CIL
CENTRE FOR INTERNATIONAL LAW
National University of Singapore

# International Law Year in Review

## *Investor/State Disputes – Noteworthy Cases & Developments 2024*

CELINE LANGE, LEAD, PROGRAMME DEVELOPMENT, INTERNATIONAL DISPUTE RESOLUTION

SINGAPORE, 22 JANUARY 2025

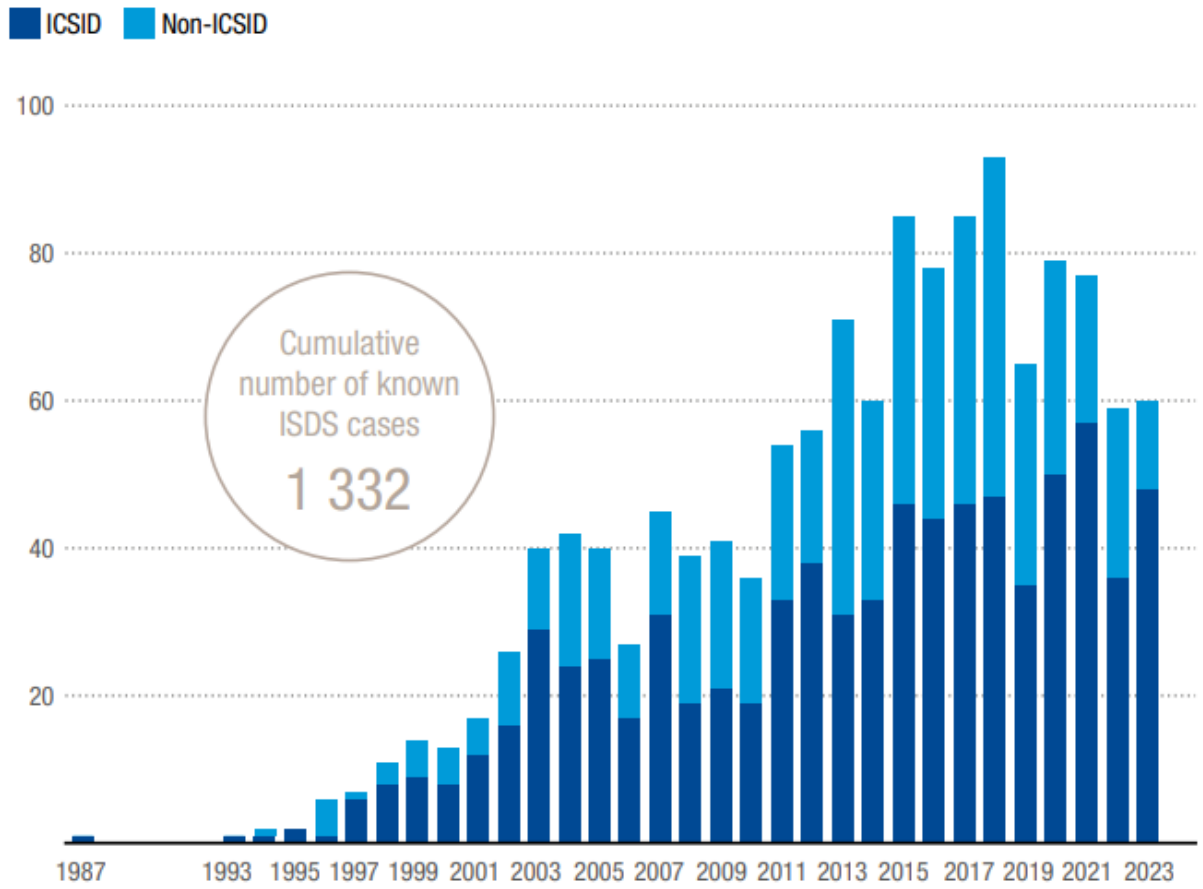
# Introduction

- Number of known treaty-based Investor/State cases: 1,332.
- In 2023, 60 new arbitrations were initiated.
- In 2024, ICSID (International Centre for Settlement of Investment Disputes) registered 58 cases - the second highest in ICSID history.

