



# IIA ISSUES NOTE

## INTERNATIONAL INVESTMENT AGREEMENTS



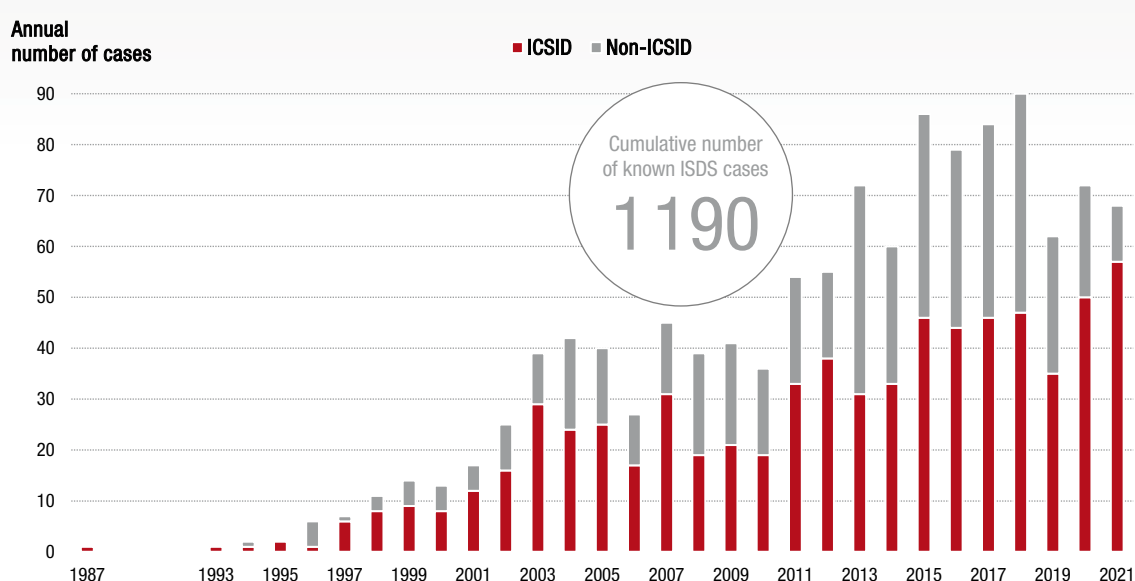
UNITED NATIONS  
UNCTAD

## FACTS ON INVESTOR–STATE ARBITRATIONS IN 2021: WITH A SPECIAL FOCUS ON TAX-RELATED ISDS CASES

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

- The total count of known investor–State dispute settlement (ISDS) cases reached 1,190 at the end of 2021. At least 68 ISDS cases were initiated under international investment agreements (IIAs) in 2021.
- The new ISDS cases in 2021 were brought against 42 countries. Five countries – Cambodia, Congo, Finland, Malta and the Netherlands – faced their first known ISDS claims.
- Two IIAs signed in the 1990s – the Energy Charter Treaty (ECT, 1994) and the North American Free Trade Agreement (NAFTA, 1992) – continued to be the instruments invoked most frequently.
- UNCTAD data suggest that investors have challenged tax-related measures in 165 ISDS cases based on IIAs. High-profile examples include cases related to the imposition of capital gains taxes (*Cairn v. India*, *Vodafone v. India (I) and (II)*), tax investigations and large tax assessments (*Hulley Enterprises v. Russia*, *Veteran Petroleum v. Russia*, *Yukos Universal v. Russia*), and regulatory changes to feed-in tariffs for renewable energy production (*The PV Investors v. Spain*, *Charanne and Construction Investments v. Spain*).
- This IIA Issue Note expands on research published in UNCTAD's World Investment Report 2022.

**Figure 1. Trends in known treaty-based ISDS cases, 1987–2021**



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

## a. New cases initiated in 2021

In 2021, investors initiated 68 publicly known ISDS cases under IIAs (figure 1; annex 1). As of 1 January 2022, the total number of publicly known ISDS claims had reached 1,190. As some arbitrations can be kept confidential, the actual number of disputes filed in 2021 and in previous years is likely higher. To date, 130 countries and one economic grouping are known to have been respondents to one or more ISDS claims. In 2022, the war in Ukraine brought into the spotlight past and potential future ISDS claims relating to armed conflict (box 1).

