

IIA

ISSUES NOTE

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INVESTOR-STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2015

Highlights

- A record high of 70 investor-State dispute settlement (ISDS) cases were filed in 2015. The overall number of publicly known ISDS claims reached 696.
- By the end of 2015, a total of 444 ISDS proceedings have been concluded, with 36 per cent of cases decided in favour of the State, 26 per cent in favour of the investor and 26 per cent of cases settled.
- Following the recent trend, a high share of new cases in 2015 (about 40 per cent) was brought against developed countries, including many cases by European investors against European Union member States.
- The majority of new cases invoked bilateral investment treaties (BITs), most of them dating back to the 1990s. In about one third of all cases last year foreign investors relied upon the Energy Charter Treaty, which by now is the most frequently invoked treaty (87 cases), followed by the North American Free Trade Agreement (56 cases), and the Argentina–United States BIT (20 cases).
- State conduct most frequently challenged by investors in 2015 included legislative reforms in the renewable energy sector, alleged direct expropriations of investments, alleged discriminatory treatment, and revocation or denial of licences or permits.
- Newly filed cases include, among others, claims related to events in Crimea, a mass claim arising out of the Eurozone crisis, a case concerning the prohibition of gaming, a first-ever claim invoking the WTO General Agreement on Trade in Services, and several tax-related disputes.
- In 2015, ISDS tribunals rendered at least 51 decisions, of which 31 are in the public domain. Most of the public decisions on jurisdiction were decided in favour of the State, while the majority of those on merits ended in favour of the investor.



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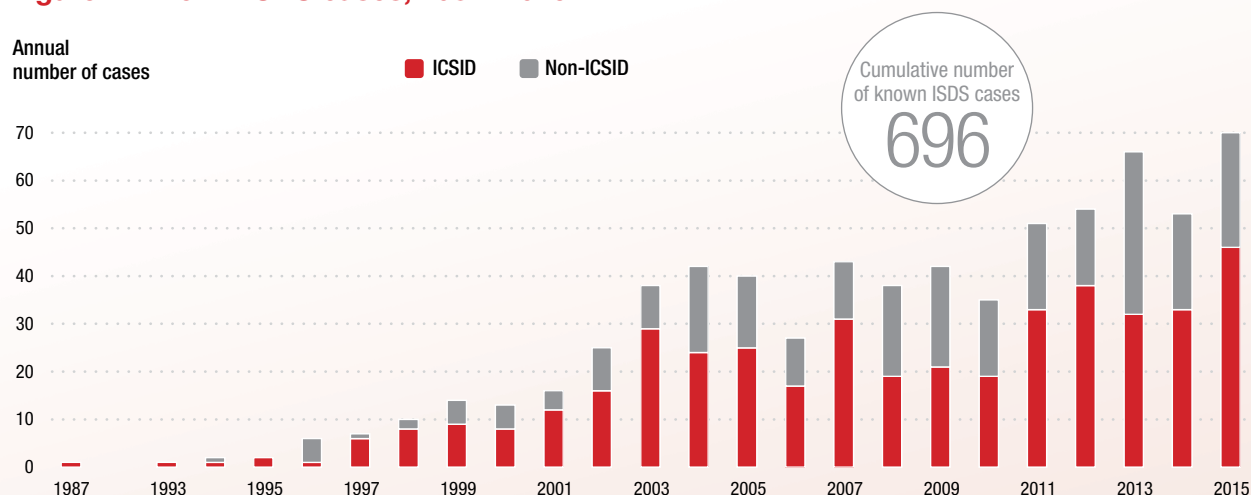
Highlights

- Arbitral decisions adopted in 2015 touch upon a number of important legal issues concerning the scope of treaty coverage, the conditions for bringing ISDS claims, the meaning of substantive treaty protections, the calculation of compensation and others. On some issues, tribunals followed previous decisions, while on some other issues they adopted approaches that departed from earlier decisions.
- Some of the prominent decisions rendered in 2015 concerned investor nationality, ownership and control. This topic – including approaches, implications and policy challenges – receives in-depth coverage in UNCTAD's World Investment Report 2016.

I. Latest trends in ISDS

In 2015, the number of ISDS cases reached a record high with a continued large share of cases against developed countries.

Figure 1. Known ISDS cases, 1987–2015



Source: ©UNCTAD, ISDS Navigator.

Note: Information about 2015 claims has been compiled on the basis of public sources, including specialized reporting services. UNCTAD's statistics do not cover investor-State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signalled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continuously adjusted as a result of verification and may not match case numbers reported in previous years.

In 2015, investors initiated 70 known investor-State dispute settlement (ISDS) cases pursuant to international investment agreements (IIAs), which is the highest number of cases ever filed in a single year (figure 1). As arbitrations can be kept confidential under certain circumstances, the actual number of disputes filed for this and previous years is likely to be higher.

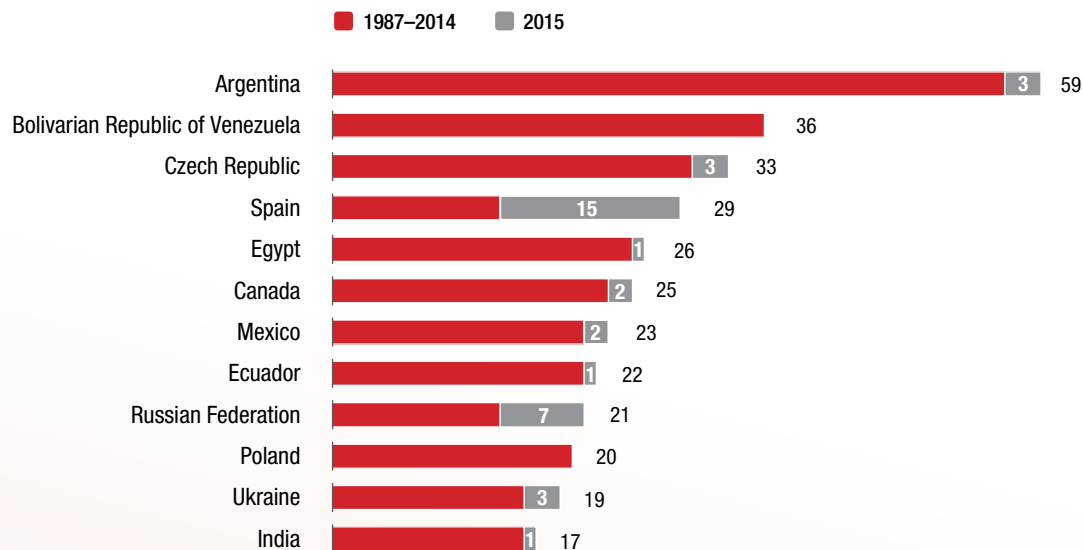
As of 1 January 2016, the total number of publicly known ISDS claims has reached 696.¹ So far, 107 countries have been respondents to one or more known ISDS claims.

¹ UNCTAD's ISDS Navigator (<http://investmentpolicyhub.unctad.org/isds>) is a comprehensive database of treaty-based international arbitrations between investors and States. It contains key information about each case and offers numerous user-friendly tools to search and filter the data.

Respondent States

As in the two preceding years, in 2015 the relative share of new cases against developed countries stood at about 40 per cent. Prior to 2013, fewer cases were brought against developed countries. In all, 35 countries faced new claims last year. Spain was the most frequent respondent in 2015, followed by the Russian Federation (figure 2). Six countries – Austria, Cabo Verde, Cameroon, Kenya, Mauritius and Uganda – faced their first (known) ISDS claims.

Figure 2. Most frequent respondent States, total as of end 2015 (Number of known cases)

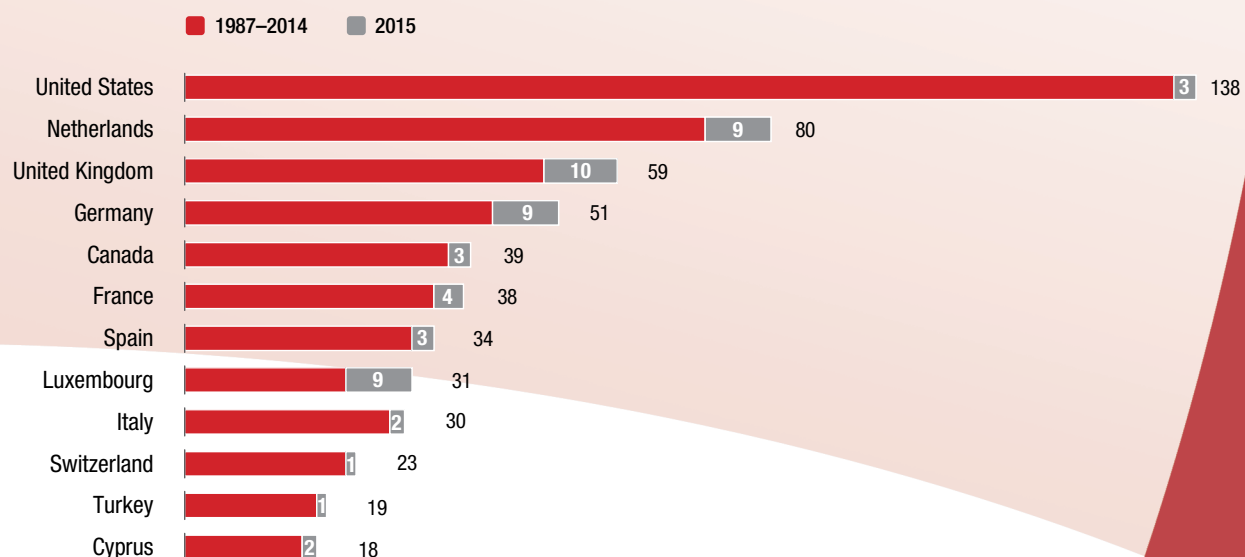


Source: ©UNCTAD, ISDS Navigator.

Home States of claimants

Developed-country investors brought most of the 70 known cases in 2015. This follows the historical trend in which developed-country investors have been the main ISDS users, accounting for over 80 per cent of all known claims. The most frequent home States in ISDS in 2015 were the United Kingdom, followed by Germany, Luxembourg and the Netherlands (figure 3).

Figure 3. Most frequent home States of claimants, total as of end 2015 (Number of known cases)

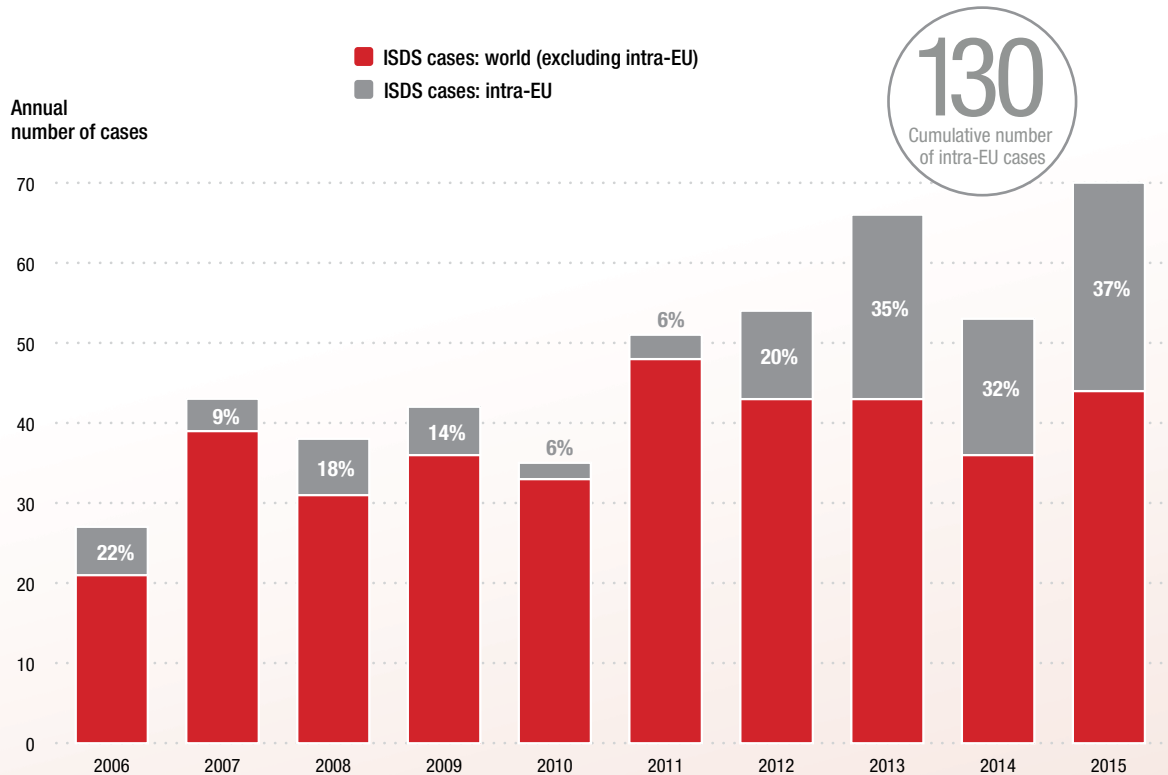


Source: ©UNCTAD, ISDS Navigator.

Intra-European Union disputes

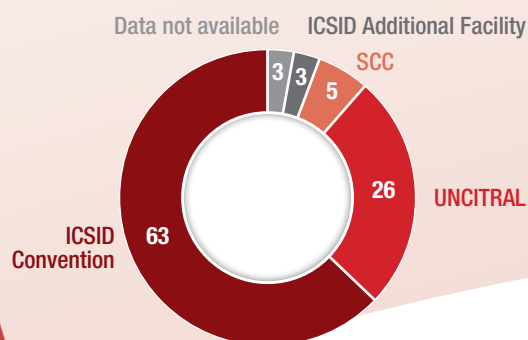
Similarly to the two preceding years, intra-European Union (EU) cases accounted for about one third of investment arbitrations initiated in 2015 (figure 4). Intra-EU cases are proceedings initiated by an investor from one EU member State against another member State. The overwhelming majority – 19 out of 26 – were brought pursuant to the Energy Charter Treaty (ECT) and the rest on the basis of intra-EU bilateral investment treaties (BITs). The overall number of known intra-EU investment arbitrations totalled 130 by the end of 2015, i.e. approximately 19 per cent of all known cases globally.

Figure 4. Known ISDS cases and share of intra-European Union cases, 2006–2015



Source: ©UNCTAD, ISDS Navigator.

Figure 5. Known ISDS cases filed, by arbitral rules, 2015 (Per cent)



Source: ©UNCTAD, ISDS Navigator.

Arbitral forums and rules

About two thirds of last year's ISDS cases were filed with the International Centre for Settlement of Investment Disputes (ICSID), either under the ICSID Convention Rules or under the ICSID Additional Facility Rules (figure 5). Overall, 62 per cent of all known cases have been filed under the ICSID Convention or ICSID Additional Facility Rules.

Applicable investment treaties

Whereas the majority of investment arbitrations in 2015 were brought under BITs – most of them dating back to the 1990s –, the ECT was invoked in about one third of the new cases. Looking at the overall trend, the ECT is by far the most frequently invoked IIA (87 cases), followed by the North American Free Trade Agreement (NAFTA) (56 cases). Among BITs, the Argentina–United States BIT (20 cases) remains the agreement most frequently relied upon by foreign investors.

In addition to the ECT (23 new cases), three other treaties were invoked more than once in 2015:

- Russian Federation–Ukraine BIT (1998) (6 cases)
- NAFTA (3 cases)
- Czech Republic–United Kingdom BIT (1990) (2 cases)

Some other IIAs invoked by claimants in 2015 included the Commonwealth of Independent States (CIS) Investor Rights Convention (1997), the Unified Agreement for the Investment of Arab Capital in the Arab States (1980), and the Investment Agreement of the Organization of the Islamic Conference (1981). In one case, the claimants relied on four legal instruments at once, including the WTO General Agreement on Trade in Services (GATS). This is the first known ISDS case invoking GATS as a basis for the tribunal's jurisdiction.²

Economic sectors involved

About 76 per cent of the cases filed in 2015 relate to activities in the services sector, including:

- Supply of electricity and gas (23 cases)
- Construction (7 cases)
- Financial and insurance services (7 cases)
- Transportation and storage (7 cases)

Primary industries accounted for 14 per cent of new cases, while the remaining 10 per cent related to investments in manufacturing. This is broadly in line with the overall distribution of the 696 ISDS cases filed so far: about 66 per cent of all cases arose in the services sector, 20 per cent in primary industries, and 14 per cent in manufacturing.

Affected sustainable development sectors

A number of 2015 ISDS claims concerned sustainable development sectors such as infrastructure and climate-change mitigation. Approximately 30 per cent of cases concerned the regulation of renewable energy producers, all of which were brought against EU member States (Bulgaria, Italy and Spain). Some of the 2015 cases concerned environmental issues, indigenous protected areas, anti-corruption and taxation.³

² *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal* (ICSID Case No. ARB/15/21). A brief discussion of this case can be found in section III.

³ Section III offers a review of selected ISDS cases filed in 2015.

Measures challenged

Investors in 2015 most frequently challenged four types of State conduct:

- Legislative reforms in the renewable energy sector (at least 20 cases)
- Alleged direct expropriations of investments (at least 6 cases)
- Alleged discriminatory treatment (at least 6 cases)
- Revocation or denial of licences or permits (at least 5 cases)

Other challenged measures included cancellations or alleged violations of contracts or concessions, measures related to taxation, placement of enterprises under external administration, as well as bankruptcy proceedings. In several cases, information about governmental measures challenged by the claimant is not publicly available.

Amounts claimed

The amounts claimed in 2015 cases range from \$15 million (in *Aeroporto Belbek v. Russia*) to \$12 billion (in *Pugachev v. Russia*). Information regarding the amounts sought by investors is available for only one quarter of the known cases.⁴

II. ISDS outcomes

Publicly available arbitral decisions issues in 2015 had a variety of outcomes, with States often prevailing at the jurisdictional stage of the proceedings, and investors winning more of the cases that reached the merits stage.

A. 2015 decisions and outcomes

In 2015, ISDS tribunals rendered at least 51 decisions in investor-State disputes, 31 of which are in the public domain (at the time of writing).⁵ Most of the public decisions on jurisdictional issues were decided in favour of the State, while the majority of those on merits ended in favour of the investor.

