Pace Law Review

Volume 41 | Issue 2 Article 8

August 2021

Using Investor-State Dispute Settlement to Enforce International Environmental Commitments

Andie Altchiler

Using Investor-State Dispute Settlement to Enforce International Environmental Commitments

Andie Altchiler*

TABLE OF CONTENTS

I. INTRODUCTION

Climate change poses an imminent threat to all of planet Earth that transcends national boundaries.[1] In response, a

* Editors' Note: The IPCC published the Sixth Assessment Report (AR6) on August 6, 2021. Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2021: The Physical Science Basis* (2021), https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf. This article was already finalized for publication, and therefore references the Fifth Assessment Report (AR5), *Climate Change 2014 Synthesis Report Summary for Policymakers*, *infra* note 1.

1. *See* Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2014 Synthesis Report Summary for Policymakers*, at 8 (2014), https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf

majority of the world's countries have made some form of international commitment to protect the environment and mitigate the effects of climate change.[2] For example, 195 countries have signed the Paris Agreement, committing to pursue national efforts to limit the increase the global average of greenhouse gas (GHG) emissions.[3] The European Union (EU) has also enacted directives committing its member states to pursue national efforts to increase the development and implementation of renewable energy, consistent with the obligations of the Paris Agreement.[4] Beyond making public declarations, these agreements in and of themselves do not actually provide a legal mechanism to enforce large substantive parts of the agreements.[5] In other words, there is no internal enforcement mechanism written into these agreements to provide a way to hold states[6] accountable for their commitments.

As the threat of climate change intensifies,[7] environmentalists are using creative legal mechanisms to hold

---

[hereinafter 2014 Climate Change Synthesis Report].

2. *See, e.g.*, *The Paris Agreement*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement (last visited Aug. 10, 2021) (noting that the Paris Agreement "brings all nations into a common cause to undertake ambitious efforts to combat climate change and adapt to its effects"); *What is the Kyoto Protocol?*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/kyoto_protocol (last visited Aug. 10, 2021) ("The Kyoto Protocol operationalizes the United Nations Framework Convention on Climate Change by committing industrialized countries . . . to limit and reduce greenhouse gases emissions in accordance with agreed individual targets".).

3. U.N. Framework Convention on Climate Change, *Adoption of the Paris Agreement*, U.N. Doc. FCCC/CP/2015/10/Add.1 (Dec. 12, 2015) [hereinafter Paris Agreement]; *see 7. d Paris Agreement: Chapter XXVII Environment*, U.N. TREATY COLLECTION (Dec. 12, 2015), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en.

4. *See, e.g.*, *Renewable Energy Directive*, EUR. COMM'N (July 16, 2014), https://ec.europa.eu/energy/topics/renewable-energy/renewable-energy-directive/overview_en (last updated Dec. 10, 2020) (explaining EU Directives 2009/28/EC and 2018/2001/EU).

5. David Roberts, *The 5 Biggest Deceptions in Trump's Paris Climate Speech*, VOX (June 2, 2017, 8:20 AM), https://www.vox.com/energy-and-environment/2017/6/2/15727984/deceptions-trump-paris-speech (explaining the non-binding nature of the Paris Agreement, stating that participating countries "determine their own targets and their own policies" and that "they can fail to meet the targets, without penalty").

6. This Comment will use the term "state" to refer to countries and nations in accordance with standard international terminology.

7. 2014 Climate Change Synthesis Report, *supra* note 1, at 8.

actors accountable for their impacts on the environment.[8] This Comment proposes that a form of international arbitration called Investor-State Dispute Settlement (ISDS) may be a viable legal framework to enforce states' international environmental commitments.[9] ISDS is a legal framework commonly written into international investment agreements (IIAs) that allows investors from one state to bring arbitration actions directly against a foreign state for breaches of the IIA.[10] An investor may bring an ISDS action against a foreign state for damages when he or she invests in the state relying on the state's policy, and the state then changes its policy in a way that hurts the investment.[11] To enforce a states' international environmental agreement under, for example, the Paris Agreement or an EU Directive, a renewable energy investor could bring an ISDS claim against a state who committed to decrease GHG emissions or promote renewable energy under the international agreement. If the investor relied on the agreement in making his or her investment, and the state then enacts a policy drastically inconsistent with the agreement, the investor may be able to attain damages from the state.[12] In principle, the prospect of responding to ISDS claims and paying investors large sums in damages would incentivize states to act in

8. *See, e.g.*, James Conca, *Atmospheric Trust Litigation—Can We Sue Ourselves Over Climate Change?*, FORBES (Nov. 23, 2014, 9:42 PM), https://www.forbes.com/sites/jamesconca/2014/11/23/atmospheric-trust-litigation-can-we-sue-ourselves-over-climate-change/#117396b40056 (explaining state and federal Atmospheric Trust Litigation); Sara Mogharabi et al., *Environmental Citizen Suits in the Trump Era*, ABA, (Oct. 1, 2017), https://www.americanbar.org/groups/environment_energy_resources/publications/natural_resources_environment/2017-18/fall/environmental-citizen-suits-trump-era/ (describing citizen suits brought under the Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act, and Endangered Species Act).

9. Caroline Simson, *Int'l Law Seen as Path to Fight Climate Change*, LAW360 (Apr. 18, 2019, 7:15 PM), https://www.law360.com/articles/1151466.

10. David Gaukrodger & Kathryn Gordon, *Investor State-Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD WORKING PAPERS ON INT'L INV. 10 (2012), http://dx.doi.org/10.1787/5k46b1r85j6f-en; Tim R. Samples, *Winning and Losing Investor-State Dispute Settlement*, 56 AM. BUS. L.J. 115, 116 (2019) (citing Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grant Bargain*, 46 HARV. INT'L. L.J. 66, 77 (2005)).

