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INVESTOR-STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2015

Highlights

- A record high of 70 investor-State dispute settlement (ISDS) cases were filed in 2015. The overall number of publicly known ISDS claims reached 696.
- By the end of 2015, a total of 444 ISDS proceedings have been concluded, with 36 per cent of cases decided in favour of the State, 26 per cent in favour of the investor and 26 per cent of cases settled.
- Following the recent trend, a high share of new cases in 2015 (about 40 per cent) was brought against developed countries, including many cases by European investors against European Union member States.
- The majority of new cases invoked bilateral investment treaties (BITs), most of them dating back to the 1990s. In about one third of all cases last year foreign investors relied upon the Energy Charter Treaty, which by now is the most frequently invoked treaty (87 cases), followed by the North American Free Trade Agreement (56 cases), and the Argentina–United States BIT (20 cases).
- State conduct most frequently challenged by investors in 2015 included legislative reforms in the renewable energy sector, alleged direct expropriations of investments, alleged discriminatory treatment, and revocation or denial of licences or permits.
- Newly filed cases include, among others, claims related to events in Crimea, a mass claim arising out of the Eurozone crisis, a case concerning the prohibition of gaming, a first-ever claim invoking the WTO General Agreement on Trade in Services, and several tax-related disputes.
- In 2015, ISDS tribunals rendered at least 51 decisions, of which 31 are in the public domain. Most of the public decisions on jurisdiction were decided in favour of the State, while the majority of those on merits ended in favour of the investor.

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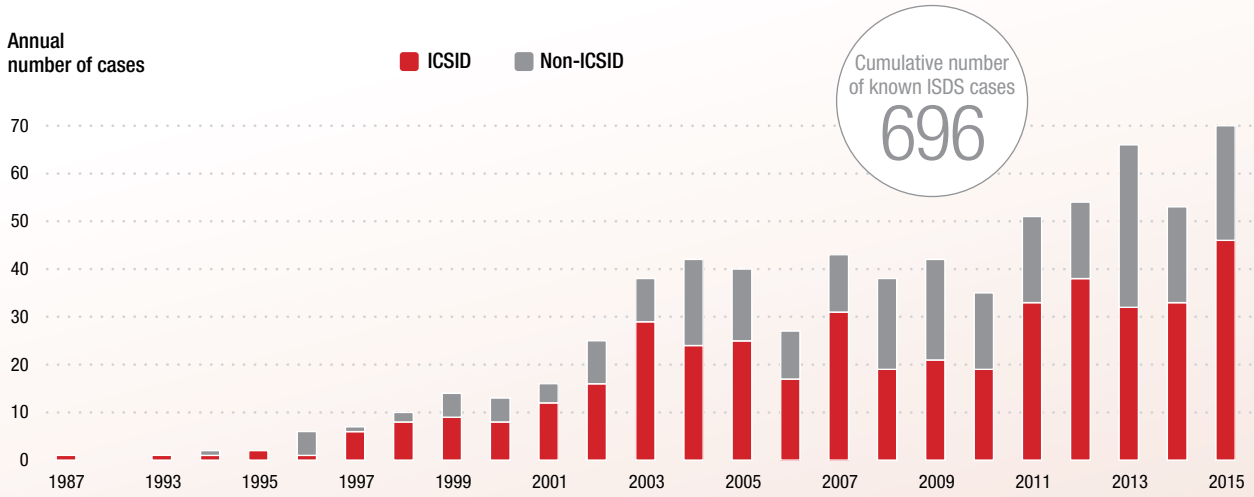
- Arbitral decisions adopted in 2015 touch upon a number of important legal issues concerning the scope of treaty coverage, the conditions for bringing ISDS claims, the meaning of substantive treaty protections, the calculation of compensation and others. On some issues, tribunals followed previous decisions, while on some other issues they adopted approaches that departed from earlier decisions.
- Some of the prominent decisions rendered in 2015 concerned investor nationality, ownership and control. This topic – including approaches, implications and policy challenges – receives in-depth coverage in UNCTAD's World Investment Report 2016.

I. Latest trends in ISDS

In 2015, the number of ISDS cases reached a record high with a continued large share of cases against developed countries.

