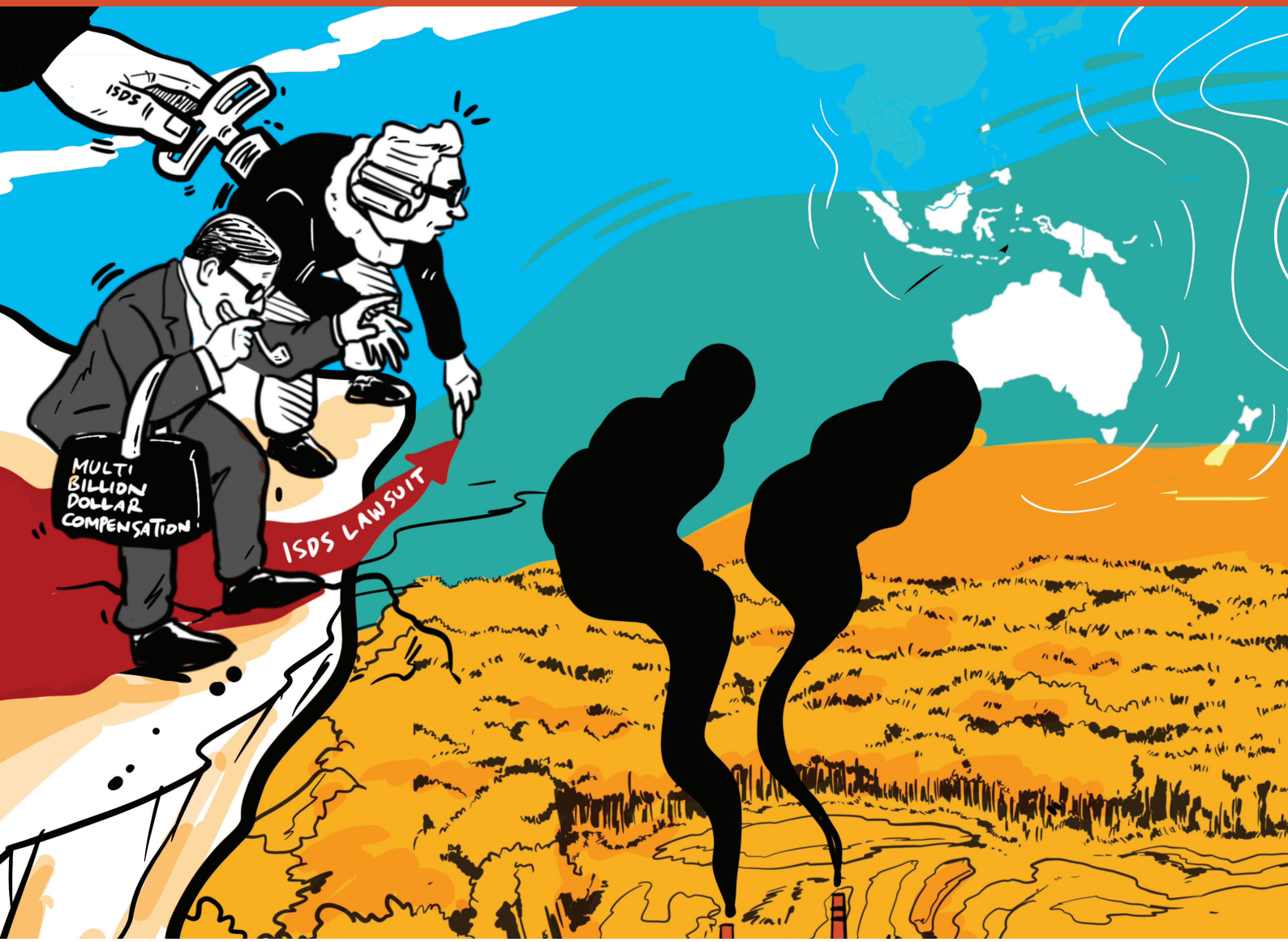
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The Attack On Just Energy Transitions: ISDS Lawsuits and Risks in ASEAN-RCEP



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Brief Summary

- The Investor-State Dispute Settlement (ISDS) mechanism in trade and investment agreements enables foreign investors to sue governments for billions of dollars if they deem that a change in law or policy or a court decision reduces their future profits. Fossil fuel companies are increasingly using ISDS against government attempts to phase out fossil fuels, making ISDS a barrier to a just transition towards renewable non-carbon-based energy.

- Global uncertainty is contributing to regionalism, and for the Association of Southeast Asian Nations (ASEAN) region this has meant its enhanced integration as a global production hub, particularly for key partners such as China, Japan and South Korea. It is anticipated that energy demand in the region will continue to grow 2.6-fold by 2050, with the industrial and transport sectors expected to account for 84% of the total.

- Almost all ASEAN countries have pledged to phase out coal mining between 2040 and 2050 and to reach net-zero or carbon-neutral goals between 2050 and 2060. Fossil fuels will, however, remain dominant in the energy supply mix in ASEAN member states. The move away from coal is underway, but the path ahead remains uncertain. This is often linked to the inconsistent application of policies that lead governments to make exceptions that undermine previous agreements. The regulatory chilling effect of ISDS has the potential to prevent countries from implementing national regulations and and commitments to energy transition.

- ISDS lawsuits have become a real threat to just energy transitions globally and have had an impact on (1) states' commitments to achieving net-zero emissions; (2) communities' struggles to defend their territories and the sustainability of their livelihoods; (3) the perpetuation of colonialism in low- and middle-income countries (LMICs); and (4) public policies that communities need.

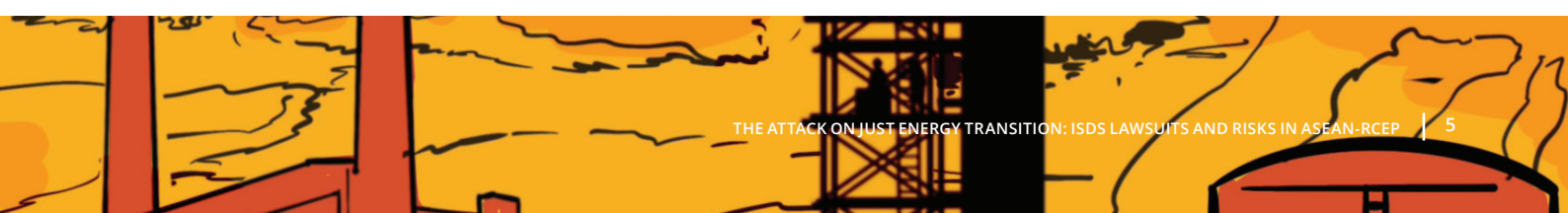




- ASEAN member states have a 'traditional' network of old-generation investment treaties covering 85% of their foreign direct investment (FDI), which may expose them to a higher risk of ISDS claims. While ASEAN countries have attracted investment from industrialised economies in green technology and renewable energy, the region is facing increasing pressure to strengthen investment liberalisation and predictability through trade and investment agreements with foreign partners. Simultaneously, Singapore is seeking to be a regional and global investment arbitration hub, where investors already registered there are the most frequent initiators of ISDS claims in the wider Asia-Pacific region. The ASEAN Investment Report 2024 called for urgent investment treaty reforms and the need for synchronisation at national, bilateral, and regional levels.

- Importantly, the investment chapter in the Regional Comprehensive Economic Partnership (RCEP) does not currently include ISDS. But the parties committed to revisit that omission through a General Review are due to make a decision on whether and how to adopt an ISDS mechanism by around 2027. A nearer-term test of the same question is already underway. The review of the ASEAN-Australia-New Zealand free trade agreement (AANZFTA) is ongoing (2026) and requires consensus among the ten ASEAN countries plus Australia and New Zealand to remove or amend ISDS in the updated agreement.

- ISDS is outdated and governments are rejecting it. United Nations (UN) bodies and other multilateral institutions have identified ISDS as a structural barrier to achieving climate justice and a just energy transition. **There is no other way to stop these corporate attacks on a just energy transition and climate justice other than removing ISDS from trade and investment agreements.**



Chapter 1: Investor Lawsuits are holding back ASEAN's energy transition

The climate crisis is intensifying across the Asia-Pacific region with more frequent and severe cyclones, wildfires, sea-level rise and flooding, with the worst impacts on vulnerable communities. Communities, civil society and policymakers across Asia increasingly agree on the need for a just transition away from fossil fuels to renewable non-carbon-based energy to reduce the disastrous effects of climate change and diversify energy supplies amidst repeated crises.