11. Gaukrodger & Gordon, *supra* note 10, at 9.

12. Simson, *supra* note 9.

accordance with their international environmental commitments.

Part II of this comment provides a background on the Investor-State Dispute Settlement system and the two most common fora for ISDS claims. Part II also discusses some common advantages and disadvantages of ISDS. Part III lays out an example of how ISDS works in the context of an actual case, *Eiser Infrastructure Ltd. and Energía Solar Luxembourg S.À.R.I. v. Kingdom of Spain* ("*E.S.L. v. Spain*").[13] Part IV briefly explains the current state of the climate crisis and the importance of renewable energy. Finally, Part V explains the logistics of how ISDS might be used to enforce international environmental agreements and considers some foreseeable roadblocks.

II. INVESTOR-STATE DISPUTE RESOLUTION

A. What is Investor-State Dispute Settlement?

Investor-State Dispute Settlement (ISDS) is a legal mechanism for resolving claims that arise from breaches of international investment treaties.[14] Under ISDS, foreign investors can obtain damages from foreign states that have breached their treaty obligations.[15] In contrast to most domestic dispute resolution systems, ISDS allows private investors to bring claims directly against states through the arbitration system.[16]

The vast majority ,approximately eighty-nine percent, of international investment agreements (IIAs) that provide for international ISDS are in the form of bilateral investment treaties (BITs).[17] BITs establish investment commitments between two individual states.[18] While most ISDS provisions are found in BITs, some multilateral agreements between more than two states also contain provisions providing for ISDS.[19] For

13. Eiser Infrastructure Ltd. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award (May 4, 2017) [hereinafter E.S.L. v. Spain].

14. Gaukrodger & Gordon*,* *supra* note 10, at 10.

15. *Id.* at 10.

16. Samples, *supra* note 10, at 117.

17. *Id.* at 126.

18. *Id.*

19. *Id.* at 127.

example, the North American Free Trade Agreement (NAFTA), a trade and investment treaty entered into by Canada, Mexico, and the United States as well as the Energy Charter Treaty (ECT), an international energy treaty which currently binds fifty-three countries, both contain ISDS provisions resembling those commonly found in BITs.[20]

The presence of ISDS within investment treaties strengthens the reliability of states' commitments to international investors and decreases the risks posed by investing in foreign states. Because the potential costs of ISDS are so great for a respondent host state,[21] ISDS, in principle, creates a powerful incentive for states to honor the commitments they have made in investment treaties.[22]

1. History of ISDS

Before the establishment of ISDS, foreign investors had to depend on domestic arbitration systems or diplomatic processes to recover damages caused by another state's violation of investment treaty obligations.[23] According to the United Nations, in the decade and a half before the first BITs came into force, there were 875 takings of foreign investment properties in over sixty countries with no effective remedy.[24]

IIAs including ISDS provisions have greatly increased in number over the past thirty years. As of 1990, about 500 international investment treaties had been signed;[25] as of 2017, more than 3,300 international investment treaties had been

20. *See, e.g.*, The Energy Charter Treaty art. 26, ¶ 4, Dec. 17, 1994, 2080 U.N.T.S. 100; North American Free Trade Agreement, Can.-Mex.-U.S., ch. 11, Dec. 17, 1992, 32 I.L.M 289.

21. *See, e.g.*, Samples, *supra* note 10, at 144 ("[T]he net ISDS losses of Belize are worth almost one year of government spending). *See, also*, i*d.* at 149–50 ("UNCTAD calculates that a successful claimant is awarded about $522 million on average . . . Poland . . . has paid in excess of $4 billion in ISDS settlements.").

22. Gaukrodger & Gordon*, supra* note 10, at 10.

23. *See id.* at 9.

24. Scott Miller & Gregory N. Hicks, *Investor-State Dispute Settlement: A Reality Check*, CTR. FOR STRATEGIC & INT'L STUD. 5 (Jan. 2015), https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/150116_Miller_InvestorStateDispute_Web.pdf.

25. Samples, *supra* note 10, at 120.

signed.[26] The number of ISDS settlements and arbitrations have also risen dramatically over the past decade alongside the rise in ISDS provisions.[27] According to the United Nations Conference on Trade and Development (UNCTAD), about one hundred ISDS claims were initiated during the fifteen-year period between 1987–2002.[28] As of 2003, that number had more than quadrupled and over five hundred ISDS cases were filed in the ten year period between 2003–2013.[29]

The emergence of BITs and the establishment of the International Centre for the Settlement of Investment Disputes (ICSID) reformed the system of enforcing fair treatment of international investors.[30] After the creation of BITs and ICSID, parties could bring claims of unfair treatment of investors in front of a neutral panel.[31] In the face of such a neutral panel, unlike in many domestic dispute settlement forums, international investors are treated with equal legal status as the states against which they bring their claims.[32]

Some ISDS cases challenge states' policies or changes in policies as breaches of IIAs. While all sovereign states are accorded a level of deference and right to control their states' policies, ISDS Tribunals have considered states' policy modifications as grounds for breaches in IIAs when those policies are sufficiently detrimental to investors. [33]

2. Two Major Fora for ISDS: ICSID and UNCITRAL

A majority of BITs that provide for ISDS call for the arbitration to be governed by the ICSID Convention,[34] the

26. *Id.*
27. Miller & Hicks, *supra* note 24, at 6.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 5.
32. *Id.* at 5.
33. *See, e.g.*, E.S.L. v. Spain*, supra* note 13 (considering whether Spain's policies modifying the regulatory regime for renewable energy constituted a breach of the ECT); Philip Morris Brands S.á.r.l. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016) [hereinafter Philip Morris v. Uruguay] (considering whether Uruguay's policies modifying the marketing requirements for tobacco products constituted a breach of the BIT).
34. *See generally* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1720,

United Nations Commission on International Trade Law (UNCITRAL),[35] or provide a choice between the two fora.[36]

ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[37] The purpose of ICSID is to provide facilities for conciliation and arbitration of investment dispute claims between investors of contracting states and nationals of other contracting states.[38] UNCITRAL Arbitration Rules were adopted by the United Nations General Assembly.[39] Similar to ICSID, UNCITRAL was created as a procedural mechanism for resolving disputes arising from international investment through conciliation or arbitration.[40]

The 2006 ICSID Regulations and Rules (ICSID Rules) and the 2010 UNCITRAL Arbitration Rules (UNCITRAL Rules) both provide similar procedural mechanisms for bringing and resolving ISDS claims. For example, both the ICSID Rules and the UNCITRAL Rules extend jurisdiction over any legal dispute that arises directly out of an investment between a state and a national of another state.[41] The two systems also have similar rules for appointing arbitrators to the arbitral tribunal, both of which provide for an arbitral tribunal composed of three arbitrators, unless the parties decide otherwise.[42] Under the ICSID Rules, unless the parties decide otherwise, each party gets to appoint one arbitrator, and the parties must agree on the appointment of a third arbitrator.[43] Under the UNCITRAL Rules, the third arbitrator is chosen by the two arbitrators

575 U.N.T.S. 159 [hereinafter ICSID Convention]; International Center for Settlement of Investment Disputes Convention, Regulations and Rules, ICSID/15 (Apr. 10, 2006) [hereinafter ICSID 2006 Regulations and Rules].

35. G.A. Res. 65/22, United Nations Commission on International Trade Law Arbitration Rules (Apr. 2010) [hereinafter UNCITRAL 2010 Arbitration Rules].

36. Gaukrodger & Gordon, *supra* note 10, at 53.

37. ICSID Convention, *supra* note 34.

38. ICSID 2006 Regulations and Rules, *supra* note 34, at art. 1.

39. UNCITRAL 2010 Arbitration Rules, *supra* note 35.

40. *Id.* at art. 17.

41. ICSID 2006 Regulations and Rules, *supra* note 34, at art. 25; UNCITRAL 2010 Arbitration Rules, *supra* note 35, at art. 1.

42. ICSID 2006 Regulations and Rules, *supra* note 34, at art. 29; UNCITRAL 2010 Arbitration Rules, *supra* note 35, at art. 7.

43. ICSID 2006 Regulations and Rules, *supra* note 34, at art. 29.

chosen by the parties.[44] The ICSID Rules and UNCITRAL Rules are also similar in that they provide for final, binding awards.[45] Overall, the ICSID Rules and UNCITRAL Rules provide two relatively similar arbitration processes.

B. Advantages and Disadvantages of ISDS

1. Advantages of ISDS

ISDS generally serves as protection for international investors, as it permits them to obtain compensation should the investment lose significant value due to state actions.[46] The existence of ISDS and possibility of recovering from breaches of treaty obligations encourages foreign investors to invest in states without fear of unfair treatment or discrimination.[47] As a result, ISDS promotes foreign direct investment (FDI).[48] ISDS is especially useful for promoting FDI when one of the parties is a low-income or middle-income country.[49] Investment experts have found that ISDS provisions effectively establish the credibility of BITs and induce foreign direct investment (FDI).[50] Increased FDI has been well-documented to benefit the national economies for host states, especially developing economies.[51] As countries develop, an inward flow of FDI helps further the country's integration into the global economy.[52]

In addition to its economic benefits, FDI often improves the environmental and social conditions of a host country.[53] For example, technologies brought to low-income and middle-income

44. UNCITRAL 2010 Arbitration Rules, *supra* note 35, at art. 9.

45. *Id.* at art. 34; ICSID Regulations and Rules, *supra* note 34, at art. 53.

46. Gaukrodger & Gordon, *supra* note 10, at 9.

47. *Assessing the Trans-Pacific Partnership*, 1 PETERSON INST. INT'L ECON. 109 (Feb. 2016), https://www.piie.com/system/files/documents/piieb16-1.pdf [hereinafter Assessing the TPP].

48. Miller & Hicks, *supra* note 24, at 6 ("The most apparent reason for the rise in ISDS arbitrations is the concurrent rise in the stock of foreign direct investment (FDI).").

49. Assessing the TPP, *supra* note 47, at 109.

50. *Id.* at 111.

51. *Foreign Direct Investment for Development Maximising Benefits, Minimising Costs*, OECD 5 (2002), https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf.

52. *Id.* at 11.

53. *Id.* at 5.

countries via FDI are generally more modern and environment-friendly than the technologies that are available locally.[54]

The benefits and effectiveness of ISDS come largely from the mere possibility of investors bringing a claim, rather than from the actual arbitration of claims. Out of all of the BITs that are in force with ISDS provisions, approximately ninety percent of them have never seen a single dispute raised.[55] While the number and frequency of ISDS claims is rising, that rise is consistent with and proportionate to a rise in FDI flow.[56]

2. Disadvantages of ISDS

Critics argue that ISDS undermines states' sovereignty by providing a way for investors to pressure host states into changing policies that may have been determined to be for the benefit of that states' people.[57] For example, foreign investors from the oil and gas industries have brought claims against host countries for enacting policies or taxes that harm oil and gas investments, even when such policies were enacted to mitigate climate change and promote environmental protectionism.[58]

There is also an issue of outcome distribution regarding ISDS cases brought from different countries. ISDS claimants are usually from high-income countries (86.25% of ISDS claimants are from high-income countries), with far fewer claimants from upper-middle income countries and lower-middle income countries, and "no ISDS claims brought by investors from low-income countries."[59] On the other hand, respondents in ISDS cases are most frequently upper-middle income countries and lower-middle income countries, with high-income countries as the respondent in only 27.55% of ISDS