Figure 1. Known ISDS cases, 1987–2015



Source: ©UNCTAD, ISDS Navigator.

Note: Information about 2015 claims has been compiled on the basis of 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 signalled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continuously adjusted as a result of verification and may not match case numbers reported in previous years.

In 2015, investors initiated 70 known investor-State dispute settlement (ISDS) cases pursuant to international investment agreements (IIAs), which is the highest number of cases ever filed in a single year (figure 1). As arbitrations can be kept confidential under certain circumstances, the actual number of disputes filed for this and previous years is likely to be higher.

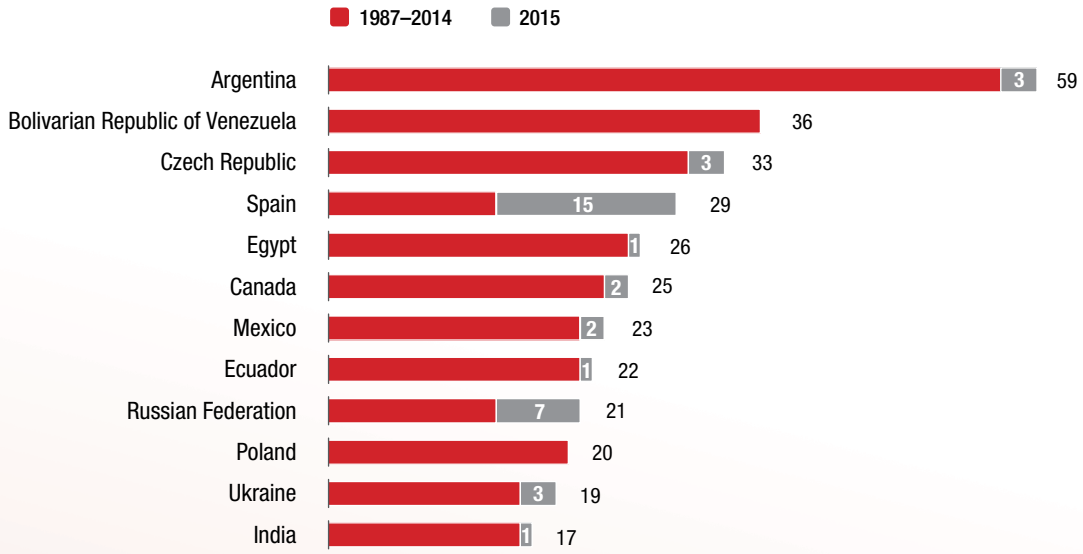
As of 1 January 2016, the total number of publicly known ISDS claims has reached 696.[1] So far, 107 countries have been respondents to one or more known ISDS claims.

[1] UNCTAD's ISDS Navigator (http://investmentpolicyhub.unctad.org/isds) is a comprehensive database of treaty-based international arbitrations between investors and States. It contains key information about each case and offers numerous user-friendly tools to search and filter the data.

Respondent States

As in the two preceding years, in 2015 the relative share of new cases against developed countries stood at about 40 per cent. Prior to 2013, fewer cases were brought against developed countries. In all, 35 countries faced new claims last year. Spain was the most frequent respondent in 2015, followed by the Russian Federation (figure 2). Six countries – Austria, Cabo Verde, Cameroon, Kenya, Mauritius and Uganda – faced their first (known) ISDS claims.

Figure 2. Most frequent respondent States, total as of end 2015 (Number of known cases)