Investor-State Dispute Settlement (ISDS) provisions in trade and investment agreements enable foreign investors to sue host governments for colossal sums if they deem that a change in law, policy or a court decision reduces their future profits. Fossil fuel companies are increasingly using ISDS against government attempts to phase out fossil fuels, which makes ISDS a barrier to efforts to achieve a just transition towards renewable non-carbon-based energy. There is also a danger that the rush to invest in renewable energy and the critical minerals needed for its development will become new sources of capital expansion that also puts profits before the needs of people and communities.

Moreover, global uncertainty is contributing to regionalism. For the Association of Southeast Asian Nations (ASEAN) member states this has enhanced the region's integration as a global production hub, particularly for key partners such as China, Japan and South Korea. Energy demand in the region is expected to grow 2.6-fold by 2050, with the industrial and transport sectors accounting for 84%, while ASEAN's potential for renewable energy is estimated at 17,230 GW.[1] Solar energy presents the greatest investment opportunity, and wind energy plays a significant role. Investment in ASEAN rose by 8% in 2024, reaching US$ 226 billion.[2] The region accounted for 15% of total global foreign direct investment (FDI), and investors are increasingly interested in finance, renewable energy, electronic vehicle (EV) value chains, and in response to the restructuring of international supply chains.

ASEAN has initiated regional cooperation with its strategic partners – namely Australia, China, Japan, New Zealand and South Korea – through the Regional Comprehensive Economic Partnership (RCEP). RCEP cooperation is key to regional integration among ASEAN countries, particularly in the supply chains of several key sectors in the global energy transition agenda. This is owing to the significant influence of certain countries in regional supply chains – such as China, Japan and South Korea – where the backward linkages with ASEAN countries are particularly strong.

Almost all ASEAN countries have pledged to phase out coal mining between 2040 and 2050 and to reach net-zero or carbon-neutral goals by 2050–2060.[3] Since announcing its 2050 carbon-neutrality target in 2021, Malaysia's government has taken the clearest and most consistent path towards phasing out coal by halting approvals for new coal plants and aligning its utility strategy

through Tenaga Nasional Berhad's plan to halve coal capacity by 2035. Indonesia has pledged to approve no new coal plants and signalled a full phase-out by 2040, embedding this in its 2021-2030 Electricity Supply Business Plan (RUPTL). Vietnam, in launching its US$ 15.5 billion Just Energy Transition Partnership (JETP) and the National Power Development Plan (PDP), said it will cap coal-based power at 30-31 GW by 2030 before phasing it out entirely by 2050. The Philippines, while not having a target to reach net zero or carbon neutrality, it plans to start decommissioning its coal plants based on market performance from 2024.

Fossil fuels will, however, continue to dominate the energy supply mix in ASEAN countries. The transition from coal is underway, but the path ahead remains uncertain. This is often linked to policy inconsistencies that lead governments to make exceptions that undermine previous pledges.[4] The regulatory chilling effect of ISDS *(see Box 1)* has the potential to prevent countries from implementing established national regulations and for commitments to energy transition. Through ISDS, a foreign corporation can bypass domestic courts and sue a government before an international arbitral tribunal when a public-interest measure – a coal phase-out, tighter environmental standards, or a reassertion of sovereignty over transition minerals – is said to harm its expected profits. A single claim can run into billions of dollars, footed by taxpayers in the host country.

The *2025 UNCTAD Report*[5] notes an upward trend in ISDS cases throughout 2024 relating to mineral-extraction and energy-supply activities. By the end of 2024, there were at least 249 cases relating to the energy and mining sectors. Around 55% of all new cases were brought against low- and middle-income countries (LMICs), including six least-developed countries such as Angola, Burkina Faso, Ethiopia,

BOX : 1

How do multinational corporations use ISDS to prevent states from climate action?

- **ISDS is a mechanism originates from the Bretton Woods system** and post-war efforts to promote foreign direct investment (FDI) and development financing. These efforts culminated in the 1965 Washington Convention, which established the International Centre for Settlement of International Disputes (ICSID) and later became a part of the market-oriented reforms of the Washington Consensus in the 1980s. Many academics and experts, however, have demonstrated that there is no evidence to support the claim that including ISDS in trade and investment agreements facilitates more FDI.
- **ISDS is a key provision to protect investors embedded in international investment protection agreements (IIAs) or business contracts between states and private investors,** particularly in the oil, gas and mining and electricity sectors. IIAs usually take the form of Bilateral Investment Treaties (BITs) or investment chapters within free trade agreements (FTAs) or Comprehensive Economic Partnership Agreements (CEPAs). Many FTAs include ISDS under the investment chapter including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CP-TPP), the North American Free Trade Agreement (NAFTA), and the ASEAN-Comprehensive Investment Agreement (ACIA) among others.

- **ISDS grants special rights for foreign investors that states cannot access.** Under ISDS, foreign investors enjoy the right to bring claims directly against states before international arbitration tribunals, while states cannot do likewise. Indeed, to date, states have been unable to hold multinational corporations (MNCs) accountable for the human rights violations and environmental damage they cause. ISDS has bolstered corporate impunity, whilst undermining governments' power to regulate their practices.
- **ISDS claims can run into billions of dollars in compensation claims, potentially bankrupting public budgets.** ISDS allow corporations to claim compensation for losses, including expected future losses, from a state that introduces policies that affect the investment. Overall, fossil fuel and mining investors have attempted to claim US$ 856.74 billion from states through ISDS, of which a staggering US$ 113.87 billion has been awarded to them.[6] The largest single award was US$ 40 billion, where Russia had to pay the former majority owners of the oil and gas company Yukos.[7] States also have to bear the costs of dispute-resolution proceedings, where a single ISDS case can reach US$ 8 million in legal and arbitration fees alone,[8] in some cases up to US$ 30 million.
- **ISDS creates a 'regulatory chill' on public policies.** The high costs of compensation and litigation mean that ISDS is one of the reasons why host countries delay or cancel public policies rather than face investor claims. This phenomenon is known as the 'regulatory chilling effect'. ISDS claims have succeeded in intimidating states to the point of forcing them to weaken their own laws, thereby profoundly undermining democracy worldwide.
- **ISDS cases are tried in a secretive tribunal of highly paid corporate lawyers and arbitrators.[9]** International investment law and the resulting disputes are largely shaped by Northern-based law firms, arbitrators and, more recently, a phalanx of speculators who make a great deal of money from these disputes. Elite law firms charge as much as US$ 1,000 per hour per lawyer – with entire legal teams handling cases – and arbitrators also earn substantial salaries, amounting to nearly US$ 1 million in one reported case.[10] These costs are borne by taxpayers in the host country, even where most of the population lack access to basic services. Arbitrators tend to prioritise the rights of private investors; several prominent arbitrators have served on the boards of major MNCs, including those that have brought cases against LMICs.
- **Even if states decide to terminate bilateral investment agreements with ISDS clauses, investors are often protected for years through the so-called 'survival' or 'sunset clause'.** This clause grants foreign investors protection for a specific period even after the treaty has been terminated or not renewed. For example, in the Indonesia–Netherlands BIT the sunset clause stipulates that investors will continue to receive protection for a period of 15 years from the date the treaty is terminated. Thus, although Indonesia terminated the BIT in 2014, investor protection remains in force until 2029. Several governments have been sued under this clause, with the example of Italy, which withdrew from the Energy Charter Treaty (ECT) in 2016, yet has since been repeatedly sued owing to ECT's 20-year survival clause.[11]
- **The investment protection provisions most used in ISDS lawsuits** against states are 'Fair and Equitable Treatment', National Treatment and Most-Favoured-Nation Principle, Prohibition of Capital Controls (Transfer of Funds), Full Protection and Security Standard, Prohibition of Expropriation, and Prohibition of Investment Performance Requirements.