### Box 1. IIA-based ISDS cases related to war and armed conflict: facts and examples

ISDS cases can arise out of events related to war and armed conflict. In the past, at least 30 ISDS cases brought against States arose out of destruction or harm caused to investments in the context of war, armed conflict, military operations and civil unrest (annex 2). This includes the first known ISDS case based on an IIA brought in 1987: *AAPL v. Sri Lanka*, which arose out of the alleged destruction of the claimant's investment during a military operation conducted by Sri Lankan security forces.

International courts and tribunals (e.g. the International Court of Justice and the International Criminal Court) may weigh in on specific elements of armed conflicts. Disputes may also occur in the trade context and at the WTO through the State–State dispute mechanism.

The stock of IIAs in force commonly protects covered investments in cases of direct and indirect expropriation, impairment and losses owing to war or armed conflict. They also include other substantive protection standards such as full protection and security, and fair and equitable treatment. Most of these IIAs grant covered investors direct access to international arbitration in case of treaty violations. Some 15 per cent of them include exceptions that could help countries ward off ISDS claims related to emergency measures taken for the protection of essential security interests. Generally, ISDS tribunals have not pronounced on the legality of the use of force. Instead, they have limited their assessments to the question of State responsibility for breaches of IIAs. The underlying events giving rise to ISDS claims related to armed conflicts are multifaceted and multi-layered.

Out of the 30 ISDS cases identified in this context, the Russian Federation and Libya were the most frequent respondents, with 10 cases each. The cases against the Russian Federation related to the events in Crimea in 2014, including nationalizations in different economic sectors. Ukrainian companies and businesspeople invoked the Russian Federation–Ukraine bilateral investment treaty (BIT, 1998), alleging expropriation of assets by the Russian Federation (e.g. *Ukrenergo v. Russia*; *Oschadbank v. Russia*; *Naftogaz and others v. Russia*). The cases against Libya mostly related to the alleged failure to protect foreign investments during times of war and civil unrest in the country (e.g. *Trasta v. Libya*; *Cengiz v. Libya*).

In addition to the 30 identified ISDS cases, several cases were related to economic sanctions and the suspension of diplomatic relations (e.g. *Qatar Pharma and Al Sulaiti v. Saudi Arabia*; *beIN v. Saudi Arabia*).

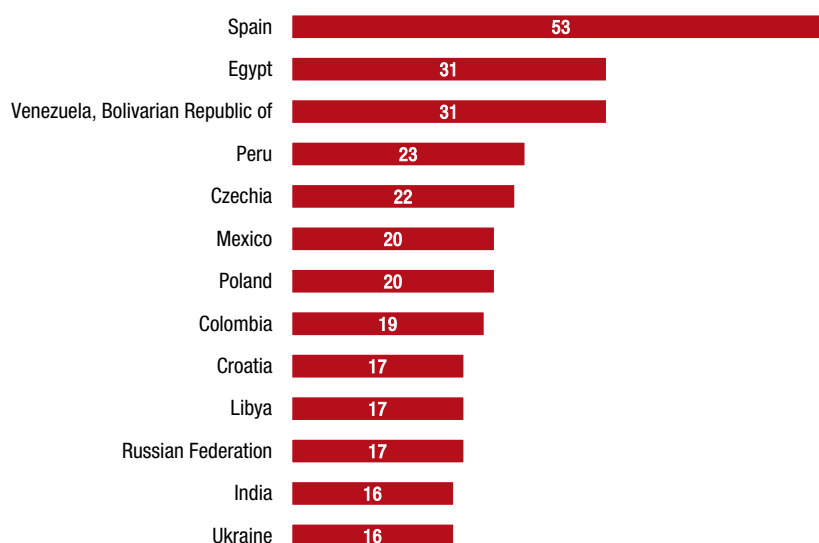
Source: UNCTAD.

Note: The ISDS cases related to war and armed conflict were identified on the basis of UNCTAD's ISDS Navigator and information from other public sources, including notices of arbitration, arbitral decisions and specialized reporting services.