54. *Id.* at 19.
55. *Id.* at 7.
56. *Id.* at 3.
57. *Id.* at *3.*
58. *See, e.g.*, Clayton v. Government of Canada, PCA No. 2009-04, UNCTAD (2008), (discussing claims arising from Government rejecting investors' project following a negative environmental assessment); Mobil Investments Canada Inc. v. Government of Canada, ICSID Case No. ARB(AF)/07/4, UNCTAD (2007), (discussing claims arising from Government regulatory changes affecting investors projects with oil fields).
59. Samples, *supra* note 10, at 143.

cases.[60]

Another major concern with ISDS is a lack of transparency. According to the United Nations Conference on Trade and Development (UNCTAD), only eighteen of the eighty-five cases heard before the United Nations Permanent Court of Arbitration were made public.[61] Settlements, which comprise a major portion of ISDS cases, are even less transparent than ISDS arbitration, and there are no public records of a majority of ISDS settlements.[62] ISDS might have a greater influence on states' policy modifications if the results of those cases were more readily available to the public.[63]

In light of criticisms surrounding ISDS, some countries have begun to re-examine their relationship with ISDS and BITs in general. For example, Indonesia and South Africa have publicly stated their intent to allow existing IIAs containing ISDS provisions to lapse, and Ecuador and Venezuela both officially withdrew from the ICSID Convention.[64]

III. ISDS IN PRACTICE: A CASE STUDY

Eiser Structure Limited and Energía Solar Luxembourg S.á.r.l. v. Kingdom of Spain (*E.S.L. v. Spain*) is illustrative of a successful ISDS case in which the claimants were renewable energy investors.[65] After Spain modified its regulatory and economic regime for renewable energy projects following the 2011 general election,[66] renewable energy investors from various countries brought ISDS claims against the Kingdom of Spain (Spain or Respondent).[67] In *E.S.L. v. Spain*, investors

60. *See id.* at 143.

61. *Assessing the TPP*, *supra* note 47, at 117.

62. Samples, *supra* note 10, at 140.

63. *Id.*

64. *Id.* at 147.

65. *See* E.S.L v. Spain, *supra* note 13.

66. *See id.* ¶ 137–150.

67. *See, e.g.*, Antin Infrastructure Services Lux. S.a.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/31, UNCTAD (2013) (involving claimant renewable energy investors from Luxembourg and Netherlands); Cube Infrastructure Fund SIVAC v. Kingdom of Spain, ICSID Case No. ARB/15/20, UNCTAD (2015), (involving claimants renewable energy investors from France and Luxembourg); European Solar Farms v. Kingdom of Spain, ICSID Case No. Arb/18/45, UNCTAD (2018) (involving claimant renewable energy investors from Denmark); Itochu Corp. v. Kingdom of Spain, ICSID Case No.

from Luxembourg and the United Kingdom (U.K.) initiated arbitration against Spain. Claimants argued, among other things, that Spain denied them fair and equitable treatment in violation of the Energy Treaty Charter by enacting the aforementioned policy changes.[68] This Section describes the procedural mechanisms used in *E.S.L. v. Spain* and the substantive arguments considered by the Tribunal in deciding the case in favor of the Claimant investors.

A. Factual Background

In 2001, the European Union (EU) adopted a policy of reducing greenhouse gas emissions (GHGs) through development of renewable energy.[69] EU Directive 2001/77/EC set out binding targets for EU member countries to develop renewable energy, and declared that subsidies for the renewable energy sector would be necessary to reach these targets.[70] In the years that followed, Spain adopted a series of measures to regulate, facilitate, and incentivize the production of renewable energy consistent with EU Directive 2001/77/EC.[71] In February of 2007, Spain adopted Royal Decree 661/2007 ("RD 661/2007") to increase remuneration for facilities using technologies to comply with the targets outlined under EU Directive 2001/77/EC and Spain's Renewable Energy Plan.[72] RD 661/2007 based remuneration on the amount of energy produced by renewable

ARB/18/25, UNCTAD (2018) (involving claimant renewable energy investors from Japan).

68. *See* E.S.L v. Spain, *supra* note 13, ¶ 349 ("Claimants contend that Respondent's actions in entirely eliminating and replacing the . . . regime violated Spain's obligations under the ECT by (1) expropriating their investment contrary to Article 13; (2) denying fair and equitable treatment contrary to Article 10; (3) subjecting Claimants' investments to unreasonable measures, contrary to Article 10(1); and (4) failing to honor undertakings entered into with Claimants' investments, again contrary to Article 10(1).").

69. *Id.* ¶ 101 (citing EU Directive 2001/77/EC, 2001 O.J. (L 238) 33-44).

70. *Id.*

71. *See id.* ¶ 102, 107. For example, Parliament of Electricity Law 54/1997 "provided the legal framework for regulation of electrical sector during most of the period at issue" by guaranteeing investors of renewable energy reasonable; 1998, 2002, 2004 Royal Decrees regulated and facilitated production from renewable sources and provided incentives to producers; 2005-2010 Renewable Energy set out Spanish Government's policy for attaining renewable energy targets set by the EU in EU directive 2001/77EC.

72. *Id.* ¶ 109.

plants and guaranteed that all production of renewable energy would be subject to a new tariff scheme that permits investors to choose between two types of tariffs. [73]

Following the adoption of RD 661/2007, Claimants Eiser Infrastructure Limited (EIL), a private limited company incorporated under the laws of the United Kingdom, and Energía Solar Luxembourg S.á.r.l. (ESL), a limited liability corporation incorporated under the laws of Luxembourg and wholly owned by EIL (collectively, "Claimants") invested in a Concentrated Solar-Thermal Power (CSP)[74] plant in Spain at its initial stages of development.[75] Claimants concluded that the investment in CSP in Spain had promising business potential, largely based on the favorable characteristics and expectation of stable cash flow provided by RD 661/2007.[76] Claimants acquired a shareholding interest of eighty percent of the ASTE project by October of 2007.[77] After Claimants invested more than €126 million in the project, the plant began operation in October of 2012.[78]

In December of 2011, Spain elected a new prime minister who "called for structural reforms in the energy system".[79] In the years that followed, Spain implemented a series of changes to the regime including a seven percent tax on energy production,[80] remuneration to be calculated based on capacity instead of production,[81] and the elimination of the tariff regime set out in RD 661/2007.[82] The new measures significantly reduced the "subsidies paid to CSP and other renewables generators," and placed a new additional tax on the generators.[83]

---

73. *Id.* ¶ 148.