Mozambique, Rwanda and the United Republic of Tanzania. Among these were 13 cases relating to fossil fuels and at least six legal proceedings concerning investments in the renewable energy sector. Many fossil fuel investors alleged treaty breaches in relation to changes in the regulatory frameworks applicable to their investment, the denial or revocation of permits, and legislative changes involving reduced feed-in tariffs for renewable energy production. ISDS lawsuits have become a real threat to just energy transitions globally and have had an impact on (1) states' commitments to achieve net-zero emission targets; (2) communities' struggles to defend their territories and the sustainability of their livelihoods; (3) the perpetuation of colonialism in low- and middle-income countries (LMICs); and (4) public policies that communities need. ISDS is outdated and governments are rejecting it. United Nations (UN) bodies and other

BOX : 2

ISDS is a threat to just energy transitions: The evidence

- The UN Special Rapporteur on Human Rights and the Environment has said that ISDS is 'a major obstacle' to addressing the intertwined climate, environmental, and human rights crises.[12]
- UN Trade and Development (UNCTAD) highlights that the current international investment framework, including ISDS, is a roadblock to net-zero climate action.[13]
- The Intergovernmental Panel on Climate Change (IPCC) recommends the immediate removal of all ISDS mechanisms from trade and investment agreements. ISDS restricts host countries' freedom to adopt environmental protection policies and has led governments to refrain from or delay the implementation of climate-change mitigation policies, such as phasing out fossil fuels.[14]
- The Organisation for Economic Co-operation and Development (OECD) acknowledges that ISDS is not aligned with the global transition to a sustainable, low-carbon economy and has explored options, including coordinated government withdrawals from ISDS arrangements.[15]
- Capital-exporting countries are now also resisting ISDS. The European Union (EU)[16] and the United Kingdom (UK) have withdrawn from the Energy Charter Treaty because its ISDS provisions were being used by fossil fuel companies against government policies to address climate change.

multilateral institutions have identified ISDS as a structural barrier to achieving climate justice and a just energy transition *(see Box 2)*. The following sections focus on the threat of ISDS lawsuits to state policies aimed at addressing the climate crisis and realising a just energy transition.

1. ISDS is a threat to Net-Zero Emission Commitments

The early closure of coal-fired power plants faces challenges related to investment contracts on power purchasing agreements (PPAs) that promise substantial long-term returns to investors, given that most financing comes from foreign investors and is typically protected by Investment Protection Agreements (BITs) or treaties with investment protection. A study by Tienhaara and Cotula (2020) states that there are approximately 257 coal-fired power plants worldwide that still have an economic lifespan and are at risk of stagnation owing to foreign ownership, of which 75% (192 plants) are protected by at least one ISDS agreement.[18]

Furthermore, the study states that China has the highest number of overseas power plants protected by at least one ISDS agreement. In Southeast Asia, an agreement between China and ASEAN protects at least 36 power plants, 12 of which are in Indonesia. Moreover, China, Japan, and South Korea account for the largest foreign investments in coal mining across South and Southeast Asia, where most of the FTAs with these countries also contain ISDS mechanisms.[19]

Certainly, plans to phase out coal power have already given rise to the risks of ISDS lawsuits. One example is an ISDS lawsuit brought by the German company Uniper Benelux (an investor in a Dutch coal power plant) against the Netherlands, which was sparked by a 2019 Dutch law banning coal-power generation from older plants from 2025 and newer plants from 2030.[20] It is not only companies with investments in coal power plants that sue governments aiming to phase out coal, but also coal-mining companies aggrieved by the closure of the plants. One example is Zeph Investments vs. Australia

BOX : 3

Zeph Investments vs. Australia: Billionaire sues Australia over rejected coal mines in secret trade courts

The Australian billionaire Clive Palmer planned two mega-mines and a coal-fired power station in the Galilee Basin of Queensland, Australia,[21] one of the world's largest coal deposits. All three were stopped. Now Palmer is suing the Australian government for over $AU 120 billion in secretive international trade cases.

The Galilee Coal Project was designed to produce 40 million tonnes of thermal coal a year.[22] Youth activists and landholders successfully challenged it in the Queensland Land Court, where climate change was central to a landmark verdict for human rights and the environment. Stopping these climate-wrecking mines and power stations was democracy in action: people power, active citizens, and decisions by elected state and federal governments and the courts.

In an attempt to reverse these democratic decisions Palmer registered his mining company in Singapore, claimed to be a Singaporean investor and used ISDS in the AANZFTA to sue the Australian government for a total of $AU 420 billion under international investment tribunal in four separate claims.[23] The first claim for $AU 300 billion was for the refusal of an iron-ore mining permit in Western Australia. The last three claims for a total of $AU 120 billion related to the refusal of his Galilee Coal project mining license and a license for a coal-fired power plant for environmental reasons, including increased carbon emissions.[24] This threatens the Australian federal and state governments' ability to regulate in the public interest, and is roughly equivalent to the country's annual national health budget.

The tribunal in the first case dismissed Palmer's claim to be a Singaporean investor and ordered him to pay the government legal costs of US$13.6m.[25] The other three coal-related cases are still ongoing. This means the Australian government could face the time and costs associated with each individual case, amounting to multiples of tens of millions of dollars, even if Palmer loses. These cases demonstrate how fossil fuel companies can use the ISDS system to contest coal-mining and energy regulation and be manipulated to maximise time and costs for host governments.

stemming from the closure of the Galilee Coal Project in Queensland, Australia *(see Box 3).*

2. ISDS is a threat to the natural environment

Injustices linked to the energy transition are becoming increasingly acute as the global push for decarbonisation fuels-related extraction of mineral resources increases overall energy consumption and accelerates land grabs and environmental destruction. Not only are oil, gas and mining companies capitalising on the expanded market opportunities created by green energy transition policies, but they are also simultaneously suing governments that enact environmental and social protections aligned with a just transition. They do so by invoking investment-protection mechanisms to contest regulation in the public interest and safeguard their commercial interests.

The region's abundant reserves of key raw materials for clean energy technologies have the potential to strengthen ASEAN's strategic role in the global energy supply chain. However, mining activities often take place in ecologically sensitive areas and near Indigenous communities, with a devastating impact on the environment and

health. When a community resists a mining project, mining companies often resort to ISDS to try to compel the government to ignore local concerns or win a large payout. This may include the demand to repress local and Indigenous movements that oppose mining projects.[26]

There have been numerous revocations of mining permits on environmental grounds and the protection of Indigenous peoples' rights due to the threat of ISDS lawsuits. The case of the Australian company Kingsgate vs. Thailand is one such example. In 2017 Thailand closed the Chatree gold mine owned by Kingsgate alongside the cessation of all gold-mining and related activities in the country in response to public pressure because of their impact on public health and the environment. A year later the company retaliated with a multi-million-dollar ISDS lawsuit, resulting in a regulatory chill and pushing the Thai government to lift the suspension in 2023 and a mutual agreement to end the dispute in 2025. *(See more in Box 4.)*

As many countries and communities face increasing natural disasters and environmental degradation from the expansion of mining, the risk of ISDS lawsuits now also extends to deep-sea exploration. In 2019, the US-based Odyssey Marine Exploration sued Mexico for US$ 3.5 billion, using NAFTA's ISDS mechanism.[27] In 2018, the Mexican government took a decisive stand to protect the ocean by formally rejecting the mine's permit for a massive seabed phosphate-mining project. Local fishing cooperatives and environmental defenders fought for years to block mining by Odyssey Marine Exploration. The proposed 50-year dredging operation threatened pristine marine ecosystems, key breeding grounds for endangered sea turtles and grey whales, and the livelihoods of coastal fishing communities who rely on healthy waters to survive.

BOX : 4

Kingsgate vs. Thailand: Destructive mining trumps local health and environment

In Thailand's paddy fields, local people have accused a gold mine as having been leaking toxic waste, causing serious health problems and ruining crops. The government responded by suspending the mine in 2017 and later halted all gold mining in the country while a new mineral law was developed. Yet instead of affected communities immediately receiving compensation for harm caused, the opposite has happened. The mine was reopened in 2023, Kingsgate's stocks increased and local residents are still awaiting justice in a 10-year class-action lawsuit against the company in Bangkok's Civil Court.

Chatree was Thailand's first and largest gold mine and the first major project of the Australian Kingsgate mining company. It began operations in 2001 in Phichit, a predominantly agricultural area. The company has been in an ongoing dispute with environmentalists and local citizens since its establishment, where nearly 400 villagers living around the mine now have high levels of heavy metals in their blood.

In 2010, villagers took the company to court for failing to mitigate damages and for obtaining mining permits illegally. The court ruled that the mine had indeed breached environmental protection laws, and ordered the company to submit an Environmental

Health Impact Assessment.[28] Operations were later suspended at the Kingsgate mine in 2015 for several months, amidst ongoing environmental protests and medical tests proving local residents' heavy metal poisoning. Even in its own reports, the company acknowledged problems with dust, contaminated water, noise, and cyanide management.

Despite this, following the Thai government's decision to close the mine, Kingsgate hit back with an ISDS lawsuit claiming potentially up to US$ 900 million in compensation (the actual figure has not been made public). While the mine was closed until 2022, the government succumbed to the company's pressure, reopening it in 2023, with concessions extended to 2031 and even granting a separate exploration concession covering nearly 610 km2 (equivalent to 82% of the size of Singapore), which in turn led to a steep rise in the company's share price. In 2025, the company withdrew its ISDS case.

