



# IIA ISSUES NOTE

INTERNATIONAL INVESTMENT AGREEMENTS



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## REVIEW OF ISDS DECISIONS IN 2019: SELECTED IIA REFORM ISSUES

### H I G H L I G H T S

- In 2019, arbitral tribunals rendered at least 71 substantive decisions in investor–State dispute settlement (ISDS) cases. Thirty-nine of the ISDS decisions were publicly available at the time of writing. Most decisions concerned cases based on old-generation international investment agreements (IIAs) signed in the 1990s or earlier.
- For policymakers and IIA negotiators, arbitral decisions can be a useful source for learning how IIA provisions work in practice and for identifying which areas are most in need of reform.
- Decisions from 2019 touched upon important issues on the reform agenda for the IIA regime, including:
  - Preserving the right to regulate (e.g. exclusions from treaty scope, interpretation of fair and equitable treatment, expropriation and umbrella clauses)
  - Improving investment dispute settlement (e.g. ISDS scope, relationship with domestic proceedings, counterclaims)
  - Ensuring investor responsibility (e.g. legality of investment under host State law)
- Decisions rendered in 2019 displayed some divergent interpretations by arbitrators and tribunals on certain key issues. Questions of interpretation typically arise where the applicable treaty does not provide enough details on the matter at issue and leaves a wider margin of discretion to tribunals. There were instances in which respondent States lacked sufficient legal basis in the treaty to defend themselves more effectively.
- Policymakers and IIA negotiators may wish to consider the implications of these developments for treaty drafting (e.g. by identifying options to add, clarify, circumscribe or omit certain provisions). They can adopt a holistic approach, combining substantive and procedural reform options (e.g. different approaches to ISDS reform) during the development of future treaties as well as the modernization of existing ones. UNCTAD's Investment Policy Framework for Sustainable Development (2015), the Road Map for IIA Reform included in the World Investment Report 2015 and the Reform Package for the International Investment Regime (2018) offer a variety of tools and policy options in this regard.
- UNCTAD's next Annual IIA Conference, to be held at the World Investment Forum 2021, will focus on accelerating the reform of old-generation treaties based on options suggested in UNCTAD's IIA Reform Accelerator launched in November 2020. It will also build on the outcome of UNCTAD's Virtual IIA Conference 2020.

## Introduction: Selected IIA reform issues addressed in ISDS decisions

This note provides an overview of arbitral findings in publicly available ISDS decisions rendered in 2019 (box 1) that may have implications for the drafting of future IIAs and the modernization of old-generation treaties. A factual summary of the questions addressed by ISDS tribunals in publicly available decisions can be a useful source for learning how IIA provisions work in practice and for identifying which areas are most in need of reform. Most arbitral decisions rendered in 2019 concerned cases that were based on provisions in old-generation treaties signed in the 1990s or earlier.

Against this background, this note draws on policy options for Phases 1 and 2 of IIA Reform put forward in UNCTAD's Reform Package for the International Investment Regime (2018), the Investment Policy Framework for Sustainable Development (2015) and the Road Map for IIA Reform included in the World Investment Report 2015. It also highlights the relevance of UNCTAD's IIA Reform Accelerator, launched in November 2020, to help speed up the reform of unbalanced treaty provisions prevalent in the old stock of IIAs.

The cases and issues highlighted in this note were selected after a comprehensive case-by-case mapping of key issues addressed by ISDS tribunals in 2019, which is available as supplementary material.<sup>1</sup>

Selected issues addressed by arbitral tribunals are arranged in the order of the typical IIA structure (rather than being divided into jurisdictional, admissibility or merits issues):

- Treaty scope and definitions
- Standards of treatment and protection
- Public policy exceptions and other exceptions
- ISDS scope, conditions for access and procedural issues

The analysis of ISDS decisions should be read in conjunction with other recent UNCTAD publications related to IIAs and ISDS. The IIA Issues Note "Investor–State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019" (No. 2, July 2020) provides an overview of known treaty-based ISDS cases initiated in 2019 and overall ISDS case outcomes. The IIA Issues Note on "The Changing IIA Landscape: New Treaties and Recent Policy Developments" (No. 1, July 2020) summarizes ISDS reform developments and outlines four ISDS reform approaches countries implemented in recent IIAs: (i) No ISDS, (ii) Standing ISDS tribunal, (iii) Limited ISDS, and (iv) Improved ISDS procedures. It also documents progress on IIA reform involving countries at all levels of development and from all geographical regions.

### Box 1. ISDS decisions in 2019 and overall outcomes

In 2019, ISDS tribunals rendered at least 71 substantive decisions in investor–State disputes, 39 of which were in the public domain at the time of writing.<sup>a</sup> More than half of the public decisions on jurisdictional issues were decided in favour of the State, whereas on the merits more decisions were decided in favour of the investor.

- Fourteen decisions (including rulings on preliminary objections) principally addressed jurisdictional issues, with five upholding the tribunal's jurisdiction and nine declining jurisdiction.
- Twenty-five decisions on the merits were rendered, with 14 accepting at least some investor claims and 11 dismissing all the claims. In the decisions holding the State liable, tribunals most frequently found breaches of the fair and equitable treatment (FET) provision. The amounts awarded ranged from less than 10 million (\$7.9 million in *Magyar Farming and others v. Hungary*) to several billions (\$4 billion in *Tethyan Copper v. Pakistan* and \$8.4 billion in *ConocoPhillips v. Venezuela*).

In addition, four publicly known decisions were rendered in annulment proceedings at the International Centre for Settlement of Investment Disputes (ICSID). Ad hoc committees of ICSID rejected the applications for annulment in all four cases.

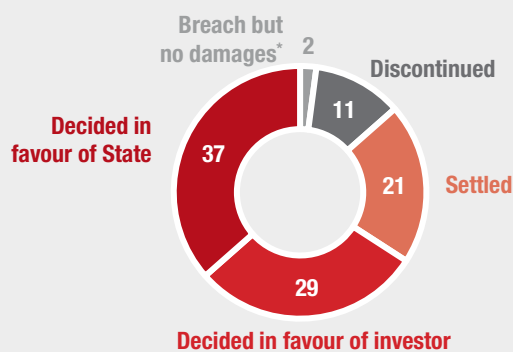
<sup>1</sup> This analysis covers publicly available decisions as of January 2020. The case-by-case mapping records a larger set of issues. Available at <https://investmentpolicy.unctad.org/publications/series/2/international-investment-agreements>.

## Box 1 (continued)

By the end of 2019, at least 674 ISDS proceedings had been concluded. The relative share of case outcomes changed only slightly from that in previous years (box figure 1).

Of the cases that were resolved in favour of the State, about half were dismissed for lack of jurisdiction. Looking at the totality of decisions on the merits (i.e. where a tribunal determined whether the challenged measure breached any of the IIA's substantive obligations), about 60 per cent were decided in favour of the investor and the remainder in favour of the State (box figure 2).

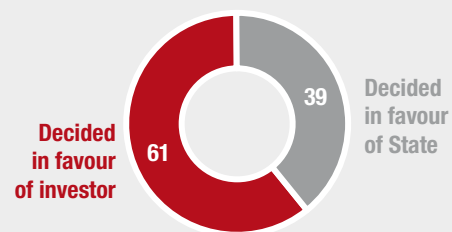
**Box figure 1. Results of concluded cases, 1987–2019 (Per cent)**



Source: UNCTAD, ISDS Navigator.

\* Decided in favour of neither party (liability found but no damages awarded).

**Box figure 2. Results of decisions on the merits, 1987–2019 (Per cent)**



Source: UNCTAD, ISDS Navigator.

Note: Excludes cases (i) dismissed by tribunals for lack of jurisdiction, (ii) settled, (iii) discontinued for reasons other than settlement (or for unknown reasons) and (iv) decided in favour of neither party (liability found but no damages awarded).

Source: UNCTAD (based on UNCTAD, 2020b).

Note: Reference to “dollars” (\$) means United States dollars, unless otherwise indicated.

<sup>a</sup> These numbers include decisions (awards) on jurisdiction and awards on liability and damages (partial and final). They do not include decisions on provisional measures, disqualification of arbitrators, procedural orders, discontinuance orders, settlement agreements, decisions in ICSID annulment proceedings or decisions of domestic courts.

## 1. Treaty scope and definitions

### a. Definition of investment

#### Coverage of indirect investments

One decision rendered in 2019 analysed whether investments held by claimants indirectly were protected by the applicable IIA (table 1). The tribunal determined that the investments held through a local company were covered by the applicable bilateral investment treaty (BIT).

This question can also arise with regard to investments controlled indirectly through a series of foreign entities in third States, particularly where the applicable IIA is silent on whether it applies to indirect investments (i.e. does not expressly exclude them).

**Table 1. Coverage of indirect investments**

Case details	Investment at issue	Selected issues and tribunals' findings
<p><b>Anglo American v. Venezuela</b></p> <ul style="list-style-type: none"> <li>• United Kingdom–Bolivarian Republic of Venezuela BIT (1995)</li> <li>• Award, 18 January 2019</li> <li>• Derains, Y. (President); Tawil, G. S. (Dissenting Opinion); Vinuesa, R. E.</li> </ul>	<p>Rights under nickel-mining concessions owned by Anglo American's local subsidiary, Minera Loma de Níquel C.A. (indirect participation of 91.37 per cent).</p>	<ul style="list-style-type: none"> <li>• Whether Claimant's indirect shareholding in local company through another local company, which in turn was owned by a Panamanian subsidiary of the Claimant, was covered by the BIT (→YES; BIT protected both direct and indirect investments)</li> </ul>

Source: UNCTAD.

### Ultimate ownership of investment

In at least three cases, respondent States objected to the tribunals' jurisdiction on the basis that the investment was ultimately owned by nationals of the respondent State, the invested capital was of domestic origin, or the investment made through holding companies was ultimately owned by nationals of third States not covered by the applicable IIA (table 2).

In the publicly available decisions rendered in 2019, the tribunals rejected such objections. They held that in the absence of a requirement of substantial business activity, the decisive factor remained the place of incorporation and therefore holding companies were protected by the respective IIAs. Two of the tribunals also considered that invested funds need not be of foreign origin to be protected.

**Table 2. Ultimate ownership of investment**

Case details	Investment at issue	Selected issues and tribunals' findings
<p><b>Europa Nova v. Czechia</b></p> <ul style="list-style-type: none"> <li>• Cyprus–Czechia BIT (2001); Energy Charter Treaty (ECT) (1994)</li> <li>• Award, 15 May 2019</li> <li>• van Houtte, H. (President); Beechey, J.; Landau, T.</li> </ul>	<p>Majority shareholding (90 per cent) in Czech company SolarOne s.r.o., which owned two special purpose vehicles with solar plants (the Tomsan and Slunecní projects).</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction over Claimant under the Cyprus–Czechia BIT (→NO; Tribunal lacked jurisdiction because Claimant did not meet the condition of having a permanent seat in the other Contracting Party to qualify as investor under the BIT; Claimant only had registered office)</li> <li>• Whether, under ECT, Tribunal had jurisdiction over investment owned by domestic investors through a foreign shell company (in Cyprus) (→YES; ECT does not preclude the protection of an investment made by an entity which mainly serves as a holding company)</li> <li>• Whether Claimant qualified as investor if funds used to make investment originated from a national of the host State (→YES; under ECT, investment refers to "every kind of asset", no requirement that funds of an investment be of foreign origin)</li> </ul>
<p><b>I.C.W. v. Czechia</b></p> <ul style="list-style-type: none"> <li>• Czechia–United Kingdom BIT (1990); ECT (1994)</li> <li>• Award, 15 May 2019</li> <li>• van Houtte, H. (President); Beechey, J.; Landau, T.</li> </ul>	<p>Sole shareholding in a Czech special purpose vehicle, Hutira FVE-Omice a.s., which owned and operated a solar plant in South Moravia.</p>	<ul style="list-style-type: none"> <li>• Whether Claimant qualified as investor if funds used to make investment originated from a national of the host State (→YES; under both ECT and BIT, investment refers to "every kind of asset", no requirement that funds of an investment be of foreign origin)</li> </ul>
<p><b>NextEra v. Spain</b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019</li> <li>• McRae, D. M. (President); Fortier, L. Y.; Boisson de Chazournes, L.</li> </ul>	<p>Construction and operation of two thermosolar plants in Extremadura, Spain.</p>	<ul style="list-style-type: none"> <li>• Whether Claimants, as pure holding companies incorporated in the Netherlands with no economic activity in the Netherlands (and ultimately owned by an American corporation), qualified as investors within the meaning of the ECT (→YES; holding companies are covered investors; the decisive factor is whether the company is organized under the laws of a Contracting Party and not the existence of economic activity)</li> </ul>

Source: UNCTAD.

### Characteristics of investment (contribution of resources)

In four decisions rendered in 2019, tribunals examined whether the investments at issue in the disputes met the characteristics of investment, particularly the criterion of contribution of resources (table 3). While respondent States raised jurisdictional objections relying on the *Salini* test in three cases,<sup>2</sup> only one tribunal applied it (based on the disputing parties' agreement). The other tribunals focused their analysis on specific elements provided for in the definitions of investment or investor of the respective IIAs (and applied tests on this basis).

In one case, the tribunal ruled that ownership of shares in a local company acquired by the claimant (from its parent company) without any payment in exchange could not be considered a protected investment as there was no contribution of any kind from the claimant. Other tribunals examined whether a contribution must take a financial form or whether loans to local companies could be considered a protected investment.

Old-generation treaties typically use an open-ended definition of "investment" that grants protection to all types of assets. Many recent IIAs, however, list the "commitment of capital or other resources" (alongside other characteristics such as the expectation of profit and the assumption of risk) in definitions of the term "investment" (UNCTAD, 2019c). They also often exclude certain types of assets from coverage. Some recent IIAs and model treaties include the "contribution to sustainable (or economic) development" as a characteristic of a covered investment (UNCTAD, 2020a).

Table 3. Characteristics of investment: contribution of resources		
Case details	Investment at issue	Selected issues and tribunals' findings
<p><b><i>Clorox v. Venezuela</i></b></p> <ul style="list-style-type: none"> <li>Spain–Bolivarian Republic of Venezuela BIT (1995)</li> <li>Award, 20 May 2019</li> <li>Derains, Y. (President); Hanotiau, B.; Vinuesa, R. E.</li> </ul>	<p>Ownership of Corporación Clorox de Venezuela S.A. ("Clorox Venezuela"), a local company engaged in manufacturing of cleaning products.</p>	<ul style="list-style-type: none"> <li>Whether mere ownership of shares in a local company is sufficient for Claimant to be considered a protected investor holding a protected investment (→NO; BIT further requires the investor to carry out an "action of investing" (payment of a value when acquiring shares))</li> <li>Whether Claimant made any contribution or payment in exchange of the shares (→NO)</li> </ul>
<p><b><i>Doutremepuich v. Mauritius</i></b></p> <ul style="list-style-type: none"> <li>France–Mauritius BIT (1973)</li> <li>Award on Jurisdiction, 23 August 2019</li> <li>Scherer, M. (President); Caprasse, O.; Paulsson, J.</li> </ul>	<p>Ownership of three locally incorporated enterprises for the construction and operation of a forensic DNA and paternity testing laboratory in Mauritius.</p>	<ul style="list-style-type: none"> <li>Whether Claimants' alleged investment satisfied the Salini test criteria ((i) contribution to the host State; (ii) a certain duration; (iii) participation in the risk of the operation) (→NO; Tribunal applied Salini test based on disputing parties' agreement to do so)</li> <li>Whether the transfer of funds made by Claimants from one bank account in France to local bank accounts in Mauritius met the Salini test criterion of contribution to the host state (→NO)</li> <li>Whether contribution to the host state can take non-financial forms (→YES; non-financial inputs may also satisfy the test as long as they have an economic value that can be contributed)</li> <li>Whether Claimants made any contribution of know-how of economic value constitutive of investment (→NO)</li> <li>Whether planned future investments qualify as an investment (→NO; Tribunal is to determine whether or not at the time of the termination of the project an investment had occurred that qualifies as such under BIT)</li> </ul>

<sup>2</sup> *Clorox v. Venezuela*; *Doutremepuich v. Mauritius*; *Seo v. Korea*. The test is named after *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, 23 July 2001. According to this test, an "investment" (in the sense of Article 25(1) of the ICSID Convention) is characterized by the following elements: (1) the existence of a substantial contribution by the foreign national, (2) a certain duration of the economic activity in question, (3) the assumption of risk by the foreign national, and (4) the contribution of the activity to the host State's development.

