

Investor-State Arbitration and Climate Change

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Outline

1. What are climate-related ISDS cases?
2. What kind of state measures are vulnerable to challenges under IIAs?

05 Feb 2021, 13:33 Benjamin Wehrmann

RWE sues Netherlands for two billion euros compensation over the state's 2030 coal exit

#Coal #International



Clean Energy Wire / Handelsblatt

German energy company **RWE** is suing the Netherlands for compensation payments in relation to the country's coal phase-out plans, the World Bank's arbitration court (ICSID) has **announced**. In contrast to Germany's planned coal exit, the Dutch phase-out law for the fossil power source does not stipulate an "adequate compensation" for plant operators, business daily Handelsblatt **reports**. "We don't think that this is legal," the company told the newspaper, which cites industry sources as saying **RWE** is claiming about two billion euros from the Netherlands. The country plans to end coal-fired power production by 2030, up to eight years earlier than Germany, which impacts two plants operated by the biggest German energy company. It would also mean the Eemshvaen plant, which was built in 2015 for 2.5 billion euros, would have to go offline, and **RWE** is arguing that the Dutch government encouraged the company's investment just a few years ago. NGO Client Earth said in an e-mailed statement that the legal action taken by **RWE** amounted to "an aggressive response to necessary and foreseeable action by the Dutch government to combat climate change," and argued that the lawsuit is "entirely the wrong message to send." The NGO said the ICSID should reject the company's claims, adding that "poor business decisions" made by **RWE** could not be addressed by "shifting losses from stranded assets onto states." Client Earth legal expert Mascha Klein said that while Germany had taken precautions to prevent

RWE to withdraw ECT claim against Netherlands

Jack Ballantyne
03 November 2023



Credit: Shutterstock/StringerAL

German energy company RWE is withdrawing its Energy Charter Treaty claim against the Netherlands over coal phase-out legislation – months after a German court ruled it was inadmissible.

Investor files trio of claims against EU, Denmark and Germany

Toby Fisher
25 October 2023

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A US-owned investment group has launched the first ever ICSID claim against the European Union, as well as separate claims against Germany and Denmark over an oil and gas enterprise.

