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IIA ISSUES NOTE

INTERNATIONAL INVESTMENT AGREEMENTS

REVIEW OF ISDS DECISIONS IN 2018: SELECTED IIA REFORM ISSUES

HIGHLIGHTS

- In 2018, arbitral tribunals rendered at least 50 substantive decisions in investor–State dispute settlement (ISDS) cases. Most decisions were based on old-generation international investment agreements (IIAs) signed in the 1990s or earlier. Twenty-nine of the ISDS decisions, including five ICSID annulment decisions, were publicly available as of January 2019.
- For policymakers, arbitral decisions can be a useful source for learning how IIA provisions work in practice and which areas are most in need of improvement.
- Decisions rendered in 2018 touched upon many IIA reform topics, including:
    - Preserving the right to regulate (e.g. exclusions from treaty scope, interpretation of fair and equitable treatment, expropriation and umbrella clauses)
    - Improving investment dispute settlement (e.g. limitation periods for bringing ISDS claims, local litigation requirements as a prerequisite to arbitration, counterclaims)
    - Ensuring investor responsibility (e.g. legality of investment under host State law)
- Decisions from 2018 show some important developments. Questions of interpretation typically arise where the applicable treaty does not provide enough details on the matter at issue and leaves a wider margin of discretion to tribunals. There are instances in which respondent States lacked sufficient legal basis in the treaty to defend themselves more effectively. On certain issues, arbitral decisions gradually converge, while arbitrators and tribunals continue to be divided on others. Decisions issued in 2018 also reveal novel elements of legal reasoning by arbitral tribunals.
- Policymakers may wish to consider the implications of these developments for treaty drafting (e.g. by identifying options to add, clarify, circumscribe or omit certain formulations). They may wish to do so in a holistic manner, i.e. considering substantive and procedural issues (e.g. different approaches to ISDS reform) during the development of future treaties as well as the modernization of existing ones.
- UNCTAD's next High-level IIA Conference, to be held in November 2019, will offer an opportunity to take stock of IIA reform progress and lessons learned. The High-level IIA Conference 2019 will aim to pave the way for further inclusive, transparent and synchronized IIA reform processes in the pursuit of sustainable development.

Note: This report can be freely cited provided appropriate acknowledgement is given to UNCTAD. This document has not been formally edited.

Introduction: Selected IIA reform issues addressed in ISDS decisions

This note provides an overview of arbitral findings in the previous year's publicly available ISDS decisions (box 1) that may have implications for the drafting of future IIAs and the modernization of old-generation treaties. A factual summary of the questions addressed by ISDS tribunals in publicly available decisions can be a useful source for learning how IIA provisions work in practice and which areas are most in need of improvement. Most arbitral decisions rendered in 2018 relied on provisions in old-generation treaties signed in the 1990s or earlier.

Against this background, this note draws on policy options for Phases 1 and 2 of IIA Reform put forward in UNCTAD's Reform Package for the International Investment Regime (2018) and the Investment Policy Framework for Sustainable Development (2015).

The cases and issues highlighted in this note were selected after a comprehensive case-by-case mapping of key issues addressed by ISDS tribunals in 2018 (covering publicly available decisions as of January 2019), which is available as supplementary material.[1]

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

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

The analysis of ISDS decisions should be read in conjunction with other recent UNCTAD publications related to ISDS. The "Fact Sheet on Investor–State Dispute Settlement Cases in 2018" (IIA Issues Note, No. 2, May 2019) provides an overview of known treaty-based ISDS cases initiated in the previous year and overall ISDS case outcomes. The IIA Issues Note on "Reforming Investment Dispute Settlement: A Stocktaking" (No. 1, March 2019) summarizes ISDS reform developments and identifies five principal approaches to ISDS reform that emerged from IIAs signed in 2018: (I) no ISDS, (ii) a standing ISDS tribunal, (iii) limited ISDS, (iv) improved ISDS procedures, and (v) an unreformed ISDS mechanism.

When considering lessons learned for treaty drafting, policymakers may also consult Chapter III of the World Investment Report 2019, which documents progress on IIA reform involving countries at all levels of development and from all geographical regions.

Box 1. ISDS decisions in 2018 and overall outcomes

In 2018, ISDS tribunals rendered at least 50 substantive decisions, 29 of which were in the public domain as of January 2019.[a] Of these public decisions, most – about 70 per cent – were decided in favour of the investor, either on jurisdictional grounds or on the merits.

- Eight decisions (including rulings on preliminary objections) principally addressed jurisdictional issues, with six upholding the tribunal's jurisdiction and two denying jurisdiction.
- Sixteen decisions on the merits were rendered, with 11 accepting at least some investor claims and 5 dismissing all the claims. In the decisions holding the State liable, tribunals most frequently found breaches of the fair and equitable treatment (FET) provision.

In addition, five publicly known decisions were rendered in ICSID annulment proceedings. ICSID ad hoc committees rejected the applications for annulment in all five cases.

Ten awards of damages were rendered in 2018, ranging from approx. $3.2 million (*Gavrilovic v. Croatia*) to $2 billion (*Unión Fenosa v. Egypt*). These amounts do not include interest or legal costs, and some awards may be subject to set-aside or annulment proceedings.

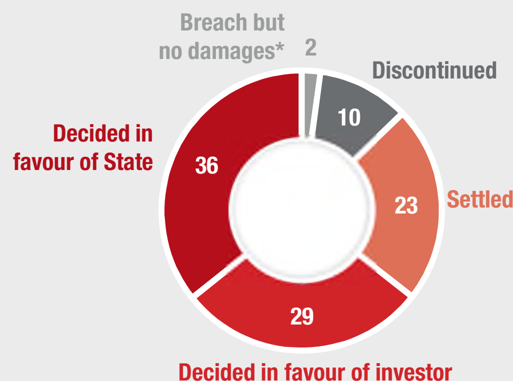
[1] The case-by-case mapping records a larger set of issues (e.g. attribution of conduct to the respondent State, intra-EU application of the Energy Charter Treaty). Available at https://investmentpolicy.unctad.org/publications/series/2/international-investment-agreements.

Box 1 (continued)

By the end of 2018, about 600 ISDS cases had been concluded. The relative share of overall case outcomes changed only slightly from that in previous years (box figure 1).

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

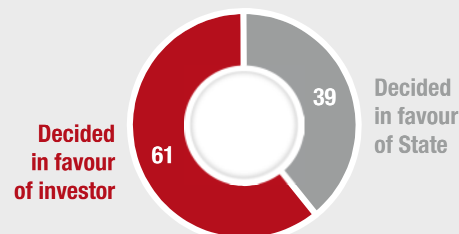
Box figure 1. Results of concluded cases, 1987–2018 (Per cent)



Source: UNCTAD, ISDS Navigator.

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

Box figure 2. Results of decisions on the merits, 1987–2018 (Per cent)



Source: UNCTAD, ISDS Navigator.

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

Source: UNCTAD (based on UNCTAD, 2019a and 2019d).

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

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

1. Treaty scope and definitions

a. Definition of investment

Coverage of indirect investments

Several decisions in 2018 addressed whether investments held by claimants indirectly – e.g. through a local company or through foreign entities not covered by the applicable IIA – qualified for IIA protection (table 1). The question arose particularly in those cases where the applicable IIA was silent on whether it applied to indirect investments. In the decisions reviewed, tribunals have interpreted such silence as meaning that indirect investments were covered by the IIA concerned.

