



IIA ISSUES NOTE

INTERNATIONAL INVESTMENT AGREEMENTS



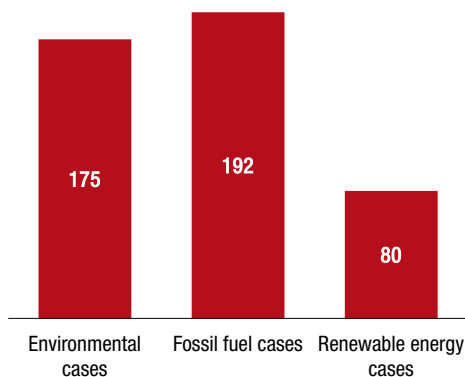
UNITED NATIONS
UNCTAD

TREATY-BASED INVESTOR–STATE DISPUTE SETTLEMENT CASES AND CLIMATE ACTION

H I G H L I G H T S

- The urgency of climate action has added attention to the need to reform the international investment agreements (IIA) regime. The risk of investor–State dispute settlement (ISDS) being used to challenge climate policies is a major concern.
- Many past ISDS cases were related to measures or sectors of direct relevance to climate action. Investor claimants brought at least 175 IIA-based ISDS cases in relation to measures taken for the protection of the environment.
- Investors in the fossil fuel sector have been frequent ISDS claimants, initiating at least 192 ISDS cases against different types of State conduct.
- The last decade has also seen the emergence and proliferation of ISDS cases brought by investors in the renewable energy sector, with 80 known cases.
- More immediate IIA reform steps are needed to alleviate ISDS risks and create the necessary policy space for States to take urgent climate action. A complementary publication takes stock of IIA provisions relevant to climate action and presents policy options for climate-responsive IIA reform (IIA Issues Note, No. 3, September 2022).

Figure 1. IIA-based ISDS cases related to sectors or measures relevant to climate action, 1987–2021
(Cumulative number of cases)



Source: UNCTAD, ISDS Navigator.

Note: The categories are not mutually exclusive, e.g. some cases are counted as environmental ISDS cases and fossil fuel cases at the same time. ISDS cases have been compiled based on UNCTAD's ISDS Navigator and information from public sources, including notices of arbitration, arbitral decisions and 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.

Investor–State arbitration cases and climate action

The urgency of climate action has added attention to the need to reform the international investment agreements (IIA) regime. The risk of investor–State dispute settlement (ISDS) being used to challenge climate policies is a major concern. Many past IIA-based ISDS cases were related to measures or sectors that are of direct relevance to climate action. Three categories of cases can be identified (figure 1):¹

- Environmental ISDS cases (amounting to at least 175 cases, see annex 1)
- Fossil fuel ISDS cases (at least 192, see annex 2)
- Renewable energy ISDS cases (at least 80, see annex 3)

Eco Oro v. Colombia and *RWE v. Netherlands* are prominent examples (box 1).

Box 1. Recent examples of ISDS cases directly impacting countries' efforts to combat climate change

Two recent high-profile ISDS cases were directly relevant to countries' efforts to protect the environment.

In *Eco Oro v. Colombia*,^a the tribunal held that Colombia's environmental mining ban decision violated the minimum standard of treatment in the investment chapter of the Colombia–Canada FTA (2008) and that the general environmental exception included in the FTA (Article 2201(3)) did not preclude the obligation to pay compensation. The decision has two distinct repercussions. First, it signals that measures taken for the protection of the environment can be challenged and deemed a violation of IIAs; and second, it sheds doubt on the effectiveness of countries' efforts to rebalance IIAs by including explicit safeguards and exceptions to protect the State's right to regulate for the protection of the environment and climate adaptation.

The Netherlands faced its first-ever ISDS claim in *RWE v. Netherlands* (based on the Energy Charter Treaty, 1994) as a result of the Government's decision to ban the burning of coal for electricity generation by 2030 in compliance with the country's Paris Agreement commitments. According to the claimant, the new law prohibiting the use of coal to generate electricity would not provide appropriate compensation for losses incurred by coal plant operators. While the case is pending, it demonstrates countries' risk when implementing regulations for phasing out fossil fuels.

Source: UNCTAD.

^a *Eco Oro v. Colombia*, [Decision on Jurisdiction, Liability and Directions on Quantum](#), 9 September 2021.

