

## REPORT on Compliance with Investment Treaty Arbitration Awards 2022

### The current State of Play:

- As of 31 December 2021, the total number of known treaty-based ISDS arbitrations had reached 1,190 of which 807 have been concluded, 370 are still pending and for 13 cases the status is unknown.
- Of those 807 concluded cases, 37,4% were decided in favour of Respondents, 28,4% in favour of investors, 19,3% were settled, 12,4% were discontinued.
- 2,560 International Investment Treaties are currently in force.
- To date, 130 countries and one economic grouping are known to have been Respondents to one or more ISDS claims.

In light of these figures, a highly significant question arises as to the compliance rate with Investment Treaty Arbitration Awards that have been rendered against Respondents. More specifically, which States are especially recalcitrant in not paying these awards and thus are violating their international obligations? Also, which economic sectors are particularly affected by the refusal of States to pay those awards? Does the compliance rate differ between ICSID and non-ICSID awards?

These are some of the questions this Report seeks to answer by analysing the publicly available information on ISDS disputes and Awards.

In this very first edition, we have limited ourselves to focus on the top 20 countries that have received the most ISDS Awards and appear to be most delinquent in their international law obligations by avoiding payment of Awards rendered against them.<sup>1</sup>

The intention is to publish this report on an annual basis, thereby providing updates on the compliance level by current and future countries concerned and expanding on the level of detail known about ISDS Awards.

Relevant observations from the study are presented below, with detailed country-specific information provided in the Annexes.

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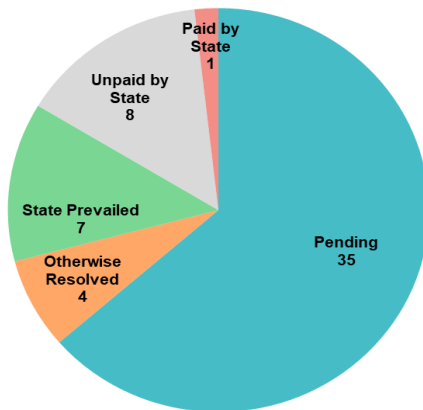
<sup>1</sup> Disclaimer: While we have done our best to retrieve all relevant publicly available information regarding the cases covered in this study, some information remains confidential or simply unavailable. We therefore do not claim that this study is fully complete and 100% accurate. We are, however, confident that this study illustrates several trends, which are substantiated with sufficiently reliable data. The data used in this study in principle covers the data until 1 July 2022.

## Many EU Member States are in the top 30 countries ordered to pay compensation as a result of ISDS disputes

In the top 30 countries that have received the most ISDS Awards, the high number of EU Member States, in particular Spain, Czech Republic, Poland, Romania, Hungary, Croatia, Slovakia, Italy and Bulgaria, is immediately notable.<sup>2</sup>

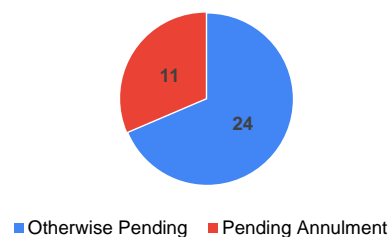
- Spain is one of the most delinquent Respondents and Award Debtors.
- Spain has been confronted with more than 50 ISDS disputes, resulting in damages claims totalling more than 9.5 billion USD so far.<sup>3</sup>
- Our analysis shows that Spain has so far not paid a single ISDS Award since the Maffezini Award issued in 2000.<sup>4</sup>
- Indeed, Spain ranks second of the most delinquent Respondents in the world when it comes to the refusal to pay these Awards.

Spain- Status of ISDS Cases (Total- 55 cases)



Pending cases - Otherwise pending and Pending Annulment procedures

Spain- Pending cases Current Status



<sup>2</sup> Argentina (63); Venezuela (58); Spain (52); Egypt (43); Czech Republic (40); Mexico (33); Poland (31); Canada (30); Ecuador (30); Ukraine (27); Peru (26); Russia (26); India (25); Libya (25); Kazakhstan (24); Kyrgyz Republic (23); Romania (19); Bolivia (16); Hungary (16); United States of America (16); Croatia (15); Georgia (15); Colombia (14); Moldova (14); Turkey (14); Slovakia (13); Turkmenistan (13); Serbia (12); Costa Rica (11); Italy (11); Bulgaria (11); Algeria (10). The number in brackets indicates the number of disputes against that country.

<sup>3</sup> The amount is based on our own calculations based on this Study.

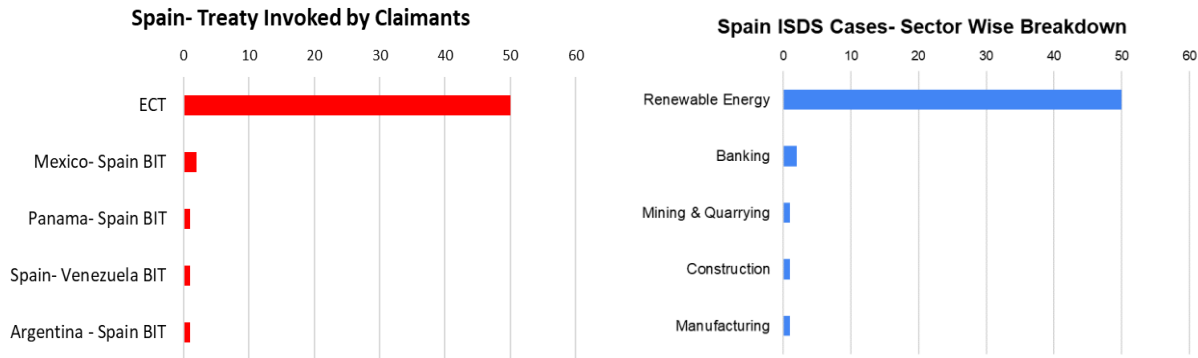
<sup>4</sup> E. Gaillard, I. Mitrev Penushliski, State Compliance with Investment Awards, ICSID Review - Foreign Investment Law Journal, Volume 35, Issue 3, Fall 2020, Pages 540–594.

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Indeed, our analysis confirms that in particular Spain, but also Hungary and Czech Republic belong to the same group of delinquent non-payers as Venezuela, Russia and Ukraine to name but a few.

The table below, based on our Study, ranks the top 20 countries that have received adverse ISDS awards in terms of whether the country concerned has fulfilled its international law obligation to pay the award or not. It lists the award debtors from most unpaid awards to least unpaid awards (International Rule of Law Compliance Index).

Ranking	Country Name	Number of unpaid awards	Total amount in USD
1	Venezuela	11	7,168 mln USD
2	Spain	8	700 mln USD
3	Russia	6	55,132 mln USD
4	Ukraine	4	132 mln USD
5	Argentina	2	344 mln USD
6	Kyrgyzstan	2	25 mln USD
7	Hungary	1	7 mln USD
8	India	1	114 mln USD
9	Czech Republic	1	300 mln USD
10	Romania	0	-
11	Italy	0	-
12	Croatia	0	-
13	Egypt	0	-
14	Ecuador	0	-
15	Turkey	0	-

16	Kazakhstan	0	-
17	Indonesia	0	-
18	Canada	0	-
19	Libya	0	-
20	Poland	0	-

### The double whammy of CJEU judgments and the Termination Agreement

Once noticing the large number of EU Member States that fall among the list of delinquent Award debtors, one must confront the role that the Court of Justice of the European Union (CJEU) has played in this outcome.

- Starting with its *Achmea* judgment in March 2018, the CJEU has consistently decided that intra-EU ISDS arbitration – whether based on intra-EU BITs or the ECT – is incompatible with EU law (*Achmea*, *Komstroy*, *PL Holdings*, *Micula* judgments).<sup>5</sup>
- Moreover, the 2020 Termination Agreement concluded by 23 EU Member States not only confirms the incompatibility of ISDS arbitration with EU law but also proclaims the invalidity of intra-EU BITs retroactively from the date of accession of the Central and Eastern EU Member States in 2004, 2007, 2013 respectively.<sup>6</sup>
- The Termination Agreement also attempts to terminate all on-going intra-EU disputes and prohibiting any new ones.
- While many of these ISDS Awards have not yet become enforceable because the EU Member States are attempting to have those Awards annulled (by ICSID Ad hoc Committees) or set aside (by domestic courts at the seat of arbitration in case of non-ICSID Awards), the double whammy of CJEU judgments and the Termination Agreement encourages EU Member States to consistently refuse to pay any ISDS Awards.

<sup>5</sup> See: N. Lavranos, Lex superior: How EU law trumps investment law, Practical Law Arbitration blog, 28 June 2022, <http://arbitrationblog.practicallaw.com/lex-superior-how-eu-law-trumps-investment-law/>; N. Lavranos, Regime Interaction in Investment Arbitration: EU Law; From Peaceful Co-Existence to Permanent Conflict, Kluwer Arbitration blog, 13 January 2022, <http://arbitrationblog.kluwerarbitration.com/2022/01/13/regime-interaction-in-investment-arbitration-eu-law-from-peaceful-co-existence-to-permanent-conflict/>.