Table 1. Coverage of indirect investments		
Case details	Investment at issue	Selected issues and tribunals' findings
Antin v. Spain • Energy Charter Treaty (ECT) (1994) • Award, 15 June 2018 • Zuleta, E. (President); Reichert, K.; Thomas, J. C.	Direct and indirect shareholding in two solar thermo plants in Andalucía, Spain.	• 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)
Chevron and TexPet v. Ecuador (II) • Ecuador–United States of America bilateral investment treaty (BIT) (1993) • Second Partial Award on Track II, 30 August 2018 • Veeder, V. V. (President); Grigera Naón, H. A.; Lowe, V.	Oil exploration and production rights in Ecuador's Amazon region through concession contracts concluded with the Government.	• 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)
Mera Investment v. Serbia • Cyprus–Serbia BIT (2005) • Decision on Jurisdiction, 30 November 2018 • von Segesser, G. (President); Fortier, L. Y.; Cremades, B. M.	Ownership of a locally incorporated investment fund, Mera Invest d.o.o, holding shares in a construction company in Southeastern Serbia and local banks.	• 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)
South American Silver v. Bolivia • Bolivia–United Kingdom BIT (1988) • Award, 30 August 2018 • Zuleta, E. (President); Orrego Vicuña, F. (Separate opinion); Guglielmino, O. C. (Dissenting opinion)	Rights under mining concessions held through claimant's wholly-owned subsidiary, Compañia Minera Malku Khota.	• Whether BIT covers investments held indirectly (Claimant held its investment through Bahamian holding companies) (➔YES – BY MAJORITY; BIT does not expressly exclude indirect investments)

Source: UNCTAD.

Ultimate ownership of investment

In several cases, respondent States objected to the tribunals' jurisdiction on the basis that the investment at issue was ultimately owned either by nationals of the respondent State itself or by third-state nationals not covered by the applicable IIA (table 2).

In publicly available decisions rendered in 2018, tribunals dealing with this issue have rejected such objections. They typically reasoned that the applicable IIA did not refer to ultimate ownership or the origin of invested capital as relevant attributes of investment. Notably, the IIAs applicable in those cases contained a simple incorporation test for determining the nationality of an investor (legal entity).

The incorporation approach to defining qualifying corporate investors is used in most of today's stock of IIAs.[2] In recent IIAs, however, there has been a growing tendency to clarify clauses and concepts related to ownership and control with a view to circumscribing treaty coverage. For example, recent treaties more frequently include a "substantial business activities" requirement (combined with the incorporation or the seat approach) (UNCTAD, 2016).

[2] The World Investment Report 2016 (chapter IV) analysed different approaches to ownership and control in relevant IIA clauses (UNCTAD, 2016, 172-181).

Table 2. Ultimate ownership of investment		
Case details	Investment at issue	Selected issues and tribunals' findings
A11Y v. Czechia • Czechia–United Kingdom BIT (1990) • Decision on Jurisdiction, 9 February 2017 (became public in 2018); Award, 29 June 2018 • Fortier, L. Y. (President); Alexandrov, S. A.; Joubin-Bret, A.	Company engaged in the supply of high quality compensation aids to blind and visually impaired people.	(Decision on Jurisdiction, 9 February 2017) • Whether Claimant company, majority owned by host State national, qualified as protected United Kingdom investor (➜YES; BIT set out simple incorporation test of nationality)
Cortec Mining v. Kenya • Kenya–United Kingdom BIT (1999) • Award, 22 October 2018 • Binnie, I. (President); Dharmananda, K.; Stern, 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.	• Whether Claimants qualified for BIT protection (Respondent alleged that they were "shell" United Kingdom companies, with ultimate investors having third-party nationality) (➜YES; origin of funds is irrelevant under BIT)
Mera Investment v. Serbia • Cyprus–Serbia BIT (2005) • Decision on Jurisdiction, 30 November 2018 • von Segesser, G. (President); Fortier, L. Y.; Cremades, B. M.	Ownership of a locally incorporated investment fund, Mera Invest d.o.o, holding shares in a construction company in Southeastern Serbia and local banks.	• 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)
Rawat v. Mauritius • France–Mauritius BIT (1973) • Award on Jurisdiction, 6 April 2018 • Reed, L. (President); Honlet, J.-C.; Lowe, V.	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).	• 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)
South American Silver v. Bolivia • Bolivia–United Kingdom BIT (1988) • Award, 30 August 2018 • Zuleta, E. (President); Orrego Vicuña, F. (Separate opinion); Guglielmino, O. C. (Dissenting opinion)	Rights under mining concessions held through claimant's wholly-owned subsidiary, Compañia Minera Malku Khota.	• Whether Claimant qualified as investor if invested capital originated from Claimant's parent company (Canadian) (➜YES; origin of capital is irrelevant under BIT)

Source: UNCTAD.

Characteristics of investment (contribution of resources)

In at least three decisions, tribunals addressed the related question of "contribution of resources" (table 3). In a case brought under UNCITRAL rules, the tribunal examined whether there may be a covered investment in a situation where the claimant – an intermediary company owned by a host State national – had not contributed any resources to the host State. The respondent State argued that the "contribution, risk and duration" criteria must be met. The applicable BIT did not explicitly define or limit the terms "every kind of asset".

In two cases under the ICSID Convention, respondent States alleged that the respective claimants had made no contribution of economic resources to the host State.

The contribution of resources is considered to be a necessary characteristic of an investment under the so-called *Salini* test.[3] Article 25 of the ICSID Convention, the clause having triggered the *Salini* test, uses the term "investment", but does not define it (UNCTAD, 2011). Old-generation treaties typically use an open-ended definition of "investment" that grants protection to all types of assets. Many recent IIAs, however, list the "commitment of capital or other resources" (alongside other characteristics such as the expectation of profit and the assumption of risk) in definitions of the term "investment" (UNCTAD, 2019d). They also often exclude certain types of assets from coverage.

Table 3. Characteristics of investment: contribution of resources

Case details	Investment at issue	Selected issues and tribunals' findings
A11Y v. Czechia • Czechia–United Kingdom BIT (1990) • Decision on Jurisdiction, 9 February 2017 (became public in 2018); Award, 29 June 2018 • Fortier, L. Y. (President); Alexandrov, S. A.; Joubin-Bret, A.	Company engaged in the supply of high quality compensation aids to blind and visually impaired people.	(Award, 29 June 2018) • 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.)
Cortec Mining v. Kenya • Kenya–United Kingdom BIT (1999) • Award, 22 October 2018 • Binnie, I. (President); Dharmananda, K.; Stern, 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.	• 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 *Salini* criteria)
Masdar v. Spain • ECT (1994) • Award, 16 May 2018 • Beechey, J. (President); Born, G. B.; Stern, B.	Shareholding in the Spanish company Torresol Energy Investments S.A. which operated three concentrated solar power plants in Spain: Gemasolar, Termesol and Arcosol.	• Whether Claimant made an investment in host State (Respondent alleged that Claimant had not contributed own economic resources) (➔YES; investment met *Salini* test; BIT did not contain origin of capital requirement)

Source: UNCTAD.

b. Definition of investor

Company seat

In one case, the tribunal discussed the notion of corporate seat (table 4). The applicable IIA required that in order to be considered an investor, a company must have its corporate seat in the presumed home State.

