



# IIA ISSUES NOTE

## INTERNATIONAL INVESTMENT AGREEMENTS

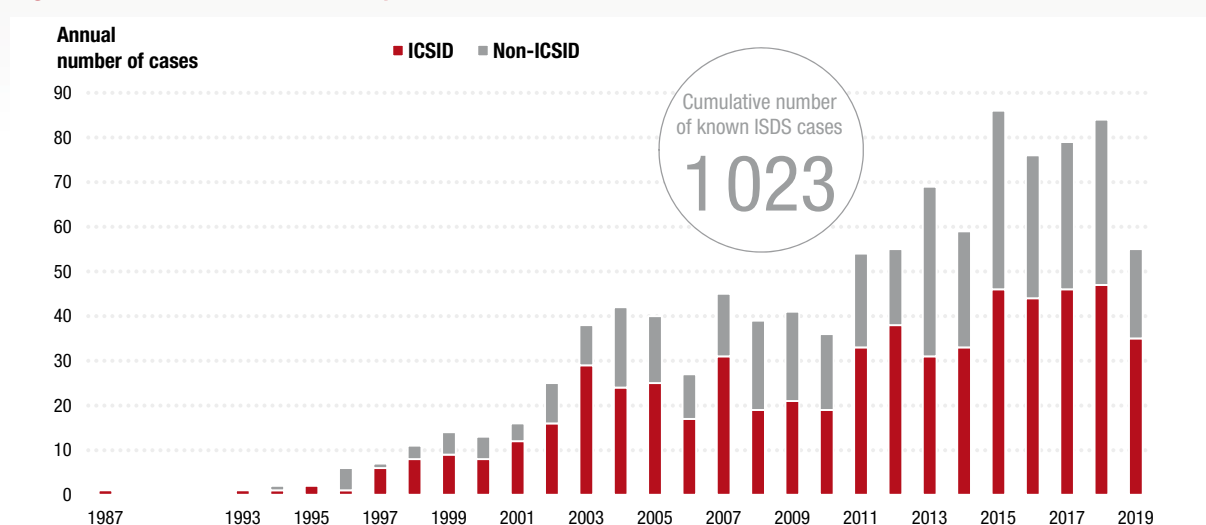


## INVESTOR–STATE DISPUTE SETTLEMENT CASES PASS THE 1,000 MARK: CASES AND OUTCOMES IN 2019

### H I G H L I G H T S

- At least 55 known treaty-based investor–State dispute settlement (ISDS) cases were initiated in 2019 (figure 1), all under old-generation treaties signed before 2012.
- As of 1 January 2020, the total number of known ISDS cases pursuant to international investment agreements (IIAs) had reached 1,023. To date, 120 countries and one economic grouping are known to have been respondents to one or more ISDS claims.
- The new ISDS cases in 2019 were initiated against 36 countries and one economic grouping (the European Union, EU). As in previous years, the majority of new cases were brought against developing countries and transition economies. Developed-country investors brought most of the 55 known cases.
- UNCTAD's Special Investment Policy Monitor (No. 4) and the World Investment Report 2020 (chapter III) review investment policy responses to the COVID-19 pandemic, also highlighting the risk of ISDS proceedings under IIAs and the need to safeguard sufficient regulatory space in this regard.

**Figure 1. Trends in known treaty-based ISDS cases, 1987–2019**



Source: UNCTAD, ISDS Navigator.

Note: Information has been compiled from public sources, including specialized reporting services. UNCTAD's statistics do not cover investor–State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signaled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continually adjusted as a result of verification processes and may not match exactly case numbers reported in previous years.