More specifically, in 2015:

- Ten decisions principally addressed jurisdictional issues, with one upholding the tribunal's jurisdiction (at least in part) and nine denying jurisdiction.
- Out of 15 decisions on the merits, 12 accepted at least some of the investors' claims, and 3 dismissed all of the claims. In the decisions holding the State liable, tribunals most frequently found breaches of the fair and equitable treatment (FET) provision and the expropriation provision.
- Ten decisions awarded compensation to the investor, ranging from \$8.6 million to \$383.6 million. The average amount awarded was \$120.2 million and the median \$48.6 million.⁶

⁴ Amount claimed refers to the amount of monetary compensation claimed by the investor, not including interest, legal costs or costs of arbitration.

⁵ This number includes decisions (awards) on jurisdiction and awards on liability and damages (partial and final) as well as follow-on decisions such as decisions rendered in ICSID annulment proceedings and ICSID resubmission proceedings. It does not include decisions on provisional measures, disqualification of arbitrators, procedural orders, discontinuance orders, settlement agreements or decisions of domestic courts.

⁶ Amount awarded refers to the amount of monetary compensation awarded by the arbitral tribunal to the claimant, not including interest, legal costs or costs of arbitration.

- Six decisions related to annulments. ICSID ad hoc committees rejected five applications for annulment and partially annulled one award.

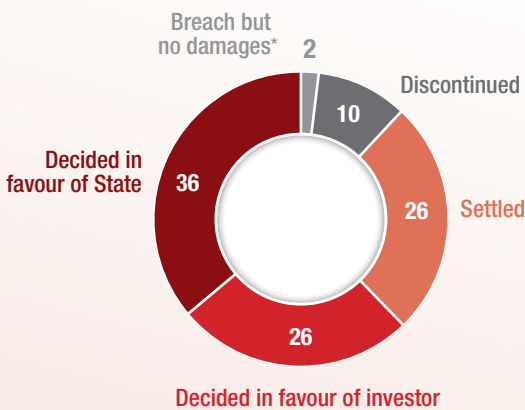
Eleven cases were reportedly settled by the disputing parties, and another four proceedings discontinued for other or unknown reasons.

B. Overall outcomes

By the end of 2015, a total of 444 ISDS proceedings are known to have been concluded. About one third of all concluded cases were decided in favour of the State (claims dismissed either on jurisdictional grounds or on the merits) and about one quarter were decided in favour of the investor, with monetary compensation awarded (figure 6).

Of the cases that ended in favour of the State, about half were dismissed for lack of jurisdiction.⁷ Looking at the totality of decisions on the merits (i.e. when a tribunal made a determination of whether the challenged governmental measure breached any of the IIA's substantive obligations), around 60 per cent were decided in favour of the investor, and 40 per cent in favour of the State (figure 7).

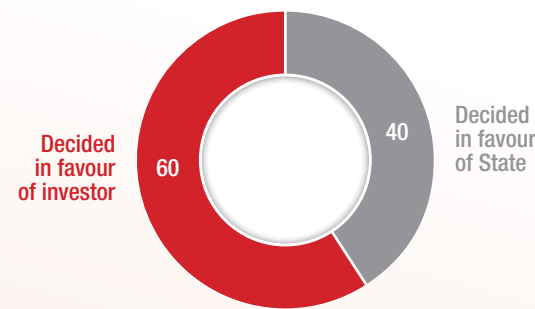
Figure 6. Results of concluded cases, total as of end 2015 (Per cent)



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

Source: ©UNCTAD, ISDS Navigator.

Figure 7. Results of decisions on the merits, total as of end 2015 (Per cent)



Source: ©UNCTAD, ISDS Navigator.

Note: Excluding cases (1) dismissed by tribunals for lack of jurisdiction, (2) settled, (3) discontinued for reasons other than settlement (or for unknown reasons), and (4) decided in favour of neither party (liability found but no damages awarded).

C. Other developments related to ISDS

UNCITRAL Transparency Rules

The United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration are now applicable to a number of treaties concluded *after* 1 April 2014.⁸ The UNCITRAL Transparency Rules set out procedures for greater transparency in investor-State arbitrations conducted under the UNCITRAL Arbitration Rules⁹ and provide for a “Transparency Registry”, which will be a central repository for the publication of information and documents in treaty-based ISDS cases.

⁷ These are cases in which a tribunal found, for example, that the asset/transaction did not constitute a “covered investment”, the claimant was not a “covered investor”, the dispute arose before the treaty entered into force or fell outside the scope of the ISDS clause, the investor had failed to comply with certain IIA-imposed conditions (e.g. the mandatory local litigation requirement) or other reasons that deprived the tribunal of the competence to decide the case on the merits.

⁸ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html

⁹ The rules came into effect on 1 April 2014 and are incorporated into the latest version of the UNCITRAL Arbitration Rules.

UN Transparency Convention

Sixteen States signed¹⁰ and one State, Mauritius, ratified the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration. The Convention was opened for signature on 17 March 2015; it will enter into force once three ratification instruments have been deposited. The Convention enables States, as well as regional economic integration organizations (REIOs), to make the UNCITRAL Transparency Rules applicable to ISDS proceedings brought under their IIAs concluded *prior* to 1 April 2014 and regardless of whether the arbitration was initiated under the UNCITRAL Arbitration Rules.¹¹

ICSID Convention and New York Convention

In 2015, the ICSID Convention entered into force for San Marino and Iraq. Andorra, Comoros, the Democratic Republic of the Congo and the State of Palestine became parties to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

III. New claims in 2015: some highlights

Cases relating to reforms in the renewable energy sector

A total of 20 new cases relate to reforms in the renewable energy sector in Spain, Italy and Bulgaria. Most of these cases – 16 out of 20 – were filed against Spain and relate to a series of measures adopted by the country in 2012 (including the imposition of a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers). Meanwhile, Spain prevailed in the first decided case that relates to the same measures: in January 2016, the tribunal in *Charanne v. Spain* rejected all claims on the merits, finding that the measures did not breach Spain's obligations under the ECT.¹²

In 2015, solar investors launched three cases against Italy, which relate to governmental decrees to cut tariff incentives for some solar power projects. The investors, all from EU member States, base their claims on the ECT.¹³ In the meantime, Italy withdrew from the ECT, effective from 1 January 2016.¹⁴

Cases related to events in Crimea

Of the seven known cases filed against the Russian Federation in 2015, at least 5 (possibly, 6) relate to the events in Crimea. Following March 2014, nationalizations took place in different economic sectors.¹⁵ The claims brought by Ukrainian companies and businesspersons under the Russian Federation-Ukraine BIT of 1998 arise out of the alleged expropriation of assets (including

¹⁰ Belgium, Canada, Congo, Finland, France, Gabon, Germany, Italy, Luxembourg, Madagascar, Mauritius, Sweden, Switzerland, the Syrian Arab Republic, the United Kingdom and the United States.

¹¹ In the absence of reservations by the signatories, the Convention will apply to disputes where (i) both the respondent State and the home State of the claimant investor are parties to the Convention; and (ii) only the respondent State is party to the Convention but the claimant investor agrees to the application of the Rules.

¹² *Charanne B.V. and Construction Investments S.a.r.l. v. Spain* (SCC), Award, 21 January 2016. See Global Arbitration Review, "Spain wins first solar case", 26 January 2016. Available from <http://globalarbitrationreview.com/news/article/34513/>.

¹³ *Belenergia S.A. v. Italian Republic* (ICSID Case No. ARB/15/40), <http://investmentpolicyhub.unctad.org/ISDS/Details/670>. *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50), <http://investmentpolicyhub.unctad.org/ISDS/Details/698>. *Greentech Energy Systems and Novenergia v. Italy* (SCC), <http://investmentpolicyhub.unctad.org/ISDS/Details/634>.

¹⁴ <http://www.energycharter.org/who-we-are/members-observers/countries/italy/>.

¹⁵ E.g. RIA Novosti, "How Ukrainian assets were nationalised in the Crimea", 27 February 2015. Available from <http://ria.ru/economy/20150227/1050081202.html>.

buildings, petrol stations, a bank, and a commercial passenger terminal of an airport) by the Russian Federation. To date, the Russian Government has refused to recognize the jurisdiction of arbitral tribunals in these cases or to take part in the arbitral proceedings.¹⁶

Mass claim relating to the Eurozone crisis

An ICSID claim was filed against Cyprus by a group of 954 Greek investors, all of whom had deposits or bonds in the Bank of Cyprus and the now defunct Laiki Bank.¹⁷ The claimants seek to recover their losses incurred as a result of Cyprus's €10 billion bailout following an agreement with the European Commission, the European Central Bank and the International Monetary Fund. The deal required customers to forfeit deposits of above €100,000 and bonds issued by both banks. The claimants maintain that they were singled out and discriminated against during the bailout, and demand at least \$135 million (€120 million) in compensation.¹⁸

Mining and environmental protection

Gabriel Resources, a Canadian gold exploration company, filed an ICSID claim against Romania, in relation to the Rosia Montana, a gold and silver mine in western Romania.¹⁹ In 1997 the project company was granted a licence to develop the mine, but subsequently failed to receive an approval of the environmental impact assessment and to obtain the environmental permit required to start exploitation of the project. The company's activities in Romania have attracted opposition and public protest, in part because of the planned use of cyanide to extract gold and silver from ore.²⁰ Opposition has also focused on archeological evidence of Roman mining activities in the area, which have led to calls for the site to be made a UNESCO World Heritage Site.²¹

Prohibition of gaming

A claim filed against the Czech Republic concerns the cancellation of licences for video lottery terminals awarded for a 10-year term (in 2004) to Synot, a Czech gambling group.²² The licences, which were issued by the Ministry of Finance, allowed these video lottery terminals to operate in towns and villages where traditional slot machines had been banned by municipal authorities. However, in 2011 the Czech Constitutional Court upheld a complaint brought by a municipality and ruled that local bans against slot machines also covered video gaming machines. After a second judgment by the Constitutional Court on a related

¹⁶ In its letters, "the Russian Federation indicated, *inter alia*, that the '[Russia-Ukraine BIT] cannot serve as a basis for composing an arbitral tribunal to settle [the Claimants' claims]' and that it 'does not recognize the jurisdiction of an international arbitral tribunal at the Permanent Court of Arbitration in settlement of [the Claimants' claims].'" (According to the information from the PCA, which administers some or all of these proceedings, <http://www.pcacases.com/web/view/121>.)

¹⁷ *Theodoros Adamakopoulos and others v. Republic of Cyprus* (ICSID Case No. ARB/15/49), <http://investmentpolicyhub.unctad.org/ISDS/Details/690>.

¹⁸ Global Arbitration Review, "Greek creditors sue Cyprus over bailout", 30 September 2015. Available from <http://globalarbitrationreview.com/news/article/34192/greek-creditors-sue-cyprus-bailout/>.

¹⁹ *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania* (ICSID Case No. ARB/15/31), <http://investmentpolicyhub.unctad.org/ISDS/Details/632>.

²⁰ In 2000, a massive cyanide spill occurred at the Baia Mare gold mine in northern Romania. The spill released about 100,000 cubic metres of contaminated water into a series of rivers crossing Romania, Hungary, Serbia and Bulgaria and leading to the Black Sea.

²¹ Investment Arbitration Reporter, "As Romania grapples with mining regulation in aftermath of 2000 environmental catastrophe, a foreign investor loses patience with delays", 21 January 2015. Available from <http://www.iareporter.com/articles/as-romania-grapples-with-mining-regulation-in-aftermath-of-2000-environmental-catastrophe-a-foreign-investor-loses-patience-with-delays/>. Global Arbitration Review, "Canadian miner hopes to strike gold with ICSID claim against Romania", 22 July 2015. Available from <http://globalarbitrationreview.com/news/article/33998/canadian-miner-hopes-strike-gold-icsid-claim-against-romania/>.

²² *WCV Capital Ventures Cyprus Limited and Channel Crossings Limited v. The Czech Republic* (UNCITRAL Rules), <http://investmentpolicyhub.unctad.org/ISDS/Details/694>.

issue, the ministry withdrew the licences in 2013. The claimants alleged losses equivalent to US\$41 million. Reportedly, both claimant companies, incorporated in Cyprus, are ultimately owned by the family of Ivo Valenta, a member of the Czech Senat and a dual national of the Czech Republic and Monaco.²³

First ever case invoking the GATS

The year 2015 saw the first ever ISDS case where the claimants invoked, *inter alia*, the WTO GATS.²⁴ The case concerns the provision of aircraft ground-handling services at the Dakar airport in Senegal. One of the two claimants is a company incorporated in Luxembourg. It argues that – in the absence of a BIT between Senegal and Luxembourg – the company is entitled to benefit from the Netherlands-Senegal BIT. This because, the argument goes, the company qualifies as a “service supplier” under the GATS, and the latter’s most-favoured-nation (MFN) treatment clause entitles it to access investor-State arbitration under any BIT signed by Senegal, since Senegal did not exempt ISDS or BITs from the GATS MFN clause as some other WTO Members have done. In other words, the claimant does not allege any breaches of the GATS itself, but uses the GATS as a “bridge” to a BIT otherwise unavailable to it.²⁵

Tax-related disputes

Companies have used the ISDS mechanism to challenge decisions regarding the payment of taxes in the host State. For instance, in *Hanocal and IPIC International v. Korea*, two Dutch companies allege that a tax was wrongly levied on the 2010 sale of their controlling stake in a Korean petroleum and refinery company.²⁶ Specifically, the claimants contest the non-application of the Korea-Netherlands double taxation treaty under which they should have allegedly benefitted from tax exemptions; they demand damages of US\$168 million.²⁷ In *Cairn v. India*, the claimant challenges *inter alia* a draft assessment order issued by the Indian tax authority in respect of the fiscal year 2006/7 in the amount of US\$1.6 billion plus any applicable interest and penalties.²⁸ Cairn argues that legislative amendments, which serve as a basis for the draft assessment, “seek to tax prior year transactions” in a retrospective manner.²⁹ Finally, in *Total E&P v. Uganda*,³⁰ the claimant maintains that a stamp duty was unlawfully imposed by the Uganda Revenue Authority upon the acquisition of interest in an oil and gas block in the Lake Albert region.³¹

²³ Global Arbitration Review, “Senator takes on Czech Republic”, 29 September 2015. Available from <http://globalarbitrationreview.com/news/article/34182/senator-takes-czech-republic/>.

²⁴ *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal* (ICSID Case No. ARB/15/21), <http://investmentpolicyhub.unctad.org/ISDS/Details/642>.

²⁵ *Ibid.*, Procedural Order No. 2, 2 December 2015.

²⁶ *Hanocal Holding B.V. and IPIC International B.V. v. Republic of Korea* (ICSID Case No. ARB/15/17), <http://investmentpolicyhub.unctad.org/ISDS/Details/635>.

²⁷ Debevoise & Plimpton LLP, “Debevoise and Kim & Chang to Defend Republic of Korea in ICSID Arbitration Filed by IPICI and Hanocal”, 23 September 2015. Available from <http://www.debevoise.com/insights/news/2015/09/debevoise-and-kim>.

²⁸ *Cairn Energy PLC v. India* (UNCITRAL), <http://investmentpolicyhub.unctad.org/ISDS/Details/691>.

²⁹ Cairn Energy PLC, “Indian tax dispute”, 10 March 2015. Available from <http://www.cairnenergy.com/index.asp?pageid=27&newsid=471>.

³⁰ *Total E&P Uganda BV v. Republic of Uganda* (ICSID Case No. ARB/15/11), <http://investmentpolicyhub.unctad.org/ISDS/Details/657>.

³¹ Reuters Africa, “Total seeks arbitration over Uganda tax dispute”, 31 March 2015. Available from <http://af.reuters.com/article/ugandaNews/idAFL6NOWW4NE20150331>. Global Arbitration Review, “Total files against Uganda”, 26 March 2015. Available from <http://globalarbitrationreview.com/news/article/33672/total-files-against-uganda/>.

IV. 2015 decisions: an overview

A. Jurisdictional and admissibility issues

Qualifying as an “investment” under the applicable IIA and the ICSID Convention

According to the tribunal in *State Enterprise v. Moldova*, the agreement between Moldova and Ukraine concerning the supply of electricity into Moldova could suggest an existence of an “investment” for the purposes of the ECT.³² However, the tribunal found that Energorynok’s claim to money under that agreement did not qualify as an investment, reasoning that under Article 1(6)(c) of the ECT, a “claim to money” must be associated with some other, self-standing investment in the underlying energy-related economic activity out of which the claim to money arose. To the tribunal, the claimant had “no role in the economic activity carried out under the [agreement]”; it “acquired a debt, or was authorized to collect a debt, but it did not acquire an investment under the ECT”.³³ Contrasting the claimant’s minimal role in the operation with the more active role of the claimant in *Petrobart v. Kyrgyz Republic*, the tribunal denied jurisdiction.³⁴

In *Poštová banka and Istrokapital v. Greece*, the tribunal denied jurisdiction for Poštová banka’s claims concerning Greek government bonds finding that these assets were not protected under the Greece-Slovakia BIT.³⁵ The tribunal noted that the BIT contained a broad definition of investment in Article 1 (with reference to “every kind of asset”) rather than a closed list of covered investments.³⁶ However, the tribunal reasoned that the scope of the treaty terms must be interpreted in accordance with the rules of interpretation of the Vienna Convention on the Law of Treaties (VCLT) and that it could not “expand the scope of the [protected] investments” beyond the State parties’ intentions.³⁷ The tribunal found that the definition of investment in the BIT at hand contained “less encompassing language” than that in the Argentina-Italy BIT in the cases *Abaclat v. Argentina and Ambiente Ufficio v. Argentina*.³⁸ It stressed that the reference to bonds in the Greece-Slovakia BIT was limited to “debentures of a company”.

While the BIT also referred to “loans”, the tribunal was unwilling to equate that term with government bonds that do not entail contractual privity, i.e. a direct relationship between lender and debtor.³⁹ Equally, the tribunal decided that “claims to money”, if they are to qualify as a covered investment, should arise under a contractual relationship.⁴⁰ The tribunal decided that Greece’s sale of debt on the primary market and the claimant’s purchase of debt interests in the secondary market did not provide for such a clear-cut contractual relationship.⁴¹

³² *State Enterprise Energorynok v. the Republic of Moldova* (SCC Case No. 2012/175), Final Award, 29 January 2015, para. 81.

³³ *Ibid.*, para. 101.

³⁴ *Ibid.*, para. 86. The tribunal cited *Petrobart Ltd. v. The Kyrgyz Republic* (SCC Case No. 126/2003), Award, 29 March 2005, and *Electrabel S.A. v. The Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012.