74. *See* Solar Energy Technologies Office, *Concentrating Solar-Thermal Power*, ENERGY.GOV, https://www.energy.gov/eere/solar/concentrating-solar-power (last visited Aug. 10, 2021). Concentrated Solar-Thermal Power (CSP) is a system that generates electricity by converting energy from sunlight into heat energy using lenses to concentrate a large area of sun onto a receiver, which drives a steam engine connected to an electrical power generator. *Id.*

75. *See* E.S.L v. Spain, *supra* note 13, ¶ 117.

76. *Id.* ¶ 117.

77. *Id.* ¶ 120.

78. *Id.* ¶ 121.

79. *Id.* ¶ 137.

80. *Id.* ¶ 144.

81. *Id.* ¶ 148.

82. *Id.* ¶ 145.

83. *Id.* ¶ 150.

Under the new regime, the ASTE project's revenues ". . . dropped sharply from those projected by the investors . . . under the prior regime,"[84] forcing the operating companies into debt. EIL's founding partner said the project lost all value, as the original €126 million invested by Claimants was now valued at only €4 million.[85]

B. Procedural Background

The states involved in this action, Spain, Luxembourg, and the United Kingdom, are all member states of the Energy Charter Treaty of 1998 (ECT), which established a legal framework to promote cooperation in the energy field.[86] The ECT contains an ISDS provision in Article 26, which governs treaty "disputes between a Contracting Party and an Investor of another Contracting party relating to an Investment of the latter in the Area of the former."[87] If parties cannot settle their case amicably, Article 26 directs the investor party to submit the case for resolution to either the ICSID Convention, UNICITRAL, or the Stockholm Chamber of Commerce.[88]

In accordance with ECT Article 26, Claimants in this case chose to request arbitration against Respondent under the ICSID Convention, and the parties complied with the ICSID Rules and Regulations.[89] Parties agreed to constitute a tribunal consisting of three arbitrators: one appointed by each of the two parties, and a third arbitrator, the president of the tribunal, appointed by the agreement of both parties.[90] Respondent

84. *Id.* ¶ 151.

85. *Id.* ¶ 154.

86. Energy Charter Treaty, *supra* note 20, at art. 2 ("This Treaty establishes a legal framework in order to promote long-term co-operation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.").

87. *Id.* at art. 26 ¶ 1.

88. *Id.* at art. 26 ¶ 4.

89. E.S.L v. Spain, *supra* note 13, ¶¶ 6, 7.

90. *Id.* ¶¶ 8, 9. (noting that members of the Tribunal were "Professor John R. Crook, a national of the United States, President, appointed by the Chairman of the ICSID Administrative Council in accordance with the Parties' agreement on the method of constitution; Dr. Stanimir Alexandrov, a national of Bulgaria, appointed by Claimants; and Professor Campbell McLachlan QC, a national of New Zealand, appointed by Respondent. Ms. Luisa Fernanda Torres, ICSID Legal Counsel, . . . serve[d] as Secretary of the Tribunal").

challenged the tribunal's jurisdiction to hear Claimant's claims,[91] but the tribunal overruled Respondent's objections to jurisdiction and decided the case on its merits.[92]

C. Claims

Claimants contended that they reasonably relied upon the inducements and promises of Respondent, particularly the regime established in RD 661/2007,[93] and that Respondent violated its obligations under the ECT by implementing measures that changed the economic regime for CSP plants under which Claimants invested €126 million in CSP.[94] Claimants relied on the stability of Respondent's regulatory regime when they initially decided to invest in the ASTE project and throughout the process of building the plants, and Respondent's regulatory authorities continually confirmed that the project would be subject to the incentives provided by RD 661/2007 throughout the process.[95]

Claimants alleged that Respondents violated various obligations under the ECT by drastically altering the regulatory regime and substituting it with a totally different regime, culminating in the elimination of the RD 661/2007 regime.[96] Specifically, Claimants contended that Respondent violated Articles 10 and 13 of the ECT by expropriating Claimants' investment, denying Claimants fair and equitable treatment, subjecting Claimants' investments to unreasonable measures, and failing to honor undertakings entered into with Claimants' investments.[97] Respondents disputed the claims and contended that there had been no violations of the ECT.[98]

91. *Id.* ¶¶ 160, 208, 232, 250, 273, 299.

92. *Id.* ¶ 298. The Tribunal sustained one of Respondent's objections to jurisdiction on Claimants' expropriation claim but found that it was not necessary to decide the expropriation claim as the case could be resolved on another basis.

93. *Id.* ¶ 347.

94. *Id.*

95. *Id.* ¶ 121.

96. *Id.* ¶ 348.

97. *Id.* ¶ 349.

98. *Id.* ¶ 350.