# 1. Trends in ISDS: new cases and outcomes

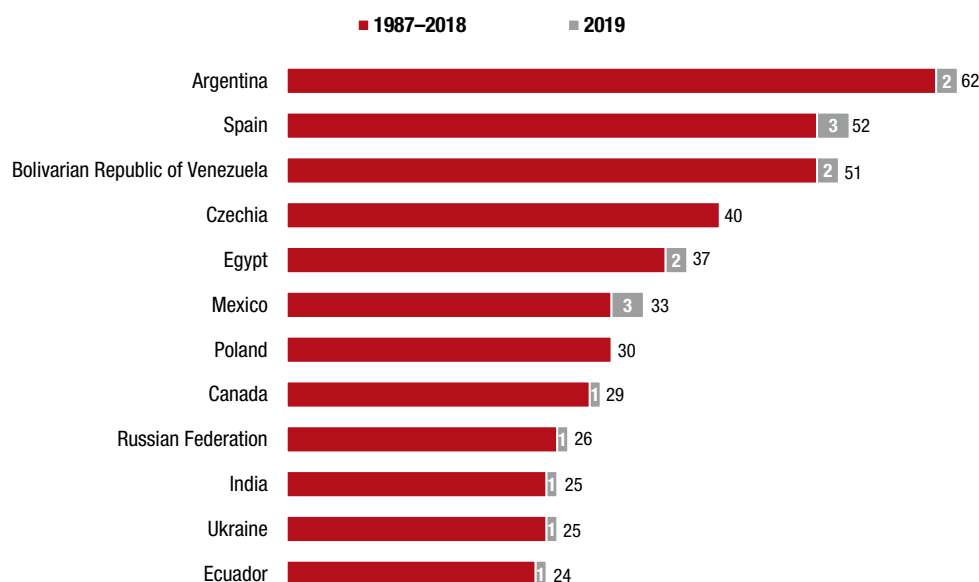
## (i) New cases initiated in 2019

In 2019, investors initiated 55 publicly known ISDS cases pursuant to IIAs (figure 1), the lowest number in the preceding five years. On the basis of newly revealed information, the number of known cases for 2018 was adjusted to 84. As of 1 January 2020, the total number of publicly known ISDS claims had reached 1,023. As some arbitrations can be kept confidential, the actual number of disputes filed in 2019 and previous years is likely to be higher. To date, 120 countries and one economic grouping are known to have been respondents to one or more ISDS claims.

## Respondent States

The new ISDS cases in 2019 were initiated against 36 countries and one economic grouping (the EU). Colombia, Mexico, Peru and Spain were the most frequent respondents, with three known cases each. Three economies – the EU,<sup>1</sup> Nepal and Sierra Leone – faced their first known ISDS claims. As in previous years, the majority of new cases (80 per cent) were brought against developing countries and transition economies. Overall, Argentina, Spain and Venezuela have received the largest share of claims over the years (figure 2).

**Figure 2. Most frequent respondent States, 1987–2019 (Number of known cases)**



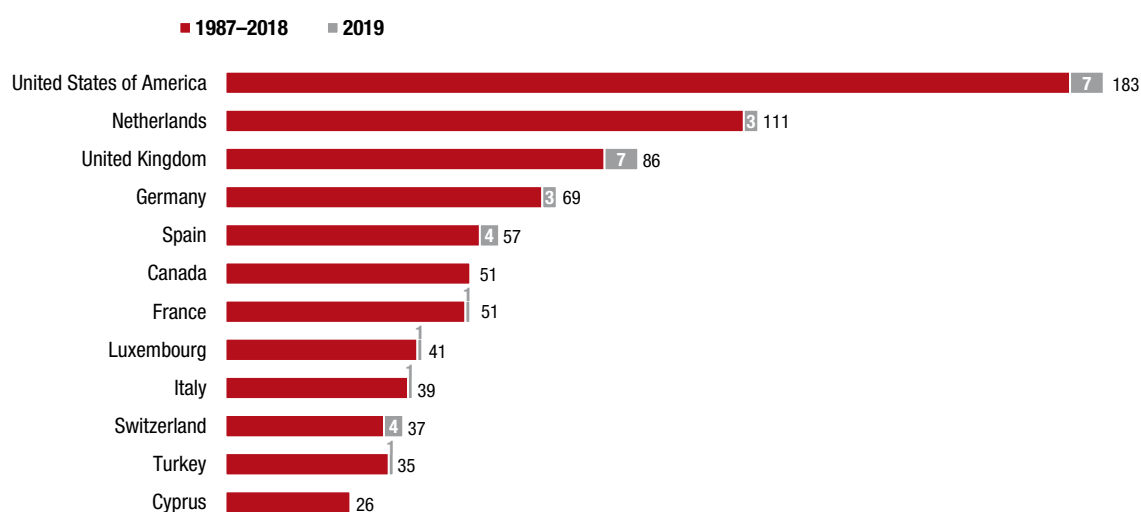
Source: UNCTAD, ISDS Navigator.