**Table 3. Characteristics of investment: contribution of resources**

Case details	Investment at issue	Selected issues and tribunals' findings
<b><i>Seo v. Korea</i></b> <ul style="list-style-type: none"> <li>• Republic of Korea–United States of America FTA (2007)</li> <li>• Final Award, 24 September 2019</li> <li>• Simma, B. (President); Lo, B. (Concurring Opinion); McRae, D. M.</li> </ul>	Partial ownership (76%) of a residential property in Seoul.	<ul style="list-style-type: none"> <li>• Whether Claimant's real estate property met the characteristics of an investment (→NO; there was no expectation of gain or profit as the property was acquired and predominantly served as a private residence for Claimant and her family, nor was there any assumption of risk)</li> </ul>
<b><i>Voltaic Network v. Czechia</i></b> <ul style="list-style-type: none"> <li>• Czechia–Germany BIT (1990); ECT (1994)</li> <li>• Award, 15 May 2019</li> <li>• van Houtte, H. (President); Beechey, J.; Landau, T.</li> </ul>	Sole shareholding in a Czech special purpose vehicle, Solarpark Rybníček s.r.o., which owned and operated a solar plant near Rybníček.	<ul style="list-style-type: none"> <li>• Whether shares in a local company acquired by Claimant using a loan and paid for directly by the lender qualified as protected investment (→YES; the ECT and the BIT do not require that investor itself makes the investment – it is sufficient that the investor owns the asset)</li> </ul>

Source: UNCTAD.

## b. Definition of investor

### Home and host country dual nationals

In three cases conducted under the UNCITRAL Arbitration Rules, respondent States challenged the tribunals' jurisdiction on the basis that the claimants were dual nationals of both parties to the IIA (home and host countries) and should not be permitted to bring any claims against one of their home States (table 4). The tribunals in the three cases rejected jurisdiction over the respective claimants.

In one decision, the tribunal assessed the effective and dominant nationality of the claimants based on the applicable treaty's explicit wording on the issue. It determined that the claimants' effective and dominant nationality was that of the respondent State.

In the two other decisions, the applicable treaties did not explicitly address the issue of double nationality in the definition of investor. In one of the cases, the tribunal considered that the definition of investor of the invoked treaty (the Spain–Venezuela BIT of 1995) implicitly excluded claims from dual nationals. It reached a different conclusion than another tribunal in a related case under the same treaty, which had held in 2014 that claims from dual nationals were permitted since the BIT did not expressly exclude them.<sup>3</sup>

In the third case, the tribunal found clear indications in the treaty showing the contracting parties' intent not to cover dual nationals of the home and host countries. As part of its analysis, the tribunal applied the principle of dominant and effective nationality based on general principles of international law.

Most IIAs are silent on the matter of dual nationality and typically they do not explicitly refer to effective and dominant nationality. Some recent IIAs address this issue by specifying the circumstances under which natural persons with dual nationality are covered or by excluding certain dual nationals from coverage (UNCTAD, 2020a). UNCTAD's IIA Reform Accelerator lists different reform-oriented formulations accompanied by recent treaty examples.

<sup>3</sup> *García Armas and García Gruber v. Venezuela*, Decision on Jurisdiction, 15 December 2014.

**Table 4. Definition of investor: dual nationals**

Case details	Investment at issue	Selected issues and tribunals' findings
<p><b><i>Ballantine v. Dominican Republic</i></b></p> <ul style="list-style-type: none"> <li>• Dominican Republic–Central America Free Trade Agreement (CAFTA–DR) (2004)</li> <li>• Final Award, 3 September 2019</li> <li>• Ramírez Hernández, R. (President); Cheek, M. L. (Partial Dissent); Vinuesa, R. E.</li> </ul>	<p>Ownership of Jamaca de Dios SRL and Aroma de la Montaña, E.I.R.L. that were used to make investments in real estate and infrastructure to create a gated complex of luxury homes, restaurants, a hotel and a spa.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction over Claimants, dual Dominican-American, after having determined that their effective and dominant nationality was Dominican (→NO – BY MAJORITY; effective and dominant nationality requirement in CAFTA–DR was not met)</li> <li>• Whether Claimants' permanent residence at the relevant times was in the United States such as to make it the more likely effective and dominant nationality (→NO)</li> <li>• Whether the centre of the Claimants' economic, social and family life was at the relevant time in the United States (→NO)</li> </ul>
<p><b><i>García Armas and others v. Venezuela</i></b></p> <ul style="list-style-type: none"> <li>• Spain–Bolivarian Republic of Venezuela BIT (1995)</li> <li>• Award on Jurisdiction, 13 December 2019</li> <li>• Nunes Pinto, J. E. (President); Gómez-Pinzón, E.; Torres Bernárdez, S.</li> </ul>	<p>Investments in six locally incorporated companies (Friosa, La Fuente, Koma, Gaisa, La Meseta, Ingahersa).</p>	<ul style="list-style-type: none"> <li>• Whether BIT allows dual nationals of both parties to bring any claims against one of their home States (→NO; BIT implicitly excludes claims by such dual nationals)</li> <li>• Whether, even if BIT allowed claims by dual nationals, Claimants' dominant nationality was Spanish (→NO; Claimants' State of habitual residence, their personal attachment, and the centre of their economic, social and family life indicated Venezuela as their dominant nationality)</li> <li>• Whether dual nationals can never bring claims against one of their home States (→NO; under certain circumstances, claims by dual nationals can be allowed provided the dominant and effective nationality of the investor is not the respondent State)</li> </ul>
<p><b><i>Heemsen v. Venezuela</i></b></p> <ul style="list-style-type: none"> <li>• Germany–Bolivarian Republic of Venezuela BIT (1996)</li> <li>• Award on Jurisdiction, 29 October 2019</li> <li>• Derains, Y. (President); Gómez-Pinzón, E.; Stern, B.</li> </ul>	<p>Indirect minority shareholding in a 643-hectare land plot ("La Salina") owned by Sucesión Heemsen, C.A., in the city of Puerto Cabello in northern Venezuela.</p>	<ul style="list-style-type: none"> <li>• Whether BIT contemplates claims by dual nationals against one of their home States (→NO; Contracting Parties' choice of ICSID as principal forum for ISDS claims demonstrated their intent to exclude dual nationals)</li> <li>• Whether Claimant's dominant and effective nationality was German (→NO; dominant and effective nationality test – applied as part of general international law – showed that Claimant was Venezuelan)</li> </ul>

Source: UNCTAD.

### Company seat

One decision rendered in 2019 examined whether the claimant had its "permanent seat" in the presumed home State to be considered a protected investor under the BIT (table 5). The tribunal ruled that the claimant did not meet the "permanent seat" requirement of the applicable IIA, as it merely had its "registered office" in the other contracting party.

While often absent in old-generation treaties, recent treaties increasingly require the covered investors to have "substantial business activities" (or sometimes "real economic activities") in the contracting party whose nationality they claim. Typically, this is combined with the incorporation approach or the seat approach to defining qualifying corporate investors.<sup>4</sup>

<sup>4</sup> UNCTAD, 2016, pp. 173-174.

Table 5. Definition of investor: company seat		
Case details	Investment at issue	Selected issues and tribunals' findings
<p><b>Europa Nova v. Czechia</b></p> <ul style="list-style-type: none"> <li>• Cyprus–Czechia BIT (2001); ECT (1994)</li> <li>• Award, 15 May 2019</li> <li>• van Houtte, H. (President); Beechey, J.; Landau, T.</li> </ul>	<p>Majority shareholding (90 per cent) in Czech company SolarOne s.r.o., which owned two special purpose vehicles with solar plants (the Tomsan and Slunecní projects).</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction over Claimant under the Cyprus–Czechia BIT (→NO; Tribunal lacked jurisdiction because Claimant did not meet the condition of having a permanent seat in the other Contracting Party to qualify as investor under the BIT; Claimant only had registered office)</li> <li>• Whether Tribunal had jurisdiction <i>ratione personae</i> over Claimant under ECT (→YES; ECT does not have a permanent seat requirement)</li> </ul>

Source: UNCTAD.

### Denial of benefits

In one case, the respondent State invoked (in a memorial on jurisdiction, after the arbitration had been initiated against it) the denial-of-benefits clause in the applicable IIA arguing that the claimant did not have “substantial business activities” in its alleged home State (table 6). The tribunal decided that the respondent State had not asserted the denial of benefits in a timely fashion. The applicable IIA provided no explicit guidance on the time at which the right to deny benefits must be exercised.

In light of several decisions which have held that the denial-of-benefits clause may not be invoked against an investor after the commencement of arbitral proceedings, policymakers may consider providing explicit guidance on this issue in their treaties. Recent IIAs and model treaties can provide examples of reform-oriented formulations for the denial-of-benefits clause; they are illustrated in UNCTAD’s IIA Reform Accelerator (UNCTAD, 2020a).

Table 6. Denial of benefits		
Case details	Investment at issue	Selected issues and tribunals' findings
<p><b>NextEra v. Spain</b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019</li> <li>• McRae, D. M. (President); Fortier, L. Y.; Boisson de Chazournes, L.</li> </ul>	<p>Construction and operation of two thermosolar plants in Extremadura, Spain.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction despite Respondent’s invocation of the denial of benefits clause (→YES; Respondent’s assertion of the right to deny benefits three years after becoming aware of such right was too late and lacked good faith)</li> </ul>

Source: UNCTAD.

### c. Legality of investment

In one case decided in 2019, the respondent State argued that claimants had made their investment in violation of the host State law and thus it did not qualify for treaty protection (table 7). The tribunal rejected the allegations.

In two other decisions related to the same investment projects, the respondent State alleged that the claimants committed acts of corruption at the initial and subsequent stages of the investment. The respective tribunals determined that the claimants’ conduct amounted to manifest bad faith, however they found no “clear and convincing evidence” of corruption.

Many IIAs explicitly require covered investments to be made “in accordance with host State law” (UNCTAD, 2018; UNCTAD, 2020a).<sup>5</sup> A related option is to specify that host State laws should be complied with at both the entry and the post-entry stages of an investment (UNCTAD, 2015b). A few recent IIAs and model treaties encourage or require investor compliance with human rights, labour and environmental standards (UNCTAD, 2019a).

<sup>5</sup> Some past tribunals confirmed that the legality requirement applied even when it was not explicitly mentioned in the IIA, see UNCTAD, 2019b.



Table 7. Legality of investment		
Case details	Investment at issue	Selected issues and tribunals' findings
<p><b><i>Glencore International and C.I. Prodeco v. Colombia (I)</i></b></p> <ul style="list-style-type: none"> <li>• Colombia–Switzerland BIT (2006)</li> <li>• Award, 27 August 2019</li> <li>• Fernández-Armesto, J. (President); Garibaldi, O. M.; Thomas, J. C.</li> </ul>	<p>Ownership of C.I. Prodeco S.A., a thermal coal producer holding a concession for the Calenturitas mine in Northern Colombia.</p>	<ul style="list-style-type: none"> <li>• Whether Claimants' investment should be denied treaty protection because of allegations that it had been made illegally through corruption and bad faith in violation of Colombia's laws and regulations (→NO; Tribunal found no indication of corruption or bad faith)</li> </ul>
<p><b><i>Lao Holdings v. Laos (I)</i></b></p> <ul style="list-style-type: none"> <li>• Lao People's Democratic Republic–Netherlands BIT (2003)</li> <li>• Award, 6 August 2019</li> <li>• Binnie, I. (President); Hanotiau, B.; Stern, B.</li> </ul>	<p>Contributions made in the form of loans extended to local companies; majority shareholding in two hotels and casinos: Savan Vegas and Paksong Vehas; ownership stakes in certain slot clubs; business know-how.</p>	<ul style="list-style-type: none"> <li>• Whether the "red-flags test" or "balance of probabilities" is sufficient as the standard of proof for corruption allegations (→NO; higher standard of clear and convincing evidence is required)</li> <li>• Whether a generalized doctrine of "clean hands" should be incorporated into investor-State law (→NO; however, serious financial misconduct by Claimant incompatible with good faith is not without treaty consequences)</li> <li>• Whether the corruption allegations levied against Claimant by Respondent met the "clear and convincing evidence" standard of proof (→NO; however, the allegations would have met the lower standard of balance of probabilities)</li> <li>• Whether Claimant made efforts to manipulate the Government to advance its gambling initiatives and to manipulate the arbitration process, amounting to manifest bad faith (→YES)</li> </ul>
<p><b><i>Sanum Investments v. Laos (I)</i></b></p> <ul style="list-style-type: none"> <li>• China–Lao People's Democratic Republic BIT (1993)</li> <li>• Award, 6 August 2019</li> <li>• Rigo Sureda, A. (President); Hanotiau, B.; Stern, B.</li> </ul>	<p>Contributions made in the form of loans extended to local companies; majority shareholding in two hotels and casinos: Savan Vegas and Paksong Vehas; ownership stakes in certain slot clubs; business know-how.</p>	<ul style="list-style-type: none"> <li>• Whether the "red-flags test" or "balance of probabilities" is sufficient as the standard of proof for corruption allegations (→NO; higher standard of "clear and convincing evidence" is required)</li> <li>• Whether a generalized doctrine of "clean hands" should be incorporated into investor-State law (→NO; however, serious financial misconduct by Claimant incompatible with good faith is not without treaty consequences)</li> <li>• Whether the corruption allegations levied against Claimant by Respondent met the "clear and convincing evidence" standard of proof (→NO; however, the allegations would have met the lower standard of balance of probabilities)</li> <li>• Whether Claimant made efforts to manipulate the Government to advance its gambling initiatives and to manipulate the arbitration process, amounting to manifest bad faith (→YES)</li> </ul>

Source: UNCTAD.

#### d. Exclusions from treaty scope (taxation measures)

A significant number of decisions decided in 2019 examined whether certain measures challenged by claimants were "taxation measures" excluded from the scope of the applicable treaty (table 8).

In all reviewed decisions, the ECT was invoked, sometimes in combination with a BIT. In the cases against Spain, tribunals confirmed that the relevant measure was outside of the scope of the ECT. In the cases against Czechia, tribunals determined that the challenged measures did not qualify for the ECT's tax carve-out, as they did not aim at raising general revenue for the State; their main objective was deemed to be a different one.

Exclusions of specific policy areas from the treaty scope (e.g. taxation, subsidies and grants, government procurement, sovereign debt) are more frequently encountered in recent treaties. However, tax carve-outs in these treaties typically do not define the term “taxation measure”. Whether a specific measure is a “tax” within the meaning of a carve-out provision has been a contentious issue in many recent decisions (UNCTAD, 2019b).

