

# SUPPLEMENTARY MATERIAL

## REVIEW OF ISDS DECISIONS IN 2018: SELECTED IIA REFORM ISSUES (IIA ISSUES NOTE, NO. 4, JULY 2019)

### Case-by-case tables on key issues addressed by ISDS tribunals in 2018

These case-by-case tables give an overview of key issues addressed by ISDS tribunals in 2018. The tables summarize 24 ISDS decisions that were publicly available as of January 2019.<sup>1</sup> The arbitral decisions and more detailed information on each case are available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/>.

Most arbitral decisions in 2018 relied on provisions in old-generation treaties. A factual summary of the questions addressed by ISDS tribunals in publicly available awards and decisions can be a useful source for learning how IIA provisions work in practice and which areas are most in need of improvement.

Selected issues and cases of relevance for treaty drafting and IIA reform are highlighted in the IIA Issues Note “Review of ISDS Decisions in 2018: Selected IIA Reform Issues” (No. 4, July 2019), available at <https://investmentpolicy.unctad.org/publications/series/2/international-investment-agreements>.

#### Abbreviations

BIT	Bilateral investment treaty
CAFTA-DR	Dominican Republic–Central America Free Trade Agreement
CJEU	Court of Justice of the European Union
ECT	Energy Charter Treaty
EU	European Union
FET	Fair and equitable treatment
FPS	Full protection and security
MST	Minimum standard of treatment
NAFTA	North American Free Trade Agreement
NT	National treatment

Reference to “dollars” (\$) means United States dollars, unless otherwise indicated. Amounts awarded, where indicated, do not include interest or legal costs, and some decisions may be subject to set-aside or annulment proceedings.

#### Acknowledgements

This supplementary material relates to IIA Issues Note No. 4, July 2019, prepared by UNCTAD’s IIA team led by Elisabeth Tuerk, under the supervision of Joerg Weber and the overall guidance of James Zhan. It is based on research conducted by Sergey Ripinsky (main author), with contributions provided by Diana Rosert and comments by Hamed El Kady. Amrit Onkar Bhatia provided helpful edits and inputs.

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<sup>1</sup> This number includes decisions (awards) on jurisdiction and awards on liability and damages (partial and final). The five publicly available decisions rendered in ICSID annulment proceedings in 2018 are not covered.

## Decisions on jurisdiction

(Decisions on jurisdiction and “jurisdictional issues” may also include issues of admissibility.)

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

Table 1. Decisions upholding jurisdiction (at least in part) (without examining the merits)		
Case details	Case summary	Key issues and tribunals' findings
<p><b>Casinos Austria v. Argentina</b></p> <p><i>Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic</i> (ICSID Case No. ARB/14/32)</p> <p>Argentina–Austria BIT (1992)</p> <p>Decision on Jurisdiction, 29 June 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• van Houtte, H. (President)</li> <li>• Schill, S.</li> <li>• Torres Bernárdez, S. (Dissenting opinion)</li> </ul>	<p><b>Disputed measure(s):</b> Revocation by an Argentinean province of a license to operate games of chance and lottery held by claimants' local subsidiary under alleged concerns of money laundering.</p> <p><b>Investment at issue:</b> Rights under a gambling license granted by the Government of Salta province in Argentina to claimants' local subsidiary, Entretenimientos y Juegos de Azar S.A. (ENJASA).</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether assets owed by Claimants' local subsidiary were part of investment (→NO; but Claimants' shareholder rights may be impacted by interference with those assets)</li> <li>• Whether Claimants' shares in local subsidiary qualified as investment under ICSID Convention (→YES; investment met all <i>Salini</i> criteria)</li> <li>• Whether Claimants established prima facie claims for jurisdictional purposes (→YES – BY MAJORITY; facts alleged by Claimants (without determining their veracity) are capable of constituting breach of BIT)</li> <li>• Whether Claimants' claims may be properly characterized as treaty claims (as opposed to contract claims) (→YES – BY MAJORITY; Claimants advanced treaty claims; Respondent itself was not party to relevant contracts)</li> <li>• Whether Claimants complied with BIT requirement to pursue local remedies for at least 18 months (relevant local proceedings were pending for less than 18 months at the time of commencement of arbitration) (→YES – BY MAJORITY; as pre-arbitral requirements in BIT do not constitute conditions precedent to State's consent to arbitration, they can be fulfilled until decision on jurisdiction is taken)</li> <li>• Whether Claimants breached BIT requirement to terminate local proceedings upon commencement of arbitration (→NO – BY MAJORITY; if Claimants were required to withdraw domestic proceedings prior to tribunal's decision on jurisdiction, they could be left without any remedy (justice would be denied) if tribunal declined jurisdiction)</li> </ul> <p>Other issues:</p> <ul style="list-style-type: none"> <li>• Whether Tribunal may rely on legal arguments and authorities not submitted by parties (→YES; <i>maxim iura novit curia</i> enables tribunal to apply law on its own motion, provided parties are given opportunity to comment)</li> </ul>

Table 1. Decisions upholding jurisdiction (at least in part) (without examining the merits)		
Case details	Case summary	Key issues and tribunals' findings
<p><b><i>Lion v. Mexico</i></b></p> <p><i>Lion Mexico Consolidated L.P. v. United Mexican States</i> (ICSID Case No. ARB(AF)/15/2)</p> <p>NAFTA (1992)</p> <p>Decision on Jurisdiction, 30 July 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Fernández-Armesto, J. (President)</li> <li>• Cairns, D. J. A.</li> <li>• Boisson de Chazournes, L.</li> </ul>	<p><b>Disputed measure(s):</b> Mexican authorities' cancellation of promissory notes held by the claimant and mortgages to which the claimant was a beneficiary.</p> <p><b>Investment at issue:</b> Promissory notes and mortgages over three properties located in Mexico.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether non-negotiable promissory notes, linked to a loan of less than three-year maturity, qualify as investments under NAFTA (→NO; promissory notes are intrinsically bound to loans and therefore do not meet three-year maturity test in NAFTA Article 1139(d)(ii); promissory notes do not qualify as "debt securities" under NAFTA Article 1139(c) because they are not tradeable)</li> <li>• Whether mortgages used to secure a loan of less than three-year maturity qualify as investments under NAFTA (→YES; under Mexican law, mortgages qualify as "intangible real estate" used for economic benefit and therefore fit category of investment in NAFTA Article 1139(g))</li> </ul>
<p><b><i>Mera Investment v. Serbia</i></b></p> <p><i>Mera Investment Fund Limited v. Republic of Serbia</i> (ICSID Case No. ARB/17/2)</p> <p>Cyprus–Serbia BIT (2005)</p> <p>Decision on Jurisdiction, 30 November 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• von Segesser, G. (President)</li> <li>• Fortier, L. Y.</li> <li>• Cremades, B. M.</li> </ul>	<p><b>Disputed measure(s):</b> Government's alleged harmful measures against Mera Invest, the claimant's local subsidiary, including the freezing of its assets, fabrication of tax claims, blocking of its bank accounts and accounts of related entities.</p> <p><b>Investment at issue:</b> Ownership of a locally incorporated investment fund, Mera Invest d.o.o., holding shares in a construction company in Southeastern Serbia and local banks.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether Claimant was properly incorporated in Cyprus and had registered office there (→YES)</li> <li>• Whether Claimant had its corporate seat in Cyprus (→YES; under Cypriot law, term "seat" requires maintaining registered office and does not require effective management to be located in Cyprus)</li> <li>• Whether Claimant could be considered as making investments in Serbia (investments had been made before company was registered in Cyprus) (→YES; making investment includes not only funding and acquisition of investments, but also "holding and management" of investments)</li> <li>• Whether assets held by Claimant indirectly through local company constituted investments protected by BIT (→YES; BIT's object and purpose ("broad investment protection") and broad definition of investment confirm that indirect investments are covered)</li> <li>• Whether granting jurisdiction goes against object and purpose of BIT and ICSID Convention (investment was ultimately owned by host State nationals; invested capital originated in host State) (→NO; BIT and ICSID Convention do not require foreign origin of capital or foreign effective control of investment)</li> </ul>

