

REPORT on Compliance with Investment Treaty Arbitration Awards 2024 (3rd edition)

The current State of Play:

- The total number of known treaty-based ISDS arbitrations increased to 1,332 of which 958 have been concluded, 354 are still pending and for 20 cases the status is unknown.¹
- Of those 958 concluded cases, 37,7% were decided in favour of Respondents, 28% in favour of investors, 18,5% were settled, 13,4% were discontinued, and 2,5% were decided in favour of neither party.²
- The statistics for ICSID arbitrations are as follows: 49% upholding claims in part or in full, 30% dismissing all claims, 20 declining jurisdiction, 1% deciding that the claims are manifestly without legal merit.³
- 2,222 International Investment Agreements (IIAs) and 390 Treaties with Investment Provisions are currently in force, totalling 2,612.⁴
- In 2023, at least 29 IIAs were concluded, at least 15 IIAs entered into force and 4 were terminated.⁵
- To date, 132 countries and one economic grouping are known to have been Respondents to one or more ISDS claims.⁶

Accordingly, the number of ISDS arbitrations continues to rise, while at the same time States keep on concluding new IIAs. This demonstrates that the ISDS system continues to be viewed by both investors and States as a valuable dispute settlement tool.

¹ As of 31 December 2023, UNCTAD, Investment Policy Hub, <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

² Ibid.

³ See: ICSID case-load statistics (2024-2), p. 13, <https://icsid.worldbank.org/sites/default/files/publications/2024-2%20ENG%20-%20The%20ICSID%20Caseload%20Statistics%20%28Issue%202024-2%29.pdf>.

⁴ UNCTAD, Investment Policy Hub, <https://investmentpolicy.unctad.org/international-investment-agreements>.

⁵ UNCTAD, World Investment Report 2024, pp. 20-21, https://unctad.org/system/files/official-document/wir2024_en.pdf.

⁶ UNCTAD, World Investment Report 2024, p. 30: “The new cases in 2023 were initiated against 37 countries and one economic grouping (the European Union). About 70% of them were brought against developing countries, including LDCs (Myanmar, Senegal and the United Republic of Tanzania). Mexico was the most frequent respondent, with 10 new known cases. Honduras faced five cases, followed by Argentina and the Bolivarian Republic of Venezuela with three cases each. The largest share of claims was directed at countries in Latin America and the Caribbean, with about half of the 60 cases [initiated in 2023].”
https://unctad.org/system/files/official-document/wir2024_en.pdf.

PROF. DR. NIKOS LAVRANOS, LL.M.

(NL-INVESTMENTCONSULTING)

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Given the consistently increasing number of Awards that are rendered by arbitral tribunals⁷, the question of compliance by States with adverse ISDS Awards has been gaining increased attention.

For example, in June 2024, ICSID published a background paper on “*Compliance with and Enforcement of ICSID Awards*”.⁸ However, this study only covers pecuniary Awards rendered until 31 December 2021. Thus, the ICSID study does not take into account the most recent developments, which are covered by this Compliance Report.

Also, in 2024, an article was published by a group of scholars on “*Compliance politics and international investment disputes: a new data set*”.⁹

In addition, the 2023 Compliance Report has been gaining wider recognition and traction. For example, the above-mentioned ICSID study refers to the 2023 Compliance Report in its first footnote.

Toby Landau KC referred in his *Ciarb Alexander Lecture 2023* to the 2023 Compliance Report.¹⁰

Most notably, the US Court of Appeals mentioned the 2023 Compliance Report in its important recent *Nextera* judgment.¹¹

In sum, the Compliance Report has been recognized as an important study containing very useful and practical information for the arbitration community as a whole.

In this third edition, we have increased the geographical coverage by including several new countries, i.e., Mexico, Peru, Panama and Georgia.

The 2024 Compliance Report focuses on the top 20 countries that have received the most ISDS Awards and appear to be most delinquent in their international law obligations by refusing to pay those adverse ISDS Awards.

We have based our analysis on publicly available information on ISDS disputes and Awards.¹²

⁷ See e.g., ICSID case-load statistics (2024-2), <https://icsid.worldbank.org/sites/default/files/publications/2024-2%20ENG%20-%20The%20ICSID%20Caseload%20Statistics%20%28Issue%202024-2%29.pdf>.

⁸ ICSID Compliance Report (2024), <https://icsid.worldbank.org/resources/publications/compliance-and-enforcement-icsid-awards>.

⁹ Nicola Strain et al, Compliance politics and international investment disputes: a new dataset, (2024) *Journal of International Economic Law*, Vol. 27, Issue 1, pp. 70–92, <https://doi.org/10.1093/jiel/jgae004>, <https://academic.oup.com/jiel/article/27/1/70/7607727?login=false>.

¹⁰ Ciarb Alexander Lecture 2023, delivered by Toby Landau KC, <https://www.youtube.com/watch?v=2ql6AIR6xec>.

¹¹ *NEXTERA ENERGY et al v. KINGDOM OF SPAIN*, judgment of 16 August 2024, <https://www.italaw.com/sites/default/files/case-documents/italaw182181.pdf>.

¹² 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 September 2024, with updates until 1 November 2024. Assistance by Adhiraj Lath is kindly acknowledged.

Spain ranks number 1 in the world in terms of the number of unpaid Awards

As in the past year, Spain ranks number 1 in the world in terms of the number of unpaid Awards, ahead of Venezuela and Russia. Indeed, over the past 12 months, arbitral tribunals have issued 9 new final adverse Awards against Spain, raising the number from 15 to 24 unpaid Awards, which Spain continues to refuse to pay.

Ranking on the basis of number of unpaid Awards in 2024 worldwide

Ranking	Country Name	Number of unpaid Awards
1	Spain	24
1	Venezuela	20
3	Russia	10

Moreover, Spain also ranks number 1 in the world as far as the number of initiated ISDS disputes based on the Energy Charter Treaty (ECT) is concerned, well ahead of Italy and Romania.

Ranking on the basis of number of initiated ECT disputes

Ranking	Country Name	Number of initiated ECT disputes
1	Spain	52
2	Italy	14
3	Romania	8

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(NL-INVESTMENTCONSULTING)

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Finally, Spain ranks 3rd in the world in terms of the outstanding amount of damages, which currently totals about **USD 1.6 billion / EUR 1.5 billion**.

In addition, Spain has incurred interest rates and legal fees totalling **USD 350 million / EUR 320 million**. Also, Spain has spent at least **EUR 73 million** for its own legal fees.¹³

The damages claimed total more than **USD 10 billion**, with interest rates continuing to be added to that number.

Ranking on the basis of outstanding amounts of unpaid Awards in 2024 worldwide

Ranking	Country Name	Total amount of unpaid Awards in USD
1	Russia	60.7 billion
2	Venezuela	17.1 billion
3	Spain	1.6 billion

¹³ See: the Spanish Renewable Energy saga tracker: <https://spanishrenewabledebt.com/en/index.html>.

Several EU Member States feature in the top 20 of most delinquent countries

The **International Rule of Law Compliance Index**, based on our Report, ranks the top 20 countries in terms of adverse ISDS Awards, which have not been paid. By refusing to pay those Awards, Respondent States fail to fulfil their international law obligations, thereby undermining the International Rule of Law.

In this context, it is particularly alarming to note that several EU Member States continue to feature in the top 20 list (marked in red), thereby highlighting the fact that the Rule of Law standard within the EU is increasingly backsliding.¹⁴

International Law Compliance Index 2024

Ranking	Country Name	Number of unpaid Awards	Total amount of unpaid Awards in USD
1	Spain	24	1.6 billion
2	Venezuela	20	17.1 billion
3	Russia	10	60.7 billion
4	Mexico	9	386.4 million
5	Argentina	5	728 million
6	Peru	5	693.5 million
7	Poland	5	686.8 million
8	Libya	5	178.2 million
9	Ukraine	4	142 million
10	Ecuador	4	76.6 million
11	Kyrgyzstan	4	61.8 million
12	Kazakhstan	3	215 million
13	Czech Republic	2	415 million
14	India	2	206 million
15	Croatia	1	184 million
16	Italy	1	16 million
17	Canada	1	7 million
18	Romania	1	3.5 million
19	Georgia	1	Amount unknown
20	Columbia	1	9.4 million

¹⁴ Even the US Department of State specifically refers to the International Law Compliance Index of this Report and mentions the high number of adverse ISDS awards against Spain in its *2024 Investment Climate Statements: Spain Report*, <https://www.state.gov/reports/2024-investment-climate-statements/spain/>.

PROF. DR. NIKOS LAVRANOS, LL.M.

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Emerging trend: Enforcement of intra-EU Awards outside the EU

One of the most notable emerging trend of the past 12 months is the divergent developments regarding the recognition and enforcement of intra-EU Awards *within the EU* as opposed to *outside the EU*.

Impossibility of enforcement of intra-EU Awards within the EU

Within the EU, domestic courts of the Member States have been faithfully implementing the CJEU's *Achmea*, *Komstroy*, *Micula*, *PL Holding* judgments by effectively preventing the recognition and enforcement of intra-EU ISDS Awards within the EU.¹⁵

Accordingly, Swedish¹⁶ and French¹⁷ courts have annulled adverse ISDS Awards by implementing the CJEU's ban on intra-EU arbitration.

Even more remarkable is the German Supreme Court's decision in the *RWE/UNIPER*¹⁸ case deciding that the ICSID ECT proceedings against the Netherlands are "inadmissible" on the basis of the CJEU's jurisprudence, which eventually resulted in the discontinuance of that case.

One outlier in this trend is a decision by the Amsterdam Court of Appeal, which rejected Poland's bid for an interim order that would restrain Dutch company *LC Corp* from pursuing arbitration under the Netherlands-Poland BIT based on the UNCITRAL Arbitration Rules. Although, the BIT was already terminated in 2019, LC Corp is relying on the 15 years sunset clause contained in the BIT. The main reason for rejecting Poland's objection was the fact that the seat of the arbitration is London and thus outside the EU.¹⁹ Hence, the CJEU's jurisprudence on the intra-EU arbitration ban does not – in principle – affect the continuation of the arbitral proceedings in the UK, given that the UK is not bound anymore by EU law.

¹⁵ See already my blogpost in 2022: Nikos Lavranos, The decentralised implementation of the ISDS ban by EU domestic courts, Practical Law Arbitration Blog, 26 September 2022, <http://arbitrationblog.practicallaw.com/the-decentralised-implementation-of-the-isds-ban-by-eu-domestic-courts/>.

¹⁶ See: IA Reporter, Swedish courts set aside another ECT award against Spain, 8 July 2024, <https://www.iareporter.com/articles/swedish-courts-set-aside-another-ect-award-against-spain/>.

¹⁷ See: IA Reporter, [Updated] Paris court sets aside gambling award against Poland, finding that the tribunal lacked jurisdiction due to the intra-EU nature of the dispute, 20 April 2022, <https://www.iareporter.com/articles/paris-court-sets-aside-gambling-award-against-poland-finding-that-the-tribunal-lacked-jurisdiction-due-to-the-intra-eu-nature-of-the-dispute/>.

¹⁸ See for analysis: Eva-Maria Wettstein & Lisa Schöttmer, German Federal Supreme Court Declares intra-EU Investor-State ICSID Arbitration Inadmissible', (2024), Vol. 9, *European Investment Law and Arbitration Review*, Issue 1, pp. 151-160, <https://kluwerlawonline.com/journalarticle/European+Investment+Law+and+Arbitration+Review/9.1/EILA2024030>.

¹⁹ See: GAR, Dutch appeal court refuses to stay intra-EU BIT claim, 4 September 2023, <https://globalarbitrationreview.com/article/dutch-appeal-court-refuses-stay-intra-eu-bit-claim>.

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Successful of enforcement of Awards outside the EU

In stark contrast to the situation within the EU, the enforcement of intra-EU awards outside the EU is significantly more successful.

Indeed, as we already noted in our 2023 Compliance Report, Australia and the UK have emerged as preferred investor-friendly jurisdictions for the successful recognition and enforcement of intra-EU BITs/ECT Awards – next to the US, which has traditionally been a preferred jurisdiction.²⁰

Based on recently rendered judgments by Swiss courts, Switzerland can be added to this list as well.

Switzerland

In June 2024, the Swiss Supreme Court dismissed the Czech Republic's attempt to set aside an adverse final intra-EU ECT Award in the *Natland Investment Group et al. v. Czech Republic* case.²¹

In April 2024, the Swiss Supreme Court in its judgment in the *EDF v. Spain* case strongly pushed back against the CJEU's line of argument that consent to intra-EU ECT arbitration was *ab initio* invalid and therefore making the recognition and enforcement of adverse Awards impossible.²²

Instead, the Swiss Supreme Court – correctly – adopted a public international (treaty) law perspective and found that EU Member States cannot rely on the CJEU's intra-EU arbitration ban to escape their legal obligations under the ECT and ICSID. The Swiss Supreme Court also clearly stated that it is not bound by EU law or the CJEU's jurisprudence.²³

²⁰ This is also confirmed in the ICSID Compliance Report (2024), Annex A (n 8); see generally: L. Rees-Evans, English High Court Takes Pro-enforcement Stance in Intra-EU ECT Award Against Spain, Kluwer Arbitration blog, 12 August 2023, <https://arbitrationblog.kluwerarbitration.com/2023/08/12/english-high-court-takes-pro-enforcement-stance-in-intra-eu-ect-award-against-spain/>; Gibson Dunn, UK and Australian Courts confirm no sovereign immunity from recognition of ICSID Arbitral Awards against sovereign States, 31 May 2023, <https://www.gibsondunn.com/wp-content/uploads/2023/05/uk-and-australian-courts-confirm-no-sovereign-immunity-from-recognition-of-icsid-arbitral-awards-against-sovereign-states.pdf>.

²¹ See: IA Reporter, Swiss Federal Tribunal upholds intra-EU renewable energy award against Czech Republic, 17 July 2024, <https://www.iareporter.com/articles/swiss-federal-tribunal-upholds-intra-eu-renewable-energy-award-against-czech-republic/>.

²² See e.g., Ch. Boog, Swiss Supreme Court Rejects CJEU's *Komstroy* Ruling, Jus Mundi Arbitration Review (2024) (1) <https://jusmundi.com/en/document/publication/en-swiss-supreme-court-rejects-cjeus-komstroy-ruling>.

²³ Ibid.

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US

In September 2024, the US District Court for the District of Columbia has enforced the (extra-EU) ICSID award in *JGC v. Kingdom of Spain*.²⁴ Judge Rudolph Contreras first declined Spain's request for a stay of the enforcement proceedings pending the outcome of (i) EU state aid proceedings, and (ii) an appeal before the DC Circuit in *NextEra v. Spain*, *9Ren v. Spain*, *AES and others ("The PV Investors") v. Spain*. He noted that the former was irrelevant to the enforcement action, while the latter had already resulted in a judgment in August 2024. Next, he ruled that the court had subject-matter jurisdiction, since the arbitration exception of the Federal Sovereign Immunities Act ("FSIA") applied.

In August 2024, intra-EU Award holders obtained a significant victory before the US Court of Appeals. In its *NEXTEra v. Spain* judgment, the US Court of Appeals ruled that Spain cannot hide behind the US Foreign Sovereign Immunities Act (FSIA) to escape its obligations under the ICSID Convention.²⁵ Accordingly, the US Court of Appeals ruled that US courts have jurisdiction to enforce intra-EU ECT awards.

Australia

In April 2023, the High Court of Australia in *Spain v. Infrastructure Services Luxembourg SÀRL*²⁶ held that Spain had waived its foreign State immunity in Australia by ratifying the ICSID Convention. Consequently, Spain lost its foreign State immunity. Accordingly, the High Court confirmed that courts were able to 'recognise' and 'enforce', but not 'execute', the EUR 101 million ICSID award against Spain.²⁷

On 29 August 2024, the Federal Court of Australia has denied Spain's application for leave to appeal an order that directed Spain to post a security for costs (of merely AUD 56,000) to seek reconsideration of examination orders granted in view of executing the *Antin v. Spain* intra-EU ECT award.²⁸

²⁴ IA Reporter, US court enforces JGC v. Spain ECT award, finding that ICSID award is entitled to full faith and credit, and doctrines of act of state, forum non conveniens and comity do not apply, 27 September 2024, <https://www.iareporter.com/articles/us-court-enforces-jgc-v-spain-ect-award-finding-that-icsid-award-is-entitled-to-full-faith-and-credit-and-doctrines-of-act-of-state-forum-non-conveniens-and-comity-do-not-apply/>.

²⁵ This was also argued by the group of international legal scholars who submitted an *amicus curiae* brief to the US Court of Appeals in this case. The current author belongs to this group of international legal scholars. The *amicus curiae* brief is available at:

<https://www.qmul.ac.uk/ccls/media/law/docs/news/Micula-Amicus-Brief-IS.pdf>.

²⁶ *Kingdom of Spain v Infrastructure Services Luxembourg S.a.r.l.* [2023] HCA 11 (12 April 2023) <https://austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/11.html>.

²⁷ Ibid.

²⁸ IA Reporter, Australian court orders Spain to pay security for costs in proceedings for enforcement of intra-EU award, 2 September 2024, <https://www.iareporter.com/articles/australian-court-orders-spain-to-pay-security-for-costs-in-proceedings-for-enforcement-of-intra-eu-award/>.

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Previously, in 2020, the Federal Court of Australia had enforced the *Eiser Infrastructure Ltd v. Spain* Award of EUR 128 million.²⁹

UK

In October 2024, the UK Court of Appeal ruled that, as parties to the ICSID Convention, Spain and Zimbabwe had waived their sovereign immunities for the purpose of the recognition in the UK of ICSID awards. The unanimous bench confirmed that Spain and Zimbabwe cannot rely on sovereign immunity to escape their obligations under the ICSID Convention.³⁰

In August 2024, Aena, Spain's state-owned airport operator disclosed that its shares in London's Luton Airport have been seized by a US renewable energy group seeking to enforce its EUR 291 million ICSID award. Aena stated that on 11 July 2024 NextEra obtained interim charging orders over a 26% shareholding that Aena holds in London Luton Airport, as well as charging orders over land that forms part of the airport. Aena, which is majority-owned by Spain's public air traffic control authority Enaire, has a 51% stake in Luton's operating company.³¹

In May 2023, the UK High Court supported the conclusion reached by the Australian High Court in *Antin* case mentioned above.³²

The UK High Court also ruled that the *Antin v. Spain* Award holders are entitled to seize Spanish property in London in order to enforce their EUR 120 million ICSID ECT Award against Spain.³³

Similarly, in 2020, the UK Supreme Court enforced the USD 250 million intra-EU BIT *Micula v. Romania* Award.³⁴

²⁹ *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157 (24 February 2020),

<https://globalitigationnews.bakermckenzie.com/2020/04/23/australian-court-enforces-icsid-awards-against-spain/>.

³⁰ UK Court of Appeals, *Infrastructure Services Limited and another -v- Spain, and Border Timbers and another -v- Zimbabwe* [2024] EWCA Civ 1257, 22 October 2024, <https://www.judiciary.uk/judgments/infrastructure-services-luxembourg-s-a-r-l-and-another-v-the-kingdom-of-spain-and-border-timbers-ltd-and-another-v-republic-of-zimbabwe/>.

³¹ See: GAR, Award creditor targets Spanish shares in London airport, 5 August 2024,

<https://globalarbitrationreview.com/article/award-creditor-targets-spanish-shares-in-london-airport>.

³² IA Reporter, UK High Court enforces Antin v. Spain intra-EU award, emphasizing the limited scope for review of ICSID awards and denying the state's attempt to rely on its sovereign immunities, 25 May 2023,

<https://www.iareporter.com/articles/uk-high-court-enforces-antin-v-spain-intra-eu-award-emphasizing-the-limited-scope-for-review-of-icsid-awards-and-denying-the-states-attempt-to-rely-on-its-sovereign-immunities/>.

³³ GAR, Award creditors seize Spanish-owned property in London, (4 August 2023),

<https://globalarbitrationreview.com/article/award-creditors-seize-spanish-owned-property-in-london>;

Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain, ICSID Case No. ARB/13/31, 15 June 2018, <https://www.italaw.com/sites/default/files/case-documents/italaw9875.pdf>.

³⁴ S. Collins & T. Tyrrell, UK Supreme Court paves the way for enforcement of the *Micula* award, Practical Law Arbitration Blog, 3 March 2020, <http://arbitrationblog.practicallaw.com/uk-supreme-court-paves-the-way-for-enforcement-of-the-micula-award/>.

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From the above, it becomes clear that Award holders are able to successfully enforce their intra-EU Awards in various jurisdictions outside the EU, in particular, Australia, UK, US and Switzerland, whereas enforcement within the EU appears to be effectively impossible now.

This makes the EU an investment arbitration-unfriendly space, which – inevitably – will have a negative impact on future foreign investments into the EU.

EU's withdrawal from the ECT

- The most significant development of the past 12 months has been the final act of the ECT meltdown by the EU's decision to formally withdraw from the ECT.³⁵
- As we mentioned in our 2023 Compliance Report, the so-called “modernization process” of the ECT ended in a complete failure.³⁶
- Meanwhile, several EU Member States have already formally withdrawn from the ECT, i.e., Italy (which withdrew already in 2016), France, Germany and Poland. In addition, most recently Ireland, Luxembourg, Slovenia, Portugal, the Netherlands, Denmark and Spain have publicly announced and/or notified their intention to withdraw from the treaty. Also, the UK, recently decided to denounce the ECT.³⁷
- While at first sight it might seem that with the common withdrawal of the EU and its Member States, the numerous ECT disputes and Awards would simply disappear, the truth is that this move will leave a legal and political mess behind.
- **First**, the 20 years sunset clause of the ECT continues to apply. This means that all investments made until the withdrawal takes effect will be protected for another 20 years and will allow investors to bring ISDS disputes against the EU and its Member States. Thus, the withdrawal from the ECT will not put an immediate end to the high number of ECT arbitrations.
- In fact, new ECT cases have been initiated such as the one against the EU and several EU Member States.³⁸

³⁵ IA Reporter, [Updated] EU notifies withdrawal from the ECT, following a declaration and agreement by the EU and its member states clarifying that ECT investor-state arbitration provisions do not apply in intra-EU context, 27 June 2024, <https://www.iareporter.com/articles/eu-member-states-sign-declaration-and-initial-agreement-clarifying-that-ect-investor-state-arbitration-provisions-do-not-apply-in-intra-eu-context/>.

³⁶ N. Lavranos, Comment: Leaving the Energy Charter Treaty also means leaving a legal mess behind, Borderlex, 10 July 2023, <https://borderlex.net/2023/07/10/comment-leaving-the-energy-charter-treat-also-means-leaving-a-legal-mess-behind/>; N. Lavranos et al, The meltdown of the ECT: How it was ruined by the EU and its Member States, *SchiedsVZ* 2023, pp. 38 et seq, available at: <https://www.nl-investmentconsulting.com/wp-content/uploads/2023/10/Lavranos-Lath-Varma-Aufsatz-Heft-1-2023.pdf>.

³⁷ IA Reporter, Ireland to leave the Energy Charter Treaty, 6 June 2024, <https://www.iareporter.com/articles/ireland-to-leave-the-energy-charter-treaty/>.

³⁸ See e.g., *Klesch Group v. the EU, Germany and Denmark*; *MOL Hungarian Oil and Gas Public Limited Company v. Republic of Croatia* (ICSID Case No. ARB/24/19); *Suomi Power Networks TopCo B.V., Supernova II Bidco BV and AMF Tjänstepension AB v. Republic of Finland* (ICSID Case No. ARB/24/37).

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- In spite of this clear legal situation, the EU and its Member States (with the notable exception of Hungary) have signed a “*Declaration on the Legal Consequences of the Komstroy judgment and Common Understanding on the Non-Applicability of Article 26 of the ECT as a Basis for Intra-EU Arbitration Proceedings*”, with which they are attempting to disapply the ECT, including the 20 years sunset clause.³⁹
- **Second**, the already rendered ECT Awards still need to be paid as the EU Member States are required to fulfil their international treaty obligations arising out of the ECT and the ICSID and New York Conventions.
- **Third**, in contrast to public perceptions, the renewable energy sector has been the most affected economic sector. Therefore, investors in the renewable energy sector have relied most often on the ECT in order to obtain – rather successfully – compensation for unfair treatment by EU Member States, in particular by Spain.
- **Finally**, by creating this legal uncertainty, the EU and its Member States will not be able to attract the necessary investments in the renewable energy sector in order to meet the Paris Agreement and the EU Green Deal.

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 (52)** and received the **highest number of adverse ECT Awards worldwide**.
- The majority of ISDS Awards initiated against other EU Member States such as Italy, Romania, Czech Republic and Slovakia also concern renewable energy disputes.
- It is also noteworthy that Awards resulting from disputes in the **traditional fossil fuel (or “unclean”) energy sector are settled significantly more often** than renewable energy Awards.
- This fact debunks the often repeated but untrue claim that the ECT protects unclean energy.
- Indeed, the destruction of the ECT by the EU and its Member States casts serious doubts on the EU’s stated goals of leading the global energy transition and achieving the Paris Agreement and EU Green Deal targets.
- The obvious reason behind the common withdrawal of the EU and its Member States from the ECT is to avoid paying the dozens of adverse ECT Awards.

³⁹ IA Reporter, [Updated] Analysis: EU publishes text of inter-se Declaration on non-applicability of ECT arbitration clause to intra-EU disputes, 1 July 2024, <https://www.iareporter.com/articles/analysis-eu-publishes-text-of-inter-se-declaration-on-non-applicability-of-ect-arbitration-clause-to-intra-eu-disputes/>.

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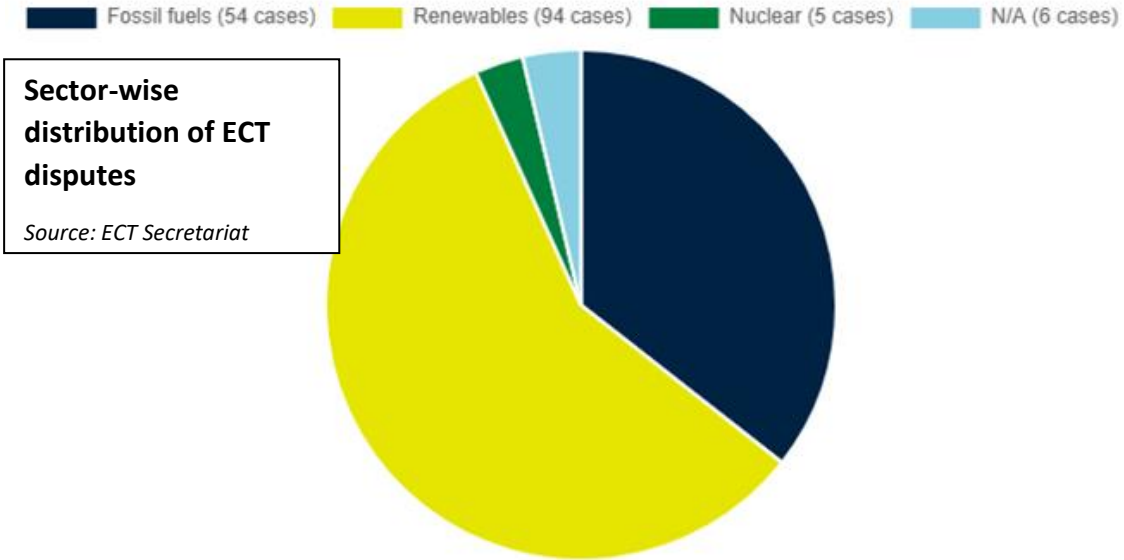
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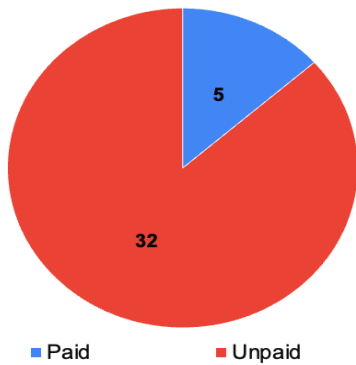


- Thus, at the end of the day, renewable energy investors will have no legal redress within the EU legal system any longer and Award creditors are potentially deprived of their right to compensation – at least within the EU.
- In fact, the recent judgment of the German Federal Supreme Court deprived claimants of their right to compensation when it ruled that EU Member States are allowed to use “upstream national legal protection” to effectively prevent intra-EU ECT ICSID proceedings due to a lack of an effective arbitration agreement.⁴⁰

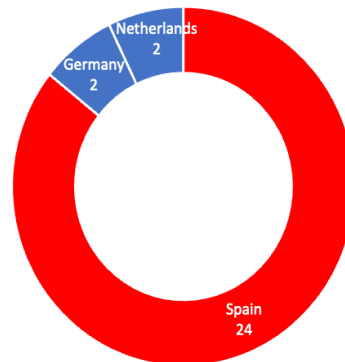
⁴⁰ See: GAR, German Courts offer protection to States facing intra-EU ICSID claims, 27 July 2023, <https://globalarbitrationreview.com/article/german-courts-offer-protection-states-facing-intra-eu-icsid-claims>.



ECT cases- Compliance Status Regarding the States Covered in this Report



Unclean energy ECT awards get settled while clean energy ECT awards are not paid [Germany and Netherlands have settled the majority of their unclean energy cases, while Spain does not pay clean energy awards.]



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Compliant States that paid adverse ISDS Awards

Whereas many EU Member States eventually pay or settle adverse ISDS Awards, 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 adverse ISDS Awards.

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

- Russia paid the *Sedelmeyer* Award, although reportedly not all accrued interest rates.⁴¹
- 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.⁴²
- Venezuela settled its disputes with *ENI* by reportedly paying USD 700 million⁴³, USD 650 million to *Holcim*⁴⁴ and USD 600 million to *CEMEX*⁴⁵.
- Bolivia paid USD 357 million to *Pan American Energy* to settle that dispute.⁴⁶
- Belize settled its dispute with *Dunkeld* by paying in total USD 129.3 million.⁴⁷
- Egypt paid USD 99.5 million of the USD 115 million *Bahgat* Award by way of a settlement.⁴⁸
- Kyrgyz Republic recently settled the *Centerra* Award, partially by cash payment and offering of company shares.⁴⁹

⁴¹ E. Gaillard & I. Mitrev Penushliski, State Compliance with Investment Awards, *ICSID Review - Foreign Investment Law Journal*, Vol. 35, Issue 3, Fall 2020, pp. 540–594.

⁴² Gaillard (op cit); LEXOLOGY, 26 February 2019, <https://www.lexology.com/library/detail.aspx?g=91e9c821-364c-4b70-a1f1-20f4c7b4f240>.