In 2026, 382 villagers won compensation ordered by a Thai court of up to US$6,250 each from Akara Resources, the Australian-owned operator of Thailand's Chatree Gold Mine, along with a clean-up order for contaminated land and water.[29] The company is appealing the decision and delaying the compensation payments and thus the community's struggle for justice continues.

3. ISDS is a threat to national sovereignty over natural resources

The increased demand for various clean energy technologies to accelerate the global transition to net zero will require six times more mineral extraction by 2040 than is currently the case.[30] With this potential, several ASEAN countries are seeking to maximise the value-added from their mineral resources by developing intermediate mineral processing rather than exporting raw minerals. The development of downstream industries is now a strategic priority. Indonesia is leading these efforts through an extensive network of nickel-refining plants and industrial estates that integrate smelting processes with the production of raw materials for EV batteries. Malaysia and Vietnam are also strengthening their capacities to refine aluminium, copper and tin, while the Philippines is planning to build High Pressure Acid Leach (HPAL) plants for processing nickel and cobalt in partnership with Japanese and Australian firms.

In practice, these policies focus on strengthening ownership of state-owned mining companies and tightening control over value-added activities. This includes regulating mining and nationalising resources or companies to expand state ownership, either through divestment or revocation of mining permits, banning the export of raw minerals, or implementing the mandatory domestic processing of raw minerals. These policies aim to strengthen sovereignty over natural resources and support national economic growth through building national productive capacities. However, these policies raise the risk of ISDS claims under existing trade and investment agreements.

These risks highlight the colonial origins of the modern international investment framework, including ISDS, which emerged from the 1960s as former colonies gained independence. At the time, many newly independent countries moved to nationalise foreign assets particularly in resource sectors long dominated by the former colonial powers. These efforts resulted in the international investment-protection provision preventing the expropriation of such assets as European corporations sought to safeguard their investments in their host countries' former colonies.[31] Consequently, investment protections place a strong emphasis on compensation for expropriated assets and therefore reproduce the unequal global structural conditions that privilege the former colonial powers and their corporations

over the interests of peoples and the environment in their resource-rich former colonies.

The effects are still seen today, for example in the case of Indonesia, which banned the export of raw minerals in 2009. This move resulted in an ISDS claim in 2014, filed by Newmont (Nusa Tenggara Partnership BV), a US mining company registered in the Netherlands *(see Box 5).*

4. ISDS is a threat to public budgets and energy transition financing

Mining, oil and gas companies are posing a serious risk to public budgets and climate

BOX : 5

Newmont Mining vs Indonesia: Resource Nationalism, Corporate Extraction, and the Fight for Green Industrial Policy

For decades, transnational mining giants like Newmont have extracted immense wealth from LMICs while leaving host nations trapped in dependence on exporting raw materials. In response, Indonesia enacted Law No. 4/2009 to require domestic mineral processing, restrict raw exports, and mandate up to 51% local share ownership. Rather than respecting the policy of a sovereign nation, foreign extractive industries launched aggressive campaigns to sabotage these reforms and safeguard their profits.

The case of Newmont Mining vs Indonesia is a powerful example of how companies use investment agreements, particularly BITs, to get exemptions from government regulations and legislation, undermining democracy and development.[33] It also illustrates the long-term dangers of governments signing investment agreements, which continue to be enforced even when subsequent governments try to re-establish sovereign control over investment in their countries. In July 2014, Newmont Mining Corporation brought a case against Indonesia using the Indonesia–Netherlands BIT at the ICSID.

By using the ISDS mechanism, foreign corporations have the unique power to bypass local courts and claim billions in public funds because of policies that threaten their future profits. In making the legal claim, the mining giant argued that the Indonesian government's plans to ban unprocessed mineral exports would violate the investment agreement between Indonesia and the Netherlands. The case at ICSID was presented four months after Indonesia announced it would not renew its Bilateral Investment Treaty (BIT) with the Netherlands when it expires in July 2015.[34]

Under the constant threat of financial penalties, the Indonesian government succumbed to backroom negotiations, granting Newmont massive tax concessions and policy exemptions. Although Newmont eventually withdrew its formal lawsuit, the damage to democratic accountability was severe: closed-door concessions gutted the core intent of the 2009 Mining Law without any oversight by civil society. This case clearly demonstrates how ISDS induces a 'regulatory chill', coercing governments into abandoning environmental, labour and economic protections.

Recognising these traps, Indonesia took bold action by terminating its investment treaty with the Netherlands and targeting dozens of similar corporate deals. Yet structural obstacles like the 15-year 'survival clauses', or sunset clauses, ensure these agreements continue to threaten state regulation long after cancellation. For international movements fighting trade deals like TTIP, Indonesia's struggle is a crucial warning: achieving genuine resource sovereignty requires dismantling the ISDS architecture entirely, enforcing radical transparency, and building global solidarity against corporate supremacy.

BOX : 6

Pakistan charged nearly 2% of GDP for refusing a mining license

In 2011, Pakistan's Balochistan province refused to grant a mining license to Tethyan Copper Company at the Reko Diq copper-gold mine, despite years of exploration work. The provincial governmental body refused the license on grounds of the annulment of the Joint Venture Agreement (Chagai Hills Exploration Joint Venture Agreement/CHEJVA) by Supreme Court of Pakistan.

As a result, Tethyan brought a claim under the Australia–Pakistan BIT arguing that Pakistan had violated fair and equitable treatment obligations. After 10 years the tribunal awarded Tethyan US$ 4.1 billion in damages plus US$ 1.75 billion in pre-award interest and legal costs.

Although not conventional borrowing, ISDS awards are an enforceable financial obligation. Had Pakistan paid immediately, it would have required financing similar to issuing government debt or using foreign-exchange reserves. At nearly US$ 6 billion, the amount was comparable to the country's support package from the International Monetary Fund (IMF) at the time.

Furthermore, as awards are valued in US dollars, this increased pressure on Pakistan's foreign exchange reserves and its ability to service its foreign debt. Coupled with the fact that investors can pursue enforcement actions against state assets abroad, rather than paying the award outright Pakistan negotiated a settlement in 2022.

What was the settlement? Barrick Gold became the lead investor in a restructured Reko Diq project with 50% ownership shared with the state.

The case demonstrates that ISDS awards can become hidden sovereign debt. Governments therefore often prefer negotiated settlements or project restructuring to paying awards in cash.

financing, as awards can amount to as much as 11.5% of national gross domestic product (GDP), as was the case of Venezuela in ConocoPhillips vs. Venezuela. Another prominent example of the impact ISDS can have on public budgets is Tethyan Copper Company vs. Pakistan *(see Box 6)*. Investors often claim massive amounts as a negotiating tactic to pressure governments to repeal their initial action.

The data we have analysed with regard to mining and energy-related cases in the RCEP region, nine of the 20 cases are pending, while the remaining cases have been decided in favour of the state, discontinued or settled. Only 50% have claim amounts publicly available (when extended to all cases in the RCEP region it is 57%). Among these, cases brought since 2019 have risen significantly over the amounts claimed in the previous decade, with an average of US$ 46.6 billion after 2019 compared to US$ 460.6 million before.[35]

Even if investors do not win their claims, the costs for host governments remain high, including party costs (legal representation and expert fees) and tribunal costs (arbitrator fees and institutional administrative charges). The size of the claim also matters, as higher claims significantly increase these; and with cases lasting on average 5.5 years, this also drives up the expenses.[36] Where several cases are a result of a single government action, these costs can increase dramatically. For example, the Philippine government spent US$ 58 million defending two cases against the German airport operator Fraport.[37] Even when governments win,

70% still have to pay their own costs, while when investors win they have to cover their own costs in only 40% of the cases.[38]

Looking at the cases related to mining and energy to estimate the costs as a percentage of financing required for host governments to fund them, the impact of ISDS claims is significant. Those with pending cases are at most risk with estimated potential costs totalling between 0.49% of financing needs for the Philippines and 91.86% for Australia. In view of the mega-claims associated with Zeph investments, Australia may have to pay up to US$ 78.572 billion for the remaining three cases, where the Australian Energy Market Operator 2024 Integrated System Plan has outlined US$ 85.57 required for the country's energy transition. From only one case Myanmar could risk up to the equivalent of 13.8% of its transition finance based on the average award claim related to mining and energy cases in RCEP, while Vietnam could risk up to the equivalent of 6.2% of transition finance (see Table 1). The total potential costs associated with ISDS cases related to mining and energy suggest the equivalent of 1.2% of transition financing is at risk across ASEAN countries. This includes potential costs associated with won, discontinued or settled cases.