An increasing share of recent treaties require the covered investor to have "substantial business activities" (or sometimes "real economic activities") in the contracting party whose nationality it claims. Typically, this is combined with the incorporation approach or the seat approach to defining qualifying corporate investors.[4]

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

[4] UNCTAD, 2016, 173-174.

Table 4.	Definition of investor: company seat	
Case details	Investment at issue	Selected issues and tribunals' findings
Mera Investment v. Serbia • Cyprus–Serbia BIT (2005) • Decision on Jurisdiction, 30 November 2018 • von Segesser, G. (President); Fortier, L. Y.; Cremades, B. M.	Ownership of a locally incorporated investment fund, Mera Invest d.o.o, holding shares in a construction company in Southeastern Serbia and local banks.	• 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)

Source: UNCTAD.

Denial of benefits

In one case, the respondent State invoked (after the arbitration had been initiated against it) the denial-of-benefits clause in the applicable IIA arguing that the claimant did not have "substantial business activities" in its alleged home State (table 5).

The denial-of-benefits clause is becoming widely used in recent treaties (UNCTAD, 2016). In light of several decisions which have held that the clause may not be invoked against an investor after it initiates a formal arbitration claim, policymakers may consider clarifying in their treaties whether the clause can also be invoked *after* the commencement of arbitral proceedings (UNCTAD, 2015b; UNCTAD, 2018).

Table 5.	Denial of benefits	
Case details	Investment at issue	Selected issues and tribunals' findings
Masdar v. Spain • ECT (1994) • Award, 16 May 2018 • Beechey, J. (President); Born, G. B.; Stern, B.	Shareholding in the Spanish company Torresol Energy Investments S.A. which operated three concentrated solar power plants in Spain: Gemasolar, Termesol and Arcosol.	• 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) • 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)

Source: UNCTAD.

c. Legality of investment

In a number of cases decided in 2018, respondent States argued that claimants had made their investments in violation of the host State law, and that such illegal investments did not qualify for IIA protection (table 6). Two tribunals confirmed that the legality requirement applied even when it was not explicitly mentioned in the IIA.[5]

Many recent as well as old-generation treaties include an explicit "in accordance with host State law" requirement for investments to be covered by the treaty (UNCTAD, 2018).

[5] A similar finding was made in another 2018 decision that recently became public: *Álvarez y Marín Corporación S.A., Estudios Tributarios AP S.A., Stichting Administratiekantoor Anbadi, Bartus van Noordenne and Cornelis Willem van Noordenne v. Republic of Panama* (ICSID Case No. ARB/15/14), Award, 12 October 2018, with Dissenting Opinion by Horacio Grigera Naón.

Table 6. Legality of investment

Case details	Investment at issue	Selected issues and tribunals' findings
Aven and others v. Costa Rica • Dominican Republic–Central America Free Trade Agreement (CAFTA–DR) (2004) • Final Award, 18 September 2018 • Siqueiros, E. (President); Baker, C. M.; Nikken, P.	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.	• 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")
Cortec Mining v. Kenya • Kenya–United Kingdom BIT (1999) • Award, 22 October 2018 • Binnie, I. (President); Dharmananda, K.; Stern, 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.	• 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)
Gavrilovic v. Croatia • Austria–Croatia BIT (1997) • Award, 26 July 2018 • Pryles, M. C. (President); Alexandrov, S. A.; Thomas, J. C.	Ownership and operation of a meat processing factory; ownership of related agricultural and grazing land in Croatia.	• 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)
Unión Fenosa v. Egypt • Egypt–Spain BIT (1992) • Award, 31 August 2018 • Veeder, V. V. (President); Rowley, J. W.; Clodfelter, M. A. (Dissenting opinion)	Majority shareholding (80 per cent) in SEGAS, an Egyptian company that operated the Damietta liquefied natural gas plant in the port of Damietta.	• Whether Claimant committed acts of corruption when developing project and concluding gas purchase agreement (➜NO – BY MAJORITY; insufficient proof)
South American Silver v. Bolivia • Bolivia–United Kingdom BIT (1988) • Award, 30 August 2018 • Zuleta, E. (President); Orrego Vicuña, F. (Separate opinion); Guglielmino, O. C. (Dissenting opinion)	Rights under mining concessions held through claimant's wholly-owned subsidiary, Compañia Minera Malku Khota.	• 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)

Source: UNCTAD.

d. Exclusions from treaty scope (taxation measures)

In several cases decided in 2018, arbitral tribunals examined whether taxation measures were excluded from the scope of the applicable treaty (table 7). In all but one case, the tribunals confirmed that the relevant measure was outside the scope of the applicable treaty. In the remaining case, the tribunal analysed the economic essence of the measure and decided that it was not a tax (despite its formal nomination as such) and therefore did not qualify for the treaty's tax carve-out.

As compared to old-generation treaties, exclusions of specific policy areas from the treaty scope (e.g. taxation, subsidies and grants, government procurement, sovereign debt) are more frequently encountered in recent treaties (UNCTAD, 2018; UNCTAD, 2015a).

Table 7.	Exclusions from treaty scope	
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Antaris and Göde v. Czechia • Germany–Slovakia BIT (1990); ECT (1994) • Award, 2 May 2018 • Collins, L. (President); Born, G. B. (Dissenting opinion); Tomka, P. (Separate opinion – "Declaration")	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.	• 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)
Antin v. Spain • ECT (1994) • Award, 15 June 2018 • Zuleta, E. (President); Reichert, K.; Thomas, J. C.	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.	• 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)
Foresight and others v. Spain • ECT (1994) • Award, 14 November 2018 • Moser, M. J. (President); Sachs, K.; Vinuesa, R. E. (Partial dissenting opinion)	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.	• 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)
Masdar v. Spain • ECT (1994) • Award, 16 May 2018 • Beechey, J. (President); Born, G. B.; Stern, 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.	• 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)
Novenergia v. Spain • ECT (1994) • Final Award, 15 February 2018 • Sidklev, J. (President); Crivellaro, A.; Sepúlveda-Amor, J. 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.	• 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)

Source: UNCTAD.

2. Standards of treatment and protection

a. Fair and equitable treatment (FET)

Legitimate expectation of regulatory stability

Under the FET heading, a significant number of tribunals in 2018 addressed the question of investors' legitimate expectations of the stability of the regulatory regime existing at the time of investment in the host State (table 8).[6] These questions were discussed in particular in the context of claims against Czechia, Italy and Spain due to their reforms in the renewable energy sector.

In several cases, tribunals found that the respondent States had established attractive regulatory regimes for investments in their renewable energy sectors and had also provided assurances of the regimes' long-term stability, which gave rise to investors' legitimate expectations.