³⁵ *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic* (ICSID Case No. ARB/13/8), Award, 9 April 2015.

³⁶ *Ibid.*, para. 286.

³⁷ *Ibid.*, para. 288.

³⁸ *Ibid.*, para. 308. The tribunal referred to *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic* (ICSID Case No. ARB/07/5) and *Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v. Argentine Republic* (ICSID Case No. ARB/08/9).

³⁹ *Ibid.*, paras. 336-338.

⁴⁰ *Ibid.*, paras. 341-343.

⁴¹ *Ibid.*, para. 344.

Finally, the tribunal observed that a majority of the panel would also have dismissed the claim on the basis that it did not concern an investment protected under Article 25 of the ICSID Convention.⁴²

The tribunal in *Al Tamimi v. Oman* found that the lease agreements related to the development and operation of a limestone quarry constituted “investments” under the Oman-United States Free Trade Agreement (FTA) because they qualified as “other tangible and intangible movable or immovable property” as mentioned in the treaty’s definition of investment. According to the tribunal, the agreements exhibited the characteristics of an investment, such as the commitment of capital, the expectation of gain or profit, and the assumption of risk.⁴³

Ownership and control of investment⁴⁴

The ICSID ad hoc Committee in *Occidental v. Ecuador (II)* partially annulled the award rendered in favour of United States-based Occidental Petroleum in 2012.⁴⁵ While the original tribunal had unanimously accepted jurisdiction over the 60 per cent interest owned by Occidental in an oil block (Block 15), there had been disagreement with respect to the remaining 40 per cent. One arbitrator opined that since Occidental had “farmed out” this 40 per cent share to the Alberta Energy Corporation (beneficial owner), and remained only a “nominee” of that interest, it did not qualify as the owner of that investment.⁴⁶ The ad hoc Committee agreed with the dissenting arbitrator; it held that the majority of the tribunal had committed a manifest excess of powers in assuming jurisdiction over an investment that, at the relevant time, no longer belonged to Occidental, and in compensating the claimants for 100 per cent of the value of Block 15. Thus, the annulment decision reduced the original \$1.77 billion award to \$1.06 billion.⁴⁷

In *Guardian Fiduciary Trust v. Macedonia*, the tribunal had to resolve the issue of whether the claimant, a New Zealand company, was “controlled directly or indirectly” by a Dutch national, in order to determine whether it was protected by the Macedonia-Netherlands BIT.⁴⁸ The BIT covers legal entities, regardless of the country of incorporation, that are “controlled directly or indirectly” by Dutch nationals. The ownership structure included an intermediate company, whose ownership was split between a Dutch entity (legal owner) and a company registered in the Marshall Islands (beneficial owner). Given that “different aspects of the ownership [...] [were] divided”,⁴⁹ the arbitrators set out to examine whether there was sufficient evidence that the Dutch entity exercised actual control over the claimant. Having assessed the limited evidence provided on this issue by the claimant, the tribunal came to the view that the Marshall Islands company, not the Dutch entity, was in fact in control of the claimant. For example, it was the director of the Marshall Islands company that had authorized the claimant’s request for ICSID arbitration. Therefore, the tribunal held that the claimant did not qualify as a Dutch national, as defined in the Macedonia-Netherlands BIT, and declined jurisdiction.⁵⁰

⁴² If the tribunal were to follow the “‘objective’ approach, which would give the term ‘investment’ an inherent meaning” (contribution, duration and risk). *Ibid.*, paras. 359, 351-371.

⁴³ *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015, paras. 278-280.

⁴⁴ See further Chapter IV in UNCTAD (2016, forthcoming). *World Investment Report 2016: Investor Nationality – Policy Challenges*. New York and Geneva: United Nations.

⁴⁵ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11) (II), Decision on Annulment, 2 November 2015.

⁴⁶ *Ibid.*, Dissenting Opinion (Award, 5 October 2012).

⁴⁷ *Ibid.*, Decision on Annulment, 2 November 2015, paras. 185-301.

⁴⁸ *Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan, Ltd v. Macedonia, former Yugoslav Republic of* (ICSID Case No. ARB/12/31), Award, 22 September 2015.

⁴⁹ *Ibid.*, para. 131.

⁵⁰ *Ibid.*, paras. 132-138.

Non-existence of investment at the time the dispute arose

In *Accession Mezzanine v. Hungary*, the tribunal considered whether the dispute “ar[ose] directly out of an investment” for the purpose of establishing its jurisdiction under the Hungary-United Kingdom BIT.⁵¹ In 1997, the claimants had been part of a successful bid for commercial radio broadcasting rights in Hungary. Under the Hungarian Media Law, the resulting Broadcasting Agreement was allowed to be valid for a maximum of seven years, subject to renewal once without a new tender for an additional five years. In 2009, following the expiration of the initial term and the one-time renewal, the rights under the Broadcasting Agreement came to an end and the respondent State put the rights up for tender.⁵²

The claimants were not successful in the 2009 tender and initially sought review in the Hungarian courts. Although the courts found that the Hungarian licensing authority had acted unlawfully in some respects in awarding the licence to a different bidder, the courts did not find that the unlawfulness required or permitted the termination of the new licence-holder’s rights or a “restoration” of the licence to the claimants.⁵³ Subsequently, in 2012, the claimants initiated arbitration before ICSID.

As a jurisdictional defence, the respondent State argued that the claimants did not have a right to a new licence, and hence there was no cognisable investment in respect of a new licence, which could have been expropriated. The tribunal agreed. Looking at Hungarian law as the source of the claimants’ alleged rights, it concluded that once the Broadcasting Agreement had expired, “the Claimants did not have a property right, contractual right or any other vested legal right in Hungarian law in relation to the exploitation of a national radio frequency in Hungary on the critical date of the alleged expropriation [i.e., the date on which the new licence was awarded to another bidder]”.⁵⁴

Jurisdictional objections based on investors’ alleged illegal conduct

In *Mamidoil v. Albania*, the tribunal addressed allegations of potential illegality. The tribunal agreed with “the widely-held opinion that investments are protected by international law only when they are made in accordance with the legislation of the host State”.⁵⁵ At the same time, the tribunal noted that “States must not be allowed to abuse the process by scrutinizing the investment *post festum* with the intention of rooting out minor or trivial illegalities as a pretext to free themselves of an obligation” or the “consequences of its standing agreement to arbitrate”.⁵⁶

Albania’s first argument was that the investment was illegal because Albanian law prohibited a central element of the operation, the landing of petroleum products at the Durres port. The tribunal rejected this argument on the ground that the “decisive moment for the appreciation of the investment’s substantive legality is when the investment is planned and made”. When the lease was

⁵¹ *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary* (ICSID Case No. ARB/12/3), Award, 17 April 2015, para. 58.

⁵² *Ibid.*, paras. 38-41.

⁵³ *Ibid.*, para. 49.

⁵⁴ *Ibid.*, para. 146. The tribunal also rejected the claimants’ argument that Hungary’s actions resulted in an indirect expropriation of their shares in (and loans to) their local Hungarian company, “Danubius”, which had been the broadcasting licence-holder. The tribunal held that the claimants’ expropriation claim with respect to the shares and loans was “contingent upon procuring a new broadcasting agreement [...] [and thus arose] out of an alleged investment right that the Claimants never had” (*ibid.*, para. 185).

⁵⁵ *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24), para. 359.

⁵⁶ *Ibid.*, para. 483.

executed and the site was transferred to the claimant, “neither Party anticipated the changes and restrictions on the port of Durres”.⁵⁷ As for Albania’s second argument that the claimant had failed to obtain certain fundamental permits, the tribunal partly agreed. In so doing, it rejected the claimant’s argument that Albania was estopped from invoking illegality. Whereas the claimant argued that Albania had “consistently acknowledged the legality of the investment” over the last 12 years, the arbitrators found that since 2003, the State had consistently insisted that the permits were lacking.⁵⁸ At the same time, the State had made offers to legalize the claimant’s activities. To the tribunal, this showed that “in that State’s own appreciation, the illegality of the investment was susceptible of being cured”. The tribunal decided to uphold jurisdiction and assess the legal significance of the absence of permits as a question of merits.⁵⁹

“Time-sensitive restructuring” – jurisdictional objections based on investors’ alleged abuse of process

The tribunal in *Levy and Gremcitel v. Peru* denied jurisdiction due to abuse of process by the claimants.⁶⁰ It considered that an abuse of process objection must be distinguished from a *ratione temporis* objection: “If a claimant acquires an investment after the date on which the challenged act occurred, the tribunal will normally lack jurisdiction *ratione temporis* and there will be no room for an abuse of process. Here, the Tribunal has established that Ms. Levy acquired her investment prior to the challenged measure, even if it was just slightly before. In such a situation, a tribunal has jurisdiction *ratione temporis* but may be precluded from exercising its jurisdiction if the acquisition is abusive.”⁶¹

In this respect, the tribunal agreed with the test formulated in *Pac Rim v. El Salvador*: to find an abuse, “a specific future dispute” must be foreseeable at the time of acquisition “as a very high probability and not merely as a possible controversy”.⁶² Having observed that “the threshold for a finding of abuse of process is high”,⁶³ the tribunal analysed the proximity in time between the transfer of the shares of Gremcitel to Ms. Levy and the challenged measures. It found that the “actual transfer of the shares occurred [...] only one day before [the challenged measure] was issued and 9 days before it was published”. In the tribunal’s view, “[a] review of the record show[ed] that such striking proximity of events [was] not a coincidence” and that the claimants could have foreseen that the disputed measure was forthcoming.⁶⁴ According to the tribunal, “the only reason for the sudden transfer of the majority of the shares in Gremcitel to Ms. Levy was her nationality” and the “only purpose of the transfer was to obtain access to ICSID/BIT arbitration, which was otherwise precluded”.⁶⁵

⁵⁷ Ibid., para. 375.

⁵⁸ Ibid., paras. 468, 472.

⁵⁹ Ibid., paras. 494-495.

⁶⁰ *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru* (ICSID Case No. ARB/11/17), Award, 9 January 2015, paras. 191-195.

⁶¹ Ibid., para. 182. The tribunal in *Phillip Morris Asia Ltd. v. Australia* arrived at the same conclusion on the issue of *ratione temporis*. See *Phillip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL, PCA Case No. 2012-12), Award on Jurisdiction and Admissibility, 17 December 2015, paras. 524-534.

⁶² *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru* (ICSID Case No. ARB/11/17), Award, 9 January 2015, para. 185. *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, para. 2.99.

⁶³ *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru* (ICSID Case No. ARB/11/17), Award, 9 January 2015, para. 186.

⁶⁴ Ibid., para. 188-189.

⁶⁵ Ibid., para. 191.

As in *Levy and Gremcitel v. Peru*, the tribunal in *Philip Morris v. Australia*⁶⁶ had to rule on whether there was an abuse of rights on the claimant's part. At issue was the timing and motivation for the claimant's acquisition of Philip Morris (Australia) Limited, a tobacco company operating within Australia and neighbouring countries. Philip Morris Asia Limited, the Hong Kong-based claimant, had become the owner of Philip Morris (Australia) in February 2011 through a corporate restructuring undertaken by the global parent of both companies, Philip Morris International (United States). For a number of years prior to the restructuring, the Australian government had been publicly considering legislation to mandate the "plain packaging" of cigarettes sold in Australia, legislation which the Philip Morris companies argued would substantially diminish the value of their investment in the country. As a consequence of the restructuring, the claimant, as the owner of Philip Morris (Australia), initiated proceedings under the BIT between Australia and Hong Kong Special Administrative Region (SAR) after Australia's adoption of "plain packaging" legislation in November 2011.

Australia argued that the claim was an abuse of rights because the corporate restructuring had been motivated wholly or partly by a desire to gain access to protection under the Australia-Hong Kong SAR BIT in order to bring a claim in respect of the "plain packaging" legislation.⁶⁷ The claimant responded by noting that the legislation had not been adopted at the time of the restructuring and, further, that the restructuring had been undertaken for reasons other than to gain access to protection under the relevant BIT.⁶⁸

The tribunal observed that "the mere fact of restructuring an investment to obtain BIT benefits is not *per se* illegitimate".⁶⁹ However, "it may amount to an abuse of process to restructure an investment to obtain BIT benefits in respect of a foreseeable dispute".⁷⁰ As to the meaning of "foreseeable", the tribunal followed earlier arbitral decisions on the matter and concluded that "a dispute is foreseeable when there is a reasonable prospect [...] that a measure which may give rise to a treaty claim will materialise".⁷¹ Applying this test to the facts before it, the tribunal concluded that at the time of the restructuring, the dispute was foreseeable to the claimant.

The claimant argued that the restructuring had been undertaken for reasons other than to gain access to protection under the relevant BIT. In response, the tribunal noted that, in general, even if the dispute was foreseeable, "it would not normally be an abuse of right to bring a BIT claim in the wake of a corporate restructuring, if the restructuring was justified independently of the possibility of bringing such a claim".⁷² However, on the facts before it, the claimant had failed to demonstrate other reasons for the restructuring. As a result, the tribunal declined jurisdiction.

"Retrospective" exercise of a denial of benefits clause

In *Khan Resources v. Mongolia*, the respondent State invoked the denial of benefits clause of the ECT in relation to one of the claimants (incorporated in the Netherlands). Mongolia argued that this company was owned and controlled by Canadian nationals and did not engage in substantial business activities in the Netherlands. The claimants did not dispute this, but argued that the denial of

⁶⁶ *Philip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL, PCA Case No. 2012-12), Award on Jurisdiction and Admissibility, 17 December 2015.

⁶⁷ *Ibid.*, para. 536.

⁶⁸ *Ibid.*, paras. 537 and 570.

⁶⁹ *Ibid.*, para. 540.

⁷⁰ *Ibid.*, para. 545.

⁷¹ *Ibid.*, para. 554.

⁷² *Ibid.*, para. 570.

benefits clause may not be invoked after the commencement of arbitration (i.e. after the State's offer of consent to arbitration was perfected by the investor).

In its decision on jurisdiction (rendered in 2012 but published in 2015), the tribunal found, first, that the denial of benefits clause did not automatically exclude such companies from treaty coverage, but gave the State a right that must be “actively exercised”.⁷³ Secondly, the tribunal ruled that a State could not exercise this right toward an investor after the latter commenced ISDS proceedings against it. The tribunal based its reasoning on the object and purpose of the ECT “to create a predictable legal framework for investments in the energy field”. In the tribunal's view, such predictability would only exist if investors “know in advance whether they are entitled to the protections of the Treaty”.⁷⁴ Arbitral practice on this issue remains divided as some decisions have allowed States to exercise their right to deny treaty benefits retrospectively.⁷⁵

Local litigation requirement

In *Muhammet Çap v. Turkmenistan*, the tribunal analysed whether Article VII.2 of the Turkey-Turkmenistan BIT imposed a mandatory 1-year local litigation requirement. The claimants contended that the treaty provided merely for an option to submit the dispute to domestic courts, without requiring it.⁷⁶ The tribunal agreed with the claimants that Article VII.2 allowed the investor to choose between three arbitration venues or local courts. To the tribunal, the fact that the claimants had not submitted the dispute to the courts of Turkmenistan prior to arbitration “was no impediment to Claimants having brought these proceedings”.⁷⁷

This outcome departs from an earlier decision in *Kiliç v. Turkmenistan*, where the same issue was at stake. The *Kiliç* tribunal ruled (with a separate opinion by one arbitrator) that the BIT required the claimant to submit its dispute to local courts before pursuing international arbitration.⁷⁸ Noting the different outcome of the two cases, the tribunal in *Muhammet Çap* explained that it reached its decision based on evidence and arguments presented to it, and after finding that the English version of the treaty, not the Russian version, was the authentic one.⁷⁹

Requirement to waive domestic litigation

According to the majority in *Detroit International v. Canada*, the tribunal lacked jurisdiction due to the absence of an adequate waiver under Article 1121 of NAFTA (the provision obliges claimants to waive their right to initiate or continue administrative or court proceedings with respect to the measures challenged

⁷³ *Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd.* (UNCITRAL, PCA Case No. 2011-09), Decision on Jurisdiction, 25 July 2012 (became public in 2015), paras. 417-424.

⁷⁴ *Ibid.*, para. 426.

⁷⁵ See, in particular, *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia* (UNCITRAL, PCA Case No. 2011-17), Award (corrected), 31 January 2014; and *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent's Jurisdictional Objections, 1 June 2012.

⁷⁶ *Muhammet Çap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case No. ARB/12/6), Decision on Respondent's Objection to Jurisdiction under Article VII(2), 13 February 2015, paras. 65-67.

⁷⁷ *Ibid.*, paras. 280-281.

⁷⁸ *Kiliç Insaat İthalat İhracat Sanayi Ve Ticaret Anonim Sirketi v. Turkmenistan* (ICSID Case No. ARB/10/1), Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty, 7 May 2012, para. 11.1. Due to the claimant's failure to satisfy the requirement, the tribunal dismissed the claim for lack of jurisdiction. See Award, 2 July 2013.

⁷⁹ *Muhammet Çap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case No. ARB/12/6), Decision on Respondent's Objection to Jurisdiction under Article VII(2), 13 February 2015, paras. 274.

in the NAFTA arbitration).⁸⁰ The tribunal pointed out that Article 1121 referred to domestic proceedings under the law of *any Party* (i.e. Canada, Mexico or the United States).

By majority, the tribunal first held that the lawsuit brought before a United States court against Canada covered “the same grounds” as the “measures” at issue in the notice of arbitration.⁸¹ It then rejected the claimant’s argument that the United States litigation fell within the Article 1121 exception. The exception allows administrative or court proceedings under certain conditions (if they concern “injunctive, declaratory, or other extraordinary relief not involving the payment of damages”). The tribunal cited two reasons for doing so: (i) the United States proceeding did involve a request for damages,⁸² and (ii) the proceeding was initiated before United States courts and not before Canadian courts (under Article 1121, the exception for declaratory or injunctive relief is available only for proceedings under the law of the disputing Party, i.e. Canada).⁸³ The tribunal further noted that the claimant had later withdrawn the request for damages in the United States proceeding and submitted a second notice of arbitration after the start of the arbitration. The majority did not consider, however, that this “could retroactively validate several months of proceedings during which the Tribunal wholly lacked jurisdiction”.⁸⁴

Temporal aspects of jurisdiction

In *Ping An v. Belgium*, the tribunal dismissed the case for lack of jurisdiction, upholding Belgium’s objection *ratione temporis*.⁸⁵ The jurisdictional controversy concerned the interaction between the Belgium-Luxembourg Economic Union-China BIT that entered into force in 1986 and a subsequent BIT between the same parties that entered into force on 1 December 2009 and that “substituted and replaced” the 1986 BIT.