Table 1 – Cost Comparison: Estimated ISDS Costs vs Energy Transition Financing

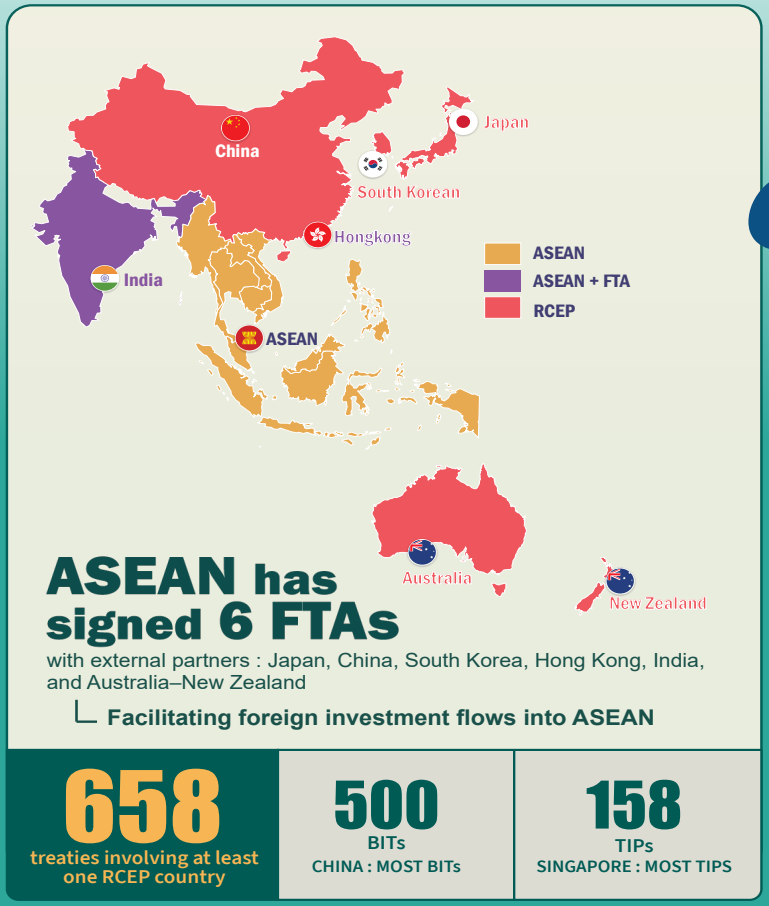
Country	Energy transition estimated financing (in US$ billion)[39]	Estimated total costs of mining and energy-related ISDS cases (in US$ billion)[40]	Percentage of energy transition financing	Number of cases	Energy transition target/document
Australia	85.57	78.604	91.86%	5 (3 pending)	2024 Integrated System Plan[41]
Myanmar	5.8	0.800	13.80%	1 (pending)	National Electrification Plan 2014[42]
Vietnam	835.4	5.174	6.19%	5 (4 pending)	National Power Development Plan 8 Revision[43]
Philippines	166.4	0.821	0.49%	2 (1 pending)	Philippine Energy Plan 2023-2050[44]
Thailand	51.93	0.013	0.03%	1	OECD Clean Energy Finance and Investment Roadmap of Thailand[45]
Indonesia	186	0.026	0.01%	3	PT Perusahaan Listrik Negara (PLN)'s 2025–2034 Electricity Supply Business Plan (RUPTL)[46]
Korea	747	0.006	0.001%	1	K-GX, or Korea-Green Transformation[47]
Japan	951	0.006	0.001%	1	GX2040 Vision[48]
China	2,999	0.006	0.0002%	1	15th Five-Year Plan period (2026-30)[49]

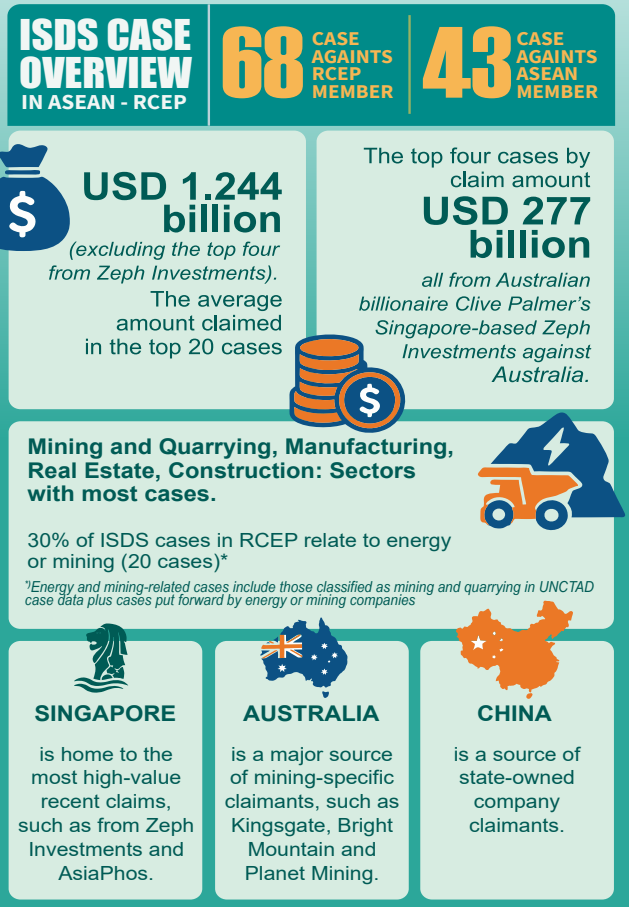
Source: researchers estimates based on UNCTAD ISDS case data (see endnote)

Chapter 2: ISDS Exposure in ASEAN–RCEP Countries

ASEAN states have a 'traditional' network of old-generation investment treaties covering 85% of their FDI, which may expose them to a higher risk of ISDS cases.[50] While ASEAN has attracted investment from industrialised economies in green technology and renewable energy, the region is facing increasing pressure to strengthen investment liberalisation and predictability through trade and investment agreements with external partners. Simultaneously, Singapore is seeking to be a regional and global investment arbitration hub,[51] where investors already registered there are also the most frequent initiators of ISDS claims in the wider Asia-Pacific region. ASEAN itself has initiated regional cooperation with its strategic partners—namely Japan, South Korea, China, Australia and New Zealand—through the Regional Comprehensive Economic Partnership (RCEP). RCEP cooperation is key to regional integration within ASEAN, particularly within the supply chains of several key sectors on the global energy transition agenda.

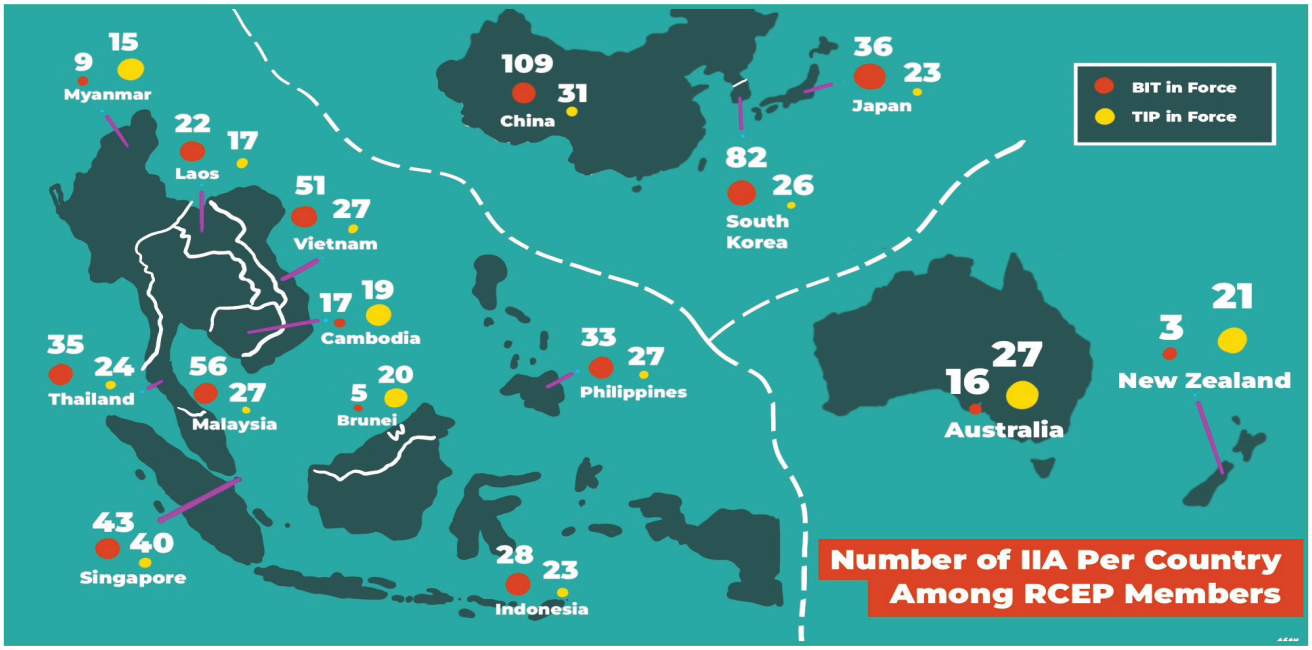
Trade & Investment Agreements in ASEAN-RCEP