<sup>6</sup> [https://ec.europa.eu/info/publications/200505-bilateral-investment-treaties-agreement\\_en](https://ec.europa.eu/info/publications/200505-bilateral-investment-treaties-agreement_en).

### Compliant States that Pay Awards Rendered Against Them

Whereas many EU Member States eventually pay or settle the ISDS Awards issued against them, Spain stands out as consistently refusing to pay them. In contrast, there are many Respondents – some of them rather counter-intuitively – that have complied with their international law obligations and have paid Awards rendered against them.

While not all the details of payment are publicly known, some notable examples include:

- Russia paid the *Sedelmeyer* Award, although reportedly not all accrued interest rates.<sup>7</sup>
- Argentina eventually paid most of the outstanding Awards by way of settlements that were initiated in the early 2000s following its economic crisis, albeit with substantial reductions.<sup>8</sup>
- Egypt paid USD 99.5 million of the USD 115 million *Bahgat* Award by way of a settlement.<sup>9</sup>
- Kyrgyz Republic recently settled the *Centerra* Award, partially by cash payment and offering of company shares.<sup>10</sup>
- India settled the USD 1.2 billion *Cairn* dispute.<sup>11</sup>
- Pakistan settled the USD 6 billion *Tethyan Copper*.<sup>12</sup>
- Zimbabwe eventually paid the *Von Pezold and Funnekotter* Awards by way of settlement, albeit with a substantial reduction.<sup>13</sup>

<sup>7</sup> Gaillard article (op cit).

<sup>8</sup> Gaillard article (op cit); LEXOLOGY, 26 February 2019, <https://www.lexology.com/library/detail.aspx?g=91e9c821-364c-4b70-a1f1-20f4c7b4f240>.

<sup>9</sup> IA Reporter, 20 May 2022, <https://www.iareporter.com/articles/third-party-funder-turns-to-uk-courts-seeking-payment-of-proceeds-from-treaty-award-against-egypt/>

<sup>10</sup> IA Reporter, 4 April 2022, <https://www.iareporter.com/articles/gold-miner-announces-settlement-of-arbitration-dispute-with-kyrgyzstan/>.

<sup>11</sup> GAR, 24 February 2022, <https://globalarbitrationreview.com/india-makes-billion-dollar-payout-end-tax-dispute>.

<sup>12</sup> IA Reporter, 21 March 2022, PARTIES ANNOUNCE SETTLEMENT OF HIGH-STAKES MINING DISPUTE BETWEEN TETHYAN COPPER AND PAKISTAN, <https://www.iareporter.com/articles/parties-announce-settlement-of-high-stakes-mining-dispute-between-tethyan-copper-and-pakistan/>

<sup>13</sup> Gaillard article (op cit); NRC (Dutch newspaper), Zimbabwe compenseert Nederlandse boeren, 7 Oct. 2017.

PROF. DR. NIKOS LAVRANOS, LL.M.

(NL-INVESTMENTCONSULTING)

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Zooming into the compliance level of EU Member States generally, the following examples illustrate that several Awards rendered against them have been paid or settled. For example, Germany recently settled the ECT *Vattenfall* dispute by paying USD 1.5 billion.<sup>14</sup> Also, Romania paid most of the USD 250 million *Micula* award, with interest, before it was ordered by the European Commission and the CJEU to stop.<sup>15</sup> Recently, Hungary reportedly complied with the *Sodexo* and *Edenred* awards by paying them.<sup>16</sup> And in the early 2000s, Poland settled its dispute with *Achmea* by paying in total USD 4 billion, partially in shares and in cash.<sup>17</sup>

Despite these examples, the more recent general trend of EU Member States is to refuse paying intra-EU BITs/ECT Awards issued against them by systematically challenging these or claiming that EU bodies prohibit them from paying. In the same vein, the European Commission is systematically intervening as *amicus curiae* in annulment and set-aside proceedings in order to prevent the recognition and enforcement of these awards and in this way assists the EU Member States in avoiding complying with their international legal obligations arising out of the IIAs, ICSID and NY Conventions.<sup>18</sup>

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<sup>14</sup> REUTERS, 5 March 2021, <https://www.reuters.com/article/us-germany-nuclear-settlement-idUSKBN2AX10T>

<sup>15</sup> N. Lavranos, 10 March 2022, <http://arbitrationblog.practicallaw.com/the-new-micula-judgment-and-the-overreach-of-the-ecj/>.

<sup>16</sup> IA Reporter, 26 May 2022, <https://www.iareporter.com/articles/eastern-europe-round-up-a-transparency-order-new-decisions-information-on-award-compliance-and-a-legislative-change/>.

<sup>17</sup> WSJ, 5 October 2009, <https://www.wsj.com/articles/SB125469684214462753>.

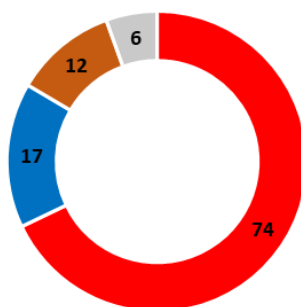
<sup>18</sup> A.G. Leventhal and A. Shreedhar, The European Commission: Ami Fidèle or Faux Ami? Exploring the Commission's Role as Amicus Curiae in ICSID Proceedings, *European Investment Law and Arbitration Review* 2020, pp. 70-91; Carlos González-Bueno and Laura Lozano, More Than a Friend of the Court: The Evolving Role of the European Commission in Investor-State Arbitration, *Kluwer Arbitration blog*, 26 January 2015, <http://arbitrationblog.kluwerarbitration.com/2015/01/26/more-than-a-friend-of-the-court-the-evolving-role-of-the-european-commission-in-investor-state-arbitration/>.

**Renewable energy sector is the most affected economic sector**

- Our analysis illustrates that most unpaid ISDS Awards relate to disputes arising out of the renewable energy sector and rendered under the ECT, although some renewable energy Awards were issued also under intra-EU BITs.
- Again, Spain stands out as the country which has been facing by far the highest number of renewable energy cases (more than 50) and which has received the highest number of Awards against it.
- Moreover, the majority of ISDS Awards initiated against other EU Member States such as the Czech Republic, Slovakia and Italy concerned renewable energy disputes.
- It is also noteworthy that awards resulting from disputes in the traditional, or “unclean,” energy sector are settled significantly more often than renewable energy awards. This phenomenon casts doubt on the EU’s stated goals of leading the global energy transition.
- The obvious intention of the EU Member States to avoid paying ECT awards has recently been re-confirmed by the conclusion of the negotiations for revising the ECT (so-called “modernization process”) in which the EU and its Member States have stated their intention to disapply the ISDS provisions of the ECT among themselves.<sup>19</sup> This arguably will have similar effects as the Termination Agreement for intra-EU BITs as far as ongoing and new intra-EU ECT disputes are concerned (see above the double whammy section), leaving renewable energy investors with no legal redress outside the EU legal system and threatening to deprive Award creditors of their rights to compensation.

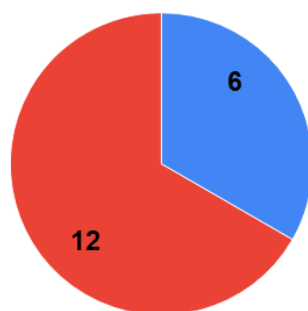
<sup>19</sup> N. Lavranos, Comment: How the EU disconnected itself from the Energy Charter Treaty, Borderlex, 27 June 2022, <https://borderlex.net/2022/06/27/comment-how-the-eu-disconnected-itself-from-the-energy-charter-treaty/>

### Sectorwise Distribution of ECT cases



■ Renewable Energy ■ Electric Power ■ Oil & Gas ■ Mining & Quarrying

### ECT cases- Compliance Status



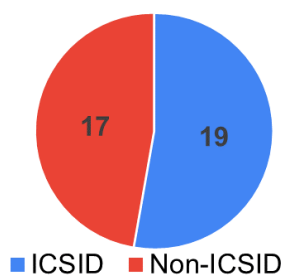
■ Paid or Settled ■ Unpaid



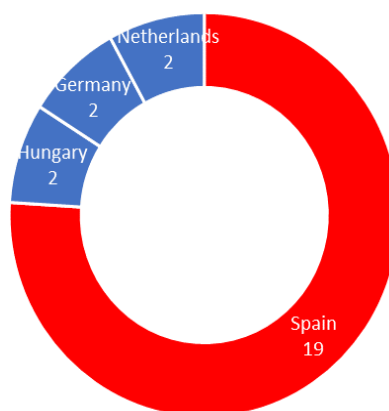
**ICSID v. Non-ICSID Awards**

Since the ICSID Convention provides for a self-contained, quasi-automatic recognition and enforcement regime of ICSID Awards, whereas non-ICSID awards can be set-aside by domestic courts, in particular for violations of the *ordre public*, one would expect that ICSID Awards are much easier recognized and enforced, hence, more likely to be paid by Respondents.