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

Table 8. FET: legitimate expectation of regulatory stability

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Antaris and Göde v. Czechia • Germany–Slovakia BIT (1990); ECT (1994) • Award, 2 May 2018 • Collins, L. (President); Born, G. B. (Dissenting opinion); Tomka, P. (Separate opinion – "Declaration")	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.	• Whether legitimate expectations could in principle be inferred from domestic legislation (➔YES) • 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) • Whether Respondent had rational objective for adopting measures (➔YES; reducing excessive profits for solar energy producers and protecting energy consumers) • Whether challenged measures were proportionate to objectives pursued (➔YES) • Whether Claimants' profits reduced dramatically due to challenged measures (➔NO) • Whether challenged measures breached ECT and BIT (➔NO – BY MAJORITY)
Antin v. Spain • ECT (1994) • Award, 15 June 2018 • Zuleta, E. (President); Reichert, K.; Thomas, J. C.	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.	• Whether Respondent – through its general acts and regulations – had created legitimate expectation that legal framework for concentrated solar power plants would remain stable (➔YES) • Whether ECT precludes States from exercising regulatory powers in public interest (➔NO) • Whether Respondent may radically alter regulatory regime specifically created to induce investments (➔NO) • Whether Respondent breached FET by frustrating Claimants' legitimate expectations (➔YES)

[6] This issue was also addressed in *RREEF v. Spain,* in a 2018 decision that recently became public. *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/30), Decision on Responsibility and on the Principles of Quantum, 30 November 2018, with Partially Dissenting Opinion of Robert Volterra.

Table 8.	FET: legitimate expectation of regulatory stability	
Case details	**Disputed measure(s)**	**Selected issues and tribunals' findings**
Foresight and others v. Spain • ECT (1994) • Award, 14 November 2018 • Moser, M. J. (President); Sachs, K.; Vinuesa, R. E. (Partial dissenting opinion)	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.	• 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) • Whether enactment of new regulatory regime breached FET standard by frustrating Claimants' legitimate expectations (➔YES – BY MAJORITY)
Greentech and NovEnergia v. Italy • ECT (1994) • Final Award, 23 December 2018 • Park, W. W. (President); Haigh, D.; Sacerdoti, G. (Dissenting opinion)	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.	• 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) • Whether such assurances constituted "non-waivable guarantees" whose breach could be justified only by *force majeure* (➔YES – BY MAJORITY) • Whether reduction of incentive tariffs constituted breach of FET standard (➔YES – BY MAJORITY)
Masdar v. Spain • ECT (1994) • Award, 16 May 2018 • Beechey, J. (President); Born, G. B.; Stern, 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.	• Whether FET standard prohibits States to modify legislation in an unreasonable or unjustified manner contrary to specific commitments undertaken towards investor (➔YES) • 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) • Whether challenged measures frustrated Claimant's legitimate expectations and thereby breached FET standard (➔YES)
Novenergia v. Spain • ECT (1994) • Final Award, 15 February 2018 • Sidklev, J. (President); Crivellaro, A.; Sepúlveda-Amor, J. 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.	• 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) • 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) • Whether regulatory changes implemented in 2010-2013 breached FET standard (➔NO; they did not "entirely transform or fundamentally change" regulatory framework) • 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)

Source: UNCTAD.

In several of the cases listed above, the tribunals determined that the State had provided assurances (whether specific or general) that the regulatory framework would remain unchanged, often for a specified number of years. In two other disputes concluded in 2018, investors claimed to have acquired a legitimate expectation of

regulatory stability in the absence of the State's assurances (table 9). In both cases, the tribunals rejected such claims.

Many recent IIAs clarify or omit FET obligations, while old-generation treaties typically included an unqualified FET standard (UNCTAD, 2019d; UNCTAD, 2018). The FET standard is one of the IIA clauses that is at the core of today's debate on IIA reform.

Table 9. FET: legitimate expectation of regulatory stability in the absence of assurances

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Greentech and NovEnergia v. Italy • ECT (1994) • Final Award, 23 December 2018 • Park, W. W. (President); Haigh, D.; Sacerdoti, G. (Dissenting opinion)	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.	• 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)
Unión Fenosa v. Egypt • Egypt–Spain BIT (1992) • Award, 31 August 2018 • Veeder, V. V. (President); Rowley, J. W.; Clodfelter, M. A. (Dissenting opinion)	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.	• 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)

Source: UNCTAD.

Investor due diligence

In assessing legitimacy and reasonableness of the claimants' expectations, several tribunals also examined whether investors had conducted proper due diligence before making their investments (table 10).

Arbitrators essentially treated due diligence as an exercise required to ascertain legal and regulatory conditions surrounding the investment, including indications of possible future regulatory changes. While some tribunals found the claimants' due diligence to be sufficient, in other cases investors' failure to conduct proper due diligence (established by the arbitrators) played a role in the tribunals' rejection of the claims.

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

Table 10. FET: investor due diligence

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Antaris and Göde v. Czechia • Germany–Slovakia BIT (1990); ECT (1994) • Award, 2 May 2018 • Collins, L. (President); Born, G. B. (Dissenting opinion); Tomka, P. (Separate opinion – "Declaration")	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.	• Whether Claimants undertook proper due diligence when making investment (➔NO – BY MAJORITY)

Table 10.	FET: investor due diligence	
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Aven and others v. Costa Rica • CAFTA–DR (2004) • Final Award, 18 September 2018 • Siqueiros, E. (President); Baker, C. M.; Nikken, P.	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.	• Whether Claimants undertook proper due diligence regarding environmental restrictions when making investment (➜NO)
Foresight and others v. Spain • ECT (1994) • Award, 14 November 2018 • Moser, M. J. (President); Sachs, K.; Vinuesa, R. E. (Partial dissenting opinion)	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.	• Whether Claimants carried out sufficient legal due diligence when making investment (➜YES – BY MAJORITY)
Novenergia v. Spain • ECT (1994) • Final Award, 15 February 2018 • Sidklev, J. (President); Crivellaro, A.; Sepúlveda-Amor, J. 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.	• Whether Claimant undertook sufficient legal due diligence prior to making investment (➜YES)

Source: UNCTAD.

Proportionality of State conduct

In two disputes, the tribunals based their FET analysis on assessing the objectives and proportionality of State measures (table 11).[7] Given the increasing prominence of the proportionality concept in arbitral practice, policymakers may wish to consider whether – and if so how – they should address this issue in case they include (circumscribed) FET clauses in future treaties or treaty amendments.

Table 11.	FET: proportionality of State conduct	
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Antaris and Göde v. Czechia • Germany–Slovakia BIT (1990); ECT (1994) • Award, 2 May 2018 • Collins, L. (President); Born, G. B. (Dissenting opinion); Tomka, P. (Separate opinion – "Declaration")	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.	• Whether Respondent had rational objective for adopting measures (➜YES; reducing excessive profits for solar energy producers and protecting energy consumers) • Whether challenged measures were proportionate to objectives pursued (➜YES) • Whether challenged measures breached ECT and BIT (➜NO – BY MAJORITY)

[7] This issue was also addressed in *RREEF v. Spain,* in a 2018 decision that recently became public. *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/30), Decision on Responsibility and on the Principles of Quantum, 30 November 2018, with Partially Dissenting Opinion of Robert Volterra.

Table 11.	FET: proportionality of State conduct	
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Marfin v. Cyprus • Cyprus–Greece BIT (1992) • Award, 26 July 2018 • Hanotiau, B. (President); Price, D. M.; Edward, D. A. O.	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.	• Whether Respondent's actions were unreasonable, arbitrary or capricious (➜NO) • Whether Respondent's actions were abusive, did not afford due process or were designed to conceal improper ends (➜NO) • Whether Respondent's conduct breached FET provision (➜NO; measures were proportionate, i.e. had reasonable relationship to rational policy and were appropriately tailored)

Source: UNCTAD.