## (i) Respondent States

The new ISDS cases in 2021 were initiated against 42 countries. Peru was the most frequent respondent, with six known cases, followed by Egypt and Ukraine with four known cases each. Five countries – Cambodia, Congo, Finland, Malta and the Netherlands – faced their first known ISDS claims. As in previous years, the majority of new cases (about 65 per cent) were brought against developing countries. In the past 10 years, Spain, Egypt and Venezuela have received the largest share of claims (figure 2). Looking at the 1,190 known ISDS cases filed since 1987 (the year of the first treaty-based ISDS case), Argentina (with 62 cases), Spain (55 cases) and Venezuela (55 cases) have been the most frequent respondent States.

**Figure 2. Most frequent respondent States, 2012–2021** (Number of known cases)

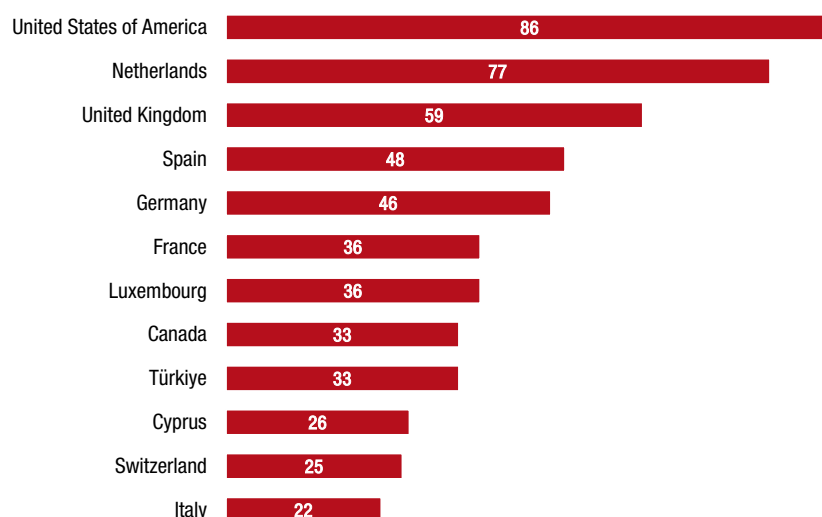


Source: UNCTAD, ISDS Navigator.

### (ii) Claimant home States

Developed-country claimants brought most – about 75 per cent – of the 68 known cases in 2021. The highest numbers of cases were brought by claimants from the United States (10 cases), France (5 cases), the Netherlands (5 cases) and the United Kingdom (5 cases). In the past 10 years, investors from the United States, the Netherlands and the United Kingdom have filed the largest number of claims (figure 3). Overall, these three countries have been the three most frequent home States of claimants in known ISDS cases filed from 1987 to 2021.

**Figure 3. Most frequent home States of claimants, 2012–2021** (Number of known cases)



Source: UNCTAD, ISDS Navigator.

### (iii) Applicable investment treaties

About 75 per cent of investment arbitrations in 2021 were brought under BITs and TIPs signed in the 1990s or earlier. The ECT (1994) was the IIA invoked most frequently in 2021, with seven cases, followed by NAFTA (1992) in combination with the United States–Mexico–Canada Agreement (USMCA, 2018), with four cases.<sup>1</sup>

<sup>1</sup> Under Annex 14-C of the USMCA, the parties consent to the submission of so-called “legacy investment claims” under NAFTA until three years after its termination, i.e. 1 July 2023.

Overall (1987–2021), about 20 per cent of the 1,190 known ISDS cases have invoked the ECT (145 cases), NAFTA (76 cases) or the Investment Agreement of the Organisation of Islamic Cooperation (OIC; 16 cases).

## b. ISDS outcomes

### (i) Decisions and outcomes in 2021

In 2021, ISDS tribunals rendered at least 54 substantive decisions in investor–State disputes, 31 of which were in the public domain at the time of writing: 11 of the public decisions principally addressed jurisdictional issues (including preliminary objections), with 4 upholding the tribunal's jurisdiction and 7 declining jurisdiction. The remaining 20 public decisions were rendered on the merits, with 12 holding the State liable for IIA breaches and 8 dismissing all investor claims.