Table 1. Decisions upholding jurisdiction (at least in part) (without examining the merits)		
Case details	Case summary	Key issues and tribunals' findings
<p><b><i>Mobil v. Canada (II)</i></b></p> <p><i>Mobil Investments Canada Inc. v. Canada (II)</i> (ICSID Case No. ARB/15/6)</p> <p>NAFTA (1992)</p> <p>Decision on Jurisdiction and Admissibility, 13 July 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Greenwood, C. (President)</li> <li>• Rowley, J. W.</li> <li>• Griffith, G.</li> </ul>	<p><b>Disputed measure(s):</b> Government's continued enforcement of the 2004 Guidelines for Research and Development Expenditures, which allegedly resulted in expenditures incurred by the claimant in 2012-2015. A previous tribunal, <i>Mobil and Murphy v. Canada</i>, found the Guidelines to violate NAFTA and awarded the claimants a portion of the damages sought.</p> <p><b>Investment at issue:</b> Indirect controlling shareholding in two companies, Hibernia Management and Development Co. and Terra Nova Oil Development Project, engaged in two petroleum development projects off the coast of the Province of Newfoundland and Labrador in Canada.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether limitation period starts running again in case a contracting party continues to enforce measure held to be in breach of treaty by an earlier decision of another ISDS tribunal (→YES; Canada's decision to continue enforcing 2004 Guidelines notwithstanding decision of <i>Mobil I</i> Tribunal is an act separate and distinct from promulgation of 2004 Guidelines and their enforcement until that date)</li> <li>• Whether Tribunal had jurisdiction to decide a claim previously considered by another ISDS tribunal that had found it to be not "ripe for determination" (Respondent argued that earlier tribunal had considered same claim for damages) (→YES; for res judicata to apply, previous tribunal must have decided a question; barring Claimant from bringing claim previously considered not "ripe for determination" would create injustice)</li> </ul> <p>Other issues:</p> <ul style="list-style-type: none"> <li>• Whether prior submissions of treaty parties to other ISDS tribunals applying same treaty affect treaty interpretation (→YES; treaty parties' subsequent practice establishing their agreement regarding interpretation should be accorded considerable weight, even if does not take form of Free Trade Commission's decision)</li> <li>• Whether treaty party is obliged to cease wrongful act previously found in breach of NAFTA (→YES; under general international law, State responsible for internationally wrongful act of continuing nature is under obligation to cease that act)</li> </ul>
<p><b><i>Resolute Forest v. Canada</i></b></p> <p><i>Resolute Forest Products Inc. v. Canada</i> (PCA Case No. 2016-13)</p> <p>NAFTA (1992)</p> <p>Decision on Jurisdiction and Admissibility, 30 January 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Crawford, J. R. (President)</li> <li>• Cass, R. A.</li> <li>• Lévesque, C.</li> </ul>	<p><b>Disputed measure(s):</b> Measures taken by the provincial Government in Nova Scotia and the Government of Canada, which allegedly discriminated in favour of the competitor's Port Hawkesbury paper mill and resulted, among other damages, in the closing of claimant's Laurentide paper mill in October 2014.</p> <p><b>Investment at issue:</b> Ownership of Laurentide paper mill.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether claim is time-barred if challenged measures are outside limitation period, but Claimant acquired knowledge of loss incurred within limitation period (→NO; NAFTA requires that certain conditions must be fulfilled for limitation period to apply: the alleged breach must actually have occurred, the resulting damage must actually have been incurred, and claimant must know, or should have known, of these facts)</li> <li>• Whether measures not directed at Claimant's investment may be considered as "relating to" investment if they have economic impact on it (→YES; "legally significant connection" must exist between measure and investment but it is not necessary that measure targets Claimant's investment; however, "a measure which adversely affected the claimant in a tangential or merely consequential way will not suffice for this purpose")</li> <li>• Whether measure by regional government that affects investment located outside this region is capable of constituting violation of NAFTA NT obligation (→YES; scope of NT obligation is not limited to investments located within particular province; whether breach occurred is to be established at merits stage)</li> </ul>

Table 1. Decisions upholding jurisdiction (at least in part) (without examining the merits)		
Case details	Case summary	Key issues and tribunals' findings
<p><b>Salini Impregilo v. Argentina</b></p> <p><i>Salini Impregilo S.p.A. v. Argentine Republic</i> (ICSID Case No. ARB/15/39)</p> <p>Argentina–Italy BIT (1990)</p> <p>Decision on Jurisdiction and Admissibility, 23 February 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Crawford, J. R. (President)</li> <li>• Hobér, K.</li> <li>• Kurtz, J.</li> </ul>	<p><b>Disputed measure(s):</b> Government's alleged failure to pay state subsidies provided for under a highway construction concession, the enactment of emergency legislation that affected the project's toll revenue and economic viability as well as delays in completing the renegotiation of the concession contract as mandated by this legislation. According to the claimant, the alleged measures ultimately resulted in the bankruptcy of the local concessionaire, the termination of the concession contract by the Government and its reassignment to a third party.</p> <p><b>Investment at issue:</b> 26% interest in a local company, Puentes del Litoral S.A., that held a 25-year concession contract for the construction, operation and maintenance of a bridge and toll road in Argentina.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether claims were time-barred (challenged measures had been adopted more than 10 years before commencement of arbitration) (→NO; BIT does not contain limitation period; international law does not lay down any general time limit for bringing claims)</li> <li>• Whether Claimant complied with BIT requirement to pursue local remedies for at least 18 months (relevant local proceedings were initiated by different party and under different legal instruments; domestic court action was pending for less than 18 months at the time of commencement of arbitration) (→YES; “substantive underpinnings” of dispute are the same)</li> <li>• Whether Tribunal should apply <i>forum non conveniens</i> doctrine and decline jurisdiction because Argentine courts are the most appropriate forum for Claimant's claims (→NO; no ISDS tribunal has ever relied on <i>forum non conveniens</i> doctrine; no grounds to rely on it in this case either)</li> <li>• Whether Claimant, as shareholder in project company, has standing to bring BIT claims in relation to project company's rights (→YES; BIT's broad definition of investment covers shareholdings, including minority ones)</li> </ul>

Source: UNCTAD.