## Claimant home States

Developed-country investors brought most – about 70 per cent – of the 55 known cases in 2019. The highest numbers of cases were brought by investors from the United Kingdom and the United States, with seven cases each. Of all known cases, investors from the United States, the Netherlands and the United Kingdom have filed the largest shares (figure 3).

<sup>1</sup> Nord Stream 2 AG (Switzerland), a subsidiary of Gazprom (Russian Federation), initiated an arbitration against the EU under the ECT on 26 September 2019 related to the EU Gas Directive amendment of 2019; see <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1008/nord-stream-2-v-eu>.

**Figure 3. Most frequent home States of claimants, 1987–2019** (Number of known cases)



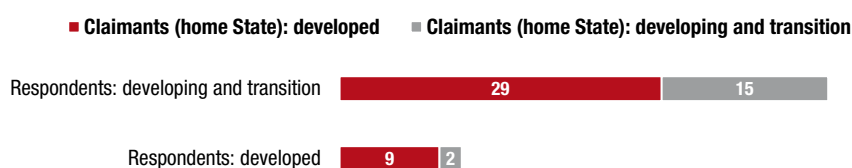
Source: UNCTAD, ISDS Navigator.

### Cases by country classification

In about half of the 55 known cases in 2019, developing countries and transition economies were the respondent States and developed countries were the home States of the claimants (29 cases; figure 4).<sup>2</sup> However, about 25 per cent of cases were brought by investors from developing countries or transition economies against other countries from these categories (15 cases).

Developed-country investors' cases against other developed countries – 9 cases – mostly consisted of intra-EU disputes. In two cases, investors from developing countries and transition economies challenged developed countries.

**Figure 4. ISDS cases by country classification, 2019** (Number of known cases)



Source: UNCTAD, ISDS Navigator.

### Intra-EU disputes

About 15 per cent of the 55 known cases filed in 2019 were intra-EU disputes (seven cases), slightly below the historical average of 20 per cent. Five of these seven disputes were brought on the basis of the Energy Charter Treaty (ECT); the remaining two invoked intra-EU bilateral investment treaties (BITs).

The overall number of known arbitrations initiated by an investor from one EU member State against another totalled 188 at the end of 2019. It remains to be seen whether recent EU-level developments related to intra-EU BITs and the ECT will greatly reduce or eventually eliminate new treaty-based intra-EU disputes (box 1).

<sup>2</sup> This includes four cases brought by developed-country investors against least developed countries.

## Box 1. EU agreement for the termination of intra-EU BITs

On 5 May 2020, 23 EU member States<sup>a</sup> signed the agreement for the termination of intra-EU BITs in order to implement the ruling in the *Achmea* case, which found that investor–State arbitration clauses in intra-EU BITs are incompatible with EU law. The agreement contains one annex with a list of about 125 intra-EU BITs currently in force that will be terminated upon entry into force of the agreement for the relevant member States and clarifies that their sunset clauses will also be terminated. A second annex lists 11 already terminated intra-EU BITs whose sunset clauses will also cease to produce legal effect upon entry into force of the agreement for the relevant member States. The agreement does not cover intra-EU proceedings under the Energy Charter Treaty (ECT). It indicates that the EU as a group and the member States will address this matter at a later stage.

Source: UNCTAD (2020). *World Investment Report 2020: International Production Beyond the Pandemic*. New York and Geneva: United Nations.

<sup>a</sup> These are Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.

### Applicable investment treaties

About 70 per cent of investment arbitrations in 2019 were brought under BITs and treaties with investment provisions (TIPs) signed in the 1990s or earlier. The remaining cases were based on treaties signed between 2000 and 2011. The ECT (1994) was the IIA invoked most frequently in 2019, with seven cases, followed by the North American Free Trade Agreement (NAFTA, 1992) with three cases. Looking at the overall trend, about 20 per cent of the 1,023 known cases have invoked the ECT (128 cases) or NAFTA (67 cases).