In addition, six publicly known decisions were rendered in annulment proceedings at the International Centre for Settlement of Investment Disputes (ICSID). ICSID ad hoc committees rejected the applications for annulment in five cases; in one case, the award at issue was partially annulled.

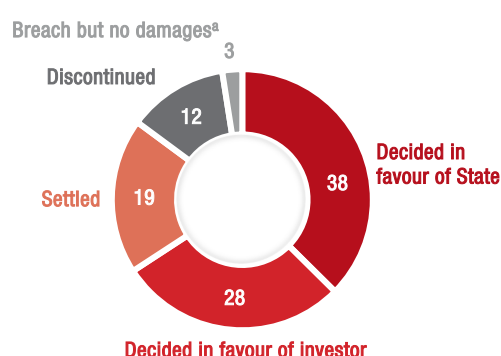
### (ii) Overall outcomes

By the end of 2021, at least 807 ISDS proceedings had been concluded. The relative share of case outcomes changed only slightly from previous years (figure 4).

Thirty-eight 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 28 per cent were decided in favour of the investor, with monetary compensation awarded. Nineteen 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 an IIA breach but did not award monetary compensation.

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), 56 per cent were decided in favour of the investor (breach found and damages awarded). The remainder were dismissed on the merits or breaches were found but no damages awarded (figure 5).

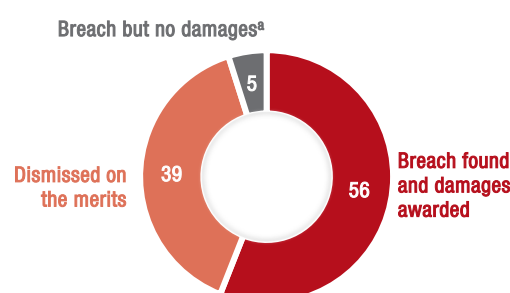
**Figure 4. Results of concluded cases, 1987–2021 (Per cent)**



Source: UNCTAD, ISDS Navigator.

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

**Figure 5. Results of decisions on the merits, 1987–2021 (Per cent)**



Source: UNCTAD, ISDS Navigator.

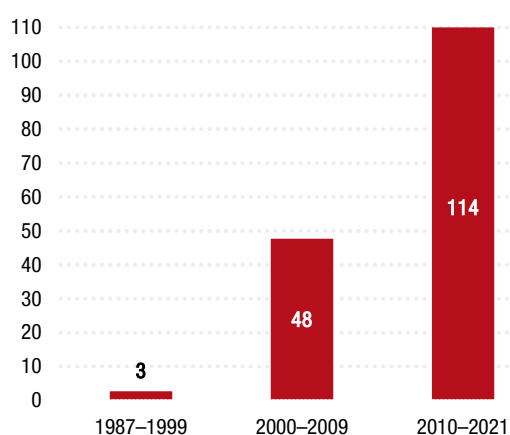
<sup>a</sup> Decided in favour of neither party (liability found but no damages awarded).

Note: Excludes cases (i) dismissed by tribunals for lack of jurisdiction, (ii) settled, (iii) discontinued for reasons other than settlement (or for unknown reasons).

## 2. Tax-related ISDS cases based on IIAs: facts and numbers

Investors have challenged tax-related measures in 165 ISDS cases based on IIAs (figure 6; annex 3). A wide working definition of the term “tax” was used to identify tax-related ISDS cases based on IIAs.<sup>2</sup> From 2000 to 2021, the absolute number of tax-related cases has grown at the same speed as overall ISDS cases (figure 7). Tax-related claims accounted for about 15 per cent of the 1,190 publicly known ISDS cases filed overall as of the end of 2021.<sup>3</sup>

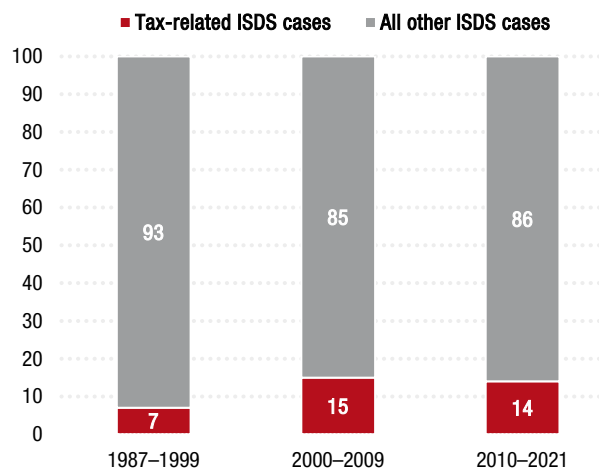
**Figure 6. Tax-related ISDS cases based on IIAs, 1987–2021 (Number of known cases)**



Source: UNCTAD.

