impact on greenhouse gas emissions, citing a single report from another consulting firm—EnSys Energy—that had previously worked with the Koch brothers, ExxonMobil and the American Petroleum Institute (API).[68] The first draft EIS was met with substantial public opposition and even an open letter from the EPA that pointed out that the State Department had failed to consider whether KXL would lead to increased tar sands production.[69] Hamilton concludes that "the State Department's findings on the pipeline's climate-change effects were clearly influenced by TransCanada and other fossil fuel players, demonstrating the extent to which government consideration of the KXL's climate-change harms was determined by an industry-friendly attitude that considered expansion of infrastructure to be business as usual."[70]

In November 2011, Nebraska's state legislature enacted new siting requirements that led to TC Energy revising KXL's route to avoid the environmentally sensitive Sand Hills region. The State Department needed additional time to consider the new route, but Congress wanted a quick decision on the permit, enacting a requirement in December 2011 that the national interest determination be made within 60 days. Given that this was not sufficient time to consider the new route, TC Energy's application was denied. In May 2012, TC Energy resubmitted the application with a new route and a shorter pipeline.[71] The environmental review for this second application was also controversial due to the involvement of EnSys Energy (mentioned above) and Environmental Resources Management,[72] a consulting firm best known for aiding the tobacco industry with the public relations tactics documented in the classic book *Merchants of Doubt*.[73]

The State Department's final decision on the permit was delayed by litigation in Nebraska concerning the pipeline's route. Then on 2 November 2015, TC Energy asked the State Department to suspend the review, which was thought to be a tactic to have the decision deferred until after the 2016 election when a Republican might take office.[74] This request was denied and on 6 November, the State Department released its determination that the project was not in the national interest and the permit should be rejected. The determination was based largely on the lack of clear economic benefits of the pipeline, but climate change was also a factor. President Obama noted among the various reasons for the decision that "America is now a global leader when it comes to taking serious action to fight climate change. And frankly, approving this project would have undercut that global leadership."[75] This was, notably, just a few weeks before the start of the 21st Conference of the Parties to the UNFCCC (COP21) where the Paris Agreement would be signed.

[65]Hamilton 2016.

[66]Vann and Parfomak 2017.

[67]Babcock 2020.

[68]Hamilton 2016.

[69]EPA 2013.

[70]2016, 274.

[71]The southern leg was carved off into a separate "Gulf Coast Project" that was entirely within the US and did not require State Department approval – construction of this section was completed in 2014.

[72]"State Department Keystone XL Study Done by Oil Industry-Connected Firm with Big Tobacco, Fracking Ties", *DeSmog*, 11 March 2013, https://www.desmog.com/2013/03/11/state-department-keystone-xl-study-oil-industry-big-tobacco-fracking/.

[73]Oreskes and Conway 2010.

[74]Hamilton 2016.

[75]Obama 2015.

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The rejection of KXL was a major triumph for the environmental movement, but the celebrations were short-lived. In 2016, TC Energy launched both a federal lawsuit and a US$15 billion ISDS claim through the North American Free Trade Agreement (NAFTA). Later that year, Donald Trump was elected President. During the election campaign, Trump had vowed to reverse the State Department's decision. Trump's pick to head the EPA, an agency that had pushed the State Department to give more consideration of the climate impacts of KXL, was Scott Pruitt, a climate denier with extensive connections to the oil industry who eventually resigned over an ethics scandal.[76] Pruitt was a strong proponent of KXL; as the Attorney General for Oklahoma, prior to his appointment to the EPA, he supported TC Energy's federal lawsuit, arguing that "The president doesn't have the constitutional authority to unilaterally block the completion of this project."[77]

Upon entering office in January 2017, President Trump invited TC Energy to reapply for the permit on the condition that it drop its ISDS claim.[78] The company did so, and the permit was approved by the State Department in March. Environmental groups launched litigation successfully challenging this decision on the basis that the environmental review was stale and incomplete.[79] To bypass the ruling, President Trump revoked the State Department's permit and issued a new permit himself. This permit explicitly stated that it "may be terminated, revoked, or amended at any time at the sole discretion of the President of the United States … with or without advice provided by any executive department or agency." In taking this step, Babcock argues that Trump "may have stepped beyond the limits" of his discretionary constitutional powers because a decision about a cross-border permit is only referred to the President at the request of an agency that has been consulted by the State Department and disagrees with its decision.[80]