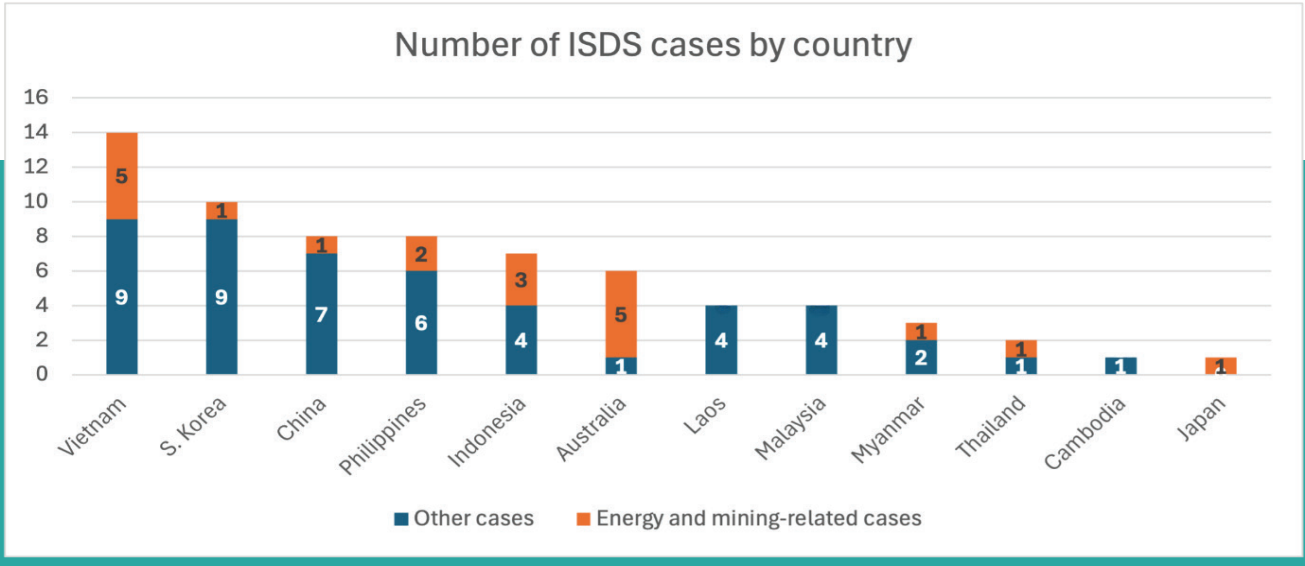
Source: UNCTAD ISDS Case Data | Infographic: Leo

The RCEP Agreement, signed in 2020, consolidates the majority of ASEAN's Bilateral Investment Treaties (BITs) with non-ASEAN countries that are RCEP participants. Singapore is the RCEP country that has signed the most trade agreement with investment protections (TIPs), whilst China is the RCEP country that has signed the most BITs (See image below).

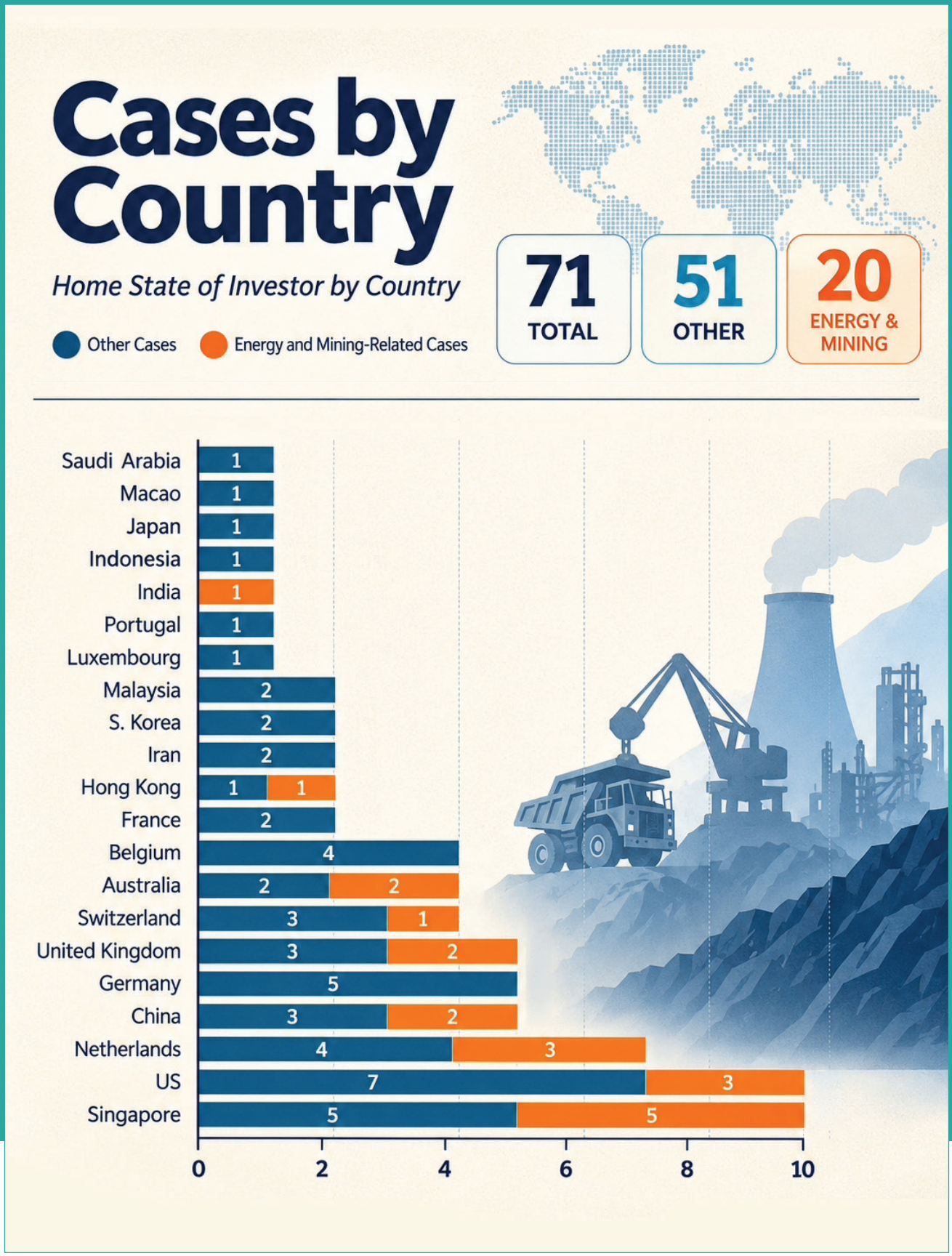


Source: UNCTAD Treaty Data | Illustration: Agah

There have been 68 ISDS cases involving RCEP countries, with Vietnam having the highest number of cases (14), followed by South Korea (10), China (8), the Philippines (8), Indonesia (7) and Australia (6). In the energy and mining sector, Singapore is home to the most high-value recent claims, such as from Zeph Investments and AsiaPhos. Netherlands is frequently used as a base for energy-related subsidiaries, such as Shell, Hanocal, and Nusa Tenggara. Australia is a major source of mining specific claimants, such as Kingsgate, Bright Mountain and Planet Mining. The US is home to major energy and construction claimants, and China is a source of state-owned company claimants. The ISDS cases based on the claimant's home country show that 43 per cent were in Europe (both EU and non-EU countries), 32 per cent were in RCEP countries, 15 per cent were in the US, and 10 per cent were in the rest of Asia. *(See the graphics below)*