Note: Tax-related 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.

**Figure 7. Share of tax-related ISDS cases out of the total 1,190 cases (Per cent)**



Source: UNCTAD, ISDS Navigator.

Several tax-related ISDS cases and awards have attracted public attention. High-profile examples include cases challenging the following types of State conduct:

- Imposition of capital gains taxes (*Cairn v. India*, *Vodafone v. India (I)* and *(II)*)
- Initiation of tax investigations and large tax assessments (*Hulley Enterprises v. Russia*, *Veteran Petroleum v. Russia*, *Yukos Universal v. Russia*)
- Increases in windfall profit taxes and royalties (*Burlington v. Ecuador*, *ConocoPhillips v. Venezuela*)
- Legislative reforms in the renewable energy sector related to feed-in tariffs and incentives for solar energy (*The PV Investors v. Spain*, *Charanne and Construction Investments v. Spain*)
- Withdrawal of subsidies or tax exemptions (*Micula v. Romania (I)*)

Tax-related claims played a major role in many of the 165 ISDS cases. In other tax-related cases, tax measures were one element among the alleged breaches but did not feature as the major subject matter.

Overall, the types of tax-related ISDS claims that have arisen under IIAs were diverse (e.g. withdrawal of incentives, increases in windfall profit taxes) and often intertwined with non-tax measures (e.g. forced liquidation,

<sup>2</sup> These 165 cases were identified on the basis of UNCTAD's ISDS Navigator and information from other public sources, including notices of arbitration, arbitral decisions and specialized reporting services. A wide working definition of the term “tax” was used, considering the controversy regarding the scope of the term in the context of ISDS practice. Whether or not a case involves “tax-related” matters can be subject to differing views between the claimant investor and the respondent State, especially if there is a tax exception under the relevant IIA. The analysis of this question rests with the arbitral tribunal deciding the specific case. In a number of tax-related cases, information on the challenged measures was limited or incomplete.

<sup>3</sup> 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.

interference with or termination of contracts). Tax-related ISDS cases can, but do not necessarily, overlap with the subject matter covered by double double-taxation treaties (DTTs) and the mutual agreement procedure.

### Respondent States

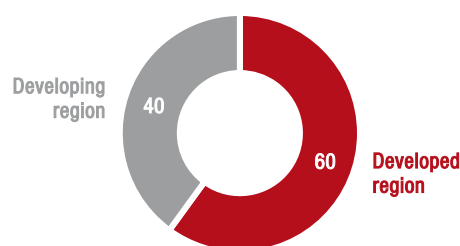
Sixty per cent of the tax-related cases were brought against developed countries; the remaining 40 per cent were directed at developing countries (figure 8). Spain was the most frequent respondent with 42 cases (about 25 per cent of all tax-related ISDS cases), followed by Ecuador and Italy with 10 cases each. Overall, 47 respondent States have faced at least one known tax-related ISDS claim.

### Claimant home States

Developed-country investors brought over 90 per cent of tax-related IIA claims (figure 9). The highest numbers of such cases were initiated by claimants from the Netherlands (30 cases), the United States (26 cases) and Germany (24 cases).

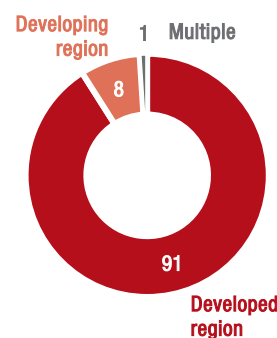
About 40 per cent of all tax-related ISDS cases were so-called intra-EU disputes brought by EU claimants against EU respondent States (63 cases).

**Figure 8. Respondent States in tax-related ISDS cases, by country category (Per cent)**



Source: UNCTAD, ISDS Navigator.