⁴³ LAW 360, Venezuela Reaches \$700M Settlement With Eni, 19 February 2008, <https://www.law360.com/articles/47552>.

⁴⁴ Holcim Press release, HOLCIM RECEIVES FINAL COMPENSATION INSTALLMENT FOR NATIONALIZATION OF ITS OPERATIONS IN VENEZUELA, 1 December 2014, <https://www.holcim.com/media/media-releases/holcim-receives-final-compensation-installment-nationalization-its-operations-venezuela>.

⁴⁵ REUTERS, Update 4 - Venezuela to pay \$600 mln compensation to Cemex, 1 December 2011, <https://www.reuters.com/article/venezuela-mexico-cemex-idINN1E7B00FX20111201>.

⁴⁶ Compass Lexecon's Client Receives the Highest Settlement Ever Paid by Bolivia, 17 December 2014, <https://www.compasslexecon.com/cases/compass-lexecon-client-receives-the-highest-settlement-ever-paid-by-bolivia/>.

⁴⁷ Amandala news, GOB pays Ashcroft US\$67.3 mil, 19 October 2016, <https://amandala.com.bz/news/gob-pays-ashcroft-us67-3-mil/>.

⁴⁸ 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/>.

⁴⁹ IA Reporter, 4 April 2022, <https://www.iareporter.com/articles/gold-miner-announces-settlement-of-arbitration-dispute-with-kyrgyzstan/>.

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- India settled the USD 1.2 billion *Cairn* dispute.⁵⁰
- Pakistan settled the USD 6 billion *Tethyan Copper* dispute.⁵¹
- Tanzania very recently settled the *Nachingwea and Ntaka Nickel* dispute by paying USD 90 million.⁵²
- Zimbabwe eventually paid the *Von Pezold and Funnekotter* Awards by way of settlement, albeit with a substantial reduction.⁵³

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:

- Germany settled the ECT *Vattenfall* dispute by paying USD 1.5 billion.⁵⁴
- 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 paying.⁵⁵
- Hungary reportedly complied with the *Sodexo* and *Edenred* awards by paying them.⁵⁶
- Croatia has settled investment treaty disputes with six banks following the fallout from the Swiss central bank's decision to scrap exchange rate controls.⁵⁷
- In the early 2000s, Poland settled its dispute with *Achmea* by paying in total USD 4 billion, partially in shares and in cash.⁵⁸

Despite these examples, this 2024 Compliance Report confirms again the general trend, namely, the refusal of EU Member States to pay adverse intra-EU BITs/ECT Awards by systematically challenging them or claiming that EU law and/or EU institutions 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

⁵⁰ GAR, 24 February 2022, <https://globalarbitrationreview.com/india-makes-billion-dollar-payout-end-tax-dispute>.

⁵¹ 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/>.

⁵² IA Reporter, Mining company announces settlement providing for payment of major part of ICSID award against Tanzania, 29 July 2024, <https://www.iareporter.com/articles/mining-company-announces-settlement-providing-for-payment-of-major-part-of-icsid-award-against-tanzania/>.

⁵³ Gaillard (op cit); NRC (Dutch newspaper), Zimbabwe compensateert Nederlandse boeren, 7 October 2017.

⁵⁴ REUTERS, 5 March 2021, <https://www.reuters.com/article/us-germany-nuclear-settlement-idUSKBN2AX10T>

⁵⁵ N. Lavranos, 10 March 2022, <http://arbitrationblog.practicallaw.com/the-new-micula-judgment-and-the-overreach-of-the-ecj/>.

⁵⁶ 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/>.

⁵⁷ GAR, Croatia settles 'francogeddon' cases, 4 February 2021, <https://globalarbitrationreview.com/article/croatia-settles-francogeddon-cases>.

⁵⁸ WSJ, 5 October 2009, <https://www.wsj.com/articles/SB125469684214462753>.

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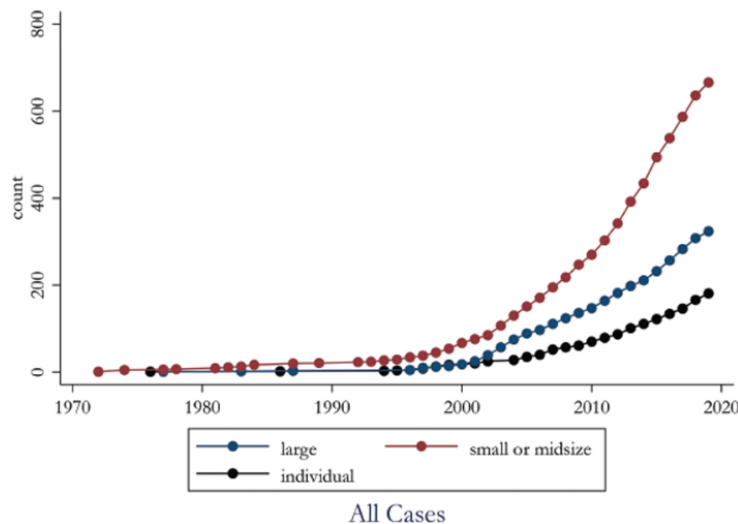
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these Awards and in this way actively assists the EU Member States in avoiding complying with their international legal obligations arising out of the IIAs, ICSID and New York Conventions.⁵⁹

SME's use ISDS most often

A recently published study by Prof. Rao found that – contrary to public perceptions – Small and Medium-sized Enterprises (SMEs) are using ISDS more often as compared to multinational companies.⁶⁰ (The author defines SMEs as companies with less than 250 employees).

Figure 1: Case Filing



This finding is significant because it highlights the importance of access to ISDS for all types of investors, in particular SMEs, which have heavily invested in renewable energy. Accordingly, the refusal of States to pay adverse ISDS Awards has a particularly huge negative impact on SMEs because their financial buffers are normally much smaller than those of large multinationals. Thus, non-payment of adverse ISDS Awards pushes SMEs into financial difficulties, thereby preventing them from investing.

⁵⁹ As was also the case in the proceedings before the US Court of Appeals in the *NEXTERA* case. See generally: A.G. Leventhal & 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; C. González-Bueno & L. 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/>.

⁶⁰ Weijia Rao, Large Corporations and Investor-State Arbitration, (2023) Vol. 65 (1) *Harvard International Law Journal*, pp. 134-184, https://journals.law.harvard.edu/ilj/wp-content/uploads/sites/84/HILJ-651-Rao_compressed-1.pdf.

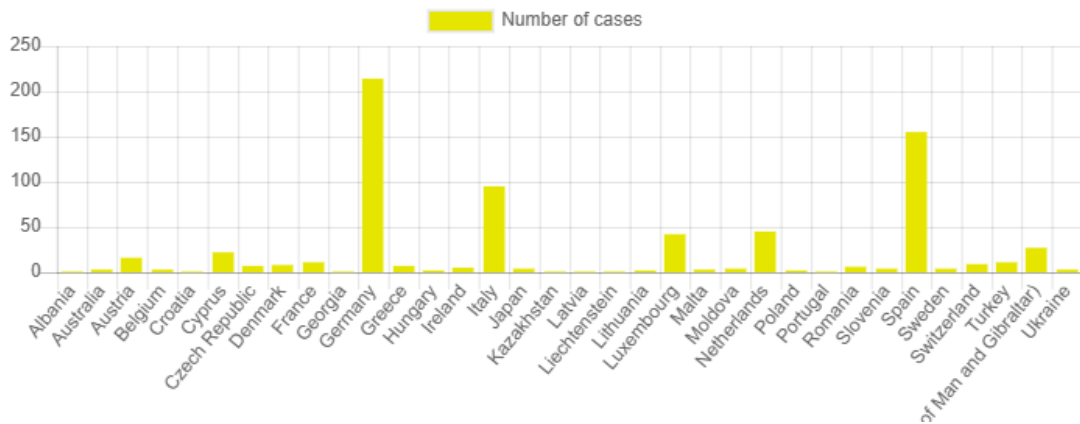


Most frequent home States of claimants

Our analysis (also confirmed by similar figures of UNCTAD and the ECT) highlights the fact that many EU Member States (including UK pre-Brexit) belong to the most frequent home States of ISDS arbitration claimants. In particular, the Netherlands, UK, Germany, Spain, Luxembourg, France, Cyprus and Italy stand out. This highlights the fact that European investors are often unfairly treated by host States around the world, and therefore frequently rely on the substantive and procedural rights contained in the IIAs, in particular in the ECT.

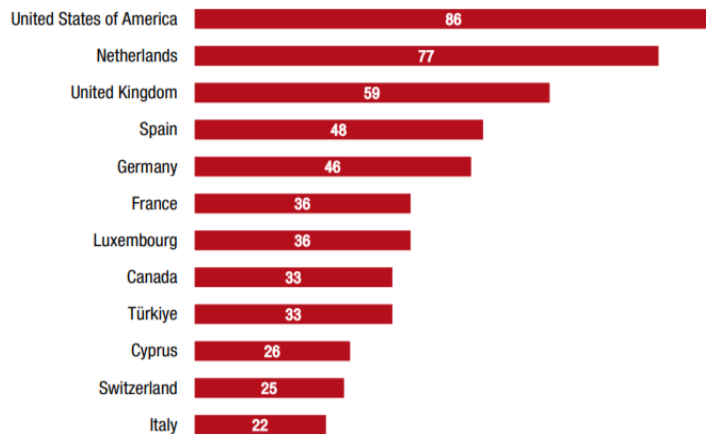
Therefore, it seems nonsensical that the very same home States of European investors are removing the possibility – *inter alia* for their own investors – to rely on those IIAs by terminating intra-EU BITs, by withdrawing from the ECT and by refusing to pay adverse ISDS Awards, thus failing to honour their international legal obligations.

Nationality of Claimants: 162 cases*



Source: ECT Secretariat

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



Source: UNCTAD, ISDS Navigator.

Annex

Country-specific information

Methodology

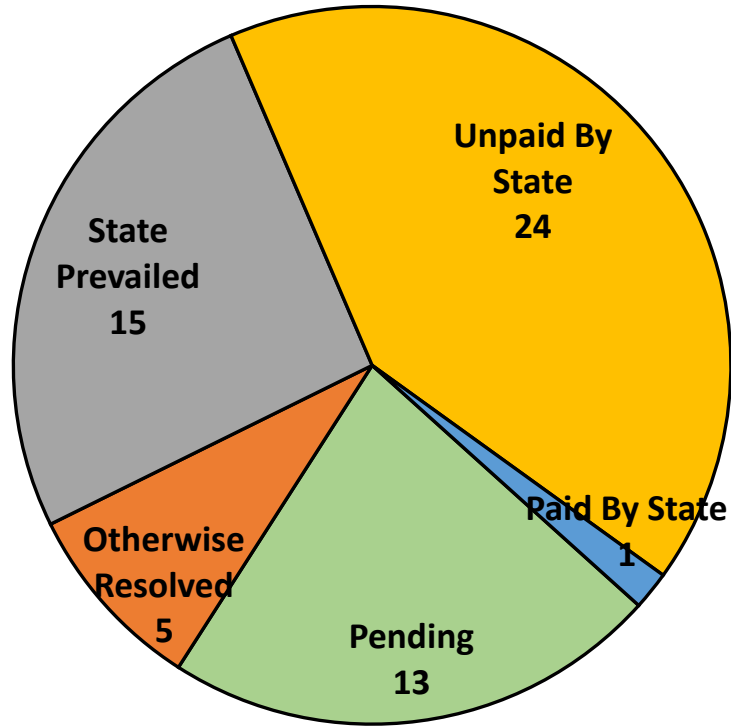
The data used for this Report has been retrieved from publicly available sources – both free and behind paywalls, such as the ICSID website, UNCTAD Investment Policy Hub, ITALAW, GAR, IA Reporter and Jus Mundi.

The following four broad classifications were used to classify the status of the cases:

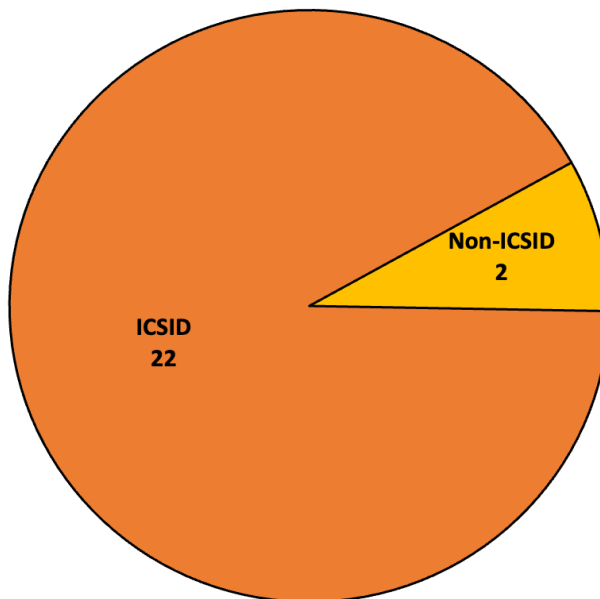
- **State prevailed** = Arbitral tribunal declined jurisdiction, dismissed the case or otherwise discontinued the arbitration proceedings.
- **Paid by State** = covers all the situations in which Respondents paid (in part or in full) adverse Awards.
- **Unpaid by State** = covers all the situations in which Respondents refuse to pay a final and binding adverse Award by initiating annulment, setting aside procedures or using other procedures which lead to delay of payment or even non-payment of the Award.
- **Pending** = covers the situations of arbitral procedures which are still pending at the international level as well as enforcement procedures at the domestic level.
- **Otherwise resolved** = covers settlement agreements and similar situations which have led to the termination of the arbitral procedure prior to rendering a final Award.

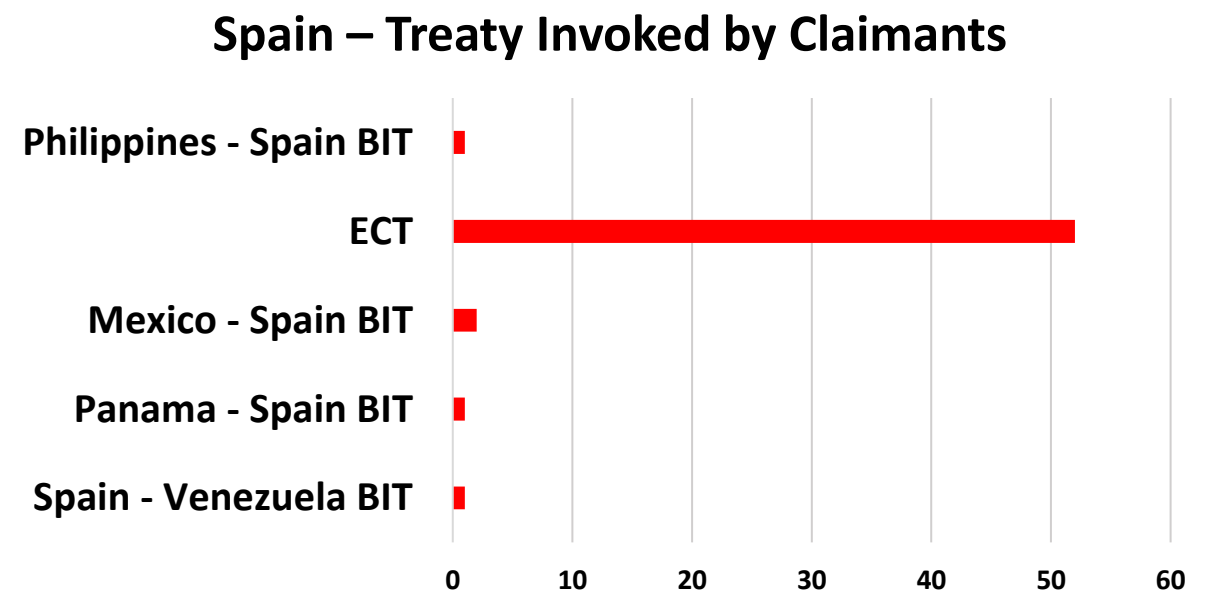
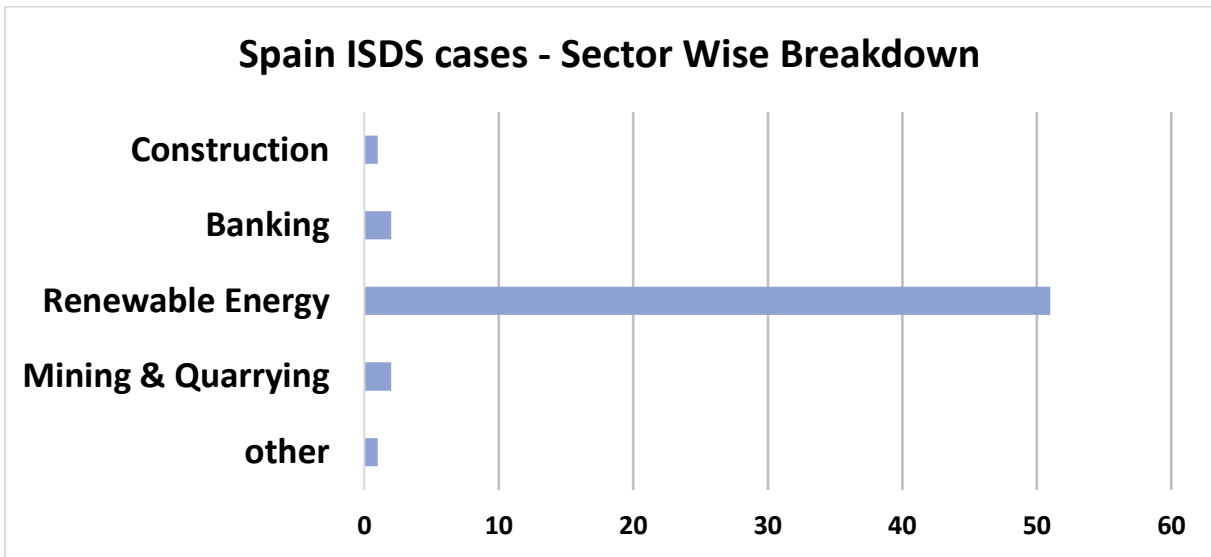
Spain

Spain- Status of ISDS Cases (Total - 58)



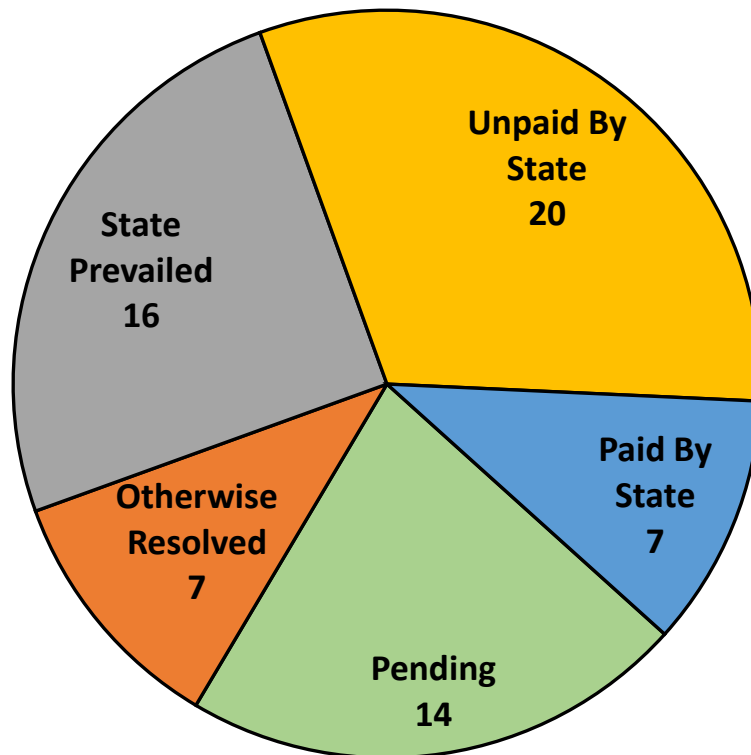
Spain Unpaid Cases - ICSID v. Non-ICSID



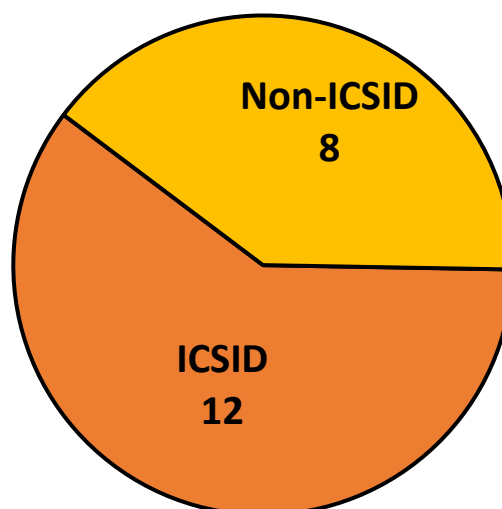


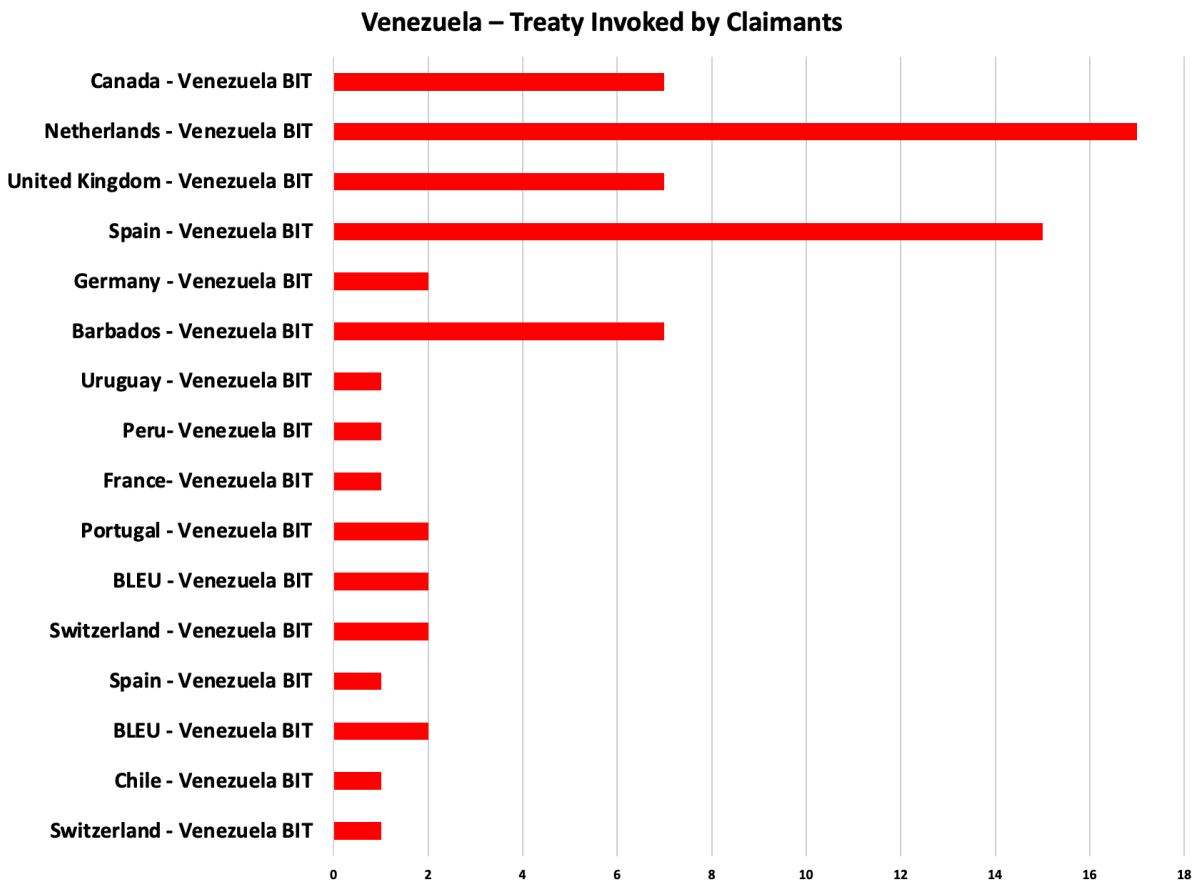
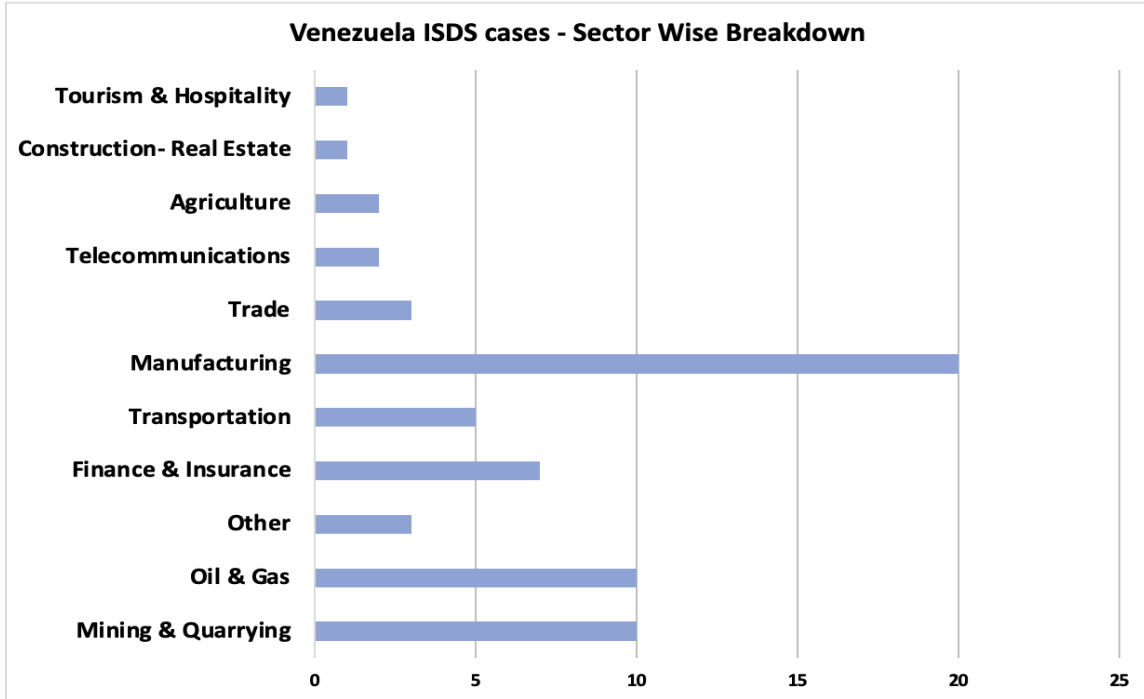
Venezuela

Venezuela- Status of ISDS Cases (Total - 64)

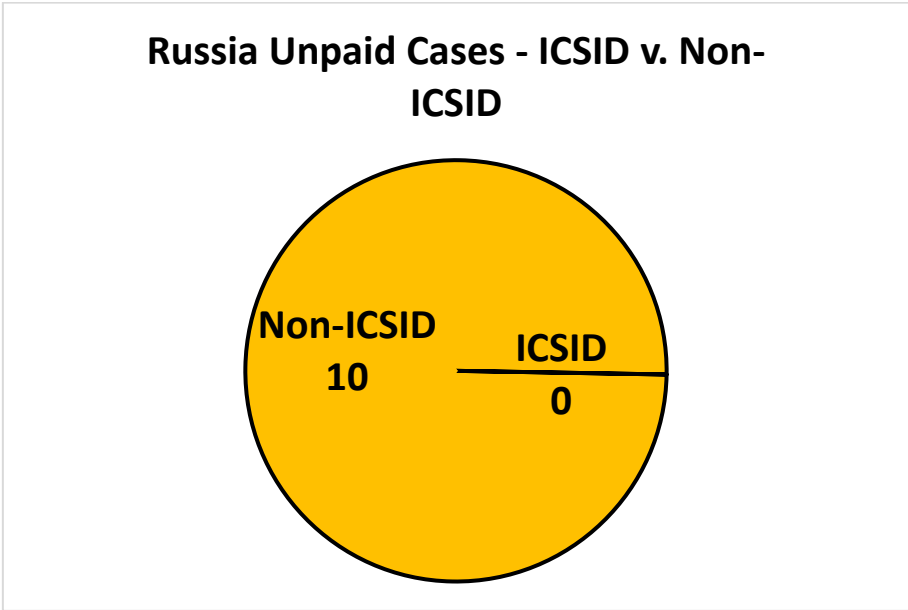
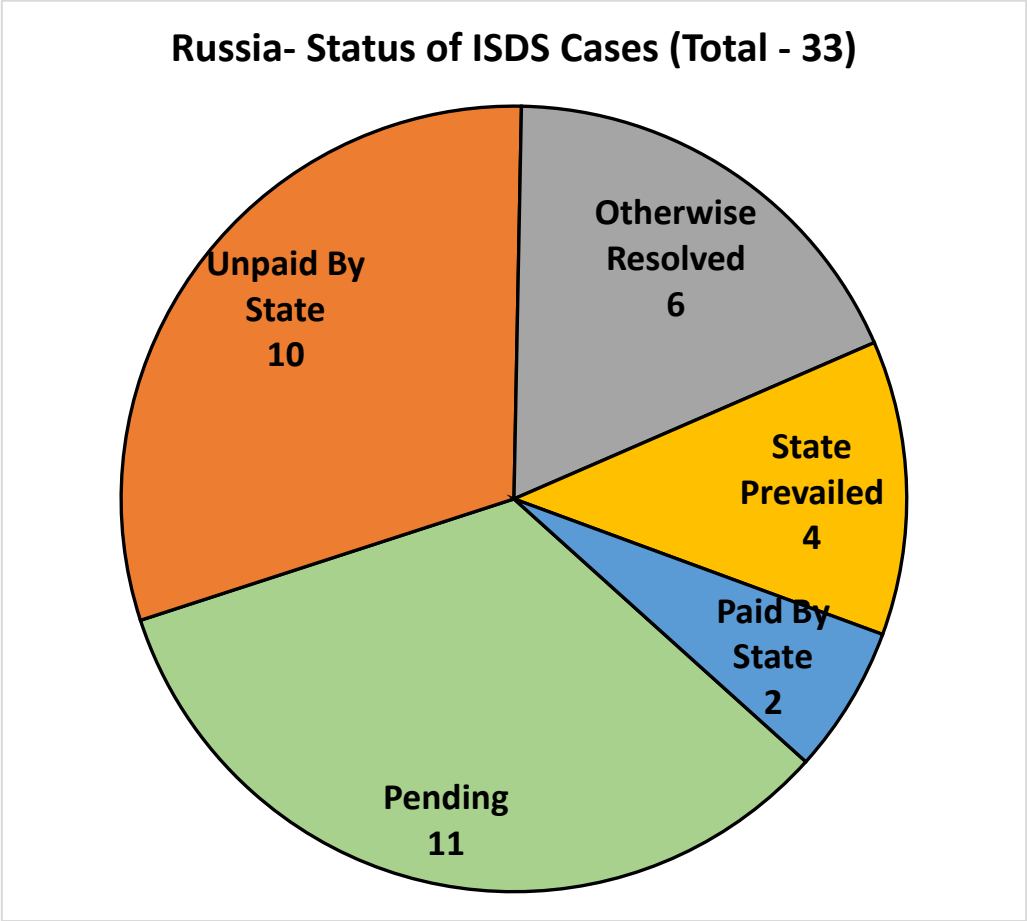