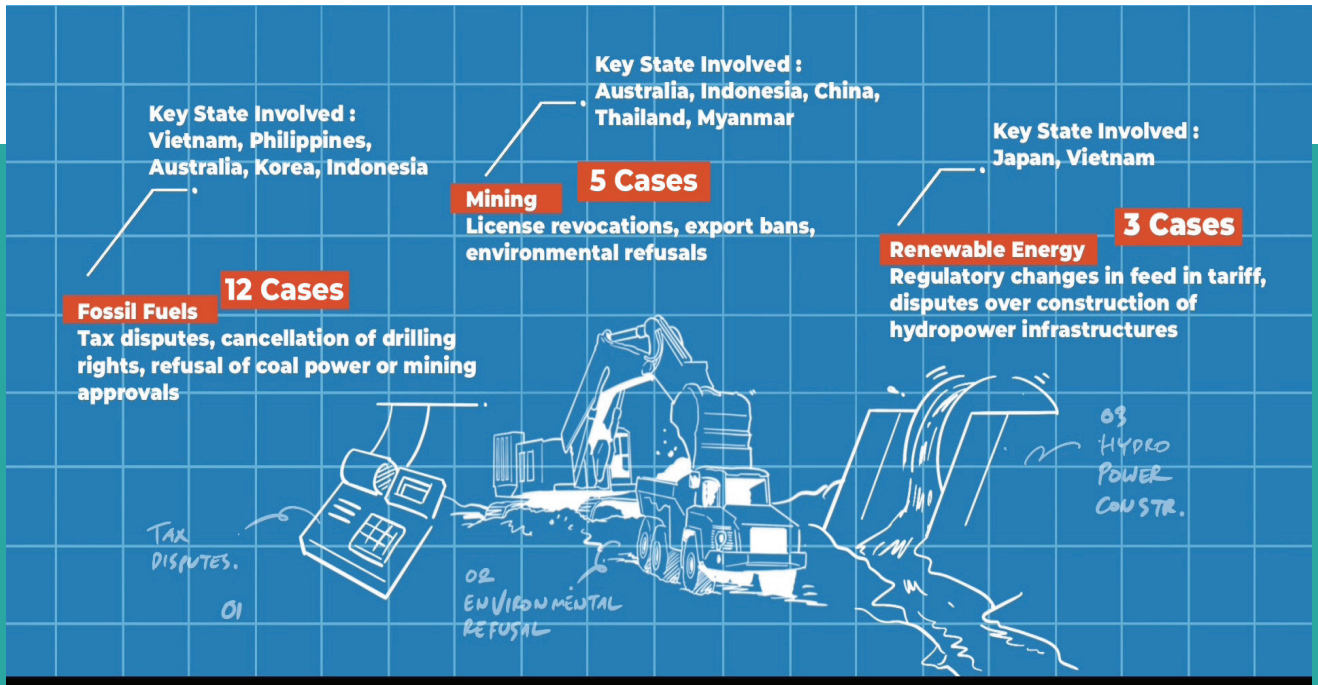


Source: ICSID treaty data



Source: ICSID ISDS case data

There are 20 ISDS cases that relate to mining and energy involving RCEP countries. A substantial subset of these cases involves investments in fossil fuels and traditional power generation. A few cases relate to renewable energy projects or feed-in tariffs for renewable energy, while others involve environmental protection measures and tax disputes (see the Philippines case vs Shell below). Disputes in the mining sector frequently arise from the revocation of licenses, new environmental regulations, termination of mining concessions, changes to licensing regimes, and policies related with nationalization and divestment. Another category of case relates to the extraction of critical minerals that are essential for green technologies, such as iron ore, copper and phosphate. *(See the image and table below for details of the cases).*



Source: UNCTAD ISDS Case Data | Illustration: Agah

ISDS cases in ASEAN-RCEP Countries Related to Mining and Energy

Sector	Number of Cases	Key States Involved	Specific Issues	Cases
Mining (excluding coal)	5	Australia, China, Indonesia, Myanmar, Thailand	License revocations, export bans, environmental	• Bright Mountain vs Myanmar (AANZFTA) • Zeph vs Australia I (AANZFTA) • AsiaPhos and Norwest vs China (China-Singapore BIT) • Kingsgate vs Thailand (Australia-Thailand FTA) • NusaTenggara vs Indonesia (Netherlands-Indonesia BIT)

Fossil Fuels, including extraction	12	Australia, Vietnam, Philippines, Indonesia, South Korea	Tax disputes, cancellation of drilling rights, refusal of coal-power or mining approvals.	• Zeph vs. Australia II, III, IV (AANZFTA) • APR Energy and others vs. Australia (Australia-US FTA) • US Energy co vs. Vietnam • Dangelas and others vs. Vietnam (US-Vietnam) • ConocoPhillips and Perenco vs Vietnam (UK-Vietnam BIT) • Chevron vs. Philippines (Philippines-Switzerland BIT) • Shell vs. Philippines (Netherlands-Philippines BIT) • IMFA vs. Indonesia (Indonesia-Netherlands BIT) • Churchill Mining and Planet Mining vs. Indonesia (Indonesia-Australia BIT; Indonesia-UK BIT) • Hanocal and IPIC International vs. Korea (Korea-Netherlands BIT)
Renewable Energy	3	Japan, Vietnam	Regulatory changes in feed-in-tariffs, disputes over construction of hydropower infrastructure	• PowerChina and China Railway vs Viet Nam I & II (ASEAN-China; China-Vietnam BIT) • hift Energy vs. Japan (ECT)

Source: UNCTAD ISDS Case Data

BOX : 7

Shell vs. the Philippines: Malampaya Corporate Power Grab

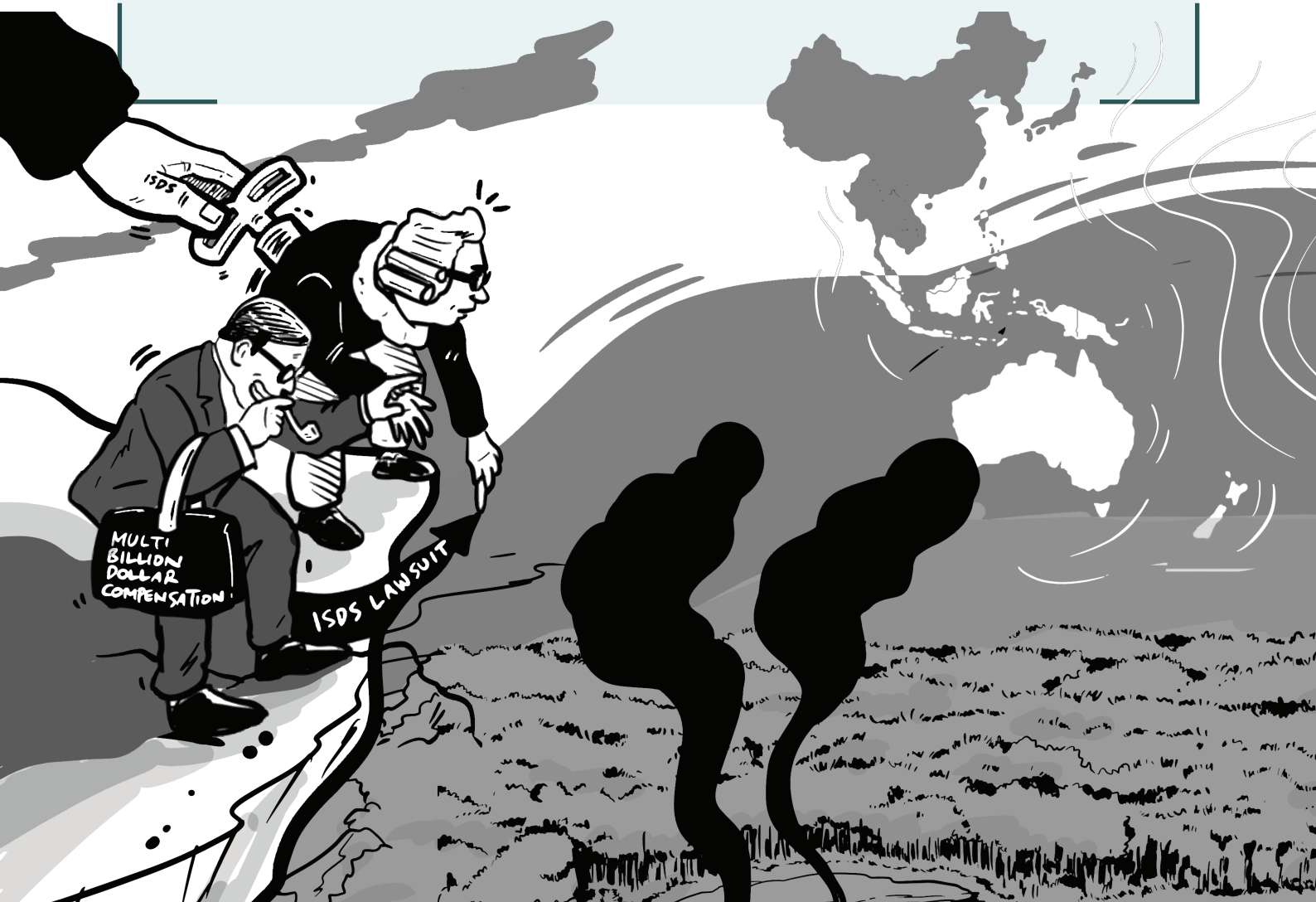
In 2016, Shell Philippines Exploration B.V. (now Prime Energy Resources Development B.V.) launched an ICSID arbitration case against the Philippine government under the Netherlands-Philippines BIT. Chevron Overseas Finance GmbH following in 2019 under the Philippine-Switzerland BIT. Both companies sued over their Malampaya gas project investments after state authorities sought to recover more than PHP 53 billion (USD 1.1 billion) in income taxes from the consortium operating in the West Philippine Sea. Chevron discontinued its claim, but Shell's remains ongoing.