However, our analysis shows that, to date, there is not much of a difference between ICSID and non-ICSID Awards when it comes to the level of compliance by Respondents.

**Unpaid Awards- ICSID v. Non-ICSID**

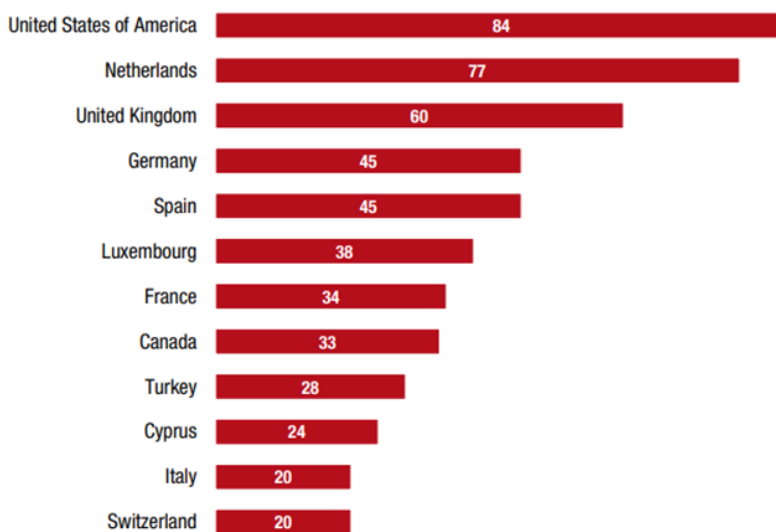
The majority of these cases are still pending - either through follow-on challenge proceedings or enforcement proceedings. Thus, they are not covered under the chart.

**Unclean energy ECT awards get settled while clean energy ECT awards are not paid**

### Most frequent home States of claimants

Our analysis (also confirmed by similar figures of UNCTAD) highlights the fact that many EU Member States (including UK pre-Brexit) belong to the most frequent home States of arbitration claimants. In particular, the Netherlands, UK, Germany, Spain, Luxembourg, France, Cyprus and Italy stand out.

**Figure 3. Most frequent home States of claimants, 2011–2020** (Number of known cases)



Source: UNCTAD, ISDS Navigator.

Source: UNCTAD Issue note 4, Sep 2021.<sup>20</sup>

This highlights the fact that European investors are often unfairly treated by host States and thus frequently rely on the substantive and procedural rights provisions contained in IIAs. Therefore, it seems ironic that the very same home States of European investors are removing the possibility – *inter alia* for their own investors – to rely on those IIAs by terminating BITs and disconnecting from the ECT and by refusing to pay Awards issued against them, thus failing to honour their international legal obligations.

<sup>20</sup> UNCTAD, [https://unctad.org/system/files/official-document/diaepcbinf2021d7\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf).

**Table of the top countries by GDP<sup>21</sup> showing the number of ISDS cases received and the number of unpaid awards and their amount**

<b>GDP Ranking</b>	<b>Country Name and Size of Economy</b>	<b>Number of ISDS cases received</b>	<b>Number of unpaid awards</b>	<b>Total amount in USD</b>
1	United States: 20.09 tn USD	21	0	0
2	China: 14.9 tn USD	10	0	0
3	Japan: 5.04 tn USD	1	0	0
4	Germany: 3.84 tn USD	5	0	0
5	United Kingdom: 2.76 tn USD	1	0	0
6	India: 2.67 tn USD	27	1	114 mln USD
7	France: 2.62 tn USD	2	0	0
8	Italy: 1.89 tn USD	13	0	0
9	Canada: 1.65 tn USD	38	0	0
10	South Korea: 1.64 tn USD	10	0	0
11	Russia: 1.48 tn USD	27	6	55,132 mln USD
12	Brazil: 1.45 tn USD	0	0	0
13	Australia: 1.36 tn USD	2	0	0
14	Spain <sup>22</sup> : 1.28 tn USD	55	8	700 mln USD
15	Mexico: 1.09 tn USD	40	0	0
16	Indonesia: 1.06 tn USD	7	0	0
17	Iran: 0.94 tn USD	1	0	0
18	Netherlands: 0.91 tn USD	3	0	0
19	Switzerland: 0.75 tn USD	1	0	0
20	Turkey: 0.73 tn USD	19	0	0

<sup>21</sup> As per the World Population Review, 2022- <https://worldpopulationreview.com/countries/countries-by-gdp>.

<sup>22</sup> More than 11 cases against Spain are pending enforcement/ execution proceedings and the final award in 24 cases have not been rendered as on 1<sup>st</sup> July 2022.

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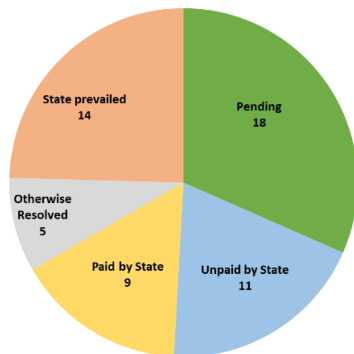
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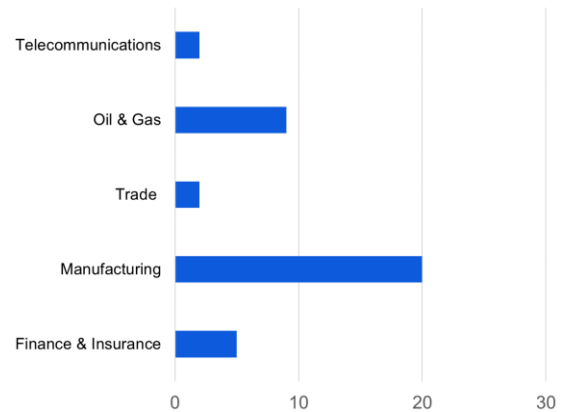
## Annexes

## Venezuela

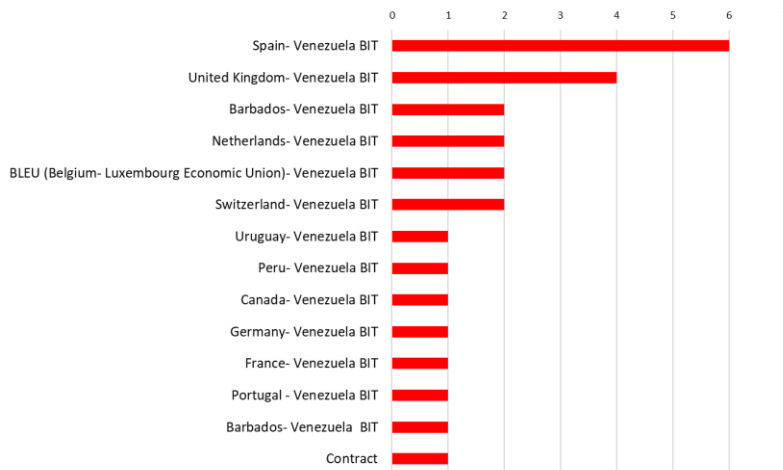
Venezuela- Status of ISDS Cases (Total- 57 cases)



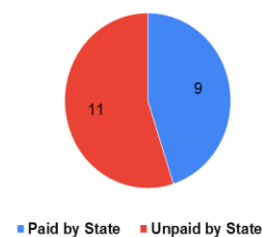
Venezuela ISDS Cases- Sector Wise Breakdown



Venezuela – Treaty Invoked by Claimants

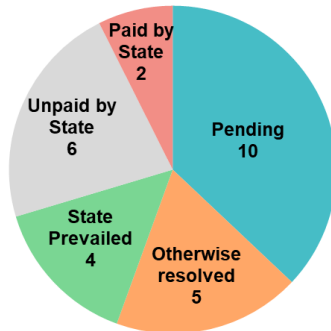


Venezuela- Paid vs. Unpaid Awards

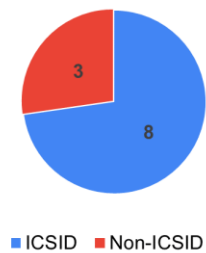
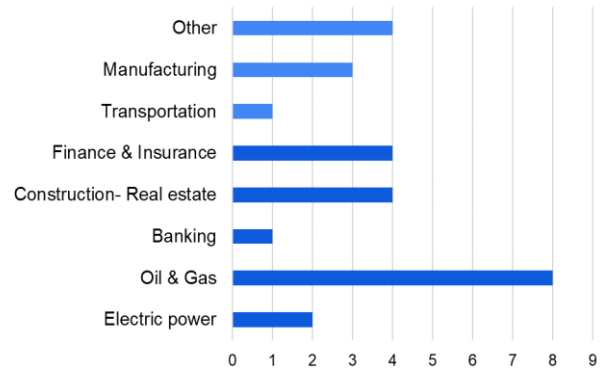