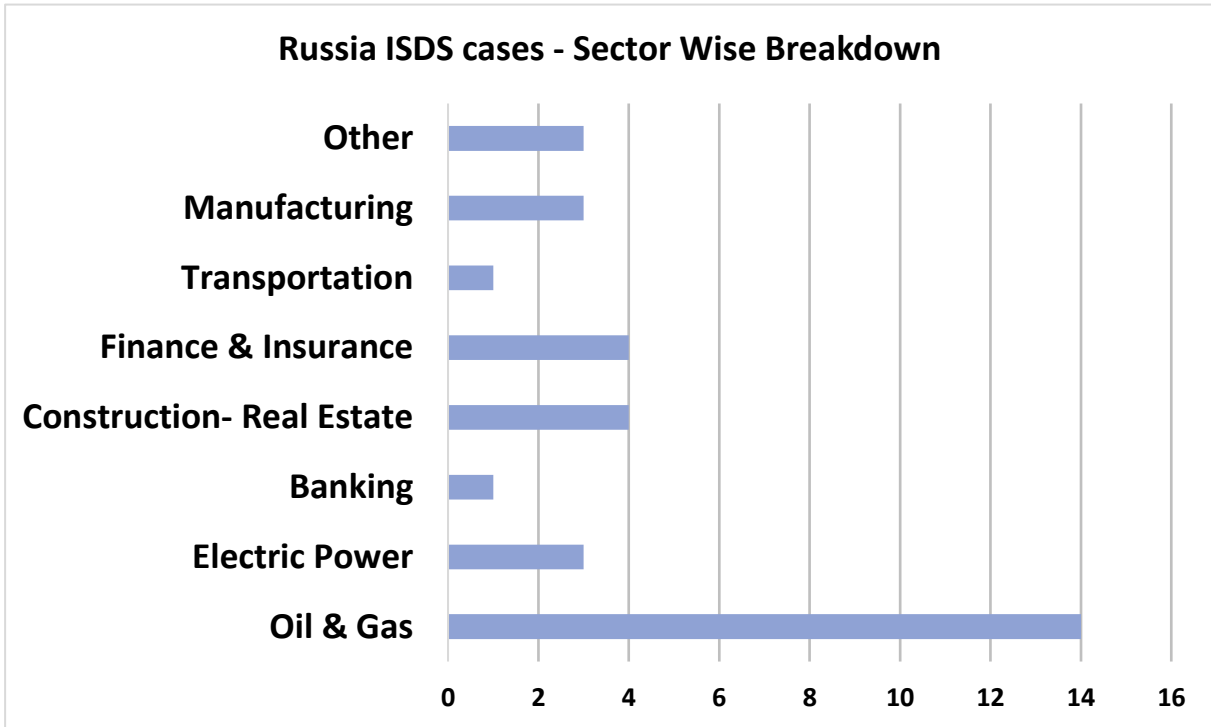
Venezuela Unpaid Cases - ICSID v. Non-ICSID



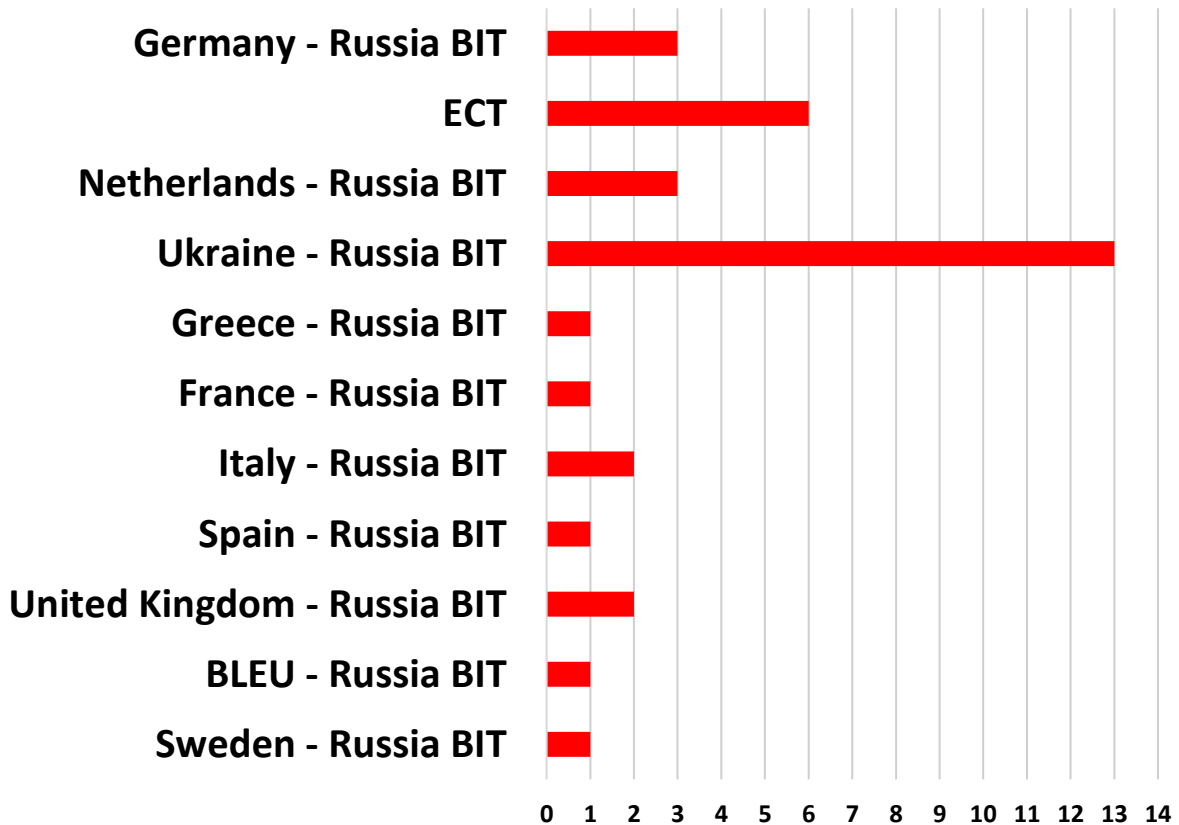


Russia

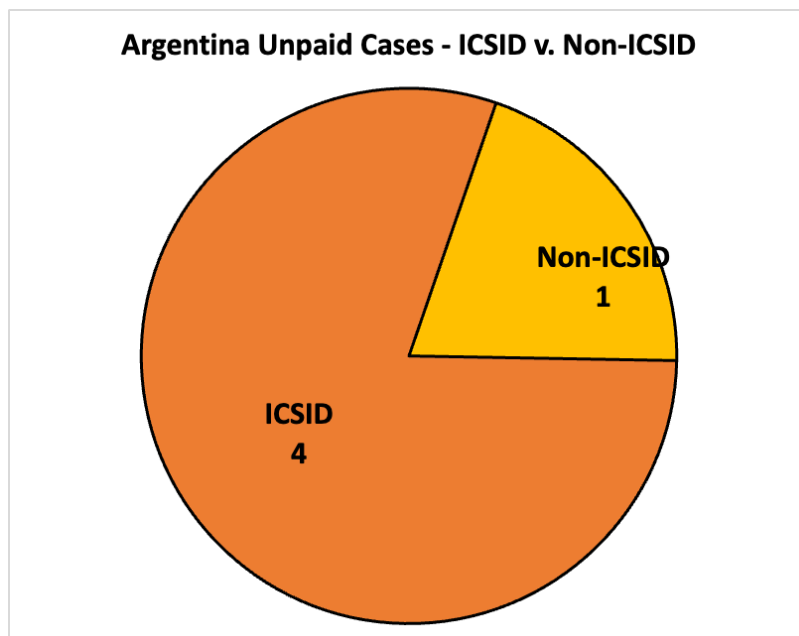
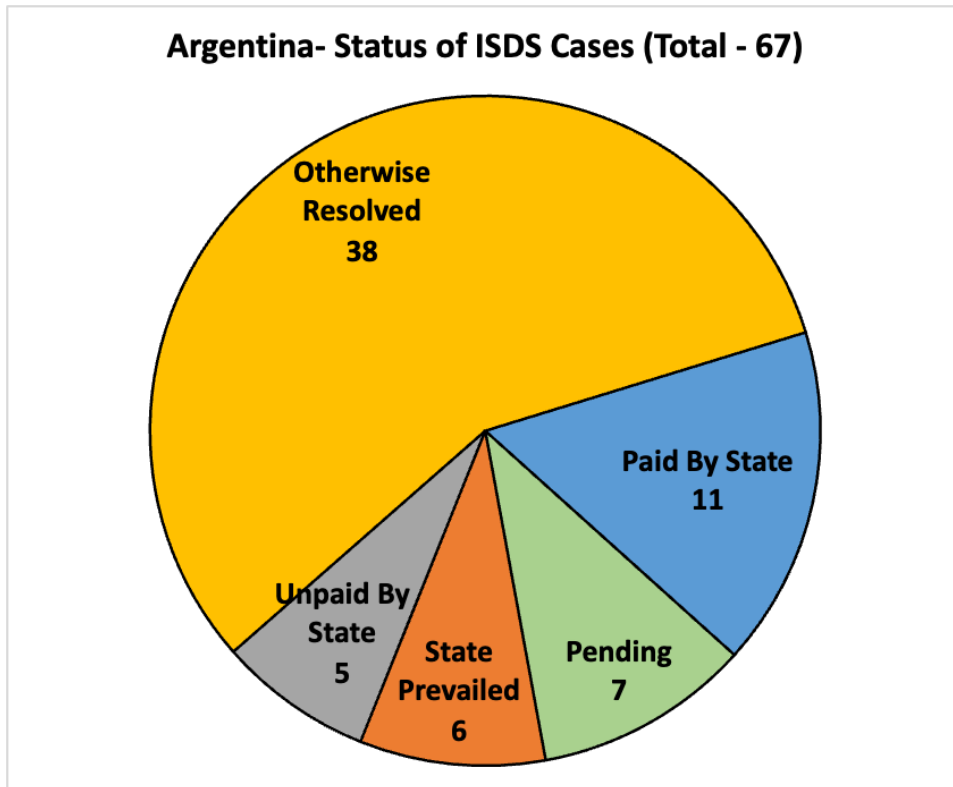


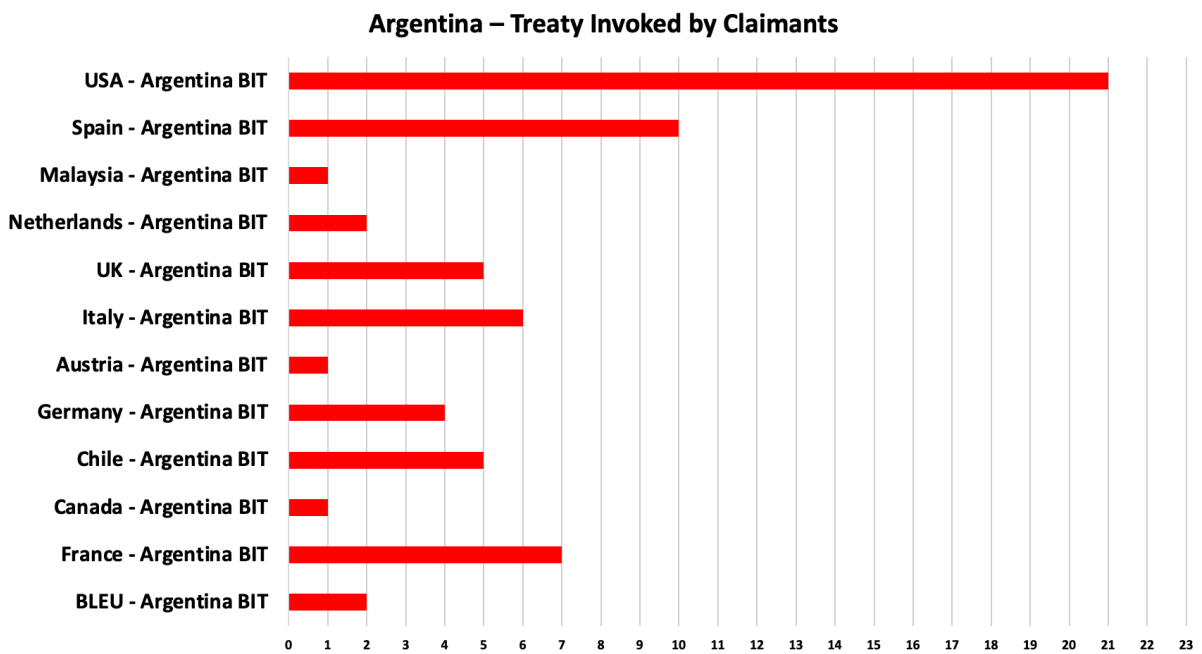
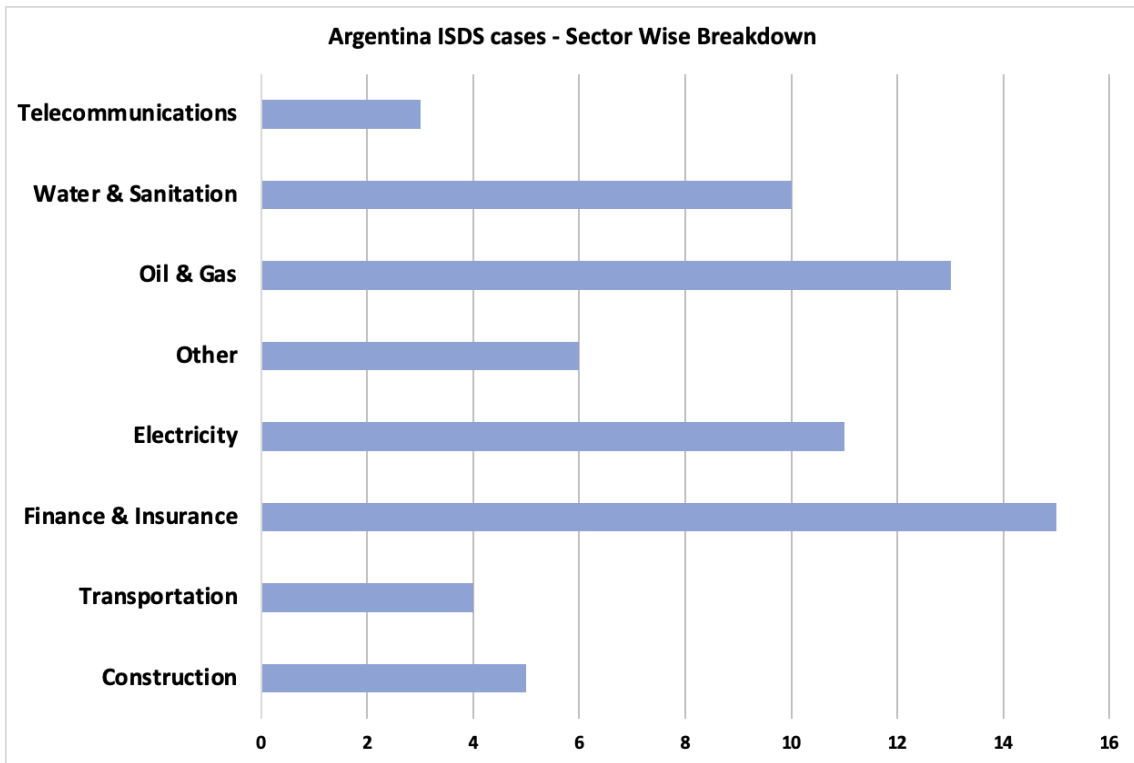


Russia – Treaty Invoked by Claimants



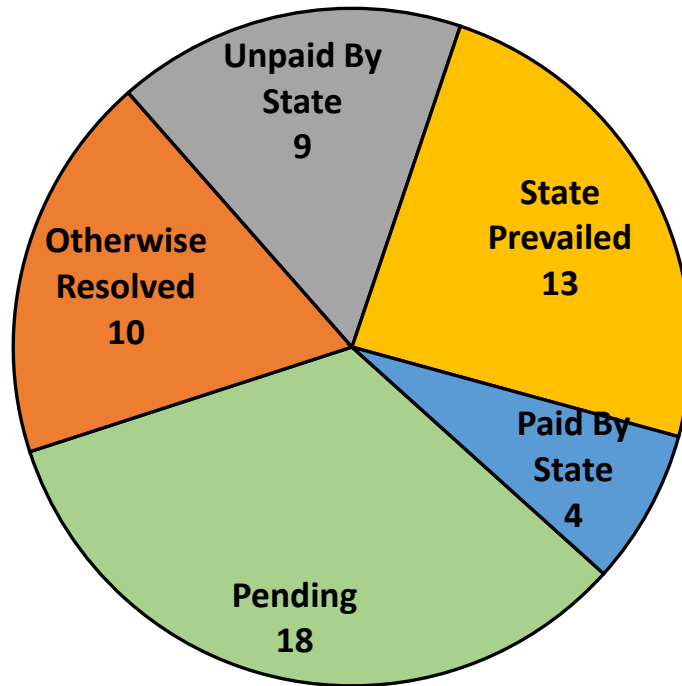
Argentina



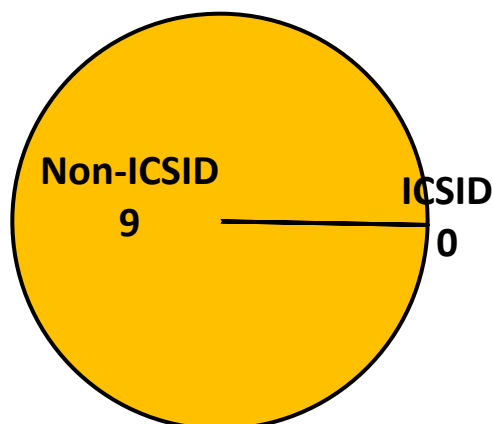


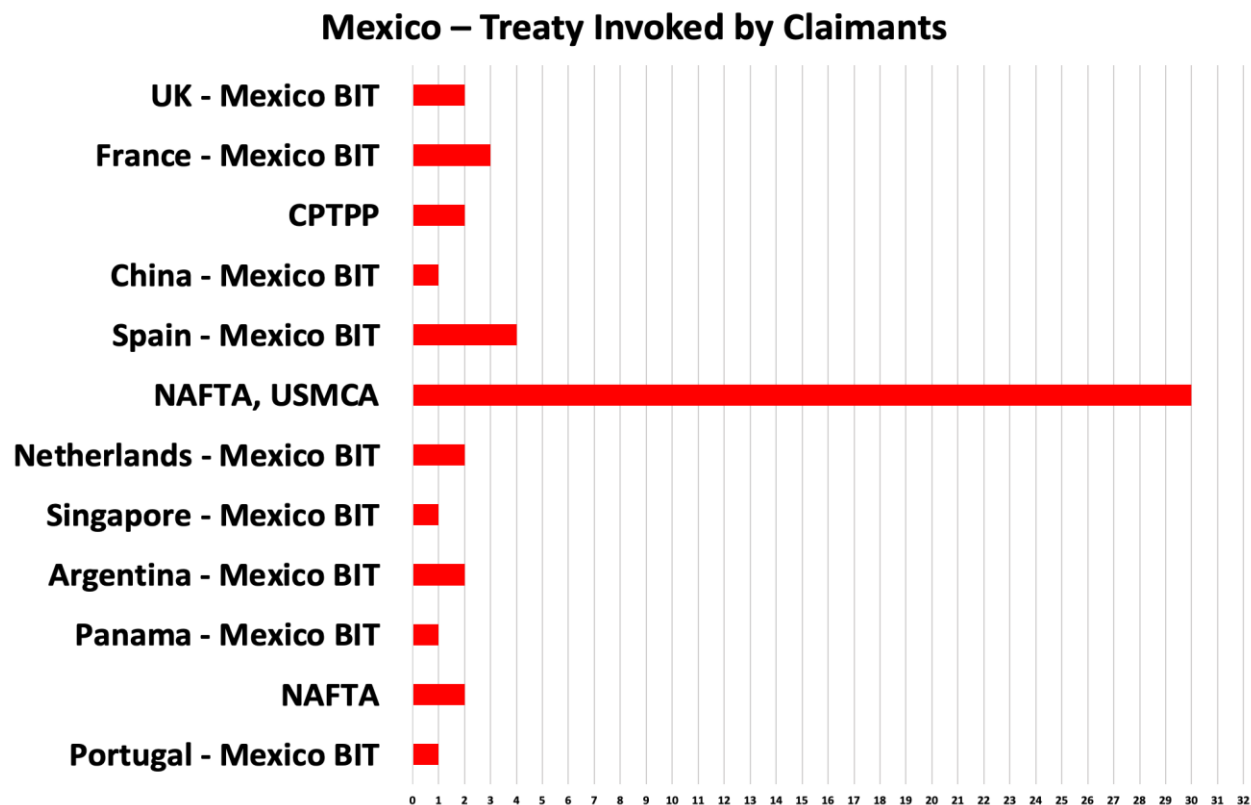
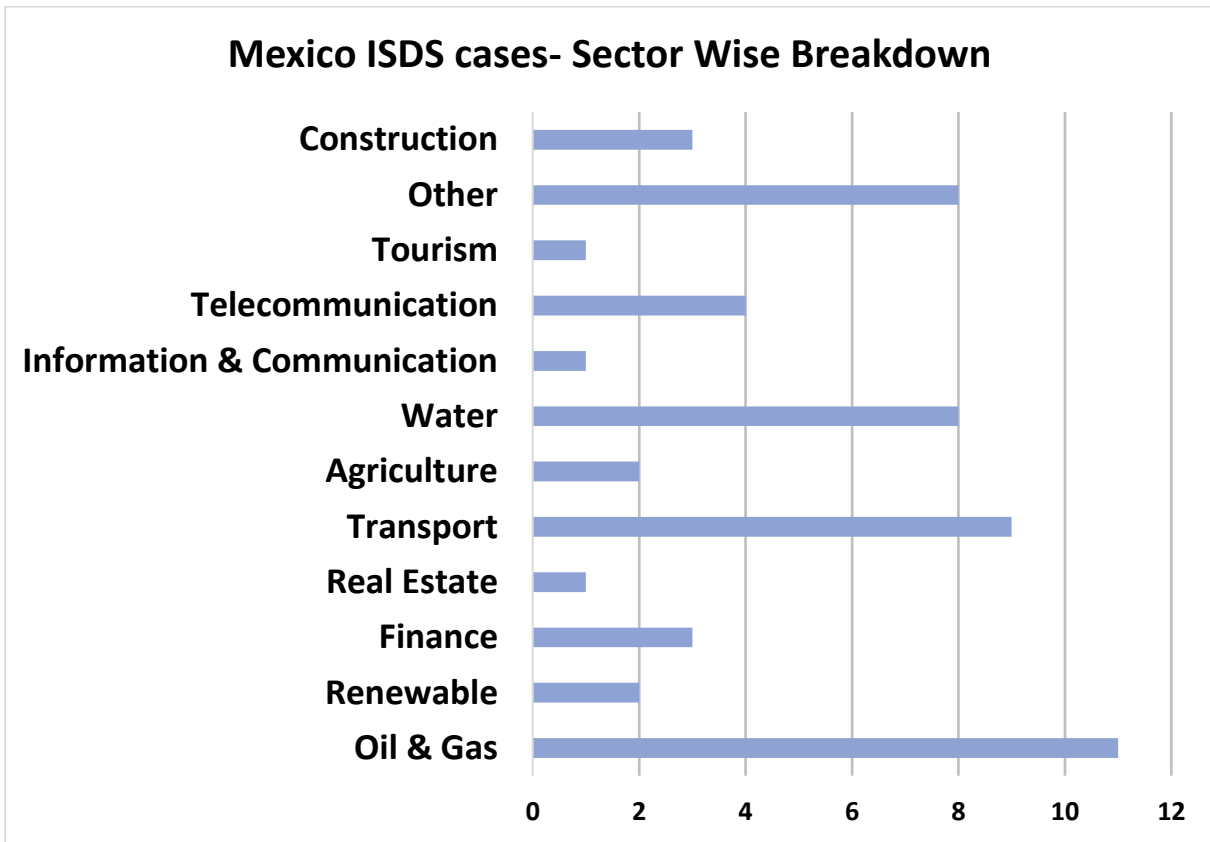
Mexico

Mexico- Status of ISDS Cases (Total - 54)



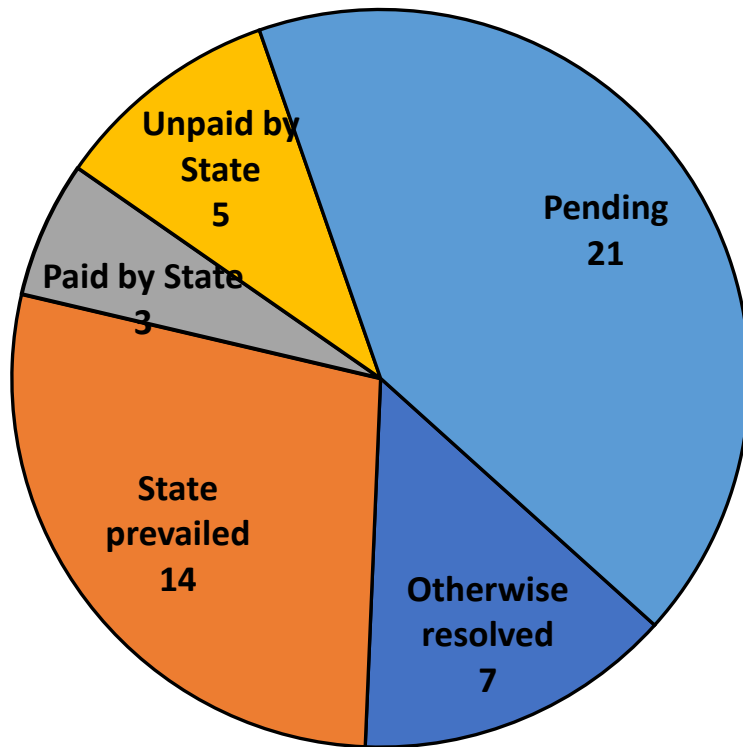
Mexico Unpaid Cases - ICSID v. Non-ICSID



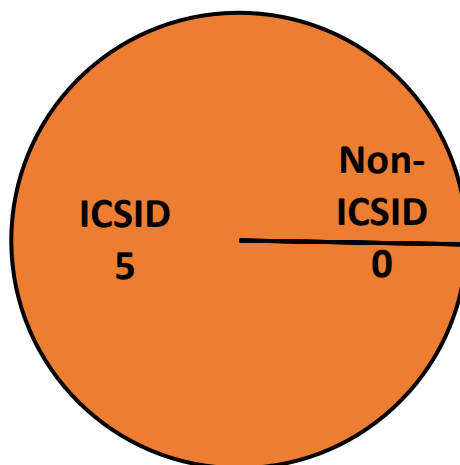


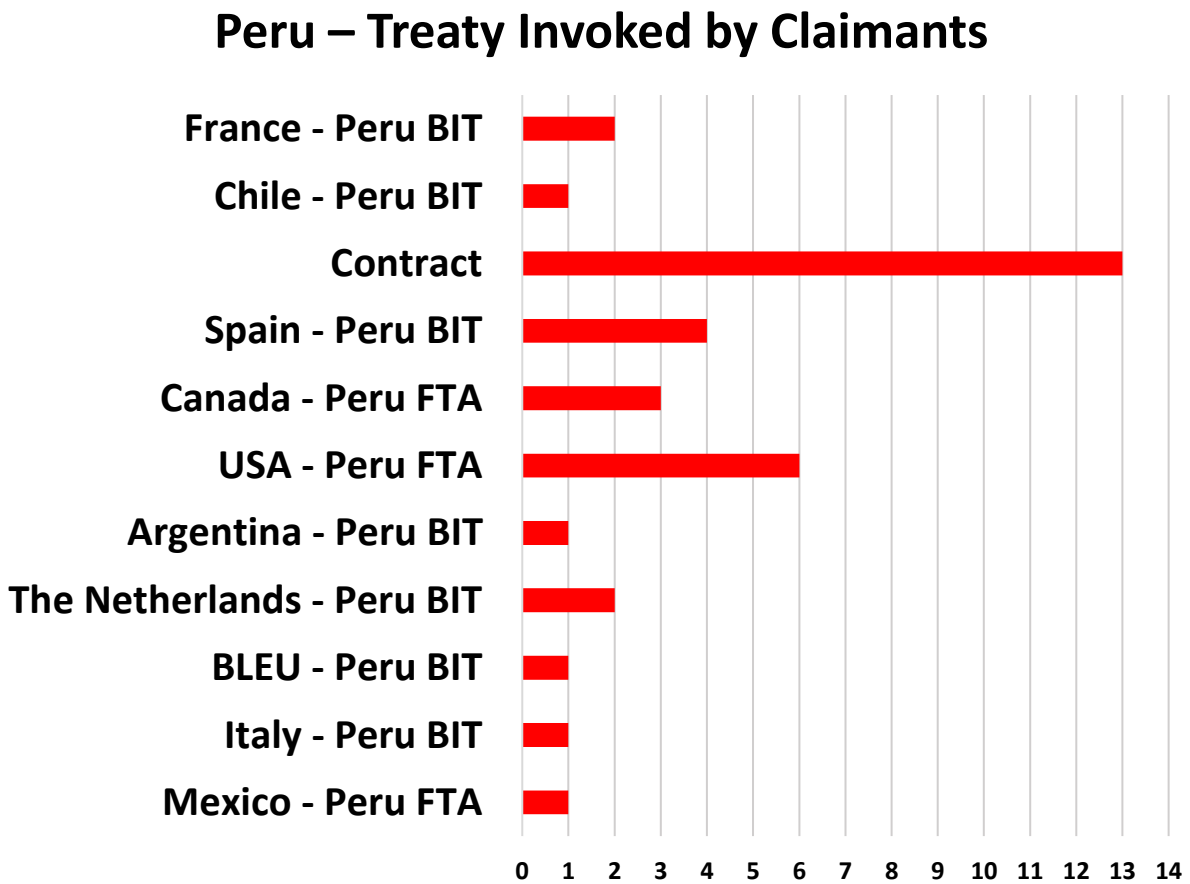
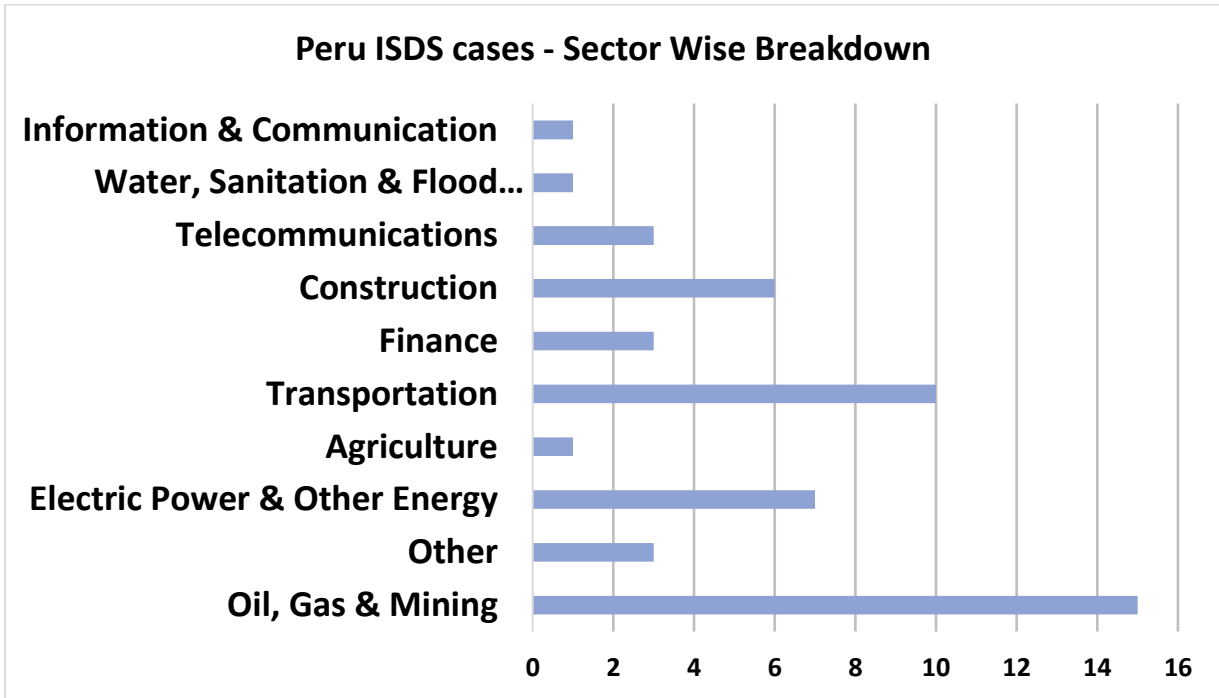
Peru