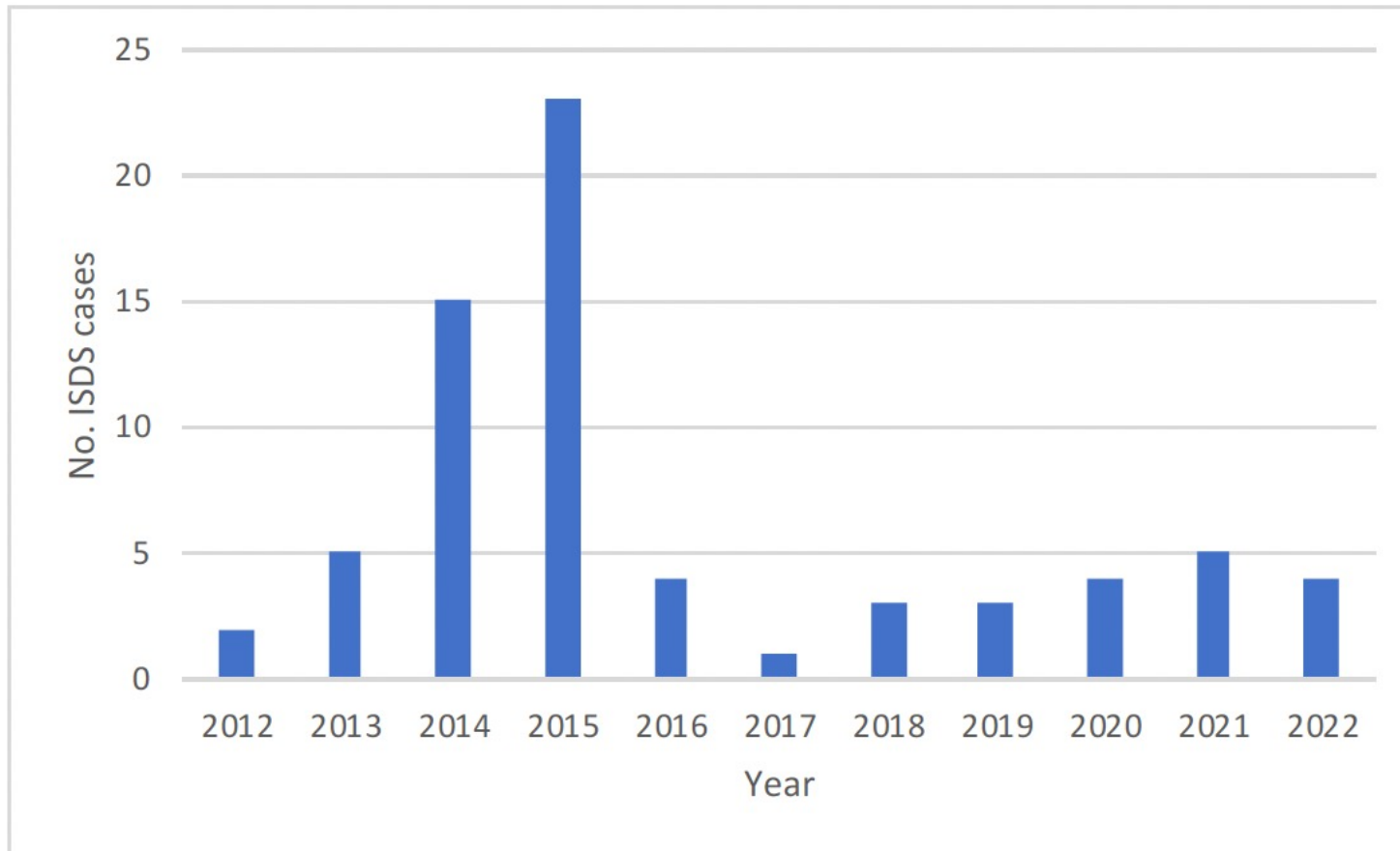
THE NET ZERO TRANSITION

- In order to have a 50% chance of limiting warming to 1.5 degrees by 2050 nearly 60% of oil and fossil methane gas, and 90% of coal must remain unextracted. (Welsby et al, 2021)
- More than 80% of the world's coal reserves are unburnable if global warming is to be held below 2 degrees. ([UCL study](#))
 - Rendering many operational and planned fossil fuel projects unviable → **Stranded assets**
- IPCC, WG III (2022) “there are still examples of international cooperation having a **chilling effect on climate mitigation**, particularly through financing and investment practices, **including legal norms designed to protect the interests of owners of fossil assets.**” (Emphasis added).
- A global transformation to a low-carbon economy is expected to require investment of at least **\$4–6 trillion per year** until 2030 to reach net zero by 2050 (COP 27, 2022)