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

Table 2. Decisions rejecting jurisdiction (in toto), including rulings on preliminary objections		
Case details	Case summary	Key issues and tribunals' findings
<p><b><i>Cortec Mining v. Kenya</i></b></p> <p><i>Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya</i> (ICSID Case No. ARB/15/29)</p> <p>Kenya–United Kingdom BIT (1999)</p> <p>Award, 22 October 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Binnie, I. (President)</li> <li>• Dharmananda, K.</li> <li>• Stern, B.</li> </ul>	<p><b>Disputed measure(s):</b> Government's allegedly unlawful revocation of claimant's mining license, following the discovery of new rare earths deposits by the claimant.</p> <p><b>Investment at issue:</b> Investments in the Kenyan mining sector, including a 21-year mining license for the extraction of rare earths at the Mrima Hill project in the southern part of the country.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether Claimants qualified for BIT protection (Respondent alleged that they were “shell” companies from the United Kingdom, with ultimate investors having third-party nationality) (→YES; origin of funds is irrelevant under BIT)</li> <li>• Whether Claimants made an investment in host State (Respondent alleged that Claimants had not made any financial contribution) (→YES; Claimants' investment (shares in project company) met <i>Salini</i> criteria)</li> <li>• Whether Claimant committed serious violation of host State law when making investment, by obtaining mining license without required environmental impact assessment (→YES; BIT protects only lawful investments even if it does not explicitly say so; violation must be sufficiently serious so that denial of treaty protection is proportionate response)</li> </ul>
<p><b><i>Rawat v. Mauritius</i></b></p> <p><i>Dawood Rawat v. Republic of Mauritius</i> (PCA Case No. 2016-20)</p> <p>France–Mauritius BIT (1973)</p> <p>Award on Jurisdiction, 6 April 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Reed, L. (President)</li> <li>• Honlet, J.-C.</li> <li>• Lowe, V.</li> </ul>	<p><b>Disputed measure(s):</b> A series of measures taken by the government of Mauritius, allegedly including the illegal appointment of special administrators who took control over two insurance and banking companies as well as related companies in which the claimant held interests, and the subsequent transfer or sale of their assets to State-owned companies and third parties.</p> <p><b>Investment at issue:</b> Indirect controlling shareholding in an investment holding company (British American Investment Co. (Mtius) Ltd) with a subsidiary life insurance company (British American Insurance Company Ltd) and a bank (Bramer Banking Corporation Ltd).</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether Claimant, dual Mauritian-French national, is eligible for BIT protection (→NO; BIT does not expressly exclude dual nationals from definition of investor, but specific treaty context suggests that they are not covered)</li> </ul>

## Decisions on the merits

(Decisions on the merits may include findings on jurisdiction.)

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

Table 3. Decisions finding State's liability for IIA breaches (at least in part)		
Case details	Case summary	Key issues and tribunals' findings
<p><b><i>Antin v. Spain</i></b></p> <p><i>Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain</i> (ICSID Case No. ARB/13/31)</p> <p>ECT (1994)</p> <p>Award, 15 June 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Zuleta, E. (President)</li> <li>• Reichert, K.</li> <li>• Thomas, J. C.</li> </ul>	<p><b>Disputed measure(s):</b> A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p> <p><b>Investment at issue:</b> Direct and indirect shareholding in two solar thermo plants in Andalucía, Spain.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether ECT applies to intra-EU disputes (→YES)</li> <li>• Whether certain assets were "directly and indirectly owned" by Claimants and related claims can be submitted to arbitration, despite ultimate ownership by third party (→YES; ECT covers indirect investments, protects intermediary companies)</li> <li>• Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; ECT carves out taxation measures from its scope)</li> <li>• Whether Claimants complied with 3-month cooling-off period prescribed by ECT (Claimants challenged inter alia measures introduced after they sent their notice of dispute to Government) (→YES; there was "inseparable relationship" between initial and further measures; they were part of single dispute)</li> </ul> <p>Merits issues:</p> <ul style="list-style-type: none"> <li>• Whether Respondent – through its general acts and regulations – had created legitimate expectation that legal framework for concentrated solar power (CSP) plants would remain stable (→YES)</li> <li>• Whether ECT precludes States from exercising regulatory powers in public interest (→NO)</li> <li>• Whether Respondent may radically alter regulatory regime specifically created to induce investments (→NO)</li> <li>• Whether Respondent breached FET by frustrating Claimants' legitimate expectations (→YES)</li> </ul> <p>Awarded: approx. \$131.2 million (€112 million)</p>
<p><b><i>Chevron and TexPet v. Ecuador (II)</i></b></p> <p><i>Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II)</i> (PCA Case No. 2009-23)</p>	<p><b>Disputed measure(s):</b> Texaco's historical activities under oil concession contracts, and the Government's alleged misconduct in subsequent domestic litigation against Texaco for environmental remediation (in the so-called "Lago Agrio" judgment of 2012, the Ecuadorian court ordered Chevron and TexPet to pay \$9.5 billion for environmental damage).</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether Chevron's indirect investment in Ecuador (through its stake in TexPet) qualified for BIT protection (→YES; BIT did not require investment to be direct)</li> <li>• Whether Claimants' failure to exhaust all local judicial remedies in Ecuador precluded Tribunal's jurisdiction over denial of justice claim (→NO; by time of arbitral award Ecuador's Constitutional Court had ruled on Claimants' appeal)</li> <li>• Whether Claimants may add new claims after filing notice of arbitration (after filing arbitration in 2009, Claimants added denial of justice and umbrella clause claims in 2012) (→YES; amendments were justified by new factual developments, Ecuador had full opportunity to defend against new claims)</li> </ul>



