

# Climate Change Disputes

## Past, Present and Future

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## What Are Climate Change Disputes?

Any dispute arising out of or in relation to the effect of climate change and climate change policy, the United Nations Framework Convention on Climate Change (UNFCCC) and/or the Paris Agreement.



# How Does Climate Change Increase Disputes?

## Resource Scarcity

- Reduced availability and access to natural resources
- Claims may be raised against governments or corporations

## Financial & Political Decisions

- Disputes stemming from climate-related investments and policy shifts

## Contract-Based Disputes

- Transition/Mitigation Contracts
- General Commercial Contracts
- Submission Agreements

## Market Mechanism Disputes

- Emissions trading schemes
- Clean Development Mechanism (CDM) compliance and credit allocation



## Challenges for Addressing Climate Change Politically

- Short-term political cycles vs. long-term climate timelines
- Influence of powerful interest groups
- Global problems cannot easily be solved by national politics



## Benefits of Adversarial Dispute Resolution for Climate Disputes

- Litigation/arbitration can provide a useful tool for the shortcomings of the political systems, offering structured, enforceable solutions to manifestations of the climate crisis.
- Litigation/arbitration can also drive change, not just act as a tool for enforcement:
  - Courts can interpret existing laws to address some of the expressions of the climate crisis that might meet the requirements of existing legal tools.
  - Environmental protection may be recognized as part of human rights law.
  - Legal action can expand the scope of obligations, even without new legislation.



## Challenges in Bringing Climate Change Disputes

- **Attribution & Causation:** Legal systems require clear causation: who caused what harm, when, and how. However, climate change results from cumulative global actions, not a single actor or event.
- **Standing:** Courts require personal, direct harm which is difficult to establish with global, collective climate impacts.
- **Timing:** Many claims are future-oriented, but courts are designed to address past or present damage.
- **Jurisdiction:** Climate change crosses borders, courts typically do not.
- **Judicial Expertise:** Climate science is complex; most judges lack the technical background to assess it.



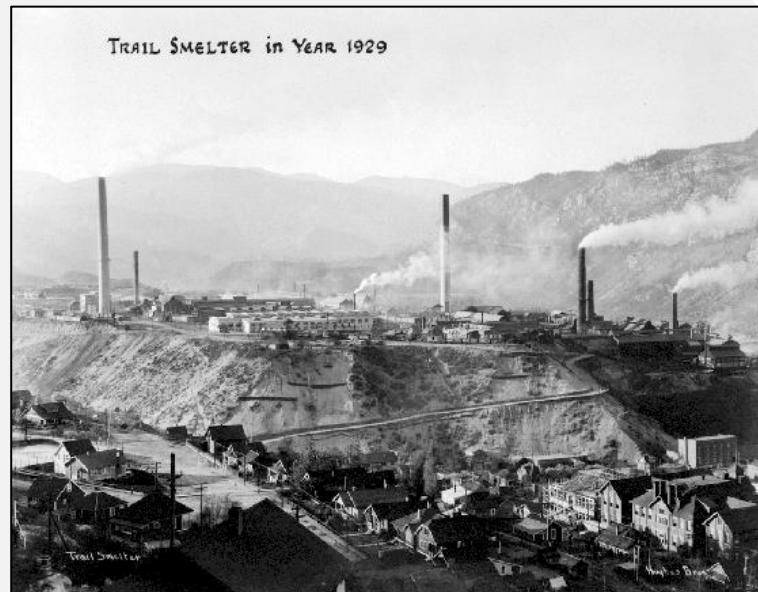
## How Arbitration Can Resolve Some of These Challenges

- **Flexibility:** Parties can design the process choose rules, procedures, and expert arbitrators.
- **International Scope:** Well-suited for cross-border disputes (such as multinational corporations, transboundary pollution). Avoids jurisdictional limitations of national courts.
- **Confidentiality:** Most proceedings are private which can encourage open dialogue and reduce reputational risk.
- **Push for Transparency:** ICC (2019) and IBA support greater openness in climate arbitration. Suggested reforms include public hearings, published awards, and adoption of UNCITRAL Transparency Rules.



# Trail Smelter Arbitration

The Tribunal, therefore, finds that the above decisions, taken as a whole, constitute an adequate basis for its conclusions, namely, that, under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.