**Figure 9. Home States of claimants in tax-related ISDS cases, by country category (Per cent)**



Source: UNCTAD, ISDS Navigator.

### IIAs invoked

The ECT (1994) was the IIA invoked most frequently in tax-related ISDS cases, with 68 cases, followed by NAFTA (1992) with 12 cases and the Ecuador–United States BIT (1993) with 6 cases.

Most of the tax-related cases under the ECT were intra-EU disputes related to investments in the renewable energy sector (57 cases).

### Economic sectors involved

About 60 per cent of the tax-related ISDS cases related to activities in the services sector:

- Supply of electricity, gas, steam and air (75 cases)
- Information and communication, e.g. telecommunications (11 cases)
- Wholesale and retail trade (7 cases)
- Construction, e.g. construction of buildings and civil engineering (4 cases)
- Arts, entertainment and recreation, e.g. gambling and betting activities (3 cases)
- Transportation and storage (3 cases)
- Financial and insurance activities (3 cases)

Primary industries (mostly consisting of mining and quarrying activities) accounted for about 25 per cent of the new cases and manufacturing for about 15 per cent.

A [guide released in 2021](#) and the [World Investment Report 2022](#) (Chapters 2 and 3) consider the implications of IIAs for tax policymaking. They also present IIA reform options to minimize the risk of friction with tax measures.

## Annex 1. List of known IIA-based ISDS cases initiated in 2021

No.	Short case name 	Respondent State	Home State of claimant	Applicable IIA
1	ADP and Vinci Airports v. Chile	Chile	France	Chile–France BIT (1992)
2	Alamos Gold v. Türkiye	Türkiye	Netherlands	Netherlands–Türkiye BIT (1986)
3	Alpene v. Malta	Malta	China	China–Malta BIT (2009)
4	Anglo American v. Colombia	Colombia	United Kingdom	Colombia–United Kingdom BIT (2010)
5	APG SGA and Alma Quattro v. Serbia	Serbia	Switzerland	Serbia–Switzerland BIT (2005)
6	Bahgat v. Egypt (II)	Egypt	Finland	Egypt–Finland BIT (2004)
7	Bayındır v. Pakistan (II)	Pakistan	Türkiye	Pakistan–Türkiye BIT (1995)
8	Congo Mining and Midus v. Congo	Congo	United Kingdom	Congo–United Kingdom BIT (1989)
9	Dayyani and others v. Korea (II)	Korea, Republic of	Iran, Islamic Republic of	Iran, Islamic Republic of–Korea, Republic of BIT (1998)
10	Discovery Global v. Slovakia	Slovakia	United States of America	Slovakia–United States of America BIT (1991)
11	EEPL v. Congo	Congo	Mauritius	Congo–Mauritius BIT (2010)
12	Enagás v. Peru (II)	Peru	Spain	Peru–Spain BIT (1994)
13	Enel v. Türkiye	Türkiye	Italy	Italy–Türkiye BIT (1995)
14	Energía y Renovación v. Guatemala	Guatemala	Panama	Central America–Panama FTA (2002)
15	ESSA2 and Enel v. Costa Rica	Costa Rica	Chile	Chile–Costa Rica BIT (1996)
16	Everyway v. Ghana	Ghana	China	China–Ghana BIT (1989)
17	Finetis v. Morocco	Morocco	France	France–Morocco BIT (1996)
18	Finley and others v. Mexico	Mexico	United States of America	NAFTA (1992); USMCA (2018)
19	First Majestic v. Mexico	Mexico	Canada	NAFTA (1992); USMCA (2018)
20	GEB and Trecsa v. Guatemala (II)	Guatemala	Colombia	Colombia, El Salvador, Guatemala and Honduras FTA (2007)
21	Glencore v. Colombia (III)	Colombia	Switzerland	Colombia–Switzerland BIT (2006)
22	HeidelbergCement and others v. Egypt	Egypt	Germany; France; Italy	Egypt–Germany BIT (2005); Egypt–France BIT (1974); Egypt–Italy BIT (1989)
23	HSBC v. El Salvador	El Salvador	United Kingdom	El Salvador–United Kingdom BIT (1999)
24	IBT and others v. Panama (III)	Panama	United States of America; Spain	Panama–United States FTA (2007); Panama–United States of America BIT (1982); Panama–Spain BIT (1997)
25	Imeks Insaat v. Turkmenistan	Turkmenistan	Türkiye	Türkiye–Turkmenistan BIT (1992)
26	Interconexión v. Chile	Chile	Colombia	Chile–Colombia FTA (2006)
27	Kaloti v. Peru	Peru	United States of America	Peru–United States FTA (2006)
28	KELAG and others v. Romania	Romania	Austria	ECT (1994)
29	KGL v. Egypt	Egypt	Kuwait	Egypt–Kuwait BIT (2001)
30	L1bre v. Mexico	Mexico	United States of America	NAFTA (1992); USMCA (2018)
31	Liberty v. Venezuela (II)	Venezuela, Bolivarian Republic of	Spain	Spain–Venezuela, Bolivarian Republic of BIT (1995)
32	Linares Sanoja and others v. Peru	Peru	Italy	Italy–Peru BIT (1994)
33	MacKenzie v. Hungary	Hungary	United Kingdom	Hungary–United Kingdom BIT (1987)
34	Mainstream Renewable and others v. Germany	Germany	Ireland	ECT (1994)