## Russia

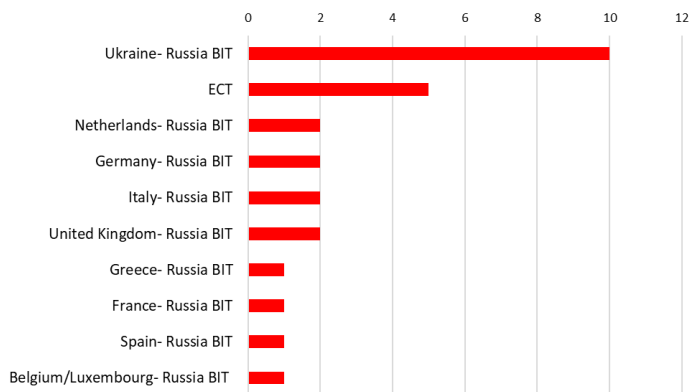
**Russia- Status of ISDS cases (Total- 27 cases)**



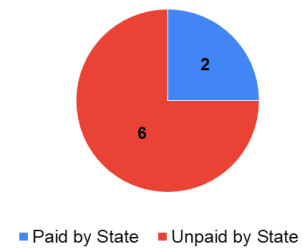
**Russia ISDS cases- Sector Wise Breakdown**



**Russia- Treaty Invoked by Claimants**



**Russia- Paid v. Unpaid Awards**



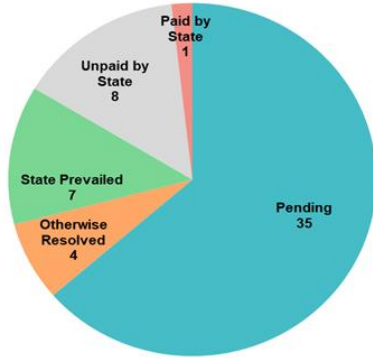
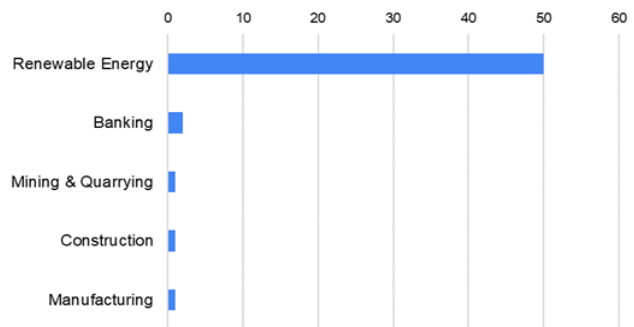
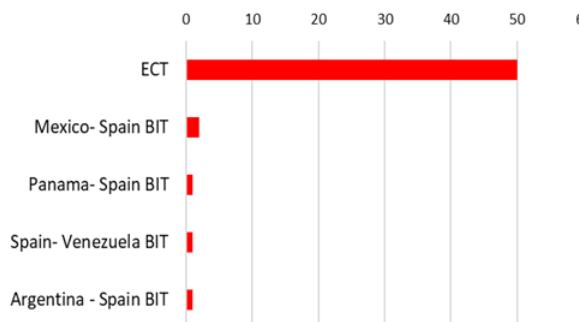
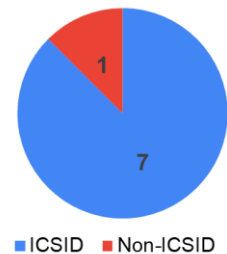
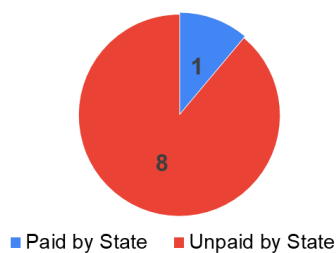
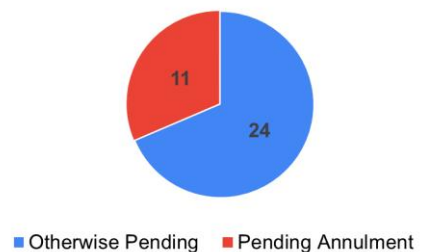
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## Spain

**Spain- Status of ISDS Cases (Total- 55 cases)****Spain ISDS Cases- Sector Wise Breakdown****Spain- Treaty Invoked by Claimants****Spain- Unpaid Awards- ICSID & Non- ICSID****Spain- Paid v. Unpaid Awards****Spain- Pending cases Current Status**

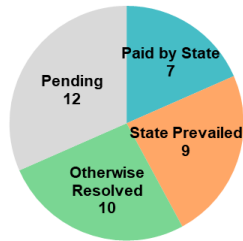
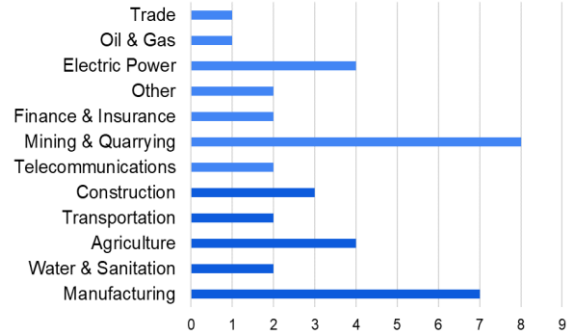
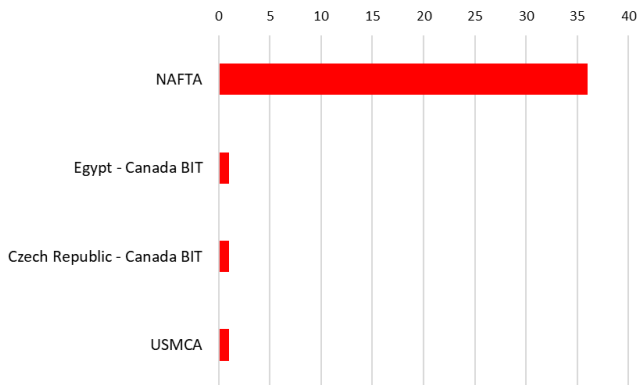
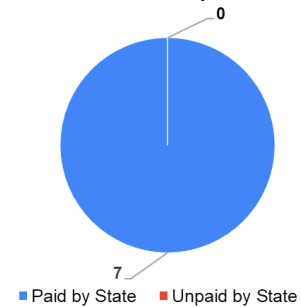
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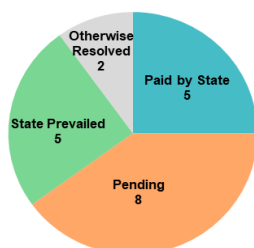
## Canada

**Canada- Status of ISDS cases (Total- 38 cases)****Canada ISDS cases- Sector Wise Breakdown****Canada- Treaty Invoked by Claimants****Canada- Paid v. Unpaid Awards**

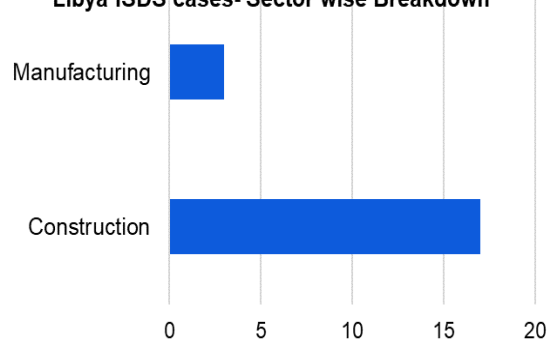


## Libya

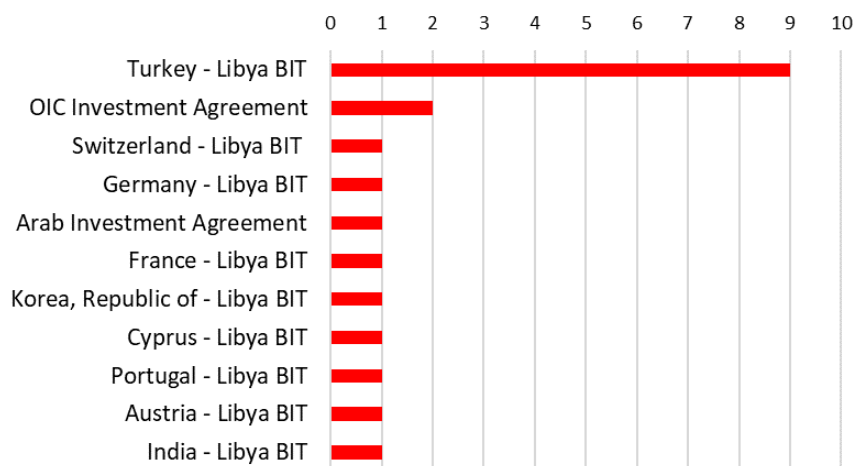
Libya- Status of ISDS cases (Total- 20 cases)