FET and the minimum standard of treatment

In one decision rendered in 2018, the tribunal addressed the scope of FET under the minimum standard of treatment (MST) in customary international law (table 12). The tribunal continued the trend to interpret such FET wording in a somewhat more restricted manner, as compared to the unqualified FET obligation. In particular, the tribunal held in that case that the FET/MST did not encompass an obligation to avoid discrimination between nationals and foreign investors or an obligation to maintain transparency in governmental decision making.

An increasing share of treaties qualify the FET standard by reference to the MST under customary international law (UNCTAD, 2018), at times in combination with an open-ended list of State obligations. Another approach, emerging in recently signed IIAs, is to clarify or replace the general FET clause with an exhaustive list of more specific obligations (e.g. a prohibition to deny justice or flagrantly violate due process, engage in manifestly abusive or arbitrary treatment). A few recent treaties omit the FET clause altogether (UNCTAD, 2019b).

Table 12.	FET and the minimum standard of treatment	
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Mercer v. Canada • North American Free Trade Agreement (NAFTA) (1992) • Award, 6 March 2018 • Veeder, V. V. (President); Orrego Vicuña, F.; Douglas, Z.	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.	• 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"; dissenting view expressed by Orrego Vicuña, F.)

Source: UNCTAD.

FET and denial of justice

Several decisions in 2018 also analysed the conditions for bringing denial of justice claims (e.g. exhaustion of local remedies) and the threshold for finding a denial of justice (table 13).

A number of recent IIAs have expressly included a reference to denial of justice in their FET clause or the "standards of treatment" clause (in the absence of an FET clause).

Table 13. FET and denial of justice		
Case details	**Disputed measure(s)**	**Selected issues and tribunals' findings**
Aven and others v. Costa Rica • CAFTA–DR (2004) • Final Award, 18 September 2018 • Siqueiros, E. (President); Baker, C. M.; Nikken, P.	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.	• 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)
Chevron and TexPet v. Ecuador (II) • Ecuador–United States of America BIT (1993) • Second Partial Award on Track II, 30 August 2018 • Veeder, V. V. (President); Grigera Naón, H. A.; Lowe, V.	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).	• 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) • 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)
Marfin v. Cyprus • Cyprus–Greece BIT (1992) • Award, 26 July 2018 • Hanotiau, B. (President); Price, D. M.; Edward, D. A. O.	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.	• 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)
Olin v. Libya • Cyprus–Libya BIT (2004) • Final Award, 25 May 2018 • Comair-Obeid, N. (President); Ziadé, N.; Fadlallah, I.	Claims arising out of the alleged expropriation of the claimant's dairy and juice factory.	• 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) • 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")

Source: UNCTAD.

b. Umbrella clause

At least four decisions in 2018 addressed claims submitted under the applicable IIA's umbrella clause that required the host State to respect obligations undertaken in respect of specific investments (table 14).[8] While two tribunals in cases invoking the ECT did not accept such claims because the host State had not undertaken commitments *specifically* in relation to the claimants, one tribunal held (by majority) that the ECT umbrella clause was sufficiently broad to encompass State obligations set out in legislative and regulatory instruments of general application.

[8] This issue was also addressed in *RREEF v. Spain,* in a 2018 decision that recently became public. *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/30), Decision on Responsibility and on the Principles of Quantum, 30 November 2018, with Partially Dissenting Opinion of Robert Volterra.

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

Table 14. Umbrella clause

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Chevron and TexPet v. Ecuador (II) • Ecuador–United States of America BIT (1993) • Second Partial Award on Track II, 30 August 2018 • Veeder, V. V. (President); Grigera Naón, H. A.; Lowe, V.	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).	• 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)
Foresight and others v. Spain • ECT (1994) • Award, 14 November 2018 • Moser, M. J. (President); Sachs, K.; Vinuesa, R. E. (Partial dissenting opinion)	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.	• Whether Respondent breached ECT's umbrella clause (➔NO; specific commitments had not been provided to Claimants)
Greentech and NovEnergia v. Italy • ECT (1994) • Final Award, 23 December 2018 • Park, W. W. (President); Haigh, D.; Sacerdoti, G. (Dissenting opinion)	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.	• Whether reduction of incentive tariffs breached ECT's umbrella clause (➔YES – BY MAJORITY; umbrella clause is sufficiently broad to encompass legislative and regulatory instruments)
Novenergia v. Spain • ECT (1994) • Final Award, 15 February 2018 • Sidklev, J. (President); Crivellaro, A.; Sepúlveda-Amor, J. 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.	• Whether challenged measures breached ECT's umbrella clause (➔NO; Respondent had not made specific commitment to Claimant)

Source: UNCTAD.

c. Expropriation

Indirect expropriation

In deciding claims of indirect expropriation, tribunals paid particular attention to the purpose and intentions underlying the relevant State conduct (table 15). The IIAs invoked in these cases did not include clarifications or additional guidance on the meaning of indirect expropriation, and the tribunals derived the relevant legal tests from general international law and prior decisions of ISDS tribunals.

More recent IIAs typically set out criteria for distinguishing between State action amounting to an indirect expropriation and State action of a general regulatory nature for which no compensation is due (UNCTAD, 2018). A few recent agreements omit an explicit reference to indirect expropriation (UNCTAD, 2019b).

Table 15. Indirect expropriation		
Case details	Disputed measure(s)	Selected issues and tribunals' findings
A11Y v. Czechia • Czechia–United Kingdom BIT (1990) • Decision on Jurisdiction, 9 February 2017 (became public in 2018); Award, 29 June 2018 • Fortier, L. Y. (President); Alexandrov, S. A.; Joubin-Bret, A.	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.	• Whether Respondent's conduct amounted to expropriation (➔NO; measures were largely "bona fide regulatory measures")
Marfin v. Cyprus • Cyprus–Greece BIT (1992) • Award, 26 July 2018 • Hanotiau, B. (President); Price, D. M.; Edward, D. A. O.	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.	• Whether Respondent's measures taken to protect public welfare, in non-discriminatory and proportionate manner, could entail compensation (➔NO) • Whether "police powers" doctrine is part of customary international law (➔YES) • Whether Respondent had intent to nationalise bank (➔NO; Respondent merely tried to save bank that was suffering from exposure to Greek government bonds) • Whether Respondent's actions were unreasonable, arbitrary or capricious (➔NO) • Whether Respondent's actions were abusive, did not afford due process or were designed to conceal improper ends (➔NO) • Whether Respondent's actions constituted indirect expropriation (➔NO)
Gavrilovic v. Croatia • Austria–Croatia BIT (1997) • Award, 26 July 2018 • Pryles, M. C. (President); Alexandrov, S. A.; Thomas, J. C.	Ownership and operation of a meat processing factory; ownership of related agricultural and grazing land in Croatia.	• 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)
UP and C.D Holding v. Hungary • France–Hungary BIT (1986) • Award, 9 October 2018 • Böckstiegel, K.-H. (President); Fortier, L. Y.; Bethlehem, D.	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.	• Whether Claimants held rights capable of expropriation (➔YES; Claimants held shares in local subsidiary) • 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)

Source: UNCTAD.

Compensation requirement for expropriation

In at least three decisions where expropriation was found, the tribunals decided that the respondents' failure to pay compensation rendered the expropriation unlawful, regardless of whether such expropriation was direct or indirect (table 16).