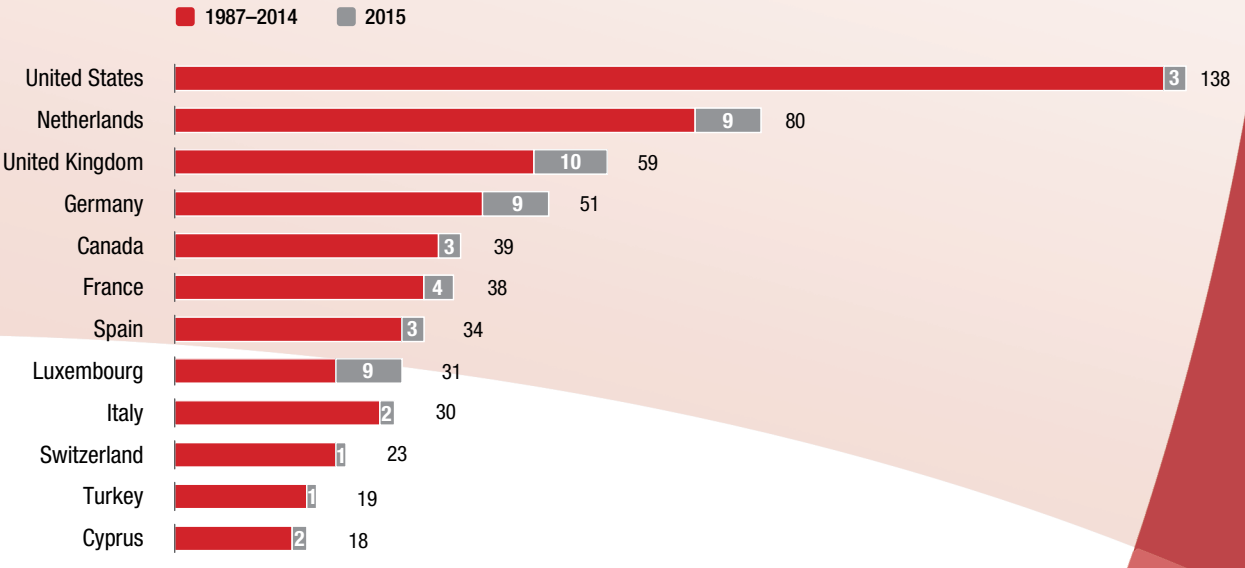


Source: ©UNCTAD, ISDS Navigator.

Home States of claimants

Developed-country investors brought most of the 70 known cases in 2015. This follows the historical trend in which developed-country investors have been the main ISDS users, accounting for over 80 per cent of all known claims. The most frequent home States in ISDS in 2015 were the United Kingdom, followed by Germany, Luxembourg and the Netherlands (figure 3).

Figure 3. Most frequent home States of claimants, total as of end 2015 (Number of known cases)