**Figure 1**

**Investor–State dispute settlement cases surpassed 1,300 at the end of 2023**

(Annual number of known treaty-based cases)




*Source:* UNCTAD, ISDS Navigator database, accessed 25 September 2024.

# Focus Topics

| |
|---|
| 1. Climate change related arbitrations continue to grow. |
| 2. A record number of cases in Latin America. |
| 3. Update on the « intra-EU arbitration saga ». |

# 1. The body of climate change related investment arbitrations continues to grow.

- End 2023: total of 235 fossil fuel-related cases filed and at least 123 ISDS proceedings in relation to the renewable energy sector.

  *Source: UNCTAD IIA Issues Note, No. 3, 2024*

- *Changes made to an existing regulatory framework as part of climate change measures.*
- *"Phase-out" cases.*
- *Denial or withdrawal of project approvals and licences.*

*Changes made to an existing regulatory framework as part of climate change measures.*

- Investment in solar photovoltaic power (small number related to wind and hydroelectric power, eg *LSG Building Solutions GmbH and others v. Romania* – award rendered in Feb 2024, in favour of investor).
- First known treaty claim against Japan - *Shift Energy Japan KK v. Japan* (HK Investor). Decided in favour of State (2023). Concerned cuts to renewable energy subsidies.
- Continuous wave of "renewable energy" cases against Spain.

*Changes made to an existing regulatory framework as part of climate change measures.*

- Continuous wave of "renewable energy" cases against Spain

  -Total of 50 cases, totalling almost euros 8 billion in claims.

  -Mixed results of annulment actions by Spain (*EON v. Spain*, decided in 2024 is pending annulment proceedings – € 325 million in damages, one of the highest awards in Spanish cases).

  -Spain has refused to pay any damages, joining Venezuela, Russia, and Argentina as one of the countries with the highest unpaid arbitration awards in the world.

  -2024: *EBL & Tubo Sol v. Spain* award - few cases in favour of Spain. Tribunal found that only one aspect of the disputed regime, breached the Fair and Equitable Treatment standard, and that this discrete breach had not caused any palpable damage to the claimants.

  -2024: *Sapec v. Spain* award – only second time that ICSID Tribunal found that it lacked jurisdiction to hear ECT claim brought against Spain (*ESF* in 2022) – will come back to that.

*“Phase-out” cases.*

***Westmoreland Coal Company v. Canada III***

- US company argues that it was unlawfully excluded from a scheme developed to compensate investors for losses associated with the Alberta government's Climate Leadership Plan, which accelerated the deadline for the phase out of coal power to 2030.

- Hearing May 2024

*Denial or withdrawal of project approvals and licences.*

- *TC Energy and TransCanada v. USA (II)*: July 2024 award in favour of State. Revocation of a permit to construct a crude oil pipeline from Alberta (Canada) to Nebraska (United States).

  *Question of the transition rules between USCMA – NAFTA was discussed (re consent to arbitrate – a dissenting opinion).*

- *Discovery Global v. Slovakia*: Jan 2025. Slovakia's alleged actions preventing oil & gas drilling activities (after exploration licences were granted). In favour of State.

  Planned drilling operations were allegedly rendered impossible by local activists' protests blocking the well sites as well as local authorities' decisions ordering full-scope environmental impact assessments.

*Denial or withdrawal of project approvals and licences.*

## Awards in Colombia's páramos cases

- Cases concerning mining operations in the páramos, a range of high-altitude wetlands that serve as a primary source of the country's water supply.

- *Eco Oro v. Colombia*: award on Damages (July 2024).

Claimant's mining rights reduced by 50%. Decision on jurisdiction, Liability and Directions on Quantum (2021) had spurred agitation - challenged measures fell within the scope of the general exceptions clause as a lawful exercise of Colombia's police powers - but that did not remove State's obligation to pay compensation for the treaty breach.

Award on Damages (July 2024): collapse of the soufflé: Tribunal found that it could not award damages as Claimant did not provide loss of opportunity evidence, despite being specifically asked to do so.