Table 3. Decisions finding State's liability for IIA breaches (at least in part)		
Case details	Case summary	Key issues and tribunals' findings
<p>Ecuador–United States of America BIT (1993)</p> <p>Second Partial Award on Track II, 30 August 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Veeder, V. V. (President)</li> <li>• Grigera Naón, H. A.</li> <li>• Lowe, V.</li> </ul>	<p><b>Investment at issue:</b> Oil exploration and production rights in Ecuador's Amazon region through concession contracts concluded with the Government.</p>	<p>Merits issues:</p> <ul style="list-style-type: none"> <li>• Whether Lago Agrio judgment failed to respect 1995 settlement agreement between Claimants and Ecuador, which protected Claimants from liability for environmental harm, and thereby breached BIT's umbrella clause (→YES)</li> <li>• Whether various actions attributed to Ecuador (acceptance of bribe by first-instance judge; allowing his judgment to be "ghostwritten"; failure of appeal courts to address judicial misconduct) constituted denial of justice (→YES)</li> <li>• Whether Respondent must suspend enforceability of Lago Agrio judgment and take steps to preclude all third parties and States from enforcing the ruling (→YES)</li> </ul> <p>(Case proceeded to damages phase)</p>
<p><b><i>Foresight and others v. Spain</i></b></p> <p><i>Foresight Luxembourg Solar 1 S.Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy II S.P.A v. Kingdom of Spain</i> (SCC Case No. 2015/150)</p> <p>ECT (1994)</p> <p>Award, 14 November 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Moser, M. J. (President)</li> <li>• Sachs, K.</li> <li>• Vinuesa, R. E. (Partial dissenting opinion)</li> </ul>	<p><b>Disputed measure(s):</b> A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p> <p><b>Investment at issue:</b> Investments in three solar photovoltaic facilities (the Madrideojos, La Castilleja and Fotocampillos plants).</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether ECT applies to disputes involving intra-EU investments (→YES)</li> <li>• Whether CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) precluded Tribunal's jurisdiction (→NO; CJEU decision concerned BITs, not ECT)</li> <li>• Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; ECT carves out taxation measures from its scope)</li> </ul> <p>Merits issues:</p> <ul style="list-style-type: none"> <li>• Whether Respondent – through its acts of general application – created legitimate expectation that regulatory framework existing at the time of investment would not be fundamentally and abruptly changed (→YES)</li> <li>• Whether Claimants carried out sufficient legal due diligence when making investment (→YES – BY MAJORITY)</li> <li>• Whether enactment of new regulatory regime breached FET standard by frustrating Claimants' legitimate expectations (→YES – BY MAJORITY)</li> <li>• Whether Respondent breached ECT's umbrella clause (→NO; specific commitments had not been provided to Claimants)</li> <li>• Whether Respondent's conduct amounted to expropriation (→NO; there was no substantial deprivation of investment)</li> </ul> <p>Awarded: approx. \$43.9 million (€39 million)</p>



Table 3. Decisions finding State's liability for IIA breaches (at least in part)		
Case details	Case summary	Key issues and tribunals' findings
<p><b>Gavrilovic v. Croatia</b></p> <p><i>Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia</i> (ICSID Case No. ARB/12/39)</p> <p>Austria–Croatia BIT (1997)</p> <p>Award, 26 July 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Pyles, M. C. (President)</li> <li>• Alexandrov, S. A.</li> <li>• Thomas, J. C.</li> </ul>	<p><b>Disputed measure(s):</b> Disagreements over claimants' title to agricultural and grazing land for the investor's meat processing business in Croatia that led to unsuccessful domestic litigation for Mr. Gavrilovic and his company and the alleged subsequent statutory expropriation of his lands and commercial properties.</p> <p><b>Investment at issue:</b> Ownership and operation of a meat processing factory; ownership of related agricultural and grazing land in Croatia.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether Respondent may object to Tribunal's jurisdiction on grounds that Claimants had committed illegalities when making investment, if Respondent itself was involved in such illegalities (→NO; the illegalities cannot be imputed to the Claimants)</li> <li>• Whether claims relating to a purchase agreement that had a contractual forum selection clause are admissible (→YES; Claimants' claims are treaty claims, not contract claims)</li> </ul> <p>Merits issues:</p> <ul style="list-style-type: none"> <li>• Whether Claimants proved ownership over majority of land plots that had been allegedly expropriated (→NO)</li> <li>• Whether Respondent directly expropriated land plots (which Claimants proved to own) by registering them in State's name (→YES)</li> <li>• Whether Respondent indirectly expropriated certain real estate assets by failing to register them in Claimants' name and failing to negotiate in good faith about ownership of properties (→NO; no relevant failures by Respondent)</li> <li>• Whether Respondent breached FET provision by failing to register properties and to negotiate about ownership of properties (→NO; Claimants did not have legitimate expectation regarding the registration of properties; Respondent acted in good faith during negotiations regarding ownership)</li> <li>• Whether Respondent violated BIT's umbrella clause by breaching purchase agreement (→NO; Respondent was not party to purchase agreement)</li> <li>• Whether Respondent breached BIT's NT obligation by allowing another Croatian national to register land plot despite Claimants having ownership dispute with State (→NO; that Croatian national was not in "like circumstances" with Claimants)</li> </ul> <p>Awarded: approx. \$3.2 million</p>
<p><b>Greentech and NovEnergia v. Italy</b></p> <p><i>Greentech Energy Systems A/S, NovEnergia II Energy &amp; Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic</i> (SCC Case No. 2015/095)</p>	<p><b>Disputed measure(s):</b> A series of governmental decrees to prematurely cut tariff incentives for photovoltaic plants originally offered for 20-year period, as well as modifications to the taxation regime and minimum guaranteed price scheme, cancellation of inflation adjustment and imposition of new fees.</p> <p><b>Investment at issue:</b> Ownership of 134 solar plants located in Italy.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether Tribunal lacked jurisdiction because Claimants already submitted dispute to Italian courts (ECT has fork-in-the-road provision) (→NO; domestic claims were submitted by Claimants' subsidiaries rather than by Claimants)</li> <li>• Whether Claimants complied with ECT's cooling-off period (the notice of dispute did not contain some of the claims advanced in arbitration) (→NO – subsequent claims related to same subject-matter as original notice of dispute)</li> <li>• Whether claims were contractual in nature and should be subject to contractual forum selection clauses (→NO; Claimants were not parties to those contracts, and their claims are treaty claims)</li> </ul>