THE NET ZERO TRANSITION

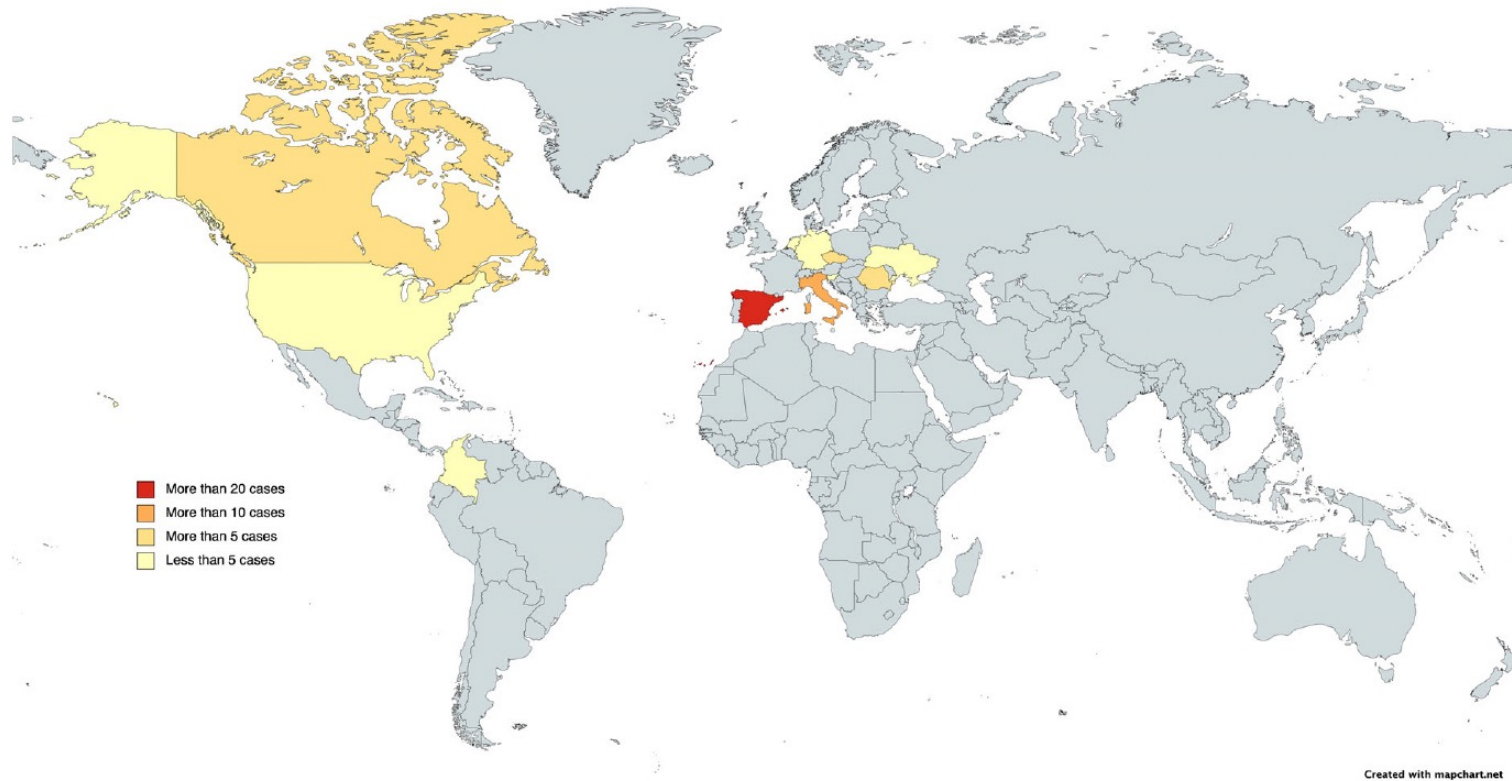
- Need for transition and decarbonization policies → **Regulatory changes**, changes in incentive schemes; carbon taxes; etc.
- A broad range of interests can constitute an investment. Therefore, many climate-sensitive economic activities fall within the coverage of an investment treaty.
- **Investments** that qualify as protected under an IIA, may include:
 - Property rights (e.g., power plants, pipelines, transmission lines, substations, refineries, or renewable energy installations)
 - Contractual rights (e.g., permits, concessions or licenses)
 - Intellectual property rights (e.g., trademarks and patent rights)

Figure 1. Number of climate-related ISDS cases since 2012.



SOURCE: MAPPING CLIMATE-RELATED INVESTMENT ARBITRATIONS BY M. FERMEGLIA, C. HIGHAM, K. SILVERMAN-ROATI, AND J. SETZER; TDM VOL. 21, ISSUE 1; FEBRUARY 2024

Figure 3. Map of climate-related ISDS cases by host State.



SOURCE: MAPPING CLIMATE-RELATED INVESTMENT ARBITRATIONS BY M. FERMEGLIA, C. HIGHAM, K. SILVERMAN-ROATI, AND J. SETZER; TDM VOL. 21, ISSUE 1; FEBRUARY 2024

CATEGORIES OF CLIMATE-RELATED ISDS CASES

CATEGORY 1

Stranded Asset
Claims

Category 1-A
Measures of
general application



Category 1-B
Permitting Process



CATEGORY 2

Roll-back of Climate
Legislation Claims



SOURCE: MAPPING CLIMATE-RELATED INVESTMENT ARBITRATIONS BY M. FERMEGLIA, C. HIGHAM, K. SILVERMAN-ROATI, AND J. SETZER; TDM VOL. 21, ISSUE 1; FEBRUARY 2024

MEASURES OF GENERAL APPLICATION

RWE v. The Netherlands, Uniper v. The Netherlands

- Investment: Two coal power-plants (RWE); one coal power-plant (Uniper)
- RWE and Uniper are German companies
- Measure: Phase-out of coal-fired plants by 2030 (law banning coal in electricity production)
- Claims under the Energy Charter Treaty (ECT): FET and indirect expropriation with no adequate compensation paid, claiming 1.4 billion EUR (RWE), and 1 billion EUR (Uniper)
- Discontinued