(i) Environmental ISDS cases

Many IIA-based ISDS cases have been brought against measures that are related to environmental protection.² At least 175 such cases have been brought against States, amounting to about 15 per cent of all 1,190 known ISDS cases based on IIAs.³ As some arbitrations can be kept confidential, the actual number of disputes is likely higher. Some of the challenged measures involved allegations that the claimants' investment projects were environmentally harmful (causing pollution and degradation of the environment). Several cases, also counted under this category, challenged measures related to regulatory changes for renewable energy production.

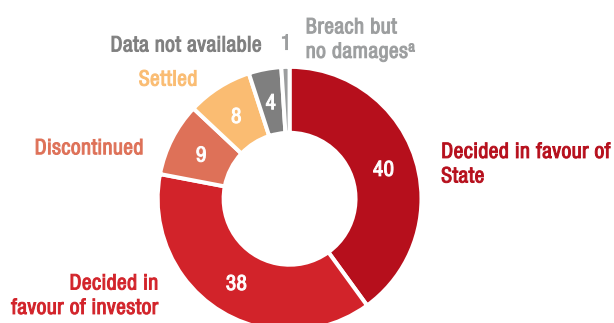
About one third of the analysed environmental cases are pending. Looking at the outcomes of concluded environmental ISDS cases (figure 2), 40 per cent were decided in favour of the State (jurisdiction declined or claims dismissed on the merits) and 38 per cent were decided in favour of the investor (with damages awarded). The remaining cases were discontinued, settled, the outcome is unknown, or the tribunal found an IIA breach but did not award monetary compensation (breach but no damages).

¹ The categories are not mutually exclusive, e.g. some cases are counted as environmental ISDS cases and fossil fuel cases at the same time.

² A wide working definition of the term "environmental protection" was used to identify environmental ISDS cases. The motives behind the challenged measures can be subject to differing views between the claimant investor and the respondent State. The analysis of this question rests with the arbitral tribunal deciding the specific case.

³ See also Chapter II of the UNCTAD World Investment Report 2022 (UNCTAD, 2022b).

Figure 2. Outcomes of environmental ISDS cases, 1987–2021^a (Per cent)



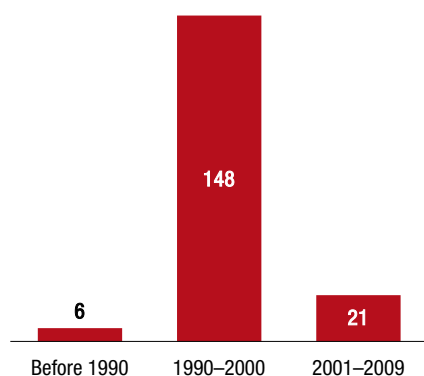
Source: UNCTAD, ISDS Navigator.

^a Based on 118 concluded cases out of 175 environmental ISDS cases identified by UNCTAD (the remaining 57 cases are pending).

^b Decided in favour of neither party (liability found but no damages awarded).

All of the analysed environmental ISDS cases were brought on the basis of IIAs signed before 2010. The vast majority was based on IIAs signed in the 1990s (figure 3). The Energy Charter Treaty (1994) was the most frequently invoked IIA with 80 cases, amounting to about half of the 175 environmental ISDS cases. This highlights the need for addressing the large stock of old-generation IIAs.

Figure 3. IIAs invoked in environmental ISDS cases, by IIA date of signature (Cumulative number of cases)



Source: UNCTAD, ISDS Navigator.

As opposed to the general trend whereby developing countries are the most frequent respondents in ISDS overall,⁴ environmental ISDS cases have been more often brought against developed regions (67 per cent, figure 4). Developing countries as respondents accounted for about one third of environmental ISDS cases. As to the home States of claimants, 95 per cent of environmental ISDS cases were initiated by investors from developed regions (figure 5).

⁴ See also Chapter II of the UNCTAD World Investment Report 2022.