Peru- Status of ISDS Cases (Total - 50)

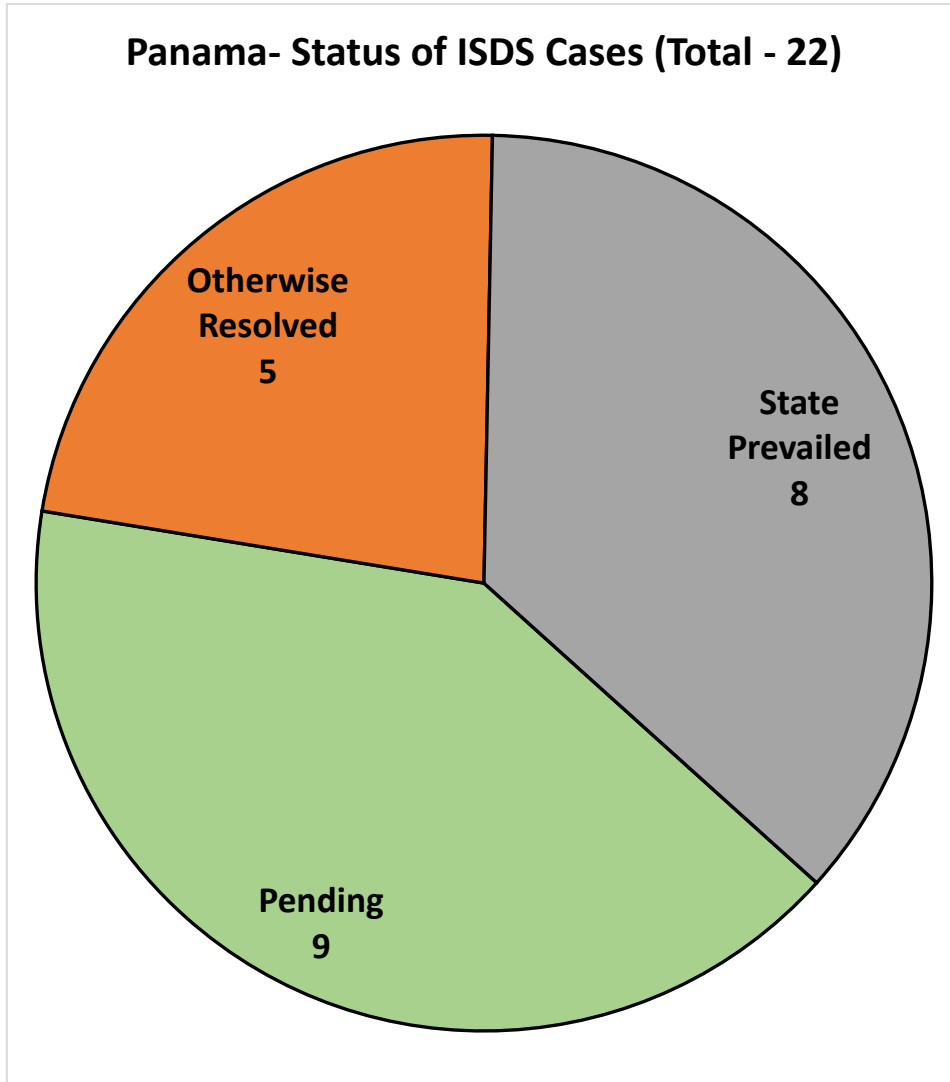


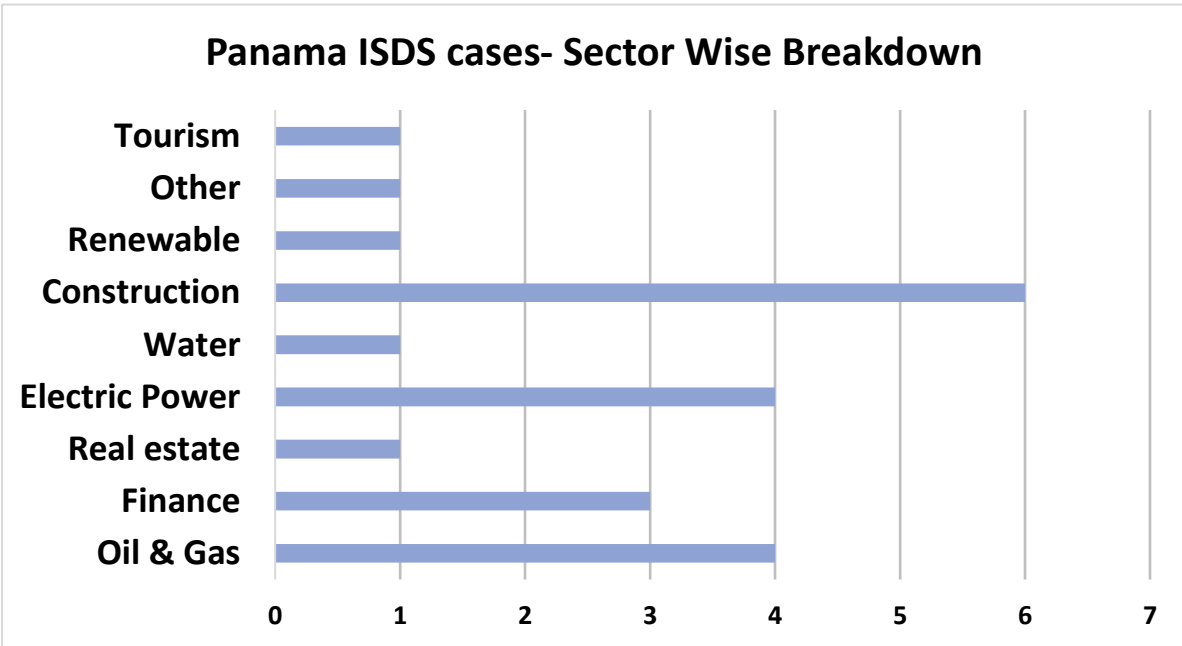
Peru Unpaid Cases - ICSID v. Non-ICSID



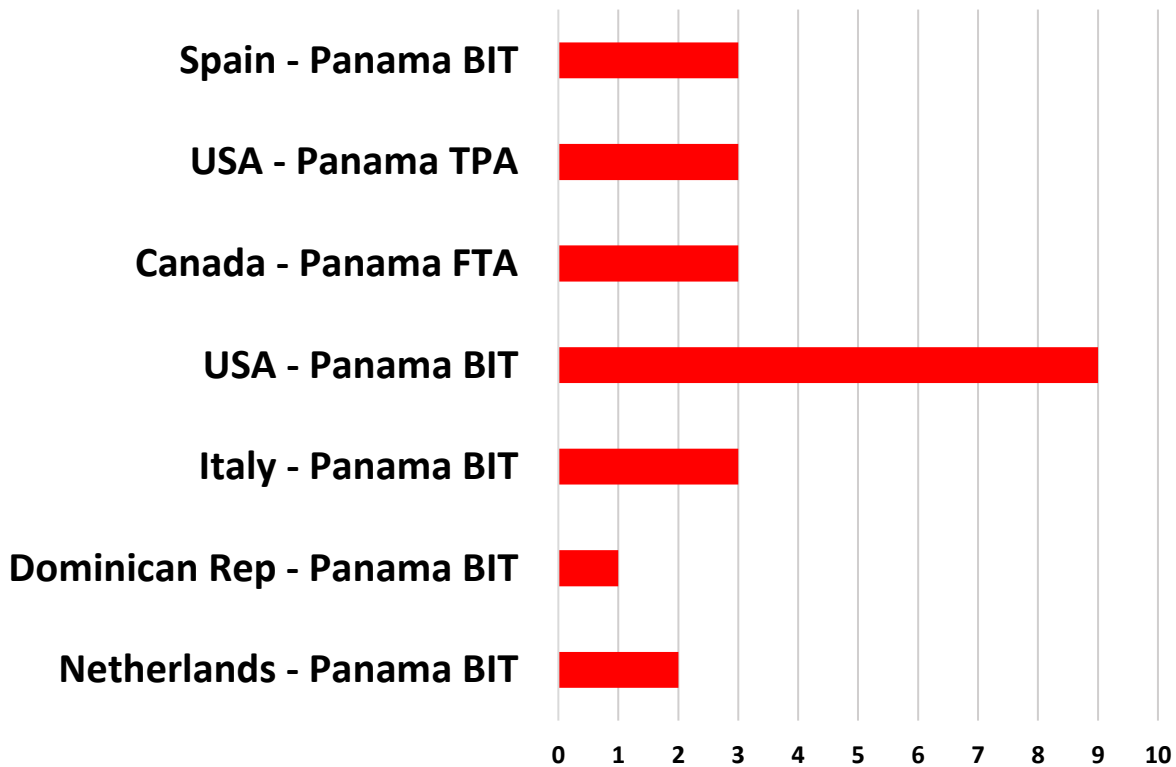


Panama



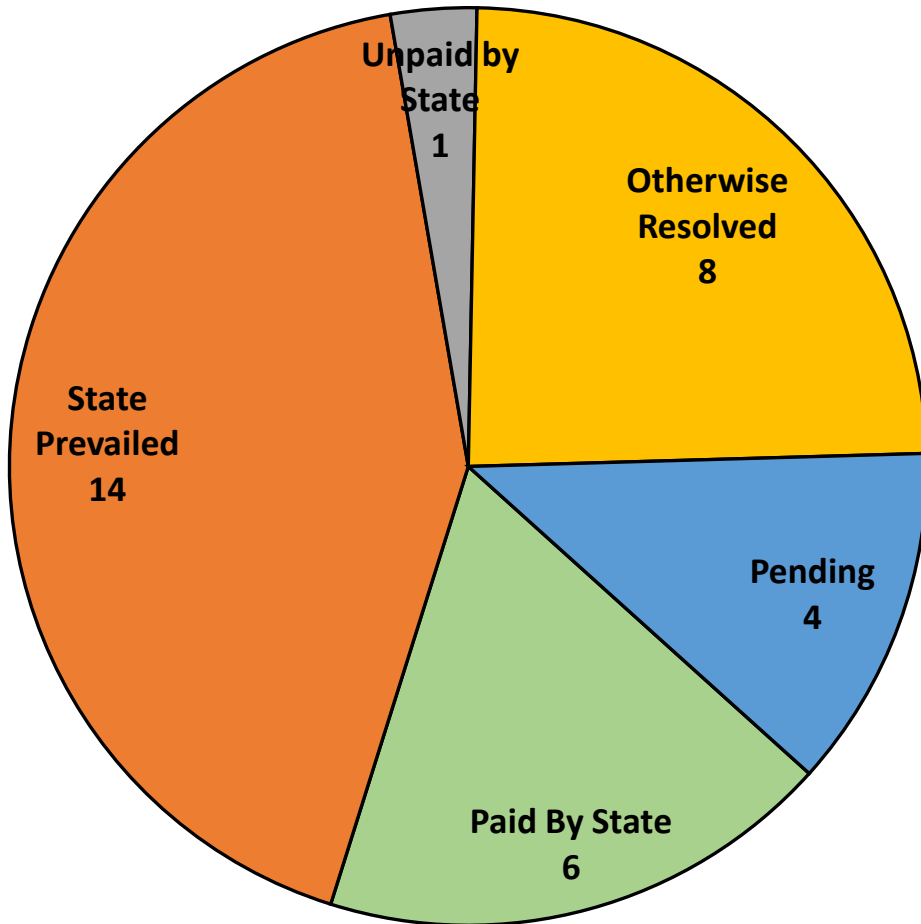


Panama – Treaty Invoked by Claimants

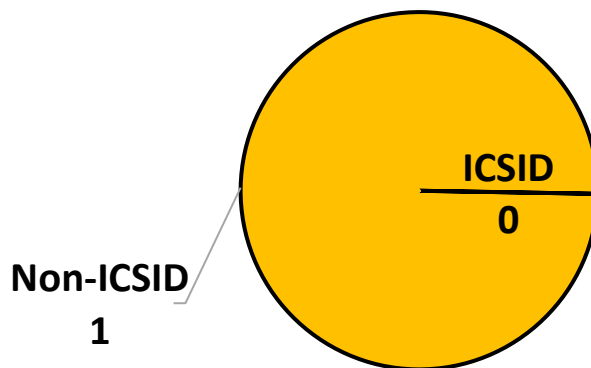


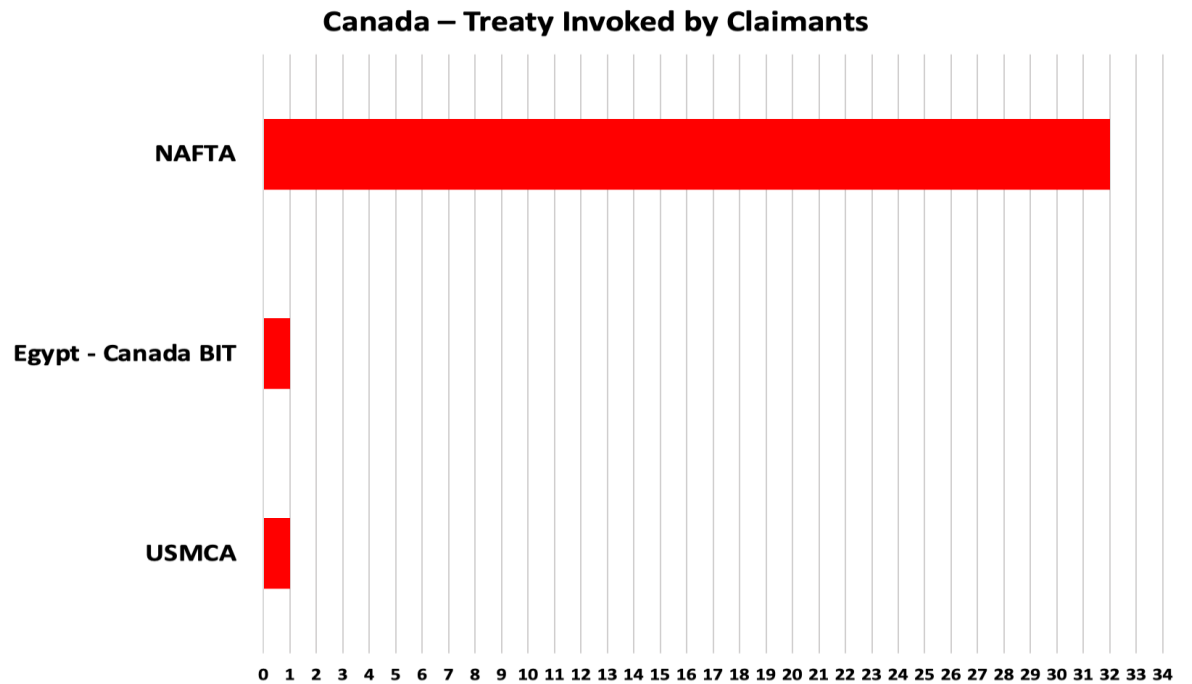
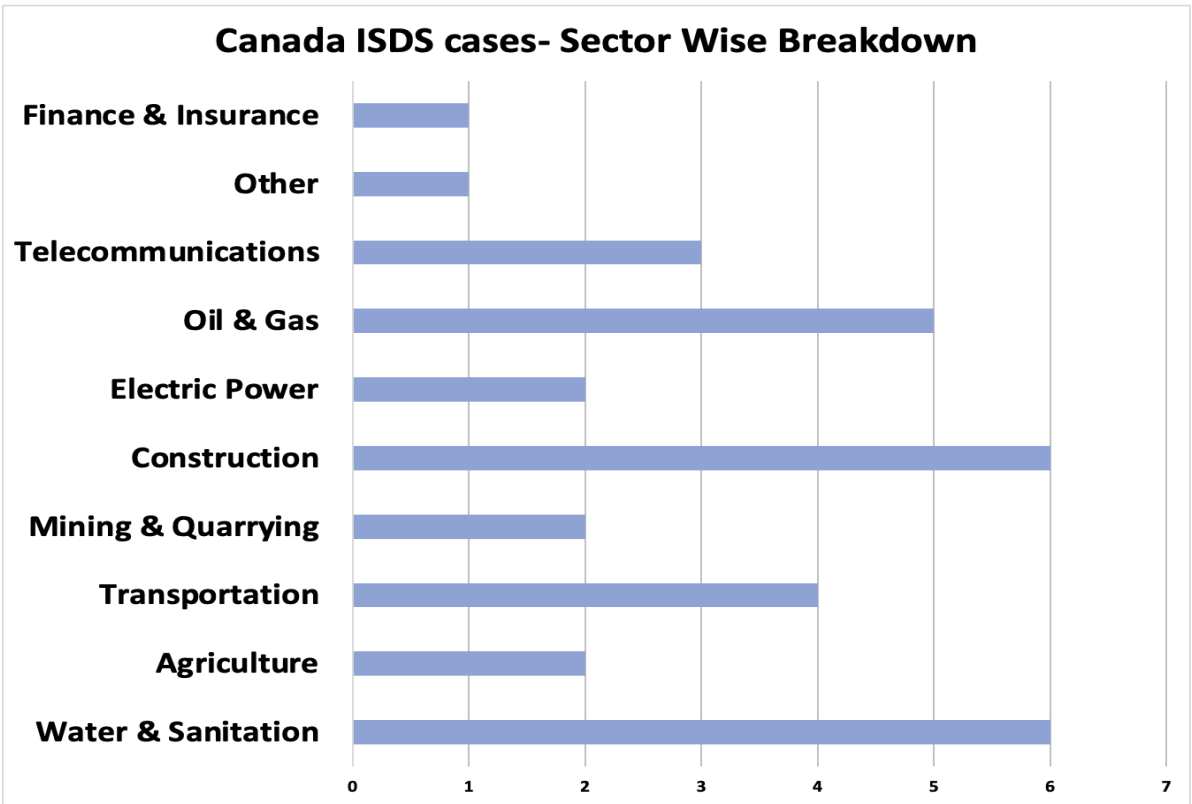
Canada

Canada- Status of ISDS Cases (Total - 33)



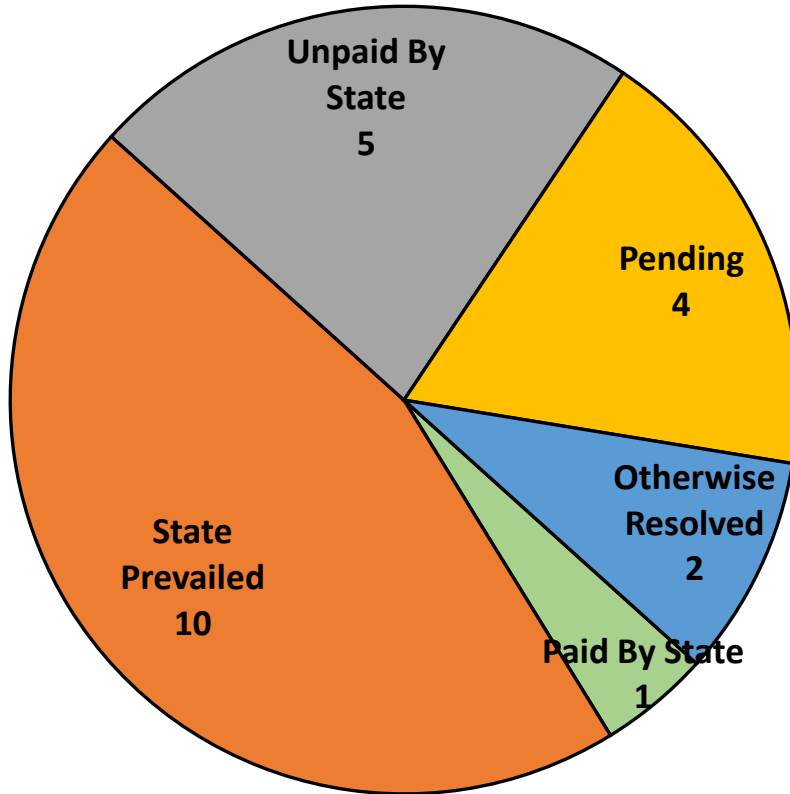
Canada Unpaid Cases - ICSID v. Non-ICSID



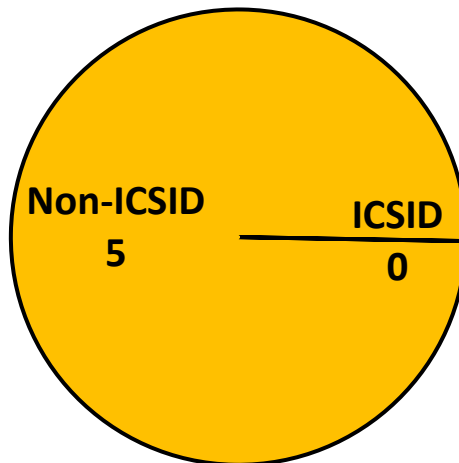


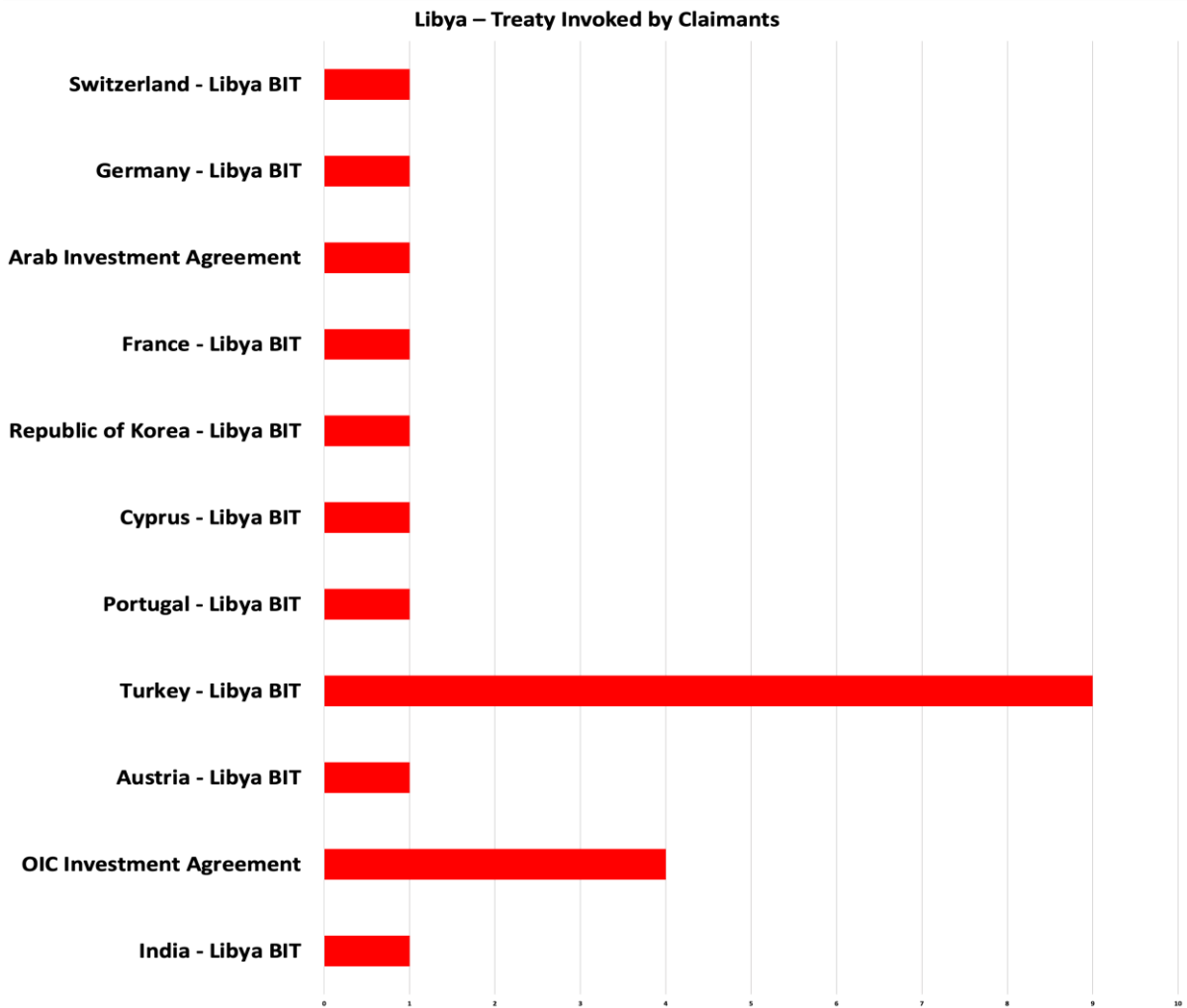
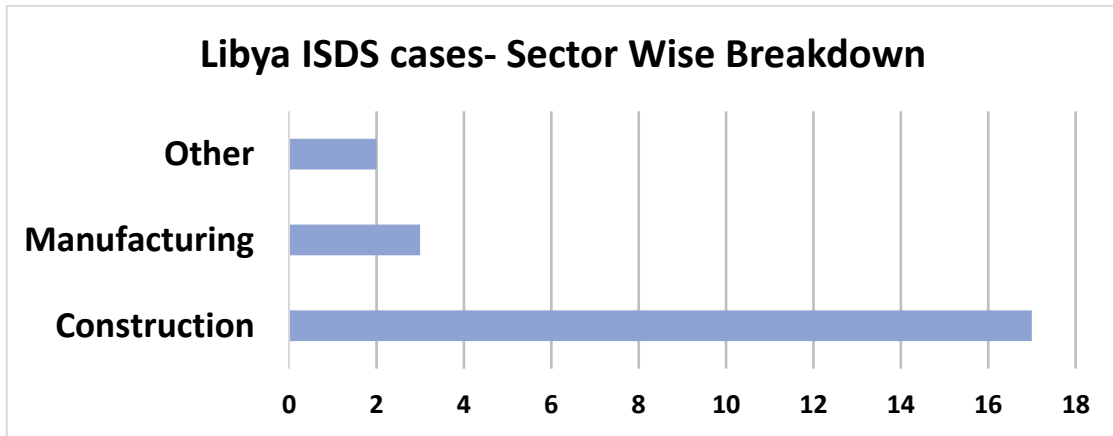
Libya

Libya- Status of ISDS Cases (Total - 22)