<b>Table 8. Exclusions from treaty scope</b>		
<b>Case details</b>	<b>Disputed measure(s)</b>	<b>Selected issues and tribunals' findings</b>
<p><b><i>9REN Holding v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 31 May 2019</li> <li>• Binnie, I. (President); Haigh, D.; Veeder, V. V.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; Law 15/2012 is a taxation measure and ECT carves out taxation measures from its scope)</li> </ul>
<p><b><i>BayWa r.e. v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019</li> <li>• Crawford, J. R. (President); Grigera Naón, H. A. (Dissenting Opinion); Malintoppi, L.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; Law 15/2012 is a taxation measure and ECT carves out taxation measures from its scope)</li> </ul>
<p><b><i>Belenergia v. Italy</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 6 August 2019</li> <li>• Derains, Y. (President); Hanotiau, B.; Fernández Rozas, J. C.</li> </ul>	<p>A series of governmental decrees to cut tariff incentives for some solar power projects.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction over claims relating to imbalance costs imposed by AEEG Resolution No. 444/2016 and charged to PV plant owners (→NO; imbalance costs fall within the meaning of a taxation measure under the ECT and are carved out from the scope)</li> </ul>
<p><b><i>Cube Infrastructure and others v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019</li> <li>• Lowe, V. (President); Spigelman, J.; Tomuschat, C. (Separate and Partial Dissenting Opinion)</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; Law 15/2012 is a taxation measure and ECT carves out taxation measures from its scope)</li> </ul>
<p><b><i>Europa Nova v. Czechia</i></b></p> <ul style="list-style-type: none"> <li>• Cyprus–Czechia BIT (2001); ECT (1994)</li> <li>• Award, 15 May 2019</li> <li>• van Houtte, H. (President); Beechey, J.; Landau, T.</li> </ul>	<p>Amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction over the solar levy measure despite claim by Respondent that it was a taxation measure falling under the ECT tax carve-out (→YES; the measure was not a tax measure, its main objective was to reduce the incentives granted to solar investors; the ECT tax carve-out was intended to exclude measures aimed at raising general revenue for the State from the ECT's scope)</li> </ul>
<p><b><i>I.C.W. v. Czechia</i></b></p> <ul style="list-style-type: none"> <li>• Czechia–United Kingdom BIT (1990); ECT (1994)</li> <li>• Award, 15 May 2019</li> <li>• van Houtte, H. (President); Beechey, J.; Landau, T.</li> </ul>	<p>Amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction over the solar levy measure despite claim by Respondent that it was a taxation measure falling under the ECT tax carve-out (→YES; the measure was not a tax measure, its main objective was to reduce the incentives granted to solar investors; the ECT tax carve-out was intended to exclude measures aimed at raising general revenue for the State from the ECT's scope)</li> </ul>

**Table 8. Exclusions from treaty scope**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b><i>NextEra v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019</li> <li>• McRae, D. M. (President); Fortier, L. Y.; Boisson de Chazournes, L.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; Law 15/2012 is a taxation measure and ECT carves out taxation measures from its scope)</li> </ul>
<p><b><i>OperaFund and Schwab v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 6 September 2019</li> <li>• Böckstiegel, K.-H. (President); Reinisch, A.; Sands, P. (Dissenting Opinion on Liability and Quantum)</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; Law 15/2012 is a taxation measure and ECT carves out taxation measures from its scope)</li> </ul>
<p><b><i>Photovoltaik Knopf v. Czechia</i></b></p> <ul style="list-style-type: none"> <li>• Czechia–Germany BIT (1990); ECT (1994)</li> <li>• Award, 15 May 2019</li> <li>• van Houtte, H. (President); Beechey, J.; Landau, T.</li> </ul>	<p>Amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction over the solar levy measure despite claim by Respondent that it was a taxation measure falling under the ECT tax carve-out (→YES; the measure was not a tax measure, its main objective was to reduce the incentives granted to solar investors; the ECT tax carve-out was intended to exclude measures aimed at raising general revenue for the State from the ECT's scope)</li> </ul>
<p><b><i>RWE Innogy v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019</li> <li>• Wordsworth, S. (President); Kessler, J. L.; Joubin-Bret, A.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; Law 15/2012 is a taxation measure and ECT carves out taxation measures from its scope)</li> </ul>
<p><b><i>SolEs Badajoz v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 31 July 2019</li> <li>• Donoghue, J. E. (President); Williams, D. A. R.; Sacerdoti, G.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; Law 15/2012 is a taxation measure and ECT carves out taxation measures from its scope)</li> </ul>
<p><b><i>Stadtwerke München and others v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 2 December 2019</li> <li>• Salacuse, J. W. (President); Hobér, K. (Dissenting Opinion); Douglas, Z.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; Law 15/2012 is a taxation measure and ECT carves out taxation measures from its scope)</li> </ul>
<p><b><i>Voltaic Network v. Czechia</i></b></p> <ul style="list-style-type: none"> <li>• Czechia–Germany BIT (1990); ECT (1994)</li> <li>• Award, 15 May 2019</li> <li>• van Houtte, H. (President); Beechey, J.; Landau, T.</li> </ul>	<p>Amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction over the solar levy measure despite claim by Respondent that it was a taxation measure falling under the ECT tax carve-out (→YES; the measure was not a tax measure, its main objective was to reduce the incentives granted to solar investors; the ECT tax carve-out was intended to exclude measures aimed at raising general revenue for the State from the ECT's scope)</li> </ul>

Source: UNCTAD.

## 2. Standards of treatment and protection

### a. Fair and equitable treatment (FET)

#### Legitimate expectation of regulatory stability

As in previous years, in many decisions rendered in 2019, arbitral tribunals addressed the question of investors' legitimate expectations of the stability of the regulatory regime in place at the time of investment in the host State (table 9). These questions were discussed in particular in the context of claims against Czechia, Italy and Spain related to these countries' reforms in the renewable energy sector.

In several cases, tribunals found that the respondent States had established attractive regulatory regimes for investments in their renewable energy sectors – through general legislation (acts and regulations) – and had also provided assurances of the regimes' long-term stability, which gave rise to investors' legitimate expectations. Other tribunals held that such general legislation cannot give rise to legitimate expectations that the regulatory framework would remain unchanged.

In many of the decisions reviewed, the tribunals confirmed that the FET standard did not preclude States from exercising their regulatory powers in the public interest. However, tribunals established boundaries to permissible regulatory action and found breaches of legitimate expectations under FET (at times, by majority), if they determined that the State had overstepped these boundaries.

Old-generation treaties typically include an FET provision drafted in a minimalist, open-ended way. Most of the recently signed IIAs contain a circumscribed FET clause, e.g. by replacing it with an exhaustive list of State obligations (UNCTAD, 2020c). Some treaties that have opted for a closed list retain the label of "fair and equitable treatment", while others entirely omit this term (UNCTAD, 2020a). It is notable that recent treaties with closed lists do not incorporate investors' legitimate expectations. Reform-oriented formulations and recent treaty examples can be found in the IIA Reform Accelerator (UNCTAD, 2020a).

**Table 9. FET: legitimate expectation of regulatory stability**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b><i>9REN Holding v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 31 May 2019</li> <li>• Binnie, I. (President); Haigh, D.; Veeder, V. V.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether Respondent made a specific commitment through its acts and regulations such as to create a legitimate expectation that benefits under the legal regime in existence at the time of the investment would remain irrevocable (→YES)</li> <li>• Whether challenged measures frustrated Claimant's legitimate expectations and thereby breached FET standard (→YES)</li> </ul>
<p><b><i>BayWa r.e. v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019</li> <li>• Crawford, J. R. (President); Grigera Naón, H. A. (Dissenting Opinion); Malintoppi, L.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether Claimants had a legitimate expectation that the special regime subsidies would continue to be paid for the lifetime of their investment (→NO – BY MAJORITY)</li> <li>• Whether the retrospective nature of the new regulatory regime breached the stability guarantee under the FET clause (→YES – BY MAJORITY)</li> <li>• Whether unilateral statements made by Respondent's officials are binding commitments in international law under the doctrine of binding unilateral statements (→NO; that doctrine does not apply to statements made vis-à-vis private parties in a domestic context)</li> </ul>

**Table 9. FET: legitimate expectation of regulatory stability**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b><i>Belenergia v. Italy</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 6 August 2019</li> <li>• Derains, Y. (President); Hanotiau, B.; Fernández Rozas, J. C.</li> </ul>	<p>A series of governmental decrees to cut tariff incentives for some solar power projects.</p>	<ul style="list-style-type: none"> <li>• Whether Claimant's convention concluded with the public entity overseeing the incentive regime contained specific commitments addressed to Claimant that could give rise to legitimate expectations (→NO; convention merely reproduced content of the regulatory and legislative framework)</li> <li>• Whether Claimant should have legitimately expected the incentive regime not to be changed at the time of the investment (→NO; a prudent investor should have seen the clear trends towards reduction of incentives and should have been warned by Spain's earlier changes to its renewable energy regime)</li> </ul>
<p><b><i>CEF Energia v. Italy</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 16 January 2019</li> <li>• Reichert, K. (President); Sachs, K.; Sacerdoti, G.</li> </ul>	<p>A series of governmental decrees to cut tariff incentives for some solar power projects.</p>	<ul style="list-style-type: none"> <li>• Whether, at the time of making its investment, Claimant enjoyed a legitimate expectation that the specific incentive regime would be maintained by Respondent for a period of twenty years (→YES; only in relation to one out of the three photovoltaic plants)</li> <li>• Whether challenged measures frustrated Claimant's legitimate expectations and thereby breached FET standard (→YES – BY MAJORITY)</li> </ul>
<p><b><i>Cube Infrastructure and others v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019</li> <li>• Lowe, V. (President); Spigelman, J.; Tomuschat, C. (Separate and Partial Dissenting Opinion)</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether a legitimate expectation can arise from a regulatory regime that does not make any specific commitment to each individual claimant (→YES; regulatory regimes aimed at attracting investments by providing that investments will be subject to a set of specific regulatory principles for a certain length of time will create legitimate expectations insofar as they are objectively reasonable and investments are made in reliance upon them)</li> <li>• Whether Claimants were justified in relying upon Respondent's commitment to stability despite Respondent's sovereign authority to amend or revoke any law (→YES – BY MAJORITY; Respondent committed itself in certain respects and for a certain limited time not to exercise its undoubted power to amend the law)</li> <li>• Whether any deviation by Respondent from initial regulatory regime will breach FET (→NO; FET does not require maintenance of every aspect or detail of the initial regulatory regime; the State is however required not to defeat basic expectations taken into account by investor to make the investment)</li> <li>• Whether Respondent breached FET standard in respect of Claimants' PV plants (→YES)</li> <li>• Whether Respondent breached FET standard in respect of Claimants' hydro plants (→YES – BY MAJORITY)</li> </ul>

**Table 9. FET: legitimate expectation of regulatory stability**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b><i>Europa Nova v. Czechia</i></b></p> <ul style="list-style-type: none"> <li>• Cyprus–Czechia BIT (2001); ECT (1994)</li> <li>• Award, 15 May 2019</li> <li>• van Houtte, H. (President); Beechey, J.; Landau, T.</li> </ul>	<p>Amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants.</p>	<ul style="list-style-type: none"> <li>• Whether Respondent, by introducing changes to the incentive scheme, failed to provide a stable and predictable legal framework thereby breaching the FET standard (→NO; the changes did not repeal the fundamental features of the incentive scheme and Respondent had not agreed to a stabilization commitment)</li> <li>• Whether Respondent, by introducing changes to the incentive scheme, violated Claimant's legitimate expectations under FET (→NO; Respondent did not give any assurance that incentive scheme would always remain in place and unchanged)</li> </ul>
<p><b><i>I.C.W. v. Czechia</i></b></p> <ul style="list-style-type: none"> <li>• Czechia–United Kingdom BIT (1990); ECT (1994)</li> <li>• Award, 15 May 2019</li> <li>• van Houtte, H. (President); Beechey, J.; Landau, T.</li> </ul>	<p>Amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants.</p>	<ul style="list-style-type: none"> <li>• Whether Respondent, by introducing changes to the incentive scheme, failed to provide a stable and predictable legal framework thereby breaching the FET standard (→NO; the changes did not repeal the fundamental features of the incentive scheme and Respondent had not agreed to a stabilization commitment)</li> <li>• Whether Respondent, by introducing changes to the incentive scheme, violated Claimant's legitimate expectations (→NO; Respondent did not give any assurance that incentive scheme would always remain in place and unchanged for the duration of the PV plant)</li> </ul>
<p><b><i>NextEra v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019</li> <li>• McRae, D. M. (President); Fortier, L. Y.; Boisson de Chazournes, L.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether the regulatory framework alone (without specific assurances or representations) can give rise to legitimate expectations (→NO; legislation cannot create legitimate expectations because it can be changed)</li> <li>• Whether letters from Respondent's officials to Claimants created legitimate expectations that the investment regime would not be changed in a way that would undermine the security and viability of their investment (→YES)</li> <li>• Whether Respondent's failure to protect Claimants' legitimate expectations amounted to a breach of the FET standard (→YES)</li> </ul>
<p><b><i>OperaFund and Schwab v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 6 September 2019</li> <li>• Böckstiegel, K.-H. (President); Reinisch, A.; Sands, P. (Dissenting Opinion on Liability and Quantum)</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether the renewable energy regulatory framework contained a stability promise (→YES – BY MAJORITY; it contained an express stability commitment whose purpose was to induce investment by shielding investors from legislative or regulatory change)</li> <li>• Whether modifications to the regulatory framework revoked the stability promise thereby breaching Claimants' legitimate expectations (→YES – BY MAJORITY)</li> <li>• Whether the new regulatory framework amounted to a fundamental change that breached the stability requirement inherent in the ECT's FET clause (→YES – BY MAJORITY)</li> </ul>

**Table 9. FET: legitimate expectation of regulatory stability**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b><i>Photovoltaik Knopf v. Czechia</i></b></p> <ul style="list-style-type: none"> <li>• Czechia–Germany BIT (1990); ECT (1994)</li> <li>• Award, 15 May 2019</li> <li>• van Houtte, H. (President); Beechey, J.; Landau, T.</li> </ul>	<p>Amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants.</p>	<ul style="list-style-type: none"> <li>• Whether Respondent, by introducing changes to the incentive scheme, failed to provide a stable and predictable legal framework thereby breaching the FET standard (→NO; the changes did not repeal the fundamental features of the incentive scheme and Respondent had not made a stabilization commitment neither contractually nor through legislation)</li> <li>• Whether Respondent, by introducing changes to the incentive scheme, violated Claimant's legitimate expectations under FET (→NO; Respondent did not give any assurance that incentive scheme would always remain in place and unchanged for the duration of the PV plant)</li> </ul>
<p><b><i>RWE Innogy v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019</li> <li>• Wordsworth, S. (President); Kessler, J. L.; Joubin-Bret, A.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether any specific commitment had been made to Claimants, through acts and regulations, that the subsidy regime would remain unchanged such as to generate legitimate expectations (→NO)</li> </ul>
<p><b><i>SolEs Badajoz v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 31 July 2019</li> <li>• Donoghue, J. E. (President); Williams, D. A. R.; Sacerdoti, G.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether legitimate expectations under FET can arise from provisions of law and regulations and statements made for inducing investment (→YES; legitimate expectations do not solely arise from specific commitments made to an investor by the State)</li> </ul>
<p><b><i>United Utilities v. Estonia</i></b></p> <ul style="list-style-type: none"> <li>• Estonia–Netherlands BIT (1992)</li> <li>• Award, 21 June 2019</li> <li>• Drymer, S. L. (President); Williams, D. A. R. (Dissent); Stern, B.</li> </ul>	<p>Alleged refusal by Estonian regulators to permit water tariff increases in Tallinn, which allegedly resulted in substantial losses for claimants' water services concession.</p>	<ul style="list-style-type: none"> <li>• Whether, absent an express stabilization clause, a State's contractual commitments towards investors can give rise to legitimate expectations that regulatory framework would not be changed (→NO – BY MAJORITY; contracts involve intrinsic expectations different from legitimate expectations under public international law)</li> <li>• Whether Claimants had legitimate expectations of legal stability at the time of investment arising from privatization agreements with Respondent (→NO – BY MAJORITY; agreements plainly disclosed to claimants that regulatory framework was not static)</li> </ul>
<p><b><i>Voltaic Network v. Czechia</i></b></p> <ul style="list-style-type: none"> <li>• Czechia–Germany BIT (1990); ECT (1994)</li> <li>• Award, 15 May 2019</li> <li>• van Houtte, H. (President); Beechey, J.; Landau, T.</li> </ul>	<p>Amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants.</p>	<ul style="list-style-type: none"> <li>• Whether Respondent, by introducing changes to the incentive scheme, failed to provide a stable and predictable legal framework, thereby breaching the FET standard (→NO; the changes did not repeal the fundamental features of the incentive scheme and Respondent had not agreed to a stabilization commitment)</li> <li>• Whether Respondent, by introducing changes to the incentive scheme, violated Claimant's legitimate expectations under FET (→NO; Respondent did not give any assurance that incentive scheme would always remain in place and unchanged for the duration of the PV plant)</li> </ul>

Source: UNCTAD.