KXL continued to face numerous obstacles, including several lawsuits at state and federal levels, that delayed construction.[81] When Joe Biden was sworn in as President in January 2021, he immediately revoked the permit that had been issued by President Trump, citing the clause that stated that it could be revoked at the discretion of the President.[82] The revocation also cited the original 2015 review by the State Department that found that the pipeline was not in the national interest and noted that the impacts of climate change had become more apparent in the interim. TC Energy officially terminated the KXL project in June 2021 and filed a NAFTA ISDS claim, again for US$15 billion, in November 2021.[83]

### *Legal claim-making through feigned victimization tactics*

The central thrust of TC Energy's argument in its Request for Arbitration is that the administrative process to review the permit and the ultimate revocation of it was not "fair" or "objective" because it was motivated by "purely political reasons."[84] The company argues:

> This dispute is not about climate change. It is about the erratic, discriminatory, arbitrary, politicized, and utterly unfair treatment the United States accorded to Claimants, their subsidiaries, and their investments—treatment that violated the substantive provisions of NAFTA 1994.[85]

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[76]"The ethics scandals that eventually forced Scott Pruitt to resign", *The Guardian*, 6 July 2018, https://www.theguardian.com/us-news/2018/jul/05/scott-pruitt-what-it-took-to-get-him-to-resign-from-his-epa-job

[77]Oklahoma Office of the Attorney General 2016.

[78]TC Energy 2021a.

[79]NRDC 2024.

[80]2020, 8.

[81]NRDC 2024.

[82]Whitehouse 2021.

[83]NAFTA was replaced by the United States-Mexico-Canada Agreement (USMCA) in July 2020, which does not allow for ISDS claims from Canadian investors against the US (or from American investors against Canada). A "legacy annex" allowed established investors to bring claims until 30 June 2023 under the old system, but it was unclear whether this covered government actions taken after NAFTA was terminated. In July 2024, a majority of the *TC Energy* tribunal determined that it did not have jurisdiction to hear the merits of the dispute because Biden's permit revocation occurred more than 6 months after NAFTA's termination.

[84]TC Energy 2021a, 6.

[85]TC Energy 2021a.

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TC Energy relies on the EIS written by industry consultants (to which it had close ties) to argue that the State Department had concluded that the pipeline would not have a significant impact on climate change. The Request characterizes TC Energy as a victim subjected to a "regulatory rollercoaster" and the government's decision-making as "erratic," suggesting that the outcome was not foreseeable.

A key treaty protection relied on by TC Energy is FET, which is mentioned in NAFTA Article 1105. The NAFTA Parties issued "Notes of Interpretation" in 2001 that clarified that the reference to FET in Article 1105 does not provide investors protection "in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[86] However, tribunals have been inconsistent in how they have responded to the Notes, with some arguing that customary international law has "evolved" to include recognition of investor expectations (see, e.g., *Bilcon* v. *Canada*).

TC Energy mentions "legitimate expectations" several times in its Request for Arbitration and in one instance couples this with reference to the argument that the actions of the US government "undermined legal stability and predictability."[87] In terms of what the company claims to have expected, this includes that the government "would run a fair administrative process consistent with U.S. law and decades of previous U.S. practice and precedent" and "would behave objectively and in accordance with longstanding regulatory practice."[88] The company argues further that it "legitimately expected" that the permit would be granted within two years of its initial application in 2008.[89]

TC Energy argues that its expectations were reasonable since the approval for the Keystone I pipeline took 23 months and Enbridge's Alberta Clipper pipeline permit application took 27 months to review. Comparisons to other contemporaneous pipeline projects neglect the fact that each project must be evaluated on a case-by-case basis, and each is vastly different in terms of its potential impacts. For example, the Alberta Clipper is a much shorter pipeline, with the Canadian section much longer than the American one. The pipeline does not pass through Montana or Nebraska, where KXL received the staunchest opposition. While the existing Keystone I pipeline does pass through Nebraska, it did not traverse the Sand Hills, a sensitive ecological area that became a key point of contention with the original route plan for KXL and led to significant delays and eventually a new application.