The Malampaya gas field began development in the early 1990s. Shell and Chevron each held 45% interest in the consortium and 10% was state-owned. The dispute arose as the Philippines' auditing commission determined income tax should come from the Shell and Chevron separately, not included within the government royalty share. The consortium appealed the decision, however the commission rejected their appeal.

Consequently, Shell and Chevron filed an ICC claim (2015), ICSID claim (2016 and 2019) and a petition for declaratory relief before the Philippine Supreme Court. In 2019 the ICC in Singapore ruled unanimously with the Malampaya consortium. The ruling came as the Philippine Department of Energy launched a new round of energy contracting exploration program to attract downstream oil-industry investors.[1] While the Department of Energy applauded the decision viewing the case as discouraging foreign investors, the audit commission disagreed highlighting the split stance in government. In 2025 the Philippine Supreme Court also ruled that the three companies were not obliged to pay the requested income taxes, overturning the findings of the audit commission.

Chevron sold its stake to Filipino conglomerate Udenna in 2020 and withdrew its ICSID claim. Shell sold its stake in 2022 to Malampaya Energy XP, yet its ICSID proceedings are ongoing despite the favourable Supreme Court ruling. Both Shell and Chevron were represented by King & Spalding, who also represented corporations in other suits under the Energy Charter Treaty and related to energy and mining.

The Malampaya gas field has been touted as a project of major national significance, where at its peak it was powering 3 power plants on Luzorn Island accounting for 40% of electricity production. Outside of the ISDS claims the project has not been without its share of problems. There have been accusations of environmental pollution and damage, affecting the nature and peoples in Palawan, where 45% of the population are fisherpeople and hence reliant on the oceans for their livelihoods. A dispute between the local government of Palawan and the national government also emerged on account of the distribution of profits from the project. The former governor of Palawan Reyes claimed that 40% of the national profits from the field should be allocated to Palawan. He was later found guilty of eleven counts of graft for irregularities involving more than 200 contracts during his term, including irregularities over management of the Malampaya gas fund. Scrutiny over the fund became a major public issue since the early 2010s, including from journalist Gerry Ortega who was later murdered in 2011, likely on account to his investigative journalism.[2]The Fund has been linked to other instances of corruption and misuse since.



Chapter 3: Addressing ISDS Risks in the Region

The ASEAN Investment Report 2024 called for urgent investment treaty reforms and the need for synchronisation at national, bilateral, and regional levels.[52] As of yet, however, there has been no ASEAN-wide initiative to revise these investment and trade agreements which include chapters on investment protection, even though many ASEAN agreements still contain ISDS mechanisms *(see Table 2)*.

Moreover, in recent years, FTAs with several partners have been expanded to cover supply-chain development and cooperation as well as FDI-related matters, such as those with China and South Korea. This includes the general review process of the RCEP and the ASEAN-New Zealand-Australia FTA, which will be used to discuss upgrading supply-chain cooperation.[53] Yet investors frequently use agreements such as the AANZFTA, the ASEAN-China FTA, and the ACIA, as instruments to file ISDS lawsuits *(see Table 3)*. Currently, ASEAN is also negotiating an FTA with Canada. Negotiations on an FTA with the European Union (EU) remain on hold since the latter prefers to pursue bilateral agreements with individual ASEAN member states such as Indonesia, Malaysia, Philippines Singapore, Thailand and Vietnam. Both FTAs will increase the potential exposure of ASEAN countries to ISDS claims. Canada is home to almost half of the world's publicly listed mining and mineral-exploration companies and significant users of ISDS with over 30% of global ISDS cases related to critical minerals.[54]

Table 3 - ISDS Provision in ASEAN Agreements

ASEAN Agreement	ISDS Provision
RCEP (2020)	No
ASEAN–Hong Kong, China SAR Investment Agreement (2017)	No
ASEAN–India Investment Agreement (2014)	Yes
ASEAN–China Investment Agreement (2009)	Yes
ASEAN–Korea, Republic of Investment Agreement (2009)	Yes
AANZFTA (2009)	Yes
ASEAN Comprehensive Investment Agreement (ACIA) (2009)	Yes
ASEAN–Japan EPA (2008)	Yes

Source: UNCTAD case data

Importantly, RCEP's investment chapter does not currently include ISDS. But the parties are committed to revisit that omission through a General Review, with a decision on whether and how to adopt an ISDS mechanism now expected in 2027.[55] A more immediate test of the same question is already underway. The AANZFTA Review, scheduled at the end of 2026, requires consensus among the ten ASEAN countries plus Australia and New Zealand to remove or amend ISDS in the updated agreement.[56]

Many governments around the world have realised that ISDS is now outdated and are rejecting it. There is no compelling evidence that agreements with ISDS result in increased FDI. In fact, India, Indonesia, South Africa and Ecuador have cancelled old investment agreements with ISDS. Brazil never agreed to ISDS. Capital-exporting countries are now also resisting ISDS. The EU and the UK have withdrawn from the Energy Charter Treaty because its ISDS provisions were being used by fossil fuel companies against government policies to address climate change.

Australia and New Zealand have also implemented policies against ISDS. In fact, New Zealand has stated its intention to eliminate the ISDS Mechanism in the general review of AANZFTA.[57] Furthermore, Australia and New Zealand already have a legally binding side letter in which they agree not to apply the ISDS provisions of AANZFTA to each other.[58] Currently, Australia has introduced the Trade and Investment Agreements (Consultation) Bill 2026 which aims to legislate on government policy, which is already being implemented, of excluding ISDS, stronger medicine monopolies and other harmful provisions from trade and investment agreements, and ensuring state and federal governments' right to regulate in the public interest.[59]

There is no way to stop these corporate attacks on a just energy transition and climate justice other than removing ISDS from trade and investment agreements and not agreeing to it in future.

Table 4 - Number of ISDS Cases by Type of Agreement used for Claims against ASEAN Countries

No.	Regional Agreement	Number of Cases
1	AANZFTA (2009)	5
2	ASEAN–China Investment Agreement (2009)	2
3	ASEAN Comprehensive Investment Agreement (2009)	2
4	ASEAN Investment Agreement (1987)	2
5	OIC Investment Agreement (1981)	1
Total		12

Source: UNCTAD case data

Endnotes

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39. The estimated financing listed in this column come from the relevant document listed in the last column.

40. The estimated costs of mining and energy-related ISDS cases is calculated based on available award claim data and party and tribunal costs available in the British Institute of International and Comparative 2021 Emperical Study on costs, damages and duration in investor-state arbitration. Where there was no award data the average claim across the 20 cases was used (minus the 4 mega claims associated to Zeph Investments).

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CASTALIA Strategic advisors (2014) Myanmar National Electrification Program Roadmap and Investment Prospectus. https://www.seforall.org/sites/default/files/Myanmar_IP_EN_Released.pdf

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Shin, K.S. (2026) 'South Korea unveils $747 billion energy transition plan through 2035,' 7 October. https://www.reuters.com/business/energy/south-korea-unveils-747-billion-energy-transition-plan-through-2035-2026-10-07/

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Agency for Natural Resources and Energy (2025) GX Policy Achieving Decarbonization and Economic Growth Together. https://www.enecho.meti.go.jp/en/category/special/article/detail_214.html

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Daye, C. (2026) 'Investement in key energy projects and new business models during the 15th five-year plan period to exceed 20 trillion yuan: NEA head.' 26 June. https://www.globaltimes.cn/page/202606/1364525.shtml

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Credit Photo : Asia Pacific Network against ISDS