Table 3. Decisions finding State's liability for IIA breaches (at least in part)		
Case details	Case summary	Key issues and tribunals' findings
<p>ECT (1994)</p> <p>Final Award, 23 December 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Park, W. W. (President)</li> <li>• Haigh, D.</li> <li>• Sacerdoti, G. (Dissenting opinion)</li> </ul>		<ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction over claims concerning taxation measures (→NO; ECT carves out taxation measures from its scope)</li> <li>• Whether ECT applies to intra-EU disputes (→YES)</li> <li>• Whether CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) precludes Tribunal's jurisdiction (→NO; CJEU's decision concerned BITs, not ECT)</li> </ul> <p>Merits issues:</p> <ul style="list-style-type: none"> <li>• Whether Respondent provided "repeated and precise assurances to specific investors" that incentive tariffs would remain fixed for 20 years, thereby giving rise to legitimate expectations (→YES – BY MAJORITY)</li> <li>• Whether such assurances constituted "non-waivable guarantees" whose breach could be justified only by <i>force majeure</i> (→YES – BY MAJORITY)</li> <li>• Whether reduction of incentive tariffs constituted breach of FET standard (→YES – BY MAJORITY)</li> <li>• Whether reduction of incentive tariffs breached ECT's umbrella clause (→YES – BY MAJORITY; umbrella clause is sufficiently broad to encompass legislative and regulatory instruments)</li> <li>• Whether other challenged measures (modification of minimum guaranteed price scheme, cancellation of inflation adjustment and imposition of fees) breached ECT (→NO; Respondent had not provided specific assurances in relation to these aspects)</li> </ul> <p>Awarded: approx. \$13.5 million (€11.9 million)</p>
<p><b>Masdar v. Spain</b></p> <p><i>Masdar Solar &amp; Wind Cooperatief U.A. v. Kingdom of Spain</i> (ICSID Case No. ARB/14/1)</p> <p>ECT (1994)</p> <p>Award, 16 May 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Beechey, J. (President)</li> <li>• Born, G. B.</li> <li>• Stern, B.</li> </ul>	<p><b>Disputed measure(s):</b> A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p> <p><b>Investment at issue:</b> Shareholding in the Spanish company Torresol Energy Investments S.A. which operated three concentrated solar power plants in Spain: Gemasolar, Termesol and Arcosol.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether Claimant company, incorporated in the Netherlands, is controlled by Government of Abu Dhabi and actions of Claimant are attributable to State of Abu Dhabi, falling outside of Tribunal's jurisdiction (→NO; Government of Abu Dhabi did not exercise control over Claimant)</li> <li>• Whether Claimant made an investment in host State (Respondent alleged that Claimant had not contributed own economic resources) (→YES; investment met <i>Salini</i> test; BIT did not contain origin of capital requirement)</li> <li>• Whether Respondent may deny treaty benefits to Claimant (→NO – BY MAJORITY; Respondent may not deny benefits after arbitration is commenced; Claimant had "substantial business activities" in home State as it was a holding company with substantial international assets under its control)</li> <li>• Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; ECT carves out taxation measures from its scope)</li> <li>• Whether ECT applies to disputes involving intra-EU investments (→YES)</li> <li>• Whether ECT's provision on investor-State arbitration is compatible with EU law (→YES)</li> </ul>

Table 3. Decisions finding State's liability for IIA breaches (at least in part)		
Case details	Case summary	Key issues and tribunals' findings
		<p>Merits issues:</p> <ul style="list-style-type: none"> <li>• Whether FET standard prohibits States to modify legislation in an unreasonable or unjustified manner contrary to specific commitments undertaken towards investor (→YES)</li> <li>• Whether Respondent – through its acts and regulations (both general and specific) – had created legitimate expectation that benefits granted by legal framework in existence at the time of investment would remain unaltered (→YES)</li> <li>• Whether challenged measures frustrated Claimant's legitimate expectations and thereby breached FET standard (→YES)</li> </ul> <p>Awarded: approx. \$76.7 million (€64.5 million)</p>
<p><b>Novenergia v. Spain</b></p> <p><i>Novenergia II - Energy &amp; Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain</i> (SCC Case No. 2015/063)</p> <p>ECT (1994)</p> <p>Final Award, 15 February 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Sidklev, J. (President)</li> <li>• Crivellaro, A.</li> <li>• Sepúlveda-Amor, J. B.</li> </ul>	<p><b>Disputed measure(s):</b> A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p> <p><b>Investment at issue:</b> Indirect investment in eight photovoltaic plants in Spain, through Novenergia II Energy &amp; Environment España, S.L., a locally incorporated company.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction over intra-EU disputes (→YES)</li> <li>• Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; ECT carves out taxation measures from its scope)</li> </ul> <p>Merits issues:</p> <ul style="list-style-type: none"> <li>• Whether Respondent – through its conduct (unspecific to Claimant) – created legitimate expectation that there would not be any “radical or fundamental changes” to regulatory framework that existed at time of investment (→YES)</li> <li>• Whether FET standard, while not ensuring full regulatory stability, requires that regulatory changes stay within boundaries of “acceptable range of legislative and regulatory behaviour” (→YES)</li> <li>• Whether Claimant undertook sufficient legal due diligence prior to making investment (→YES)</li> <li>• Whether regulatory changes implemented in 2010-2013 breached FET standard (→NO; they did not “entirely transform or fundamentally change” regulatory framework)</li> <li>• Whether regulatory changes implemented by Respondent in 2013-2014 breached FET standard (→YES; they were “radical and unexpected” departure from regulatory framework and had “significant damaging economic effect” on Claimant)</li> <li>• Whether challenged measures breached ECT's umbrella clause (→NO; Respondent had not made specific commitment to Claimant)</li> <li>• Whether challenged measures constituted expropriation (→NO; they did not have expropriatory intent or effect)</li> </ul> <p>Awarded: approx. \$66 million (€53.3 million)</p>

Table 3. Decisions finding State's liability for IIA breaches (at least in part)		
Case details	Case summary	Key issues and tribunals' findings
<p><b><i>Olin v. Libya</i></b></p> <p><i>Olin Holdings Limited v. State of Libya</i> (ICC Case No. 20355/MCP)</p> <p>Cyprus–Libya BIT (2004)</p> <p>Final Award, 25 May 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Comair-Obeid, N. (President)</li> <li>• Ziadé, N.</li> <li>• Fadlallah, I.</li> </ul>	<p><b>Disputed measure(s):</b> Alleged expropriation of the claimant's dairy and juice factory.</p> <p><b>Investment at issue:</b> Investments in a dairy and juice factory in Tripoli.</p>	<p>Merits issues:</p> <ul style="list-style-type: none"> <li>• Whether expropriation can be found where decision to expropriate was made but investment was not actually taken from Claimant (order of land expropriation was passed, but title to land restored to Claimant five years later; eviction notices served, but factory never dismantled) (→YES; State measures, even if temporary, can have an effect equivalent to expropriation if their length and impact on the investment are sufficiently important)</li> <li>• Whether Respondent failed to comply with conditions for lawful expropriation under BIT, including due to lack of compensation (→YES)</li> <li>• Whether Respondent failed to comply with due process of law requirement when expropriating investment (Libyan Investment Law prohibited expropriation without law or judicial decision) (→YES)</li> <li>• Whether the lack of due process before the Libyan national courts amounted to denial of justice (→NO, "Claimant did not satisfy the burden and relatively high threshold of proving a denial of justice under international law")</li> <li>• Whether Respondent breached obligation to accord NT (two comparable Libyan-owned factories had been exempted from expropriation order) (→YES; factories operating in the same business sector and located nearby are appropriate comparators)</li> <li>• Whether Respondent frustrated Claimant's legitimate expectation that Libya would not act in violation of its Investment Law, and thereby breached FET obligation (→YES; it was reasonable and legitimate for Claimant to expect that Libya would not act in breach of its newly enacted Investment Law)</li> <li>• Whether Respondent breached FET obligation by maintaining Claimant in situation of heightened uncertainty (while factory was not physically destroyed, Claimant was prevented from operating its plant under normal business conditions) (→YES; FET provision entails respect for investor's ability to operate its investment with minimum level of certainty and to implement basic business decisions in unfettered manner)</li> </ul> <p>Awarded: approx. \$21.3 million (€18.2 million)</p>
<p><b><i>South American Silver v. Bolivia</i></b></p> <p><i>South American Silver Limited v. The Plurinational State of Bolivia</i> (PCA Case No. 2013-15)</p>	<p><b>Disputed measure(s):</b> Government's decree that revoked mining concessions held by the claimant's subsidiary, following protests and social unrest within the indigenous populations in the mining area.</p> <p><b>Investment at issue:</b> Rights under mining concessions held through claimant's wholly-owned subsidiary, Compañía Minera Malku Khota.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether BIT covers investments held indirectly (Claimant held its investment through Bahamian holding companies) (→YES – BY MAJORITY; BIT did not expressly exclude indirect investments)</li> <li>• Whether Claimant qualified as investor if invested capital originated from Claimant's parent company (Canadian) (→YES; origin of capital is irrelevant under BIT)</li> <li>• Whether Tribunal lacked jurisdiction because Claimant did not have "clean hands" and failed to comply with requirement of legality of investment (→NO; legality requirement applies even when not mentioned in IIA; alleged violations do not "go to the essence" of investment; denial of BIT protection would be disproportionate)</li> </ul>