The evaluation of major infrastructure projects on a case-by-case basis is not unusual and TC Energy would be keenly aware that pipeline projects in its home country are also evaluated in this way, with Enbridge's Northern Gateway project canceled by the Canadian government in 2016 while other projects were permitted to proceed. In any event, administrative discretion is inherent in any process of administrative decision-making, and this basic fact ought to be known to any reasonable investor. TC Energy also argues that its expectations were grounded in the US' "long history of never having revoked a Presidential permit in order to terminate a pipeline project."[90] This claim invokes the idea that investment treaties should be interpreted as locking in the status quo (so long as it is beneficial to investors).

We reviewed the company's annual reports in the period from 2008–2021 to identify statements made by the company to its investors about permitting processes for the pipeline. This period captures the first application for the cross-border permit and covers up to President Biden's revocation of the permit. Our review indicates that TC Energy understood that the State Department has a great deal of discretionary power with respect to transboundary permit approval and might be influenced by lobbying and advocacy by the environmental movement. The company was acutely aware of public opposition to the project and the possibility that this might influence the government's decision-making as early as 2010. In its 2010 filing, it is noted that the "regulatory process conducted by the Department of State is continuing within a heightened political environment and opposition to the project has been expressed."[91] And while the company still anticipated that the project would be

[86]NAFTA Free Trade Commission 2001.
[87]TC Energy 2021a, 49.
[88]Ibid.
[89]Ibid, 13.
[90]Ibid, 27.
[91]TransCanada 2011, 33.

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approved, it considered its options if a negative decision was announced: "if the expansion project as currently proposed is denied regulatory approval, the Company would look to reconfigure all or part of the project and redeploy invested capital to other pipeline opportunities and expense any unmitigated amounts."[92]

By 2012, the company had updated the section on regulatory risk in its annual reports to note the following:

> Public opinion about crude oil development and production also has an impact on the regulatory process. There are some individuals and interest groups that are expressing their opposition to crude oil production by opposing the construction of oil pipelines. We manage this risk by continuously monitoring regulatory developments and decisions to determine their possible impact on our oil pipelines business and by working closely with our stakeholders in the development and operation of the assets.[93]

The 2014 report noted that "The timing and ultimate approval of Keystone XL remain uncertain. In the event the project does not proceed as planned, we would reassess and reduce its carrying value to its recoverable amount if necessary and appropriate."[94]

Following President Trump's issuance of a Presidential Permit in 2017, the company's reports detail numerous legal challenges that the company was facing in Montana and Nebraska, noting that plans to commence construction would be impacted by the outcomes of these cases.[95] The company's legal challenges continued after a new permit was issued in March 2019 and some remained unresolved as of January 2021, meaning that there was no certainty that the project would have proceeded if President Biden had not revoked the permit.[96]

Interestingly, the company's discussion of "regulatory risk" expanded to refer to "climate change concerns" in the 2019 report,[97] and in the 2020 filing the company acknowledged that "Shifts in government policy by existing bodies or following *changes in government* can impact our ability to grow our business."[98] The 2021 report went even further to separate "regulatory risk" (with added discussion of court challenges to regulatory decisions) from "governmental risk" which reads:

> Shifts in government policy or changes in government can impact our ability to grow our business. More complex regulatory processes, broader consultation requirements, more restrictive emissions policies and changes to environmental regulations can impact our opportunities for continued growth. We are committed to working with all levels of government to ensure our business benefits and risks are understood and mitigation strategies are implemented.[99]