Libya ISDS cases- Sector wise Breakdown



Libya- Treaty Invoked by Claimants



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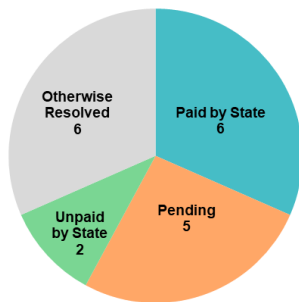
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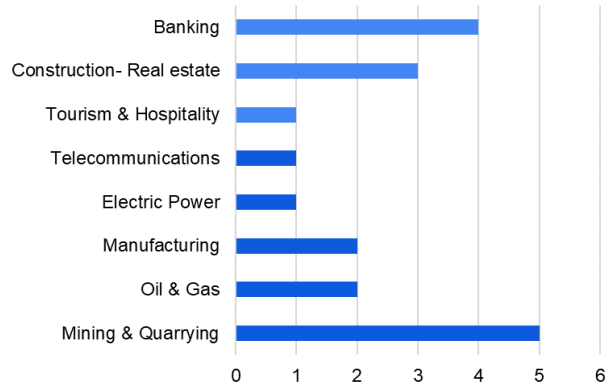
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## Kyrgyzstan

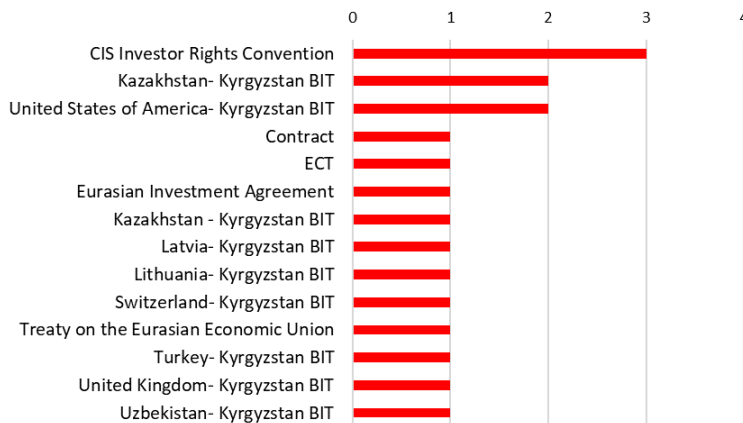
Kyrgyzstan- Status of ISDS cases (Total- 19)



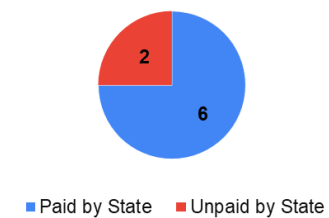
Kyrgyzstan ISDS Cases- Sector Wise Breakdown



Kyrgyzstan- Treaty Invoked by Claimants



Kyrgyzstan- Paid v. Unpaid Awards



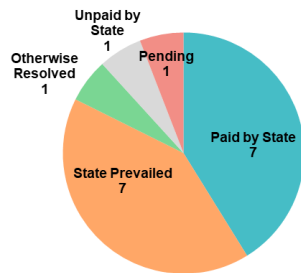
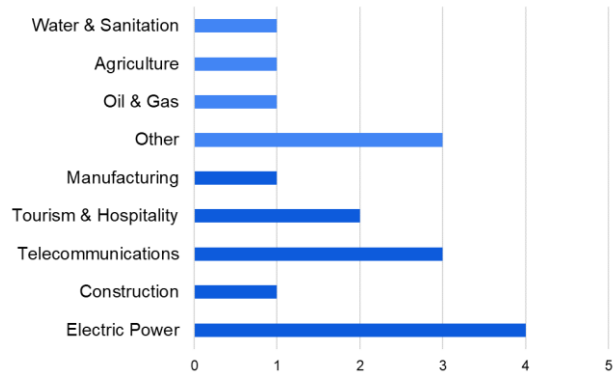
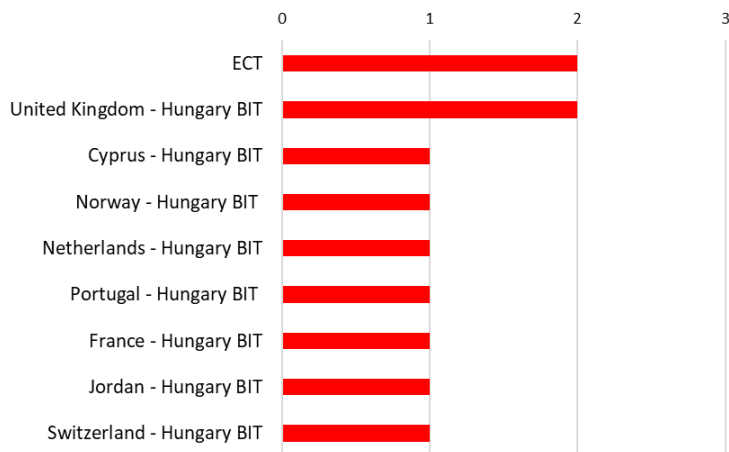
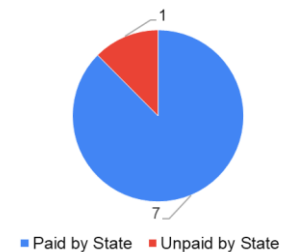
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## Hungary

**Hungary- Status of ISDS cases (Total- 17)****Hungary ISDS cases- Sector Wise Breakdown****Hungary- Treaty Invoked by Claimants****Hungary- Paid v. Unpaid awards**

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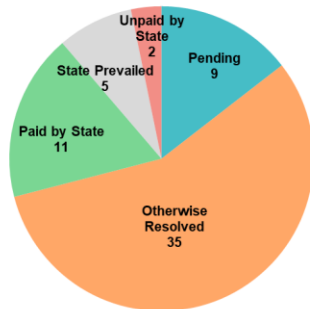
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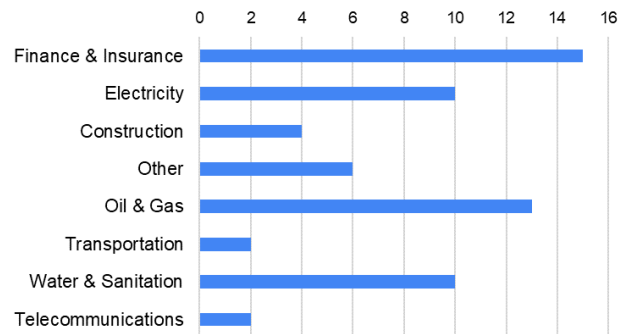
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## Argentina

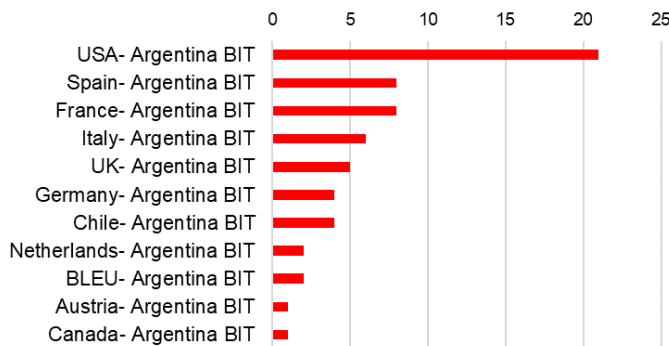
Argentina- Status of ISDS cases (Total- 62 cases)



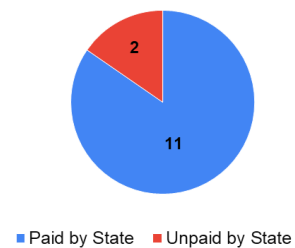
Argentina ISDS cases- Sector Wise Breakdown



Argentina- Treaty Invoked by Claimants



Argentina- Paid v. Unpaid awards



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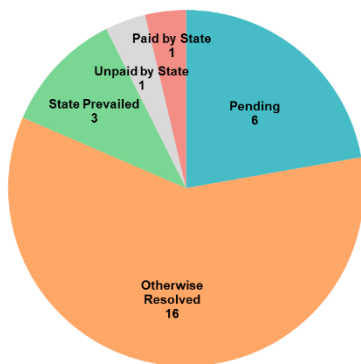
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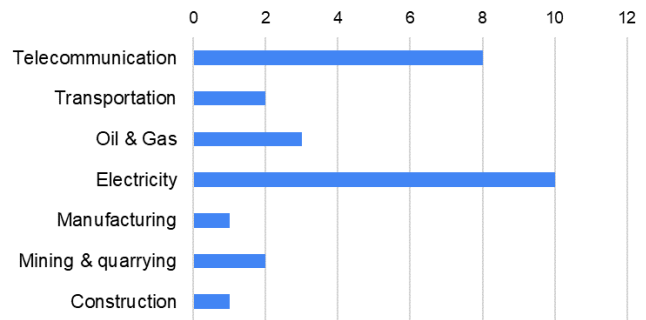
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## India