Policymakers may consider clarifying in their treaties whether, in case of an indirect expropriation claim, the non-payment of compensation alone can render such expropriation unlawful (UNCTAD, 2012b). The standard of

compensation for (lawful) expropriation is another relevant issue on which policymakers may wish to provide further guidance (UNCTAD, 2015b).

Table 16. Expropriation: compensation requirement

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Olin v. Libya • Cyprus–Libya BIT (2004) • Final Award, 25 May 2018 • Comair-Obeid, N. (President); Ziadé, N.; Fadlallah, I.	Claims arising out of the alleged expropriation of the claimant's dairy and juice factory.	• 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) • Whether Respondent failed to comply with conditions for lawful expropriation under BIT, including due to lack of compensation (➔YES)
South American Silver v. Bolivia • Bolivia–United Kingdom BIT (1988) • Award, 30 August 2018 • Zuleta, E. (President); Orrego Vicuña, F. (Separate opinion); Guglielmino, O. C. (Dissenting opinion)	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.	• Whether revocation of mining concessions constituted direct expropriation (➔YES) • Whether lack of compensation rendered expropriation unlawful (➔YES – BY MAJORITY)
UP and C.D Holding v. Hungary • France–Hungary BIT (1986) • Award, 9 October 2018 • Böckstiegel, K.-H. (President); Fortier, L. Y.; Bethlehem, D.	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.	• 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) • Whether failure to pay compensation rendered expropriation unlawful (➔YES)

Source: UNCTAD.

3. Public policy exceptions and other exceptions

a. Necessity defence under customary international law

In at least two cases, respondent States invoked the necessity defence under customary international law[9] (the applicable BITs did not contain general or security exceptions) (table 17). In one case, the tribunal dismissed the respondent State's necessity defence in relation to direct expropriation and non-payment of compensation.

In the other case, the respondent State pointed to the exceptional circumstances of the Arab Spring that served as a backdrop for the Government's actions. The tribunal concluded that the respondent State had not proven the "necessity" defence and held that Egypt had breached the FET standard by disrupting gas supplies to the claimant.

Compared to old-generation treaties, public policy and national security exceptions are more prevalent in recently concluded IIAs (UNCTAD, 2018).

[9] Article 25 of the ILC Articles on State Responsibility justifies an internationally wrongful act if it is "the only way for the State to safeguard an essential interest against a grave and imminent peril" (certain other conditions must be met for the "necessity" defence to be validly invoked).

Table 17. Necessity defence under customary international law		
Case details	Disputed measure(s)	Selected issues and tribunals' findings
South American Silver v. Bolivia • Bolivia–United Kingdom BIT (1988) • Award, 30 August 2018 • Zuleta, E. (President); Orrego Vicuña, F. (Separate opinion); Guglielmino, O. C. (Dissenting opinion)	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.	• Whether necessity defence under customary international law or police-powers doctrine excused failure to pay compensation for expropriation (➔NO)
Unión Fenosa v. Egypt • Egypt–Spain BIT (1992) • Award, 31 August 2018 • Veeder, V. V. (President); Rowley, J. W.; Clodfelter, M. A. (Dissenting opinion)	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.	• 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)

Source: UNCTAD.

4. ISDS scope, conditions for access and procedural issues

a. Limitations on the treaty provisions subject to ISDS

In one decision that became public in 2018, a tribunal was asked to determine whether the claims fell within the scope of an ISDS clause that was limited to certain substantive provisions (table 18). The tribunal found that the narrow ISDS clause in the applicable BIT covered only claims of expropriation. It found further (by majority) that the ISDS scope could not be expanded by applying the BIT's MFN clause.

Many recent treaties carefully regulate ISDS (e.g. by limiting treaty provisions subject to ISDS or excluding certain policy areas from the scope of ISDS), and a few omit access to ISDS altogether (UNCTAD, 2019c).

Table 18. Scope of ISDS		
Case details	Disputed measure(s)	Selected issues and tribunals' findings
A11Y v. Czechia • Czechia–United Kingdom BIT (1990) • Decision on Jurisdiction, 9 February 2017 (became public in 2018); Award, 29 June 2018 • Fortier, L. Y. (President); Alexandrov, S. A.; Joubin-Bret, A.	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.	(Decision on Jurisdiction, 9 February 2017) • Whether BIT's ISDS clause covered claims for alleged breaches of FET, full protection and security or national treatment obligations (➔NO; but it covered expropriation claims) • 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.)

Source: UNCTAD.

b. Requirements applicable to notice of dispute

In at least four arbitral decisions in 2018, the tribunals addressed whether a claimant may present claims that were not mentioned in its notice of dispute (table 19). In three of these cases, the tribunals allowed the additional claims to proceed, while one tribunal denied jurisdiction in respect of the new (full protection and security) claim, citing CAFTA's explicit requirements on this matter.

Old-generation treaties often do not specify how or when the respondent State should be notified of the existence of a dispute (UNCTAD, 2014). Some of the treaties that impose a specific requirement of written notification of the dispute, do not mention what such a written notification should contain. This may have implications for respondent States' preparation and calculation of time-periods (e.g. for amicable settlement).

Table 19. ISDS: requirements applicable to notice of dispute

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Antin v. Spain • ECT (1994) • Award, 15 June 2018 • Zuleta, E. (President); Reichert, K.; Thomas, J. C.	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.	• 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)
Aven and others v. Costa Rica • CAFTA–DR (2004) • Final Award, 18 September 2018 • Siqueiros, E. (President); Baker, C. M.; Nikken, P.	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.	• Whether jurisdiction should be denied in respect of full protection and security 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")
Chevron and TexPet v. Ecuador (II) • Ecuador–United States of America BIT (1993) • Second Partial Award on Track II, 30 August 2018 • Veeder, V. V. (President); Grigera Naón, H. A.; Lowe, V.	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).	• 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)
Greentech and NovEnergia v. Italy • ECT (1994) • Final Award, 23 December 2018 • Park, W. W. (President); Haigh, D.; Sacerdoti, G. (Dissenting opinion)	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.	• 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)

Source: UNCTAD.

c. Local litigation requirement as a prerequisite to arbitration

In two decisions rendered in 2018, tribunals addressed different aspects of the requirement to pursue local remedies for a specified period of time before commencing arbitration (table 20).

A few recent treaties include a requirement to exhaust local judicial remedies or to litigate in local courts for a prolonged period before resorting to arbitration (UNCTAD, 2019c).

Table 20.	ISDS: local litigation requirement as a prerequisite to arbitration	
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Casinos Austria v. Argentina • Argentina–Austria BIT (1992) • Decision on Jurisdiction, 29 June 2018 • van Houtte, H. (President); Schill, S.; Torres Bernárdez, S. (Dissenting opinion)	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.	• 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)
Salini Impregilo v. Argentina • Argentina–Italy BIT (1990) • Decision on Jurisdiction and Admissibility, 23 February 2018 • Crawford, J. R. (President); Hobér, K.; Kurtz, J.	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 the legislation.	• 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)

Source: UNCTAD.

d. Relationship with domestic proceedings

In one case in 2018, the tribunal analysed the duty to terminate domestic proceedings upon commencement of arbitration (table 21). The applicable BIT required disputing parties to withdraw any domestic judicial proceedings pending in the host State after the commencement of arbitration. The tribunal concluded that this BIT obligation only arose once the decision on jurisdiction came into effect.