We conclude from the review of annual reports that prior to the Obama administration's decision to deny the permit, TC Energy understood there was opposition to the project and that the State Department might be influenced by this opposition. When the firm proceeded with resubmission of its application to the Trump administration it would have been even more acutely aware of the risk it was taking and the ongoing legal challenges in Montana and Nebraska would have dampened its expectations further. Furthermore, given the dominance of two political parties and the scheduled nature of presidential elections in the United States, TC Energy would have been acutely aware of the potential for a change in government in four years' time. Although the company did not report on

[92]Ibid, 34.
[93]TransCanada 2013, 41.
[94]TransCanada 2015, 65.
[95]TransCanada 2019.
[96]TC Energy 2020; 2021.
[97]TC Energy 2020, 55.
[98]TC Energy 2021b, 50, emphasis added.
[99]TC Energy 2022, 54.

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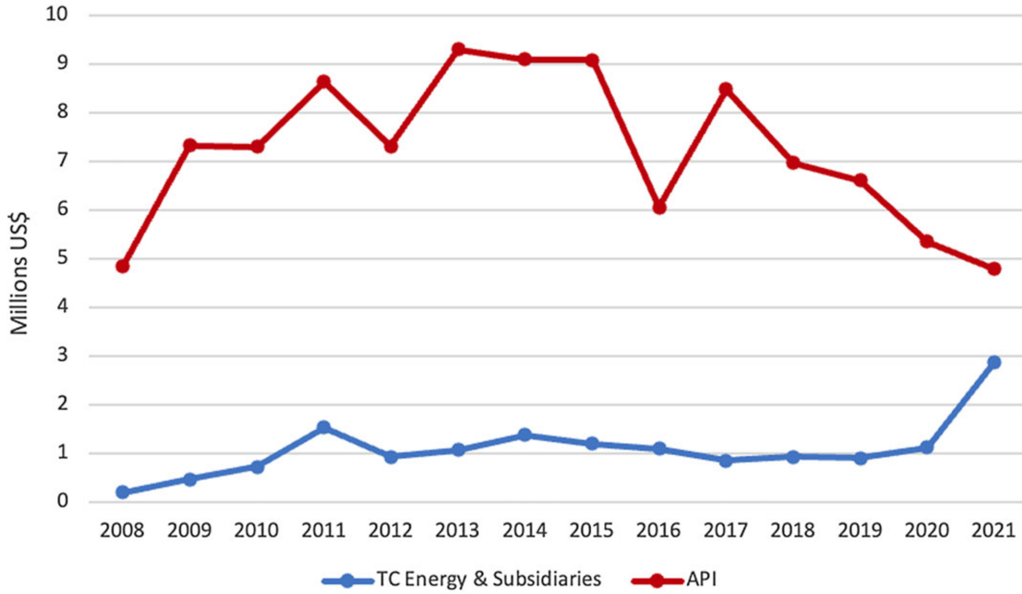


**Figure 1.** Lobbying expenditures at the federal level in the period 2008-2021. Source: OpenSecrets.org.

changes in government as a distinct risk until after President Biden had revoked the permit, the fact that it is now incorporated into its risk mitigation strategies suggests that it is considered an acceptable risk of doing business in the United States.

In addition to these reports, TC Energy's lobbying activities, donations to political parties/individual politicians, and involvement with lobbying groups such as API also shed light on how it perceived decisions about the pipeline would be made. If the company believed that its investment would be approved or denied solely on the basis of scientific and economic evidence and that decision-makers would not be influenced, one way or the other, by interest groups, then it would not have wasted resources on lobbying in relation to the project.

Federal lobbying data showing lobbying expenditure by the company and its subsidiaries are shown in Figure 1. The company spent more than US$15 million lobbying the federal government in the period 2008–2021, an average of over US$1 million per year. State-level data is more difficult to compile, but news reports and a Canadian documentary from 2017 suggest that this was also extensive.[100] Freedom of information requests demonstrate that many of the lobbyists employed by TC Energy had previously worked in government, often directly with John Kerry, who was Secretary of State from 2013–2017, or his predecessor Hillary Clinton.[101] API's lobbying expenditures are also reported in Figure 1. Industry associations are critical supports for business actors engaging in political contests[102] and API is listed by TC Energy as one of the most significant corporate memberships that it maintains. Additionally, Russ Girling—the CEO of TC Energy from 2010–2020—has been a Director of API since 2015. Although API's lobbying would not have been exclusively focused on KXL, reports suggest that the project was significant for the organization. For example, DeSmog reported that API spent US$22 million lobbying on KXL between 2008–2013.[103]