But Declaration on costs P. Sands ("jaw-dropping" costs, especially given the Claimant not being able to provide the required evidence) + third-party funding ("a tribunal should be able to make a costs order against a third-party funder" in order to "contribute to the costs of the opposing party if the claim fails" instead of a "gambler's Nirvana").

*Denial or withdrawal of project approvals and licences.*

## Awards in Colombia's páramos cases

*Red Eagle Exploration v. Colombia* (award February 2024).

- Decided in favour of State, all claims rejected (US$130 million).
- The investor owned a 352-hectare gold mine. Claims arising out of the Colombian Constitutional Court's decision to restrict mining operations in the páramos.
- Dissenting Opinion of Arbitrator José A. Martínez de Hoz on the assessment of the project's value (loss of opportunity / fully developed project)

<-> the damages question

# 2. Record number of cases in Latin America

- 2023 was the year with the highest number of ISDS claims ever registered against Latin America and the Caribbean countries, with 28 claims.
- Legacy NAFTA cases: 11 out of 28 against Mexico, brought by US or Canadian investors.

  Old investment protection chapter of NAFTA could still be invoked – the 3 year-grace period expired in July 2023 (now investor state arbitration between Mexico and the United States restricted to certain sectors).

# 2. Record number of cases in Latin America

**Cases related to the energy crisis in Honduras**

- Since 2023, 14 ICSID arbitration claims v. Honduras.
- Reaction to the approval of the *Special Law to Guarantee the Electric Energy Service as a Public Good of National Security and a Human Right of Economic Nature* (approved in May 2022).
- The 2022 New Energy Law aims to rescue the National Electric Energy Company (ENEE) from imminent bankruptcy, as well as to renegotiate energy contracts with private companies.

# 2. High number of cases in Latin America

## Cases related to the energy crisis in Honduras, ctd

- *Prospera and others v. Honduras:* Hearing on Preliminary Objections Dec 2024 (exhaustion of domestic remedies). Value of the claim: several billion US dollars, possibly as high as US$10.8 billion.
- US investor is the promoter and organiser of a special employment and economic development zone (ZEDE). Honduras introduced ZEDEs in 2013. After change of power in Honduras in 2022, the ZEDE legislative framework was changed.
- Also, series of “electricity” claims: legislation passed authorising the government to renegotiate electricity tariffs with renewable energy producers.

*In passing…*

- Successful negotiation/mediation in *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru* - Settlement Agreement 4 Dec 2024 (award already issued in 2022).
- Peru's Press Release (Ministry of Economy and Finance):

*"Settlement Agreement that will allow the country to save more than US$ 25 million (…)". Peru reaffirms its commitment to investors and international trading partners by fulfilling its obligations under international agreements, thus ratifying its status as a reliable country for investment."*

*"This agreement not only represents a milestone in the defense of the country's economic interests, but it also demonstrates the effectiveness of the [Ministry] in the management of international disputes, guaranteeing the protection of the country's national resources and macroeconomic stability.*

- UAE investor v. Angola (post-civil war project) has sought mediation with the State, with a view to settling the more than US$100 million dispute by April.

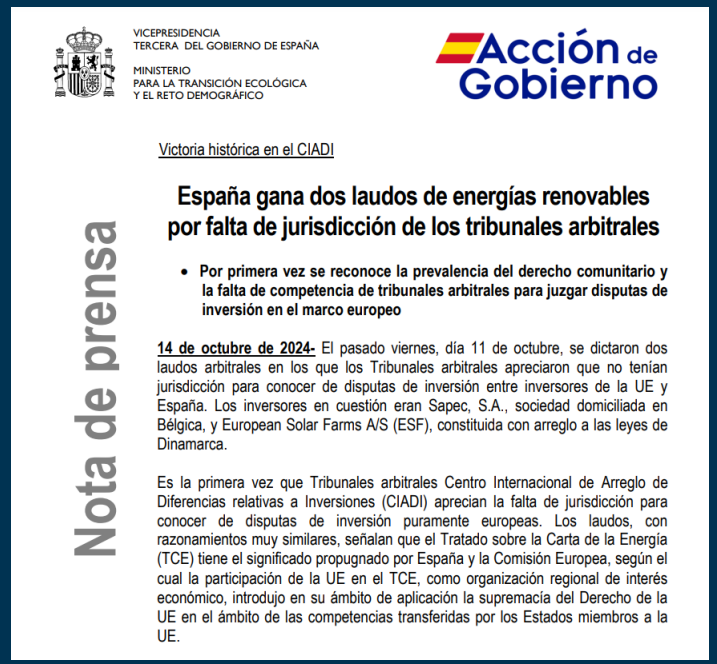
# 3. Updates on the “intra-EU saga”

