

Energy Transition Disputes: Recent Cases and Future Trends

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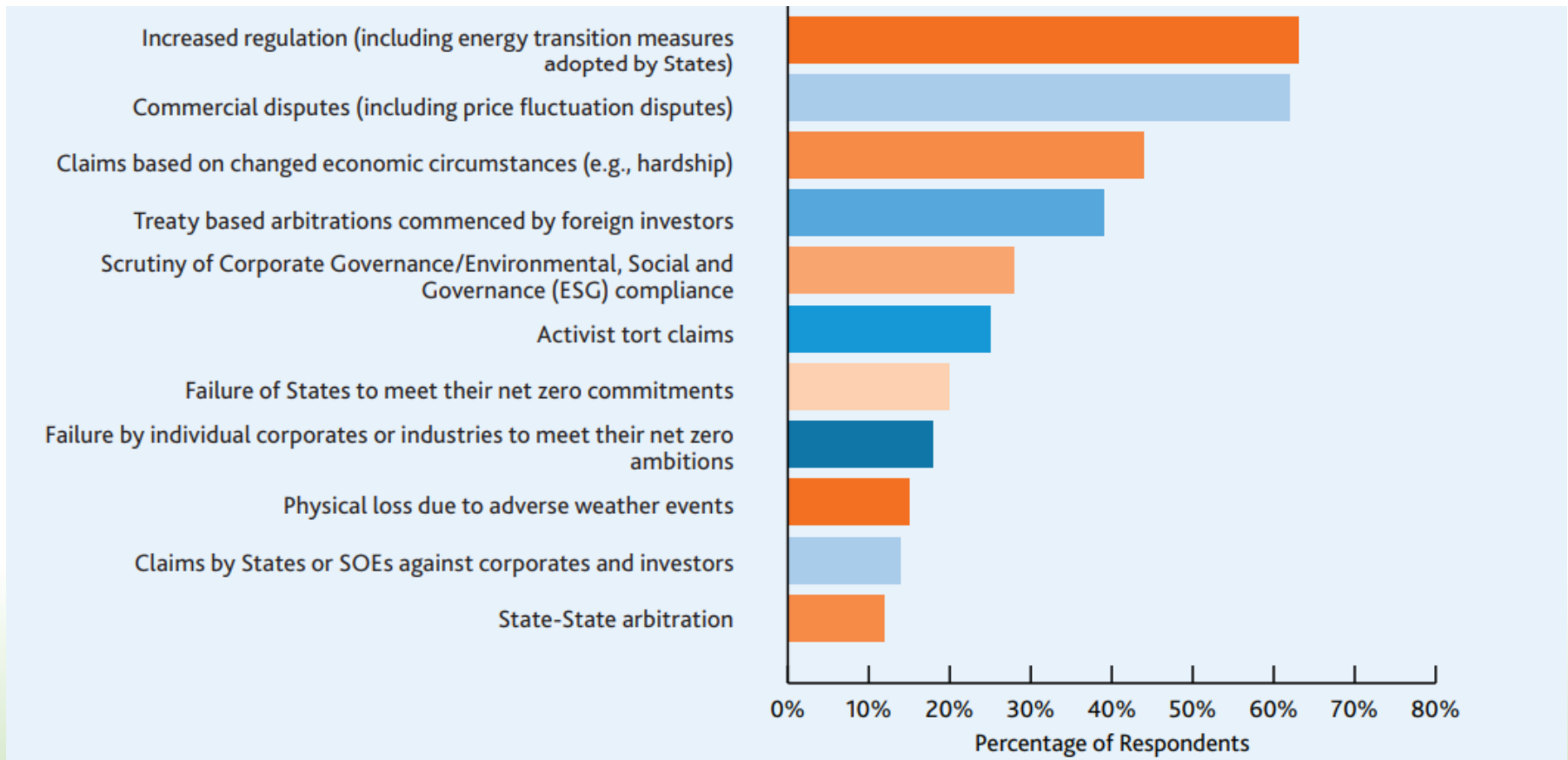
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1. *Energy Transition and the Role of State in Energy Markets*

- Estimated USD 131 trillion worth of investments needed between now and 2050 to achieve energy transition
- Role of governments seen as key to promoting energy transition and in particular investments in renewables
- Justification: correction of negative externalities + stimulate technological change
- Types of mechanisms: Feed-in tariffs, competitive auctions, green certificates, contracts for differences and trading carbon emissions allowances
- At the same time existing investments especially in carbon intensive industry face uncertainty as countries pass laws to phase out fossil fuels
- **Right to regulate v. legal certainty**
- The view of competing objectives is **MISTAKEN**
- And all of this is happening against the backdrop increased protectionism