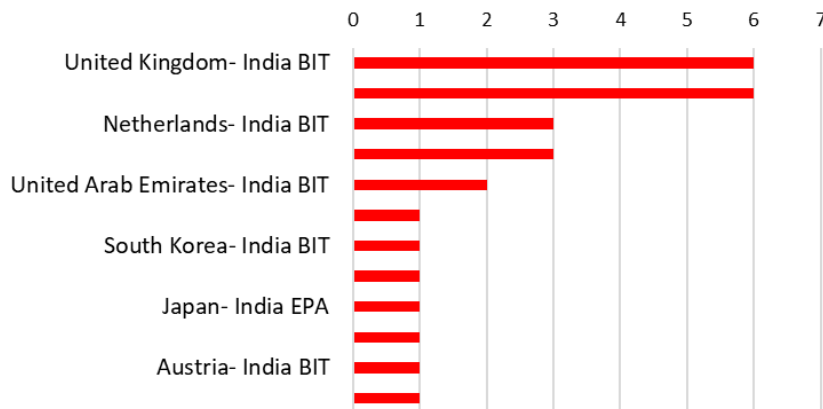
India- Status of ISDS cases (Total- 27 cases)



India ISDS cases- Sector Wise Breakdown

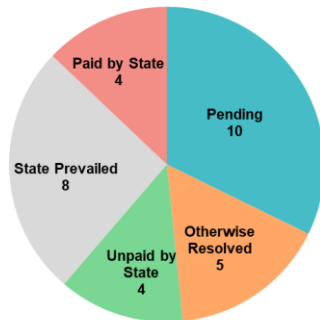


India- Treaty Invoked by Claimants

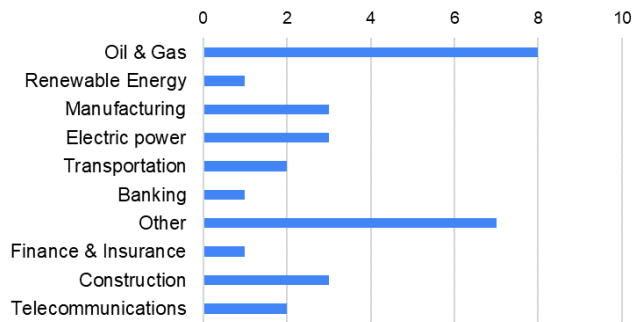


## Ukraine

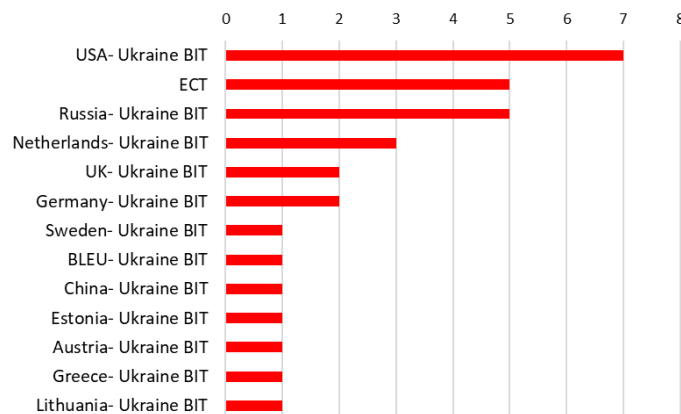
Ukraine- Status of ISDS cases (Total-31 cases)



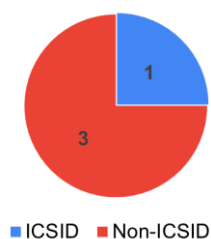
Ukraine ISDS Cases- Sector wise Breakdown



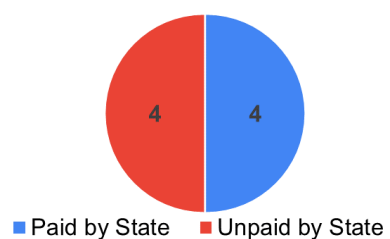
Ukraine- Treaty Invoked by Claimants



Ukraine- Unpaid Awards- ICSID &amp; Non-ICSID



Ukraine- Paid v. Unpaid awards



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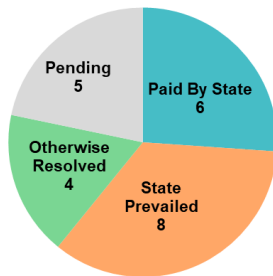
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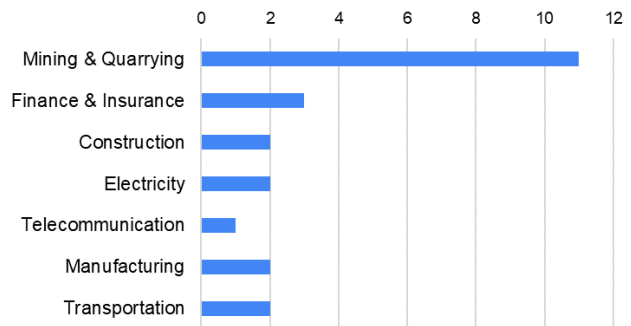
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## Kazakhstan

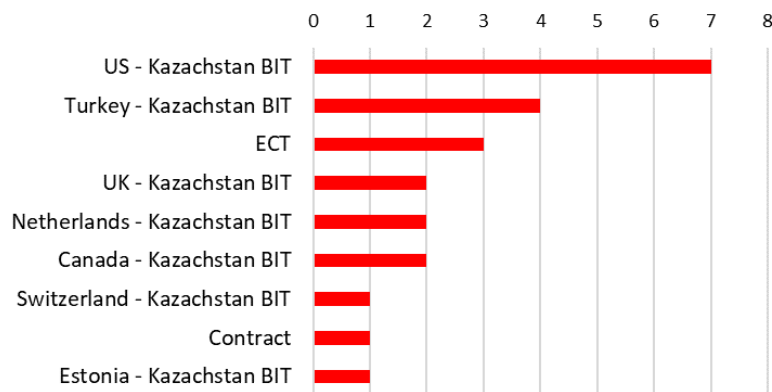
Kazakhstan- Status of ISDS cases (Total-23 cases)



Kazakhstan ISDS cases- Sector wise Breakdown



Kazakhstan- Treaty Invoked by Claimants



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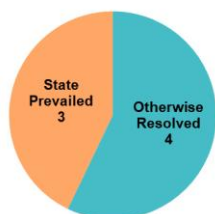
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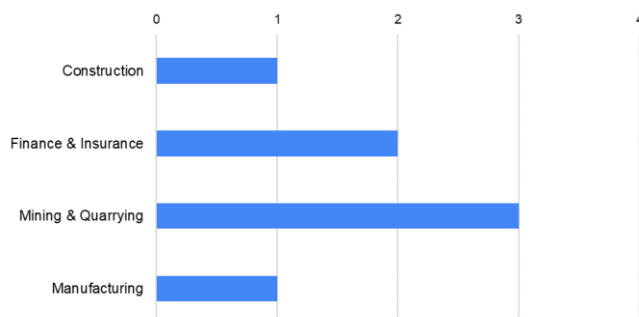
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## Indonesia

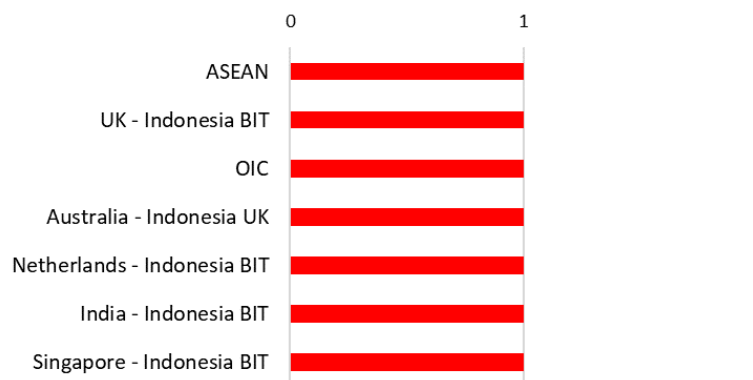
Indonesia- Status of ISDS cases (Total- 7 cases)



Indonesia ISDS cases- Sector wise Breakdown



Indonesia- Treaty Invoked by Claimants





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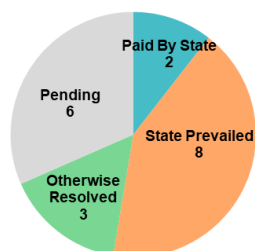
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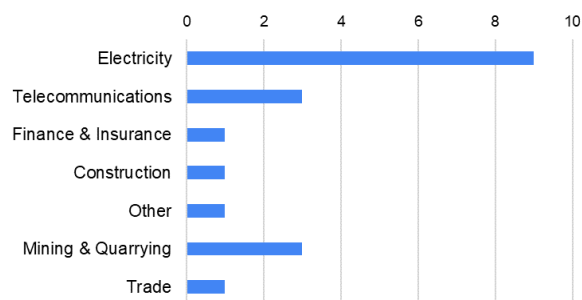
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## Turkey