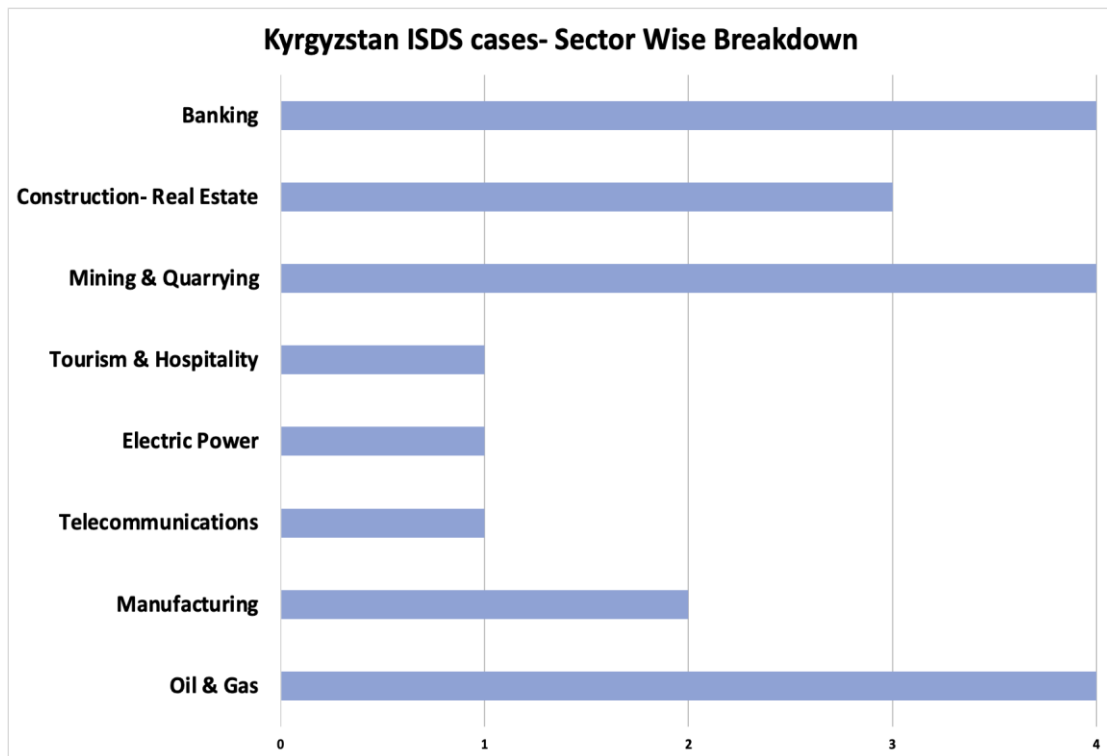
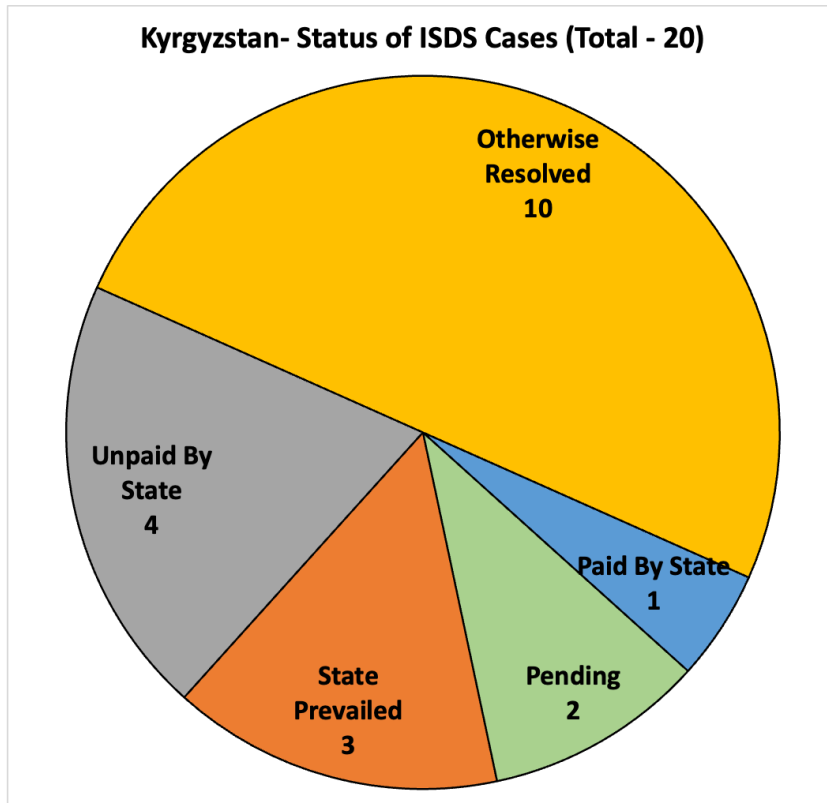


Libya Unpaid Cases - ICSID v. Non-ICSID

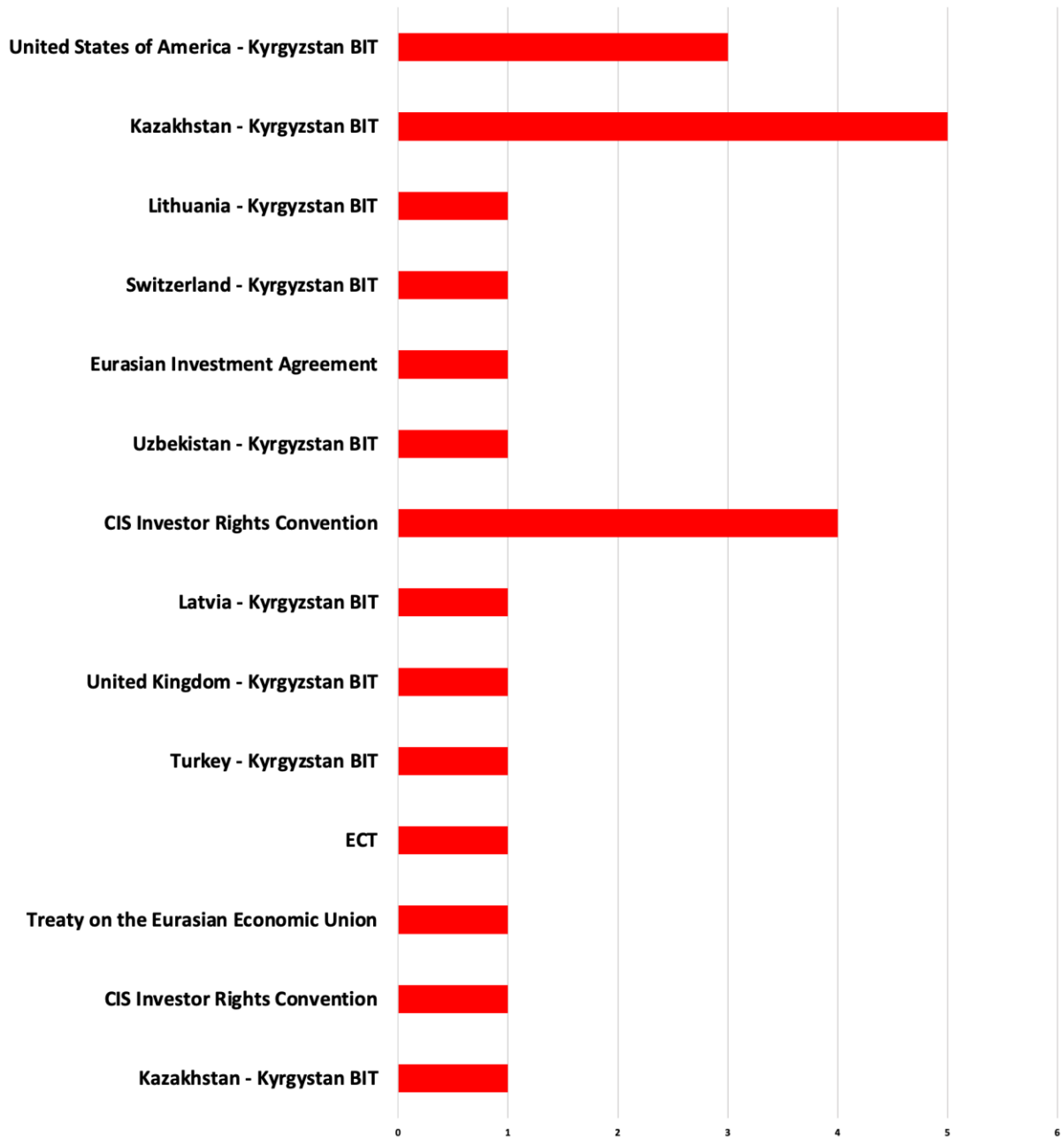




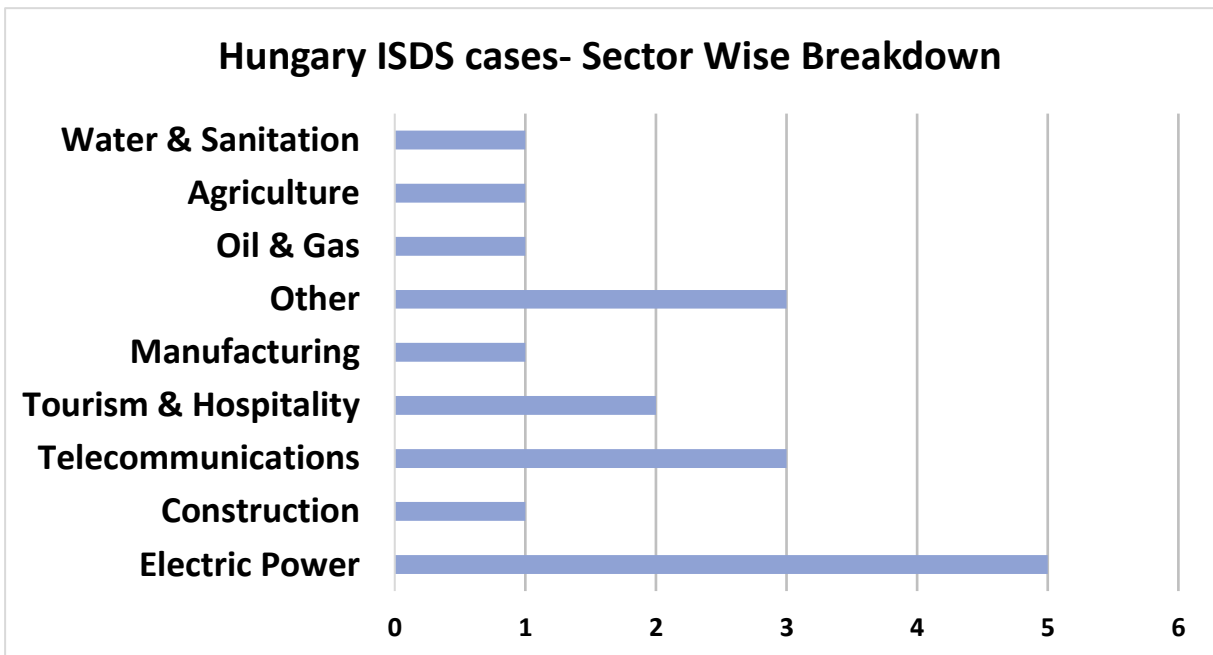
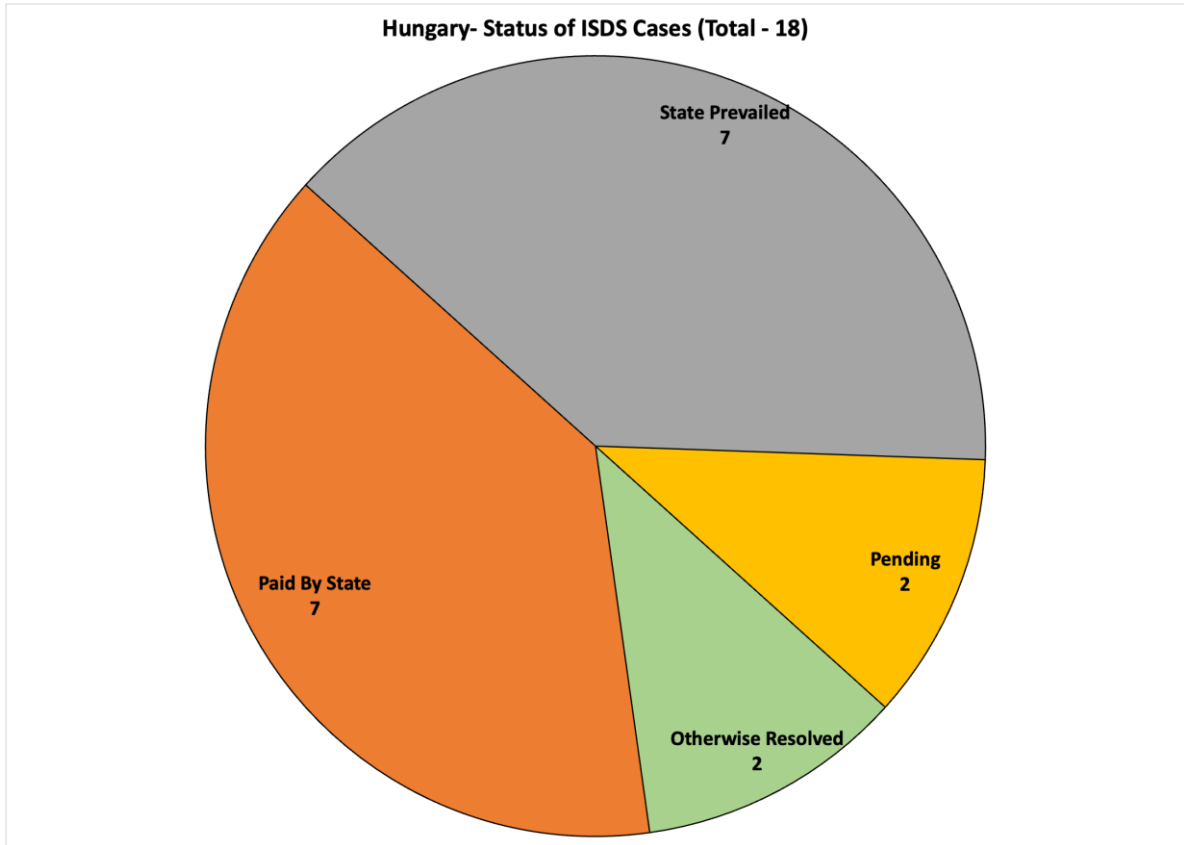
Kyrgyzstan



Kyrgyzstan – Treaty Invoked by Claimants

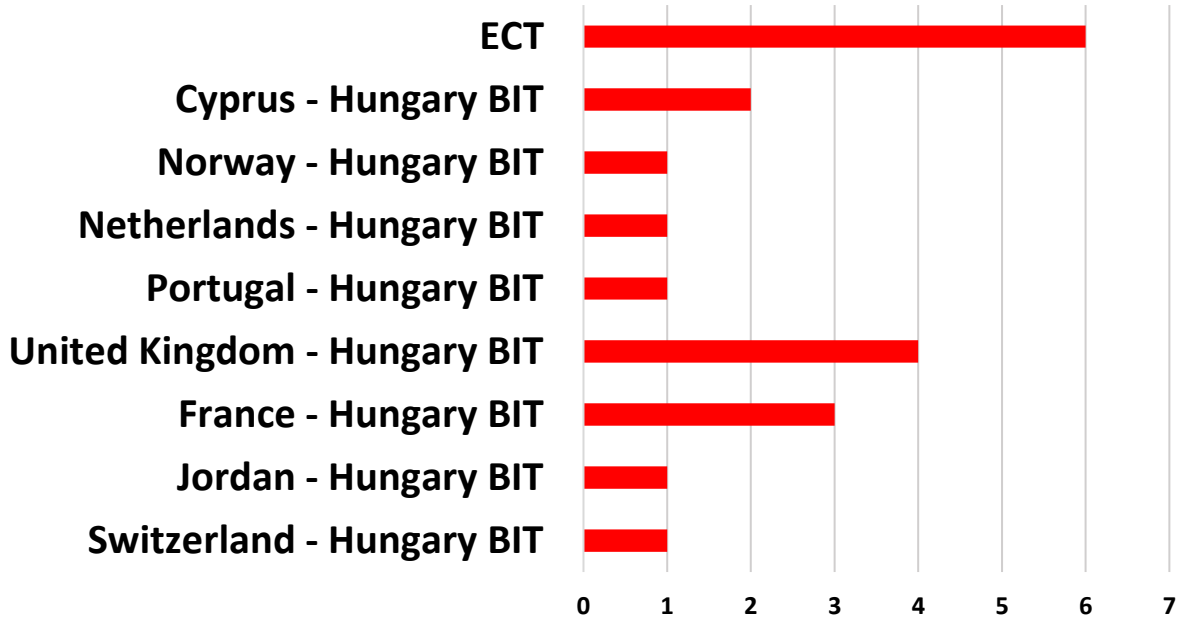


Hungary



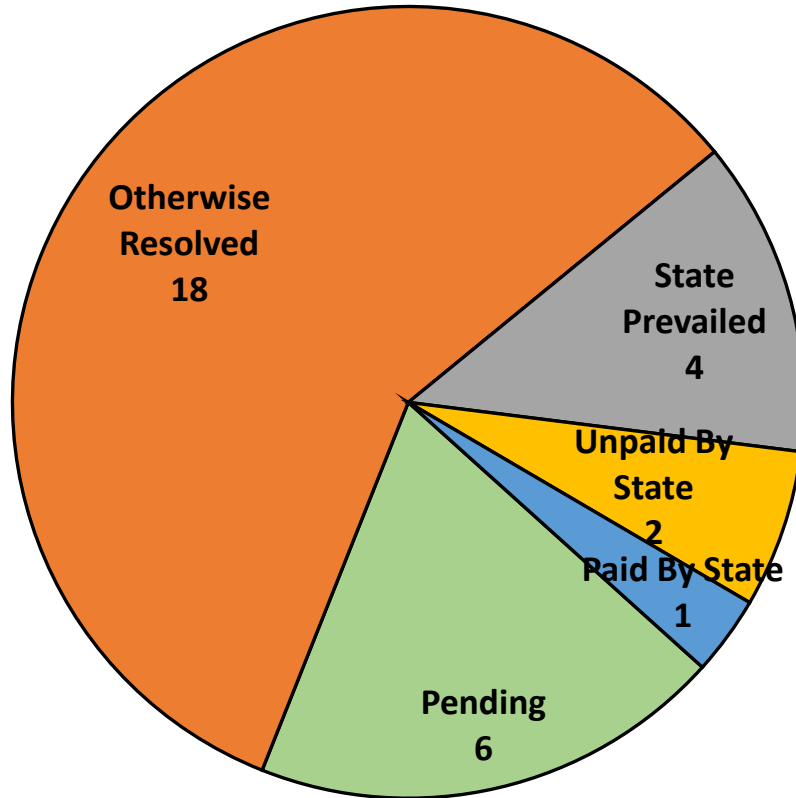


Hungary – Treaty Invoked by Claimants

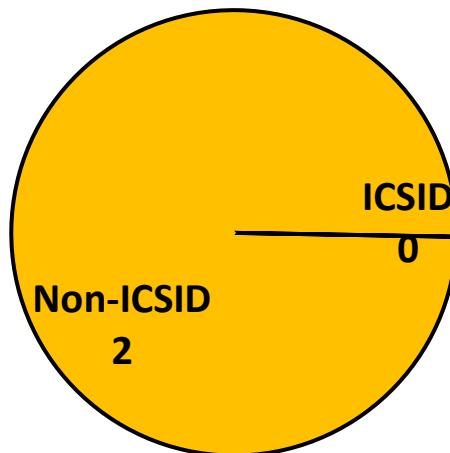


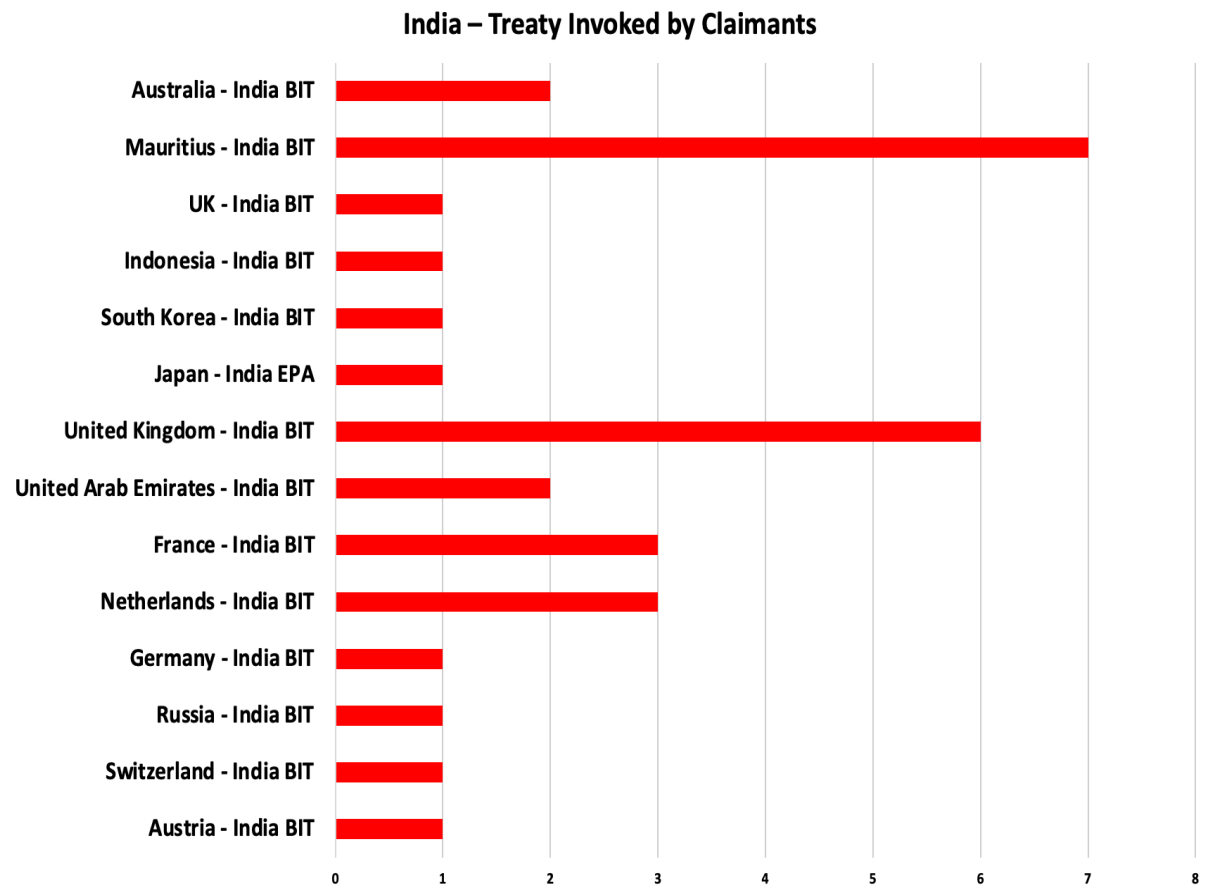
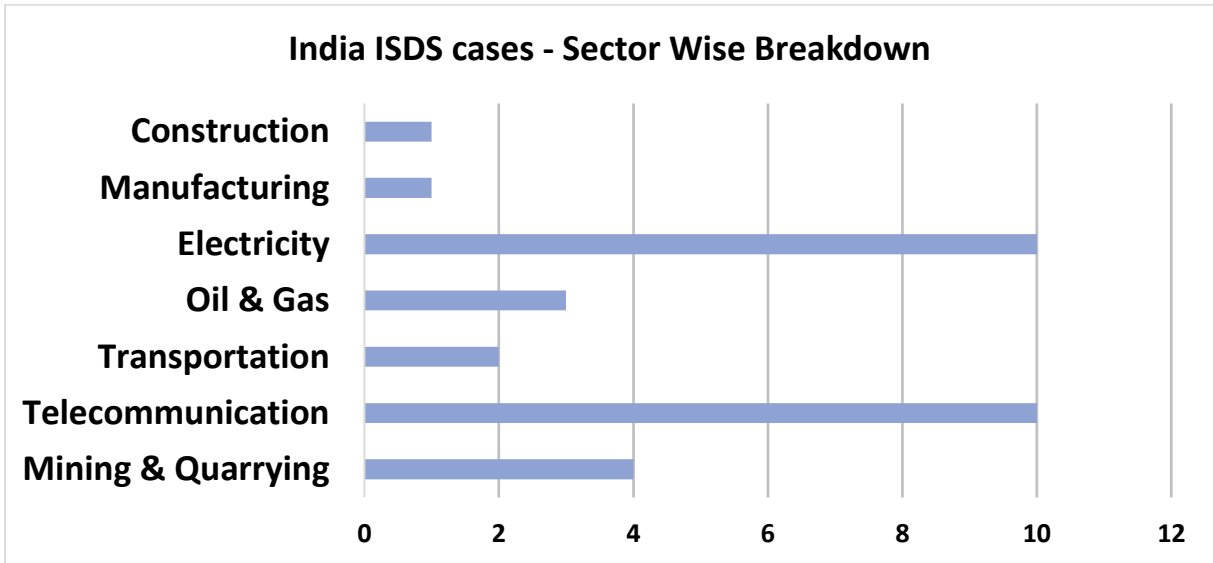
India

India- Status of ISDS Cases (Total - 31)

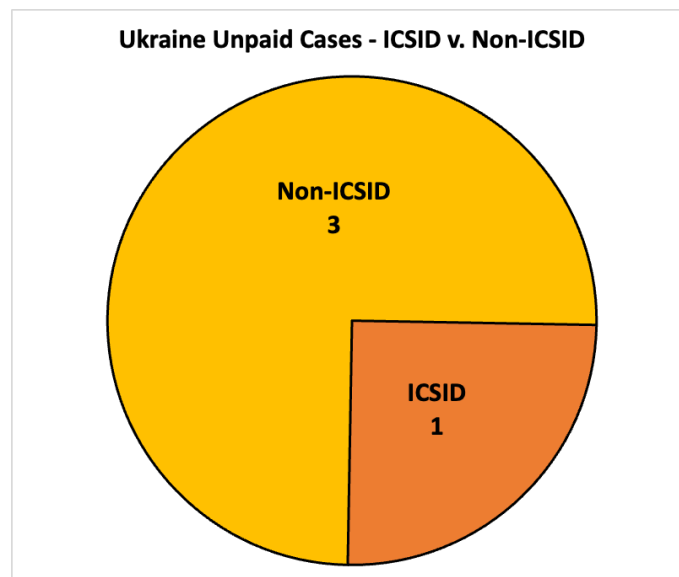
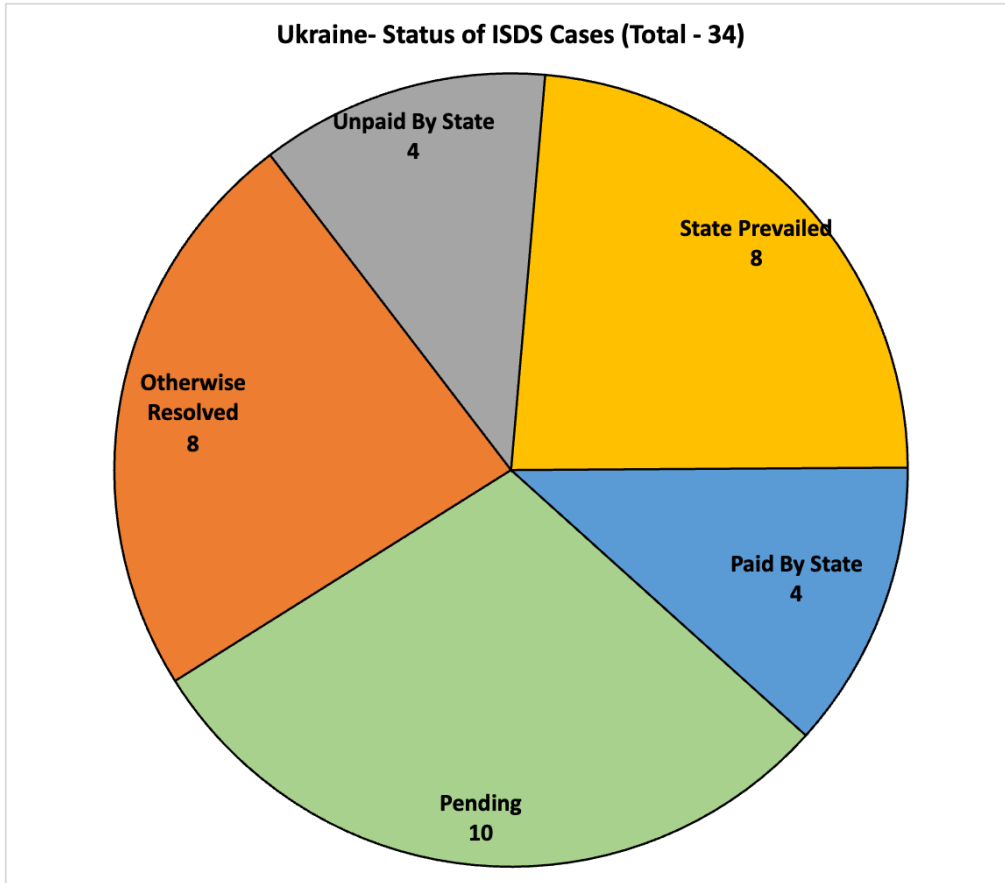