Figure 4. Respondent States in environmental ISDS cases, by country category (Per cent)

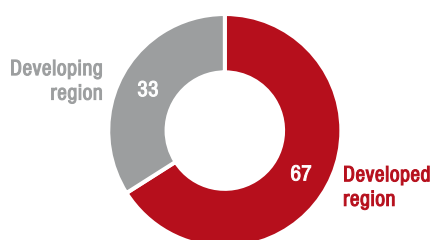
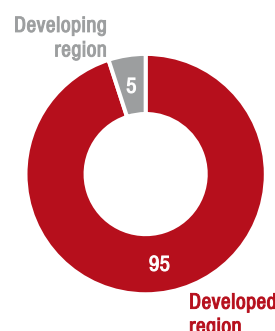


Figure 5. Home States of claimants in environmental ISDS cases, by country category (Per cent)



Source: UNCTAD, ISDS Navigator.

(ii) Fossil fuel ISDS cases

Past ISDS disputes relating to the fossil fuel sector provide insights on IIAs and climate action. At least 192 IIA-based ISDS have been brought related to fossil fuels (figures 6, 7 and 8). These ISDS cases involve investments in the following economic activities:⁵

- Mining of coal and lignite
- Extraction of crude petroleum and natural gas
- Power generation from coal, oil and gas
- Transportation and storage of fossil fuels

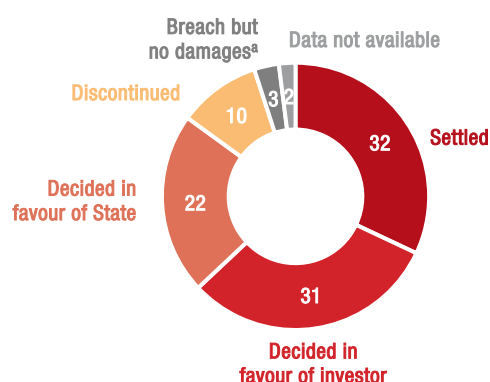
In the underlying disputes, fossil fuel investors challenged measures that were not necessarily related to climate action or the protection of the environment. For example, challenged measures included changes in regulatory frameworks applicable to the investment and the denial or revocation of permits on other than environmental grounds. As fossil fuel investors have frequently resorted to ISDS, they can also be expected to use existing ISDS mechanisms to challenge climate action measures aimed at restricting or phasing out fossil fuels. A recent high-profile example is the *RWE v. Netherlands* case (box 1).

About 30 per cent of fossil fuel ISDS cases are currently pending. Out of the concluded cases (figure 6), 32 per cent were settled⁶ and 31 per cent were decided in favour of the investor (with damages being awarded). The remaining cases were decided in favour of the State (22 per cent; jurisdiction declined or claims dismissed on the merits), discontinued, the tribunal found an IIA breach but did not award monetary compensation (breach but no damages), or the outcome is unknown.

⁵ Building on the definition used in IISD (2021, p. 5), fossil fuel ISDS cases relate to investment activities in the extraction, processing, distribution, supply, transportation, storage and the power generation from coal, oil, gas.

⁶ In most cases the terms of settlement remained confidential. For settled cases, it is likely that respondent States have offered monetary or non-pecuniary relief to the claimants.

Figure 6. Outcomes in fossil fuel ISDS cases, 1987–2021 (Per cent)



Source: UNCTAD, ISDS Navigator

Note: Based on 144 concluded cases out of 192 fossil fuel ISDS cases identified by UNCTAD (the remaining 48 cases are pending).

The overwhelming majority of fossil fuel ISDS cases were brought against respondent States from developing regions (74 per cent, figure 7). Claimants from developed regions initiated about 90 per cent of the cases (figure 8).

Figure 7. Respondent States in fossil fuel ISDS cases, by country category (Per cent)

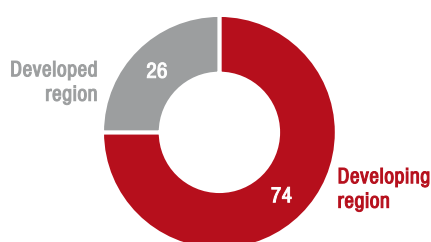
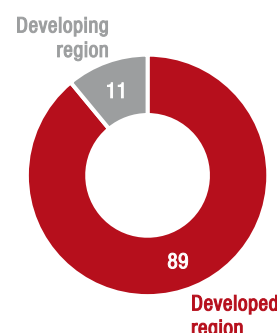


Figure 8. Home States of claimants in fossil fuel ISDS cases, by country category (Per cent)



Source: UNCTAD, ISDS Navigator.