2. *Types of Disputes which will Increase due to Energy Transition?*



Source: Queen Mary University of London and Pinsent Masons, *Future of International Energy Arbitration Survey Report 2022*, 11, <https://arbitration.qmul.ac.uk/media/arbitration/docs/Future-of-International-Energy-Arbitration-Survey-Report.pdf>

3. *Types of Energy Transition Disputes*

- **Types of Disputes by reference to the Parties in Dispute:**
 - Between companies
 - Investor-State Disputes
 - State-State Disputes
 - Individual v. States
 - Individual v. Companies

3. *Types of Energy Transition Disputes*

- **Types of Disputes by reference to dispute resolution mechanism**
 - National Courts
 - International Courts like the ECHR, Inter-American Court
 - Arbitration pursuant to Bilateral Investment Treaties, NAFTA, ECT etc
 - Commercial Arbitration pursuant to investor-state contracts

4. *Three Categories of Investment Treaty Disputes*

- **Failure by the State to take relevant preventive measures against climate change which has harmed investment**
- **Reversal of measures adopted to encourage investments in renewable sector**
- **Introduction of energy transition measures**

4.1 *Failure to Take Preventive Measures*

Allard v. Barbados, PCA Case No. 2012-06, Award, 27 June 2016

Facts:

- Claimant owned an eco-tourism site
- Allegations of degradation of the environment (i) mismanagement of the Water Authority facility; (ii) sewage spill and (iii) rezoning of nearby land to residential

Claim: Breach by State of obligation to protect an investment invoking the Full Protection and Security Standard

Held:

- Willing to consider a state's obligation to protect investment from environmental harm under FPSS

4.1 *Failure to Take Preventive Measures*

Test:

- Whether there was a degradation of the environment at the Sanctuary sufficient to render operating the Sanctuary as an ecotourism attraction impossible or financially unsustainable.
- Such degradation was caused by actions or inactions of Barbados

Finding:

- Barbados was “aware of the environmental sensitivities of the [Claimant’s investment]” but had taken “reasonable steps to protect it” [para. 242]

4.2 *Reversal of Measures Adopted to Encourage Investments in the Renewable Sector*

- **Changes in feed-in tariff**
 - Some tribunals in case of Spain have held that general legislative or regulatory provisions could not give rise to legitimate expectations as to the stability of the Spanish renewables framework
 - However, the majority of tribunals concluded that investors could derive legitimate expectations from certain legislative and regulatory provisions in Spain's renewables framework. Many highlighted that regime was introduced to induce investment
 - The tribunal in Cavalum, for instance, found that investors' right to earn a "reasonable rate of return" was "the cornerstone of the [Spanish] incentive regime" for solar energy, giving rise to legitimate expectations on the part of investors
- Similar cases against Czech Republic, Italy, Slovakia, Ukraine and most recently against **Japan**

4.2 *Reversal of Measures Adopted to Encourage Investments in the Renewable Sector*

- **Claims regarding green certificates**
 - **LSG Building Solutions v. Romania** (ECT, ICSID Case, ongoing)
 - ❖ 2008/2010 Scheme whereby guaranteed demand for GCs allowing investors to accurately predict their price over course of 15 years
 - ❖ Scheme approved by EC 2011
 - ❖ Changed on basis that price of solar equipment fell and industry suffering from cost.
 - ❖ Award rendered in July 2022 on jurisdiction and liability: breach of FET
- **Claims regarding emissions trading market**
 - **Koch Industries and Koch Supply & Trading LP v. Canada** (NAFTA, ICSID Case, 13 March 2024)

4.3 *Introduction of Energy Transition Measures*

- Estimate that claims from oil and gas investors relating to energy transition could amount to USD 340 billion
- **Vattenfall case**
 - Phase out of nuclear by German government after nuclear accident in Fukushima in 2011
 - ECT Claim + Claim in National Court
 - German Constitutional Court confirmed twice that Vattenfall was discriminated against as it could not use its production rights in its nuclear plants
 - Understanding signed on 5 March 2021 whereby Euro 1.425 was paid in compensation

4.3 *Introduction of Energy Transition Measures*

- **RWE v. Netherland/ Uniper v. Netherlands (ICSID, 2021)**

- Phase out of coal by 2030
- RWE Claim: Not given sufficient time or funds to carry out the necessary works for power plants built in 2015 to transition from burning coal to biomass
- RWE Claim: Euro 1.4 billion