Table 3. Decisions finding State's liability for IIA breaches (at least in part)		
Case details	Case summary	Key issues and tribunals' findings
<p>Bolivia–United Kingdom BIT (1988)</p> <p>Award, 30 August 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Zuleta, E. (President)</li> <li>• Orrego Vicuña, F. (Separate opinion)</li> <li>• Guglielmino, O. C. (Dissenting opinion)</li> </ul>		<p>Merits issues:</p> <ul style="list-style-type: none"> <li>• Whether revocation of mining concessions constituted direct expropriation (→YES)</li> <li>• Whether aim of ending social unrest and “preserving peace” in local area qualified as public purpose (→YES – BY MAJORITY)</li> <li>• Whether expropriation respected due process (investor had not been consulted prior to expropriation) (→YES – BY MAJORITY; due process requires only ensuring that investor has access to domestic legal remedies to challenge expropriation)</li> <li>• Whether lack of compensation rendered expropriation unlawful (→YES – BY MAJORITY)</li> <li>• Whether necessity defence under customary international law or police-powers doctrine excused failure to pay compensation for expropriation (→NO)</li> <li>• Whether Respondent's actions breached FET standard (→NO – BY MAJORITY; Respondent has right to expropriate under BIT; Claimant's conduct contributed to social unrest)</li> <li>• Whether Respondent's actions breached BIT's FPS standard (→NO; Respondent tried to ease social unrest through other means first)</li> </ul> <p>Other issues:</p> <ul style="list-style-type: none"> <li>• Whether Tribunal could apply certain international law instruments, including the American Convention on Human Rights (1969), ILO Convention No. 169 concerning Indigenous and Tribal Peoples (1989), and United Nations Declaration on the Rights of Indigenous Peoples (2007) (→NO; these instruments do not form part of customary or international law; United Kingdom is not party to these instruments)</li> </ul> <p>Awarded: \$18.7 million</p>
<p><b>Unión Fenosa v. Egypt</b></p> <p><i>Unión Fenosa Gas, S.A. v. Arab Republic of Egypt</i> (ICSID Case No. ARB/14/4)</p> <p>Egypt–Spain BIT (1992)</p> <p>Award, 31 August 2018</p>	<p><b>Disputed measure(s):</b> Alleged suspension of gas supplies by an Egyptian State-owned enterprise to the claimant's liquefied natural gas plant in contravention of the gas purchase agreement.</p> <p><b>Investment at issue:</b> Majority shareholding (80 per cent) in SEGAS, an Egyptian company that operated the Damietta liquefied natural gas plant in the port of Damietta.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether Claimant had an investment in Egypt (Respondent argued that agreement for supply of gas was purely commercial transaction, and Claimant's shares in SEGAS were pledged to a bank) (→YES)</li> <li>• Whether claims were contractual in nature and therefore outside of Tribunal's jurisdiction (→NO; they were treaty claims)</li> <li>• Whether Claimant's commencement of several arbitrations in different fora amounted to abuse and rendered claims inadmissible (→NO; but Tribunal must ensure that there is no double recovery)</li> <li>• Whether Claimant committed acts of corruption when developing project and concluding gas purchase agreement (→NO – BY MAJORITY; insufficient proof)</li> </ul>

Table 3. Decisions finding State's liability for IIA breaches (at least in part)		
Case details	Case summary	Key issues and tribunals' findings
<p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Veeder, V. V. (President)</li> <li>• Rowley, J. W.</li> <li>• Clodfelter, M. A. (Dissenting opinion)</li> </ul>		<p>Merits issues:</p> <ul style="list-style-type: none"> <li>• Whether Respondent, by endorsing gas supply contract, created legitimate expectation that it would not interfere with gas supplies (→YES – BY MAJORITY)</li> <li>• Whether failure by State-owned enterprise (EGAS) to supply gas is attributable to Respondent (→YES; actions of EGAS were directed by Respondent)</li> <li>• Whether Respondent's breach of its undertaking not to disrupt gas supplies amounted to breach of FET standard (→YES – BY MAJORITY)</li> <li>• Whether Egypt's conduct – coinciding in time with events during Arab Spring – was justified by necessity under customary international law (→NO; Respondent's conduct was not the only way to safeguard its essential interests; Claimant was affected disproportionately)</li> <li>• Whether Respondent's revocation of tax-free status of SEGAS (Claimant's majority-owned plant operator) constituted FET breach (→NO; Respondent had not promised to maintain company's tax-free status; revocation affected other companies too)</li> <li>• Whether Respondent breached BIT's NT, non-impairment and MFN obligations (→NO)</li> </ul> <p>Awarded: \$2 billion</p>
<p><b><i>UP and C.D Holding v. Hungary</i></b></p> <p><i>UP and C.D Holding Internationale v. Hungary</i> (ICSID Case No. ARB/13/35)</p> <p>France–Hungary BIT (1986)</p> <p>Award, 9 October 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Böckstiegel, K.-H. (President)</li> <li>• Fortier, L. Y.</li> <li>• Bethlehem, D.</li> </ul>	<p><b>Disputed measure(s):</b> Enactment of legislation granting the Government a monopoly over the prepaid corporate vouchers industry, allegedly introducing a State-run voucher system with conditions more favourable than those granted to private operators.</p> <p><b>Investment at issue:</b> Company engaged in the sale of social vouchers in Hungary.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) deprives Tribunal of jurisdiction (→NO; proceedings are based on ICSID Convention, while Achmea case was governed by UNCITRAL Rules)</li> </ul> <p>Merits issues:</p> <ul style="list-style-type: none"> <li>• Whether Claimants held rights capable of expropriation (→YES; Claimants held shares in local subsidiary)</li> <li>• Whether Respondent indirectly expropriated Claimants' investment by modifying legislation and changing market conditions to Claimants' detriment (→YES; value of investment suffered substantial loss; Claimants lost their market share)</li> <li>• Whether failure to pay compensation rendered expropriation unlawful (→YES)</li> <li>• Whether expropriation was effected for reasons of "public necessity" (→NO; main purpose was to exclude non-Hungarian firms from market)</li> <li>• Whether expropriation was discriminatory (→YES; there was discrimination against foreign firms)</li> </ul> <p>Awarded: approx. \$26.7 million (€23.2 million)</p>