D. Tribunal's Analysis

The Tribunal assessed the Parties' claims under Article 10(1) of the ECT, which states that, "Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its area," including "a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment."[99] Taking into account the context and purpose of the ECT, the tribunal concluded that Respondent's obligation under Article 10(1) necessarily includes an obligation to provide "fundamental stability" in the essential characteristics of the legal regime relied upon by investors making long-term investments.[100] Recognizing that regulatory regimes usually change over time, the tribunal acknowledged that investors must expect the possibility that reasonable changes in the legal framework may be made and that states maintain the right to modify their regulatory regimes to meet evolving circumstances and public needs.[101] However, the ECT Article 10(1) obligation to accord fair and equitable treatment means that states cannot alter regulatory regimes applied to existing investment so radically that it deprives investors who relied on those regimes of the value of their investment.[102]

While recognizing that Claimants could not have reasonably expected that there would be no change whatsoever to the RD 661/2007, the Tribunal held that Article 10(1) entitled them to expect that Respondent would not drastically and abruptly revise the regime on which their investment depended in a way that destroyed its value.[103] The Tribunal found that Respondent violated its obligation under Article 10(1) to accord Claimants fair and equitable treatment when it eliminated a favorable regulatory regime that was previously available to Claimants and encouraged their investment in CSP, and replaced it with an radically different regulatory approach that stripped

99. *Id.* ¶ 374 (quoting Energy Charter Treaty, *supra* note 20, at art. 10(1)).
100. *Id.* ¶ 382.
101. *Id.* ¶ 382.
102. *Id.*
103. *Id.* ¶ 419.

Claimants of virtually all the value of their investment.[104]

E. Costs and Award

Violation of a treaty obligation that causes injury entitles the injured party to compensation for the injury sustained.[105] Under the ICSID Convention Rules and Regulations, the Tribunal shall determine an award that shall be binding on the Parties and determine the allocation of arbitration cost as part of the award.[106] In light of its determination that Respondents violated Article 10(1) of the ECT by failing to accord fair and equitable treatments to Claimants, the Tribunal awarded Claimants €128 million as damages to be paid by Respondent.[107] Acknowledging that Tribunals often award arbitration costs to the prevailing party, the Tribunal determined that each party shall bear its own costs because the case involved challenging procedural and legal issues which both Parties addressed.[108]

IV. RENEWABLE ENERGY AND THE CLIMATE CHANGE CRISIS

The final Section of this paper advocates for the use of ISDS to enforce states' commitments to combat climate change.[109] For context of the importance and reason for mitigating climate change, especially by promoting renewable energy, this Section briefly explains the threats posed by climate change and the role that renewable energy can play in mitigating those threats.

In 2014, the United Nations' Intergovernmental Panel on Climate Change published a Synthesis Report (Report), providing key findings of evaluations of underlying scientific understanding of climate change made by three working groups of the IPCC.[110] The Report states that the "[w]arming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to

104. *Id.* ¶¶ 413, 419.

105. *Id.* ¶ 423 (citing International Law Commission's State Responsibility Articles 31, which the Tribunal regards as the applicable international law rules).

106. ICSID 2006 Regulations and Rules, *supra* note 34, at art. 60, 61.

107. E.S.L v. Spain, *supra* note 13, ¶ 473.

108. *Id.* ¶ 484.

109. *See infra* Section V.

110. 2014 Climate Change Synthesis Report, *supra* note 1, at 2.

millennia."[111] Current observed changes including the warming of the atmosphere and ocean, melting of snow ice, and rising of sea level,[112] affect natural and human systems such as water resources, species health, crop yields, and the frequency of extreme weather events.[113] Without substantial changes to mitigate and adapt to climate change, these existing impacts are predicted to continue to worsen alongside new risks including reduced food security, reduced renewable water resources, exacerbated human health problems, compromised human activities such as agriculture and working outdoors, and increased displacement of peoples.[114]

The Report states it is extremely likely that the dominant cause of observed warming since the mid-twentieth century was caused by anthropogenic GHG emissions together with other anthropogenic forces.[115] About seventy-eight percent of the total GHG emissions increase from 1970–2010 are attributed to emissions of carbon dioxide (CO2) from fossil fuel combustion and industrial processes, and continued GHG emissions will cause further warming and changes in the climate system.[116] Mitigation of climate change therefore requires substantial reductions of GHG emissions. Relative to fossil fuels, renewable energy technologies have low specific GHG emissions into the atmosphere, "which makes them useful tools for addressing climate change".[117] Renewable energy technology likely has the technical potential to satisfy the global energy demand.[118] Policies promoting the research, development, and deployment of renewable energy technologies have helped increase growth of renewable energy in recent years.[119] Such policies can help reduce the risks associated with investing in renewable energy.[120]

---

111. *Id.*
112. *Id.*
113. *Id.* at 5.
114. *Id.* at 13.
115. *Id.* at 4.
116. *Id.* at 5.
117. *See* Special Rep. of the IPCC, Renewable Energy Sources and Climate Change Mitigation, 174 (2012) [hereinafter 2012 Renewable Energy Report].
118. *Id.* at 10.
119. *Id.* at 15.
120. *Id.* at 194 (explaining financial and environmental risks associated

There are a variety of international agreements or policies under which parties have committed to combat climate change, some specifically committing to increase the use of renewable energy.[121] Large portions of these agreements, however, are unenforceable.[122] For example, the Paris Agreement, currently signed by 195 states, sets a substantive goal to limit the "increase in global average temperature to well below 2°C above pre-industrial levels and pursu[e] efforts to limit the temperature increase to 1.5 °C above pre-industrial levels."[123] There is also a procedural requirement that each party must put forward nationally determined contributions (NDCs) every five years detailing the domestic measures it intends to achieve in pursuit of the Agreement's goals.[124] Compliance with the NDCs is generally enforceable by a committee set out in Article 15 of the Agreement,[125] but the actual substantive goals set out in Article 2 of the Agreement, and in each Party's individual NDCs, are not enforceable under the Agreement.[126]

V. USING ISDS TO ENFORCE ENVIRONMENTAL OBLIGATIONS

ISDS typically serves as a form of protection for international investors to ensure that the conditions under which they made an investment will be honored, and to provide for compensation when a host State significantly modifies those conditions in a way that hurts the investment.[127] In addition to protecting individual investors, ISDS could also be used as a legal mechanism to enforce environmental commitments that states have made in international agreements such as the Paris Agreement or EU Directive 2018/2001/EC.[128]

---

with investment in commercial renewable energy projects).