### Investor due diligence (legal and regulatory)

In assessing legitimacy and reasonableness of the claimants' expectations, four tribunals also addressed the question of investor due diligence (table 10). In this context, the tribunals essentially treated due diligence as the investor's exercise to ascertain legal and regulatory conditions surrounding the investment, including indications of possible future regulatory changes.

In two cases, the tribunals determined that the claimants could hold legitimate expectations without having conducted detailed and formal due diligence assessments on the legal and regulatory regime (if certain other conditions were met). In another case, the tribunal found that the claimants had carried out sufficient due diligence. In the remaining case, the tribunal suggested that the claimants had failed to conduct appropriate due diligence. This played a role in the rejection of their legitimate expectations claims.

An investor's obligation to conduct due diligence (with regard to legal and regulatory conditions, or human rights) is not typically inscribed in IIAs, and therefore not all arbitrators or tribunals may be equally convinced about the relevance of this factor (UNCTAD, 2012b). Developments outside of the traditional realm of IIAs may provide insights on corporate due diligence, for example in the context of the UN Guiding Principles on Business and Human Rights and the UN Working Group on Business and Human Rights.

**Table 10. FET: investor due diligence (legal and regulatory)**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b><i>Cube Infrastructure and others v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019</li> <li>• Lowe, V. (President); Spigelman, J.; Tomuschat, C. (Separate and Partial Dissenting Opinion)</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether Claimants were entitled to rely upon representations made by Respondent in the absence of evidence that they had conducted detailed or formal legal due diligence affirming that the regulatory regime could not be significantly changed retroactively (→YES – BY MAJORITY; it is sufficient that Claimants addressed question of regulatory stability, sought expert advice, and reached understanding of the significance of the representations made)</li> </ul>
<p><b><i>OperaFund and Schwab v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 6 September 2019</li> <li>• Böckstiegel, K.-H. (President); Reinisch, A.; Sands, P. (Dissenting Opinion on Liability and Quantum)</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether the absence of "real due diligence" on the part of the investors would vitiate a legitimate expectations claim (→YES)</li> <li>• Whether Claimants conducted appropriate due diligence (→YES – BY MAJORITY; Claimants did what could be expected from a prudent investor under the circumstances and at the time of their investments)</li> </ul>
<p><b><i>SolEs Badajoz v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 31 July 2019</li> <li>• Donoghue, J. E. (President); Williams, D. A. R.; Sacerdoti, G.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether legitimate expectations claim can be successful without a formal due diligence process (→YES; formal due diligence process is not a precondition; objective standard for assessment should be information regarding the regulatory regime that a prudent investor should have known)</li> </ul>
<p><b><i>Stadtwerke München and others v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 2 December 2019</li> <li>• Salacuse, J. W. (President); Hobér, K. (Dissenting Opinion); Douglas, Z.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether a prudent investor, having conducted appropriate due diligence, would have reasonably expected that the incentive scheme would remain unchanged (→NO – BY MAJORITY; Claimants' expectations were not reasonable or legitimate)</li> </ul>

Source: UNCTAD.



## Proportionality of State conduct

In examining whether there had been a breach of the FET standard, four tribunals assessed the objective and proportionality of State conduct (table 11). Among others, tribunals examined the legislative aim behind the challenged measures and the severity of the impact on the investor. Given the increasing prominence of the proportionality concept in arbitral practice, policymakers may wish to consider whether – and if so how – they should address this issue in case they include (circumscribed) FET clauses in future treaties or through treaty amendments.

**Table 11. FET: proportionality of State conduct**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b><i>Belenergia v. Italy</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 6 August 2019</li> <li>• Derains, Y. (President); Hanotiau, B.; Fernández Rozas, J. C.</li> </ul>	<p>A series of governmental decrees to cut tariff incentives for some solar power projects.</p>	<ul style="list-style-type: none"> <li>• Whether the regulatory changes were unjustified and disproportionate, constituting a breach of the FET standard (→NO)</li> </ul>
<p><b><i>RWE Innogy v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019</li> <li>• Wordsworth, S. (President); Kessler, J. L.; Joubin-Bret, A.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether the tariff changes, despite being suitable and necessary to achieve legislative intent, imposed an excessive and disproportionate burden on the Claimants (→YES)</li> <li>• Whether such an excessive burden amounted to a breach of the FET standard (→YES)</li> </ul>
<p><b><i>SolEs Badajoz v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 31 July 2019</li> <li>• Donoghue, J. E. (President); Williams, D. A. R.; Sacerdoti, G.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether Claimant had legitimate expectations to be protected against disproportionate changes that removed the essential features of the regulatory regime (→YES)</li> <li>• Whether Respondent's reform of its regulatory framework had been disproportionate and thereby undermined the Claimant's legitimate expectations (→YES; the severity of the impact of those measures on the value of Claimant's investment exceeded what a prudent investor could have reasonably anticipated)</li> </ul>
<p><b><i>Stadtwerke München and others v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 2 December 2019</li> <li>• Salacuse, J. W. (President); Hobér, K. (Dissenting Opinion); Douglas, Z.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether impact of regulatory reform on Claimants' investment was disproportionate (→NO – BY MAJORITY)</li> </ul>

Source: UNCTAD.

## FET and due process

Four decisions rendered in 2019 addressed alleged violations of due process under FET. In all but one case, tribunals found that the respondent States had not violated due process (table 13).

In some recent IIAs, fundamental breach of due process is explicitly listed among the obligations under the FET clause or the "standards of treatment" clause, in the absence of an FET clause (UNCTAD, 2020a).

**Table 13. FET and due process**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b><i>Belenergia v. Italy</i></b> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 6 August 2019</li> <li>• Derains, Y. (President); Hanotiau, B.; Fernández Rozas, J. C.</li> </ul>	A series of governmental decrees to cut tariff incentives for some solar power projects.	<ul style="list-style-type: none"> <li>• Whether the regulatory changes were adopted without due process and thereby breached the FET standard (→NO)</li> </ul>
<b><i>García Armas and García Gruber v. Venezuela</i></b> <ul style="list-style-type: none"> <li>• Spain–Bolivarian Republic of Venezuela BIT (1995)</li> <li>• Final Award, 26 April 2019; Decision on Revision, 26 April 2019</li> <li>• Grebler, E. (President); Tawil, G. S.; Oreamuno Blanco, R.</li> </ul>	Government authorities' alleged administrative takeover, occupation and confiscation of goods of two companies in which the claimants had invested.	<ul style="list-style-type: none"> <li>• Whether Respondent's occupation of Claimants' companies in violation of Venezuelan law on expropriation breached Claimant's due process rights thereby violating the FET standard (→YES)</li> </ul>
<b><i>Glencore International and C.I. Prodeco v. Colombia (I)</i></b> <ul style="list-style-type: none"> <li>• Colombia–Switzerland BIT (2006)</li> <li>• Award, 27 August 2019</li> <li>• Fernández-Armesto, J. (President); Garibaldi, O. M.; Thomas, J. C.</li> </ul>	Government's alleged unlawful interference with the coal concession contract, including its initiation of proceedings to challenge the validity of the amendment agreed by the parties in 2010 and imposition of royalties allegedly in excess of what is owed under the contract.	<ul style="list-style-type: none"> <li>• Whether breach of due process, in judicial or administrative proceedings, may result in the violation of the FET standard (→YES)</li> <li>• Whether Respondent denied Claimants' due process rights during domestic administrative fiscal liability proceedings (→NO)</li> </ul>
<b><i>United Utilities v. Estonia</i></b> <ul style="list-style-type: none"> <li>• Estonia–Netherlands BIT (1992)</li> <li>• Award, 21 June 2019</li> <li>• Drymer, S. L. (President); Williams, D. A. R. (Dissent); Stern, B.</li> </ul>	Alleged refusal by Estonian regulators to permit water tariff increases in Tallinn, which allegedly resulted in substantial losses for claimants' water services concession.	<ul style="list-style-type: none"> <li>• Whether Respondent failed to afford Claimants due process and thereby breached the FET standard (→NO – BY MAJORITY)</li> </ul>

Source: UNCTAD.

### FET and denial of justice

One decision rendered in 2019 examined a claim of denial of justice in domestic judicial proceedings and found that the specific circumstances did not warrant a finding of denial of justice (table 14).

Together with due process, the obligation not to deny justice features in FET or “standards of treatment” clauses in some recent IIAs (UNCTAD, 2020a).

**Table 14. FET and denial of justice**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b>Lao Holdings v. Laos (I)</b></p> <ul style="list-style-type: none"> <li>• Lao People's Democratic Republic–Netherlands BIT (2003)</li> <li>• Award, 6 August 2019</li> <li>• Binnie, I. (President); Hanotiau, B.; Stern, B.</li> </ul>	<p>Multiplicity of the Government's actions, including an 80% tax on casino revenues and allegedly unfair and oppressive audits of the claimant's Savan Vegas Hotel and Casino. Subsequent to a settlement reached in this case in 2014, the claimant further alleged material breaches of the settlement agreement by the Government and infringement of the claimant's gambling monopoly rights.</p>	<ul style="list-style-type: none"> <li>• Whether the local court proceedings involving Claimant, and the resulting decision, were so flawed such as to amount to denial of justice and a breach of the FET standard (→NO)</li> </ul>

Source: UNCTAD.

### b. Umbrella clause

In at least six decisions rendered in 2019, tribunals examined claims brought under umbrella clauses (table 15). The tribunals in these cases rejected the claims, finding that respondent States had not assumed obligations vis-à-vis the claimants under the applicable treaty's umbrella clause. The tribunals typically argued that general legislation or regulation cannot fall within the scope of the ECT's umbrella clause.

About half of the old-generation treaties contain an umbrella clause (UNCTAD, 2015a), whereas almost all recently concluded IIAs omit it (UNCTAD, 2019c; UNCTAD 2020b).

**Table 15. Umbrella clause**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b>9REN Holding v. Spain</b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 31 May 2019</li> <li>• Binnie, I. (President); Haigh, D.; Veeder, V. V.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether Respondent breached the ECT's umbrella clause by changing the legal regime that contained a specific commitment (→NO; a State's public legislation or administrative regulations do not fall within the scope of ECT's umbrella clause)</li> </ul>
<p><b>BayWa r.e. v. Spain</b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019</li> <li>• Crawford, J. R. (President); Grigera Naón, H. A. (Dissenting Opinion); Malintoppi, L.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether obligations assumed by Respondent through general legislation (as opposed to contractual obligations) fall within the scope of the umbrella clause with the effect that a change to the legislation would breach the umbrella clause (→NO; general laws cannot be considered a commitment under ECT's umbrella clause)</li> <li>• Whether Respondent breached umbrella clause (→NO)</li> </ul>
<p><b>Belenergia v. Italy</b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 6 August 2019</li> <li>• Derains, Y. (President); Hanotiau, B.; Fernández Rozas, J. C.</li> </ul>	<p>A series of governmental decrees to cut tariff incentives for some solar power projects.</p>	<ul style="list-style-type: none"> <li>• Whether Respondent breached an obligation "entered into with" Claimant, thereby violating the umbrella clause (→NO; Claimant's convention concluded with the public entity overseeing the incentive regime did not contain specific commitments)</li> </ul>
<p><b>CEF Energia v. Italy</b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 16 January 2019</li> <li>• Reichert, K. (President); Sachs, K.; Sacerdoti, G.</li> </ul>	<p>A series of governmental decrees to cut tariff incentives for some solar power projects.</p>	<ul style="list-style-type: none"> <li>• Whether Respondent, by altering the incentive regime, breached ECT's umbrella clause (→NO; Respondent did not breach the obligations it owed to Claimant)</li> </ul>

**Table 15. Umbrella clause**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b><i>Cube Infrastructure and others v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019</li> <li>• Lowe, V. (President); Spigelman, J.; Tomuschat, C. (Separate and Partial Dissenting Opinion)</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether Respondent, by changing the incentive scheme, breached ECT's umbrella clause (→NO; there were no specific engagements between Respondent and Claimant; general legislative measures cannot trigger a violation of the umbrella clause)</li> </ul>
<p><b><i>Stadtwerke München and others v. Spain</i></b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 2 December 2019</li> <li>• Salacuse, J. W. (President); Hobér, K. (Dissenting Opinion); Douglas, Z.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether Respondent failed to observe obligations "it has entered" into with Claimants, thereby breaching the umbrella clause (→NO – BY MAJORITY; obligations governed by the umbrella clause are only those arising from contracts, and not those assumed via general legislation)</li> </ul>

Source: UNCTAD.

### c. Expropriation

#### Indirect expropriation

In six decisions reviewed for 2019, tribunals determined whether certain measures challenged by claimants amounted to indirect expropriation (table 16). In two decisions, tribunals decided that the challenged measures' adverse impact on claimants' shares did not amount to indirect expropriation as they did not involve a substantial deprivation of assets. In two other cases related to the same investment projects, the tribunals dismissed the indirect expropriation claims for other reasons. In the remaining two decisions, State conduct such as the refusal to grant a mining lease or the occupation and administration of claimants' local companies were found to constitute indirect expropriation.

The IIAs invoked in these cases did not include clarifications or additional guidance on the meaning of indirect expropriation, and the tribunals derived the relevant legal tests (e.g. substantial deprivation) from prior decisions of ISDS tribunals and general international law.

More recent IIAs typically establish criteria to be met for a finding of indirect expropriation and define in general terms what measures do not constitute an indirect expropriation (UNCTAD, 2018; UNCTAD, 2020a). A few recent agreements omit an explicit reference to indirect expropriation. A set of reform-oriented formulations are included in the IIA Reform Accelerator (UNCTAD, 2020a).