### Economic sectors involved

About two thirds of the cases filed in 2019 related to activities in the services sector:

- Supply of electricity, gas, steam and air (14 cases)
- Financial and insurance services (7 cases)
- Transportation and storage (5 cases)
- Construction (4 cases)
- Information and communication (2 cases)
- Real estate (2 cases)
- Other services (2 cases)

Primary industries accounted for 18 per cent of the new cases and manufacturing for 16 per cent.

### Measures challenged

Investors in 2019 most frequently challenged the following types of State conduct:

- Alleged takeover, seizure or nationalization of investments (at least 9 cases)
- Alleged breach, non-fulfilment or interference with contracts or concessions (at least 7 cases)
- Termination, non-renewal or suspension of contracts or concessions (at least 6 cases)
- Revocation or denial of licences or permits (at least 4 cases)
- Legislative reforms in the renewable energy sector (at least 3 cases)
- Forced liquidation or closure (at least 2 cases)
- Tax-related measures such as the imposition of a capital gains tax or back taxes (at least 2 cases)

Other conduct that was challenged included domestic legal decisions, alleged failure to protect investments during civil war, an import and export ban of certain steel, and the phase out of coal-fired power plants.

### Amounts claimed

Where information regarding the amounts sought by investors has been disclosed (in about half of the new cases), the reported amounts claimed range from \$10 million (*Castillo v. Panama*) to \$3.5 billion (*Odyssey v. Mexico*).

## (ii) ISDS outcomes

### Decisions and outcomes in 2019

In 2019, ISDS tribunals rendered at least 71 substantive decisions in investor–State disputes, 39 of which were in the public domain at the time of writing. More than half of the public decisions on jurisdictional issues were decided in favour of the State, whereas on the merits more decisions were decided in favour of the investor.

- Fourteen decisions (including rulings on preliminary objections) principally addressed jurisdictional issues, with five upholding the tribunal’s jurisdiction and nine declining jurisdiction.
- Twenty-five decisions on the merits were rendered, with 14 accepting at least some investor claims and 11 dismissing all the claims. In the decisions holding the State liable, tribunals most frequently found breaches of the fair and equitable treatment (FET) provision. The amounts awarded ranged from less than 10 million (\$7.9 million in *Magyar Farming and others v. Hungary*) to several billions (\$4 billion in *Tethyan Copper v. Pakistan* and \$8.4 billion in *ConocoPhillips v. Venezuela*).

In addition, four publicly known decisions were rendered in annulment proceedings at the International Centre for Settlement of Investment Disputes (ICSID). Ad hoc committees of ICSID rejected the applications for annulment in all four cases.

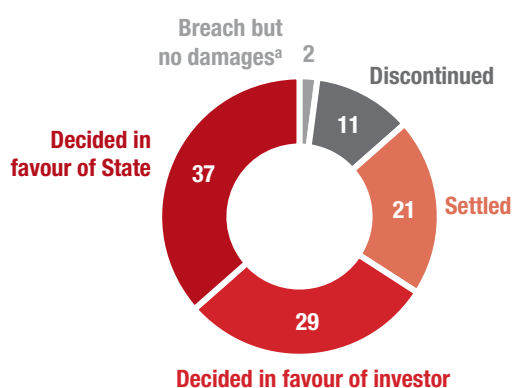
### Overall outcomes

By the end of 2019, at least 674 ISDS proceedings had been concluded. The relative share of case outcomes changed only slightly from that in previous years (figure 5).

About 37 per cent of all concluded cases were decided in favour of the State (claims were dismissed either on jurisdictional grounds or on the merits), and about 29 per cent were decided in favour of the investor, with monetary compensation awarded. About 21 per cent of the cases were settled; in most cases, the terms of settlement remained confidential. In the remaining proceedings, either the cases were discontinued or the tribunal found a treaty breach but did not award monetary compensation.

Of the cases that were resolved in favour of the State, about half were dismissed for lack of jurisdiction. Looking at the totality of decisions on the merits (i.e. where a tribunal determined whether the challenged measure breached any of the IIA’s substantive obligations), about 60 per cent were decided in favour of the investor and the remainder in favour of the State (figure 6).