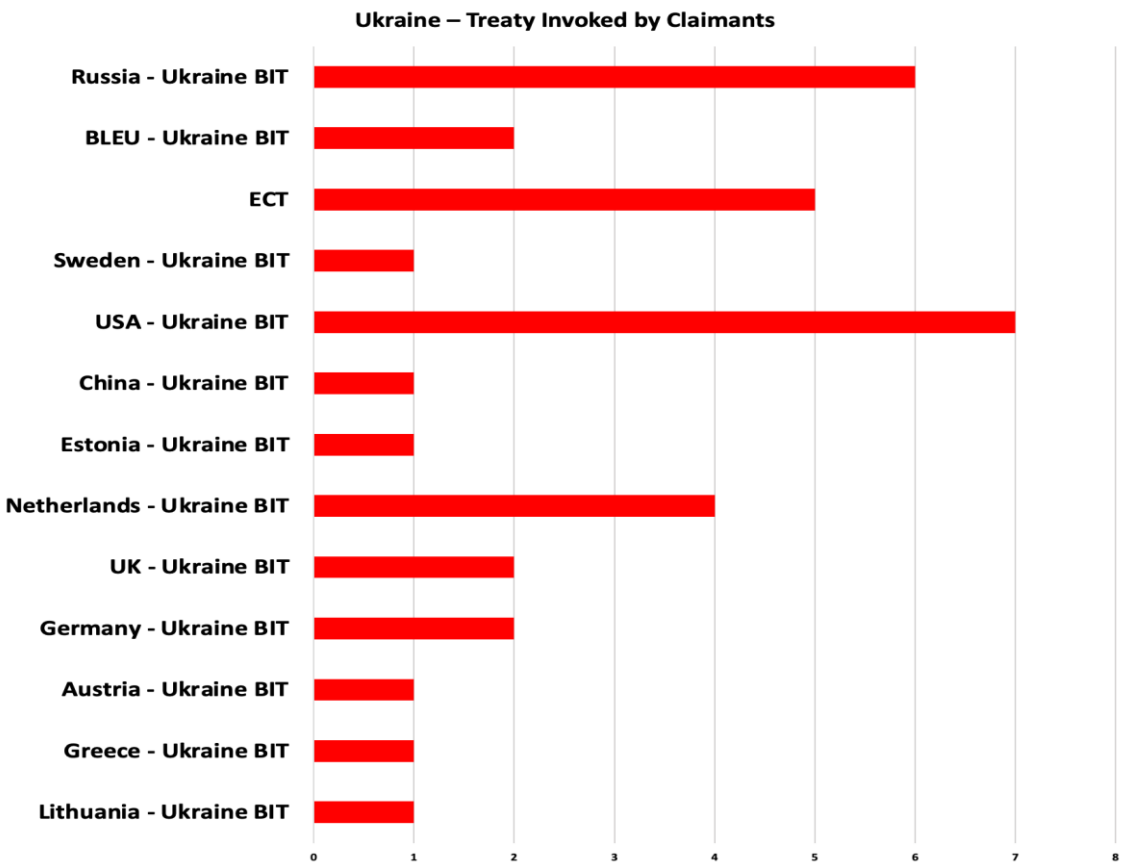
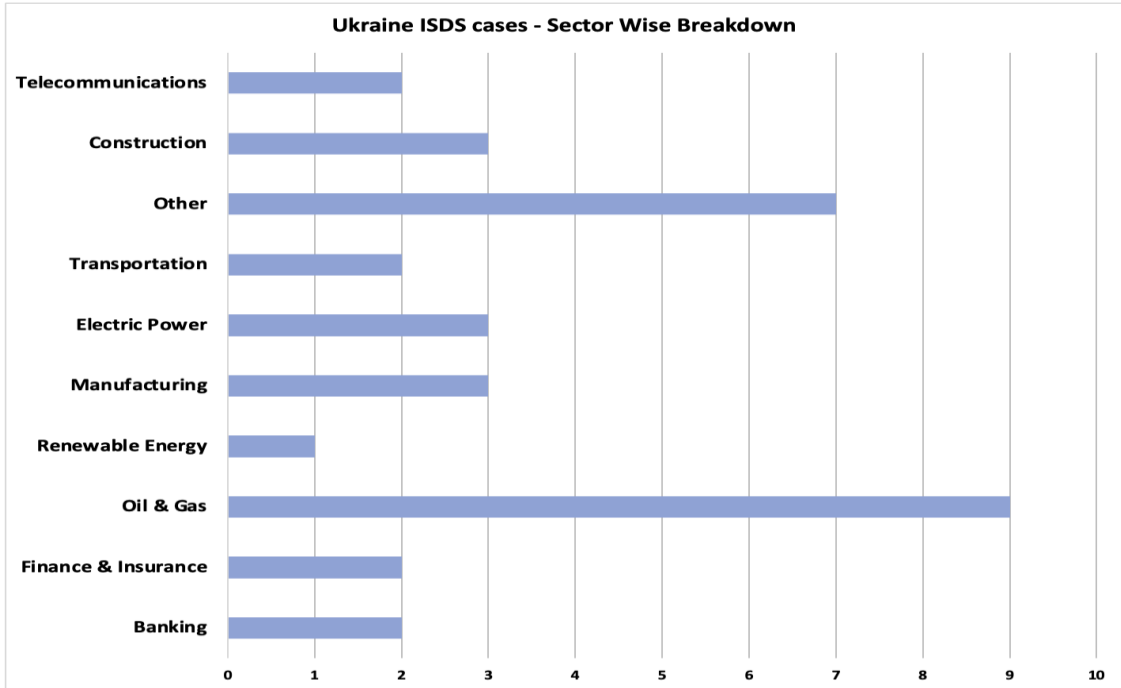
India Unpaid Cases - ICSID v. Non-ICSID





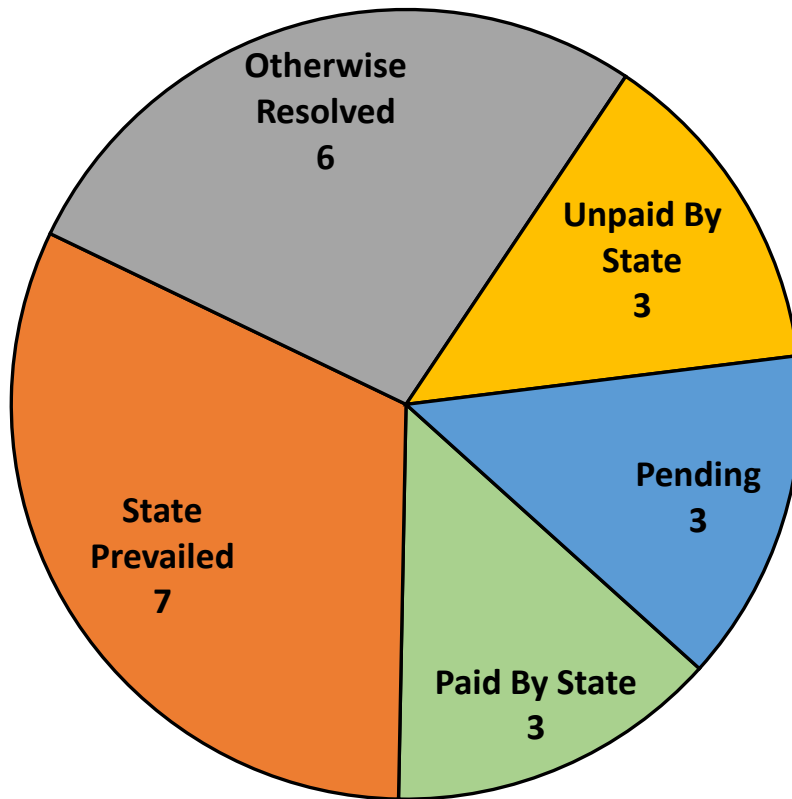
Ukraine



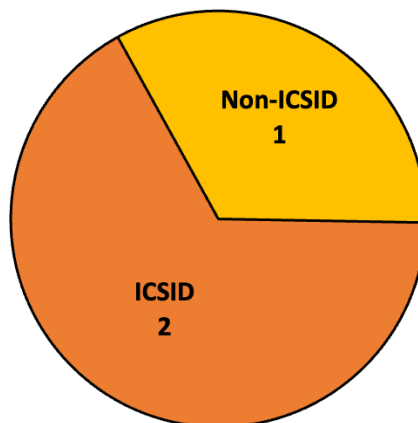


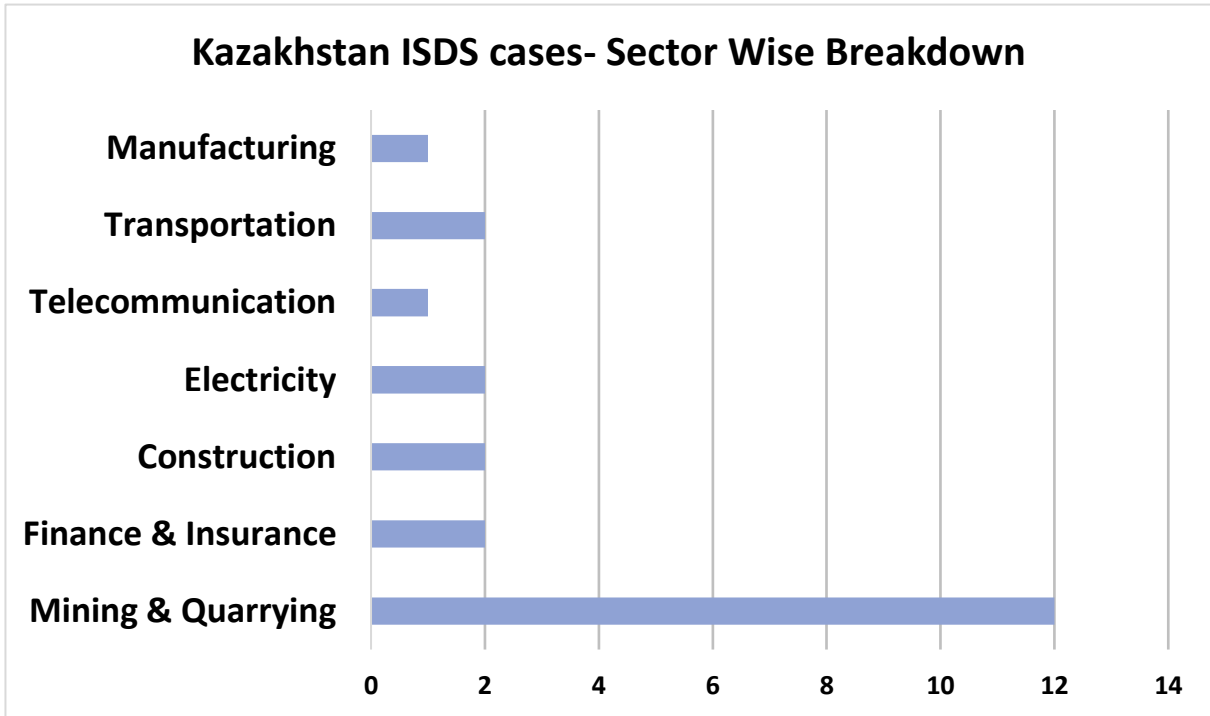
Kazakhstan

Kazakhstan- Status of ISDS Cases (Total - 22)

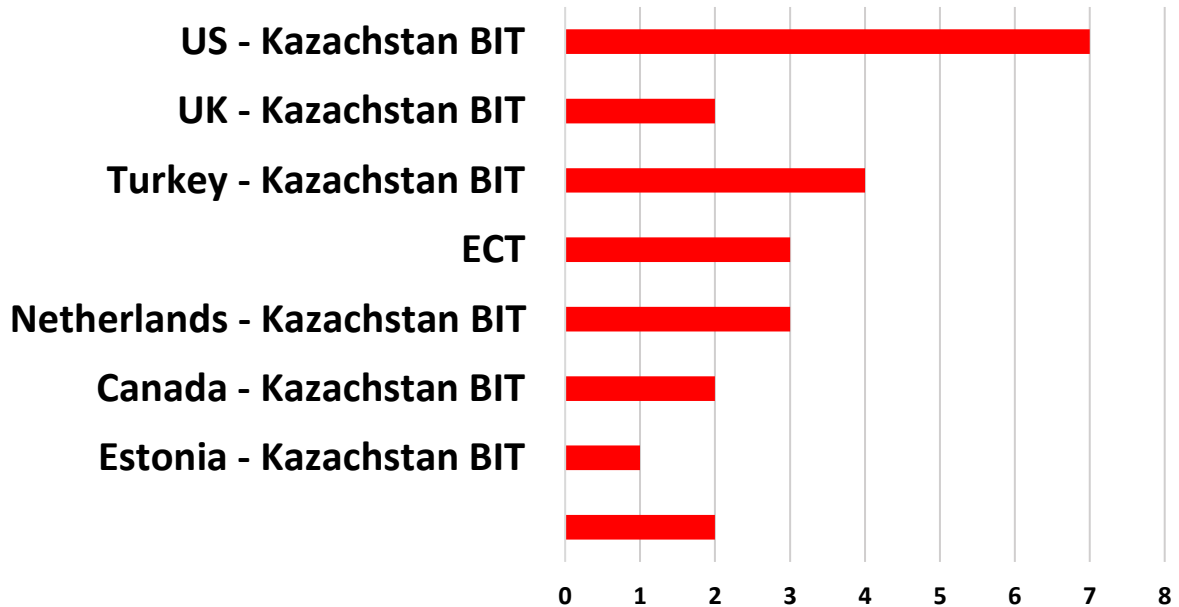


Kazakhstan Unpaid Cases - ICSID v. Non-ICSID

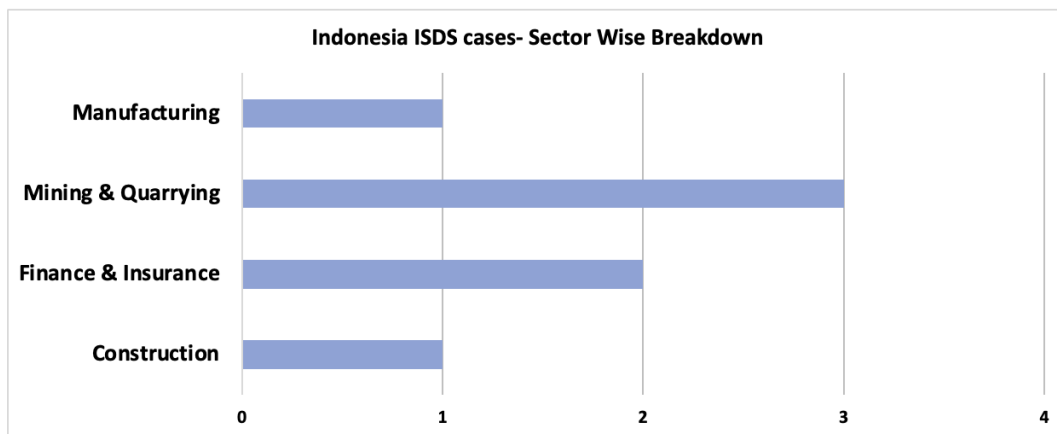
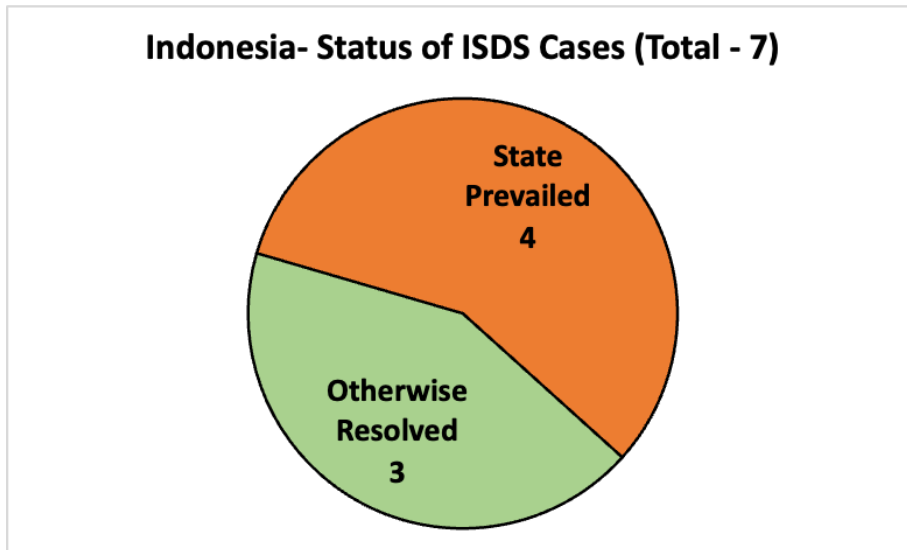




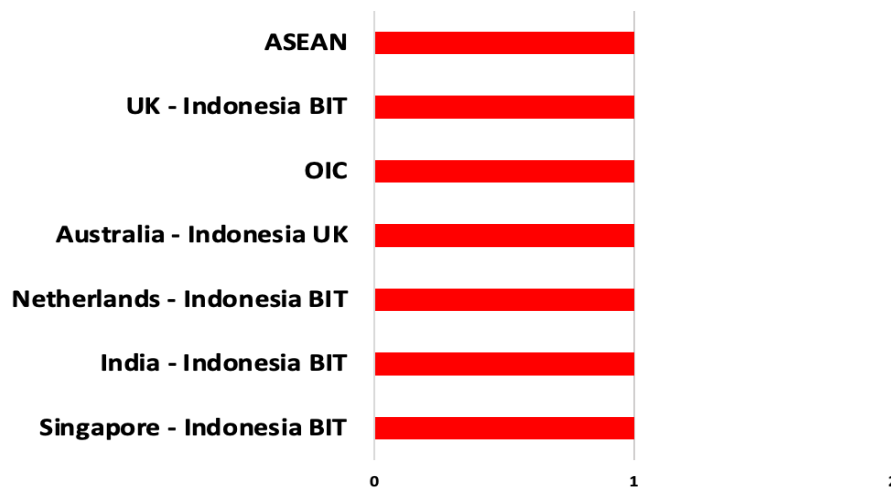
Kazakhstan – Treaty Invoked by Claimants



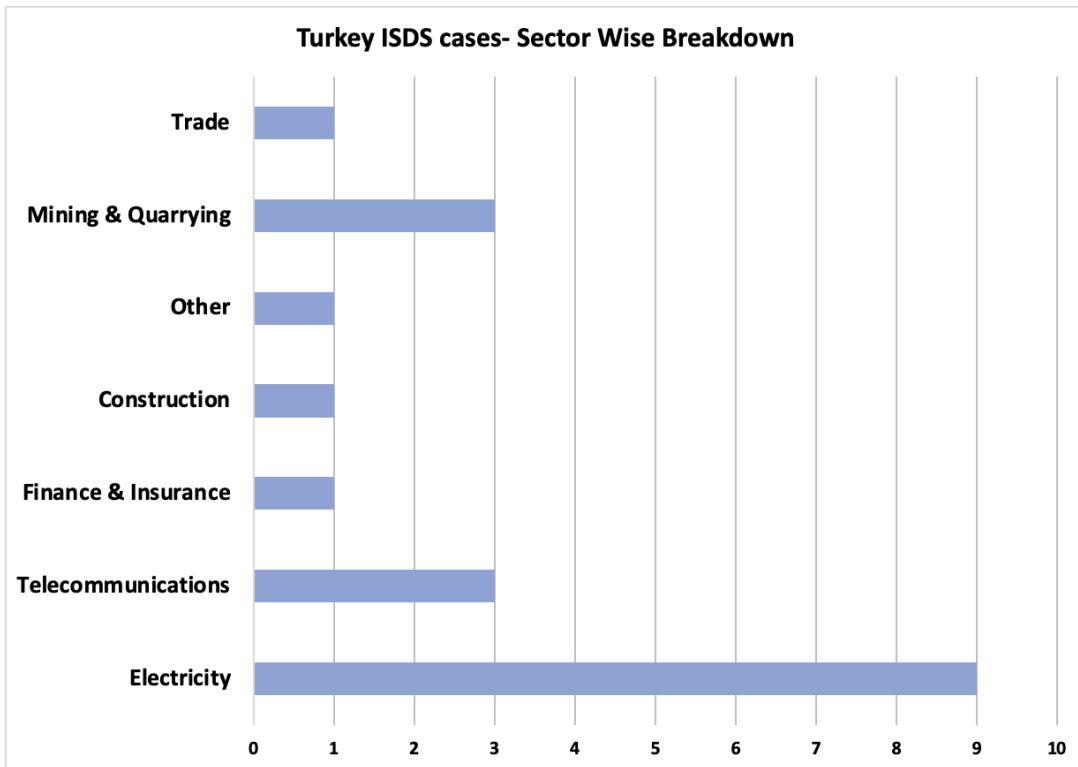
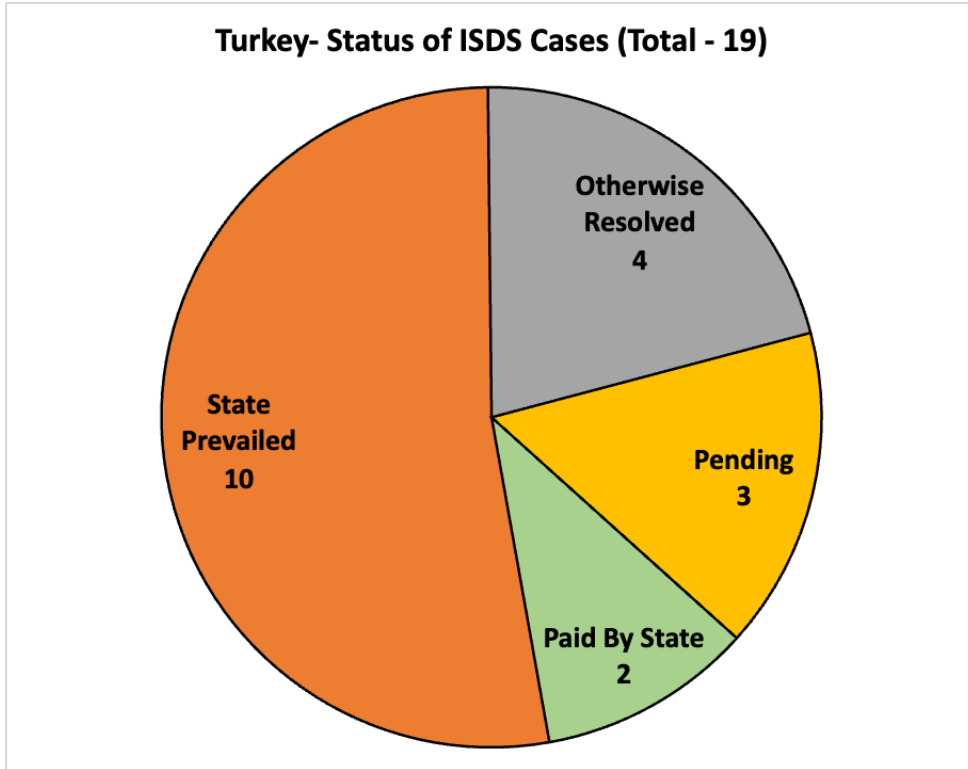
Indonesia



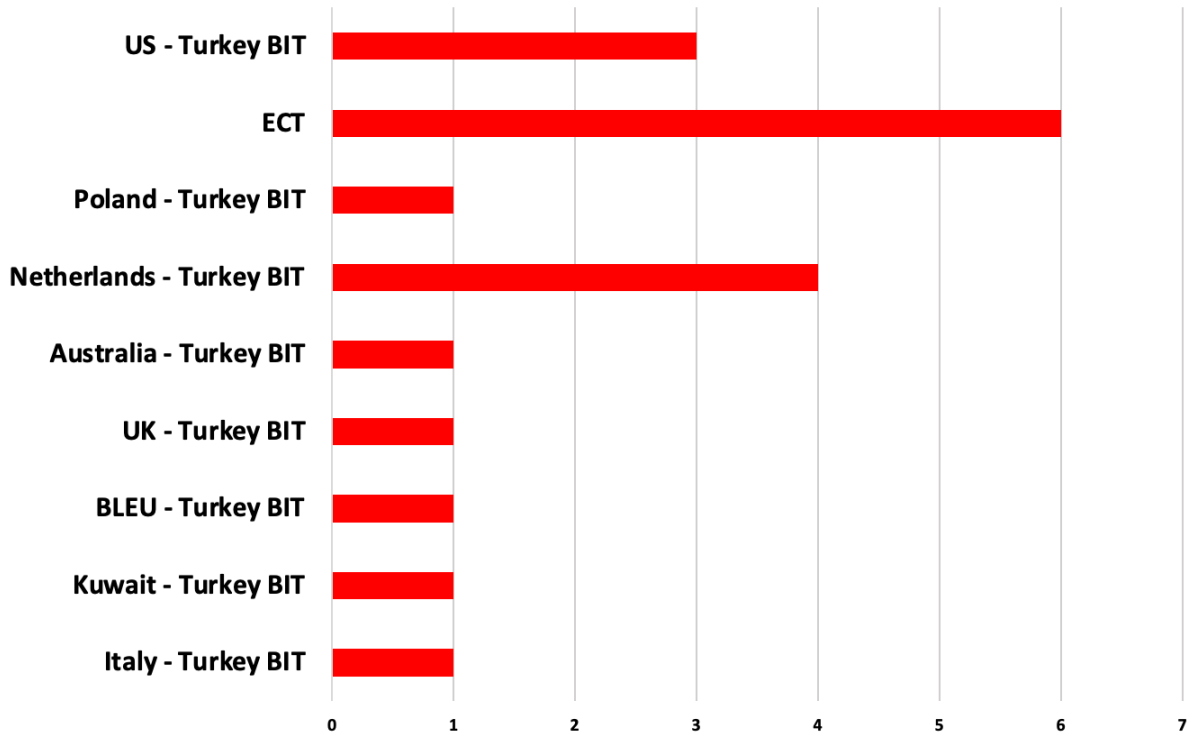
Indonesia – Treaty Invoked by Claimants



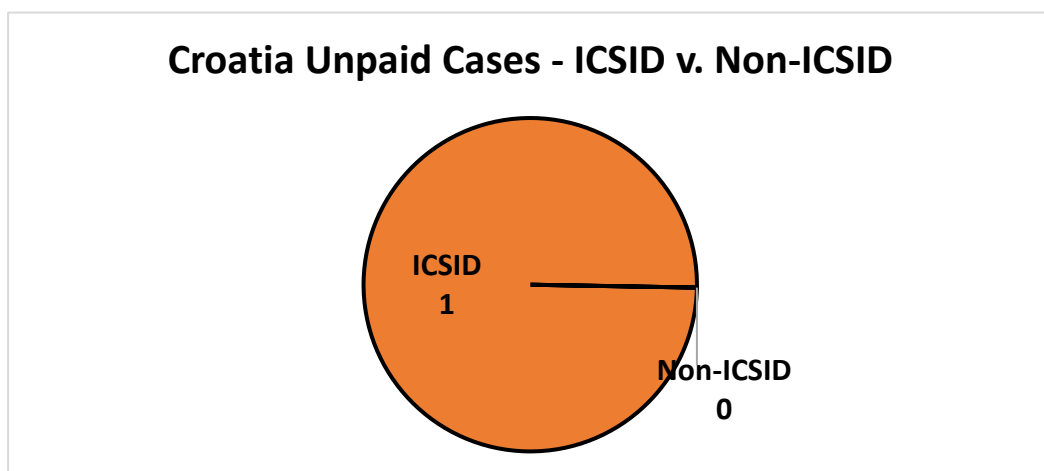
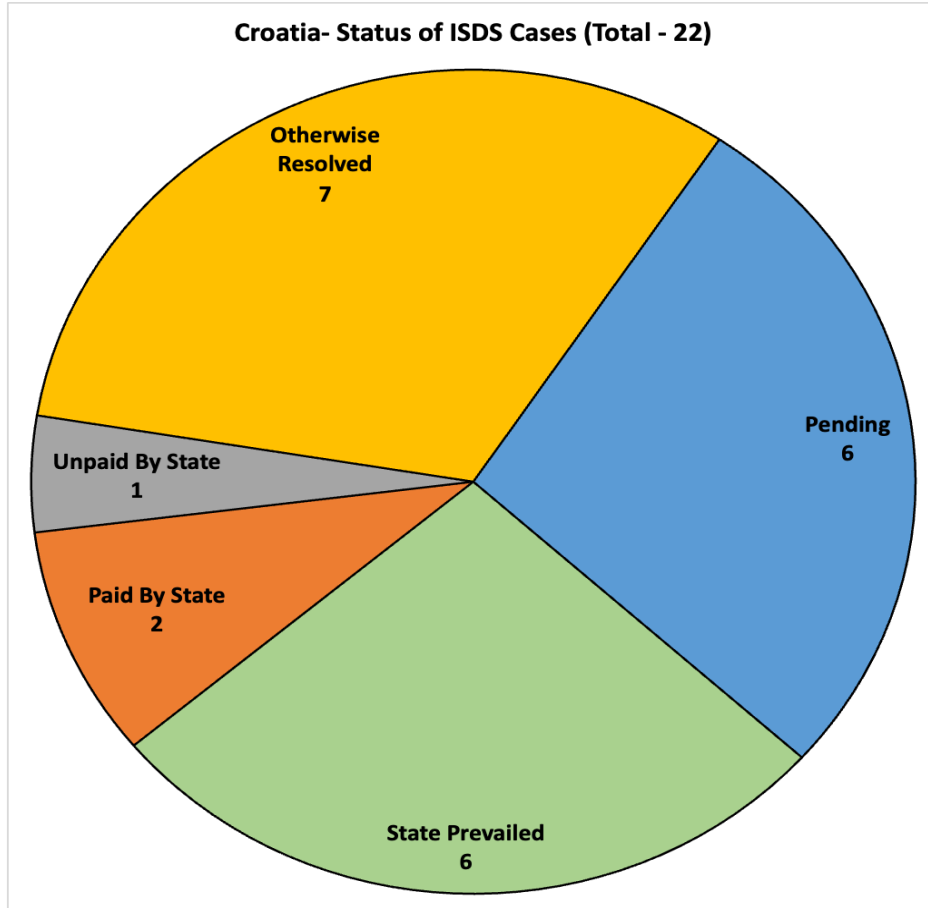
Turkey

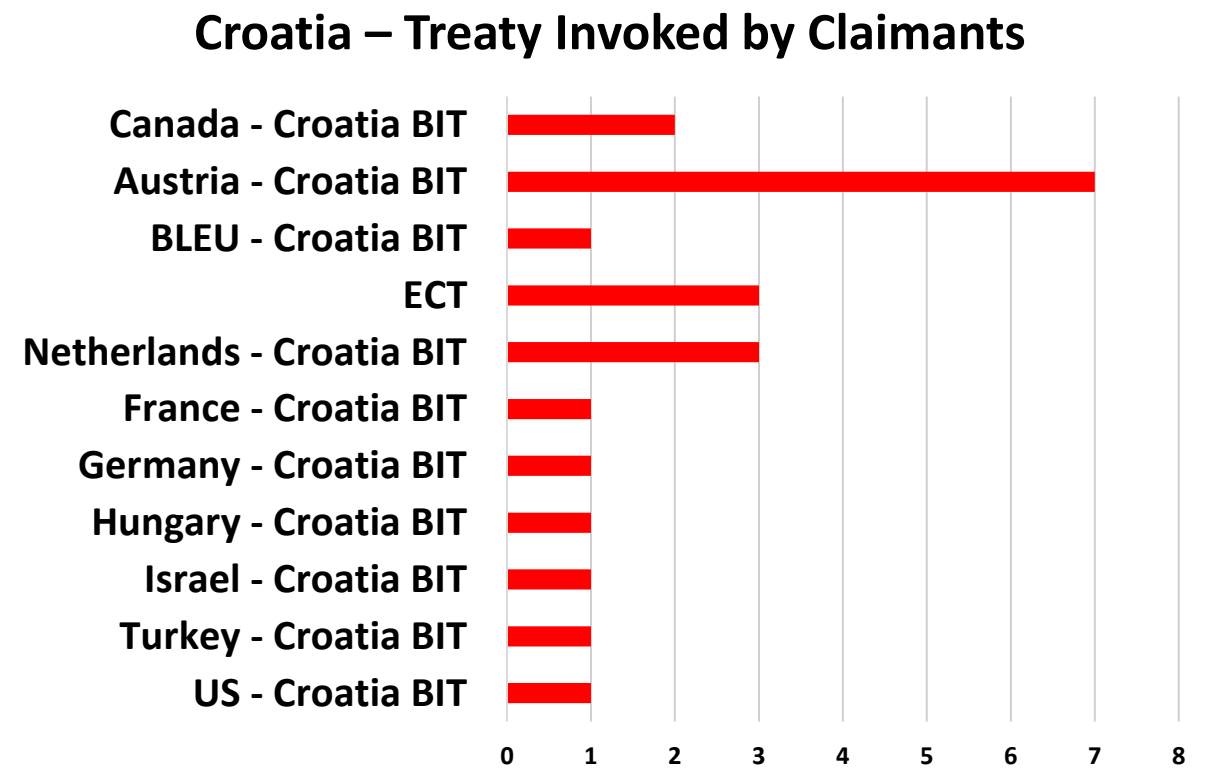
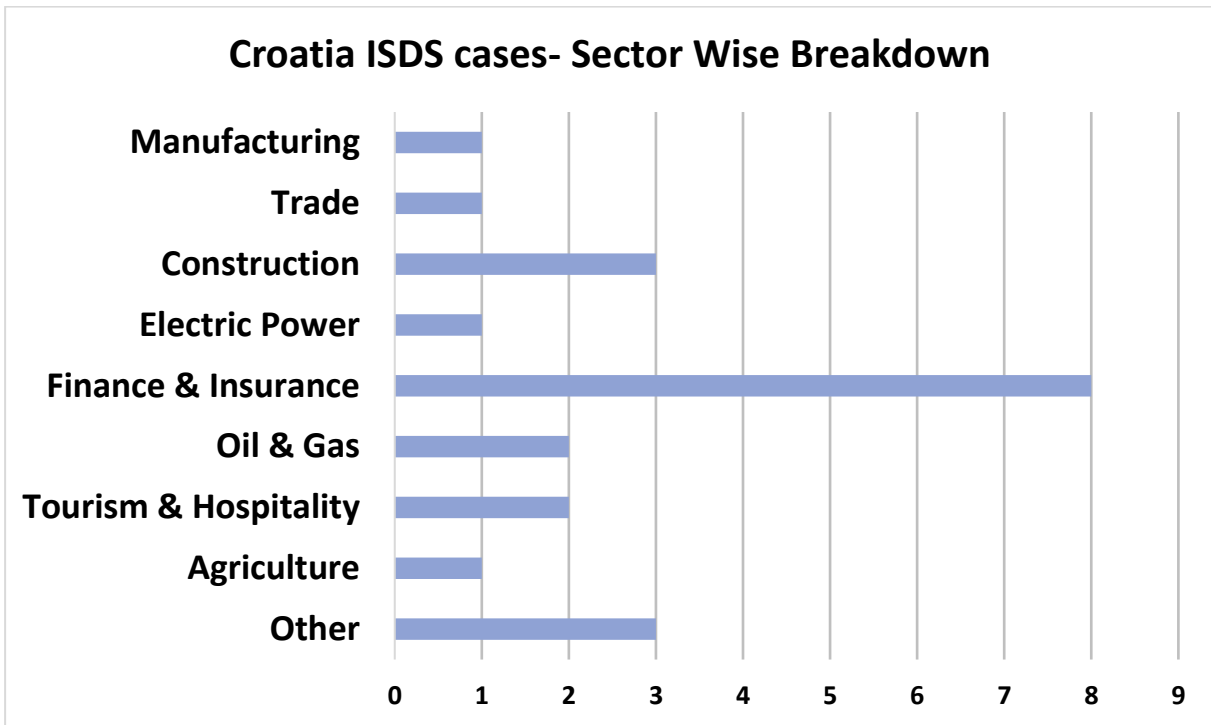