In October 2009, Ping An had notified the dispute to Belgium under the 1986 BIT. A new letter was sent in July 2012, in which the claimant “confirmed” that its October 2009 letter constituted a notice of dispute under the 2009 BIT.⁸⁶ In the ICSID case registered shortly after (September 2012), the claimants relied on the substantive provisions of the 1986 BIT and invoked the 2009 BIT to establish the tribunal’s jurisdiction.⁸⁷ The scope of the arbitration clause in the two treaties was markedly different: whereas the earlier BIT covered only disputes over the amount of compensation for expropriation, the later BIT covered “legal disputes” of any kind in Article 8(1).

Article 10(2) of the 2009 BIT provided that the BIT did not apply to any dispute or claim “which was already under judicial or arbitral process” before 1 December 2009; such disputes would “continue to be settled” under the provisions of the older BIT. However, the treaty did not expressly deal with pre-disputes that had not yet “matured” into formal arbitral proceedings. The tribunal found “several

⁸⁰ *Detroit International Bridge Company v. Government of Canada* (UNCITRAL, PCA Case No. 2012-25), Award on Jurisdiction, 2 April 2015.

⁸¹ *Ibid.*, para. 310.

⁸² *Ibid.*, para. 314.

⁸³ *Ibid.*, para. 320. The dissenting arbitrator, while finding that at least one of the United States court claims “certainly rubs up against” the NAFTA claims, concluded that the domestic lawsuit did not challenge the same measures as those at issue in the NAFTA claim and thus he “would find the waiver sufficient under Article 1121”. See Separate Dissenting Jurisdictional Statement (Award on Jurisdiction, 2 April 2015), paras. 11-12.

⁸⁴ *Ibid.*, para. 321.

⁸⁵ *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium* (ICSID Case No. ARB/12/29), Award, 30 April 2015, para. 233.

⁸⁶ *Ibid.*, paras. 105-111.

⁸⁷ *Ibid.*, para. 38.

indicators” that the 2009 BIT was inapplicable to such disputes.⁸⁸ The tribunal noted, in particular, that the contrary approach “would have the effect of allowing the use of the much wider dispute resolution provisions of the 2009 BIT to bring claims already notified under the 1986 BIT, with its far more limited substantive scope for the purposes of dispute-settlement jurisdiction”.⁸⁹

Claims brought after the notice of denunciation of the ICSID Convention

The tribunal in *Venoklim v. Venezuela* was the first one to rule on a claim brought after the respondent State gave its notice of denunciation of the ICSID Convention.⁹⁰ The claimant requested arbitration during the 6-month period, which – according to Article 71 of the Convention – must expire before the denunciation takes effect. The tribunal rejected Venezuela’s argument that the claim must be dismissed. It held that Venezuela was still a party to the Convention at the time the claimant filed its request for arbitration, and that giving immediate effect to Venezuela’s notice of denunciation would run counter to the principle of judicial security and to the temporal limitation set out in Article 71.⁹¹ The tribunal also distinguished between “consent to arbitration” and “registration” of a claim (the claim was registered by ICSID after the six-month period had expired) and concluded that the relevant date for the purposes of establishing jurisdiction (i.e. whether consent was perfected within the six-month period established by Article 71) is the date of the request for arbitration.⁹²

Attribution of conduct to the respondent State

The tribunal in *Clayton/Bilcon v. Canada* noted that Articles 4 (Conduct of organs of a State) and 5 (Conduct of persons or entities exercising elements of governmental authority) of the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts were “considered as statements of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State”, and that they were “applicable by analogy to the responsibility of States towards private parties”.⁹³ It found that the conduct of an ad hoc environmental assessment panel, the Joint Review Panel, was attributable to Canada as it was “*de jure* an organ, equipped with a clear statutory role that included making formal and public recommendations to state authorities”.⁹⁴ With reference to Article 11 (Conduct acknowledged and adopted by a State as its own) of the ILC Articles, the tribunal further stated:

“Even if the [Joint Review Panel] were not, by its nature, a part of the apparatus of the Government of Canada, the fact would remain that federal Canada and Nova Scotia both adopted its essential findings in arriving at the conclusion that the project should be denied approval under their environmental laws. [...] On the facts of the present case, [...] Article 11 would establish the international responsibility of Canada even if the [Joint Review Panel] were not one of its organs.”⁹⁵

⁸⁸ Ibid, paras. 219-223.

⁸⁹ Ibid., para. 229.

⁹⁰ *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/22), Award, 3 April 2015. Note that this case was brought pursuant to Venezuela’s domestic investment statute (the claimant later invoked a BIT but it was not recognized by the tribunal as an independent source of jurisdiction). However, the tribunal’s conclusions regarding the point summarized here are relevant for IIA-based cases.

⁹¹ Ibid., paras. 61-62.

⁹² Ibid., paras. 76-77.

⁹³ *Clayton and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL, PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015, para. 307.

⁹⁴ Ibid., para. 319.

⁹⁵ Ibid., paras. 321-322.

The *von Pezold and others v. Zimbabwe* case related to the land policy reforms adopted in Zimbabwe with a view to “acquiring” land owned by white farmers and redistributing it to black Zimbabweans. One of the issues that arose was whether the acts of the “settlers” (or “war veterans”), who moved onto the claimants’ land, could be attributed to the respondent government. The claimants argued that the government actively encouraged and assisted the “settlers”.⁹⁶ The tribunal observed, however, that Article 8 (Conduct directed or controlled by a State) of the ILC Articles on State Responsibility called for “direction and control” on the part of the government, and that the actions of Zimbabwe had not risen to that level:

“While there is ample evidence of Government involvement and encouragement, the Tribunal is not persuaded that the acts of the invaders were based on a direct order or under the direct control of the Government when they initially invaded the Claimants’ properties. Rather, the Government appears to have encouraged (and endorsed) the action once it had begun. Encouragement would not meet the test set out in Article 8.”⁹⁷

However, the relevant State conduct (including the inaction of the police), as opposed to the actions of the “settlers” themselves, was subsequently considered by the tribunal on the merits and ultimately found to be in breach of the applicable BITs.

B. Substantive issues

Interpreting the international minimum standard of treatment

In *Clayton/Bilcon v. Canada*, the tribunal reaffirmed that in light of the interpretive notes of the NAFTA Free Trade Commission⁹⁸ and the text of the NAFTA itself, “‘fair and equitable treatment’ and ‘full protection and security’ [in NAFTA Article 1105] cannot be regarded as ‘autonomous’ treaty norms that impose additional requirements above and beyond what the minimum standard requires”.⁹⁹ Following one strand of arbitral decisions, the tribunal further observed:¹⁰⁰ “NAFTA awards make it clear that the international minimum standard is not limited to conduct by host states that is outrageous. The contemporary minimum international standard involves a more significant measure of protection.”¹⁰¹ For the tribunal, this standard required “tribunals to be sensitive to the facts of each case, the potential relevance of reasonably relied-on representations by a host state, and a recognition that injustice in either procedures or outcomes can constitute a breach”.¹⁰²

⁹⁶ *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15), Award, 28 July 2015, para. 432.

⁹⁷ *Ibid.*, para. 448.

⁹⁸ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001.

⁹⁹ *Clayton and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL, PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015, para. 432.

¹⁰⁰ *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1), Award, 9 January 2003, para. 113; *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL), Award, 31 March 2010, paras. 207, 208, 210 and 213.

¹⁰¹ *Clayton and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL, PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015, para. 433. In so doing, the tribunal expressly distanced itself from the approach taken in *Glamis Gold Ltd. v. United States of America* (UNCITRAL), Award, 8 June 2009.

¹⁰² *Clayton and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL, PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015, para. 444.

Applying this standard, the tribunal's majority found a breach of NAFTA Article 1105 on the grounds that "the Investors were encouraged to engage in a regulatory approval process costing millions of dollars and other corporate resources that was in retrospect unwinnable from the outset, even though the Investors were specifically encouraged by government officials and the laws of federal Canada to believe that they could succeed on the basis of the individual merits of their case".¹⁰³

In particular, the majority found it problematic that a statutory review panel had adopted without notice to the investor an "unprecedented approach" to the review of the project by reviewing the project according to "community core values", a criterion not previously identified nor found in the review panel's terms of reference.¹⁰⁴ To the tribunal, this and certain other aspects of the panel review process (including that the investors were not given a fair opportunity to present their case and the panel's refusal to consider specific mitigation steps to address specific deleterious impacts) constituted "a fundamental departure from the methodology required by Canadian and Nova Scotia law" and rose to the level of the breach of NAFTA Article 1105.¹⁰⁵

The dissenting arbitrator took the view that what the review panel treated as "core community values" was subsumed within other language found in its terms of reference, including "terrestrial effects", "marine effects", "human environment effects" and "cumulative effects".¹⁰⁶ The dissenting arbitrator further opined that the panel's conduct, even if found to breach Canadian law, did not "offend judicial propriety" or otherwise meet the high threshold for breach of the international minimum standard.¹⁰⁷ He warned that the majority's approach represented "a significant intrusion into domestic jurisdiction" and created "a chill on the operation of environmental review panels" that will be seen as "a remarkable step backwards in environmental protection".¹⁰⁸

The international minimum standard of treatment and enforcement of environmental laws

Al Tamimi v. Oman concerned an investment for developing and operating a limestone quarry. The claimant complained, in particular, of being subjected to harassment and unwarranted sanctions by Omani environmental and other authorities, and to the ultimate termination of the quarry lease agreements. The tribunal was called upon to interpret and apply Article 10.5 of the Oman-United States FTA, which, like Article 1105 of the NAFTA, links the obligation to provide FET directly with the "international minimum standard of treatment". Quoting *Myers v. Canada* (a NAFTA case), the tribunal observed that "a finding that the minimum standard has been breached 'must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders'".¹⁰⁹ Noting the particular language of the Oman-United States FTA, the tribunal further noted that a "strict 'minimum standard of treatment' provision such as Article 10.5 [...] cannot be interpreted in the expansive fashion in which some autonomous fair and equitable treatment or full protection and security provisions of other treaties have been interpreted".¹¹⁰

¹⁰³ Ibid., para. 453.

¹⁰⁴ Ibid., para. 740.

¹⁰⁵ Ibid., paras. 588-604.

¹⁰⁶ *Clayton and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL, PCA Case No. 2009-04), Dissenting Opinion (Award on Jurisdiction and Liability, 17 March 2015), para. 15.

¹⁰⁷ Ibid., para. 40.

¹⁰⁸ Ibid., paras. 48, 51.

¹⁰⁹ *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015, para. 382.

¹¹⁰ Ibid., para. 382. The tribunal rejected the claimant's arguments that it should follow interpretations

The tribunal did, however, find it relevant to its interpretation of the FET standard under the Oman-United States FTA that the FTA contained specific provisions indicating the high value placed by the parties on environmental protection. In the first place, the tribunal noted that Article 10.10 “provides a forceful protection of the right of either State Party to adopt, maintain or enforce any measure to ensure that investment is ‘undertaken in a manner sensitive to environmental concerns’, provided it is not otherwise inconsistent with the express provisions of Chapter 10”.¹¹¹ Beyond that, the tribunal looked to Chapter 17 of the FTA, entitled “Environment”. While recognizing that Chapter 17 did not “fall directly” within its jurisdiction,¹¹² the tribunal considered that “[t]he very existence of Chapter 17 exemplifies the importance attached by the US and Oman to the enforcement of their respective environmental laws”.¹¹³ To the tribunal, Chapter 17 made it “clear that the State Parties intended to reserve a significant margin of discretion to themselves in the application and enforcement of their respective environmental laws” and provided express textual acknowledgement by the State Parties “that environmental law enforcement is not inherently consistent in its application”.¹¹⁴ In the case at hand, the claimant’s case rested largely upon instances in which inconsistent advice had been given by Omani authorities regarding his investment. While the tribunal accepted that this may have created some confusion for the investor, it was not convinced that such conduct reached “the level of ‘manifest arbitrariness’ or ‘complete lack of transparency and candour’ required for a breach of the minimum standard of treatment”.¹¹⁵

A further claim by the investor in *Al Tamimi* concerned his arrest by Omani authorities. Following the dissolution of his investment, the claimant, who no longer held any contractual or property rights under Omani law, continued to extract materials at the site of the original investment.¹¹⁶ Following a warning from the Omani authorities, the claimant was arrested on misdemeanour environmental charges, prosecuted, convicted at first instance, and ultimately acquitted on appeal. While the claimant characterised the Omani action as having “no legitimate basis in law”, the tribunal disagreed. Relying once again on the express environmental provisions of the Oman-United States FTA, the tribunal concluded that “this is precisely the kind of environmental regulatory enforcement that the Parties sought to protect through the inclusion of Article 10.10 (as well as Chapter 17) in the US–Oman FTA”.¹¹⁷ Moreover, the fact that the claimant was ultimately acquitted of the charges brought against him was

of the FET standard taken from cases applying an “autonomous standard”, such as *Técnicas Medioambientales Tecmed v. United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003, and *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* (ICSID Case No. ARB/01/7), Award, 25 May 2004. The tribunal also rejected the claimant’s reliance on an early NAFTA case, *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award, 30 August 2000, on the ground that the award predated the NAFTA Free Trade Commission’s 31 July 2001 Note of Interpretation. The Note clarified that NAFTA’s minimum standard of treatment provision applies the customary international law standard. *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015, para. 386 and fn. 774.

¹¹¹ *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015, para. 387.

¹¹² *Ibid.*, para. 388.

¹¹³ *Ibid.*, para. 389.

¹¹⁴ *Ibid.*, para. 389. The tribunal further noted that “there is no legal basis for the Claimant to assert that the Respondent bears the burden in this proceeding of proving actual environmental damage, including for the purposes of Art 10.10 (the language of which protects State regulatory action which the State ‘considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns’ (emphasis added))”. *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015, fn. 913.

¹¹⁵ *Ibid.*, para. 399. This finding was *obiter dicta*. Given the date on which the Oman-United States FTA came into force, the claimant’s claims directly based upon this inconsistent advice were not within the tribunal’s jurisdiction. *Ibid.*, para. 400. Nevertheless, the facts underlying these allegations did serve to underpin a number of other claims which the claimant alleged arose later as a direct result of the inconsistent advice. The tribunal rejected all of these claims in their entirety.

¹¹⁶ *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015, para. 437.

¹¹⁷ *Ibid.*, para. 440.

not decisive of whether the State had committed an internationally recognizable wrong:

“A State must be permitted to take a legal position in relation to the alleged or perceived violation of its existing laws, even if that position turns out ultimately to be wrong, provided it does so in good faith and with appropriate due process. To impose international liability in such a context would significantly undermine States’ long-recognised right to reasonably exercise their police powers to enforce existing laws.”¹¹⁸

Fair and equitable treatment – legitimate expectations

In *Awdi v. Romania*, the claimants acquired ownership of Rodipet, an outdoor advertising company, through a privatization contract. As a condition of the privatization agreement, the host State undertook “to make all reasonable efforts for the issuance of a normative document stipulating the granting to the Company [...] for a period of 49 years, of the lands [...] relating to the points of sale existing on Romania’s territory”.¹¹⁹ To that end, the Romanian parliament enacted a law aimed at guaranteeing the transfer of the underlying land (“Law 442”). In 2008, however, four years after the privatization, the Romanian Constitutional Court declared Law 442 unconstitutional.

Looking at the terms of the privatization contract, the tribunal found that Romania had not taken “all reasonable efforts” to address the claimants’ land rights.¹²⁰ According to the tribunal, even after the Constitutional Court had repealed Law 442, it lay within the power of the Romanian government to address the issue of land rights through the means of an “organic law”, a modality which the Court had indicated expressly would pass constitutional muster.¹²¹ Since the host State had not done so, it had thwarted the claimants’ legitimate expectations and thereby breached the FET standard of the Romania-United States BIT.¹²²

Fair and equitable treatment – the relevance of host State conditions and investor due diligence

In *Mamidoil v. Albania*, the claimant alleged, *inter alia*, a violation of Article 10.1 of the ECT in connection with the construction and operation of a petroleum container terminal on a land plot in the Durres port area.¹²³ At issue were a series of measures whereby, over a period of approximately ten years, Albania modified the range of activities for which the Durres port area would be used, including, ultimately, a prohibition on the landing of petroleum at the port. In addressing the investor’s claims under the Albania-Greece BIT, the tribunal made a number of general observations regarding the FET standard, its objective and considerations relevant to its application.

The tribunal noted that while the FET standard is “oriented to predictability of the legal system and to due process”,¹²⁴ that does not mean that such aims are “meant to favour the investors’ interests over other economic and social

¹¹⁸ Ibid., para. 444.

¹¹⁹ *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania* (ICSID Case No. ARB/10/13), Award, 2 March 2015, para. 312.

¹²⁰ Ibid., para. 319.

¹²¹ Ibid., paras. 320-321.

¹²² Ibid., paras. 329-333.

¹²³ Article 10.1 of the ECT provides: “Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area.”

¹²⁴ *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24), Award, 30 March 2015, para. 613.

interests”.¹²⁵ Rather, the purpose of the standard is to bring “foreign investors into the normative sphere of rational policy in the general interest”.¹²⁶ In the context of the State’s ability to regulate and the ability of those regulations to evolve, the tribunal made clear:

“Economic, social, environmental and legal circumstances and problems are by their nature dynamic and bound to constant change. It is indispensable for successful public infrastructure and public services to exist that they are adaptable to these changes. Accordingly, State policy must be able to evolve in order to guarantee adequate infrastructure and services in time and thereby the fair and equitable treatment of investments. The legal framework makes no exception.”¹²⁷

Having determined that a balance needed to be struck between expected legal predictability and State freedom for regulatory evolution, the tribunal considered whether “the specific situation of Albania is of relevance for the interpretation of the fair and equitable standard in general and for the obligation to provide a stable and transparent legal framework in particular”.¹²⁸ The tribunal determined that it was. After noting that at the time of the investment Albania “was in a dilapidated situation, with its infrastructure run down and with its legal framework, regulation and independent justice absent and with no stability”,¹²⁹ the tribunal held “that these circumstances matter”. It stated that “[a]n investor may have been entitled to rely on Albania’s efforts to live up to its obligations under international treaties, but that investor was not entitled to believe that these efforts would generate the same results of stability as in Great Britain, USA or Japan”.¹³⁰ Instead, it was incumbent upon the investor to exercise due diligence with respect to the investment environment of the host State and to act accordingly: “[T]he standard is addressed to both the State and the investor. Fairness and equitableness cannot be established adequately without an adequate and balanced appraisal of both parties’ conduct”.¹³¹

In the case, the tribunal majority determined that there was no treaty violation by Albania with respect to the investment. Of particular importance in this respect was the tribunal’s repeated finding that nothing which the Government of Albania had done served to create a “legitimate expectation” capable of supporting a finding of liability.¹³²

Denial of justice – judicial conduct with respect to bankruptcy proceedings

In *Dan Cake v. Hungary*, the investor invoked the FET provision of the Hungary-Portugal BIT, alleging mistreatment by the Hungarian courts in the liquidation of its investment in a biscuit-making business, “Danesita”. At issue was whether the Metropolitan Court of Budapest had committed a denial of justice by failing

¹²⁵ Ibid., para. 614.