(iii) Renewable energy ISDS cases

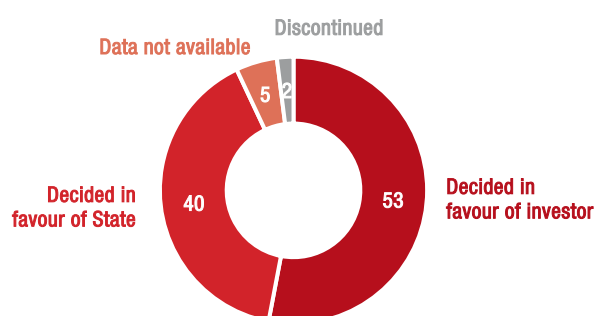
During the last decade, ISDS cases brought by investors in the renewable energy sector have proliferated, amounting to at least 80 cases (figure 9).⁷ Many of these cases challenged Governments' legislative changes involving reductions in feed-in-tariffs for renewable energy production. The renewable energy cases primarily concerned investments in solar photovoltaic power generation. A minority related to wind and hydroelectric power generation. Spain was the respondent State in 60 per cent of cases, which typically related to the same set of legislative and regulatory measures.

States have used different types of incentives to promote investments in renewable energy over time. The underlying regulatory frameworks have also evolved, partly due to concerns about State expenditures and budget deficits, as well as advances in technology for renewable energy (declined costs and increased efficiency).

About half of the renewable energy ISDS cases are currently pending. Out of the concluded cases (figure 9), 53 per cent were decided in favour of the investor (with damages awarded), while 40 per cent were decided in favour of the State. The remaining cases have been discontinued or the outcome is unknown.

⁷ Prior to 2010, a small number of ISDS cases were brought in relation to renewable energy projects, such as hydroelectric/water power supply projects. See e.g. *Empresa Nacional de Electricidad v. Argentina*; *Impregilo v. Pakistan (I)*; *Impregilo v. Pakistan (II)*; *Cementownia v. Turkey (I)*.

Figure 9. Outcomes in renewable energy ISDS cases, 2011-2021 (Per cent)

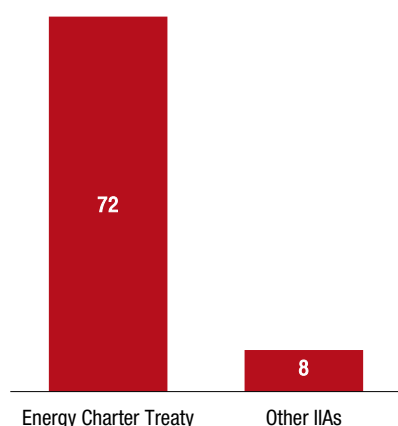


Source: UNCTAD, ISDS Navigator.

Note: Based on 43 concluded cases out of 80 renewable energy ISDS cases identified by UNCTAD (the remaining 37 cases are pending).

More than 90 per cent of the recent renewable energy ISDS cases have been initiated on the basis of the same IIA, the Energy Charter Treaty (1994) (72 cases, figure 10). Overall, about 20 per cent of the 1,190 known ISDS cases have invoked the ECT (UNCTAD, 2022b). This puts the modernization of the ECT under the spotlight (see UNCTAD, 2022a).

Figure 10. IIAs invoked in renewable energy ISDS cases (Cumulative number of cases)



Source: UNCTAD, ISDS Navigator.

Note: In eight cases brought under the Energy Charter Treaty, other IIAs were invoked at the same time (these cases have been counted under the Energy Charter Treaty). The cases under other IIAs are those exclusively based on IIAs other than the ECT.

Renewable energy ISDS cases have been almost exclusively brought by claimants from developed regions against other developed countries (98 per cent i; figures 11 and 12).

These cases show that IIAs may increase the costs of adapting energy regulatory frameworks in host States. States need flexibility for the necessary regulatory experimentation leading to climate adaptation. While investors seek stability and guarantee of returns, States should not be unduly hindered by extending unsustainable regulatory frameworks that socialize the risks arising from the energy transition.