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

Table 4. Decisions dismissing the investors' claims (in toto)		
Case details	Case summary	Key issues and tribunals' findings
<p><b><i>A11Y v. Czechia</i></b></p> <p><i>A11Y LTD. v. Czech Republic</i> (ICSID Case No. UNCT/15/1)</p> <p>Czechia–United Kingdom BIT (1990)</p> <p>Decision on Jurisdiction, 9 February 2017 (became public in 2018); Award, 29 June 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Fortier, L. Y. (President)</li> <li>• Alexandrov, S. A.</li> <li>• Joubin-Bret, A.</li> </ul>	<p><b>Disputed measure(s):</b> Allegedly discriminatory State actions against claimant's business of providing electronic aids for visually handicapped, including the disclosure of know-how to A11Y's competitors and damage to its goodwill, in the context of government allowances to blind and visually handicapped people for special compensation aids.</p> <p><b>Investment at issue:</b> Company engaged in the supply of high quality compensation aids to blind and visually impaired people.</p>	<p>Jurisdictional issues (Decision on Jurisdiction, 9 February 2017; Award, 29 June 2018):</p> <ul style="list-style-type: none"> <li>• Whether BIT's ISDS clause covered claims for alleged breaches of FET, FPS or NT obligations (→NO; but it covered expropriation claims)</li> <li>• Whether BIT's narrow scope of jurisdiction could be expanded by applying MFN clause (→NO; different view with respect to some elements expressed by Alexandrov, S. A.)</li> <li>• Whether Claimant company, majority owned by host State national, qualified as protected United Kingdom investor (→YES; BIT set out simple incorporation test of nationality)</li> <li>• Whether Claimant complied with BIT's cooling-off period (→YES)</li> <li>• Whether BIT was terminated due to Respondent's accession to EU (→NO)</li> <li>• Whether Claimant made investment in host State (Respondent alleged that Claimant had not contributed any resources) (→YES; BIT did not require that there be flow of funds to host State; possession of know-how and goodwill in host State is sufficient to find protected investment; different view expressed by Joubin-Bret, A.)</li> </ul> <p>Merits issues (Award, 29 June 2018):</p> <ul style="list-style-type: none"> <li>• Whether Respondent's conduct amounted to expropriation (→NO; measures were largely "bona fide regulatory measures")</li> </ul>
<p><b><i>Antaris and Göde v. Czechia</i></b></p> <p><i>Antaris Solar GmbH and Dr. Michael Göde v. The Czech Republic</i> (PCA Case No. 2014-01)</p> <p>Germany–Slovakia BIT (1990); ECT (1994)</p> <p>Award, 2 May 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Collins, L. (President)</li> <li>• Born, G. B. (Dissenting opinion)</li> <li>• Tomka, P. (Separate opinion – "Declaration")</li> </ul>	<p><b>Disputed measure(s):</b> Amendments to the pre-existing incentive regime applicable to renewable energy, including the introduction of a levy on electricity generated ("Solar Levy"), allegedly adopted in order to diminish windfall profit to producers (that became possible due to significant fall in costs of solar panels) and to reduce burden on energy consumers.</p> <p><b>Investment at issue:</b> Equity interests in several Czech energy companies engaged in the photovoltaic sector.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether Tribunal had jurisdiction in respect of Solar Levy despite ECT tax carve-out (→YES; economic essence of measure was to cut subsidies, not to raise revenue)</li> </ul> <p>Merits issues:</p> <ul style="list-style-type: none"> <li>• Whether legitimate expectations could be inferred from domestic legislation (→YES)</li> <li>• Whether Claimants, who invested when Czech authorities were publicly considering modifications to incentives regime, had legitimate expectation of stability of legal regime (→NO – BY MAJORITY)</li> <li>• Whether Claimants undertook proper due diligence when making investment (→NO – BY MAJORITY)</li> <li>• Whether Respondent had rational objective for adopting measures (→YES; reducing excessive profits for solar energy producers and protecting energy consumers)</li> <li>• Whether challenged measures were proportionate to objectives pursued (→YES)</li> <li>• Whether Claimants' profits reduced dramatically due to challenged measures (→NO)</li> <li>• Whether challenged measures breached ECT and BIT (→NO – BY MAJORITY)</li> </ul>



Table 4. Decisions dismissing the investors' claims (in toto)		
Case details	Case summary	Key issues and tribunals' findings
<p><b>Marfin v. Cyprus</b></p> <p><i>Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus</i> (ICSID Case No. ARB/13/27)</p> <p>Cyprus–Greece BIT (1992)</p> <p>Award, 26 July 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Hanotiau, B. (President)</li> <li>• Price, D. M.</li> <li>• Edward, D. A. O.</li> </ul>	<p><b>Disputed measure(s):</b> Issuance of a decree that increased the Government's participation in a Cypriot bank in which the claimants had invested, allegedly resulting in the take-over of the institution's management control and the bank's subsequent insolvency.</p> <p><b>Investment at issue:</b> Shareholdings in Cyprus Popular Bank (also known as the Laiki bank), held by 13 individual claimants and six corporate claimants.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether the applicable BIT was terminated due to accession of Cyprus to EU, and superseded by EU treaties (→NO)</li> <li>• Whether Claimants invested in Respondent's territory (→YES; territory of investment (shareholding) should not be confused with territory of bank's activity)</li> </ul> <p>Merits issues:</p> <ul style="list-style-type: none"> <li>• Whether certain acts of Laiki bank itself, controlled by Respondent could be attributed to Respondent (→NO; Respondent exercised control over bank generally, but not over specific actions)</li> <li>• Whether Respondent's measures taken to protect public welfare, in non-discriminatory and proportionate manner, could entail compensation (→NO)</li> <li>• Whether "police powers" doctrine is part of customary international law (→YES)</li> <li>• Whether Respondent had intent to nationalise bank (→NO; Respondent merely tried to save bank that was suffering from exposure to Greek government bonds)</li> <li>• Whether Respondent's actions were unreasonable, arbitrary or capricious (→NO)</li> <li>• Whether Respondent's actions were abusive, did not afford due process or were designed to conceal improper ends (→NO)</li> <li>• Whether regulatory conduct may be held in breach of BIT for merely falling below "international best practices" (→NO)</li> <li>• Whether Respondent's actions constituted indirect expropriation (→NO)</li> <li>• Whether Respondent's conduct breached FET standard (→NO; measures were proportionate, i.e. had reasonable relationship to rational policy and were appropriately tailored)</li> <li>• Whether Claimants were subject to discriminatory treatment (→NO)</li> <li>• Whether Claimants were denied justice by Cypriot court's worldwide freezing order in respect of Claimants' funds (→NO; Claimants did not exhaust local remedies; futility exception did not apply as local remedies were available)</li> <li>• Whether Respondent breached FPS standard (→NO; Respondent did not disrupt "secure investment environment")</li> </ul>