# Update on the “intra-EU Saga”

-2021: Court of Justice of the European Union (CJEU) ruled that the Investor-State Dispute Settlement mechanism provided for by the Energy Charter Treaty (ECT) is not applicable to intra-EU disputes <-> primacy of EU law (*Moldova v. Komstroy*).

-But Tribunals have taken mixed approaches to States’ intra-EU jurisdictional objections.

-2024: Award in *Sapec, S.A. v. Spain:*
only the second time that ICSID Tribunal found no jurisdiction to hear ECT claims against Spain (as in *ESF* in 2022 / also SCC *GreenPower in 2022).*



VICEPRESIDENCIA TERCERA DEL GOBIERNO DE ESPAÑA
MINISTERIO PARA LA TRANSICIÓN ECOLÓGICA Y EL RETO DEMOGRÁFICO

Acción de Gobierno

Nota de prensa

Victoria histórica en el CIADI

**España gana dos laudos de energías renovables por falta de jurisdicción de los tribunales arbitrales**

- **Por primera vez se reconoce la prevalencia del derecho comunitario y la falta de competencia de tribunales arbitrales para juzgar disputas de inversión en el marco europeo**

**14 de octubre de 2024-** El pasado viernes, día 11 de octubre, se dictaron dos laudos arbitrales en los que los Tribunales arbitrales apreciaron que no tenían jurisdicción para conocer de disputas de inversión entre inversores de la UE y España. Los inversores en cuestión eran Sapec, S.A., sociedad domiciliada en Bélgica, y European Solar Farms A/S (ESF), constituida con arreglo a las leyes de Dinamarca.

Es la primera vez que Tribunales arbitrales Centro Internacional de Arreglo de Diferencias relativas a Inversiones (CIADI) aprecian la falta de jurisdicción para conocer de disputas de inversión puramente europeas. Los laudos, con razonamientos muy similares, señalan que el Tratado sobre la Carta de la Energía (TCE) tiene el significado propugnado por España y la Comisión Europea, según el cual la participación de la UE en el TCE, como organización regional de interés económico, introdujo en su ámbito de aplicación la supremacía del Derecho de la UE en el ámbito de las competencias transferidas por los Estados miembros a la UE.

Spanish government’s press release (Ministry of ecological transition): “*For the first time, the prevalence of community law is recognised and the lack of jurisdiction of arbitral tribunals to judge disputes of investment in the European framework*”

# Update on the “intra EU Saga”

- Enforcement courts also divided on whether to enforce awards rendered in such intra-EU disputes.

- Clear trend of UK Courts enforcing intra-EU awards -> in 2024, the CJEU *in European Commission v. UK* found the UK to be in breach of its obligations under EU Law (*inter alia* the UK Supreme Court should have referred the matter to the CJEU for a preliminary ruling).

# Update on the “intra-EU Saga”

-Institutional development in 2024 following the CJEU jurisprudence on the incompatibility of intra-EU disputes with EU law:

-Stockholm Chamber of Commerce (SCC) adopted a new policy to ensure the enforceability of awards.

-SCC will no longer select a seat of arbitration within the EU for cases under intra-EU investment treaties -> default seat a non-EU Member State.

-London and Geneva to benefit?

# Thank You !