[100]"How TransCanada and 'dark money' groups pumped millions into Keystone XL", *CBC*, 8 November 2017 https://www.cbc.ca/news/business/transcanada-dark-money-keystone-xl-1.4384440

[101]"Friends of the Earth Sues State Department on Keystone XL FOIA Delay, DeSmog Requests White House Financial Disclosure Forms", *DeSmog*, 16 July 2016, https://www.desmog.com/2013/07/16/foe-files-lawsuit-state-dept-keystone-xl-desmog-requests-financial-disclosure-forms/

[102]Downie 2018.

[103]"API Spent $22 Million Lobbying for Keystone XL; State Dept Contractor ERM an API Member", *DeSmog*, 27 June 2013, https://www.desmog.com/2013/06/27/api-22-million-keystone-xl-lobbying-erm/

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This data demonstrates that the company was acutely aware that it needed to persuade decision-makers at all levels of government to back the project, and that the approval process was not purely technocratic. There can be no reasonable conclusion other than that TC Energy's ISDS claim involves feigned victimization, calculated to accumulate capital and obstruct climate policy through the ISDS process.

## Conclusions

International investment treaties facilitate capital accumulation and climate obstruction by fossil fuel companies. In this paper, we have argued that these outcomes arise from the conjunction of two practices. First, arbitral tribunals have tended to interpret the vague FET standard in ways that involve untenable and asymmetric assumptions about politics. Consequently, tribunals tend not to scrutinize investors' political capabilities and behavior unless there is clear evidence of fraud or corruption; "political motivations" only enter the legal analysis when the status quo is disrupted by public pressure for change. Furthermore, tribunals have tended to accept investors' portrayal of their "legitimate expectations," with little or no interrogation of whether they were reasonable based on due diligence, or if the investor actually held these expectations when making its investment. This prevailing approach affords opportunities for the second factor, which we theorize and illustrate empirically: a capital accumulation and climate obstruction tactic that we label "feigned victimization." Feigned victimization involves a disingenuous claim by an investor to be an innocent victim of a host state's political decision-making in order to maximize its prospects of success in ISDS. If investors are sophisticated risk managers and political actors—of the kind they typically narrate in their self-presentations to investors, and that are revealed by their political activities—then they cannot be innocent victims who "legitimately expect" apolitical, technocratic administrative decision-making or long-run legal stability.

Our case study provides a detailed, illustrative example of feigned victimization. TC Energy's conduct during the KXL permit review process demonstrates that it was not a passive victim of regulatory change. If there was a "regulatory rollercoaster", it was the result of the company's own actions as much as those of opponents of the pipeline. The company was actively involved in efforts to influence both the Obama and (first) Trump administrations and to shape the outcome of the permit application review through lobbying, the revolving door, disinformation campaigns and other mechanisms. Our analysis of TC Energy's communications with shareholders through its annual reports and its expenditure on lobbying also demonstrates that the actual expectations the company held are very different from those outlined in its Request for Arbitration. The company clearly understood that the final decision on the permit was at the administration's discretion and could be influenced one way or the other. The political nature of the decision-making process was considered acceptable so long as the outcome was in its favor.

We are not making the assertion that feigned victimization will be deployed by every investor, or even that the use of the tactic is widespread.[104] We acknowledge that relying on a single case study limits our ability to generalize. However, we do postulate, in light of the extensive literature documenting climate obstruction by the fossil fuel industry, that it is unlikely that TC Energy is the only company that has used or will use this tactic in the future. We hope that our research will inspire further work in this area, particularly as more climate-relevant ISDS cases emerge.