Figure 11. Respondent States in renewable energy ISDS cases, by country category (Per cent)

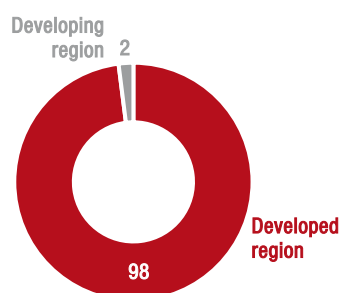
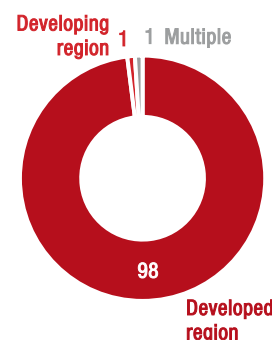


Figure 12. Home States of claimants in renewable energy ISDS cases, by country category (Per cent)



Source: UNCTAD, ISDS Navigator.

Overall, past ISDS cases provide the following insights:

- Different types of State conduct, including environmental measures and other regulatory actions, can give rise to ISDS claims.
- Investors have challenged measures taken by both developed and developing countries.
- The overwhelming majority of ISDS cases relied on old-generation IIAs.

While not all claims brought by investors under IIAs are successful, ISDS is costly. In general, the disputing parties – including the respondent States – incur significant costs for the arbitrators' work, the administration of proceedings and legal representation, all of which usually amount to several million dollars or more. In addition, claimants and respondent States face several years of uncertainty while ISDS proceedings concerning the challenged measures are ongoing. The amounts at stake in ISDS proceedings can be hundreds of millions and even billions of dollars. Moreover, ISDS proceedings may have reputational costs for the respondent States.

More immediate IIA reform steps are needed to alleviate ISDS risks and create the necessary policy space for States to take urgent climate action, including through a higher level of flexibility in undertaking regulatory changes.

This IIA Issues Note was prepared by UNCTAD's IIA team, under the supervision of Joerg Weber and the overall guidance of James Zhan. The IIA Section is managed by Hamed El-Kady.

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Annex 1. List of environmental ISDS cases based on IIAs

No.	Year of initiation	Short case name	Applicable IIA	Outcome
1	2021	Modus Energy v. Ukraine	Energy Charter Treaty (1994)	Pending
2	2021	TC Energy and TransCanada v. USA (II)	NAFTA (1992); USMCA (2018)	Pending
3	2021	TS Villalba and others v. Spain	Energy Charter Treaty (1994)	Pending
4	2021	Uniper v. Netherlands	Energy Charter Treaty (1994)	Pending
5	2020	Arka Energy v. Albania	Albania–Netherlands BIT (1994)	Pending
6	2020	Campos de Pesé v. Panama	Italy–Panama BIT (2009)	Pending
7	2020	Encavis and others v. Italy	Energy Charter Treaty (1994)	Pending
8	2020	EP Wind v. Romania	Energy Charter Treaty (1994)	Pending
9	2020	Fin.Doc and others v. Romania	Energy Charter Treaty (1994)	Pending
10	2020	Mitsui v. Spain	Energy Charter Treaty (1994)	Pending
11	2020	Shift Energy v. Japan	Hong Kong, China SAR–Japan BIT (1997)	Pending
12	2019	Canepa v. Spain	Energy Charter Treaty (1994)	Pending
13	2019	Mamacocha and Latam Hydro v. Peru	Peru–United States FTA (2006)	Pending
14	2019	Odyssey v. Mexico	NAFTA (1992)	Pending
15	2019	Sapex v. Spain	Energy Charter Treaty (1994)	Pending
16	2019	Skubenko and others v. North Macedonia	North Macedonia–Ukraine BIT (1998)	Pending
17	2019	Strabag and others v. Germany	Energy Charter Treaty (1994)	Pending
18	2019	VM Solar Jerez and others v. Spain	Energy Charter Treaty (1994)	Pending
19	2018	ACF v. Bulgaria	Energy Charter Treaty (1994)	Pending
20	2018	EBL (Genossenschaft Elektra Baselland) and Tubo Sol PE2 S.L. v. Spain	Energy Charter Treaty (1994)	Pending
21	2018	European Solar Farms v. Spain	Energy Charter Treaty (1994)	Pending
22	2018	Invenergy v. Poland	Poland–United States of America BIT (1990)	Pending
23	2018	Itochu v. Spain	Energy Charter Treaty (1994)	Pending
24	2018	KLS Energy v. Sri Lanka	Malaysia–Sri Lanka BIT (1982)	Pending
25	2018	LSG Building Solutions and others v. Romania	Energy Charter Treaty (1994)	Pending

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