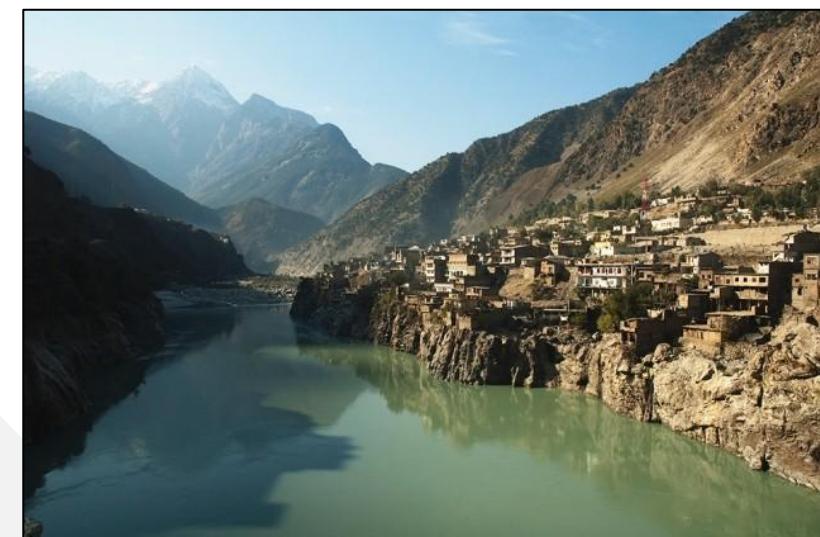


# Indus Waters Kishenganga Arbitration

449. There is no doubt that States are required under contemporary customary international law to take environmental protection into consideration when planning and developing projects that may cause injury to a bordering State. Since the time of *Trail Smelter*, a series of international conventions,<sup>657</sup> declarations<sup>658</sup> and judicial and arbitral decisions have addressed the need to



Kishenganga Hydroelectric Project



Indus River in Pakistan



# Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica

71. In approaching the question of compensation for the Santa Elena Property, the Tribunal has borne in mind the following considerations:

- International law permits the Government of Costa Rica to expropriate foreign-owned property within its territory for a public purpose and against the prompt payment of adequate and effective compensation. This is not in dispute between the parties.
- While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid.<sup>32</sup> The international source of the obligation to protect the environment makes no difference.





# Rockhopper Exploration Plc Et Al. v. Italy (Now Annulled)

99. The particular provision of Law No. 208 of 2015 which brought about the geographical limitation discussed just above, is as follows (CLA-7):

*Law 28 December 2015, No. 208*

*Art. 1, para 239*

*Article 6, para. 17, of legislative decree 3 April 2006, no. 152, second and third sentences are hereby replaced with the following: "The prohibition also applies to the marine areas located within twelve miles of the coastlines alongside the whole national coast perimeter and of the external perimeter of such protected marine and coastal areas. Enabling titles that have already been issued remain valid for the entire lifecycle of the oilfield, in compliance with safety and environmental protection standards. Maintenance activities aimed at implementing the technological upgrades necessary for the safety of the plants and the protection of the environment, as well as final environmental restoration activities must always be ensured".*

197. The Tribunal is equally not persuaded by the Respondent's invocation of police powers to justify that which it did in respect of the Claimants' investment. For the reasons set out above, the Tribunal considers the acts of the Respondent, being the combination of the law published on 30 December 2015 and the letter dated 29 January 2016 sent to the Claimants denying the production concession to constitute a direct expropriation for which no prompt compensation was offered, much less paid. The Claimants' right to protection from expropriation of their investment as a matter of the ECT was, of course, not absolute. [Art. 13 of the ECT](#) says as much. However, in order for a sovereign to avoid the consequence of unlawful expropriation it must cumulatively satisfy all of the requirements, (a)-(d) inclusive, of [Art. 13\(1\) of the ECT](#).





# Renewable Energy Claims

- A number of disputes related to legal reforms in the renewable energy sector has commonly been brought under the Energy Charter Treaty (ECT)
- Spain, Italy, and the Czech Republic have faced claims after changing renewable energy policies
- Key Cases:
  - *Eiser v. Spain*: Investors challenged Spain's 2013–2014 reforms. The Tribunal found Spain breached the ECT by depriving investors of the entire value of their investment. However, the award was annulled in 2020.
  - *RWE v. Netherlands*: German energy company RWE challenged the Dutch coal phase-out policy. Alleged insufficient time and resources were provided for a fair transition.
- The ECT has recently been modernized after multiple countries decided to leave the ECT



# Future?



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