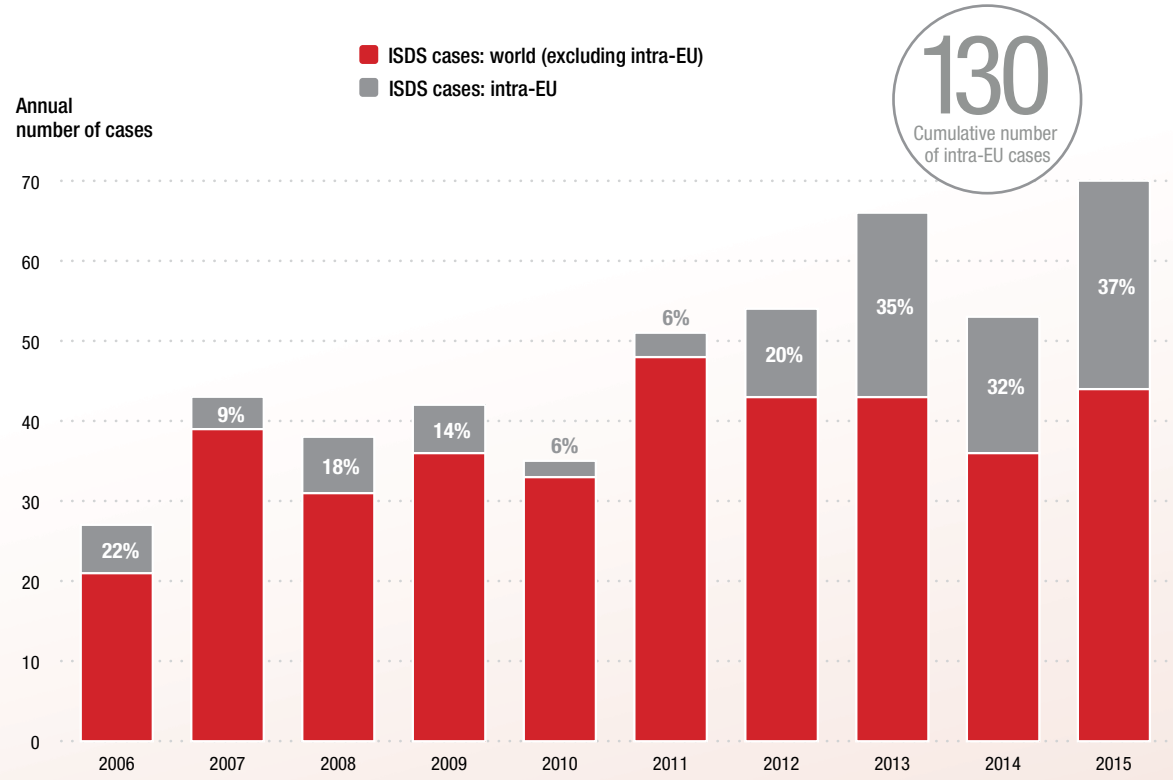


Source: ©UNCTAD, ISDS Navigator.

Intra-European Union disputes

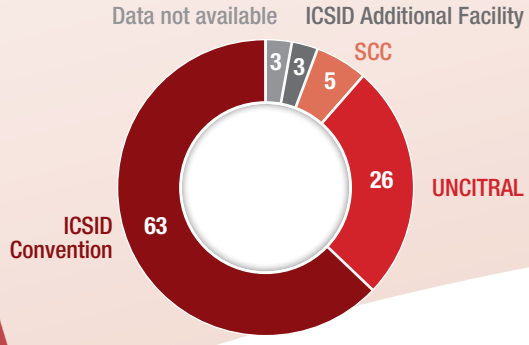
Similarly to the two preceding years, intra-European Union (EU) cases accounted for about one third of investment arbitrations initiated in 2015 (figure 4). Intra-EU cases are proceedings initiated by an investor from one EU member State against another member State. The overwhelming majority – 19 out of 26 – were brought pursuant to the Energy Charter Treaty (ECT) and the rest on the basis of intra-EU bilateral investment treaties (BITs). The overall number of known intra-EU investment arbitrations totalled 130 by the end of 2015, i.e. approximately 19 per cent of all known cases globally.

Figure 4. Known ISDS cases and share of intra-European Union cases, 2006–2015



Source: ©UNCTAD, ISDS Navigator.

Figure 5. Known ISDS cases filed, by arbitral rules, 2015 (Per cent)



Source: ©UNCTAD, ISDS Navigator.

Arbitral forums and rules

About two thirds of last year's ISDS cases were filed with the International Centre for Settlement of Investment Disputes (ICSID), either under the ICSID Convention Rules or under the ICSID Additional Facility Rules (figure 5). Overall, 62 per cent of all known cases have been filed under the ICSID Convention or ICSID Additional Facility Rules.

Applicable investment treaties

Whereas the majority of investment arbitrations in 2015 were brought under BITs – most of them dating back to the 1990s –, the ECT was invoked in about one third of the new cases. Looking at the overall trend, the ECT is by far the most frequently invoked IIA (87 cases), followed by the North American Free Trade Agreement (NAFTA) (56 cases). Among BITs, the Argentina–United States BIT (20 cases) remains the agreement most frequently relied upon by foreign investors.

In addition to the ECT (23 new cases), three other treaties were invoked more than once in 2015:

- Russian Federation–Ukraine BIT (1998) (6 cases)
- NAFTA (3 cases)
- Czech Republic–United Kingdom BIT (1990) (2 cases)

Some other IIAs invoked by claimants in 2015 included the Commonwealth of Independent States (CIS) Investor Rights Convention (1997), the Unified Agreement for the Investment of Arab Capital in the Arab States (1980), and the Investment Agreement of the Organization of the Islamic Conference (1981). In one case, the claimants relied on four legal instruments at once, including the WTO General Agreement on Trade in Services (GATS). This is the first known ISDS case invoking GATS as a basis for the tribunal's jurisdiction.[2]

Economic sectors involved

About 76 per cent of the cases filed in 2015 relate to activities in the services sector, including:

- Supply of electricity and gas (23 cases)
- Construction (7 cases)
- Financial and insurance services (7 cases)
- Transportation and storage (7 cases)

Primary industries accounted for 14 per cent of new cases, while the remaining 10 per cent related to investments in manufacturing. This is broadly in line with the overall distribution of the 696 ISDS cases filed so far: about 66 per cent of all cases arose in the services sector, 20 per cent in primary industries, and 14 per cent in manufacturing.