¹²⁶ Ibid.

¹²⁷ Ibid., para. 617. The tribunal cited a number of prior awards in support: *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary* (ICSID Case No. ARB/07/22), Award, 23 September 2010, paras. 9.3.29, 30, 31, 34; *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8), Award, 11 September 2007, paras. 331-332; *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Award, 28 March 2011, para. 285; *Saluka Investments BV v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006, para. 305.

¹²⁸ *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24), Award, 30 March 2015, para. 623.

¹²⁹ Ibid., para. 625.

¹³⁰ Ibid., para. 626.

¹³¹ Ibid., para. 634.

¹³² Ibid., paras. 691-735. The majority and the dissent split principally on the question of when the “legitimate expectation” may be created in order for it to be actionable – at the time of investment or later.

to convene a “composition hearing” of Danesita’s creditors, which the investor hoped would allow Danesita to be reorganized rather than liquidated. The tribunal found that under Hungarian law, a debtor has a right to have a composition hearing convened by the court, provided its request is accompanied by the documents required by the Bankruptcy Act, or “deemed necessary”.¹³³ With respect to Danesita’s application, it was “not disputed that the documents required by the Bankruptcy Act were submitted with the request”.¹³⁴ Nevertheless, the court refused the application, and instead ordered Danesita to make supplementary filings, listing seven additional requirements to be fulfilled within fifteen days before a composition hearing could be convened. Danesita did not satisfy the order and was subsequently liquidated in a public sale.

While recognizing that Hungarian law permits a court to require documents “deemed necessary” but not otherwise specifically identified in the Bankruptcy Act, the tribunal undertook to consider each of the seven additional requirements imposed by the Hungarian court. In so doing, the tribunal disclaimed any role as a “court of appeal”, but rather observed that “it might regard the decision to be unfair or inequitable if it found that some of the requirements were *obviously unnecessary or impossible to satisfy, or in breach of a fundamental right*”.¹³⁵ Applying this standard, the tribunal concluded variously of the individual additional requirements that “it defeats common sense”, “appears almost impossible to satisfy within 15 days”, demonstrates “a lack of understanding by the Court” of key underlying facts, and “is more than surprising”.¹³⁶ While the tribunal accepted that it was impossible to know whether a reorganization of Danesita would have been possible had the composition hearing been convened, it concluded that “the chance of a successful composition hearing [...] was destroyed by the Bankruptcy Court’s decision to refuse to convene a hearing within 60 days, as required by the law”.¹³⁷ The tribunal held that a denial of justice had been committed because “[t]he decision of the Metropolitan Court of Budapest does shock a sense of juridical propriety”.¹³⁸ In reaching this finding, the tribunal relied on a long line of arbitral decisions and a decision of the International Court of Justice, which defined denial of justice as “a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety”.

Unreasonable interference with the management, maintenance, use, enjoyment and disposal of the investment

In *Belokon v. Kyrgyzstan* (the award was rendered in 2014 but became public in late 2015), the Kyrgyz bank in which the claimant had invested was made subject to a “temporary administration” decree by the Kyrgyz central bank. Under the decree, an administrator was appointed to “assume the authority of the Board of Directors and of the Executive Boards of the Bank”.¹³⁹ In response, the former bank managers applied to the Kyrgyz courts to challenge the imposition of the temporary administration. Their application was rejected at all levels of the Kyrgyz judicial system on the grounds that only the temporary administrator could challenge the order of the central bank which had imposed the temporary administration regime.¹⁴⁰ While there appeared to be no question that the Kyrgyz courts had properly and in good faith interpreted the relevant Kyrgyz law, the tribunal concluded that the Kyrgyz law violated the Kyrgyzstan-Latvia BIT: “This

¹³³ *Dan Cake (Portugal) S.A. v. Hungary* (ICSID Case No. ARB/12/9), Decision on Jurisdiction and Liability, 24 August 2015, para. 94.

¹³⁴ *Ibid.*, para. 98.

¹³⁵ *Ibid.*, para. 117 (emphasis in original).

¹³⁶ *Ibid.*, paras. 119, 124, 129 and 132.

¹³⁷ *Ibid.*, para. 142.

¹³⁸ *Ibid.*, para. 146.

¹³⁹ *Valeri Belokon v. Kyrgyz Republic* (UNCITRAL), Award, 24 October 2014, para. 71.

¹⁴⁰ *Ibid.*, paras. 101-104.

is an unreasonable limitation on an investment. For a state to be able to seize control of a foreign investment and provide no remedy for access to the courts to challenge that seizure is a violation of Article 2(3) of the BIT.”¹⁴¹

In defence to the claim, the Kyrgyz Republic had argued that the claimant individually, as the (sole) shareholder of the bank could have challenged the decree in the Kyrgyz courts but failed to do so. The tribunal rejected this defence in a sentence: “[A] corporate entity must be entitled to have its day in court; it is no answer to say that one of its shareholders (even a 100% shareholder) may raise the entity’s grievance on his own behalf as an indirectly affected person.”¹⁴²

National treatment and comparators in “like circumstances”

In *Clayton/Bilcon v. Canada*, the claimants contended that they received less favourable treatment than that accorded to Canadian investors “in like circumstances”. The claimants’ project to operate a quarry and marine terminal in the Canadian province of Nova Scotia had been rejected by the government as a result of an environmental assessment process. The claimants argued that their project was subjected to a stricter standard of review that had “never [been] used except with respect to projects of far greater risk or magnitude”.¹⁴³ Clayton/Bilcon identified a number of other projects involving quarries and marine terminals in ecologically sensitive zones to serve as comparators. Canada, however, suggested that the possible comparators should be limited to those that were subject to a joint federal Canada-provincial review panel and faced significant local community opposition (as did the Clayton/Bilcon project).¹⁴⁴

The tribunal disagreed with the respondent’s “narrow range of possible comparators”, stating that the phrase “like circumstances” in NAFTA Article 1102 (National Treatment) was not “restricted as it is in some other trade-liberalizing agreements, such as those that refer to ‘like products’”.¹⁴⁵ The tribunal ultimately found that in three cases domestic investors were accorded more favourable treatment and it was “unable to discern any justification for the differential and adverse treatment accorded to [the claimants]”.¹⁴⁶

Umbrella clause and its relation to domestic laws

In *Khan Resources v. Mongolia*, the tribunal considered the umbrella clause of the ECT, which requires the Contracting States to observe “any obligations” entered into with a covered investor/investment. The tribunal considered whether the umbrella clause covered statutory obligations of the host State, and more specifically Mongolia’s obligations laid down in its Foreign Investment Law. Without in-depth analysis, the tribunal held that “a breach by Mongolia of any provision of the Foreign Investment Law would constitute a breach” of the ECT’s umbrella clause.¹⁴⁷ Subsequently, having found that Mongolia’s actions breached the Foreign Investment Law, the tribunal ruled that the same conduct breached the ECT’s umbrella clause.

¹⁴¹ Ibid., para. 264.

¹⁴² Ibid., para. 265.

¹⁴³ *Clayton and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL, PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015, para. 16.

¹⁴⁴ Ibid., paras. 685-690.

¹⁴⁵ Ibid., paras. 691-692.

¹⁴⁶ Ibid., para. 724.

¹⁴⁷ *Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd.* (UNCITRAL, PCA Case No. 2011-09), Award on the Merits, 2 March 2015, para. 295, citing its Decision on Jurisdiction, 25 July 2012 (became public in 2015), para. 438.

The role of an offer of compensation in determining whether an expropriation is lawful or unlawful

In *Tidewater v. Venezuela*, the tribunal considered the legal effects of a number of statutory measures adopted by Venezuela with respect to the claimant's investment in marine support services to the Venezuelan oil industry. Under the statutes, Venezuela brought into public ownership all of the ships and marine terminals in Venezuela owned by the claimant's subsidiary, SEMARCA. The claimant proceeded under the Barbados-Venezuela BIT, alleging that Venezuela had not only directly expropriated SEMARCA's assets but had indirectly expropriated its shares in SEMARCA. Further, the claimant alleged that the expropriations were illegal on the grounds that the compensation offered for SEMARCA's assets did not satisfy the "market value" requirement of Article 5 of the Barbados-Venezuela BIT and that Venezuela had failed to offer the claimant any compensation for its shares in SEMARCA. The tribunal rejected the claimant's arguments. Citing the decision of the Permanent Court of International Justice (PCIJ) in *Chorzów Factory* for the proposition that "illegality must stem from a circumstance beyond the mere absence of compensation",¹⁴⁸ the tribunal concluded that in claims arising under investment treaties "[a]n expropriation only wanting fair compensation has to be considered as a provisionally lawful expropriation, precisely because the tribunal dealing with the case will determine and award such compensation".¹⁴⁹

In contrast, in *Quiborax v. Bolivia*, the majority took the opposite view. In that case, the tribunal determined that Bolivia had caused a direct expropriation of the claimant's investment when it revoked a mining concession. Since Bolivia had not accepted that the revocation constituted an expropriation at the time it took the measures, the State had made no offer of compensation to the investor as required for a lawful expropriation under Article IV(1) of the Bolivia-Chile BIT. As a result, the majority concluded that "the expropriation also fails to meet this requirement for legality".¹⁵⁰ The dissenting arbitrator, however, relying on *Tidewater v. Venezuela*¹⁵¹ and other cases,¹⁵² disagreed with the proposition that expropriations might be treated as "unlawful" solely for the lack of compensation at the time of the expropriation.¹⁵³

Indirect expropriation and the extent of effects on the investment

In *Mamidoil v. Albania*, the claimant alleged that a series of measures taken by the State over a period of ten years was equivalent or tantamount to an expropriation under the ECT and the Albania-Greece BIT because they left the operation of the investment "completely uneconomical".¹⁵⁴ The tribunal noted the high threshold required to establish a claim of indirect expropriation, quoting the tribunal in *Santa Elena v. Costa Rica* for the principle that the claimant must

¹⁴⁸ *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Award, 13 March 2015, para. 130.

¹⁴⁹ *Ibid.*, para. 141. See further *Valeri Belokon v. Kyrgyz Republic* (UNCITRAL), Award, 24 October 2014, para. 214 (finding that in a case of indirect expropriation the treaty provision requiring "adequate compensation" for a lawful expropriation is inapplicable).

¹⁵⁰ *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award, 16 September 2015, para. 255.

¹⁵¹ *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Award, 13 March 2015, para. 146.

¹⁵² *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Award, 9 October 2014, para. 301; *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), Decision on Jurisdiction and Merits, 3 September 2013, para. 342.

¹⁵³ *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Partially Dissenting Opinion (Award, 16 September 2015), paras. 10-12.

¹⁵⁴ *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24), Award, 30 March 2015, para. 559.

establish that it “has truly lost all the attributes of ownership”,¹⁵⁵ and not simply to have incurred a loss of value as such.¹⁵⁶ In the case at hand, even though one of Albania’s challenged measures – closing the port on which claimant relied to land petroleum – had a drastic effect on the economic viability of claimant’s investment, the tribunal concluded that it did not rise to the level equivalent to an expropriation:

“The result of the measure was not Claimant’s loss of any of the attributes of its property over the investment. Claimant remained entitled to continue to use, possess, control, and dispose of the property. It is not the Tribunal’s task to evaluate business opportunities but to determine whether the dramatic losses of benefit are caused by the loss of one or all elements which constitute the essence of property”.¹⁵⁷

Expropriation for a “public purpose”

In *Belokon v. Kyrgyzstan*, the State was held liable for, *inter alia*, the indirect expropriation of the claimant’s investment in a bank in the Kyrgyz Republic. Following a “regime change” in April 2010, the State undertook a number of measures over the next two years directed towards the bank, its officers, and the claimant individually. As a result of these measures the bank was initially placed into temporary administration, its assets were seized, and ultimately it was placed into an indefinite “sequestration regime”. In addition, a number of the bank’s officers and the claimant individually were subject to more than four years of ongoing criminal investigations and attempted prosecution for money laundering and other violations of Kyrgyz law. Reviewing the claimant’s claim for indirect expropriation under the Kyrgyzstan-Latvia BIT, the tribunal concluded that notwithstanding the State’s acknowledged power to exercise its sovereign “police powers” to protect its banking system,¹⁵⁸ there appeared to be little legitimate public purpose to the measures. Instead, the tribunal concluded that the measures appeared to have been motivated by “suspicions of wrongdoing on account of a connection between the Claimant and the [former] regime”.¹⁵⁹ As a consequence, “[w]hile the initial imposition of the temporary administration regime in mid-April 2010 may have been undertaken for a public purpose”,¹⁶⁰ given the uncertainty surrounding the change of regime, once that administration was in place, the way in which it administered the bank suggested that the State was not acting “in the interests of the public but to promote the narrower interests of the government in obtaining by seizure of [the bank] what could not otherwise be achieved under the law”.¹⁶¹ As a result, the Kyrgyz measures did not meet the “public purpose” requirement for a lawful expropriation under Article 5 of the BIT.¹⁶²

¹⁵⁵ Ibid., para. 566 (quoting *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award, 17 February 2000, para. 76).

¹⁵⁶ Ibid., para. 570. The tribunal also cited and concurred with *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Award, 31 October 2011, para. 245 and *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary* (ICSID Case No. ARB/07/22), Award, 23 September 2010, para. 14.3.1. See *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24), Award, 30 March 2015, paras. 566-567.

¹⁵⁷ *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24), Award, 30 March 2015, para. 579.

¹⁵⁸ *Valeri Belokon v. Kyrgyz Republic* (UNCITRAL), Award, 24 October 2014, paras. 192-193.

¹⁵⁹ Ibid., para. 211.

¹⁶⁰ Ibid.

¹⁶¹ Ibid., para. 212.

¹⁶² As discussed in part C, this finding did not affect the manner in which the tribunal approached the quantum of compensation due to the claimant.

“Public purpose” and “discrimination” in the expropriation analysis

In *Quiborax v. Bolivia*, the tribunal held that whether or not an expropriation had been taken for a legitimate public purpose was not relevant to the determination of whether the expropriation was nonetheless unlawful on grounds of discrimination. In that case, Bolivia had effected an expropriation through the revocation of a mining concession for the Gran Salar de Uyuni Fiscal Reserve, the world’s largest dry salt flat. While the tribunal “accept[ed] that Bolivia may have had a legitimate interest in protecting the Gran Salar de Uyuni Fiscal Reserve”,¹⁶³ it nonetheless concluded that Bolivia’s decision to revoke the concession (and thereby expropriate the investment) was unlawful. The tribunal reasoned, *inter alia*, that other mining companies had been merely fined for the errors with which the investor was charged.¹⁶⁴ Quoting the tribunal in *Corn Products International v. Mexico*, which was addressing a national treatment claim, the Quiborax tribunal held that “[d]iscrimination does not cease to be discrimination, nor to attract the international liability stemming therefrom, because it is undertaken to achieve a laudable goal or because the achievement of that goal can be described as necessary”.¹⁶⁵

Allegations of criminal activity

In *Belokon v. Kyrgyzstan*, the State argued that the measures it had taken were justified on the grounds that the claimant’s investment, a bank, was engaged in money laundering operations and other criminal activities. In the course of the arbitration, however, the State produced no evidence to substantiate its claims.¹⁶⁶ At the same time, evidence was introduced that the Kyrgyz Supreme Court had twice quashed prosecutorial charges related to the case on the grounds that they lacked sufficient substantiation.¹⁶⁷ The tribunal reflected upon the State’s argument that it should not be required to prove criminal violations in order to justify taking action to combat financial crimes like money laundering. It acknowledged that “suspicion of money laundering alone may be enough to justify interlocutory measures by a host state in order to provide time for a thorough investigation of the allegedly suspicious activities”. The tribunal concluded that “it ultimately remains for the host state to prove that money laundering was actually carried out by the institution in question [...] and that the measures taken were in accordance with its international obligations”.¹⁶⁸

The principle of proportionality

In a number of cases over the past year, parties invoked the principle of proportionality as an element of their pleadings. In *Al Tamimi v. Oman*, the claimant argued that “proportionality” was a part of customary international law and an element of the international minimum standard of treatment found in the Oman-United States FTA. In a non-disputing party submission, the United States strongly disagreed with this view, taking the position that the minimum standard of treatment under customary international law does not include a general obligation of proportionality, and that proportionality itself is not “a

¹⁶³ *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award, 16 September 2015, para. 245.

¹⁶⁴ *Ibid.*, para. 247.

¹⁶⁵ *Ibid.*, para. 253 (quoting *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/1), Decision on Responsibility, 15 January 2008, para. 142).

¹⁶⁶ *Valeri Belokon v. Kyrgyz Republic* (UNCITRAL), Award, 24 October 2014, para. 151.

¹⁶⁷ *Ibid.*, para. 197.

