



British Institute of
International and
Comparative Law

International Investment Agreements and the Climate Change

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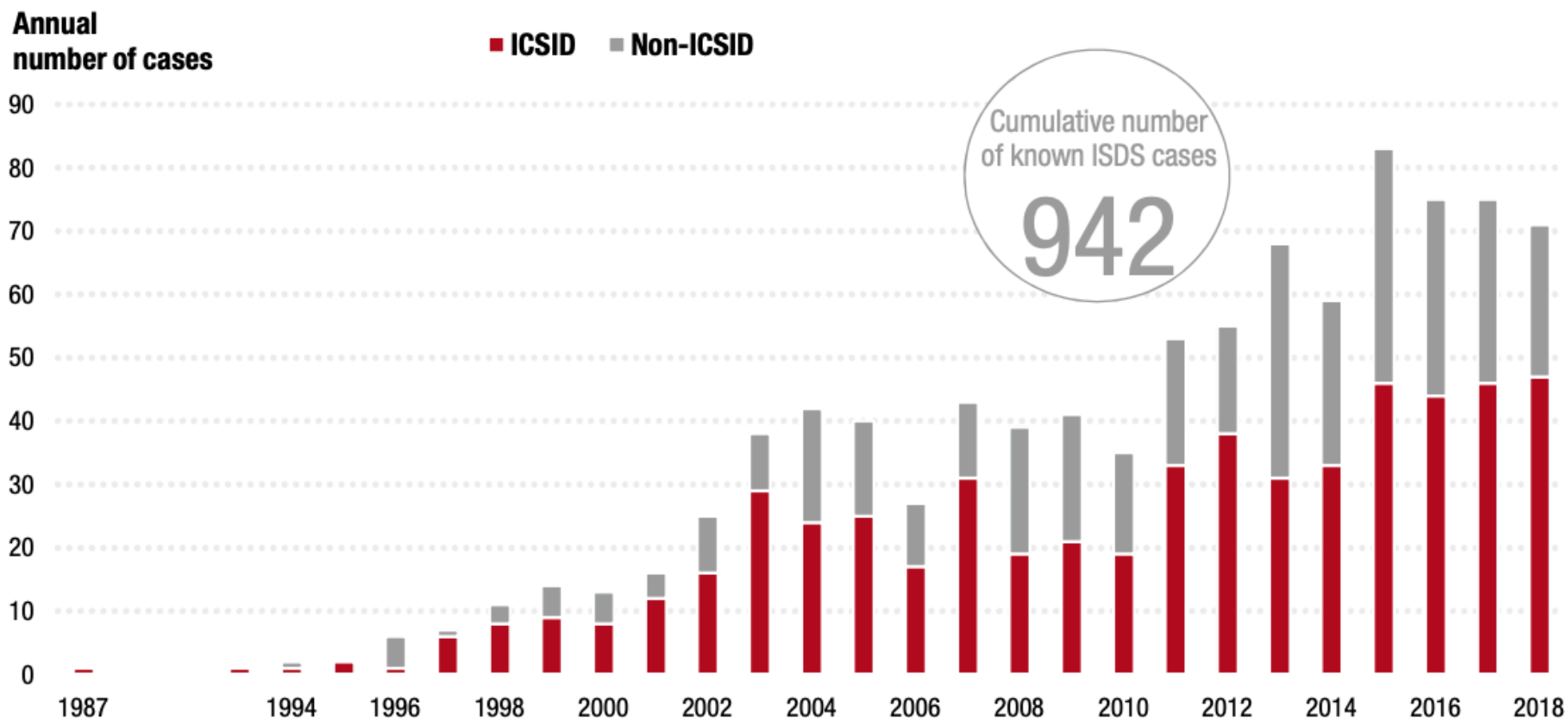
Outline

- Challenges related to the system of settlement of investment disputes
- Challenges related to substantive protections
- Examples of recent cases related to the environmental protection

Introduction to international investment law

- Protections and disputes arise out of investment treaties
- Standards such as fair and equitable treatment, guarantees in the event of expropriation
- Hundreds of pending investor-state disputes, often involving involving hundreds of millions US\$ claims
- Republic of Korea - 7 as a respondent state (4 of those in 2018), 5 as home state of claimant (against Kyrgyzstan, Oman, Saudi Arabia, Vietnam, Oman, all after 2013)

Figure 1. Trends in known treaty-based ISDS cases, 1987–2018



Source: UNCTAD, ISDS Navigator.