**Table 16. Indirect expropriation**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b><i>9REN Holding v. Spain</i></b> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 31 May 2019</li> <li>• Binnie, I. (President); Haigh, D.; Veeder, V. V.</li> </ul>	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> <li>• Whether the impact of the regulatory change on Claimant's investment (shares) amounted to expropriation (→NO; Claimant retained ownership of shares)</li> </ul>
<b><i>BayWa r.e. v. Spain</i></b> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019</li> <li>• Crawford, J. R. (President); Grigera Naón, H. A. (Dissenting Opinion); Malintoppi, L.</li> </ul>	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> <li>• Whether the disputed measures, by allegedly affecting Claimants' management and enjoyment of their investment, amounted to an indirect expropriation (→NO; expropriation, direct or indirect, requires substantial deprivation of assets)</li> <li>• Whether the effect of the disputed measures amounted to a de facto expropriation of the shares because shareholder would not be able to receive dividend (→NO; financial impact of change in the subsidy regime is not to be equated to the taking of rights)</li> </ul>
<b><i>García Armas and García Gruber v. Venezuela</i></b> <ul style="list-style-type: none"> <li>• Spain–Bolivarian Republic of Venezuela BIT (1995)</li> <li>• Final Award, 26 April 2019; Decision on Revision, 26 April 2019</li> <li>• Grebler, E. (President); Tawil, G. S.; Oreamuno Blanco, R.</li> </ul>	Government authorities' alleged administrative takeover, occupation and confiscation of goods of two companies in which the claimants had invested.	<ul style="list-style-type: none"> <li>• Whether Respondent's measures of confiscation, occupation and administration of local companies amounted to indirect expropriation (→YES)</li> </ul>
<b><i>Lao Holdings v. Laos (I)</i></b> <ul style="list-style-type: none"> <li>• Lao People's Democratic Republic–Netherlands BIT (2003)</li> <li>• Award, 6 August 2019</li> <li>• Binnie, I. (President); Hanotiau, B.; Stern, B.</li> </ul>	Multiplicity of the Government's actions, including an 80% tax on casino revenues and allegedly unfair and oppressive audits of the claimant's Savan Vegas Hotel and Casino. Subsequent to a settlement reached in this case in 2014, the claimant further alleged material breaches of the settlement agreement by the Government and infringement of the claimant's gambling monopoly rights.	<ul style="list-style-type: none"> <li>• Whether allegedly flawed court proceedings tainted by the Respondent's interference resulted in expropriation of Claimant's investment without payment of compensation (→NO; improper interference was not established)</li> <li>• Whether Respondent's refusal to renew a licence to operate a gaming club, after granting several renewals in the past, amounted to expropriation (→NO; Claimant did not show that it had a right to, or legitimate expectation of, further renewals)</li> <li>• Whether Respondent's revocation of a licence ten days after its issuance to Claimant amounted to expropriation (→NO; licence was issued by mistake by unauthorized authority and revocation was for good and sufficient cause)</li> </ul>
<b><i>Tethyan Copper v. Pakistan</i></b> <ul style="list-style-type: none"> <li>• Australia–Pakistan BIT (1998)</li> <li>• Award, 12 July 2019</li> <li>• Sachs, K. (President); Alexandrov, S. A.; Hoffmann, L.</li> </ul>	The decision by the Pakistani province of Balochistan to refuse the application by claimant's local operating subsidiary for a mining lease in respect of the Reko Diq gold and copper site.	<ul style="list-style-type: none"> <li>• Whether Respondent's refusal to grant mining lease amounted to indirect expropriation (→YES; refusal deprived the investment of its value; it was not a <i>bona fide</i> regulatory measure)</li> </ul>

**Table 16. Indirect expropriation**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b><i>Sanum Investments v. Laos (I)</i></b></p> <ul style="list-style-type: none"> <li>• China–Lao People's Democratic Republic BIT (1993)</li> <li>• Award, 6 August 2019</li> <li>• Rigo Sureda, A. (President); Hanotiau, B.; Stern, B.</li> </ul>	<p>Alleged series of measures by the Government of Laos, including its courts and provincial authorities, that affected claimant's bundle of rights for the construction and operation of two hotels and casinos, among other gaming facilities in which the claimant had invested.</p>	<ul style="list-style-type: none"> <li>• Whether allegedly flawed court proceedings tainted by Respondent's interference resulted in expropriation of Claimant's investment without payment of compensation (→NO; improper interference was not established)</li> <li>• Whether Respondent's termination of a contract with Claimant to build a hotel casino amounted to expropriation (→NO; it was terminated for breach of contract, Claimant had failed to fulfil obligations)</li> <li>• Whether Respondent's refusal to renew a licence to operate a gaming club, after granting several renewals in the past, amounted to expropriation (→NO; Claimant did not show that it had a right to, or legitimate expectation of, further renewals)</li> <li>• Whether Respondent's revocation of a licence ten days after its issuance to Claimant amounted to expropriation (→NO; licence was issued by mistake by unauthorized authority and revocation was for good and sufficient cause)</li> </ul>

Source: UNCTAD.

### Compensation requirement for expropriation

In three decisions involving expropriation claims, tribunals held that the lack of compensation rendered the expropriation unlawful, regardless of whether such expropriation was direct or indirect (table 17). In one case, the tribunal considered that the respondent State's failure to negotiate in good faith on the basis of market value compensation had rendered the expropriation unlawful.

Policymakers may consider clarifying in their treaties whether, in case of an indirect expropriation claim, the non-payment of compensation alone can render such expropriation unlawful (UNCTAD, 2012a). The standard of compensation for expropriation and the calculation of damages is another relevant issue that policymakers may wish to review (UNCTAD, 2015b). The majority of IIAs set out a standard of prompt, adequate and effective compensation (the so-called "Hull formula") and often link it to the fair market value of the investment or a similar concept (UNCTAD, 2018). A few recent IIAs and model treaties "relax" the link between the standard of compensation and the market value of investment.<sup>6</sup>

**Table 17. Expropriation: compensation requirement**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b><i>ConocoPhillips v. Venezuela</i></b></p> <ul style="list-style-type: none"> <li>• Netherlands–Bolivarian Republic of Venezuela BIT (1991)</li> <li>• Award, 8 March 2019; Decision on the Rectification of the Award, 29 August 2019</li> <li>• Zuleta, E. (President); Fortier, L. Y.; Bucher, A.</li> </ul>	<p>Venezuela's nationalization of three oil projects in which the claimants had interests, after having increased their applicable royalty rate and income tax.</p>	<ul style="list-style-type: none"> <li>• Whether Respondent's failure to respect its obligation to negotiate in good faith on the basis of market value for compensation for its taking of Claimants' investment rendered the expropriation unlawful (→YES – BY MAJORITY)</li> <li>• Whether full reparation is the standard to be adopted in a case of unlawful expropriation rather than the BIT's standard of "just compensation" at the time of expropriation (→YES; with "just compensation", there would be no sanction of a manifest breach of the provision of the BIT)</li> </ul>

<sup>6</sup> See also Bonnitcha, J. and Brewin, S. (2020). Compensation under Investment Treaties. *IISD Best Practices Series*, November 2020. Winnipeg: International Institute for Sustainable Development. Available at <https://www.iisd.org/system/files/publications/compensation-treaties-best-practices-en.pdf>.

**Table 17. Expropriation: compensation requirement**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b><i>García Armas and García Gruber v. Venezuela</i></b></p> <ul style="list-style-type: none"> <li>Spain–Bolivarian Republic of Venezuela BIT (1995)</li> <li>Final Award, 26 April 2019; Decision on Revision, 26 April 2019</li> <li>Grebler, E. (President); Tawil, G. S.; Oreamuno Blanco, R.</li> </ul>	<p>Government authorities' alleged administrative takeover, occupation and confiscation of goods of two companies in which the claimants had invested.</p>	<ul style="list-style-type: none"> <li>Whether Respondent's measures of confiscation, occupation and administration of local companies amounted to indirect expropriation (→YES)</li> <li>Whether the expropriation was unlawful (→YES; the measures did not constitute a legitimate exercise of police powers and no compensation was paid; failure to meet one of the conditions, such as the payment of prompt, adequate and effective compensation, is sufficient to render expropriation unlawful)</li> </ul>
<p><b><i>Magyar Farming and others v. Hungary</i></b></p> <ul style="list-style-type: none"> <li>Hungary–United Kingdom BIT (1987)</li> <li>Award, 13 November 2019</li> <li>Kaufmann-Kohler, G. (President); Alexandrov, S. A.; Hanefeld, I.</li> </ul>	<p>Alleged expropriation by the National Land Agency of the claimants' leasehold rights to agricultural land, following new legislation and amendments in 2010-2013 which concerned the re-distribution of certain State-owned agricultural land through tenders. According to the claimants, a tender conducted by the National Land Agency resulted in the conclusion of lease contracts with third parties for the land leased by the claimants, which allegedly breached the claimants' contractual and statutory pre-lease rights.</p>	<ul style="list-style-type: none"> <li>Whether Claimants' statutory rights constituted vested or acquired rights protected by the BIT (→YES; the doctrine of acquired or vested rights is well recognized in international and municipal law)</li> <li>Whether deprivation of already acquired statutory rights via legislation changes amounted to expropriation (→YES; if a general statute gives private parties a possibility to acquire rights of economic value, changes to that legislation should not affect rights that had already been acquired under the statute)</li> <li>Whether the legislation change was a <i>bona fide</i> measure which exempted Respondent from duty to pay compensation (→NO)</li> <li>Whether the expropriation was unlawful because of lack of compensation (→YES)</li> </ul>
<p><b><i>Tethyan Copper v. Pakistan</i></b></p> <ul style="list-style-type: none"> <li>Australia–Pakistan BIT (1998)</li> <li>Award, 12 July 2019</li> <li>Sachs, K. (President); Alexandrov, S. A.; Hoffmann, L.</li> </ul>	<p>The decision by the Pakistani province of Balochistan to refuse the application by claimant's local operating subsidiary for a mining lease in respect of the Reko Diq gold and copper site.</p>	<ul style="list-style-type: none"> <li>Whether Respondent's refusal to grant mining lease amounted to indirect expropriation (→YES; refusal deprived the investment of its value; it was not a <i>bona fide</i> regulatory measure)</li> <li>Whether the expropriation was unlawful (→YES; it was discriminatory and without payment of compensation)</li> </ul>

Source: UNCTAD.

### 3. Public policy exceptions and other exceptions

In none of the reviewed decisions for 2019, respondent States invoked general or security exceptions, or the necessity defence under customary international law. Public policy exceptions are mostly absent in old-generation treaties. They are more prevalent in recently concluded IIAs (UNCTAD, 2018; UNCTAD, 2020c).

### 4. ISDS scope, conditions for access and procedural issues

#### a. Limitations on the treaty provisions subject to ISDS

In two decisions rendered in 2019, the tribunals analysed whether the ISDS clauses in the applicable treaties excluded claims based on certain provisions (umbrella clause and FET) from the scope of their competence (table 18). Both tribunals concluded that the contracting parties' consent to arbitrate under the respective ISDS clauses did not cover such claims.

**Table 18. Limitations on the treaty provisions subject to ISDS**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b><i>Glencore International and C.I. Prodeco v. Colombia (I)</i></b> <ul style="list-style-type: none"> <li>Colombia–Switzerland BIT (2006)</li> <li>Award, 27 August 2019</li> <li>Fernández-Armesto, J. (President); Garibaldi, O. M.; Thomas, J. C.</li> </ul>	Government's alleged unlawful interference with the coal concession contract, including its initiation of proceedings to challenge the validity of the amendment agreed by the parties in 2010 and imposition of royalties allegedly in excess of what is owed under the contract.	<ul style="list-style-type: none"> <li>Whether Tribunal had jurisdiction in respect of umbrella clause claims under the ISDS provision (→NO; BIT's ISDS provision expressly excludes umbrella claims from the scope of consent to arbitration)</li> </ul>
<b><i>I.C.W. v. Czechia</i></b> <ul style="list-style-type: none"> <li>Czechia–United Kingdom BIT (1990); ECT (1994)</li> <li>Award, 15 May 2019</li> <li>van Houtte, H. (President); Beechey, J.; Landau, T.</li> </ul>	Amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants.	<ul style="list-style-type: none"> <li>Whether Tribunal had jurisdiction over FET claims based on the BIT (→NO; FET claims were excluded from the ISDS scope)</li> </ul>

Source: UNCTAD.

### b. Objections to validity of ISDS consent in intra-European Union disputes

In 15 decisions rendered in 2019, respondent States argued that tribunals in disputes involving investors from one European Union (EU) member State brought against another member State – intra-EU disputes – lacked jurisdiction (table 19). Among others, they objected to the tribunals' jurisdiction in intra-EU disputes on the ground that the 2018 ruling of the Court of Justice of the European Union (CJEU) related to the *Achmea v. Slovakia (I)* case had found that the ISDS clause in the invoked intra-EU BIT was invalid.<sup>7</sup>

In all reviewed cases, tribunals rejected the intra-EU objections and upheld jurisdiction. In the cases invoking the ECT, tribunals typically reasoned that the CJEU's decision concerned intra-EU BITs and did not concern the ECT. In the cases based on intra-EU BITs (alone or in combination with the ECT), tribunals rejected the jurisdictional objections on other grounds. Several tribunals disagreed with respondent States that jurisdiction over intra-EU disputes was precluded due to the "Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection" signed by EU member States.<sup>8</sup>

A jurisdictional objection based on the CJEU's *Achmea* ruling was also brought by a non-EU respondent State, in an arbitration based on a BIT with an EU member State.<sup>9</sup> The tribunal rejected the objection.

**Table 19. Objections to validity of ISDS consent in intra-EU disputes**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b><i>Belenergia v. Italy</i></b> <ul style="list-style-type: none"> <li>ECT (1994)</li> <li>Award, 6 August 2019</li> <li>Derains, Y. (President); Hanotiau, B.; Fernández Rozas, J. C.</li> </ul>	A series of governmental decrees to cut tariff incentives for some solar power projects.	<ul style="list-style-type: none"> <li>Whether ECT applies to intra-EU disputes (→YES)</li> <li>Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT)</li> </ul>
<b><i>CEF Energia v. Italy</i></b> <ul style="list-style-type: none"> <li>ECT (1994)</li> <li>Award, 16 January 2019</li> <li>Reichert, K. (President); Sachs, K.; Sacerdoti, G.</li> </ul>	A series of governmental decrees to cut tariff incentives for some solar power projects.	<ul style="list-style-type: none"> <li>Whether ECT applies to intra-EU disputes (→YES)</li> <li>Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT)</li> </ul>

<sup>7</sup> *Slovak Republic v. Achmea BV* (Case C-284/16), Judgment of the Grand Chamber of the European Court of Justice, 6 March 2018.

<sup>8</sup> The declaration is available at [https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties\\_en](https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en).

<sup>9</sup> *CMC v. Mozambique*.