¹⁶⁸ *Ibid.*, para. 161. Putting the matter in terms of a general approach, the tribunal stated: “If the host state, notwithstanding its resources and powers, is unable to discharge the burden of proof before a municipal court, an international tribunal will find itself in a situation where it cannot, in the absence of concrete and decisive evidence, consider identical allegations as proven by the host state. Anything else would fly in the face of any notion of due process.” *Ibid.*, para. 163.

self-standing obligation” in customary international law.¹⁶⁹ The tribunal found it unnecessary to address the issue in order to decide the case.¹⁷⁰

In *Electrabel v. Hungary*, by contrast, the tribunal was willing to adopt the principle of proportionality in connection with the application of Article 10.1 of the ECT and its prohibition of arbitrary treatment. The *Electrabel* tribunal adopted the approaches of other tribunals that “a measure will not be arbitrary if it is reasonably related to a rational policy”. It took the view that “this includes the requirement that the impact of the measure on the investor be proportional to the policy objective sought”.¹⁷¹ The tribunal did not belabour its justification for incorporating a test of proportionality into Article 10.1, but simply footnoted a number of other investment treaty awards decided under different treaties and a decision of the European Court of Human Rights.¹⁷² The test of proportionality, the tribunal observed, “has been developed from certain municipal administrative laws and requires a balancing or weighing exercise so as to ensure that the effects of the intended measure remain proportionate in regard to the affected rights and interests”.¹⁷³ In rejecting *Electrabel’s* claim, the tribunal stated that its role in reviewing the State’s conduct was not that of a court of appeal. However, it said little else with respect to the standard of review that ought to be applied in its test of proportionality.¹⁷⁴

Claims arising out of conduct during the investor-State arbitration

In *Quiborax v. Bolivia*, the claimant sought satisfaction (a declaratory judgment) for actions it alleged Bolivia had taken during the pendency of its investment treaty claims, which the claimant alleged were in violation of the ICSID Convention and Bolivia’s duty to arbitrate in good faith. In particular, the claimant alleged that Bolivia violated Article 47 of the ICSID Convention by refusing to comply with the tribunal’s decision on provisional measures;¹⁷⁵ Article 61 of the ICSID Convention and Regulation 14 of the Administrative and Financial Regulations by failing to pay its share of the advance costs of the arbitration;¹⁷⁶ and additionally its obligation to arbitrate in good faith as a consequence of these actions and, *inter alia*, its initiation of criminal proceedings against various officers of the claimant (after the notice of arbitration had been filed).¹⁷⁷ Although the tribunal held that it had jurisdiction to hear these allegations, it rejected the claimant’s application for relief.

The tribunal accepted that Bolivia was under an obligation to arbitrate in good faith. Pointing to Article X of the Bolivia-Chile BIT, the tribunal held that Bolivia’s agreement with respect to the settlement of investor-State disputes, including the agreement to arbitrate under the ICSID Convention, implied a duty to act in good faith and not to act in a manner that would undermine or frustrate the arbitral process.¹⁷⁸ As to both Article 47 and Article 61 of the ICSID Convention,

¹⁶⁹ *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015, para. 260-261.

¹⁷⁰ *Ibid.*, para. 393.

¹⁷¹ *Electrabel S.A. v. The Republic of Hungary* (ICSID Case No. ARB/07/19), Award, 25 November 2015, para. 179.

¹⁷² *Ibid.*, para. 179, fns. 141 and 142.

¹⁷³ *Ibid.*, para. 180. The tribunal in *Belokon v. Kyrgyzstan* stated that “[t]he Tribunal does not consider that lack of proportionality can be considered in the abstract as a violation of the FET standard but, as it has done in this Award, as an element to be considered when determining whether measures amount to a breach of the FET standard”. *Valeri Belokon v. Kyrgyz Republic* (UNCITRAL), Award, 24 October 2014, para. 254.

¹⁷⁴ *Electrabel S.A. v. The Republic of Hungary* (ICSID Case No. ARB/07/19), Award, 25 November 2015, para. 219.

¹⁷⁵ *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award, 16 September 2015, para. 576.

¹⁷⁶ *Ibid.*, para. 584.

¹⁷⁷ *Ibid.*, para. 587.

¹⁷⁸ *Ibid.*, paras. 590-593.

the tribunal found that Bolivia had breached its obligations but found no absence of good faith. Commenting on Bolivia's argument that it did not believe that the tribunal's interim measures under Article 47 were obligatory because of the article's use of permissive language,¹⁷⁹ the tribunal held that there was no bad faith:

“[G]iven the text of Article 47 and the relatively recent evolution of international law with respect to its interpretation, the Tribunal does not find that [Bolivia's] failure to comply with the Decision on Provisional Measures amounts to a breach of its duty to arbitrate in good faith.”¹⁸⁰

With respect to the violation of Article 61, the tribunal concluded that declaratory relief was unnecessary as the violation could be addressed in the tribunal's order on costs. Finally, as to the criminal proceedings commenced by Bolivia during the pendency of the arbitration, the tribunal refused to treat these as evidence of bad faith. The tribunal cited two reasons for doing so. First, it held that it was unable to conclude “that Bolivia's sole purpose in initiating the criminal proceedings was to frustrate the Claimants' rights in this arbitration”.¹⁸¹ Second, it concluded, regardless of Bolivia's motivations, “the criminal proceedings did not cause actual harm to the Claimants' procedural rights”.¹⁸²

C. Compensation

Unlawful expropriation – valuation date and relevance of ex post information

In *Belokon v. Kyrgyzstan*, the tribunal found that the respondent State acted unlawfully when it indirectly expropriated the claimant's investment in a Kyrgyz bank without any legitimate public purpose. At the damages stage of the proceedings, however, the tribunal rejected the claimant's arguments to set the valuation date as the date of the award (as some other tribunals have done in cases of unlawful expropriation). Instead, the tribunal held that it would use the date of expropriation as the valuation date because it was “evaluating a business which in effect no longer exists” and because of “the way this case has been pleaded”.¹⁸³

By contrast, in *the Quiborax v. Bolivia* case, which also involved an unlawful (discriminatory) expropriation, the tribunal rejected Bolivia's arguments that the valuation date should be the date of expropriation. The tribunal stated in particular:

“[T]he standard of compensation in this case is not the one set forth in Article VI(2) of the BIT [for lawful expropriations], but the full reparation principle under customary international law as enunciated by the PCIJ in *Chorzów* and restated in Article 31 of the ILC Articles, because [the tribunal] is faced with an expropriation that is unlawful not merely because compensation [from Bolivia to the investor] is lacking.”¹⁸⁴

¹⁷⁹ Article 47 of the ICSID Convention provides: “Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.”

¹⁸⁰ *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award, 16 September 2015, para. 583 (noting that “Bolivia may not have been aware of the binding nature of these provisional measures when it failed to comply with them”).

¹⁸¹ *Ibid.*, para. 594.

¹⁸² *Ibid.* The tribunal further rejected the claimant's argument that Bolivia had breached its duty of good faith by challenging the entire tribunal for alleged prejudgment of the case following the interim measures order. *Ibid.*, para. 595.

¹⁸³ *Valeri Belokon v. Kyrgyz Republic* (UNCITRAL), Award, 24 October 2014, para. 309.

¹⁸⁴ *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2),

As a result, the tribunal's majority held, following a wide range of arbitral, judicial and scholarly opinions, that when faced "with an expropriation that is unlawful not merely because compensation is lacking, [the tribunal's] task is to quantify the losses suffered by the claimant on the date of the award" and "what must be repaired is the actual harm done, as opposed to the value of the asset when taken".¹⁸⁵ To this end, the majority concluded:

"[A]ssessing the value of the investment on the date of the award [...] allows the Tribunal to take into consideration ex post data, i.e., information available after the date of the expropriation. Its task is to compensate the Claimants' actual loss on the date of the award. [...] Using actual information is better suited for this purpose than projections based on information available on the date of the expropriation, as it allows to better reflect reality (including market fluctuations) when attempting to 're-establish the situation which would, *in all probability*, have existed if that act had not been committed'."¹⁸⁶

One arbitrator strongly dissented from the majority's reliance on ex post data, describing the approach adopted by the majority as "an ultraminority position".¹⁸⁷ Relying heavily on a close reading of the Permanent Court's judgment in *Chorzów Factory*, the dissent observed that under the Court's test, the goal of reparation is to "re-establish the situation that would *in all probability* have existed in the absence of the illegal act".¹⁸⁸ To the dissenting arbitrator, this meant that the proper approach to reparation must aim to "compensate the consequences of the illegal act of the State, as appreciated at the time of such expropriation, not the consequences of some posterior evolution of prices or evolution of demand or other circumstances".¹⁸⁹

Breach of fair and equitable treatment standard – damages methodology

In the combined decision rendered in *Vivendi v. Argentina (II)* and *AWG v. Argentina*, the tribunal determined the compensation owed to investors as a result of Argentina's breach of the FET standard. The tribunal had found that the initial breach of the relevant BITs had occurred in 2002, when Argentina adopted measures which radically affected the financial equilibrium of a water concession agreement. The concession was subsequently terminated by Argentina in 2006.

Having determined that the claimants were entitled to full compensation as a matter of customary international law, the tribunal held that the quantification of compensation required it to undertake a three-step process:

"First, it must determine the value of the investment in the hypothetical situation where Argentina did not take measures that violated its treaty obligations [...]. Second, it must then determine the value of the investment as a result of the offending measures that Argentina did take [...]. Third, the Tribunal must subtract the second value from the first and then actualize that amount by means of an appropriate interest rate to arrive at the damages owing to the Claimants so as to put them in the financial position they would have been had Argentina not breached the applicable BITs."¹⁹⁰

Award, 16 September 2015, para. 370.

¹⁸⁵ Ibid., para. 377.

¹⁸⁶ Ibid., para. 379.

¹⁸⁷ *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Partially Dissenting Opinion (Award, 16 September 2015), para. 44.

¹⁸⁸ Ibid., para. 30 (emphasis in original).

¹⁸⁹ Ibid., para. 40 (emphasis omitted).

¹⁹⁰ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas*

In determining the hypothetical value required by the first step, the question was whether the period for projecting cash flows should run from the date of the breach in 2002 until the termination of the concession in 2006 or until 2023, the date of the concession's expiration according to original terms. The tribunal rejected Argentina's argument for the earlier date stating that this would "seriously undervalue the investments". While the tribunal agreed with Argentina "that the risk of termination was always present in the Concession", it held that "that risk, along with other risks, would be accounted for in the rate applied to discount to present value the remaining twenty-one years of projected cash flows".¹⁹¹

Establishing compensable harm – burden and standard of proof

In *Mobil Investments v. Canada (I)*, the majority addressed the quantification of claimants' successful claim against Canada for a violation of Article 1106 (Performance Requirements) of the NAFTA. At issue was whether certain expenditures incurred by claimants in connection with their investment were compensable as damages. In addressing the issue, the majority reiterated its previous holding from the liability phase that the claimants bore the burden of proof to show that each contested expenditure was compensable under its liability decision.¹⁹² The majority also reiterated that because its conclusions with respect to the compensability of the expenditures were dependent upon determining how claimants would have acted in the event that Canada had not violated the NAFTA, "the relevant standard of proof is 'reasonable certainty,' not 'absolute certainty'".¹⁹³ Faced with considerable evidentiary difficulties at the quantum stage, the claimants argued that under customary international law uncertainty in the record should be construed against the wrongdoer, Canada. While sympathetic to the difficulties raised by the required valuation exercise, the tribunal rejected the claimants' argument, finding that the references relied upon by the claimants provided an insufficient basis on which to establish a rule of international law.¹⁹⁴

"Country risk" in discounted cash flow analysis

In *Tidewater v. Venezuela*, the tribunal held that certain measures enacted by Venezuela had resulted in an indirect expropriation of the claimants' business of providing maritime support services to various Venezuelan state oil companies. The tribunal considered that a discounted cash flow (DCF) analysis was the most appropriate methodology for determining compensation. A key issue for the tribunal was the matter of "country risk", i.e. "the risk of investing in a particular country, here Venezuela".¹⁹⁵ From the State's perspective, any commercial valuation of claimants' investment should take into account "the general risk of government intervention that has always accompanied the investment activities

Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (ICSID Case No. ARB/03/19), Award, 9 April 2015, para. 28.

¹⁹¹ *Ibid.*, para. 36.

¹⁹² *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4), Award, 20 February 2015, para. 52.

¹⁹³ *Ibid.*, para. 52. Similarly, in the combined decision rendered in *Vivendi v. Argentina (II)* and *AWG v. Argentina*, where the tribunal had constructed a hypothetical "but-for" scenario to determine "what would the Claimants' investments be worth by the year 2023 if Argentina had not violated the BITs", the tribunal held that international law "does not demand absolute certainty" in valuing damages but only requires to determine the value that "in all probability" would have existed had the State not violated its international obligations. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic* (ICSID Case No. ARB/03/19) and *AWG Group Ltd. v. The Argentine Republic* (UNCITRAL), Award, 9 April 2015, para. 30.

¹⁹⁴ *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4), Award, 20 February 2015, para. 53.

¹⁹⁵ *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Award, 13 March 2015, para. 182.

in Venezuela, including the risk that the government would reserve a certain sector of activity to the State”.¹⁹⁶ The claimants, on the other hand, argued that concerns about the impact of “certain Venezuelan government policies, such as its nationalisation agenda, which heightened the level of legal, regulatory and political risk” should be excluded from valuation because of the protection against uncompensated expropriation provided in the BIT.¹⁹⁷ As a result of the differences in approaches, the State proposed a country risk discount rate of 14.75 per cent for the valuation of the claimants’ investment. The claimants, in contrast, proposed a significantly lower discount rate of 1.5 per cent overall.

The tribunal rejected the claimants’ limited approach to country risk. It explained its decision by noting that although the BIT provided protection against uncompensated expropriation, it did not prohibit all State taking of private property. Rather, under the BIT, once it had been established that an expropriation had taken place, it fell to the tribunal to determine the “market value” of the investment, an inquiry the tribunal characterized as “in essence an economic question” which “depends upon the value that the market would attribute to the investment in question”.¹⁹⁸ Relying on the concept of what a “willing buyer” of the investment would pay a “willing seller” in the circumstances, the tribunal concluded that “[i]n determining this value, one element that a buyer would consider is the risk associated with investing in a particular country”.¹⁹⁹

Compound v. simple interest

In the combined decision rendered in *Vivendi v. Argentina (II)* and *AWG v. Argentina*, the tribunal provided a three-point articulation of the “strong reasons, both economic and legal”, which it found justified the choice of compound interest calculation over simple interest. First, because the customary international law goal of full compensation seeks to place the injured party in the position that such party would have been if the injury had never taken place, “[c]ompound interest is more effective at achieving that result than is simple interest”.²⁰⁰ Second, there is a trend in favour of applying compound interest in damages calculations among international tribunals.²⁰¹ Third, the use of compound interest “is standard practice in business and finance when calculating financial returns and losses [...] because financial and economic experts believe it more accurately reflects economic reality than simple interest”.²⁰²

In *Quiborax v. Bolivia*, the respondent State objected to the tribunal’s application of compound interest on the ground that Bolivian law required simple interest. The tribunal rejected the argument, concluding that “[r]eparation for expropriation is governed by international law and full reparation includes interest for late payment”. It added: “The application of national law may be appropriate for contract claims, but not for a claim of breaches of the BIT.”²⁰³

¹⁹⁶ Ibid., para. 76.

¹⁹⁷ Ibid., para. 73.

¹⁹⁸ Ibid., para. 185.

¹⁹⁹ Ibid., para. 186. The tribunal adopted the respondent State’s proposed discount rate of 14.75 per cent, calling it “a reasonable, indeed conservative, premium”. Ibid., para. 190.

²⁰⁰ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic* (ICSID Case No. ARB/03/19), Award, 9 April 2015, para. 65.

²⁰¹ Ibid., para. 65 (citing *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Award, 27 November 2013).

²⁰² Ibid., para. 65.

²⁰³ *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award, 16 September 2015, paras. 520, 521 (citing *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008).

D. Costs

Allocation of costs – UNCITRAL Rules (1976)

In *AWG v. Argentina*, the claimant relied on Article 40(1) of the UNCITRAL Arbitration Rules (1976) to seek the costs of the arbitration from Argentina, against which it had successfully brought a claim for breach of the FET standard of the Argentina-United Kingdom BIT.²⁰⁴ The tribunal rejected the application. Although the claimant had been successful on its FET claim, two of its claims had failed and the claimant had recovered far less than it originally claimed. Moreover, the tribunal noted that the case “generated novel and complex procedural issues” and “while the pleadings on record in this case are vast, counsel for both parties conducted themselves according to the highest professional standards”. It further noted: “Certainly it would have been difficult, if not impossible, for a reasonable party to have predicted the potential success of claims arising out of the complex facts of the Argentine crisis in this case, let alone the precise amount of compensation that should be awarded.”²⁰⁵ As a result, the tribunal concluded that there was sufficient reason to depart from the general principle articulated in Article 40(1) and to order the claimant and Argentina each to bear their own costs and share appropriately in the administrative expenses of the proceeding.²⁰⁶

A rather more cursory approach was taken in *Belokon v. Kyrgyzstan*. There, the claimant had been successful on its claims for indirect expropriation, violation of FET and manifestly arbitrary treatment in connection with its investment in a Kyrgyz bank, and the tribunal had valued compensation at approximately US\$15 million. Relying on Article 40(1), the claimant sought recovery of its legal costs of approximately €2 million. The tribunal refused to make an order for full costs. Rather, the tribunal noted that the claimant had not prevailed on some claims and had not recovered the full amount it had sought. It further added, in apparent reference to the €2 million amount, that “the Tribunal is conscious that the reasonability of fees includes a measure of proportionality”.²⁰⁷ As a result, the tribunal held that it would be “just and proper that the Respondent contribute to 50% of the Claimant’s costs of presenting its case”.²⁰⁸

Allocation of costs – ICSID Rules

In *Vivendi v. Argentina (II)*, the companion case to *AWG v. Argentina* (but the former being decided under the ICSID Convention), the tribunal began by contrasting its discretion to award costs under the ICSID Convention with its discretion under the UNCITRAL Arbitration Rules: “Article 61(2) of the ICSID Convention gives the Tribunal greater discretion in the allocation of costs than does Article 40(1) of the UNCITRAL Arbitration Rules.”²⁰⁹ That said, the tribunal observed that among ICSID tribunals, the practice on allocation of costs “is by no means settled”, even though “historically the position taken by the majority

²⁰⁴ Article 40(1) states: “[...] the costs of the arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.”

²⁰⁵ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A.), Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic* (ICSID Case No. ARB/03/19), Award, 9 April 2015, para. 113.

²⁰⁶ *Ibid.*, para. 113.

²⁰⁷ *Valeri Belokon v. Kyrgyz Republic* (UNCITRAL), Award, 24 October 2014, para. 333. With respect to whether the claimant’s legal fees (approximately €2 million) were proportionate in light of the size of its recovery (approximately US\$15 million), it is notable that the tribunal did not question whether its fees (€500,000) were proportionate by the same measure.

²⁰⁸ *Ibid.*, para. 333.