Table 4. Decisions dismissing the investors' claims (in toto)		
Case details	Case summary	Key issues and tribunals' findings
<p><b>Mercer v. Canada</b></p> <p><i>Mercer International, Inc. v. Canada</i> (ICSID Case No. ARB(AF)/12/3)</p> <p>NAFTA (1992)</p> <p>Award, 6 March 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Veeder, V. V. (President)</li> <li>• Orrego Vicuña, F. (dissenting on certain issues)</li> <li>• Douglas, Z.</li> </ul>	<p><b>Disputed measure(s):</b> Alleged failure by Canadian regulatory agencies in British Columbia to implement a uniform treatment for pulp mills and other customers with self-generated power capacity in the Province of British Columbia, also allegedly denying claimant's subsidiary the benefits available to its competitors.</p> <p><b>Investment at issue:</b> Ownership and operation, through claimant's wholly-owned Canadian subsidiary Zellstoff Celgar Limited, of an industrial plant consisting of a pulp mill and a biomass-based electricity generation facility, located in British Columbia.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether certain MST claims were time-barred (→YES – BY MAJORITY; certain measures occurred before 3-year limitation period)</li> <li>• Whether certain NT claims based on same measures were time-barred (→NO; even though measures occurred before 3-year limitation period, Claimant acquired knowledge of competitors' allegedly more favourable treatment later on, within 3-year limitation period)</li> <li>• Whether certain challenged measures constituted "procurement by a state enterprise" and were therefore excluded from NAFTA's NT obligation pursuant to Art. 1108(7) (→YES – BY MAJORITY)</li> </ul> <p>Merits issues:</p> <ul style="list-style-type: none"> <li>• Whether NAFTA NT obligation entitles covered investors to "best in jurisdiction" treatment (→YES)</li> <li>• Whether challenged measures (those within Tribunal's jurisdiction) breached NAFTA NT obligation (→NO; differences in treatment were justified by particular circumstances of each comparator company)</li> <li>• Whether challenged measures breached MST obligation (→NO – BY MAJORITY; MST obligation does not prohibit discriminatory measures or require regulatory transparency; Respondent's actions did not display "irrationality, injustice, arbitrariness, or a violation of due process")</li> </ul>
<p><b>Aven and others v. Costa Rica</b></p> <p><i>David R. Aven, Samuel D. Aven, Giacomo A. Buscemi and others v. Republic of Costa Rica</i> (ICSID Case No. UNCT/15/3)</p> <p>CAFTA–DR (2004)</p> <p>Final Award, 18 September 2018</p> <p><b>Arbitrators:</b></p> <ul style="list-style-type: none"> <li>• Siqueiros, E. (President)</li> <li>• Baker, C. M.</li> <li>• Nikken, P.</li> </ul>	<p><b>Disputed measure(s):</b> Government's termination of claimants' hotel, beach club and villas construction project, following the revocation of an environmental viability permit after determining that the property included wetlands and a protected forest, and criminal investigations against one of the claimants.</p> <p><b>Investment at issue:</b> Shareholdings in several enterprises engaged in a construction project in Costa Rica known as Las Olas Project; ownership of 39 hectares of land in connection with this project.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> <li>• Whether one Claimant, dual Italian-United States national, was eligible for treaty protection (→YES; CAFTA's test of "dominant and effective nationality" implicitly applies only to dual nationals who have nationality of host State)</li> <li>• Whether treaty protection should be denied because Claimants breached domestic law requirement that 51% of shares be held by Costa Rican person (majority of shares were held in trust by Costa Rican company for a Claimant's benefit) (→NO; such arrangements were common in Costa Rica; "Respondent's longtime tolerance of analogous structures bars it from challenging the legality of the structure in the instant case")</li> <li>• Whether jurisdiction should be denied in respect of FPS claim that did not appear in Claimants' notice of intent (→YES; CAFTA required notice of intent to set out "legal and factual basis for each claim")</li> </ul> <p>Merits issues:</p> <ul style="list-style-type: none"> <li>• Whether CAFTA's environmental provision (Art. 10.11) impacted interpretation of substantive protections (→YES; investors' conduct must be "sensitive to environmental concerns"; States' implementation of environmental measures needs to be fair, non-discriminatory and in line with due process)</li> <li>• Whether Claimants undertook proper due diligence regarding environmental restrictions when making</li> </ul>

Table 4. Decisions dismissing the investors' claims (in toto)		
Case details	Case summary	Key issues and tribunals' findings
		<p>investment (→NO)</p> <ul style="list-style-type: none"> <li>• Whether Claimants had violated Costa Rican law by failing to disclose existence of wetlands and forested areas in their applications to State authorities (→YES)</li> <li>• Whether Claimants' works affecting wetlands and forests had been conducted without permit (→YES)</li> <li>• Whether Respondent's measures taken in response to Claimants' conduct complied with Costa Rican laws (→YES)</li> <li>• Whether Respondents' actions breached CAFTA provisions on MST or indirect expropriation (→NO)</li> <li>• Whether criminal proceedings against one Claimant failed to comply with Costa Rican laws and constituted denial of justice (→NO; "sufficient elements under the laws of Costa Rica to file charges" against one Claimant; Claimants did not meet standards for bringing such claims)</li> </ul> <p>Other issues:</p> <ul style="list-style-type: none"> <li>• Whether Tribunal had prima facie jurisdiction over Respondent's counterclaim for alleged violations of Costa Rican law (→YES)</li> <li>• Whether international investors may be considered subjects of international law, particularly in respect of environmental obligations (→YES; CAFTA poses, "at least implicitly", some obligations on investors with respect to host State environmental laws)</li> <li>• Whether Respondent's counterclaim could be accepted on merits (→NO; it was not sufficiently supported by facts)</li> </ul>