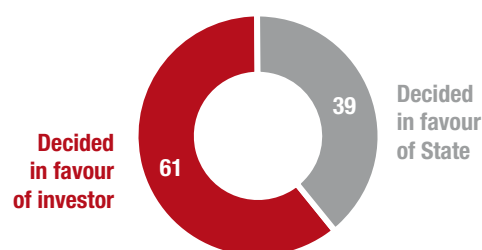
**Figure 5. Results of concluded cases, 1987–2019 (Per cent)**



Source: UNCTAD, ISDS Navigator.

<sup>a</sup> Decided in favour of neither party (liability found but no damages awarded).

**Figure 6. Results of decisions on the merits, 1987–2019 (Per cent)**



Source: UNCTAD, ISDS Navigator.

Note: Excludes cases (i) dismissed by tribunals for lack of jurisdiction, (ii) settled, (iii) discontinued for reasons other than settlement (or for unknown reasons) and (iv) decided in favour of neither party (liability found but no damages awarded).

### (iii) Government measures in response to the COVID-19 pandemic and the risk of ISDS proceedings

IAs can come into play in relation to government responses to the COVID-19 pandemic, including measures taken in the public interest, to protect public health and to tackle the devastating economic and social effects of the pandemic. As these measures also affect the operations of foreign investors, some of them could, depending on the way they are implemented, expose governments to arbitration proceedings initiated by foreign investors under IAs and/or investor–State contracts.

Concerns have been expressed that there could be a surge of ISDS cases with respect to COVID-related measures. The International Institute for Sustainable Development (IISD) highlighted the need for collective action to avoid this from happening, and noted that this could be coordinated through UNCTAD.<sup>3</sup> In May 2020, the Columbia Center on Sustainable Investment (CCSI) published a call signed by a number of leaders on human rights and sustainable development for an immediate and complete moratorium on all investor–State arbitration claims by foreign investors against governments using IAs until the end of the pandemic, as well as a permanent restriction on all arbitration claims related to government measures targeting health, economic and social dimensions of the pandemic and its effects.<sup>4</sup> The signatories also called on governments to agree on principles to ensure that future arbitration cases do not hinder countries' good faith recovery efforts and that any damages awarded in ISDS cases respect the dire financial situation facing governments following the pandemic.

This highlights the need to safeguard sufficient regulatory space in IAs to protect public health and to minimize the risk of ISDS proceedings, while protecting and promoting international investment for development. In its *Special Investment Policy Monitor* dedicated to the COVID-19 pandemic, UNCTAD has highlighted the most relevant IA provisions in the context of the pandemic and made recommendations to shield State measures from a finding of a treaty violation in line with UNCTAD's Investment Policy Framework for Sustainable Development (2015) and UNCTAD's Reform Package for the International Investment Regime (2018).<sup>5</sup> UNCTAD's IA Reform Accelerator, which will be launched later this year, will provide an actionable policy tool for economies wishing to accelerate the reform of their existing and aging network of IAs to better respond to today's challenges while maintaining investment protection.

<sup>3</sup> Withdrawing ISDS consent is put forward as another option. See Bernasconi-Osterwalder, N., Brewin, S., and Maina, N. "Protecting Against Investor–State Claims Amidst COVID 19: A call to action for governments", IISD Commentary, <https://www.iisd.org/sites/default/files/publications/investor-state-claims-covid-19.pdf>

<sup>4</sup> The full text is available at <http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19>

<sup>5</sup> UNCTAD (2020). "Investment Policy Responses to the COVID-19 Pandemic", *Investment Policy Monitor*, Special Issue No. 4, May 2020. New York and Geneva: United Nations. See also UNCTAD (2020). *World Investment Report 2020: International Production Beyond the Pandemic*. New York and Geneva: United Nations.