**Table 19. Objections to validity of ISDS consent in intra-EU disputes**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b>Cube Infrastructure and others v. Spain</b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019</li> <li>• Lowe, V. (President); Spigelman, J.; Tomuschat, C. (Separate and Partial Dissenting Opinion)</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether ECT applies to intra-EU disputes (→YES)</li> <li>• Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT)</li> </ul>
<p><b>Eskosol v. Italy</b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on Termination Request and Intra-EU Objection, 7 May 2019</li> <li>• Kalicki, J. E. (President); Tawil, G. S.; Stern, B.</li> </ul>	<p>A series of governmental decrees to cut tariff incentives for some solar power projects.</p>	<ul style="list-style-type: none"> <li>• Whether ECT applies to intra-EU disputes (→YES)</li> <li>• Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT)</li> <li>• Whether Tribunal had jurisdiction despite the Contracting Parties' signature of the January 2019 Declaration expressing that ISDS clause in ECT was inapplicable (→YES; January 2019 Declaration is not a "binding instrument" amounting to a 'shared understanding [...] regarding the interpretation of the ECT'")</li> </ul>
<p><b>Europa Nova v. Czechia</b></p> <ul style="list-style-type: none"> <li>• Cyprus–Czechia BIT (2001); ECT (1994)</li> <li>• Award, 15 May 2019</li> <li>• van Houtte, H. (President); Beechey, J.; Landau, T.</li> </ul>	<p>Amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction despite Respondent's objection based on the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; objection was not raised in a timely manner; Respondent had waived its right to raise such objection pursuant to procedural law of the arbitration seat; EU law does not enjoy primacy in Switzerland)</li> </ul>
<p><b>I.C.W. v. Czechia</b></p> <ul style="list-style-type: none"> <li>• Czechia–United Kingdom BIT (1990); ECT (1994)</li> <li>• Award, 15 May 2019</li> <li>• van Houtte, H. (President); Beechey, J.; Landau, T.</li> </ul>	<p>Amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction despite Respondent's objection based on the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; objection was not raised in a timely manner; Respondent had waived its right to raise such objection pursuant to procedural law of the arbitration seat; EU law does not enjoy primacy in Switzerland)</li> </ul>
<p><b>Landesbank Baden-Württemberg and others v. Spain</b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019</li> <li>• Greenwood, C. (President); Poncet, C.; Oreamuno Blanco, R.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether ECT applies to intra-EU disputes (→YES)</li> <li>• Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT)</li> </ul>

**Table 19. Objections to validity of ISDS consent in intra-EU disputes**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b>Magyar Farming and others v. Hungary</b></p> <ul style="list-style-type: none"> <li>• Hungary–United Kingdom BIT (1987)</li> <li>• Award, 13 November 2019</li> <li>• Kaufmann-Kohler, G. (President); Alexandrov, S. A.; Hanefeld, I.</li> </ul>	<p>Alleged expropriation by the National Land Agency of the claimants' leasehold rights to agricultural land, following new legislation and amendments in 2010-2013 which concerned the re-distribution of certain State-owned agricultural land through tenders. According to the claimants, a tender conducted by the National Land Agency resulted in the conclusion of lease contracts with third parties for the land leased by the claimants, which allegedly breached the claimants' contractual and statutory pre-lease rights.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal must conduct its own determination on jurisdiction and is not bound by CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; an ICSID Tribunal must carry out its own analysis of whether there is valid consent to arbitrate; it cannot blindly follow another adjudicatory body's determination)</li> <li>• Whether Tribunal had jurisdiction despite the Contracting Parties' signature of the January 2019 Declaration expressing that ISDS clause in intra-EU BITs was inapplicable (→YES; January 2019 Declaration is not an agreement to terminate all intra-EU BITs and even if it were, it could not retroactively invalidate the pre-existing consent to arbitration that has been accepted by the investor)</li> </ul>
<p><b>OperaFund and Schwab v. Spain</b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 6 September 2019</li> <li>• Böckstiegel, K.-H. (President); Reinisch, A.; Sands, P. (Dissenting Opinion on Liability and Quantum)</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether ECT applies to intra-EU disputes (→YES)</li> <li>• Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT)</li> </ul>
<p><b>Photovoltaik Knopf v. Czechia</b></p> <ul style="list-style-type: none"> <li>• Czechia–Germany BIT (1990); ECT (1994)</li> <li>• Award, 15 May 2019</li> <li>• van Houtte, H. (President); Beechey, J.; Landau, T.</li> </ul>	<p>Amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction despite Respondent's objection based on the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; objection was not raised in a timely manner; Respondent had waived its right to raise such objection pursuant to procedural law of the arbitration seat; EU law does not enjoy primacy in Switzerland)</li> </ul>
<p><b>Rockhopper v. Italy</b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Decision on the Intra-EU Jurisdictional Objection, 26 June 2019</li> <li>• Reichert, K. (President); Poncet, C.; Dupuy, P.-M.</li> </ul>	<p>Decision in February 2016 by the Ministry of Economic Development not to award the claimants a production concession covering the Ombrina Mare field located within 12 miles of the coast of Italy, following the Government's re-introduction of a general ban on oil and gas exploration and production activity within the 12 mile limit of the coastline.</p>	<ul style="list-style-type: none"> <li>• Whether ECT applies to intra-EU disputes (→YES)</li> <li>• Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT)</li> <li>• Whether Tribunal had jurisdiction despite the Contracting Parties' signature of the January 2019 Declaration expressing that ISDS clause in ECT was inapplicable (→YES; declaration was not signed by all EU member States and was not adopted within the EU legal order)</li> </ul>
<p><b>SolEs Badajoz v. Spain</b></p> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 31 July 2019</li> <li>• Donoghue, J. E. (President); Williams, D. A. R.; Sacerdoti, G.</li> </ul>	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> <li>• Whether ECT applies to intra-EU disputes (→YES)</li> <li>• Whether Tribunal had jurisdiction under the ECT despite the CJEU's reasoning in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; even if assuming that ECT's ISDS clause is in conflict with EU law, pursuant to Article 16 of the ECT on the relationship with other agreements: for EU law to take precedence over the dispute settlement chapter of the ECT, EU law must provide a more favourable regime to investors; however, it does not)</li> </ul>

**Table 19. Objections to validity of ISDS consent in intra-EU disputes**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b><i>Stadtwerke München and others v. Spain</i></b> <ul style="list-style-type: none"> <li>• ECT (1994)</li> <li>• Award, 2 December 2019</li> <li>• Salacuse, J. W. (President); Hobér, K. (Dissenting Opinion); Douglas, Z.</li> </ul>	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> <li>• Whether ECT applies to intra-EU disputes (→YES)</li> <li>• Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT)</li> </ul>
<b><i>United Utilities v. Estonia</i></b> <ul style="list-style-type: none"> <li>• Estonia–Netherlands BIT (1992)</li> <li>• Award, 21 June 2019</li> <li>• Drymer, S. L. (President); Williams, D. A. R. (Dissent); Stern, B.</li> </ul>	Alleged refusal by Estonian regulators to permit water tariff increases in Tallinn, which allegedly resulted in substantial losses for claimants' water services concession.	<ul style="list-style-type: none"> <li>• Whether the BIT is operative despite Estonia's accession to the EU (→YES; BIT was not terminated; BIT and EU law do not have identical subject matter)</li> <li>• Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; BIT is not incompatible with EU law or inoperative; Tribunal is not authoritatively bound by the CJEU's decision and the latter does not address arbitral proceedings under ICSID)</li> </ul>
<b><i>Voltaic Network v. Czechia</i></b> <ul style="list-style-type: none"> <li>• Czechia–Germany BIT (1990); ECT (1994)</li> <li>• Award, 15 May 2019</li> <li>• van Houtte, H. (President); Beechey, J.; Landau, T.</li> </ul>	Amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants.	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction despite Respondent's objection based on the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; objection was not raised in a timely manner; Respondent had waived its right to raise such objection pursuant to procedural law of the arbitration seat; EU law does not enjoy primacy in Switzerland)</li> </ul>

Source: UNCTAD.

### c. Requirements applicable to notice of dispute or request for arbitration

In one decision rendered in 2019, the tribunal examined whether the claimants' request for arbitration met the requirements of the applicable treaty and whether it had jurisdiction over additional claimants not mentioned in the notice of intent preceding the request for arbitration (table 20). The tribunal's majority ruled in the affirmative.

Old-generation treaties often do not specify how the respondent State should be notified of the existence of a dispute (UNCTAD, 2014). Some of the treaties that require a written notification do not specify what it should contain. This could have implications for respondent States' preparation of legal defence as well as possibilities for pre-arbitration settlement.

**Table 20. ISDS: requirements applicable to notice of dispute or request for arbitration**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b><i>B-Mex and others v. Mexico</i></b></p> <ul style="list-style-type: none"> <li>• North American Free Trade Agreement (NAFTA) (1992)</li> <li>• Partial Award, 19 July 2019</li> <li>• Verhoosel, G. (President); Born, G. B.; Vinuesa, R. E. (Partial Dissenting Opinion)</li> </ul>	<p>Government's alleged unlawful interference with the claimants' casino business in Mexico, including raids on facilities, seizure of equipment and bank account funds, closure of facilities and invalidation of a gaming permit.</p>	<ul style="list-style-type: none"> <li>• Whether request for arbitration submitted by Claimants' legal counsel established their consent to arbitration and was conveyed in the manner prescribed by NAFTA, despite the absence of a separate letter affirming Claimants' consent to arbitration (→YES; counsel was authorized to initiate arbitration; request referred to and expressly accepted Mexico's offer to arbitrate; consent was conveyed in writing, delivered to Respondent and was included in the submission of the claim to arbitration; no separate letter was required)</li> <li>• Whether Tribunal had jurisdiction over additional Claimants not mentioned in the initial notice of intent (→YES – BY MAJORITY; the subsequent inclusion of additional Claimants in the request for arbitration does not vitiate Respondent's consent to arbitration or automatically render their claims inadmissible)</li> </ul>

Source: UNCTAD.

#### d. Waiting periods and amicable settlement as a prerequisite to arbitration

In one decision rendered in 2019, the respondent State argued that the claimant's failure to give notice of the dispute and initiate a six-month waiting period under the applicable BIT rendered the claim manifestly without legal merit (table 21).

While waiting periods are often included in old-generation treaties, tribunals have at times reached different conclusions on whether claimants' non-observance of waiting or amicable settlement periods results in a lack of jurisdiction. Making written notices of dispute and waiting periods a clear condition for access to ISDS can help avoid uncertainty in this regard. A few recent treaties include dispute prevention mechanisms (as an alternative to ISDS), require investors to pursue or exhaust local remedies before turning to ISDS or make recourse to consultation procedures prior to ISDS mandatory (UNCTAD, 2019a).

**Table 21. ISDS: request for amicable settlement as a prerequisite to arbitration**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b><i>Almasryia v. Kuwait</i></b></p> <ul style="list-style-type: none"> <li>• Egypt–Kuwait BIT (2001)</li> <li>• Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019</li> <li>• Ramírez Hernández, R. (President); Dévaud, P. (Dissenting Opinion); Knieper, R.</li> </ul>	<p>Government's alleged conduct preventing the claimant from taking ownership of land for a real estate development project under a joint venture investment agreement concluded by the claimant and a Kuwaiti national.</p>	<ul style="list-style-type: none"> <li>• Whether Claimant complied with requirement to notify Respondent of dispute, request amicable settlement and initiate the six-month cooling-off period before submitting the dispute to arbitration (→NO – BY MAJORITY; BIT required written notice and six-month cooling-off period)</li> <li>• Whether Tribunal had jurisdiction despite Claimant's failure to comply with notice requirement and waiting period (→NO – BY MAJORITY; failure renders the claim manifestly without legal merit pursuant to ICSID Arbitration Rule 41(5))</li> </ul>

Source: UNCTAD.

### e. Relationship with domestic proceedings

In three decisions rendered in 2019, tribunals had to determine whether to uphold their jurisdiction in light of pending domestic proceedings (table 22). In two of the cases, the applicable IIA contained a fork-in-the-road provision. In the remaining case, the respondent State relied on Article 26 of the ICSID Convention (Exclusive Remedies) in the absence of references to domestic proceedings in the ISDS provisions of the applicable treaty.

Some IIAs include “fork-in-the-road” provisions which require the investor to choose between the domestic courts and international arbitration at the outset. Others require disputing parties to withdraw any domestic judicial proceedings pending in the host State before or after the commencement of arbitration. Many old-generation treaties do not address the relationship between ISDS and domestic proceedings. The lack of clarifications on the interaction between domestic proceedings and ISDS as well as ambiguous treaty formulations may leave greater discretion to tribunals.

**Table 22. ISDS: relationship with domestic proceedings**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b><i>Glencore International and C.I. Prodeco v. Colombia (I)</i></b></p> <ul style="list-style-type: none"> <li>Colombia–Switzerland BIT (2006)</li> <li>Award, 27 August 2019</li> <li>Fernández-Armesto, J. (President); Garibaldi, O. M.; Thomas, J. C.</li> </ul>	<p>Government’s alleged unlawful interference with the coal concession contract, including its initiation of proceedings to challenge the validity of the amendment agreed by the parties in 2010 and imposition of royalties allegedly in excess of what is owed under the contract.</p>	<ul style="list-style-type: none"> <li>Whether Tribunal had jurisdiction despite ongoing proceedings in domestic courts (→YES; the domestic proceedings prior to the start of the arbitration proceedings were “prejudicial conciliation procedures” and did not involve “the courts or administrative tribunals”; Claimants validly opted for ICSID arbitration first under the BIT’s fork-in-the road provision; the procedure before a domestic administrative tribunal was initiated after the request for arbitration and could thus not deprive the Tribunal of jurisdiction)</li> </ul>
<p><b><i>Nissan v. India</i></b></p> <ul style="list-style-type: none"> <li>India–Japan EPA (2011)</li> <li>Decision on Jurisdiction, 29 April 2019</li> <li>Kalicki, J. E. (President); Hobér, K.; Khehar, J. S.</li> </ul>	<p>Non-payment of incentives by the Indian State government of Tamil Nadu, which had been allegedly promised to the claimant under the agreement for building of a car plant, signed with the State government in 2008.</p>	<ul style="list-style-type: none"> <li>Whether Tribunal had jurisdiction despite pending domestic proceedings brought by Claimant’s affiliate (→YES; domestic proceedings did not concern an “investment dispute” under the treaty’s fork-in-the-road provision as they did not allege treaty breaches and “disputing investor” was not the same)</li> </ul>
<p><b><i>United Utilities v. Estonia</i></b></p> <ul style="list-style-type: none"> <li>Estonia–Netherlands BIT (1992)</li> <li>Award, 21 June 2019</li> <li>Drymer, S. L. (President); Williams, D. A. R. (Dissent); Stern, B.</li> </ul>	<p>Alleged refusal by Estonian regulators to permit water tariff increases in Tallinn, which allegedly resulted in substantial losses for claimants’ water services concession.</p>	<ul style="list-style-type: none"> <li>Whether Tribunal had jurisdiction despite ongoing proceedings before domestic courts initiated by the local company (→YES; the matter in local proceedings was not substantially the same as that before the Tribunal)</li> </ul>

Source: UNCTAD.

### f. Relationship with dispute settlement clauses under contracts

In three decisions rendered in 2019, tribunals addressed the implications of dispute settlement clauses in contracts that were at issue in the arbitration proceedings (table 23). Respondent States argued that jurisdiction should be dismissed because the contracts contained exclusive forum selection clauses giving jurisdiction to domestic courts or other fora. In all three cases, tribunals upheld their jurisdiction, considering that the presence of dispute settlement clauses did not preclude their jurisdiction.

This issue is left largely unaddressed in IIAs. A few IIAs clarify with regard to the umbrella clause that it cannot be used to bypass specific dispute settlement mechanisms set out in a contract, or they exclude claims arising out of the umbrella clause from the applicability of the IIA dispute settlement mechanism (UNCTAD, 2015a).

**Table 23. ISDS: relationship with dispute settlement clauses under contracts**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b><i>Anglo American v. Venezuela</i></b> <ul style="list-style-type: none"> <li>• United Kingdom–Bolivarian Republic of Venezuela BIT (1995)</li> <li>• Award, 18 January 2019</li> <li>• Derains, Y. (President); Tawil, G. S. (Dissenting Opinion); Vinuesa, R. E.</li> </ul>	Government's cancellation and non-renewal of nickel-mining concessions owned by claimant's Venezuelan subsidiary, allegedly resulting in the permanent cease of production and mining activities.	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction despite the presence of an exclusive forum selection clause in the concession contract giving jurisdiction to domestic courts (→YES; investor's claims were for treaty breaches and not contractual claims)</li> </ul>
<b><i>CMC v. Mozambique</i></b> <ul style="list-style-type: none"> <li>• Italy–Mozambique BIT (1998)</li> <li>• Award, 24 October 2019</li> <li>• Townsend, J. M. (President); Rees, P.; Casey, J. B.</li> </ul>	Alleged failure of the national roads administration and the Government to pay settlement amounts offered to the claimants for additional work related to the reconstruction of a highway, which was carried out by claimants under a contract with the national roads administration.	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction over claims despite Claimants' investment contract containing a dispute settlement provision referring to arbitration under the Cotonou Convention (→YES; investors' claims were for treaty breaches and not contractual claims)</li> </ul>
<b><i>Nissan v. India</i></b> <ul style="list-style-type: none"> <li>• India–Japan EPA (2011)</li> <li>• Decision on Jurisdiction, 29 April 2019</li> <li>• Kalicki, J. E. (President); Hobér, K.; Khehar, J. S.</li> </ul>	Non-payment of incentives by the Indian State government of Tamil Nadu, which had been allegedly promised to the claimant under the agreement for building of a car plant, signed with the State government in 2008.	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction despite the presence of an exclusive arbitration clause in an investment contract between Respondent and Claimant (→YES; Claimant did not waive its treaty right to international arbitration)</li> </ul>

Source: UNCTAD.