MEASURES OF GENERAL APPLICATION

Klesch v. the European Union, Klesch v. Denmark Klesch v. Germany (2023)

- Investment: Oil and gas refineries
- Klesch is a Holding company in Switzerland and the UK
- Measure: Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices and price levies in Denmark and Germany
- Claims under the ECT, €95m
- Pending [Case Details](#)



PERMITTING PROCESS

- ***Rockhopper v. Italy***

- Investment: 100% working interest in the Ombrina Mare oil and gas discovery project and a related offshore exploration permit (i.e., production concession).
- Investor: UK Company
- Measure: Denial of production concession for the Ombrina Mare oil field located off the coast of Abruzzo. This denial is the result of the amendment of the Italian law, which implements the ban on hydrocarbons.
- Claims under the ECT: Expropriation and FET
- Rockhopper claimed 281 million, obtained 190 million EUR
- Award: Italy's denial of a production concession **amounted to a direct expropriation**



Pipeline under construction in Alberta, Canada | [rblood via Flickr, CC BY-NC-ND 4.0](#)

PERMITTING PROCESS

- ***Lone Pine v. Canada***

- Investment: Oil and gas exploration permits in the Utica shale gas basin (fracking)
- Measure: Revocation by the Government of Quebec of claimant’s permits
- Award of 22 Nov 2022, decided in favor of state.

- ***TransCanada v. USA (I); TC Energy and TransCanada v. USA (II)***

- Investment: **P**roposed crude oil pipeline (Keystone XL Pipeline Project) from Alberta (Canada) to Nebraska (United States)
- Measures: President Obama’s refusal to grant permit, President Trump’s approval, President Biden’s executive order in 2021 revoking Trump’s presidential permit to construct the Pipeline.

ROLL-BACK OF CLIMATE LEGISLATION

- 40+ renewable energy ISDS cases against Spain
- *CEF Energia v. Italy, Blusun v. Italy, Ekosol v. Italy, etc.*
- *Mainstream Renewable Power v. Germany, Strabag and others v. Germany, etc.*
- *Fin.Doc and others v. Romania, EP Wind v. Romania, etc.*
- *Voltaic Network v. Czech Republic, etc.*



CLIMATE CHANGE-RELATED MEASURES VULNERABLE TO CHALLENGES UNDER IIAS

- Institute planned phase-outs of certain energy sources
- Discontinue fossil fuel subsidies or impose carbon taxes on fossil fuel
- Include stricter emissions or other environmental standards
- Enact policies or practices denying environmental permits for the development, transport or use of coal, gas, or petroleum resources
- Implement decisions that require or result in stranding of fossil fuel reserves



REFERENCES

- Louise Barber, *Zeph Investments v Australia*: The Latest in Investor-State Climate Change-Related Claims, Kluwer Arbitration Blog, <https://arbitrationblog.kluwerarbitration.com/2023/08/24/zeph-investments-v-australia-the-latest-in-investor-state-climate-change-related-claims/>
- Paolo Mazzotti (2022). *Rockhopper v. Italy and the tension between ISDS and climate policy. A missed moment of truth?* Völkerrechtsblog, <https://voelkerrechtsblog.org/de/rockhopper-v-italy-and-the-tension-between-isds-and-climate-policy/>
- Stefanie Schacherer, *Sustainable Development in EU Foreign Investment Law*, Brill's Nijhoff International Investment Law Series, 2021, 455 p.
- Stefanie Schacherer, *International Investment Law and Sustainable Development - Key Cases from the 2010s*, e-book, International Institute for Sustainable Development (IISD), 2018; <https://www.iisd.org/library/international-investment-law-and-sustainable-development-key-cases-2010s>
- M. Fermeglia, C. Higham, K. Silverman-Roati, and J. Setzer, 'Mapping Climate-Related Investment Arbitrations'; TDM Vol. 21, Issue 1; February 2024
- UNCTAD, World Investment Report, 2023.
- D. Welsby et al, 'Unextractable Fossil Fuels in a 1.5 C World', (2021) 597 Nature, 230