Turkey – Treaty Invoked by Claimants



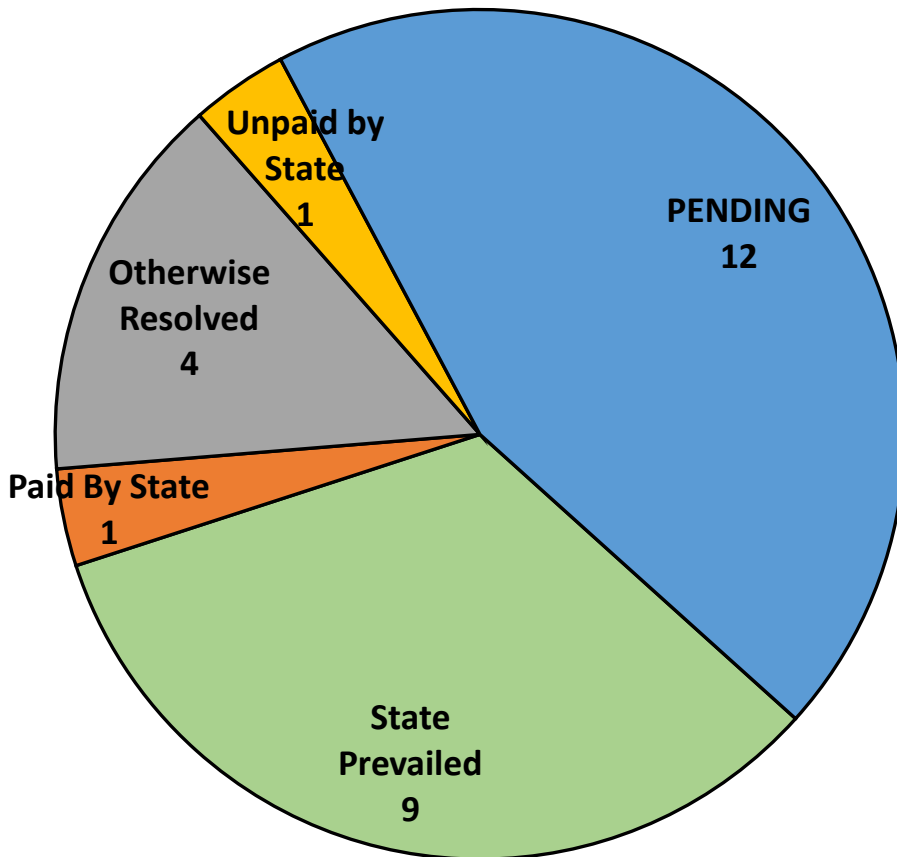
Croatia



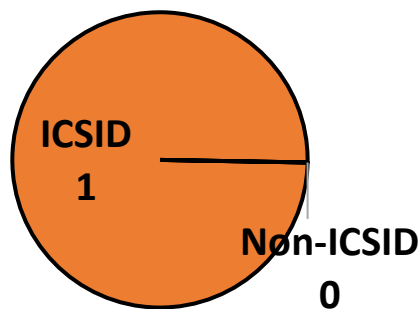


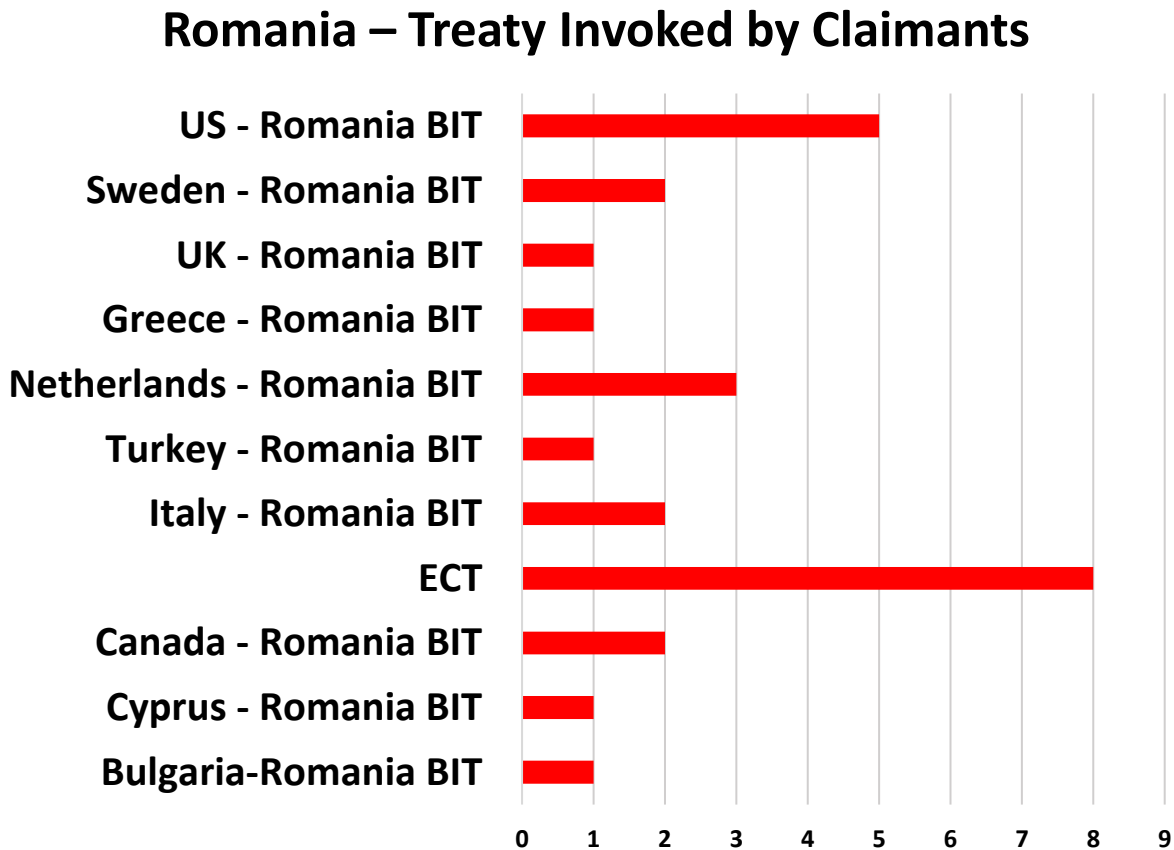
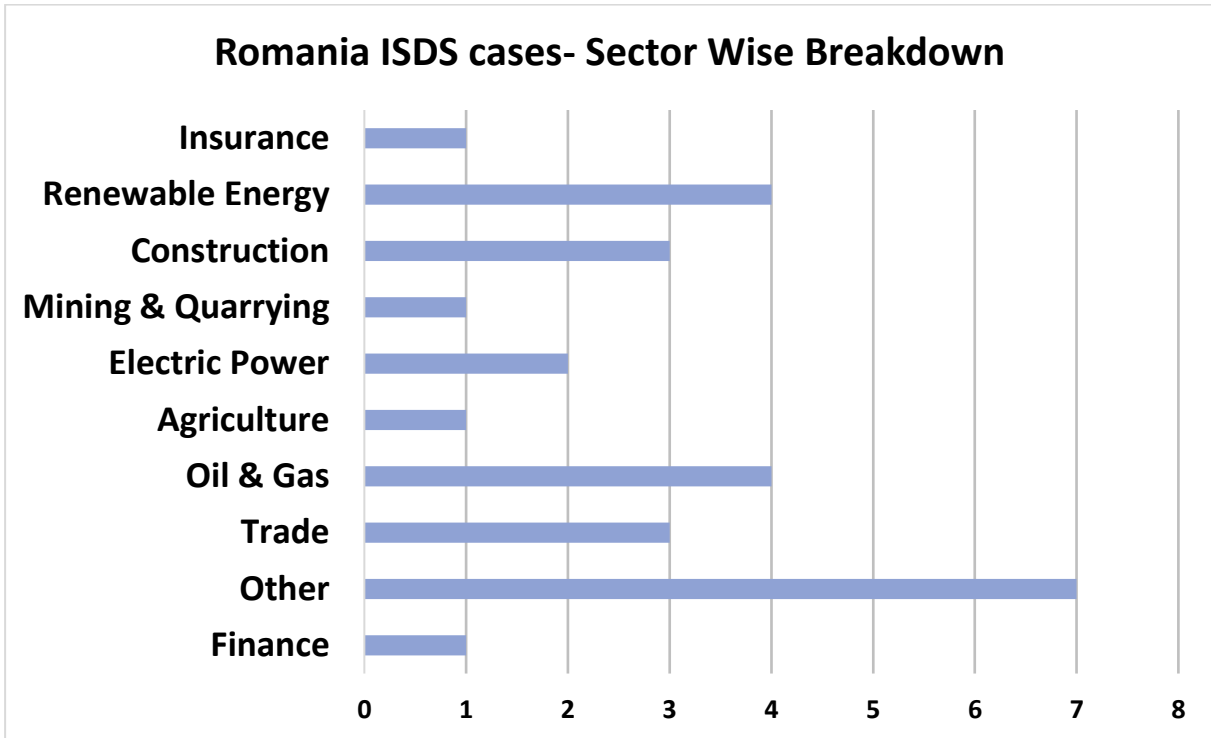
Romania

Romania- Status of ISDS Cases (Total - 27)



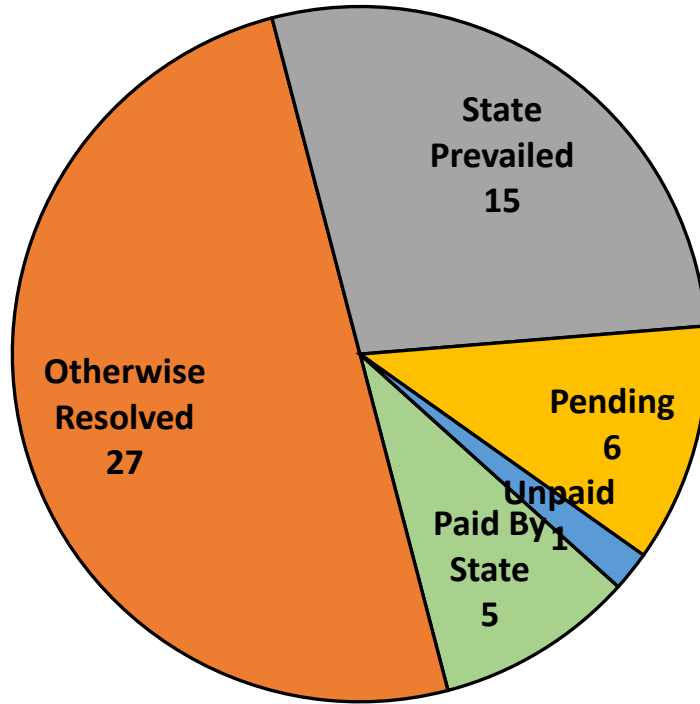
Romania Unpaid Cases - ICSID v. Non-ICSID



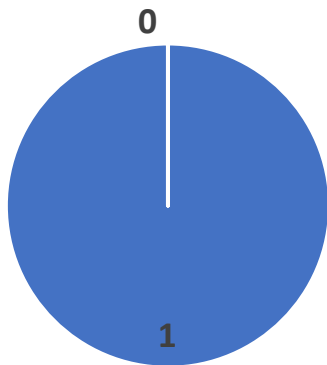


Egypt

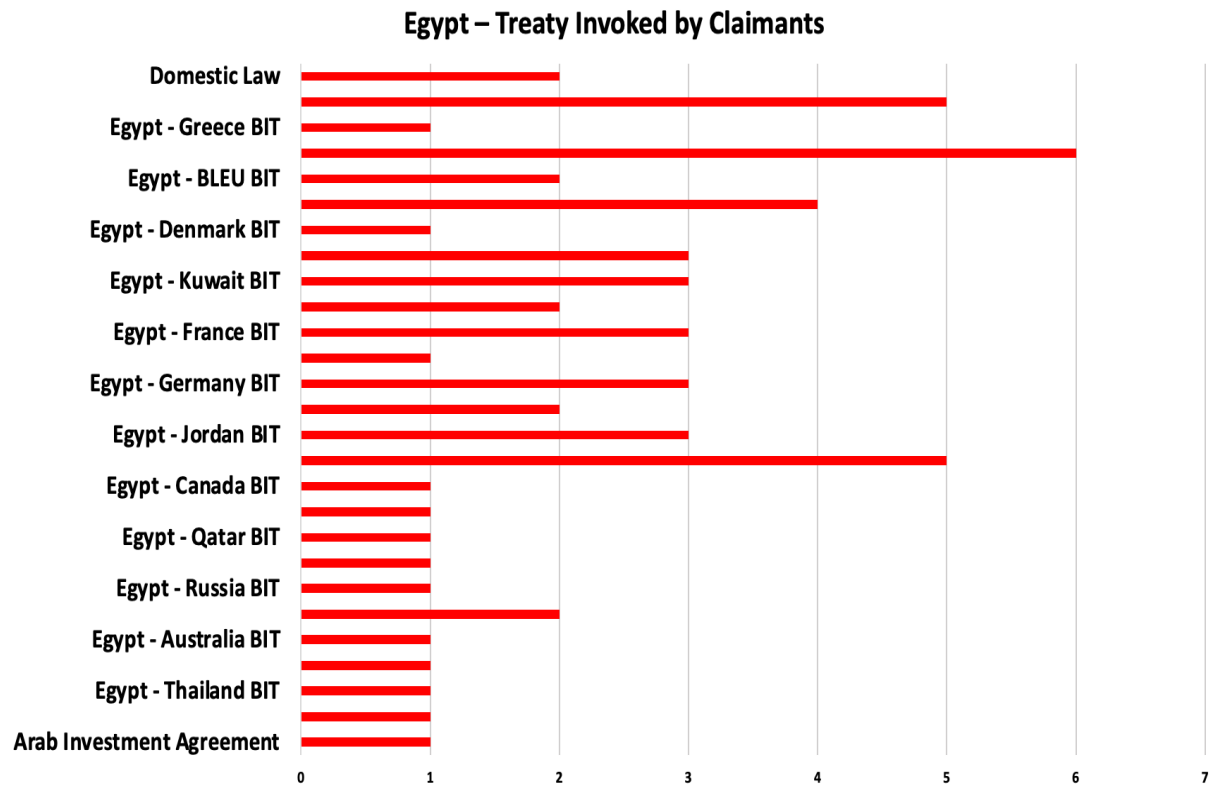
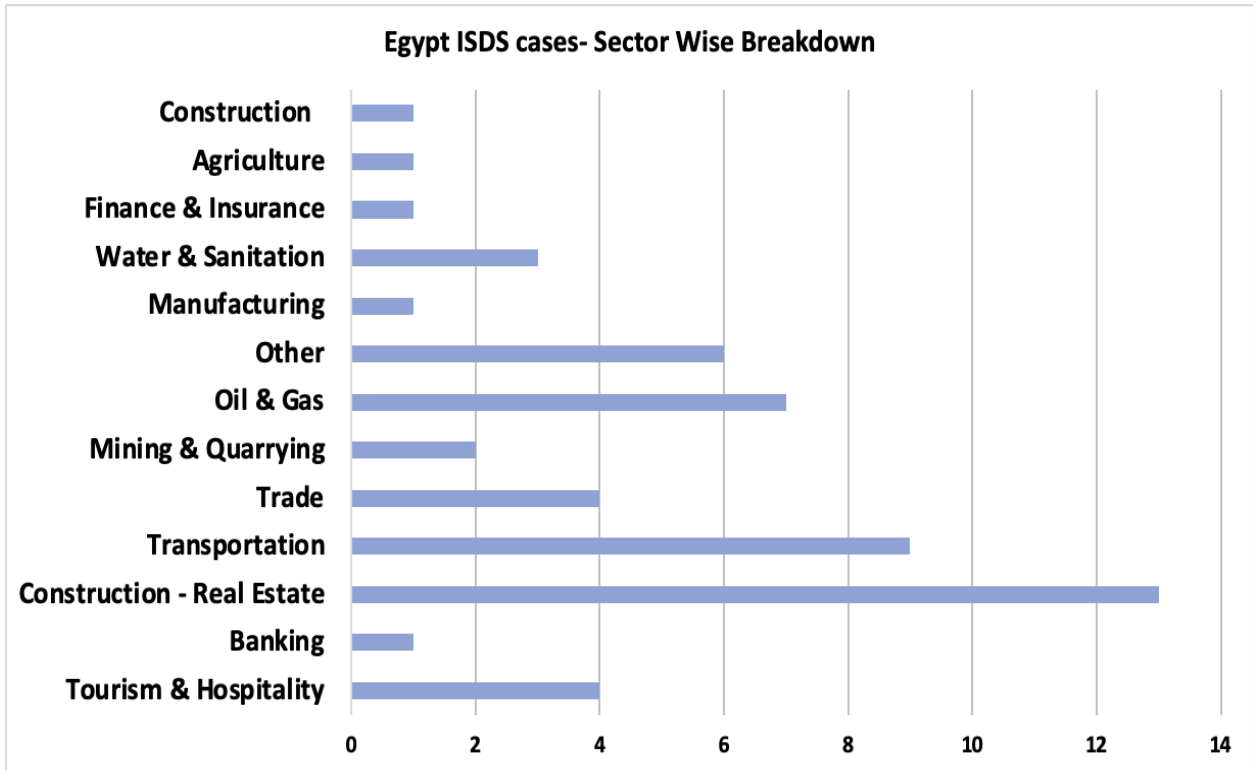
Egypt- Status of ISDS Cases (Total - 54)



unpaid ICSID v. non-ICSID awards

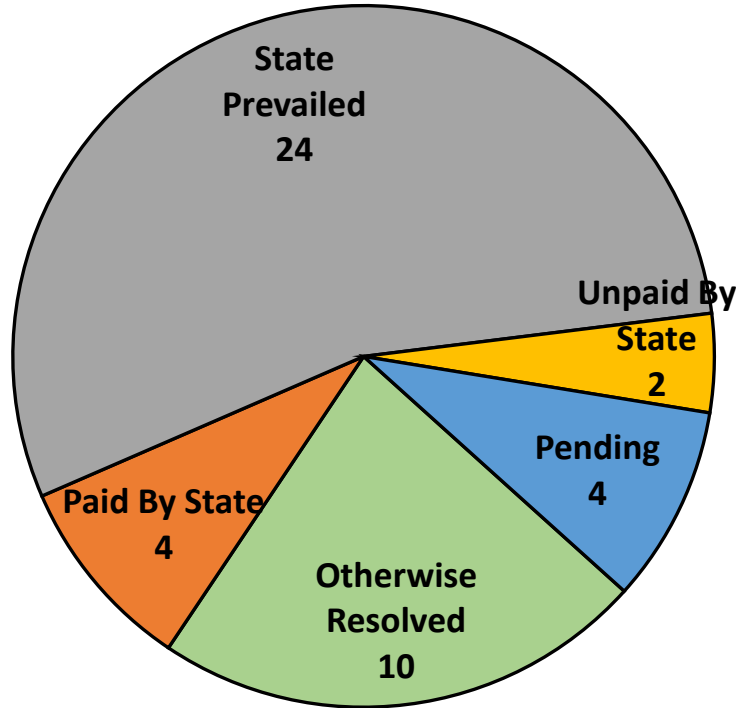


■ ICSID ■ non-ICSID

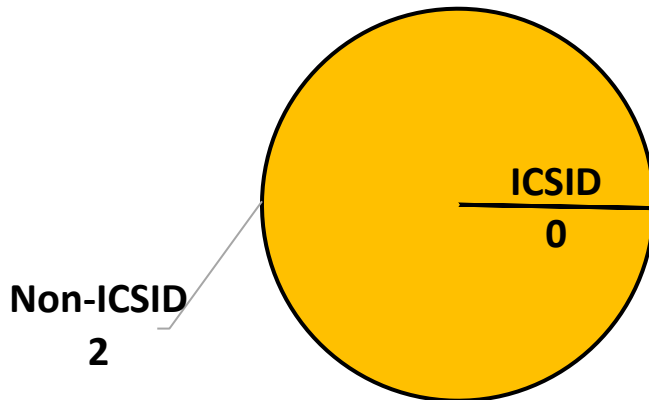


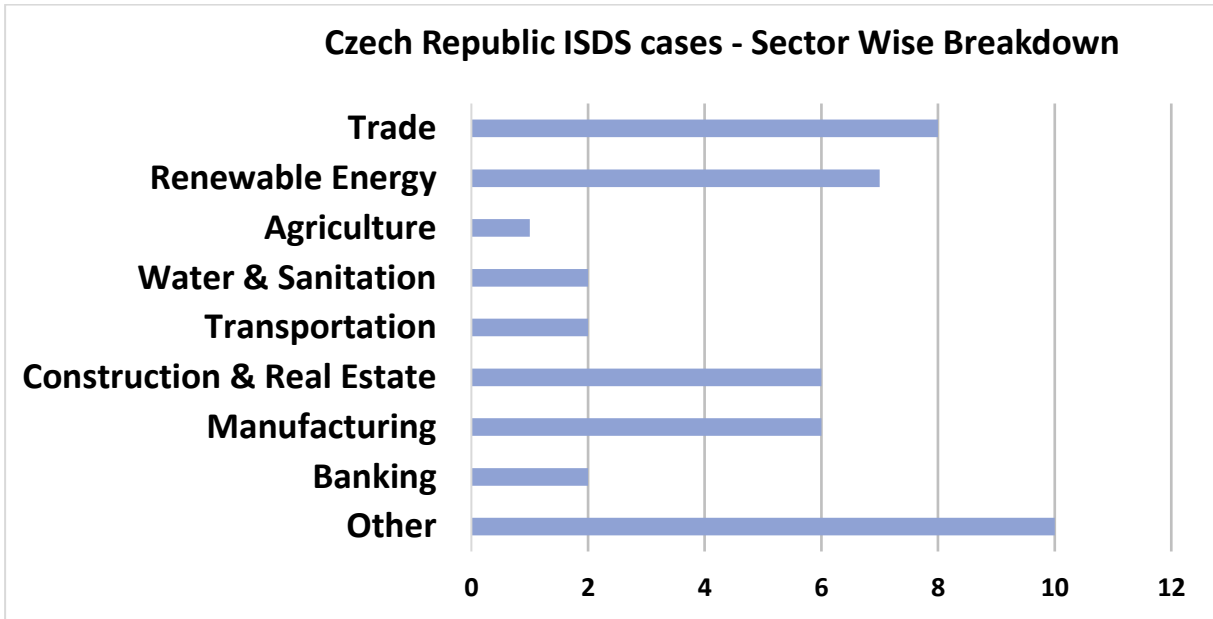
Czech Republic

Czech Republic- Status of ISDS Cases (Total - 44)