### g. Limitation period for bringing claims

In one decision rendered in 2019, a tribunal examined whether certain claims were brought within the 3-year limitation period prescribed by the treaty (table 24).

Many recent IIAs include a limitation period for bringing claims, while old-generation IIAs typically do not contain such a requirement (UNCTAD, 2014; UNCTAD, 2019a).

**Table 24. ISDS: limitation period for bringing claims**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b><i>Nissan v. India</i></b> <ul style="list-style-type: none"> <li>• India–Japan EPA (2011)</li> <li>• Decision on Jurisdiction, 29 April 2019</li> <li>• Kalicki, J. E. (President); Hobér, K.; Khehar, J. S.</li> </ul>	Non-payment of incentives by the Indian State government of Tamil Nadu, which had been allegedly promised to the claimant under the agreement for building of a car plant, signed with the State government in 2008.	<ul style="list-style-type: none"> <li>• Whether Claimant's FET and umbrella claims were time-barred, therefore depriving Tribunal of jurisdiction (→NO; Claimant was pursuing only claims falling within the 3-year limitation period)</li> </ul>

Source: UNCTAD.

### h. Temporal coverage of disputes or acts occurring before the treaty's entry into force

In one decision, the tribunal examined whether the legal dispute with the respondent State was pre-existing when the investor gained coverage under the invoked treaty by acquiring the nationality of the other contracting party, i.e. before the treaty came into force as between the respondent State and the claimant (table 25). While the applicable treaty's temporal scope excluded any claim concerning an investment which arose before the treaty's entry into force, the ISDS clause did not contain an explicit time limit for "legal disputes". The tribunal ruled that

pre-existing disputes were not covered, but determined that it had jurisdiction over the dispute at hand as it arose after the critical date.

As the question of temporal coverage may entail some uncertainties for policymakers, different options are available to clarify in an IIA whether and how the treaty applies to disputes or acts occurring before the treaty's entry into force (UNCTAD, 2015b).

**Table 25. Temporal coverage of disputes or acts occurring before the treaty's entry into force**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><i>Lao Holdings v. Laos (I)</i></p> <ul style="list-style-type: none"> <li>• Lao People's Democratic Republic–Netherlands BIT (2003)</li> <li>• Award, 6 August 2019</li> <li>• Binnie, I. (President); Hanotiau, B.; Stern, B.</li> </ul>	<p>Multiplicity of the Government's actions, including an 80% tax on casino revenues and allegedly unfair and oppressive audits of the claimant's Savan Vegas Hotel and Casino. Subsequent to a settlement reached in this case in 2014, the claimant further alleged material breaches of the settlement agreement by the Government and infringement of the claimant's gambling monopoly rights.</p>	<ul style="list-style-type: none"> <li>• Whether a temporal limit for legal disputes can be read into the BIT's ISDS clause, excluding disputes existing prior to the treaty's entry into force between Respondent and Claimant (→YES; BIT only covers legal disputes that arose after its entry into force; Article 28 of the VCLT on general principle of non-retroactivity is applicable)</li> <li>• Whether the legal dispute arose before the BIT's entry into force between Respondent and Claimant, thereby falling outside the jurisdiction of the Tribunal (→NO; analysis of evidence shows that dispute arose after the critical date)</li> </ul>

Source: UNCTAD.

### i. Counterclaims

In one case concluded in 2019, the tribunal analysed whether it had jurisdiction over the respondent State's counterclaims against the investor (table 26). It held that it lacked jurisdiction over the alleged breaches by the investor.

While a few tribunals in past cases have allowed respondent States to bring counterclaims, the issue of jurisdiction over such claims remains subject to inconsistent decisions. Several obstacles exist for the effective use of counterclaims in ISDS proceedings. The vast majority of treaties to date do not spell out the right of a State to bring counterclaims (UNCTAD, 2014). Provisions on investor responsibilities or clauses on investor compliance with domestic laws (other than at the entry stage) are also largely absent from the stock of treaties (UNCTAD, 2018). This raises general issues related to the interaction between IIAs, domestic law and other areas of international law affecting investment, e.g. human rights or environmental law (UNCTAD, 2019a).

**Table 26. ISDS: counterclaims**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><i>Anglo American v. Venezuela</i></p> <ul style="list-style-type: none"> <li>• United Kingdom–Bolivarian Republic of Venezuela BIT (1995)</li> <li>• Award, 18 January 2019</li> <li>• Derains, Y. (President); Tawil, G. S. (Dissenting Opinion); Vinuesa, R. E.</li> </ul>	<p>Government's cancellation and non-renewal of nickel-mining concessions owned by claimant's Venezuelan subsidiary, allegedly resulting in the permanent cease of production and mining activities.</p>	<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction over counterclaims brought by Respondent (→NO; jurisdiction only covers treaty breaches by the State and not breaches by the investor)</li> </ul>

Source: UNCTAD.

## Conclusions: lessons learned and way forward

Decisions from 2019 touched upon important issues on the reform agenda for the IIA regime, including:

- Preserving the right to regulate (e.g. exclusions from treaty scope, interpretation of FET, expropriation and umbrella clauses)
- Improving investment dispute settlement (e.g. ISDS scope, relationship with domestic proceedings, counterclaims)
- Ensuring investor responsibility (e.g. legality of investment under host State law)

On certain issues, arbitral decisions issued in 2019 converged (e.g. upholding jurisdiction over indirect investments; rejecting jurisdiction over claimants with dual home-host country nationality or those with the dominant nationality of the respondent State). On other key issues, the decisions displayed some divergent interpretations by arbitrators and tribunals (e.g. whether legitimate expectations under FET may arise from general legislation). Questions of interpretation typically arise where the applicable treaty does not provide enough details on the matter at issue and leaves a wider margin of discretion to tribunals (e.g. coverage of indirect investments; the scope of legitimate expectations under the FET clause). There were instances in which respondent States lacked sufficient legal basis in the treaty to defend themselves more effectively (e.g. on the issue of counterclaims). Some 2019 decisions illustrate that the formulations of IIA provisions can be crucial in providing guidance to arbitrators (e.g. excluding taxation matters from treaty coverage, limiting provisions subject to ISDS). Newer, reformed IIAs typically contain more circumscribed provisions that may help increase clarity and predictability.

Policymakers and IIA negotiators are well advised to consider the implications of these developments for the drafting of substantive and procedural IIA clauses (e.g. by identifying options to add, clarify, circumscribe or omit certain provisions). Such considerations not only apply to the development of future, but also to the modernization of existing treaties. A review of recent ISDS decisions may also help countries make informed decisions regarding their approach to ISDS reform, which may involve: (i) No ISDS, (ii) Standing ISDS tribunal, (iii) Limited ISDS, and (iv) Improved ISDS procedures.

UNCTAD's Reform Package for the International Investment Regime (2018), the Investment Policy Framework for Sustainable Development (2015) and the Road Map for IIA Reform included in the World Investment Report 2015 offer a variety of tools and policy options in this regard. UNCTAD's IIA Reform Accelerator, launched in November 2020, proposes model language for eight key IIA provisions that can be used at the national, bilateral, regional and multilateral level with a view to interpreting, amending or replacing old-generation treaties.

UNCTAD's next Annual IIA Conference, to be held at the World Investment Forum 2021,<sup>10</sup> will focus on accelerating the reform of old-generation treaties based on options suggested in UNCTAD's IIA Reform Accelerator. It will also build on the outcome of UNCTAD's Virtual IIA Conference 2020 where experts generally recognized that the COVID-19 pandemic and the ensuing economic crisis posed great challenges but also provided a new impetus for the reform of the IIA regime.<sup>11</sup>

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<sup>10</sup> The 7<sup>th</sup> World Investment Forum is scheduled for October 2021, Abu Dhabi, United Arab Emirates, see <https://worldinvestmentforum.unctad.org/#/ms-1/1>.

<sup>11</sup> The Virtual IIA Conference was held on 26 November 2020. The video recording and over 20 statements from stakeholders are available at <https://investmentpolicy.unctad.org/pages/1068/unctad-virtual-ia-conference-2020-information-on-the-programme>.



## REFERENCES

- UNCTAD (2012a). “Expropriation: A Sequel”, *UNCTAD Series on Issues in International Investment Agreements II*. New York and Geneva: United Nations.
- UNCTAD (2012b). “Fair and Equitable Treatment: A Sequel”, *UNCTAD Series on Issues in International Investment Agreements II*. New York and Geneva: United Nations.
- UNCTAD (2014). “Investor-State Dispute Settlement: A Sequel”, *UNCTAD Series on Issues in International Investment Agreements II*. New York and Geneva: United Nations.
- UNCTAD (2015a). Policy Options for IIA Reform: Treaty Examples and Data (Supplementary Material to World Investment Report 2015), 24 June 2015 (working draft).
- UNCTAD (2015b). *Investment Policy Framework for Sustainable Development*. New York and Geneva: United Nations.
- UNCTAD (2015c). *World Investment Report 2015: Reforming International Investment Governance*. New York and Geneva: United Nations.
- UNCTAD (2016). *World Investment Report 2016. Investor Nationality: Policy Challenges*. New York and Geneva: United Nations.
- UNCTAD (2018). *UNCTAD’s Reform Package for the International Investment Regime*. New York and Geneva: United Nations.
- UNCTAD (2019a). “Reforming Investment Dispute Settlement: A Stocktaking”, *IIA Issues Note*, No. 1, March 2019.
- UNCTAD (2019b). “Review of ISDS Decisions in 2018: Selected IIA Reform Issues”, *IIA Issues Note*, No. 4, July 2019.
- UNCTAD (2019c). *World Investment Report 2019: Special Economic Zones*. New York and Geneva: United Nations.
- UNCTAD (2020a). *International Investment Agreements Reform Accelerator*. New York and Geneva: United Nations.
- UNCTAD (2020b). “Investor–State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019”, *IIA Issues Note*, No. 2, July 2020.
- UNCTAD (2020c). *World Investment Report 2020: International Production Beyond the Pandemic*. New York and Geneva: United Nations.

These publications are available at <https://investmentpolicy.unctad.org/publications>

## Annex 1. Publicly available ISDS decisions rendered in 2019<sup>12</sup>

The ISDS decisions are available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/>

### A. Decisions upholding jurisdiction (at least in part), without examining the merits

*Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3), Partial Award, 19 July 2019, with Partial Dissenting Opinion by Raúl E. Vinuesa

Verhoosel, G. (President); Born, G. B.; Vinuesa, R. E. NAFTA (1992)

*Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50), Decision on Termination Request and Intra-EU Objection, 7 May 2019

Kalicki, J. E. (President); Tawil, G. S.; Stern, B. ECT (1994)

*Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain* (ICSID Case No. ARB/15/45), Decision on the “Intra-EU” Jurisdictional Objection, 25 February 2019

Greenwood, C. (President); Poncet, C.; Oreamuno Blanco, R. ECT (1994)

*Nissan Motor Co., Ltd. v. Republic of India* (PCA Case No. 2017-37), Decision on Jurisdiction, 29 April 2019

Kalicki, J. E. (President); Hobér, K.; Khehar, J. S. India–Japan EPA (2011)

*Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic* (ICSID Case No. ARB/17/14), Decision on the Intra-EU Jurisdictional Objection, 26 June 2019

Reichert, K. (President); Poncet, C.; Dupuy, P.-M. ECT (1994)

### B. Decisions rejecting jurisdiction (in toto), including rulings on preliminary objections

*Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait* (ICSID Case No. ARB/18/2), Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019, with Dissenting Opinion by Pascal Dévaud

Ramírez Hernández, R. (President); Dévaud, P.; Knieper, R. Egypt–Kuwait BIT (2001)

*Christian Doutremepuich and Antoine Doutremepuich v. Mauritius* (PCA Case No. 2018-37), Award on Jurisdiction, 23 August 2019

Scherer, M. (President); Caprasse, O.; Paulsson, J. France–Mauritius BIT (1973)

*Clorox Spain S.L. v. Bolivarian Republic of Venezuela* (PCA Case No. 2015-30), Award, 20 May 2019

Derains, Y. (President); Hanotiau, B.; Vinuesa, R. E. Spain–Bolivarian Republic of Venezuela BIT (1995)

*Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela* (PCA Case No. 2016-08), Award on Jurisdiction, 13 December 2019

Nunes Pinto, J. E. (President); Gómez-Pinzón, E.; Torres Bernárdez, S. Spain–Bolivarian Republic of Venezuela BIT (1995)

*Enrique Heemsen and Jorge Heemsen v. Bolivarian Republic of Venezuela* (PCA Case No. 2017-18), Award on Jurisdiction, 29 October 2019

Derains, Y. (President); Gómez-Pinzón, E.; Stern, B. Germany–Bolivarian Republic of Venezuela BIT (1996)

*Italba Corporation v. Oriental Republic of Uruguay* (ICSID Case No. ARB/16/9), Award, 22 March 2019

Oreamuno Blanco, R. (President); Beechey, J.; Douglas, Z. United States of America–Uruguay BIT (2005)

*Jin Hae Seo v. Republic of Korea* (HKIAC Case No. 18117), Final Award, 24 September 2019, with Concurring Opinion of Benny Lo

Simma, B. (President); Lo, B.; McRae, D. M. Republic of Korea–United States of America FTA (2007)

*Michael Ballantine and Lisa Ballantine v. The Dominican Republic* (PCA Case No. 2016-17), Final Award, 3 September 2019, with Partial Dissent of Marney L. Cheek on Jurisdiction; Partial Dissent by Emilio Raúl Vinuesa

<sup>12</sup> Publicly available as of January 2020.

on Costs

Ramírez Hernández, R. (President); Cheek, M. L.; Vinuesa, R. E. CAFTA–DR (2004)

*Oded Besserglik v. Republic of Mozambique* (ICSID Case No. ARB(AF)14/2), Award, 28 October 2019

Khan, M. A. (President); Fortier, L. Y.; von Wobeser, C. Mozambique–South Africa BIT (1997)

### C. Decisions finding State's liability for IIA breaches (at least in part)

*9REN Holding S.a.r.l v. Kingdom of Spain* (ICSID Case No. ARB/15/15), Award, 31 May 2019

Binnie, I. (President); Haigh, D.; Veeder, V. V. ECT (1994)

*BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/16), Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, with Dissenting Opinion of Horacio A. Grigera Naón

Crawford, J. R. (President); Grigera Naón, H. A.; Malintoppi, L. ECT (1994)

*CEF Energia BV v. Italian Republic* (SCC Case No. 158/2015), Award, 16 January 2019

Reichert, K. (President); Sachs, K.; Sacerdoti, G. ECT (1994)

*ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Award, 8 March 2019; Decision on the Rectification of the Award, 29 August 2019

Zuleta, E. (President); Fortier, L. Y.; Bucher, A. Netherlands–Bolivarian Republic of Venezuela BIT (1991)

*Cube Infrastructure Fund SICAV and others v. Kingdom of Spain* (ICSID Case No. ARB/15/20), Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019; Award, 15 July 2019, with Separate and Partial Dissenting Opinion by Christian Tomuschat

Lowe, V. (President); Spigelman, J.; Tomuschat, C. ECT (1994)

*Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia (I)* (ICSID Case No. ARB/16/6), Award, 27 August 2019

Fernández-Armesto, J. (President); Garibaldi, O. M.; Thomas, J. C. Colombia–Switzerland BIT (2006)

*Inicia Zrt, Kintyre Kft and Magyar Farming Company Ltd v. Hungary* (ICSID Case No. ARB/17/27), Award, 13 November 2019

Kaufmann-Kohler, G. (President); Alexandrov, S. A.; Hanefeld, I. Hungary–United Kingdom BIT (1987)

*NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain* (ICSID Case No. ARB/14/11), Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019; Award, 31 May 2019

McRae, D. M. (President); Fortier, L. Y.; Boisson de Chazournes, L. ECT (1994)

*OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain* (ICSID Case No. ARB/15/36), Award, 6 September 2019, with Dissenting Opinion on Liability and Quantum by Philippe Sands

Böckstiegel, K.-H. (President); Reinisch, A.; Sands, P. ECT (1994)

*Perenco Ecuador Limited v. Republic of Ecuador (Petroecuador)* (ICSID Case No. ARB/08/6), Award, 27 September 2019

Tomka, P. (President); Kaplan, N.; Thomas, J. C. Ecuador–France BIT (1994)

*RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain* (ICSID Case No. ARB/14/34), Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019

Wordsworth, S. (President); Kessler, J. L.; Joubin-Bret, A. ECT (1994)

*Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela* (PCA Case No. 2013-3), Final Award, 26 April 2019; Decision on Revision, 26 April 2019

Grebler, E. (President); Tawil, G. S.; Oreamuno Blanco, R. Spain–Bolivarian Republic of Venezuela BIT (1995)

*SolEs Badajoz GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/38), Award, 31 July 2019

Donoghue, J. E. (President); Williams, D. A. R.; Sacerdoti, G. ECT (1994)

*Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1), Award, 12 July 2019

Sachs, K. (President); Alexandrov, S. A.; Hoffmann, L. Australia–Pakistan BIT (1998)

#### D. Decisions dismissing the investors' claims (in toto)

*Anglo American PLC v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/14/1), Award, 18 January 2019, with Dissenting Opinion by Guido Santiago Tawil

Derains, Y. (President); Tawil, G. S.; Vinuesa, R. E. United Kingdom–Bolivarian Republic of Venezuela BIT (1995)

*Belenergia S.A. v. Italian Republic* (ICSID Case No. ARB/15/40), Award, 6 August 2019

Derains, Y. (President); Hanotiau, B.; Fernández Rozas, J. C. ECT (1994)

*CMC Africa Austral, LDA, CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., and CMC Muratori Cementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa v. Republic of Mozambique* (ICSID Case No. ARB/17/23), Award, 24 October 2019

Townsend, J. M. (President); Rees, P.; Casey, J. B. Italy–Mozambique BIT (1998)

*I.C.W. Europe Investments Limited v. The Czech Republic* (PCA Case No. 2014-22), Award, 15 May 2019

van Houtte, H. (President); Beechey, J.; Landau, T. Czechia–United Kingdom BIT (1990); ECT (1994)

*Lao Holdings N.V. v. Lao People's Democratic Republic (I)* (ICSID Case No. ARB(AF)/12/6), Award, 6 August 2019

Binnie, I. (President); Hanotiau, B.; Stern, B. Lao People's Democratic Republic–Netherlands BIT (2003)

*Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic* (PCA Case No. 2014-21), Award, 15 May 2019

van Houtte, H. (President); Beechey, J.; Landau, T. Czechia–Germany BIT (1990); ECT (1994)

*Sanum Investments v. Lao People's Democratic Republic (I)* (PCA Case No. 2013-13), Award, 6 August 2019

Rigo Sureda, A. (President); Hanotiau, B.; Stern, B. China–Lao People's Democratic Republic BIT (1993)

*Stadtwerke München GmbH and others v. Kingdom of Spain* (ICSID Case No. ARB/15/1), Award, 2 December 2019, with Dissenting Opinion of Kaj Hobér

Salacuse, J. W. (President); Hobér, K.; Douglas, Z. ECT (1994)

*United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia* (ICSID Case No. ARB/14/24), Award, 21 June 2019, with Dissent by David A. R. Williams

Drymer, S. L. (President); Williams, D. A. R.; Stern, B. Estonia–Netherlands BIT (1992)

*Voltaic Network GmbH v. The Czech Republic* (PCA Case No. 2014-20), Award, 15 May 2019

van Houtte, H. (President); Beechey, J.; Landau, T. Czechia–Germany BIT (1990); ECT (1994)

*WA Investments-Europa Nova Limited v. The Czech Republic* (PCA Case No. 2014-19), Award, 15 May 2019

van Houtte, H. (President); Beechey, J.; Landau, T. Cyprus–Czechia BIT (2001); ECT (1994)

#### E. Other public decisions

*Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain* (ICSID Case No. ARB/13/31), Decision on the Rectification of the Award, 29 January 2019

Zuleta, E. (President); Reichert, K.; Thomas, J. C. ECT (1994)

*Clayton and Bilcon of Delaware Inc. v. Government of Canada* (PCA Case No. 2009-04), Award on Damages, 10 January 2019, with Concurring Opinion of Bryan Schwartz

Simma, B. (President); Schwartz, B.; McRae, D. M. NAFTA (1992)

*Ojega Roscins v. Republic of Lithuania* (ICSID Case No. ARB/18/37), Order taking note of the discontinuance of the proceeding, 5 November 2019

Boo, L. (President); Coutant-Peyre, I.; Pawlak, D. Latvia–Lithuania BIT (1996)

*PT Ventures, SGPS, S.A. v. Republic of Cabo Verde* (ICSID Case No. ARB/15/12), Order of the tribunal taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1), 10 June 2019

Fernández-Armesto, J. (President); Mantilla-Serrano, F.; Ramos, B. M. Cabo Verde–Portugal BIT (1990)

*The Burmilla Trust, The Josias Van Zyl Family Trust and Josias Van Zyl v. The Kingdom of Lesotho* (PCA Case No. 2016-21), Procedural Order No. 6 on the Termination of Proceedings, 2 April 2019

Leon, P. (President); Tselentis, M.; Brand, F. D. J. SADC Investment Protocol (2006)

*Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/9), Order of the tribunal taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1), 3 January 2019

Rowley, J. W. (President); Tawil, G. S.; Stern, B. Spain–Bolivarian Republic of Venezuela BIT (1995)

### F. Decisions on the application for ICSID annulment

*Autobuses Urbanos del Sur S.A., Teinver S.A. and Transportes de Cercanías S.A. v. Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Annulment, 29 May 2019

Mourre, A. (President); Cantuarias Salaverry, F.; Ramírez Hernández, R. Argentina–Spain BIT (1991)

*Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon* (ICSID Case No. ARB/15/18), Decision on Annulment, 25 October 2019

Malintoppi, L. (President); Hafez, K.; Low, L. A. BLEU (Belgium-Luxembourg Economic Union)–Cameroon BIT (1980)

*Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/40 and 12/14), Decision on Annulment, 18 March 2019

Hascher, D. (President); Böckstiegel, K.-H.; Kalicki, J. E. Indonesia–United Kingdom BIT (1976); Australia–Indonesia BIT (1992)

*Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic* (ICSID Case No. ARB/04/16), Decision on Annulment, 8 May 2019

Hascher, D. (President); Mourre, A.; van Houtte, H. Argentina–United States of America BIT (1991)

### G. Domestic court decisions

*Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II)* (PCA Case No. 2009-23), Judgment of the Supreme Court of the Netherlands, 12 April 2019

Ecuador–United States of America BIT (1993)

*Crimea-Petrol LLC, Elefteria LLC, Novel-Estate LLC and others v. The Russian Federation* (PCA Case No. 2015-35), Judgment of the Swiss Federal Tribunal, 12 December 2019

Russian Federation–Ukraine BIT (1998)

*Energoolians SARL v. the Republic of Moldova, Judgment of Paris Court of Appeal*, 24 September 2019

ECT (1994)

*Kontinental Conseil Ingénierie v. Gabonese Republic*, Judgment of the Paris Court of Appeal, 25 June 2019

OIC Investment Agreement (1981)

*Oxus Gold plc v. Republic of Uzbekistan, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat*, Judgment of Paris Court of Appeal, 14 May 2019

United Kingdom–Uzbekistan BIT (1993)

*PJSC Ukrnafta v. The Russian Federation* (PCA Case No. 2015-34), Judgment of the Swiss Federal Tribunal, 12 December 2019

Russian Federation–Ukraine BIT (1998)

*PL Holdings S.a.r.l. v. Poland* (SCC Case No. 2014/163), Judgment of Svea Court of Appeal on Set-aside Application, 22 February 2019

BLEU (Belgium-Luxembourg Economic Union)–Poland BIT (1987)

*Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5), Judgment of Paris Court of Appeal, 29 January 2019

📖 Canada–Bolivarian Republic of Venezuela BIT (1996)

*Serafin García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela* (PCA Case No. 2013-3), Judgment of the French Court of Cassation, 13 February 2019

📖 Spain–Bolivarian Republic of Venezuela BIT (1995)

*Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland* (ICSID Case No. ARB(AF)/11/3), Judgment of the Paris Court of Appeal, 2 April 2019

📖 Poland–United States of America BIT (1990)

## Annex 2. ISDS decisions rendered in 2019 not publicly available<sup>13</sup>

### A. Original proceedings

*ACF Renewable Energy Limited v. Republic of Bulgaria* (ICSID Case No. ARB/18/1), Decision on Jurisdiction, 20 December 2019

*Aeroporto Belbek LLC and Igor Valerievich Kolomoisky v. The Russian Federation* (PCA Case No. 2015-07), Partial Award, 4 February 2019

*Agility Public Warehousing Company K.S.C. v. Republic of Iraq* (ICSID Case No. ARB/17/7), Decision on Jurisdiction, 9 July 2019

*Ain Telemedia Studios LLC, Talal Al Awamleh and Arab Telemedia Services LLC v. State of Qatar* (ICSID Case No. ARB/18/38), Order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1), 24 July 2019

*Albacora S.A. v. Republic of Ecuador* (PCA Case No. 2016-11), Award, 18 July 2019

*Alverley Investments Limited and Germen Properties Ltd v. Romania* (ICSID Case No. ARB/18/30), Decision on Preliminary Objections pursuant to ICSID Arbitration Rule 41(5), 1 August 2019

*Ayoub-Farid Saab and Fadi Saab v. Cyprus*, Award, 15 January 2019, with Dissenting Opinion

*B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia* (ICSID Case No. ARB/15/5), Award, 5 April 2019

*Bank of Cyprus Public Company Limited v. Hellenic Republic* (ICSID Case No. ARB/17/4), Decision on the Respondent's Jurisdictional Objection, 20 June 2019

*City-State N.V., Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v. Ukraine* (ICSID Case No. ARB/14/9), Decision on the request for supplementary decision of the award, 6 February 2019

*Crimea-Petrol LLC, Elefteria LLC, Novel-Estate LLC and others v. The Russian Federation* (PCA Case No. 2015-35), Final Award, 12 April 2019

*Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic* (ICSID Case No. ARB/14/16), Decision on Jurisdiction and Liability, 8 January 2019

*Edenred S.A. v. Hungary* (ICSID Case No. ARB/13/21), Decision on Revision, 7 February 2019

*Elías Abadi Cherem, Jaime Abadi Cherem, Abraham Abadi Tawil and others v. Kingdom of Spain* (ICSID Case No. ARB/18/33), Order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 44, 27 June 2019

<sup>13</sup> Not publicly available as of January 2020. Decisions marked with an asterisk have become publicly available by the time this document was published.

*EVN AG v. Republic of Bulgaria* (ICSID Case No. ARB/13/17), Award, 10 April 2019, with Dissenting Opinion by Daniel M. Price

*Fin.Co.Ge.Ro Spa v. Romania*, Award, 2019

*Galway Gold Inc. v. Republic of Colombia* (ICSID Case No. ARB/18/13), Decision on the Respondent's Preliminary Objections pursuant to Rule 41(5) of the ICSID Arbitration Rules, 20 December 2019

*Günes Tekstil Konfeksiyon Sanayi ve Ticaret Limited Sirketi and others v. Republic of Uzbekistan* (ICSID Case No. ARB/13/19), Award, 4 October 2019

*HOCHTIEF Infrastructure GmbH v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/18/14), Order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1), 22 August 2019

*Hydro S.r.l. and others v. Republic of Albania* (ICSID Case No. ARB/15/28), Award, 24 April 2019

*Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia* (PCA Case No. 2015-40), Award, 29 March 2019\*

*InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain* (ICSID Case No. ARB/14/12), Award, 2 August 2019, with Partial Dissenting Opinion by Pierre-Marie Dupuy\*

*JSC Tashkent Mechanical Plant, JSCB Asaka, JSCB Uzbek Industrial and Construction Bank, and National Bank for Foreign Economic Activity of the Republic of Uzbekistan v. Kyrgyz Republic* (ICSID Case No. ARB(AF)/16/4), Decision on Jurisdiction, 1 May 2019

*Juvel Ltd and Bithell Holdings Ltd. v. Poland* (ICC Case No. 19459/MHM), Award, 26 February 2019

*Mason Capital L.P. and Mason Management LLC v. Republic of Korea* (PCA Case No. 2018-55), Decision on Respondent's Preliminary Objections, 22 December 2019\*

*Medusa (Montenegro) Limited v. Montenegro* (PCA Case No. 2015-39), Award, 17 July 2019, with Dissenting Opinion by Charles N. Brower

*Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt* (PCA Case No. 2012-07), Final Award, 23 December 2019\*

*NJSC Naftogaz of Ukraine, PJSC State Joint Stock Company Chornomornaftogaz, PJSC Ukrigasvydobuvannya and others v. The Russian Federation* (PCA Case No. 2017-16), Award on Liability, 22 February 2019, with Dissenting Opinion

*Oleg Vladimirovich Deripaska v. the State of Montenegro* (PCA Case No. 2017-07), Award, 15 October 2019

*PJSC CB PrivatBank and Finance Company Finilon LLC v. The Russian Federation* (PCA Case No. 2015-21), Partial Award, 4 February 2019

*PJSC Ukrnafta v. The Russian Federation* (PCA Case No. 2015-34), Final Award, 12 April 2019

*Red Eagle Exploration Limited v. Republic of Colombia* (ICSID Case No. ARB/18/12), Decision on the Respondent's preliminary objections pursuant to ICSID Arbitration Rule 41(5), 16 December 2019

*Slim Ben Mokhtar Ghenia v. Libya*, Decision, 24 May 2019

*Sodexo Pass International SAS v. Hungary* (ICSID Case No. ARB/14/20), Award, 28 January 2019, with Separate and Dissenting Opinion of J. Christopher Thomas

*State General Reserve Fund of the Sultanate of Oman v. Republic of Bulgaria* (ICSID Case No. ARB/15/43), Award, 13 August 2019

*Trinh Vinh Binh and Binh Chau JSC v. Viet Nam (II)* (PCA Case No. 2015-23), Award, 10 April 2019

*World Wide Minerals and Paul A. Carroll v. Republic of Kazakhstan*, Award, 29 October 2019

### **B. Follow-on decisions**

*Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/21), Decision on Annulment, 22 November 2019

*Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/19), Decision on Annulment, 15 April 2019

*Highbury International AVV and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/1), Decision on Annulment, 9 September 2019

*Vestey Group Ltd v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/06/4), Decision on Annulment, 26 April 2019





### UNCTAD Policy Tools for IIA Reform

Investment Policy Framework for Sustainable Development (2015)  
[https://unctad.org/en/PublicationsLibrary/diaepcb2015d5\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf)

Reform Package for the International Investment Regime (2018)  
[https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD\\_Reform\\_Package\\_2018.pdf](https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf)

Reforming Investment Dispute Settlement: A Stocktaking (IIA Issues Note, No. 1, March 2019)  
[https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d3\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d3_en.pdf)

International Investment Agreements Reform Accelerator (2020)  
[https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d8\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d8_en.pdf)

### UNCTAD Investment Policy Online Databases

International Investment Agreements Navigator  
<https://investmentpolicy.unctad.org/international-investment-agreements>

IIA Mapping Project  
<https://investmentpolicy.unctad.org/international-investment-agreements/iaa-mapping>

Investment Dispute Settlement Navigator  
<https://investmentpolicy.unctad.org/investment-dispute-settlement>

Investment Laws Navigator  
<https://investmentpolicy.unctad.org/investment-laws>



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