121. *See generally* Paris Agreement, *supra* note 3; *What is the Kyoto Protocol?*, *supra* note 2.

122. Roberts, *supra* note 5.

123. Paris Agreement, *supra* note 2, at art. 2.

124. *Id.* at art. 4; *see 21st Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change*, CTR. FOR CLIMATE & ENERGY SOLS., https://www.c2es.org/content/cop-21-paris/ (last visited Aug. 10, 2020).

125. Paris Agreement, *supra* note 2, at art. 15.

126. Harold Hongju Koh, *Triptych's End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L.J.F. 338, 352 (2017).

127. Simson, *supra* note 9.

128. Paris Agreement, *supra* note 3; *see* Directive 2018/2001/EC, 2018

Both the Paris Agreement and EU Directive 2018/2001/EC contain substantive commitments to mitigate climate change, in addition to procedural requirements. For example, under Article 2 of the Paris Agreement, parties commit to "[h]olding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change".[129] EU Directive 2018/2001/EC, which was established in part to help the EU meet its commitments under the Paris Agreement to reduce GHG emissions, established a goal for the EU to fulfill at least thirty-two percent of its energy needs through the use of renewable energy by 2030.[130] Unfortunately, however, the agreements themselves do not provide for a mechanism to enforce those substantive commitments.

There are internally enforceable commitments in both the Paris Agreement and EU Directive 2018/2001/EC, but these are usually the procedural requirements. Under Article 4 of the Paris Agreement, "[i]n order to achieve the long-term temperature goal set out in Article 2," "[e]ach Party shall prepare, communicate and maintain successive national determined contributions that it intends to achieve," and "shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."[131] The word "shall" creates a binding commitment.[132] The procedural commitment set out in Article 4 for each party to prepare nationally determined contributions (NDCs) is enforceable through Article 15.[133] Article 15 establishes an "expert-based and facilitative" committee to "facilitate implementation and promote compliance" with the Agreement.[134] Similarly, EU Directive

O.J. (L 328/82). EU Directive 2018/2001/EC is a revised version of the original EU Directive 2009/28/EC, which established an overall policy for production and promotion of energy from renewable sources, and required the EU to fulfill at least twenty percent of its total energy needs with RE by 2020, to be achieved through attainment of individual countries.

129. Paris Agreement, *supra* note 3, at art. 2.

130. EU Directive 2018/2001/EC, *supra* note 128.

131. Paris Agreement, *supra* note 3, at art. 2.

132. Hongju, *supra* note 126, at 352.

133. Paris Agreement, *supra* note 3, at art. 15.

134. *Id.*

2018/2001/EC requires member states to draft "renewable energy action plans" and report their progress to the Commission.[135]

Simply put: the Paris Agreement and the EU Directive 2018/2001/EC both provide enforcement mechanisms for the *procedural* requirements of the agreement, but neither provide for a way to enforce the parties' substantive commitments to limit GHG emissions or promote renewable energy to a specific target. As these commitments are not internally enforceable, ISDS could present an opportunity for investors to enforce states' commitments.

A. Logistics of Using ISDS to Enforce States' International Environmental Commitments

As demonstrated by *E.S.L v. Spain*, an investor may have a valid ISDS claim challenging a states' policy changes if they can prove that (1) the host state had a stated policy; (2) an investor from another state made an investment in the host state in reasonable reliance of the stated policy; and (3) the host state changed its policy or enacted a policy that did not match its rhetoric in a way that significantly hurt the investor's investment in an unforeseen way.[136] For an ISDS claim seeking to enforce a states' international environmental commitment, the first element of the claim would most likely be a domestic policy enacted in pursuit of the goals set out in an international agreement such as the Paris Agreement or EU Directive 2018/2001/EC. Then, for the second element a foreign investor must have made an investment in the state in reasonable reliance of the states' commitment or policy. Under agreements such as the Paris Agreement or EU Directive 2018/2001/EC, parties make public, transparent commitments that they will reduce GHG emissions and promote renewable energy. It would then be reasonable for an investor to rely on a states' policies that are consistent with those agreements, because the state has committed to maintain policies in pursuit of the goals set out in the agreement.

One example of a party that may be in the positions to bring

135. *See* Directive 2018/2001/EC, *supra* note 128, ¶ 30.
136. *See infra*, Section III.

such a claim would be a renewable energy investor who invests in a state relying on the state's public commitment to reduce GHGs and promote renewable energy. If the host state then significantly changes the policy or enacts a policy that is inconsistent with its international commitments, and the investment is hurt by such changes, the investor may be able to hold the state liable for damages through ISDS.

This type of ISDS case would enforce agreements like the Paris Agreement and EU Directive 2018/2001/EC primarily through deterrence. In principle, if states are aware that, through these cases, they could potentially be liable for millions or billions[137] of dollars in damages when they enact policies inconsistent with their prior agreements, they will be incentivized to act in accordance with their agreements to avoid such damages. In cases where the challenged policy is a national policy put in place in pursuit of the international agreement, the agreement itself may play a role in proving that the investor had reason to rely on the policy. It is unclear whether the international agreement itself could suffice as a policy to challenge, or whether investors would have to challenge domestic policies that states enacted in accordance with their commitments made in the international agreements.

E.S.L v. Spain is, in many ways, illustrative of how such a claim would work. In *E.S.L v. Spain*, Spain adopted a Royal Decree incentivizing the production of renewable energy in response to a 2001 EU directive that set out targets for EU member countries to develop renewable energy, similar to EU Directive 2018/2001/EC.[138] Based largely on the Royal Decree, the Claimants decided to invest in a solar energy project in Spain.[139] Years later, Spain's new prime minister adopted a Royal Decree that both reduced the subsidies Claimants expected to receive under the initial Royal Decree, and placed a tax on Claimants' operation.[140] As a result, Claimants' investment lost almost all of its value.[141] Claimants were then able to bring an ISDS claim against Spain and recovered

137. Samples, *supra* note 10.

138. *See* E.S.L v. Spain, *supra* note 13, ¶ 101 (citing EU Directive 2001/77/EC, 2001 O.J. (L 238) 33-44).