Affected sustainable development sectors

A number of 2015 ISDS claims concerned sustainable development sectors such as infrastructure and climate-change mitigation. Approximately 30 per cent of cases concerned the regulation of renewable energy producers, all of which were brought against EU member States (Bulgaria, Italy and Spain). Some of the 2015 cases concerned environmental issues, indigenous protected areas, anti–corruption and taxation.[3]

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2 *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal* (ICSID Case No. ARB/15/21). A brief discussion of this case can be found in section III.

3 Section III offers a review of selected ISDS cases filed in 2015.

Measures challenged

Investors in 2015 most frequently challenged four types of State conduct:

- Legislative reforms in the renewable energy sector (at least 20 cases)
- Alleged direct expropriations of investments (at least 6 cases)
- Alleged discriminatory treatment (at least 6 cases)
- Revocation or denial of licences or permits (at least 5 cases)

Other challenged measures included cancellations or alleged violations of contracts or concessions, measures related to taxation, placement of enterprises under external administration, as well as bankruptcy proceedings. In several cases, information about governmental measures challenged by the claimant is not publicly available.

Amounts claimed

The amounts claimed in 2015 cases range from $15 million (in *Aeroport Belbek v. Russia*) to $12 billion (in *Pugachev v. Russia*). Information regarding the amounts sought by investors is available for only one quarter of the known cases.[4]

II. ISDS outcomes

Publicly available arbitral decisions issues in 2015 had a variety of outcomes, with States often prevailing at the jurisdictional stage of the proceedings, and investors winning more of the cases that reached the merits stage.

A. 2015 decisions and outcomes

In 2015, ISDS tribunals rendered at least 51 decisions in investor-State disputes, 31 of which are in the public domain (at the time of writing).[5] Most of the public decisions on jurisdictional issues were decided in favour of the State, while the majority of those on merits ended in favour of the investor.

More specifically, in 2015:

- Ten decisions principally addressed jurisdictional issues, with one upholding the tribunal's jurisdiction (at least in part) and nine denying jurisdiction.
- Out of 15 decisions on the merits, 12 accepted at least some of the investors' claims, and 3 dismissed all of the claims. In the decisions holding the State liable, tribunals most frequently found breaches of the fair and equitable treatment (FET) provision and the expropriation provision.
- Ten decisions awarded compensation to the investor, ranging from $8.6 million to $383.6 million. The average amount awarded was $120.2 million and the median $48.6 million.[6]

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4 Amount claimed refers to the amount of monetary compensation claimed by the investor, not including interest, legal costs or costs of arbitration.

5 This number includes decisions (awards) on jurisdiction and awards on liability and damages (partial and final) as well as follow-on decisions such as decisions rendered in ICSID annulment proceedings and ICSID resubmission proceedings. It does not include decisions on provisional measures, disqualification of arbitrators, procedural orders, discontinuance orders, settlement agreements or decisions of domestic courts.

6 Amount awarded refers to the amount of monetary compensation awarded by the arbitral tribunal to the claimant, not including interest, legal costs or costs of arbitration.

- Six decisions related to annulments. ICSID ad hoc committees rejected five applications for annulment and partially annulled one award.

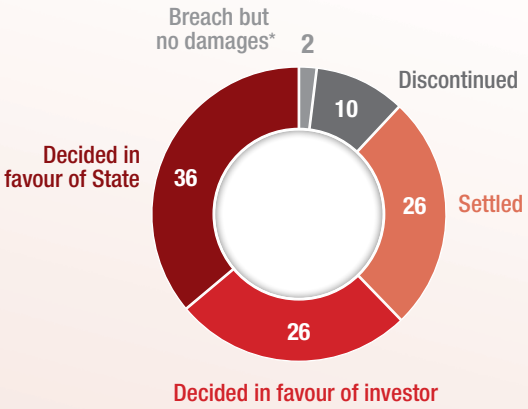
Eleven cases were reportedly settled by the disputing parties, and another four proceedings discontinued for other or unknown reasons.