- **Westmoreland Mining Holdings v. Canada (NAFTA)**

- Investor alleged acquired rights in coal plants in 2013 when Canadian regulatory regime contemplated a 50-year lifespan.
- In 2015 change of policy: phase out of coal by 2030
- Canada's defense that investor "could not have expected that the federal regulations would provide a "predictable future" as an informed investor would have known that the state contemplated further emissions regulations
- Claim dismissed on jurisdictional grounds

4.3 *Introduction of Energy Transition Measure*

- **Keystone XL Pipeline v. USA (NAFTA)**
 - Revocation of permit to construct a pipeline to export crude oil from oil sands in Alberta to US refineries
 - Claim: 15 bn
 - Claim dismissed on procedural grounds
- **France: Permits for exploration**
 - Bill proposed in France in 2017 to prohibit new exploration permits for oil and gas exploration and extension of existing ones
 - Conseil d'État, France's highest administrative court and advisory body, considered whether the bill undermined the rights of concession holders under the French Constitution

4.3 *Introduction of Energy Transition Measures*

- Arguments by permit holders: also breach of Energy Charter Treaty
 - Conseil d'État concluded that the legislation's objective—to end fossil fuel exploitation—was compatible with the French Constitution and France's obligations under European law (it did not comment on obligations under the ECT).
 - Proposed amendments as the bill risked undermining the rights of concession holders by prohibiting extensions of existing concessions.
 - The law adopted in December 2017 allows the extension of concessions until 2040, as well as longer extensions if a concession holder can show that it will not have recovered its exploration and exploitation costs by 2040
- **EU: Phase out of petrol and diesel cars by 2035**

5. Counterclaims under Investment Treaty

- Investment treaties criticised as being asymmetrical', providing protections only for investors, without providing sufficient protection for States
- ICSID Convention (Article 46) and ICSID Arbitration Rules (Rule 48 in the 2022 Rules; Rule 40 in the 2006 Rules), and the UNCITRAL Arbitration Rules (Article 21(3) in the 2021 and 2010 Rules) allow States to pursue counterclaims, provided that there is jurisdiction to consider such claims
- **Saluka Investments BV v. The Czech Republic, Decision on Jurisdiction over the Czech Republic's Counterclaim, May 7, 2004 (ICSID)**
 - Counterclaim must arise "directly out of an investment and out of the dispute" which was before the Tribunal
 - Czech Republic's counterclaims, which were largely concerned with general non-compliance with domestic law, did not constitute an "indivisible whole" with the claim and therefore there was no jurisdiction over them

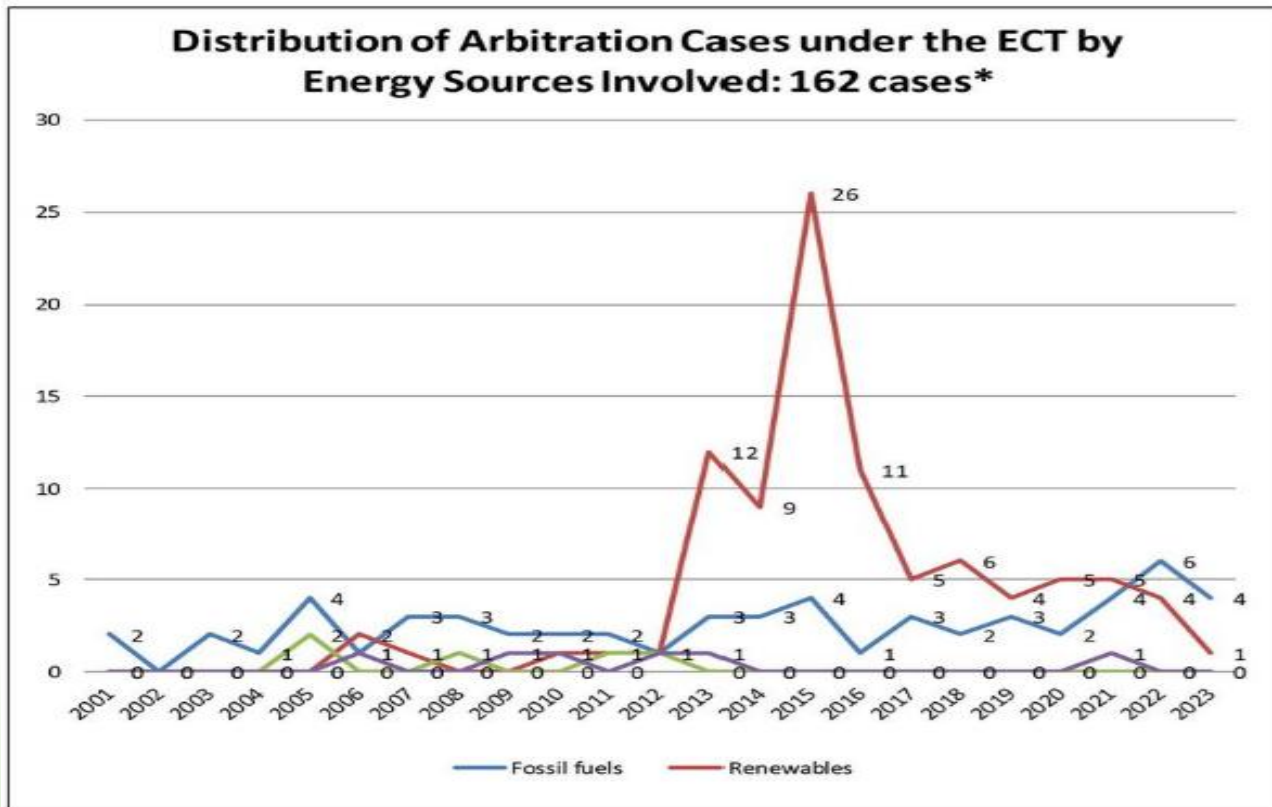
5. Counterclaims under Investment Treaty