²⁰⁹ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A.), Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic* (ICSID Case No. ARB/03/19), Award, 9 April 2015, para. 115.

of ICSID awards is that each side is to pay its own costs”.²¹⁰ In the cases at hand, the tribunal decided not to award costs, either legal or arbitral. In its view, although the claimants had been successful on some of their claims, the cases had raised “both legal and factual issues of great complexity”.²¹¹ Moreover, the tribunal indicated a disinclination to award costs in light of “the great discrepancy between the substantial costs incurred by the Claimants and the relatively more modest costs of the Respondent”.²¹²

By contrast, in *Awdi v. Romania*, while the tribunal noted the “complexity of the case and the sensitivity of many of the issues involved”, it chose to impose a partial costs order on the respondent State, even though the claimant had failed on most of its claims and had recovered only a small fraction of the amount it had originally claimed: approximately €7.7 million (approx. \$8.6 million) recovered against more than €300 million originally claimed.²¹³ The tribunal justified its decision on the grounds that “the outcome of the case has been to some extent in Claimants’ favour, the Tribunal having rejected Respondent’s jurisdictional and admissibility objections” and the claimant having achieved some recovery on the merits.²¹⁴ As a result, the respondent State was ordered to pay US\$1 million of the claimants’ legal fees.²¹⁵

In *Al Tamimi v. Oman* the tribunal issued a partial costs award in favour of the respondent State, shifting 75 per cent of the respondent’s legal and arbitral costs to the claimant. In exercising its discretion, the tribunal noted that (a) all of claimant’s claims had been dismissed, (b) “it should have been clear” to the claimant prior to commencing proceedings that certain provisions of the Oman-United States FTA posed “serious barriers to the overall viability” of his case, and (c) the evidence showed that the claimant largely had been “the author of his own misfortune through his wilful disregard of Oman’s environmental laws”.²¹⁶ The respondent State was not awarded full costs, it seems, because an earlier challenge it had made to the claimant’s nationality to raise claims under the FTA was “vaguely and equivocally articulated, and ultimately unsuccessful” and it had also made an unsuccessful challenge to the tribunal’s jurisdiction *ratione temporis*.²¹⁷

In *Electrabel v. Hungary* the tribunal refused to issue an award for legal costs in favour of the successful respondent State, although it did require the unsuccessful claimant to bear the costs of the arbitration.²¹⁸ The tribunal noted that while the State had prevailed in all respects on the merits, factual developments occurring subsequent to the filing of the claim (for which neither side bore responsibility), together with the involvement of an *amicus curiae* (the European Commission) which acted as “a second respondent more hostile to *Electrabel* than Hungary itself”, had served to complicate the proceedings to an extent which made it equitable in the tribunal’s discretion for the parties to bear their own legal costs.²¹⁹

²¹⁰ Ibid., para. 115.

²¹¹ Ibid.

²¹² Ibid.

²¹³ *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania* (ICSID Case No. ARB/10/13), Award, 2 March 2015, para. 529.

²¹⁴ Ibid., para. 530.

²¹⁵ Ibid., para. 531. The Claimant had alleged total legal fees of approximately €2.37 million, US\$1.32 million. Ibid., para. 524.

²¹⁶ *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015, para. 474.

²¹⁷ Ibid., para. 478. Also, in *Guardian Fiduciary Trust v. Macedonia*, the tribunal ordered the claimant to reimburse 80 per cent of the respondent State’s fees and expenses (*Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan, Ltd v. Macedonia, former Yugoslav Republic of* (ICSID Case No. ARB/12/31), Award, 22 September 2015, para. 151).

²¹⁸ *Electrabel S.A. v. The Republic of Hungary* (ICSID Case No. ARB/07/19), Award, 25 November 2015, para. 236.

²¹⁹ Ibid., paras. 233-234. The tribunal also acknowledged its own culpability in complicating the

In *Tidewater v. Venezuela*, the tribunal made a partial costs award in claimants' favour (approximately 33 per cent). Although the claimants had been successful on their expropriation claim, they had unsuccessfully argued that the expropriation had been unlawful. The tribunal concluded that this had "result[ed] in significant wasted costs in the evidentiary phase" and therefore refused to award the claimants full costs.²²⁰

In *Mobil Investments v. Canada (I)* (under the ICSID Additional Facility Rules), the tribunal determined that the "novel and complex issues" raised in the case justified not awarding costs.²²¹

E. Other issues

State counterclaims

In *Perenco v. Ecuador*, the tribunal issued a separate detailed decision on Ecuador's counterclaim.²²² In this case, filed in 2008 under the Ecuador-France BIT and two concession contracts, the claimant is challenging Ecuador's 99 per cent tax on windfall oil profits. In a decision issued in 2014, the tribunal decided that the tax breached the BIT and the contracts, but postponed the determination on the quantum of damages due to the claimant. The respondent State filed its counterclaim in 2011, alleging that Perenco had caused an "environmental catastrophe" through its operation of oil fields in violation of the contracts and Ecuadorian environmental law, seeking around \$2.5 billion in compensation for remediation activities.

At the outset of its analysis,²²³ the tribunal observed that "a State has wide latitude under international law to prescribe and adjust its environmental laws, standards and policies in response to changing views and a deeper understanding of the risks posed by various activities".²²⁴ In light of the Ecuadorian Constitution's focus on environmental protection, the arbitrators held that "when choosing between certain disputed (but reasonable) interpretations of the Ecuadorian regulatory regime, the interpretation which most favours the protection of the environment is to be preferred".²²⁵ They used this interpretive principle to resolve certain issues posed by Ecuadorian law, holding, for example, that the 4-year statute of limitations does not bar the counterclaim.

While to the tribunal, the available evidence suggested that Perenco's conduct was "very troubling" and did not "paint a picture of a responsible environmental steward",²²⁶ it found itself unable to determine the extent of actual contamination, and ultimately decided to appoint an expert, "solely answerable" to the tribunal, to investigate the matter.²²⁷ In the meantime, the tribunal also invited the parties to attempt negotiating a settlement for the counterclaim.

proceedings through its decision to bifurcate liability and damages in a way that was not ultimately helpful to the resolution of the claim. *Ibid.*, para. 235.

²²⁰ *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Award, 13 March 2015, paras. 215-216.

²²¹ *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4), Award, 20 February 2015, paras. 176-177.

²²² *Perenco Ecuador Limited v. Republic of Ecuador (Petroecuador)* (ICSID Case No. ARB/08/6), Interim Decision on the Environmental Counterclaim, 11 August 2015.

²²³ In contrast to some earlier cases that involved counterclaims, here the claimant did not dispute the tribunal's competence to hear the counterclaim, and the decision does not deal with this issue. However, Perenco did contend that Ecuador's counterclaim was deficient as a matter of law.

²²⁴ *Ibid.*, para. 35.

²²⁵ *Ibid.*, para. 322.

²²⁶ *Ibid.*, para. 447.

²²⁷ *Ibid.*, para. 588. The tribunal criticized party-appointed experts, stating that "each was attempting to achieve the best result for the party by whom they were instructed, and that they crossed the boundary between professional objective analysis and party representation" (*ibid.*, para. 581).

Application for revision of an award upon discovery of previously unknown facts

In *Mobil v. Venezuela*, the tribunal disagreed with the respondent State's argument that an application for a revision of a tribunal's award under Article 51 of the ICSID Convention may be based upon facts that occurred after the issuance of the award.²²⁸ Although the tribunal acknowledged that "Article 51(1) does not expressly require that the discovered fact predate the Award", it concluded that "both the textual implications of the provision as well as its object and purpose confirm that the discovered fact needs to have existed before the Award was rendered".²²⁹ The tribunal also noted the practice of the International Court of Justice of refusing applications for revision based on post-judgment facts.²³⁰

Third-party funding

In a first known decision of this kind, the *Tribunal in Muhammet Çap v. Turkmenistan* ordered the claimants to disclose whether their pending arbitration was being funded by a third-party funder. Specifically, the tribunal ordered to disclose the "names and details of the third-party funder(s), and the nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it/they will share in any successes that Claimants may achieve in this arbitration".²³¹ The tribunal noted that such a disclosure is important to ensure "the integrity of the proceedings" and "to determine whether any of the arbitrators are affected by the existence of third-party funder",²³² referring to a possible conflict of interest. The tribunal also stated that it was "sympathetic to Respondent's concern that if it is successful in this arbitration and a costs order is made in its favour, Claimants will be unable to meet these costs and the third-party funder will have disappeared".²³³

²²⁸ *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Revision, 12 June 2015.

²²⁹ *Ibid.*, para. 3.1.9.

²³⁰ *Ibid.*, paras. 3.1.16-3.1.17.

²³¹ *Muhammet Çap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case No. ARB/12/6), Procedural Order No. 3, 12 June 2015, para. 13.

²³² *Ibid.*, para. 9.

²³³ *Ibid.*, para. 12.

V. Conclusions

With 70 cases initiated in 2015, the number of new treaty-based investor-State arbitrations set an annual record. At the same time, ISDS tribunals rendered decisions in at least 51 ISDS cases, with a variety of outcomes. Publicly available arbitral decisions in 2015 show that on some issues, tribunals followed previous decisions, while on some other issues they adopted approaches that departed from earlier decisions.

The increase in ISDS cases in recent years, together with sometimes inconsistent interpretations of IIA provisions by arbitral tribunals, has raised concerns about the legitimacy of the existing system for settling investor-State disputes. Today, a consensus exists on the need to reform the investment dispute settlement, to tackle challenges related to substantive IIA clauses as well as systemic issues related to the overall IIA regime. UNCTAD's Road Map for IIA Reform and its Investment Policy Framework offer policy options in this regard,²³⁴ and have been used by more than 100 countries when reviewing their investment treaty networks and formulating a new generation of international investment policies.

IIA reform is intensifying and yielding the first concrete results, both with respect to investment dispute settlement and the substantive content of IIAs.²³⁵ Most new IIAs include refined language that aims to preserve the right to regulate while maintaining protection of investors, and to improve investment dispute settlement (with several treaties omitting the international arbitration option altogether).

Several countries and regions are adopting innovative approaches to investment dispute settlement and IIAs. Brazil, for example, has developed a new model BIT focusing on investment promotion and facilitation, dispute prevention and alternatives to arbitration instead of traditional investment protection and ISDS. The country has concluded several Cooperation and Facilitation Agreements on this basis in 2015. In Europe, much policy attention has been given by the European Commission to developing a new approach to investment protection, with a particular emphasis on the right to regulate and the establishment of an investment court system. The EU-Viet Nam FTA (negotiations concluded in December 2015) and the Canada-EU CETA (legal review concluded in February 2016) reflect this new approach.

Developments in Brazil and at the EU level are just two examples; many more countries and regions undertake reform efforts at different levels of policymaking (national, bilateral, regional and multilateral). Significant progress has been achieved in this first phase of IIA reform. Countries have built consensus on the need for reform, identified reform areas and approaches, reviewed their IIA networks, developed new model treaties and started to negotiate new, more modern IIAs.

However, much remains to be done, particularly with regard to the large body of old treaties. The second phase of IIA reform will require countries to intensify collaboration and coordination to address the systemic risks and incoherence of the existing treaty network and its ISDS mechanisms.

²³⁴ UNCTAD (2015). *World Investment Report 2015: Reforming International Investment Governance*. New York and Geneva: United Nations. http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/World_Investment_Report.aspx

²³⁵ UNCTAD (2016, forthcoming). *World Investment Report 2016: Investor Nationality – Policy Challenges*. New York and Geneva: United Nations.

UNCTAD's World Investment Forum 2016 offers the opportunity to discuss how to carry IIA reform forward.²³⁶

²³⁶ <http://unctad-worldinvestmentforum.org/>

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Elisabeth Tuerk leads UNCTAD's IIA programme, under the supervision of Joerg Weber and the overall guidance of James Zhan.

Annex 1. Known treaty-based ISDS cases initiated in 2015

Key information about each case is available at:
<http://investmentpolicyhub.unctad.org/ISDS/FilterByCaseName>

| No. | Case name | Respondent State | Home State of investor | Applicable IIA |
|-----|--|--------------------|--|--|
| 1 | 9REN Holding S.a.r.l v. Kingdom of Spain (ICSID Case No. ARB/15/15) | Spain | Luxembourg | The Energy Charter Treaty |
| 2 | Abed El Jaouni and Imperial Holding SAL v. Lebanese Republic (ICSID Case No. ARB/15/3) | Lebanon | Germany | Germany - Lebanon BIT (1997) |
| 3 | Abertis Infraestructuras, S.A. v. Argentine Republic (ICSID Case No. ARB/15/48) | Argentina | Spain | Argentina - Spain BIT (1991) |
| 4 | Aeroport Belbek LLC and Mr Igor Valerievich Kolomoisky v. The Russian Federation (UNCITRAL, PCA Case No. 2015-07) | Russian Federation | Ukraine | Russian Federation - Ukraine BIT (1998) |
| 5 | Aktau Petrol Ticaret A.S. and Som Petrol Ticaret A.S. v. Republic of Kazakhstan (ICSID Case No. ARB/15/8) | Kazakhstan | Turkey | Kazakhstan - Turkey BIT (1992) |
| 6 | Ali Alyafei v. Hashemite Kingdom of Jordan (ICSID Case No. ARB/15/24) | Jordan | Qatar | Arab Investment Agreement (1980) |
| 7 | Álvarez y Marín Corporación S.A. and others v. Republic of Panama (ICSID Case No. ARB/15/14) | Panama | Costa Rica; Netherlands | Netherlands - Panama BIT (2000); Central America-Panama FTA |
| 8 | Anglia Auto Accessories Ltd v. The Czech Republic (SCC) | Czech Republic | United Kingdom | Czech Republic - United Kingdom BIT (1990) |
| 9 | ArcelorMittal S.A. v. Arab Republic of Egypt (ICSID Case No. ARB/15/47) | Egypt | Luxembourg | BLEU (Belgium-Luxembourg Economic Union) - Egypt BIT (1999) |
| 10 | B.V. Belegging-Maatschappij "Far East" v. Republic of Austria (ICSID Case No. ARB/15/32) | Austria | Malta | Austria - Malta BIT (2002) |
| 11 | B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia (ICSID Case No. ARB/15/5) | Croatia | Netherlands | Croatia - Netherlands BIT (1998) |
| 12 | BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/16) | Spain | Germany | The Energy Charter Treaty |
| 13 | Belenergia S.A. v. Italian Republic (ICSID Case No. ARB/15/40) | Italy | Luxembourg | The Energy Charter Treaty |
| 14 | Cairn Energy PLC v. India (UNCITRAL) | India | United Kingdom | India - United Kingdom BIT (1994) |
| 15 | Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon (ICSID Case No. ARB/15/18) | Cameroon | Luxembourg | The Energy Charter Treaty |
| 16 | Cavalum SGPS, S.A. v. Kingdom of Spain (ICSID Case No. ARB/15/34) | Spain | Portugal | The Energy Charter Treaty |
| 17 | Consortio GLP Ecuador v. Republic of Ecuador (UNCITRAL) | Ecuador | Spain | Ecuador - Spain BIT (1996) |
| 18 | Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya (ICSID Case No. ARB/15/29) | Kenya | United Kingdom | Kenya - United Kingdom BIT (1999) |
| 19 | Cube Infrastructure Fund SICAV and others v. Kingdom of Spain (ICSID Case No. ARB/15/20) | Spain | France; Luxembourg | The Energy Charter Treaty |
| 20 | Dawood Rawat v. Republic of Mauritius (UNCITRAL) | Mauritius | France | France - Mauritius BIT (1973) |
| 21 | Devincci Salah Hourani and Issam Salah Hourani v. Republic of Kazakhstan (ICSID Case No. ARB/15/13) | Kazakhstan | United Kingdom; United States of America | Kazakhstan - United Kingdom BIT (1995); Kazakhstan - United States of America BIT (1992) |
| 22 | E.ON SE, E.ON Finanzanlagen GmbH and E.ON Iberia Holding GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/35) | Spain | Germany | The Energy Charter Treaty |

| No. | Case name | Respondent State | Home State of investor | Applicable IIA |
|-----|---|--------------------|-----------------------------|--|
| 23 | ENERGO-PRO a.s. v. Republic of Bulgaria (ICSID Case No. ARB/15/19) | Bulgaria | Czech Republic | The Energy Charter Treaty; Bulgaria - Czech Republic BIT (1999) |
| 24 | Eskosol S.p.A. in liquidazione v. Italian Republic (ICSID Case No. ARB/15/50) | Italy | Belgium | The Energy Charter Treaty |
| 25 | Everest Estate LLC and others v. The Russian Federation (UNCITRAL, PCA Case No. AA577) | Russian Federation | Ukraine | Russian Federation - Ukraine BIT (1998) |
| 26 | Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania (ICSID Case No. ARB/15/31) | Romania | Canada; United Kingdom | Canada - Romania BIT (2009); Romania - United Kingdom BIT (1995) |
| 27 | Gilward Investments B.V. v. Ukraine (ICSID Case No. ARB/15/33) | Ukraine | Netherlands | Netherlands - Ukraine BIT (1994) |
| 28 | Greentech Energy Systems and Novenergia v. Italy (SCC) | Italy | Denmark; Luxembourg | The Energy Charter Treaty |
| 29 | Hanocal Holding B.V. and IPIC International B.V. v. Republic of Korea (ICSID Case No. ARB/15/17) | Korea, Republic of | Netherlands | Korea, Republic of - Netherlands BIT (2003) |
| 30 | Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain (ICSID Case No. ARB/15/42) | Spain | Luxembourg; Sweden | The Energy Charter Treaty |
| 31 | Hydro S.r.l. and others v. Republic of Albania (ICSID Case No. ARB/15/28) | Albania | Italy | Albania - Italy BIT (1991) |
| 32 | ICS Inspection and Control Services Limited v. The Argentine Republic (II) (UNCITRAL) | Argentina | United Kingdom | Argentina - United Kingdom BIT (1990) |
| 33 | Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia (UNCITRAL) | Indonesia | India | India - Indonesia BIT (1999) |
| 34 | J.P. Busta and I.P. Busta v. The Czech Republic (SCC) | Czech Republic | United Kingdom | Czech Republic - United Kingdom BIT (1990) |
| 35 | JGC Corporation v. Kingdom of Spain (ICSID Case No. ARB/15/27) | Spain | Japan | The Energy Charter Treaty |
| 36 | JKX Oil & Gas plc, Poltava Gas B.V. and Poltava Petroleum Company v. Ukraine (UNCITRAL) | Ukraine | United Kingdom; Netherlands | Ukraine - United Kingdom BIT (1993); Netherlands - Ukraine BIT (1994); The Energy Charter Treaty |
| 37 | Kontinental Conseil Ingénierie v. Gabonese Republic (UNCITRAL) | Gabon | Tunisia | OIC Investment Agreement (1981) |
| 38 | KS Invest GmbH and TLS Invest GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/25) | Spain | Germany | The Energy Charter Treaty |
| 39 | Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain (ICSID Case No. ARB/15/45) | Spain | Germany | The Energy Charter Treaty |
| 40 | Limited Liability Company Lugzor and others v. The Russian Federation (UNCITRAL, PCA Case No. 2015-29) | Russian Federation | Ukraine | Russian Federation - Ukraine BIT (1998) |
| 41 | Lion Mexico Consolidated L.P. v. United Mexican States (ICSID Case No. ARB(AF)/15/2) | Mexico | Canada | NAFTA |
| 42 | Litpop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine (SCC) | Ukraine | Cyprus | The Energy Charter Treaty |
| 43 | Mathias Kruck and others v. Kingdom of Spain (ICSID Case No. ARB/15/23) | Spain | Germany | The Energy Charter Treaty |
| 44 | Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal (ICSID Case No. ARB/15/21) | Senegal | United Kingdom; Netherlands | Netherlands - Senegal BIT (1979); Senegal - United Kingdom BIT (1980) |
| 45 | Mobil Investments Canada Inc. v. Canada (ICSID Case No. ARB/15/6) | Canada | United States of America | NAFTA |
| 46 | Mohammad Reza Dayyani and others v. Republic of Korea (UNCITRAL) | Korea, Republic of | Iran, Islamic Republic of | Iran, Islamic Republic of - Korea, Republic of BIT (1998) |
| 47 | Nabucco Gas Pipeline International GmbH in Liqu. v. Republic of Turkey (ICSID Case No. ARB/15/26) | Turkey | Austria | Austria - Turkey BIT (1988) |