B. Overall outcomes

By the end of 2015, a total of 444 ISDS proceedings are known to have been concluded. About one third of all concluded cases were decided in favour of the State (claims dismissed either on jurisdictional grounds or on the merits) and about one quarter were decided in favour of the investor, with monetary compensation awarded (figure 6).

Of the cases that ended in favour of the State, about half were dismissed for lack of jurisdiction.[7] Looking at the totality of decisions on the merits (i.e. when a tribunal made a determination of whether the challenged governmental measure breached any of the IIA's substantive obligations), around 60 per cent were decided in favour of the investor, and 40 per cent in favour of the State (figure 7).

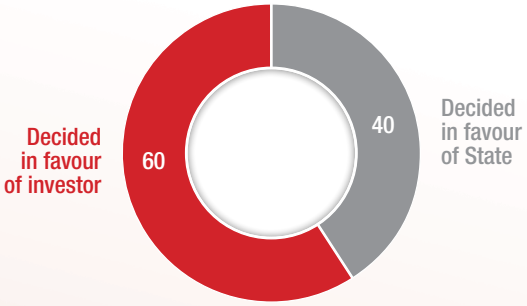
Figure 6. Results of concluded cases, total as of end 2015 (Per cent)



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

Source: ©UNCTAD, ISDS Navigator.

Figure 7. Results of decisions on the merits, total as of end 2015 (Per cent)



Source: ©UNCTAD, ISDS Navigator.

Note: Excluding cases (1) dismissed by tribunals for lack of jurisdiction, (2) settled, (3) discontinued for reasons other than settlement (or for unknown reasons), and (4) decided in favour of neither party (liability found but no damages awarded).

C. Other developments related to ISDS

UNCITRAL Transparency Rules

The United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration are now applicable to a number of treaties concluded *after* 1 April 2014.[8] The UNCITRAL Transparency Rules set out procedures for greater transparency in investor-State arbitrations conducted under the UNCITRAL Arbitration Rules[9] and provide for a "Transparency Registry", which will be a central repository for the publication of information and documents in treaty-based ISDS cases.

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7 These are cases in which a tribunal found, for example, that the asset/transaction did not constitute a "covered investment", the claimant was not a "covered investor", the dispute arose before the treaty entered into force or fell outside the scope of the ISDS clause, the investor had failed to comply with certain IIA-imposed conditions (e.g. the mandatory local litigation requirement) or other reasons that deprived the tribunal of the competence to decide the case on the merits.

8 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html

9 The rules came into effect on 1 April 2014 and are incorporated into the latest version of the UNCITRAL Arbitration Rules.

UN Transparency Convention

Sixteen States signed[10] and one State, Mauritius, ratified the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration. The Convention was opened for signature on 17 March 2015; it will enter into force once three ratification instruments have been deposited. The Convention enables States, as well as regional economic integration organizations (REIOs), to make the UNCITRAL Transparency Rules applicable to ISDS proceedings brought under their IIAs concluded *prior* to 1 April 2014 and regardless of whether the arbitration was initiated under the UNCITRAL Arbitration Rules.[11]

ICSID Convention and New York Convention

In 2015, the ICSID Convention entered into force for San Marino and Iraq. Andorra, Comoros, the Democratic Republic of the Congo and the State of Palestine became parties to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

III. New claims in 2015: some highlights

Cases relating to reforms in the renewable energy sector

A total of 20 new cases relate to reforms in the renewable energy sector in Spain, Italy and Bulgaria. Most of these cases – 16 out of 20 – were filed against Spain and relate to a series of measures adopted by the country in 2012 (including the imposition of a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers). Meanwhile, Spain prevailed in the first decided case that relates to the same measures: in January 2016, the tribunal in *Charanne v. Spain* rejected all claims on the merits, finding that the measures did not breach Spain's obligations under the ECT.[12]

In 2015, solar investors launched three cases against Italy, which relate to governmental decrees to cut tariff incentives for some solar power projects. The investors, all from EU member States, base their claims on the ECT.[13] In the meantime, Italy withdrew from the ECT, effective from 1 January 2016.[14]

Cases related to events in Crimea

Of the seven known cases filed against the Russian Federation in 2015, at least 5 (possibly, 6) relate to the events in Crimea. Following March 2014, nationalizations took place in different economic sectors.[15] The claims brought