139. *Id.* ¶ 121.

140. *Id.* ¶ 348.

141. *Id.* ¶ 154.

damages.

In principle, as a result of a case like *E.S.L. v. Spain*, states should be incentivized to maintain policies that are consistent with their Directives and agreements in order to avoid going through ISDS cases and potentially paying out substantial damages. Even if an investor claimant's case fails and they are not awarded damages, the state would still have to go through the lengthy and expensive process of arbitration or settlement. A similar case could be brought against a state that enacts a policy inconsistent with the Paris Agreement instead of an EU Directive.

B. Potential Roadblocks

In theory, using ISDS to enforce international environmental commitments could work. There are, a number of foreseeable roadblocks that such a claim would have to overcome.

As a jurisdictional requirement, in order to bring an ISDS claim there must be an IIA between the investor state and the host state that provides for ISDS to govern breaches of the IIA. However, with BITs between individual countries and multilateral agreements between groups of countries, the jurisdictional hurdle likely would not be a great one.[142]

Another potential issue with using ISDS to enforce environmental obligations is that deterrence is the primary consequence which could, in principle, drive states to fulfill their commitments. A winning claimant is not obligated to use its award to reinvest in renewable energy, or to use the money in any pro-environment way.[143] The positive environmental impact from these cases would come instead from incentivizing states to

142. *See generally The Database of Bilateral Investment Treaties*, ICSID WORLD BANK DATABASE, https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a61 (last visited Aug. 10, 2021) (collecting a comprehensive database of all existing BITs by Party. Major developed countries who have either signed the Paris Agreement or are part of the EU and would be prime targets for these claims have BITs in place with over one hundred other countries). Countries with over hundred BITs include: Belgium-Luxembourg, China, Czech Republic, France, German, Italy, Netherlands, Romania, Switzerland, and the UK. *Id.*

143. Simson, *supra* note 9.

fulfill their commitments in order to avoid paying large ISDS damages.[144]

Additionally, the damages themselves may not be sufficiently detrimental to a state to serve as an effective deterrence. From an economic standpoint, the state's fossil fuel industry, for example, could benefit the state's economy more than paying off ISDS damages would hurt. In that case, the ISDS damages alone probably would not be enough to urge the state to enact policies favoring renewable energy over fossil fuels.

The last, and perhaps greatest potential hurdle for ISDS claims is the standard of review. As explained by the tribunal in *E.S.L. v. Spain*, sovereign states have the right to modify their policies, and investors must expect reasonable modifications.[145] To constitute a breach of treaty obligations, policy changes must be substantially unforeseeable and drastic. There are many ISDS cases challenging States' policy changes when the changes were not found to amount to a breach.[146] For example, in *Philip Morris v. Uruguay*, the claimants, investors in a cigarette company, challenged Uruguay's regulatory changes precluding tobacco manufacturers from marketing certain variants of cigarettes and increased the size of health warnings on cigarette packages.[147] The tribunal determined that the regulatory changes did not have a substantial effect on the claimants' investment, and did not constitute a breach of a relevant BIT.[148] In *E.S.L. v. Spain*, the tribunal found that Spain's policy changes were substantial and did constitute a breach of the ECT.[149] In that case, the regulatory regime under which claimants invested was drastically overhauled and practically deprived the claimants' investment of all value.[150]

Environmentalists should be strategic in choosing which ISDS claims to pursue to enforce states' environmental commitments considering all of the aforementioned potential roadblocks.

---

144. *Id.*
145. E.S.L. v. Spain, *supra* note 13, ¶ 382.
146. *See, e.g.*, Philip Morris v. Uruguay, *supra* note 33.
147. *Id.* ¶ 9.
148. *Id.* ¶ 276.
149. E.S.L. v. Spain, *supra* note 13, ¶ 382.
150. *Id.* ¶ 413.

VI. CONCLUSION

There is intrinsic value in states publicly committing to combat climate change through international agreements and policies such as the Paris Agreement and EU Directive 2008/2001/EC, as they provide frameworks for states to enact domestic climate policies.[151] There are also, however, substantive commitments within these agreements that, if enforceable, would be instrumental in ensuring that states actually follow through by enacting policies that mitigate climate change and promote renewable energy. While many of the substantive commitments made in international environmental agreements are not internally enforceable, ISDS may be a useful tool to enforce them. ISDS could be used to deter states from acting inconsistent with their international agreements because states may be liable for damages to renewable energy investors hurt by the states' policies.

There are a handful of potential reasons why using ISDS to enforce states' international commitments may prove difficult.[152] However, the consequences of successfully enforcing such commitments could be quite significant in combating climate change.[153] Environmentalists should give considerable thought to the potential of ISDS as a mechanism to hold states accountable for the substantive commitments made in international environmental agreements.

151. Frédéric Gilles Sourgens, *Climate Commons Law: The Transformative Force of the Paris Agreement*, 50 N.Y.U J. INT'L L. & POL. 885, 889 (2018).

152. *See supra* Section V(B).

153. *See* 2014 Climate Change Synthesis Report, *supra* note 1, at 2 (noting that GHG emissions must be significantly reduced to mitigate climate change); Paris Agreement, *supra* note 3, at art. 2 (If enforced, Parties would be required to hold the increase in global average temperature to below 2°C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels); EU Directive 2018/2001/EC, *supra* note 128, ¶ 30 (If enforced, Parties would be required to fulfill at least 32% of its energy needs with renewable energy by 2030).