Finally, in terms of policy recommendations that can be drawn from our research, we believe it is important to highlight that the United States escaped liability in this case by virtue of having removed ISDS from its treaty relationship with Canada when NAFTA was renegotiated.[105] Other states would be well advised to take similar measures or, at the very least, to carve out the fossil fuel sector from

[104]Similarly, authors who conduct case studies of regulatory chill do not assert that a chilling effect will occur whenever an investor threatens an ISDS claim.

[105]It is, of course possible that the US would have won the case on the merits had NAFTA still been in place. Notably, the US has never lost an ISDS case. Despite this, the Trump Administration negotiated the removal of Canadian investor access to ISDS in the USMCA and the Biden Administration vowed not to include ISDS in any new treaties.

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protection in their treaties, preferably through a multilateral agreement.[106] However, such actions will be difficult for some states to achieve and will take considerable time to implement.[107] In the interim, we suggest that a state dealing with a claim involving feigned victimization can increase the potential for a reasonable interpretation of FET by submitting a defense that includes evidence of an investor's foreknowledge of risks and its lobbying activities. We have demonstrated a method for achieving this that involves comparing the statements made by the company in the course of ISDS proceedings with statements made to its shareholders (e.g., via annual reports) and with evidence of its political activities. This approach would necessitate some investigative work on the part of states, but arguably this should be easier for government officials than independent researchers, as they will have access to more data, including details of lobbying efforts. Providing this information to a tribunal will increase the likelihood that the arbitrators will scrutinize investor influence over the development of an investor-friendly policy (alongside the host government's actions) and consider whether an investor understood that a policy process could be influenced and would not be purely "rational" and "technical".[108]

We recognize that our proposed strategy has limitations, the most significant being that arbitrators, particularly those with close ties to the fossil fuel industry, may not be swayed by our reasoning about feigned victimization. States can, of course, try to shape the composition of a tribunal, but as previously noted, the vast majority of challenges to arbitrator appointments fail. In theory, investigations of independence and impartiality should be facilitated by the Code of Conduct for Arbitrators in International Investment Dispute Resolution, adopted in 2023.[109] However, the Code lacks an enforcement mechanism and challenges of appointments will continue to be governed by investment treaties and existing arbitral rules,[110] which have proven to be ineffective and, in any case, do not extend to the kind of industry ties that are of concern to us.

As such, continued public pressure is required to deliver more radical reform of ISDS.[111] There is a clear case to be made for stronger rules pertaining to arbitral appointments. As Grant and Kieff point out, "certain positions of public trust require an appointee to undergo extensive background investigations."[112] Given the impact that ISDS has on public policy, and the lack of public confidence in the system, it does not seem unreasonable to subject arbitrators to a very high level of scrutiny. One contribution from researchers that could be helpful in this regard would be the development of an open-access database of arbitrator ties to the fossil fuel industry, which could build on existing efforts to highlight the role of law firms in obstructing climate action.[113]

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[106] A multilateral arrangement is preferable to amend/terminate as many treaties as possible in an efficient manner. See further Novik and Gaukrodger 2024 and Mehranvar et al. 2024.

[107] There are a number of political and legal obstacles to treaty amendments (which need to be negotiated) and termination (which can be unilateral or by mutual consent), most notably the presence of sunset (or survival) clauses that allow investors present at the time of termination to continue to access ISDS for 5–20 years post-termination. See further Mehranvar et al. 2024.

[108] Our proposal complements those of others who argue that FET should be interpreted in accordance with the evolving international legal regime, including the Paris Agreement. See, e.g., Chaisse and Solanki 2022.

[109] See "UN Member States Adopt ICSID and UNCITRAL Code of Conduct for Arbitrators in International Investment Disputes", 14 July 2023, https://icsid.worldbank.org/news-and-events/news-releases/un-member-states-adopt-icsid-and-uncitral-code-conduct-arbitrators

[110] Giorgetti 2024.

[111] For an excellent overview of the need for holistic reform of the investment regime, see Cotula 2023.

[112] Grant and Kieff 2022, 234.

[113] See, e.g., Law Students for Climate Accountability: https://www.ls4ca.org.

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