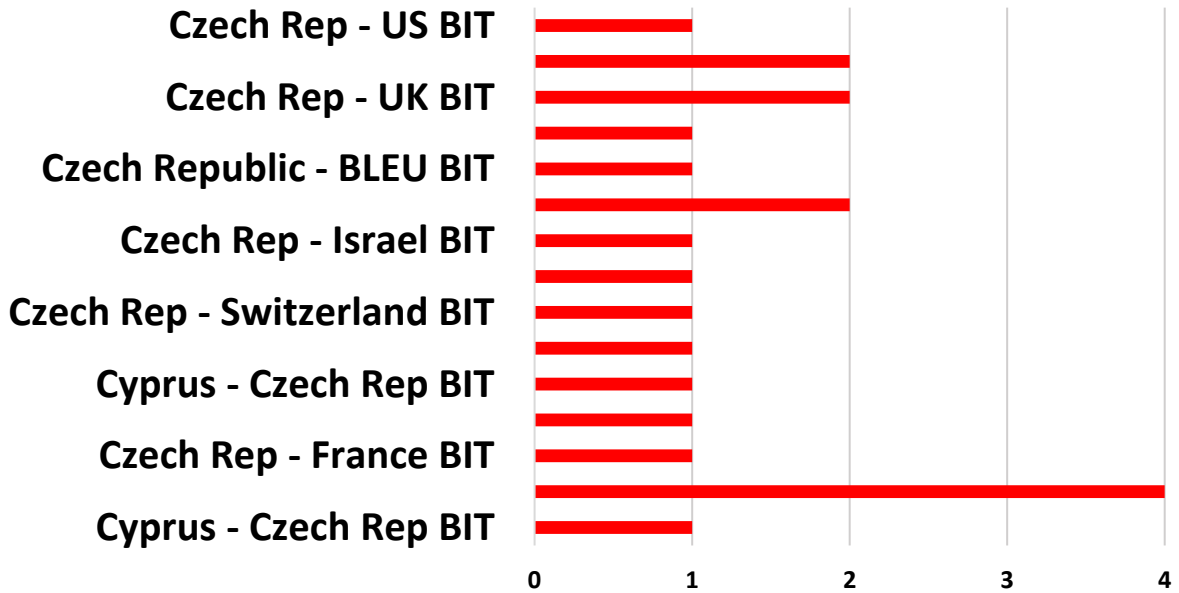


Czech Republic Unpaid Cases - ICSID v. Non-ICSID



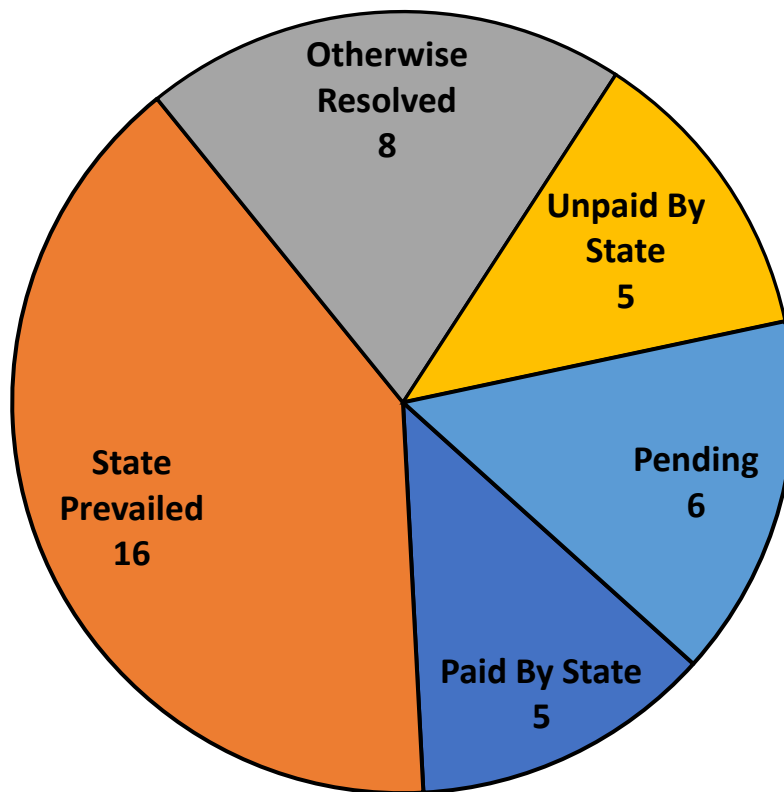


Czech Republic – Treaty Invoked by Claimants

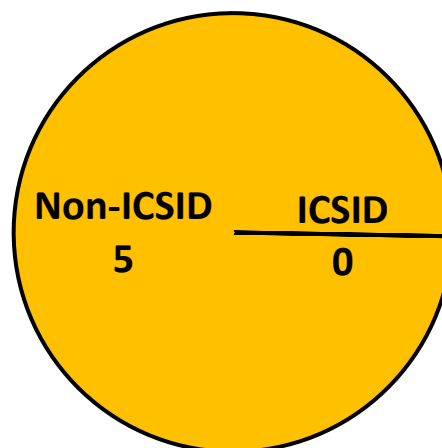


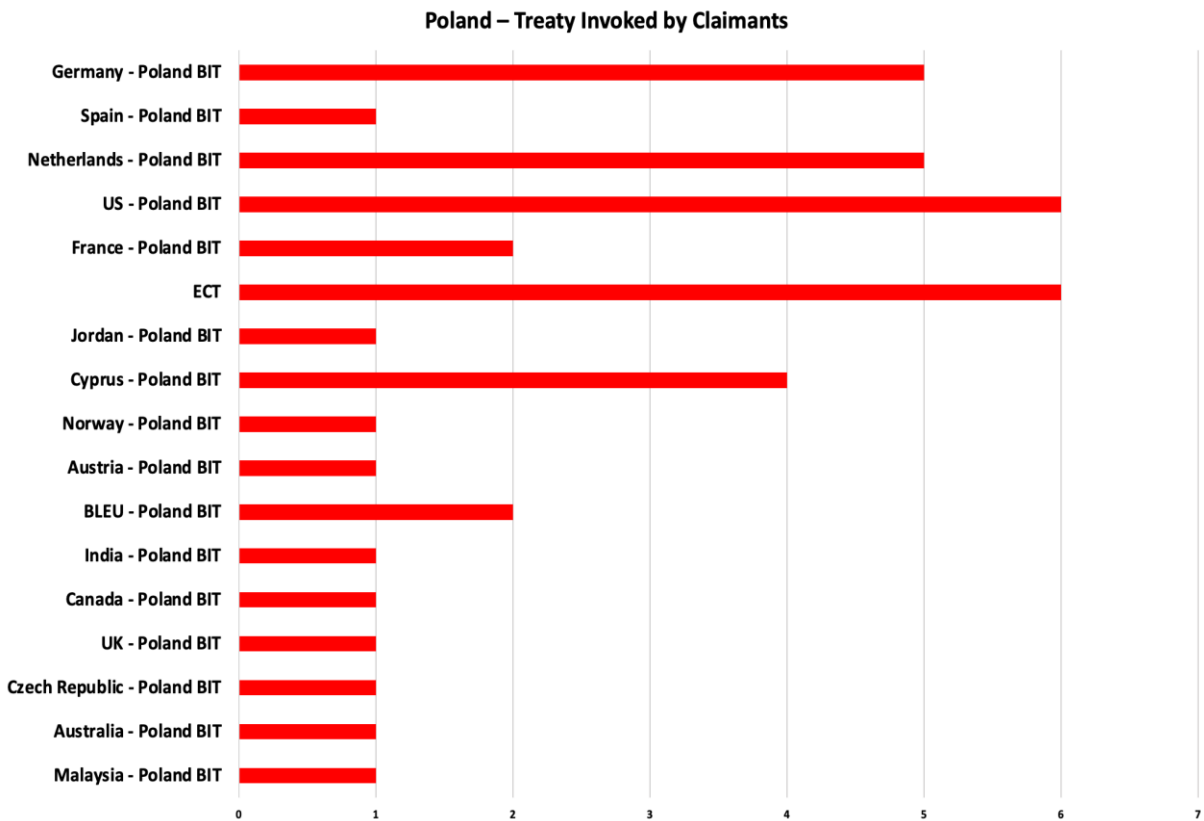
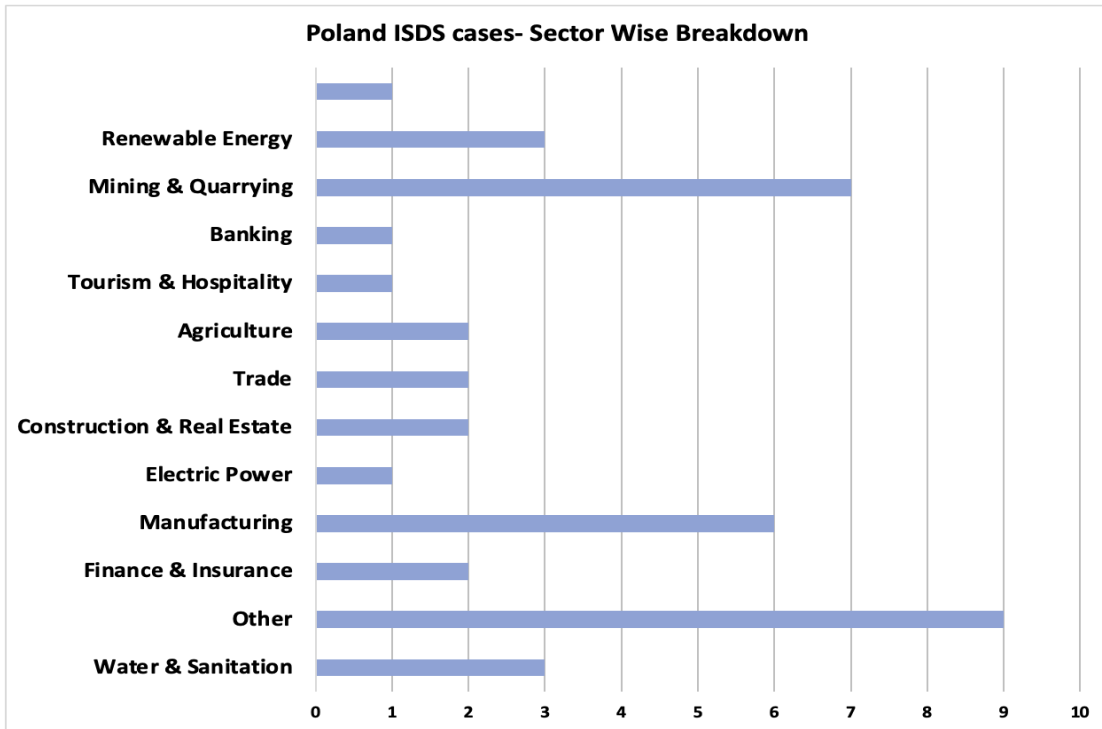
Poland

Poland- Status of ISDS Cases (Total - 40)



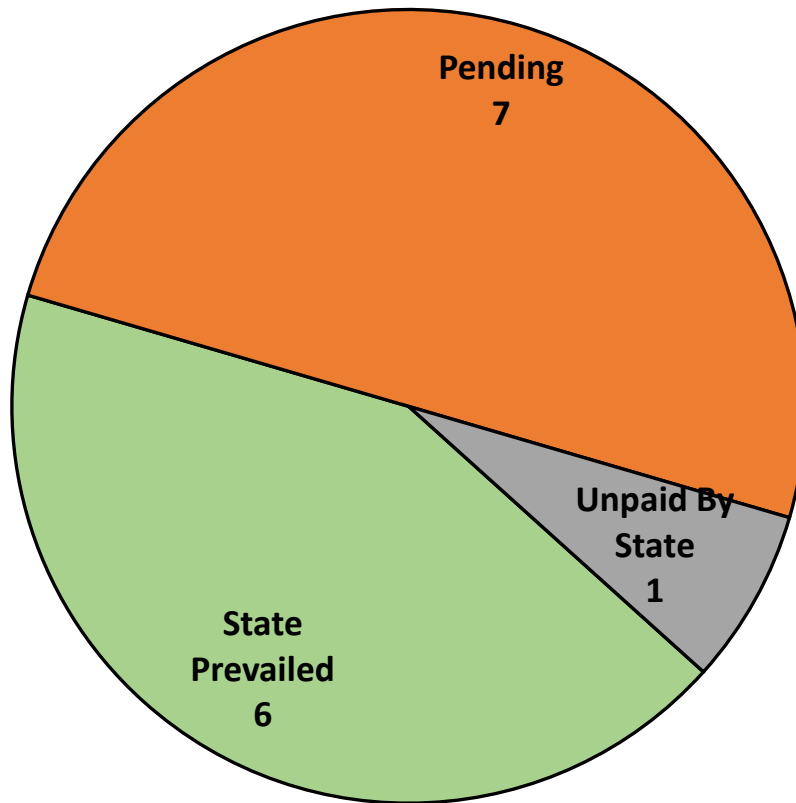
Poland Unpaid Cases - ICSID v. Non-ICSID



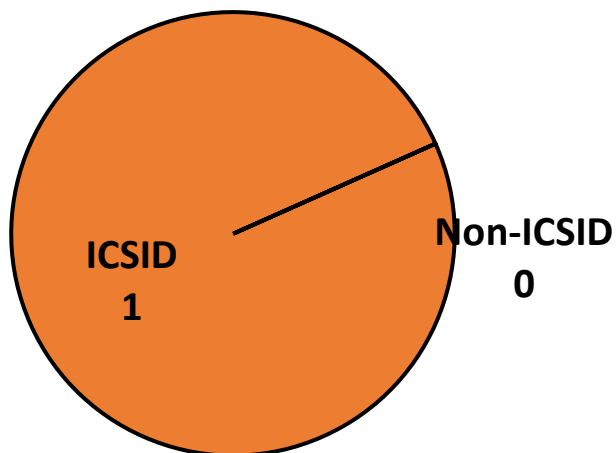


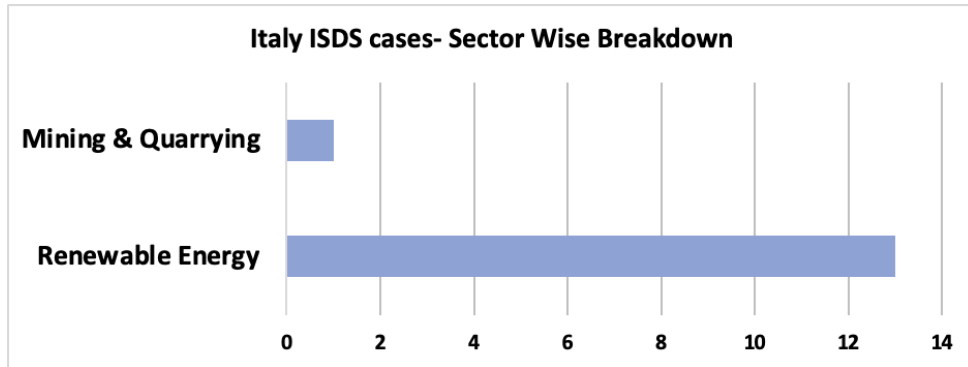
Italy

Italy- Status of ISDS Cases (Total - 14)

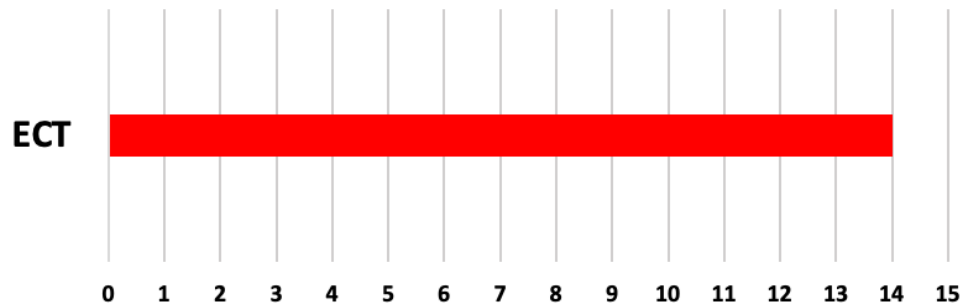


Italy Unpaid Cases - ICSID v. Non-ICSID



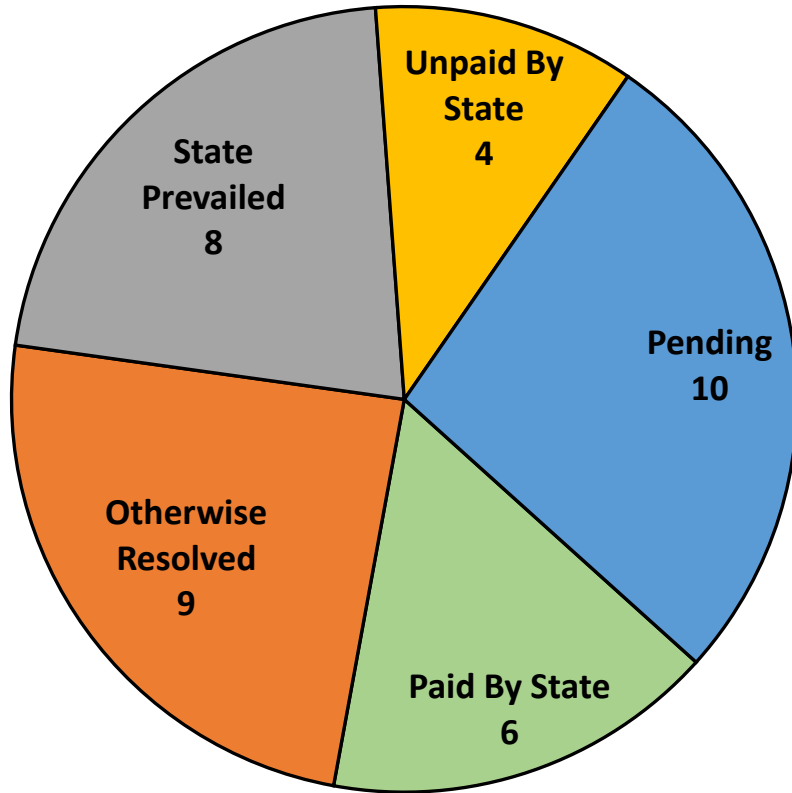


Italy – Treaty Invoked by Claimants

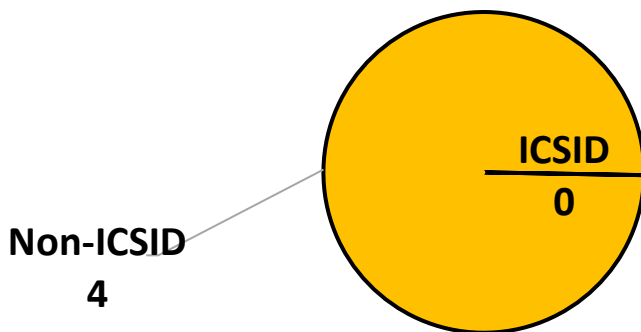


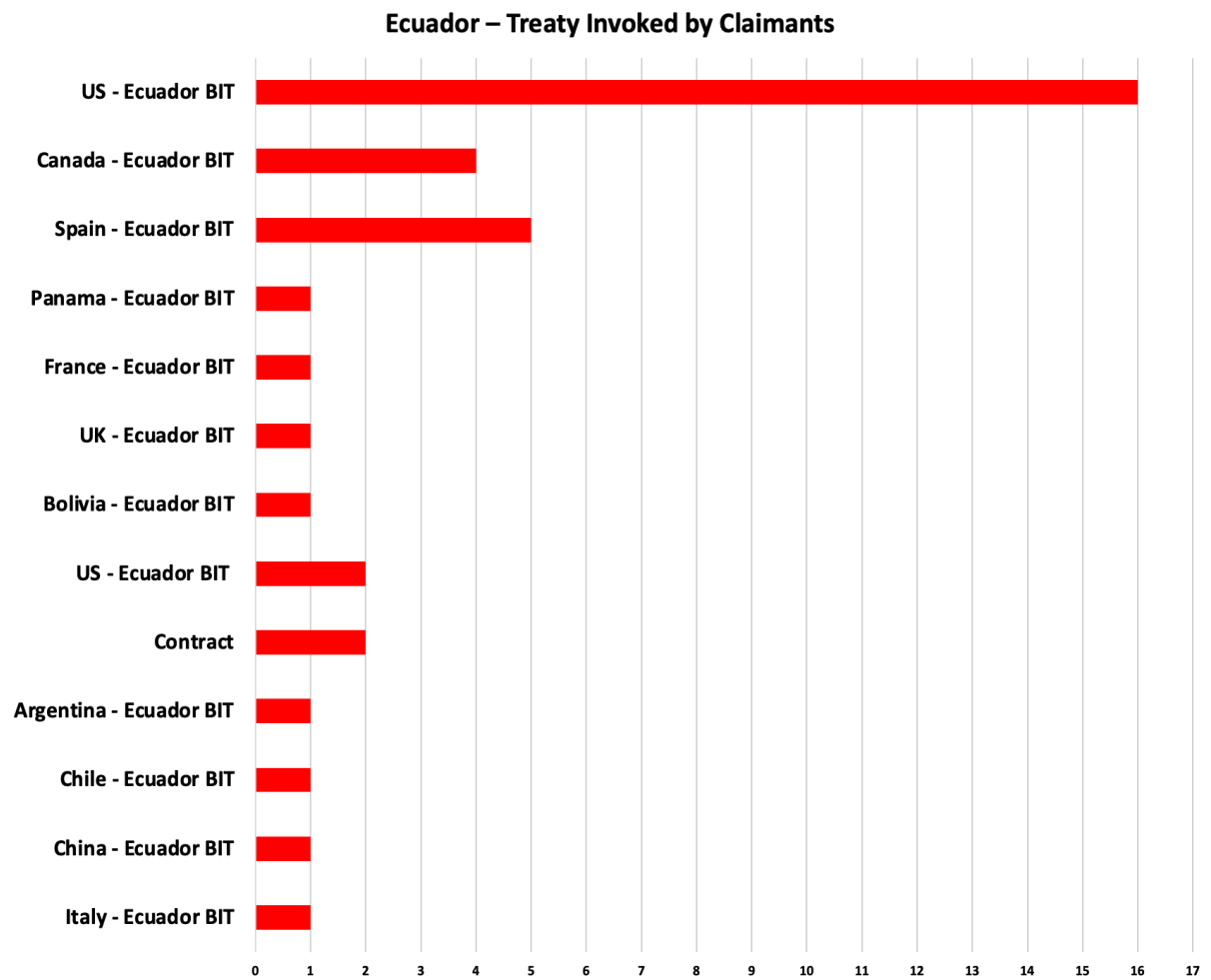
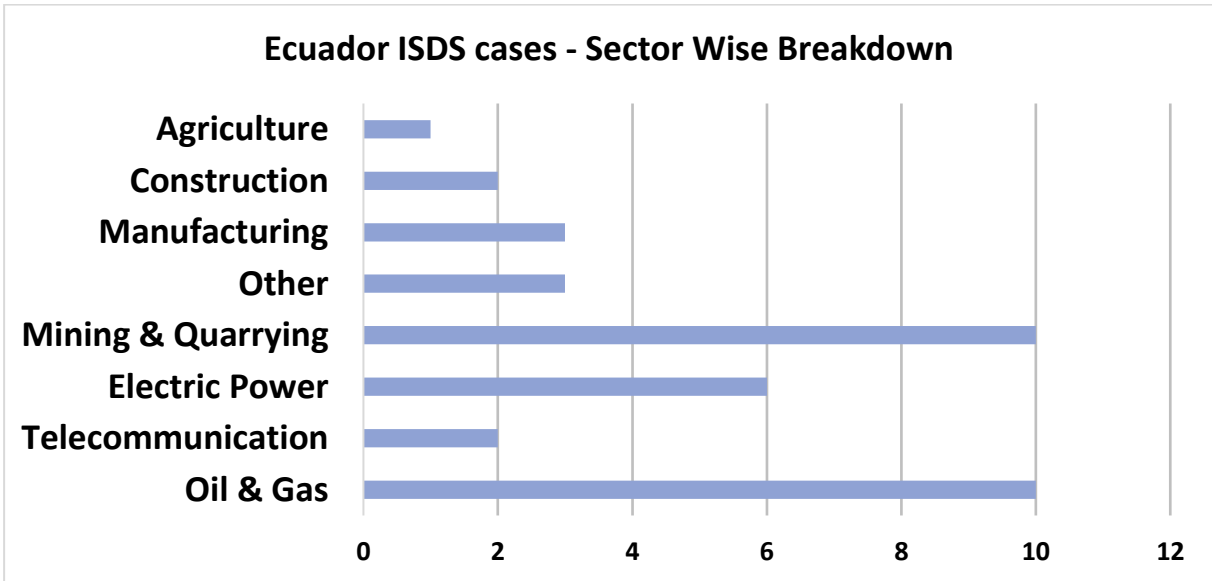
Ecuador

Ecuador- Status of ISDS Cases (Total - 37)



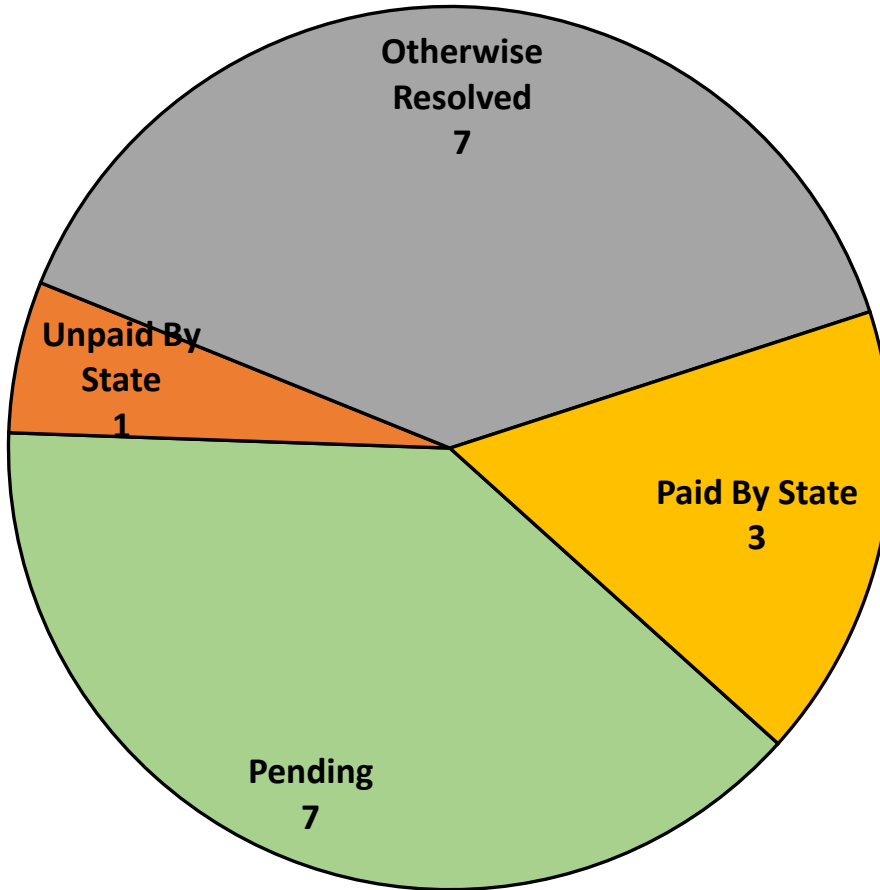
Ecuador Unpaid Cases - ICSID v. Non-ICSID



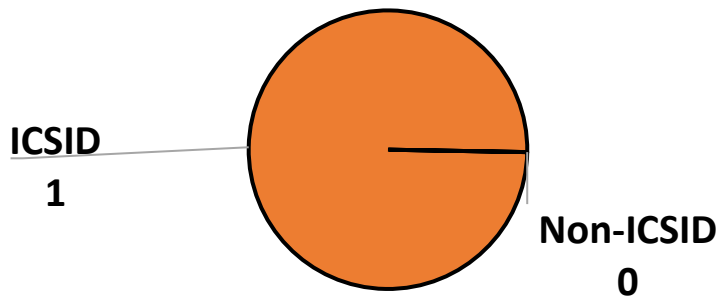


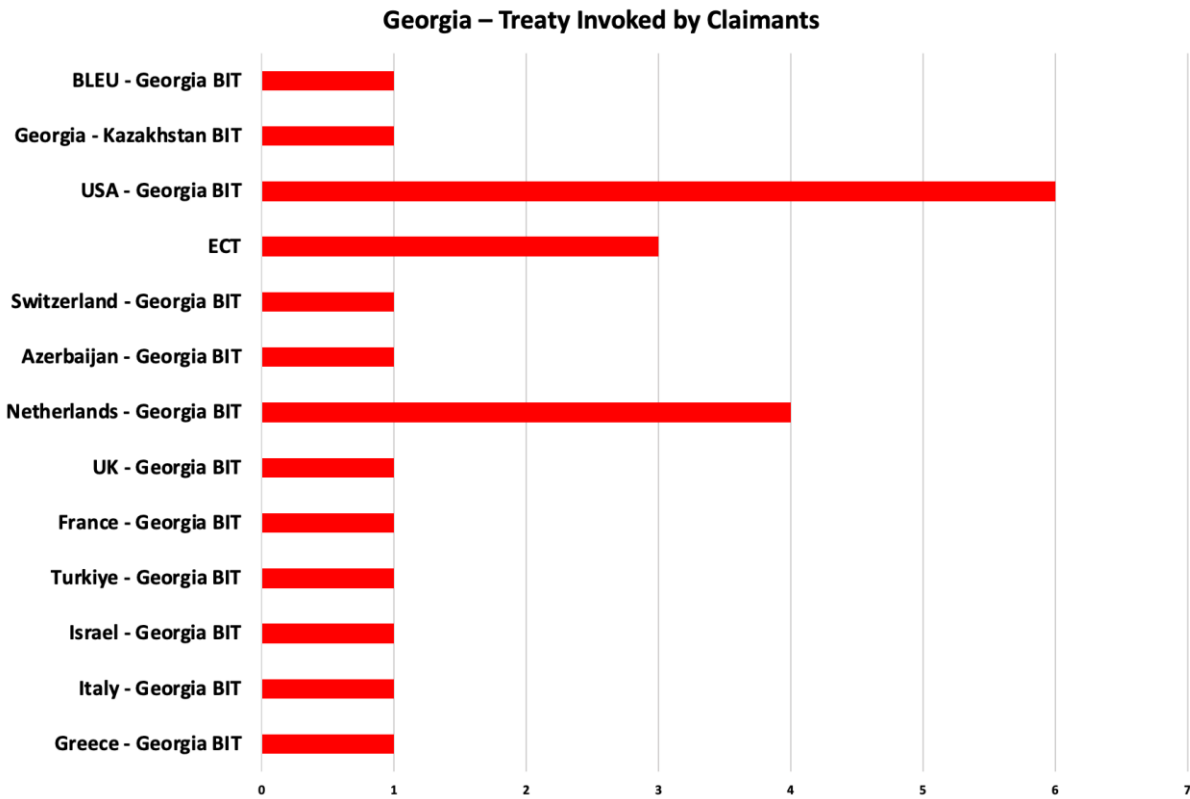
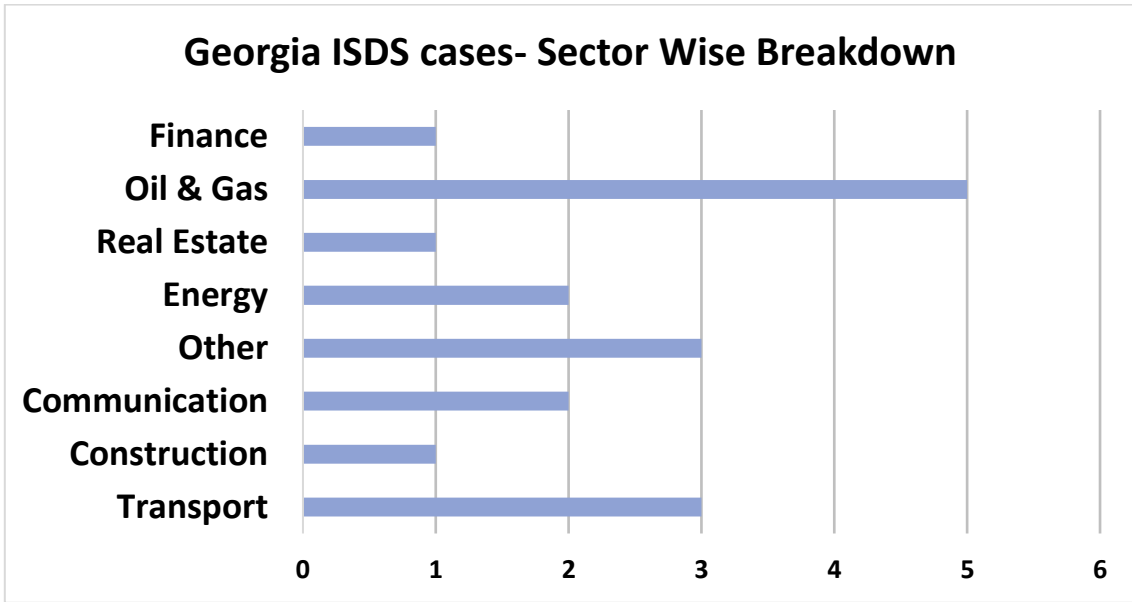
Georgia

Georgia- Status of ISDS Cases (Total - 18)



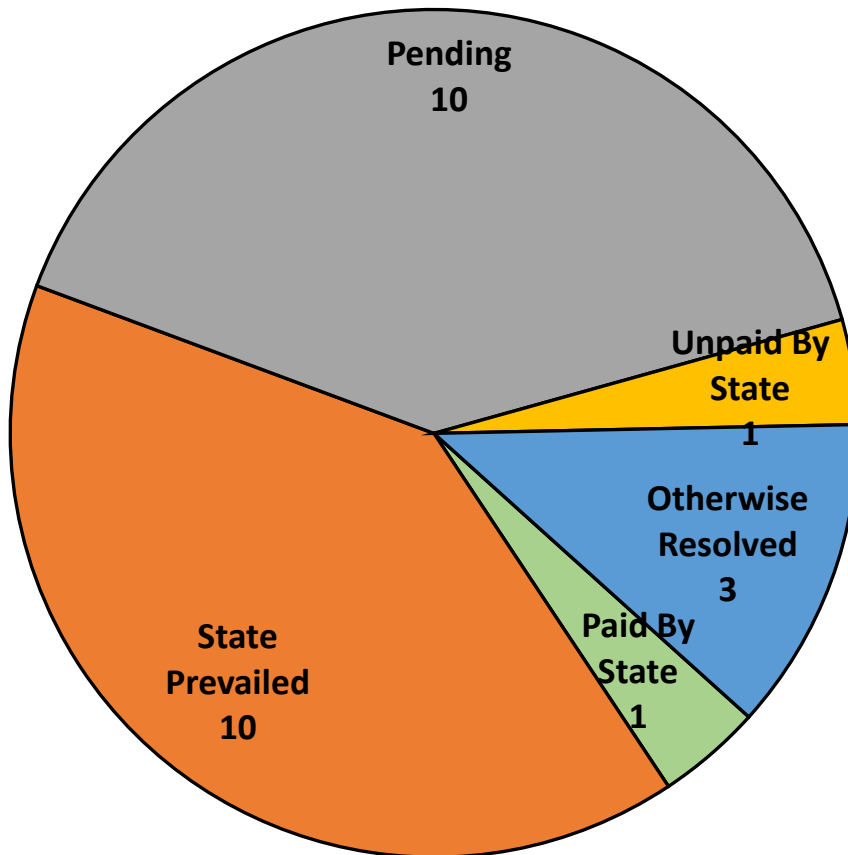
Georgia Unpaid Cases - ICSID v. Non-ICSID





Colombia

Colombia- Status of ISDS Cases (Total - 25)



Colombia Unpaid Cases - ICSID v. Non-ICSID