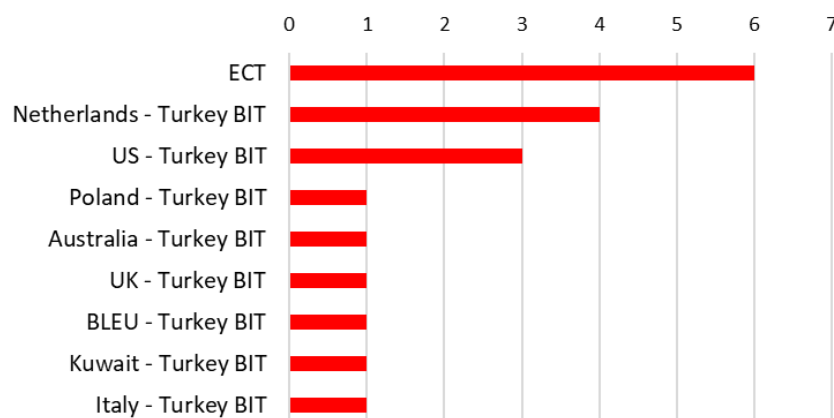
Turkey- Status of ISDS cases (Total- 19 cases)



Turkey ISDS cases- Sectorwise Breakdown



Turkey- Treaty Invoked by Claimants



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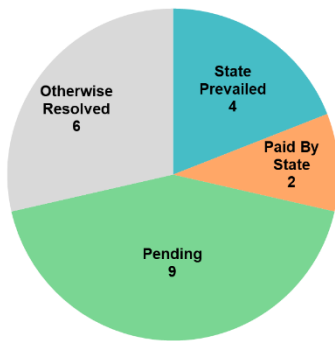
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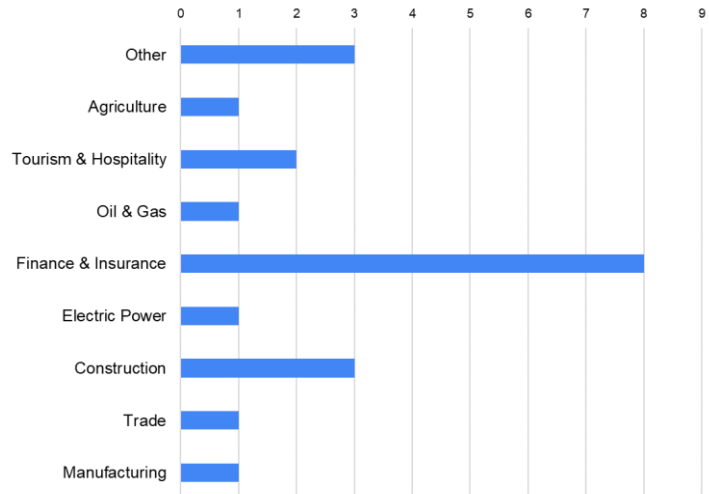
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## Croatia

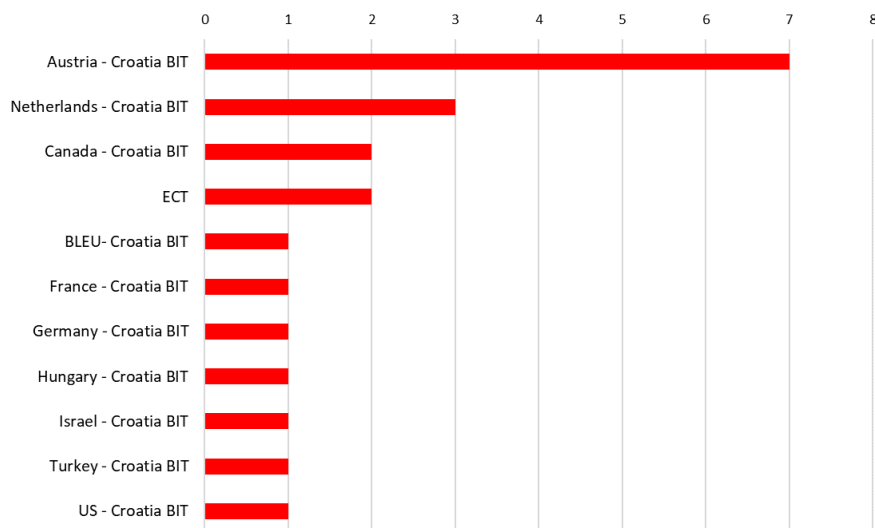
Croatia- Status of ISDS cases (Total- 21 cases)



Croatia ISDS cases- Sectorwise Breakdown



Croatia- Treaty Invoked by Claimants



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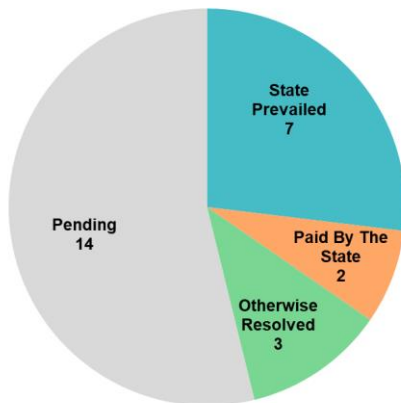
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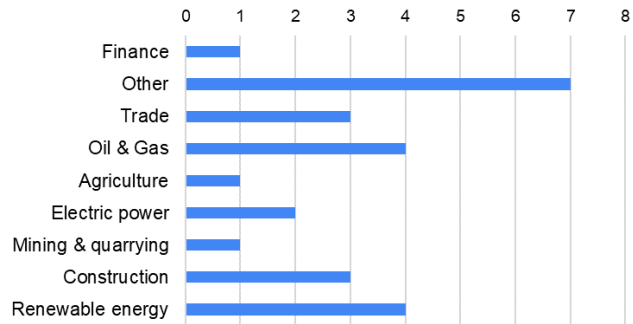
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## Romania

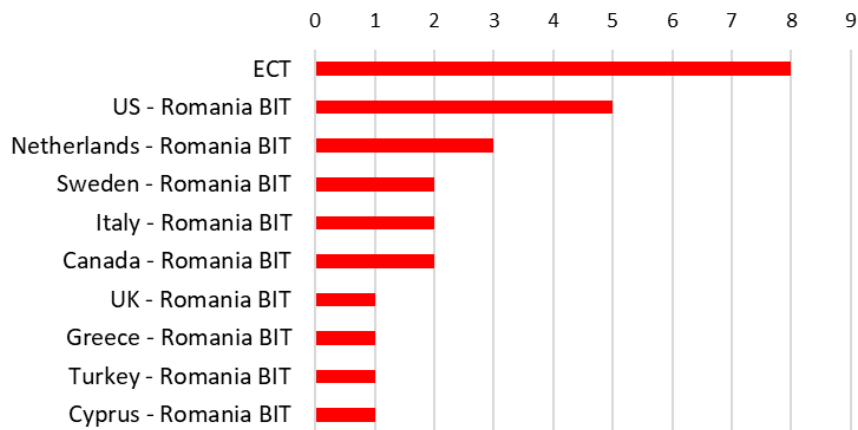
Romania- Status of ISDS cases (Total- 26 cases)



Romania ISDS cases- Sector wise Breakdown



Romania- Treaty Invoked by Claimants



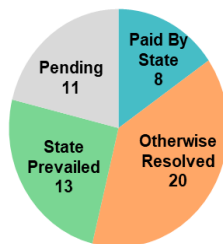
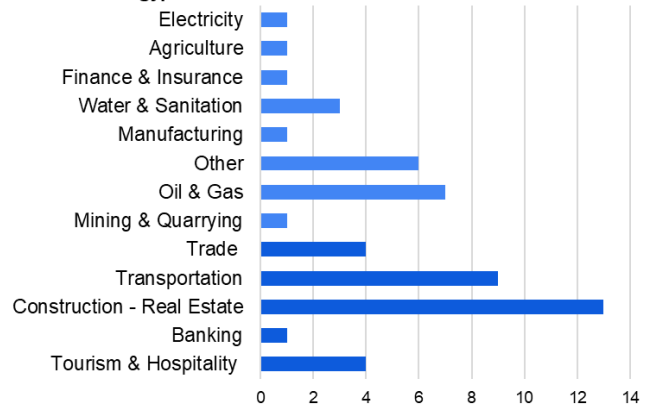
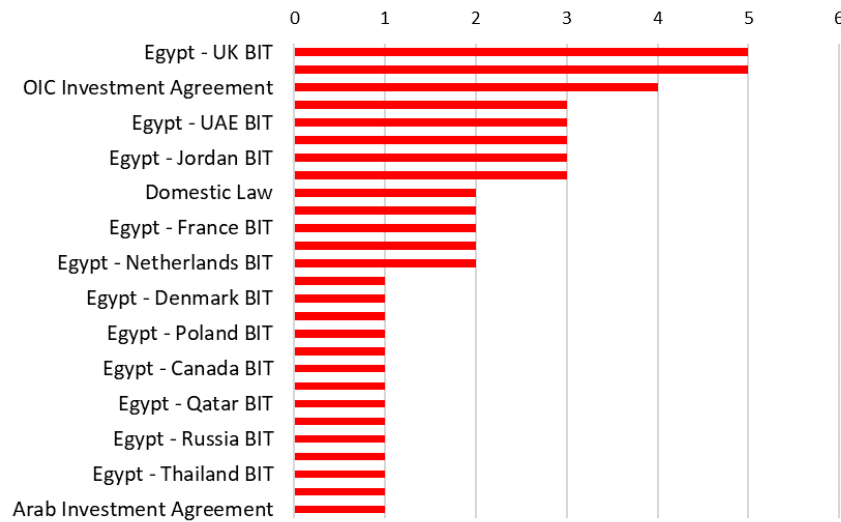
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## Egypt