| No. | Case name | Respondent State | Home State of investor | Applicable IIA |
|-----|--|---------------------------------|--------------------------------|--|
| 48 | OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain (ICSID Case No. ARB/15/36) | Spain | Malta; Switzerland | The Energy Charter Treaty |
| 49 | Orange SA v. Hashemite Kingdom of Jordan (ICSID Case No. ARB/15/10) | Jordan | France | France - Jordan BIT (1978) |
| 50 | Paz Holdings Ltd. v. Plurinational State of Bolivia (UNCITRAL) | Bolivia, Plurinational State of | United Kingdom | Bolivia, Plurinational State of - United Kingdom BIT (1988) |
| 51 | PJSC Ukrnafta v. The Russian Federation (UNCITRAL, PCA Case No. 2015-34) | Russian Federation | Ukraine | Russian Federation - Ukraine BIT (1998) |
| 52 | Privatbank and Finance Company Finilion LLC v. The Russian Federation (UNCITRAL, PCA Case No. AA568) | Russian Federation | Ukraine | Russian Federation - Ukraine BIT (1998) |
| 53 | PT Ventures, SGPS, S.A. v. Republic of Cabo Verde (ICSID Case No. ARB/15/12) | Cabo Verde | Portugal | Cabo Verde - Portugal BIT (1990) |
| 54 | Resolute Forest Products Inc. v. Canada | Canada | United States of America | NAFTA |
| 55 | Salini Impregilo S.p.A. v. Argentine Republic (ICSID Case No. ARB/15/39) | Argentina | Italy | Argentina - Italy BIT (1990) |
| 56 | Samsung Engineering Co., Ltd. v. Sultanate of Oman (ICSID Case No. ARB/15/30) | Oman | Korea, Republic of | Korea, Republic of - Oman BIT (2003) |
| 57 | Sergei Viktorovich Pugachev v. The Russian Federation (UNCITRAL) | Russian Federation | France | France - Russian Federation BIT (1989) |
| 58 | Shanara Maritime International, S.A. and Marfield Ltd. Inc. v. United Mexican States | Mexico | Panama | Mexico - Panama BIT (2005) |
| 59 | Silver Ridge Power BV v. Italian Republic (ICSID Case No. ARB/15/37) | Italy | Netherlands | The Energy Charter Treaty |
| 60 | SoIEs Badajoz GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/38) | Spain | Germany | The Energy Charter Treaty |
| 61 | Stabil LLC and others v. The Russian Federation (UNCITRAL, PCA Case No. 2015-35) | Russian Federation | Ukraine | Russian Federation - Ukraine BIT (1998) |
| 62 | Stadtwerke München GmbH and others v. Kingdom of Spain (ICSID Case No. ARB/15/1) | Spain | Germany | The Energy Charter Treaty |
| 63 | Stans Energy Corp. and Kutsay Mining LLC v. Kyrgyz Republic (II) (UNCITRAL, PCA Case No. 2015-32) | Kyrgyzstan | Canada | CIS Investor Rights Convention (1997) |
| 64 | State General Reserve Fund of the Sultanate of Oman v. Republic of Bulgaria (ICSID Case No. ARB/15/43) | Bulgaria | Oman | Bulgaria - Oman BIT (2007) |
| 65 | STEAG GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/4) | Spain | Germany | The Energy Charter Treaty |
| 66 | Strabag SE v. Libya (ICSID Case No. ARB(AF)/15/1) | Libya | Austria | Austria - Libya BIT (2002) |
| 67 | Theodoros Adamakopoulos and others v. Republic of Cyprus (ICSID Case No. ARB/15/49) | Cyprus | Greece; Luxembourg | Cyprus - Greece BIT (1992); BLEU (Belgium-Luxembourg Economic Union) - Cyprus BIT (1991) |
| 68 | Total E&P Uganda BV v. Republic of Uganda (ICSID Case No. ARB/15/11) | Uganda | Netherlands | Netherlands - Uganda BIT (2000) |
| 69 | Watkins Holdings S.à r.l. and others v. Kingdom of Spain (ICSID Case No. ARB/15/44) | Spain | Luxembourg; Netherlands; Spain | The Energy Charter Treaty |
| 70 | WCV Capital Ventures Cyprus Limited and Channel Crossings Limited v. The Czech Republic (UNCITRAL) | Czech Republic | Cyprus | Cyprus - Czech Republic BIT (2001) |

Annex 2. Respondent and home States in known treaty-based ISDS cases

Only countries with at least one known case in either category are included.

Further information is available at:

<http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>

| No. | Country | Cases as respondent State | Cases as home State of investor |
|-----|-----------------------------------|---------------------------|---------------------------------|
| 1 | Albania | 7 | 0 |
| 2 | Algeria | 6 | 0 |
| 3 | Argentina | 59 | 3 |
| 4 | Armenia | 2 | 0 |
| 5 | Australia | 1 | 3 |
| 6 | Austria | 1 | 14 |
| 7 | Azerbaijan | 2 | 0 |
| 8 | Bahamas | 0 | 2 |
| 9 | Bangladesh | 1 | 0 |
| 10 | Barbados | 1 | 4 |
| 11 | Belgium | 1 | 15 |
| 12 | Belize | 3 | 0 |
| 13 | Bermuda | 0 | 1 |
| 14 | Bolivia, Plurinational State of | 13 | 1 |
| 15 | Bosnia and Herzegovina | 2 | 0 |
| 16 | British Virgin Islands | 0 | 1 |
| 17 | Bulgaria | 7 | 0 |
| 18 | Burundi | 4 | 0 |
| 19 | Cabo Verde | 1 | 0 |
| 20 | Cameroon | 1 | 0 |
| 21 | Canada | 25 | 39 |
| 22 | Chile | 3 | 7 |
| 23 | China | 2 | 4 |
| 24 | Congo, Democratic Republic of the | 4 | 0 |
| 25 | Costa Rica | 9 | 1 |
| 26 | Croatia | 6 | 3 |
| 27 | Cyprus | 3 | 18 |
| 28 | Czech Republic | 33 | 3 |
| 29 | Denmark | 0 | 5 |
| 30 | Dominican Republic | 4 | 0 |
| 31 | Ecuador | 22 | 0 |
| 32 | Egypt | 26 | 2 |
| 33 | El Salvador | 3 | 0 |
| 34 | Equatorial Guinea | 1 | 0 |
| 35 | Estonia | 4 | 1 |
| 36 | Ethiopia | 1 | 0 |
| 37 | Finland | 0 | 2 |
| 38 | France | 1 | 38 |
| 39 | Gabon | 2 | 0 |
| 40 | Gambia | 1 | 0 |
| 41 | Georgia | 8 | 0 |
| 42 | Germany | 3 | 51 |
| 43 | Ghana | 2 | 0 |

| No. | Country | Cases as respondent State | Cases as home State of investor |
|-----|--|---------------------------|---------------------------------|
| 44 | Gibraltar | 0 | 2 |
| 45 | Greece | 2 | 12 |
| 46 | Grenada | 1 | 0 |
| 47 | Guatemala | 3 | 0 |
| 48 | Guyana | 1 | 0 |
| 49 | Hong Kong, China SAR | 0 | 1 |
| 50 | Hungary | 13 | 1 |
| 51 | India | 17 | 3 |
| 52 | Indonesia | 6 | 0 |
| 53 | Iran, Islamic Republic of | 1 | 1 |
| 54 | Ireland | 0 | 1 |
| 55 | Israel | 0 | 3 |
| 56 | Italy | 5 | 30 |
| 57 | Japan | 0 | 1 |
| 58 | Jordan | 8 | 5 |
| 59 | Kazakhstan | 15 | 4 |
| 60 | Kenya | 1 | 0 |
| 61 | Korea, Republic of | 3 | 3 |
| 62 | Kuwait | 0 | 5 |
| 63 | Kyrgyzstan | 12 | 0 |
| 64 | Lao People's Democratic Republic | 2 | 0 |
| 65 | Latvia | 6 | 2 |
| 66 | Lebanon | 4 | 2 |
| 67 | Lesotho | 1 | 0 |
| 68 | Libya | 2 | 0 |
| 69 | Lithuania | 4 | 3 |
| 70 | Luxembourg | 0 | 31 |
| 71 | Macao, China SAR | 0 | 1 |
| 72 | Macedonia, The former Yugoslav Republic of | 3 | 0 |
| 73 | Madagascar | 1 | 0 |
| 74 | Malaysia | 3 | 3 |
| 75 | Malta | 0 | 2 |
| 76 | Mauritius | 1 | 5 |
| 77 | Mexico | 23 | 1 |
| 78 | Moldova, Republic of | 9 | 1 |
| 79 | Mongolia | 4 | 0 |
| 80 | Montenegro | 2 | 0 |
| 81 | Morocco | 2 | 0 |
| 82 | Mozambique | 1 | 0 |
| 83 | Myanmar | 1 | 0 |
| 84 | Netherlands | 0 | 80 |
| 85 | Nicaragua | 1 | 0 |
| 86 | Nigeria | 1 | 0 |
| 87 | Norway | 0 | 4 |
| 88 | Oman | 2 | 2 |
| 89 | Pakistan | 9 | 0 |
| 90 | Panama | 4 | 3 |
| 91 | Paraguay | 3 | 0 |
| 92 | Peru | 11 | 2 |
| 93 | Philippines | 4 | 0 |

| No. | Country | Cases as respondent State | Cases as home State of investor |
|-----|-----------------------------------|---------------------------|---------------------------------|
| 94 | Poland | 20 | 4 |
| 95 | Portugal | 0 | 5 |
| 96 | Qatar | 0 | 1 |
| 97 | Romania | 12 | 1 |
| 98 | Russian Federation | 21 | 12 |
| 99 | Saudi Arabia | 1 | 1 |
| 100 | Senegal | 3 | 0 |
| 101 | Serbia | 6 | 0 |
| 102 | Seychelles | 0 | 1 |
| 103 | Singapore | 0 | 2 |
| 104 | Slovakia | 12 | 1 |
| 105 | Slovenia | 3 | 1 |
| 106 | South Africa | 1 | 1 |
| 107 | Spain | 29 | 34 |
| 108 | Sri Lanka | 3 | 0 |
| 109 | Sudan | 1 | 0 |
| 110 | Sweden | 0 | 8 |
| 111 | Switzerland | 0 | 23 |
| 112 | Tajikistan | 1 | 0 |
| 113 | Tanzania, United Republic of | 2 | 0 |
| 114 | Thailand | 1 | 0 |
| 115 | Trinidad and Tobago | 1 | 0 |
| 116 | Tunisia | 1 | 1 |
| 117 | Turkey | 11 | 19 |
| 118 | Turkmenistan | 8 | 0 |
| 119 | Uganda | 1 | 0 |
| 120 | Ukraine | 19 | 8 |
| 121 | United Arab Emirates | 2 | 3 |
| 122 | United Kingdom | 1 | 59 |
| 123 | United States of America | 15 | 138 |
| 124 | Uruguay | 1 | 0 |
| 125 | Uzbekistan | 7 | 0 |
| 126 | Venezuela, Bolivarian Republic of | 36 | 1 |
| 127 | Viet Nam | 4 | 0 |
| 128 | Yemen | 3 | 0 |
| 129 | Zimbabwe | 3 | 0 |

Annex 3. Arbitral decisions rendered in 2015

The arbitral decisions and follow-on decisions issued in 2015 are available at: <http://investmentpolicyhub.unctad.org/ISDS/FilterByYear>

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

Muhammet Çap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan (ICSID Case No. ARB/12/6), Decision on Respondent's Objection to Jurisdiction under Article VII(2), 13 February 2015 (Lew, J. D. M. (chair), Hanotiau, B. and Boisson de Chazournes, L.)

B. Decisions rejecting jurisdiction (in toto)

Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary (ICSID Case No. ARB/12/3), Award, 17 April 2015 (Rovine, A. W. (chair), Lalonde, M. and Douglas, Z.)

Detroit International Bridge Company v. Government of Canada (UNCITRAL, PCA Case No. 2012-25), Award on Jurisdiction, 2 April 2015 (Derains, Y. (chair), Chertoff, M. and Lowe, V.), with Separate Dissenting Jurisdictional Statement by Chertoff, M.

Grupo Francisco Hernando Contreras v. Republic of Equatorial Guinea (ICSID Case No. ARB(AF)/12/2), Award, 4 December 2015 (Sepúlveda Amor, B. (chair), Orrego Vicuña, F. and Vinuesa, R. E.), with Dissenting Opinion by Orrego Vicuña, F.

Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan, Ltd v. Macedonia, former Yugoslav Republic of (ICSID Case No. ARB/12/31), Award, 22 September 2015 (Heiskanen, V. (chair), Bucher, A. and Stern, B.)

Philip Morris Asia Limited v. The Commonwealth of Australia (UNCITRAL, PCA Case No. 2012-12), Award on Jurisdiction and Admissibility, 17 December 2015 (Böckstiegel, K.-H. (chair), Kaufmann-Kohler, G. and McRae, D. M.)

Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium (ICSID Case No. ARB/12/29), Award, 30 April 2015 (Collins, L. (chair), Williams, D. A. R. and Sands, P.)

Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic (ICSID Case No. ARB/13/8), Award, 9 April 2015 (Zuleta, E. (chair), Townsend, J. M. and Stern, B.)

Renée Rose Levy and Gremcitel S.A. v. Republic of Peru (ICSID Case No. ARB/11/17), Award, 9 January 2015 (Kaufmann-Kohler, G. (chair), Zuleta, E. and Vinuesa, R. E.)

State Enterprise Energorynok v. the Republic of Moldova (SCC Case No. 2012/175), Final Award, 29 January 2015 (Turck, N. (chair), Tirado, J. and Knieper, R.)

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

Clayton and Bilcon of Delaware Inc. v. Government of Canada (UNCITRAL, PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015 (Simma, B. (chair), Schwartz, B. and McRae, D. M.), with Dissenting Opinion by McRae, D. M.

Dan Căpă (Portugal) S.A. v. Hungary (ICSID Case No. ARB/12/9), Decision on Jurisdiction and Liability, 24 August 2015 (Mayer, P. (chair), Paulsson, J. and Landau, T.)

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

Adel A Hamadi Al Tamimi v. Sultanate of Oman (ICSID Case No. ARB/11/33), Award, 3 November 2015 (Williams, D. A. R. (chair), Brower, C. N. and Thomas, J. C.)

Electrabel S.A. v. The Republic of Hungary (ICSID Case No. ARB/07/19), Award, 25 November 2015 (Veeder, V. V. (chair), Kaufmann-Kohler, G. and Stern, B.)

Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania (ICSID Case No. ARB/11/24), Award, 30 March 2015 (Knieper, R. (chair), Hammond, S. A. and Banifatemi, Y.), with Dissenting Opinion by Hammond, S. A.

E. Decisions awarding compensation

AWG Group Ltd. v. The Argentine Republic (UNCITRAL), Award, 9 April 2015 (Salacuse, J. W. (chair), Kaufmann-Kohler, G. and Nikken, P.)

Bernhard von Pezold and others v. Republic of Zimbabwe (ICSID Case No. ARB/10/15), Award, 28 July 2015 (Fortier, L. Y. (chair), Williams, D. A. R. and Hwang, M.)

Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania (ICSID Case No. ARB/10/13), Award, 2 March 2015 (Bernardini, P. (chair), Gharavi, H. G. and Dolzer, R.)

Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd. (UNCITRAL, PCA Case No. 2011-09), Award, 2 March 2015 (Williams, D. A. R. (chair), Fortier, L. Y. and Hanotiau, B.)

Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada (ICSID Case No. ARB(AF)/07/4), Award, 20 February 2015 (van Houtte, H. (chair), Janow, M. and Sands, P.)

OI European Group B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/25), Award, 10 March 2015 (Fernández-Armesto, J. (chair), Orrego Vicuña, F. and Mourre, A.)

Oxus Gold v. Uzbekistan (UNCITRAL), Final Award, 17 December 2015 (Tercier, P. (chair), Lalonde, M. and Stern, B.), with Partially Dissenting Opinion by Lalonde, M.

Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2), Award, 16 September 2015 (Kaufmann-Kohler, G. (chair), Lalonde, M. and Stern, B.), with Partially Dissenting Opinion by Stern, B.

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (ICSID Case No. ARB/03/19), Award, 9 April 2015 (Salacuse, J. W. (chair), Kaufmann-Kohler, G. and Nikken, P.)

Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/5), Award, 13 March 2015 (McLachlan, C. A. (chair), Rigo Sureda, A. and Stern, B.)

F. Decisions on the application for annulment

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