## UNCTAD Policy Tools for IIA Reform

Investment Policy Framework for Sustainable Development (2015 version)

[https://unctad.org/en/PublicationsLibrary/diaepcb2015d5\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf)

Improving Investment Dispute Settlement: UNCTAD's Policy Tools (IIA Issues Note, No. 4, November 2018)

[https://unctad.org/en/PublicationsLibrary/diaepcb2017d8\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcb2017d8_en.pdf)

Reform Package for the International Investment Regime (2018 edition)

[https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD\\_Reform\\_Package\\_2018.pdf](https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf)

Reforming Investment Dispute Settlement: A Stocktaking (IIA Issues Note, No. 1, March 2019)

[https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d3\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d3_en.pdf)

## UNCTAD Investment Policy Online Databases

International Investment Agreements Navigator

<https://investmentpolicy.unctad.org/international-investment-agreements>

IIA Mapping Project

<https://investmentpolicy.unctad.org/international-investment-agreements/iaa-mapping>

Investment Dispute Settlement Navigator

<https://investmentpolicy.unctad.org/investment-dispute-settlement>

Investment Laws Navigator

<https://investmentpolicy.unctad.org/investment-laws>

## Annex 1. Known treaty-based ISDS cases initiated in 2019

Key information about each case is available at:

<https://investmentpolicy.unctad.org/investment-dispute-settlement>

No.	Full case name	Respondent State	Home State of claimant	Applicable IIA
1	Alaa Nizar Raja Sumrain, Ayat Nizar Raja Sumrain, Eshraka Nizar Raja Sumrain and Mohamed Nizar Raja Sumrain v. State of Kuwait (ICSID Case No. ARB/19/20)	Kuwait	Egypt	Egypt–Kuwait BIT (2001)
2	Alcosa v. The State of Kuwait	Kuwait	Spain	Kuwait–Spain BIT (2005)
3	Alejandro Diego Díaz Gaspar v. Republic of Costa Rica (ICSID Case No. ARB/19/13)	Costa Rica	Spain	Costa Rica–Spain BIT (1997)
4	Alois Schönberger v. Republic of Tajikistan (ICSID Case No. ARB(AF)/19/1)	Tajikistan	Austria	Austria–Tajikistan BIT (2010)

No.	Full case name	Respondent State	Home State of claimant	Applicable IIA
5	Amec Foster Wheeler USA Corporation, Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc., and Process Consultants, Inc. v. Republic of Colombia (ICSID Case No. ARB/19/34)	Colombia	United States of America	Colombia–United States TPA (2006)
6	Axiata Investments (UK) Limited and Ncell Private Limited v. Federal Democratic Republic of Nepal (ICSID Case No. ARB/19/15)	Nepal	United Kingdom	Nepal–United Kingdom BIT (1993)
7	Ayoub-Farid Michel Saab v. United Republic of Tanzania (ICSID Case No. ARB/19/8)	Tanzania, United Republic of	Netherlands	Netherlands–United Republic of Tanzania BIT (2001)
8	Azucarera del Guadalejo S.A. and Joaquín Francisco Martín Montero v. Dominican Republic (PCA Case No. 2020-01)	Dominican Republic	Spain	Dominican Republic–Spain BIT (1995)
9	Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. v. Kingdom of Spain (ICSID Case No. ARB/19/4)	Spain	Luxembourg	Energy Charter Treaty (1994)
10	CH Mamacocha S.R.L. and Latam Hydro LLC v. Republic of Peru (ICSID Case No. ARB/19/28)	Peru	United States of America	Peru–United States FTA (2006)
11	Chevron Overseas Finance GmbH v. The Republic of the Philippines (PCA Case No. 2019-25)	Philippines	Switzerland	Philippines–Switzerland BIT (1997)
12	CTIP Oil & Gas International Limited v. Arab Republic of Egypt (ICSID Case No. ARB/19/27)	Egypt	United Arab Emirates	Egypt–United Arab Emirates BIT (1997)
13	DSG Yapi Sanayi Ticaret Anonim Sirketi v. Kingdom of Saudi Arabia (ICSID Case No. ARB/19/32)	Saudi Arabia	Turkey	Saudi Arabia–Turkey BIT (2006)
14	Enel Fortuna S.A. v. Republic of Panama (ICSID Case No. ARB/19/5)	Panama	Panama	Italy–Panama BIT (2009)
15	Erste Nordsee-Offshore Holding GmbH, Strabag SE, Zweite Nordsee-Offshore Holding GmbH v.	Germany	Austria	Energy Charter Treaty (1994)

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