- **Sergei Paushok, CJSC Golden East Company and CIJC Vostokneftegaz Compnau v. The Government of Mongolia, UNCITRAL**
 - Counterclaims for inter alia alleged breach of “*environmental obligations towards Mongolia*”
 - Claim dismissed:
 - ❖ arise under Mongolian public law
 - ❖ subject to exclusive jurisdiction of Mongolian courts; and
 - ❖ cannot be considered as constituting an indivisible part of the Claimants’ claims based on the BIT and international law or as creating a reasonable nexus between the Claimants’ claims and the counterclaims justifying their joint consideration by an arbitral tribunal exclusively vested with jurisdiction under the BIT

5. Counterclaims under Investment Treaty

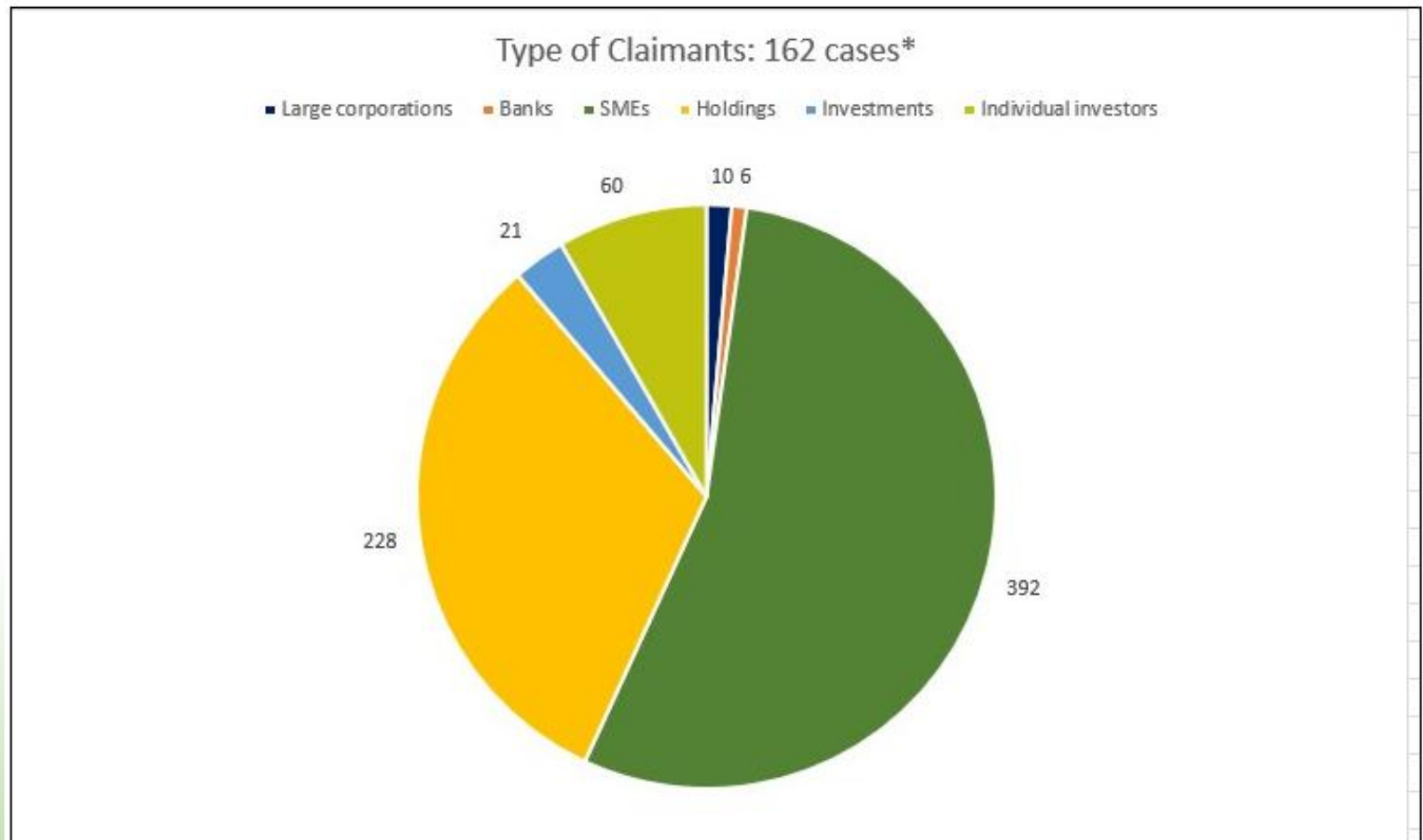
- **Burlington Resources Inc v. Ecuador, ICSID Case No. ARB/08/5 & Perenco Ecuador Ltd v. Ecuador, ICSID Case No. ARB/08/06**
 - Jurisdiction to determine the counterclaims
 - Cases concerned production sharing agreement for oil exploration in respect of two blocks
 - Counterclaim that Investor abandoned the blocks causing environmental damage
- Check carefully wording of new generation of Bilateral Investment Treaties
- Article 18 of Morocco-Nigeria BIT:
 - Obligation: (i) maintain a post-establishment environmental management system and (ii) not to operate investments in a manner which circumvents the international environmental, labour or human rights obligations of either the home or the host State

6. *Lessons from the Past: Disputes Unleashed by State Intervention in the EU*



Fossil Fuels		Renewables		Nuclear		N/A	
Total Damages Claimed***	Total Damages Awarded***	Total Damages Claimed	Total Damages Awarded	Total Damages Claimed	Total Damages Awarded	Total Damages Claimed	Total Damages Awarded