No.	Short case name	Respondent State	Home State of claimant	Applicable IIA
35	Misen v. Ukraine	Ukraine	Sweden	Sweden–Ukraine BIT (1995)
36	Modus Energy v. Ukraine	Ukraine	Netherlands	ECT (1994)
37	Montenero v. China	China	Switzerland	China–Switzerland BIT (2009)
38	Montero Mining v. Tanzania	Tanzania, United Republic of	Canada	Canada–United Republic of Tanzania BIT (2013)
39	Obuz and others v. Uzbekistan	Uzbekistan	Türkiye	Türkiye–Uzbekistan BIT (1992)
40	Optima v. United States (I)	United States of America	Ukraine	Ukraine–United States of America BIT (1994)
41	Optima v. United States (II)	United States of America	Ukraine	Ukraine–United States of America BIT (1994)
42	Pavliniu and Modus v. Belarus	Belarus	Lithuania	Belarus–Lithuania BIT (1999)
43	PETRONAS and Azhan Bin Ali v. Sudan	Sudan	Malaysia	Malaysia–Sudan BIT (1998)
44	Philip Morris and others v. Ukraine	Ukraine	Switzerland; United States of America	Switzerland–Ukraine BIT (1995); Ukraine–United States of America BIT (1994)
45	Qalaa and ASEC v. Algeria	Algeria	Egypt	Algeria–Egypt BIT (1997)
46	Qiong Ye and Jianping Yang v. Cambodia	Cambodia	China	ASEAN–China Investment Agreement (2009)
47	Quanta v. Peru	Peru	Netherlands	Netherlands–Peru BIT (1994)
48	Riverside Coffee v. Nicaragua	Nicaragua	United States of America	CAFTA–DR (2004)
49	RWE v. Netherlands	Netherlands	Germany	ECT (1994)
50	Sanitek and others v. Armenia	Armenia	Canada; Lebanon	Armenia–Canada BIT (1997); Canada–Lebanon BIT (1997)
51	Severgroup and KN v. France	France	Russian Federation	France–Russian Federation BIT (1989)
52	Shell v. Nigeria (II)	Nigeria	Netherlands	Netherlands–Nigeria BIT (1992)
53	Spanish Solar v. Spain	Spain	Ireland	ECT (1994)
54	SREW v. Ukraine	Ukraine	Belgium	BLEU (Belgium–Luxembourg Economic Union)–Ukraine BIT (1996)
55	Taheri v. United Arab Emirates	United Arab Emirates	Sweden	Sweden–United Arab Emirates BIT (1999)
56	TC Energy and TransCanada v. USA (II)	United States of America	Canada	NAFTA (1992); USMCA (2018)
57	Telefónica v. Peru	Peru	Spain	Peru–Spain BIT (1994)
58	True Blue Development and others v. Grenada	Grenada	United States of America	Grenada–United States of America BIT (1986)
59	TS Villalba and others v. Spain	Spain	Germany	ECT (1994)

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