Table 21.	ISDS: relationship with domestic proceedings	
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Casinos Austria v. Argentina • Argentina–Austria BIT (1992) • Decision on Jurisdiction, 29 June 2018 • van Houtte, H. (President); Schill, S.; Torres Bernárdez, S. (Dissenting opinion)	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.	• 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)

Source: UNCTAD.

e. Limitation period for bringing claims

In several cases, tribunals considered whether the claims were time-barred (table 22). In one such case based on a BIT that did not contain a limitation period, the respondent put forward an argument that the claims should be considered time-barred as they arose out of measures adopted more than 10 years ago. Three other 2018 decisions – all based on the NAFTA which includes a three-year limitation period – dealt with several aspects of this issue (e.g. at what time the claimant acquired knowledge of the alleged breach).

Many IIAs reviewed for the year 2018 include a limitation period for bringing claims,[10] while many older IIAs do not contain such a requirement (UNCTAD, 2014).

[10] Based on a review of IIAs for which texts were publicly available (UNCTAD, 2019c).

Table 22.	ISDS: limitation period for bringing claims	
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Mercer v. Canada • NAFTA (1992) • Award, 6 March 2018 • Veeder, V. V. (President); Orrego Vicuña, F.; Douglas, Z.	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.	• Whether certain MST claims were time-barred (➔YES – BY MAJORITY; certain measures occurred before 3-year limitation period; dissenting view expressed by Orrego Vicuña, F.) • Whether certain national treatment 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)
Mobil v. Canada (II) • NAFTA (1992) • Decision on Jurisdiction and Admissibility, 13 July 2018 • Greenwood, C. (President); Rowley, J. W.; Griffith, G.	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, *Mobil and Murphy v. Canada*, found the Guidelines to violate NAFTA and awarded the claimants a portion of the damages sought.	• 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 *Mobil I* Tribunal is an act separate and distinct from promulgation of 2004 Guidelines and their enforcement until that date)
Resolute Forest v. Canada • NAFTA (1992) • Decision on Jurisdiction and Admissibility, 30 January 2018 • Crawford, J. R. (President); Cass, R. A.; Lévesque, C.	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.	• 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)
Salini Impregilo v. Argentina • Argentina–Italy BIT (1990) • Decision on Jurisdiction and Admissibility, 23 February 2018 • Crawford, J. R. (President); Hobér, K.; Kurtz, J.	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.	• 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)

Source: UNCTAD.

f. Counterclaims

In one case concluded in 2018, the tribunal faced a question on whether it had jurisdiction over the respondent State's counterclaim (table 23). In contrast to several other decisions rendered in previous years, in which tribunals viewed counterclaims as being outside the scope of parties' consent to arbitration, the tribunal affirmed its jurisdiction over the counterclaim and concluded further that international investors carried certain obligations under the applicable IIA.

Several obstacles exist for the effective use of counterclaims in ISDS proceedings. The vast majority of treaties to date do not spell out the right of a State to bring counterclaims (UNCTAD, 2014). Provisions on investor responsibilities or clauses on investor compliance with domestic laws (other than at the entry stage) are also largely absent from the stock of treaties (UNCTAD, 2018). This raises general issues related to the interaction between IIAs, domestic law and other areas of international law affecting investment, e.g. human rights or environmental law (UNCTAD, 2019c).

Table 23. ISDS: counterclaims

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Aven and others v. Costa Rica • CAFTA–DR (2004) • Final Award, 18 September 2018 • Siqueiros, E. (President); Baker, C. M.; Nikken, P.	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.	• Whether Tribunal had prima facie jurisdiction over Respondent's counterclaim for alleged violations of Costa Rican law (➔YES) • 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) • Whether Respondent's counterclaim could be accepted on merits (➔NO; it was not sufficiently supported by facts)

Source: UNCTAD.

Conclusions: lessons learned and way forward

Decisions rendered in 2018 touched upon many IIA reform topics, including:

- Preserving the right to regulate (e.g. exclusions from treaty scope, interpretation of FET, expropriation and umbrella clauses)
- Improving investment dispute settlement (limitation periods for bringing ISDS claims, local litigation requirements as a prerequisite to arbitration, counterclaims)
- Ensuring investor responsibility (e.g. legality of investment under host State law)

The decisions from 2018 show that questions of interpretation typically arise where the applicable treaty does not address the matter at issue in sufficient detail (e.g. coverage of indirect investments, characteristics of investment, notions of company seat or substantial business activities). Some 2018 decisions illustrate that IIA language can be an effective tool in providing guidance to arbitrators (e.g. excluding taxation matters from treaty coverage, limiting the scope of ISDS, setting out limitation periods for bringing claims). Newer, reformed IIAs typically contain more detailed provisions and may help increase clarity and predictability.

On a number of occasions, respondent States lacked a sufficient legal basis in the treaty to defend themselves more effectively (e.g. the applicable treaties contained no public policy exceptions or security exceptions) and had to resort to general international law concepts instead. Recent treaties typically also equip States with more legal "armour" (e.g. by including provisions aimed at preserving regulatory space and by carefully regulating ISDS).

Some 2018 decisions brought to light relatively novel elements of legal reasoning (e.g. investors' obligation to exercise due diligence when making investments, or proportionality of State measures to the alleged policy objectives). On some issues, arbitral decisions gradually converge (e.g. that IIAs do not protect investments made with serious violations of host State law), while arbitrators and tribunals continue to be divided on certain other issues (e.g. whether legitimate expectations may arise from general legislation).

Policymakers may wish to consider the implications of these developments for the drafting of substantive and procedural IIA clauses (e.g. by identifying options to add, clarify, circumscribe or omit certain treaty formulations). Such considerations not only apply to the development of future, but also to the modernization of existing treaties. A review of recent ISDS decisions may also help policymakers make informed decisions regarding the approach to ISDS reform, which may involve these five (alone or in combination): (i) no ISDS, (ii) a standing ISDS tribunal, (iii) limited ISDS, (iv) improved ISDS procedures, and (v) an unreformed ISDS mechanism.

UNCTAD's next High-level IIA Conference, to be held in November 2019, will offer an opportunity to take stock of IIA reform progress and lessons learned. The High-level IIA Conference 2019 will aim to pave the way for further inclusive, transparent and synchronized IIA reform processes in the pursuit of sustainable development.

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UNCTAD (2019d). *World Investment Report 2019: Special Economic Zones*. New York and Geneva: United Nations.