approx. EUR 13 billion + the Yukos cases (EUR 87 billion)	approx. EUR 1 billion + the Yukos cases (EUR 40 billion)	approx. EUR 23 billion	approx. EUR 1.3 billion	approx. EUR 4.5 billion	approx. EUR 74 million	approx. EUR 550 million	0

6. *Lessons from the Past: Disputes Unleashed by State Intervention in the EU*



6. *Lessons from the Past: Disputes Unleashed by State Intervention in the EU*

- Number of renewables cases under Energy Charter Treaty as of July 2023:
 - Spain: 51
 - Italy: 14
 - Romania: 8
- Spain ranks 3rd in the world in terms of the outstanding damages awards: USD 1.3 billion / EUR 1.2 billion
- Spain has incurred interest rates and legal fees totalling USD 270 million / EUR 250 million
- Spain has spent at least EUR 70 million for its own legal fees

7. *Some Conclusions*

- **Regulatory framework and legal certainty are key for investment in energy transition**
- **The scope of “legitimate expectations” will be the key focus in energy transition cases**
- **Various recent awards have refused to treat FET obligation as comprising a strict obligation of regulatory stability**
- **Issue of reasonableness of expectations given the state of knowledge of climate change and development of obligations under IL**
- **What is the role of Investment Treaties in promoting investment in energy transition**
- **Is protecting existing oil and gas investors going to give rise to “regulatory chill”**

7. *Some Conclusions*

- Growing importance of stability clauses
- Increase likelihood of counterclaims
- Changes to BITs
- **KEY LESSON: DEVISE A ROBUST REGULATORY FRAMEWORK FOR PROMOTION OF NEW TECHNOLOGIES WHICH IS NOT SUBJECT TO CONSTANT CHANGE**

Thank you for your attention !

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