**Egypt- Status of ISDS cases (Total- 52 cases)****Egypt ISDS cases- Sector Wise Breakdown****Egypt- Treaty Invoked by Claimants**

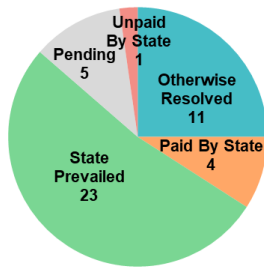
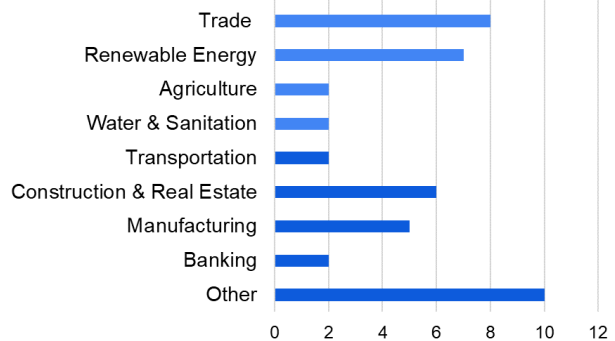
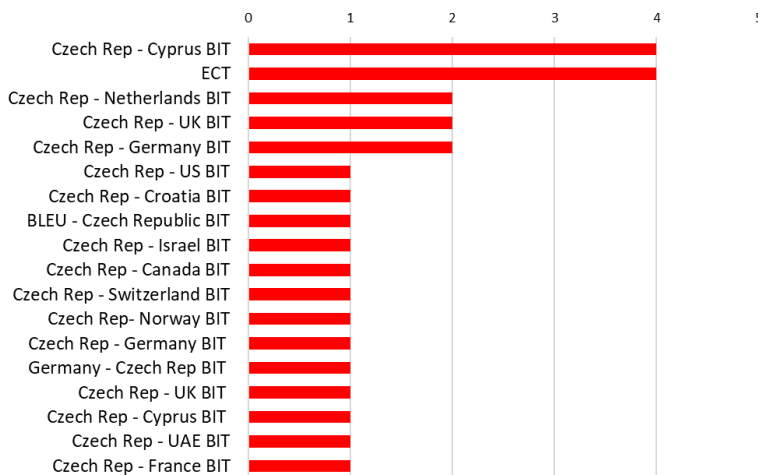
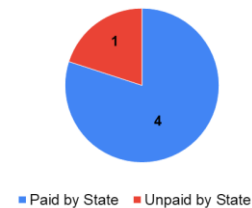
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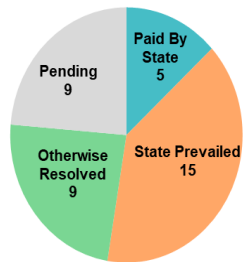
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## Czech Republic

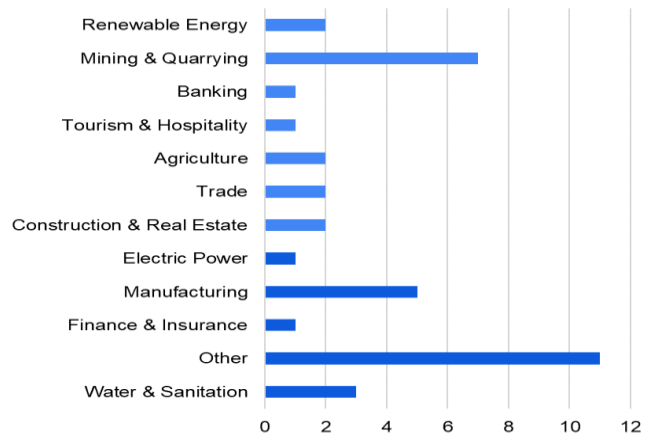
**Czech Republic- Status of ISDS cases (Total- 44 cases)****Czech Republic ISDS cases- Sector Wise Breakdown****Czech Republic- Treaty Invoked by Claimants****Czech Republic- Paid v. Unpaid Awards**

## Poland

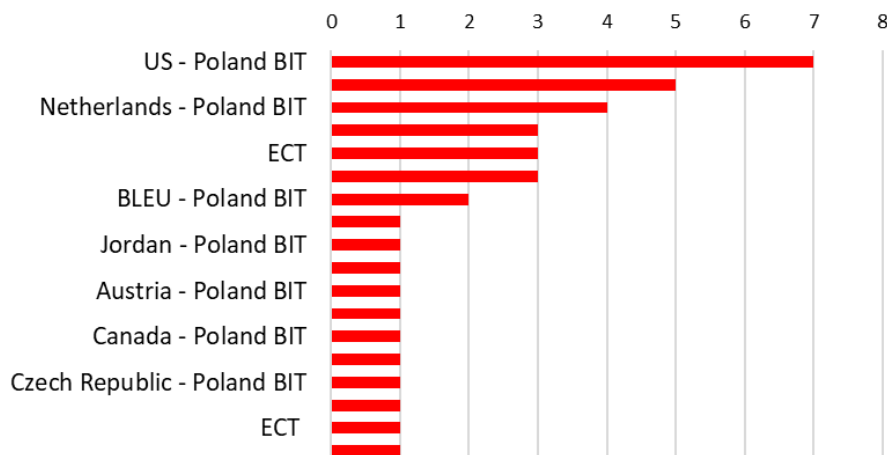
Poland- Status of ISDS cases (Total- 38 cases)



Poland ISDS cases- Sector Wise Breakdown

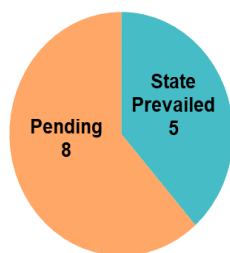


Poland- Treaty Invoked by Claimants

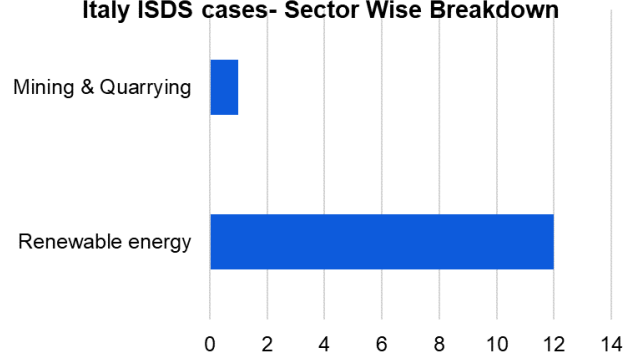


## Italy

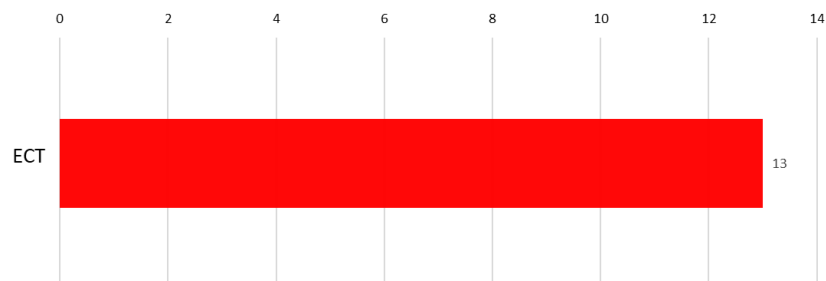
Italy- Status of ISDS cases (Total- 13 cases)



Italy ISDS cases- Sector Wise Breakdown

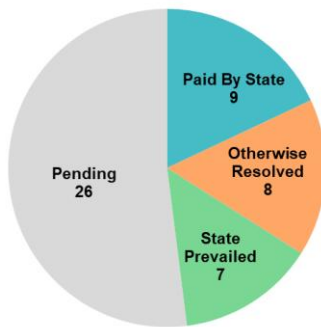


Italy- Treaty invoked by Claimants

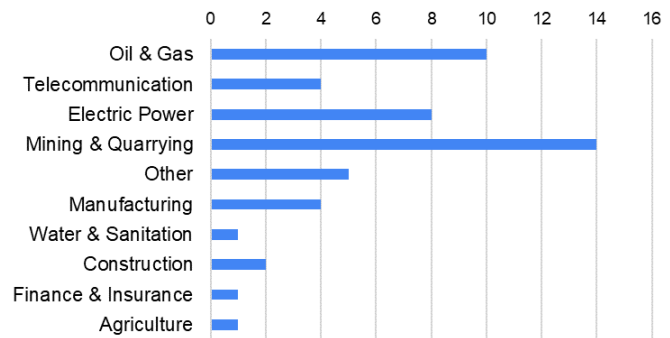


## Ecuador

Ecuador- Status of ISDS cases (Total- 50 cases)



Ecuador ISDS cases- Sector wise breakdown



Ecuador- Treaty Invoked by Claimants