Challenges related to investor-State dispute settlement

- Delays in proceedings (just under four years a mean case)
- Cost of proceedings
- Inconsistent decision-making
- Negative impact on sovereignty
- Perceived imbalance between the Global North and South
- Limited transparency
- Limited access to participation in proceedings

Other concerns expressed by users

- Over-committed arbitrators
- Arbitrators' conflicts of interest
- Challenges to arbitrators
- Allocation of costs
- Read more: Kryvoi, Yarik, [ICSID Arbitration Reform: Mapping Concerns of Users and How to Address Them](#) (November 8, 2018). Available at SSRN:

Reforming international investment treaties

- The current system exposes States to an increasing number of investment claims
- The standards and treaty provisions too broad and do not offer legal certainty to the State or investors
- Growing trend to modernise international investment agreements
- Modern treaties reflect different approaches – the question is to be a rule-taker or a rule-maker

Investment disputes related to public law issues and the right to regulate

- International administrative review of decisions taken by States that host foreign investments
- Diverse areas, including nuclear and renewable energy, tobacco regulation, economic crimes
- Jurisdiction depends on the wording of the consent document; important to see whether there are any safeguard provisions
- Difference between normal regulatory changes and breaches of legitimate expectations of investors

Environment, public health and human rights clauses

- References to the negative impact of foreign investors' activities
- Balancing the protection granted to the investment
- States' rights to receive compensation for damages to public health or the environment by an investor
- Consideration of the investment's negative impact as a mitigating factor when in damages calculations.

Environmental clauses

- According to an OECD study, "Language referring to environmental concerns is rare in BITs but common in non-BIT IIAs... All 30 non-BIT IIAs contain such references, but only 6.5% of BITs"
- Preambles mention the environment as a concern and regulatory freedom in the area of environmental regulation
- Preclude indirect expropriation claims arising out of environmental regulation
- Discourage lowering environmental standards to attract investment.
- Encourage cooperation between States and strengthening of environmental regulations.
- Read more: Gordon, Kathryn and Pohl, Joachim, Environmental Concerns in International Investment Agreements: A Survey (May 31, 2011). Available at SSRN: <https://ssrn.com/abstract=1856465> or <http://dx.doi.org/10.2139/ssrn.1856465>

The Energy Charter Treaty, 1994

(Preamble)

”Recognizing the necessity for the most efficient exploration, production, conversion, storage, transport, distribution and use of energy;

Recalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects; and Recognizing the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes.”

Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 2018 (Preamble)

REAFFIRM the importance of promoting corporate social responsibility, cultural identity and diversity, environmental protection and conservation, gender equality, indigenous rights, labour rights, inclusive trade sustainable development and traditional knowledge, as well as the importance of preserving their right to regulate in the public interest.

Cube Infrastructure Fund v. Spain

(2019)

- Spain took a few bold measures to increase greatly the proportion of its energy that is obtained from renewable sources.
- The effects of fossil fuels was a key factor these policies as well as EU policy of fixing targets related to the share of energy coming from renewable sources.
- In *Cube Infrastructure Fund* the tribunal ruled that Spain's reforms to its renewable energy regulatory framework had breached the Energy Charter Treaty and awarded €2.89 as compensation
- Read more:
<https://www.italaw.com/sites/default/files/case-documents/italaw10692.pdf>

RREEF v. Spain (2018)

- German companies invested in solar and wind projects in Spain before significant reform of the country's renewable energy regime.
- The tribunal: the disputed tax introduced in good faith was an integral part of Spain's environmental policy, which applied to all electricity producers. The tribunal was not entitled to "substitute itself to the Government of Spain in this respect".
- The majority concluded that an investor could not legitimately expect that the conditions of its investment would never change.
- Central question: whether the regulatory regime amounted to a radical transformation of the conditions of the investment.
- But the respondent was still liable for the retroactive effect of certain legislative measures.
- Full text: https://www.italaw.com/sites/default/files/case-documents/italaw10455_0.pdf

Belenergia v. Italy (2019)

- Between 2005 and 2012, Italy implemented several incentives schemes for the generation of energy from photovoltaic plants.
- Luxembourg investor failed to convince the tribunal that the Italy had breached the Energy Charter Treaty as a result of reforming its renewable energy sector.
- The investor had no legitimate expectation that Italy would not cut incentives to solar power generation, and thus had suffered no treaty breach.
- Full text:
<https://www.italaw.com/sites/default/files/case-documents/italaw10291.pdf>

Questions?

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