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

Annex 1. Publicly available ISDS decisions rendered in 2018[11]

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

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

Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic (ICSID Case No. ARB/14/32), Decision on Jurisdiction, 29 June 2018, with Dissenting Opinion of Santiago Torres Bernárdez
✐ van Houtte, H. (President); Schill, S.; Torres Bernárdez, S. 🗎 Argentina–Austria BIT (1992)

Lion Mexico Consolidated L.P. v. United Mexican States (ICSID Case No. ARB(AF)/15/2), Decision on Jurisdiction, 30 July 2018
✐ Fernández-Armesto, J. (President); Cairns, D. J. A.; Boisson de Chazournes, L. 🗎 NAFTA (1992)

Mera Investment Fund Limited v. Republic of Serbia (ICSID Case No. ARB/17/2), Decision on Jurisdiction, 30 November 2018
✐ von Segesser, G. (President); Fortier, L. Y.; Cremades, B. M. 🗎 Cyprus–Serbia BIT (2005)

Mobil Investments Canada Inc. v. Canada (II) (ICSID Case No. ARB/15/6), Decision on Jurisdiction and Admissibility, 13 July
✐ Greenwood, C. (President); Rowley, J. W.; Griffith, G. 🗎 NAFTA (1992)

Resolute Forest Products Inc. v. Canada (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018
✐ Crawford, J. R. (President); Cass, R. A.; Lévesque, C. 🗎 NAFTA (1992)

Salini Impregilo S.p.A. v. Argentine Republic (ICSID Case No. ARB/15/39), Decision on Jurisdiction and Admissibility, 23 February 2018
✐ Crawford, J. R. (President); Hobér, K.; Kurtz, J. 🗎 Argentina–Italy BIT (1990)

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

Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya (ICSID Case No. ARB/15/29), Award, 22 October 2018
✐ Binnie, I. (President); Dharmananda, K.; Stern, B. 🗎 Kenya–United Kingdom BIT (1999)

Dawood Rawat v. Republic of Mauritius (PCA Case No. 2016-20), Award on Jurisdiction, 6 April 2018
✐ Reed, L. (President); Honlet, J.-C.; Lowe, V. 🗎 France–Mauritius BIT (1973)

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

Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain (ICSID Case No. ARB/13/31), Award, 15 June 2018
✐ Zuleta, E. (President); Reichert, K.; Thomas, J. C. 🗎 ECT (1994)

Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II) (PCA Case No. 2009-23), Second Partial Award on Track II, 30 August 2018
✐ Veeder, V. V. (President); Grigera Naón, H. A.; Lowe, V. 🗎 Ecuador–United States of America BIT (1993)

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 (SCC Case No. 2015/150), Award, 14 November 2018, with Partial Dissenting Opinion by Raúl E. Vinuesa
✐ Moser, M. J. (President); Sachs, K.; Vinuesa, R. E. 🗎 ECT (1994)

[11] Publicly available as of January 2019.

Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia (ICSID Case No. ARB/12/39), Award, 26 July 2018
✎ Pryles, M. C. (President); Alexandrov, S. A.; Thomas, J. C. 🗎 Austria–Croatia BIT (1997)

Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic (SCC Case No. 2015/095), Final Award, 23 December 2018, with Dissenting Opinion of Giorgio Sacerdoti
✎ Park, W. W. (President); Haigh, D.; Sacerdoti, G. 🗎 ECT (1994)

Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain (ICSID Case No. ARB/14/1), Award, 16 May 2018
✎ Beechey, J. (President); Born, G. B.; Stern, B. 🗎 ECT (1994)

Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain (SCC Case No. 063/2015), Final Arbitral Award, 15 February 2018
✎ Sidklev, J. (President); Crivellaro, A.; Sepúlveda-Amor, J. B. 🗎 ECT (1994)

Olin Holdings Limited v. State of Libya (ICC Case No. 20355/MCP), Final Award, 25 May 2018
✎ Comair-Obeid, N. (President); Ziadé, N.; Fadlallah, I. 🗎 Cyprus–Libya BIT (2004)

South American Silver Limited v. The Plurinational State of Bolivia (PCA Case No. 2013-15), Award, 30 August 2018, with Separate Opinion of Francisco Orrego Vicuña and Dissenting Opinion of Osvaldo Cesar Guglielmino
✎ Zuleta, E. (President); Orrego Vicuña, F.; Guglielmino, O. C. 🗎 Bolivia–United Kingdom BIT (1988)

Unión Fenosa Gas, S.A. v. Arab Republic of Egypt (ICSID Case No. ARB/14/4), Award, 31 August 2018, with Dissenting Opinion of Mark Clodfelter
✎ Veeder, V. V. (President); Rowley, J. W.; Clodfelter, M. A. 🗎 Egypt–Spain BIT (1992)

UP and C.D Holding Internationale v. Hungary (ICSID Case No. ARB/13/35), Award, 9 October 2018
✎ Böckstiegel, K.-H. (President); Fortier, L. Y.; Bethlehem, D. 🗎 France–Hungary BIT (1986)

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

A11Y LTD. v. Czech Republic (ICSID Case No. UNCT/15/1), Award, 29 June 2018
✎ Fortier, L. Y. (President); Alexandrov, S. A.; Joubin-Bret, A. 🗎 Czechia–United Kingdom BIT (1990)

Antaris Solar GmbH and Dr. Michael Göde v. The Czech Republic (PCA Case No. 2014-01), Award, 2 May 2018, with Dissenting Opinion of Gary Born and Declaration of Peter Tomka
✎ Collins, L. (President); Born, G. B.; Tomka, P. 🗎 ECT (1994)

David R. Aven, Samuel D. Aven, Giacomo A. Buscemi and others v. Republic of Costa Rica (ICSID Case No. UNCT/15/3), Final Award, 18 September 2018
✎ Siqueiros, E. (President); Baker, C. M.; Nikken, P. 🗎 CAFTA–DR (2004)

Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus (ICSID Case No. ARB/13/27), Award, 26 July 2018
✎ Hanotiau, B. (President); Price, D. M.; Edward, D. A. O. 🗎 Cyprus–Greece BIT (1992)

Mercer International, Inc. v. Canada (ICSID Case No. ARB(AF)/12/3), Award, 6 March 2018; Supplementary Decision, 10 December 2018
✎ Veeder, V. V. (President); Orrego Vicuña, F.; Douglas, Z. 🗎 NAFTA (1992)

E. Other public decisions

Vattenfall AB and others v. Federal Republic of Germany (II) (ICSID Case No. ARB/12/12), Decision on the Achmea Issue, 31 August 2018
✎ van den Berg, A. J. (President); Brower, C. N.; Lowe, V. 🗎 ECT (1994)

F. Decisions on the application for ICSID annulment

Bernhard von Pezold and others v. Republic of Zimbabwe (ICSID Case No. ARB/10/15), Decision on Annulment, 21 November 2018
✏ Heiskanen, V. (President); Kalicki, J. E.; Kettani, A. 🗎 Germany–Zimbabwe BIT (1995); Switzerland–Zimbabwe BIT (1996)

CEAC Holdings Limited v. Montenegro (ICSID Case No. ARB/14/8), Decision on Annulment, 1 May 2018
✏ Greenwood, C. (President); Kim, J.; Oyekunle, T. 🗎 Cyprus–Montenegro BIT (2005)

OI European Group B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/25), Decision on Application for Annulment, 6 December 2018
✏ Castellanos Howell, A. R. (President); Bernardini, P.; Pawlak, D. 🗎 Netherlands–Venezuela, Bolivarian Republic of BIT (1991)

Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2), Decision on the Application for Annulment, 18 May 2018
✏ Rigo Sureda, A. (President); Söderlund, C.; Argueta Pinto, M. 🗎 Bolivia, Plurinational State of–Chile BIT (1994)

Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Argentine Republic (ICSID Case No. ARB/03/17), Decision on Annulment, 14 December 2018
✏ McRae, D. M. (President); Abraham, C. W. M.; Jones, D. 🗎 Argentina–France BIT (1991); Argentina–Spain BIT (1991)

G. Domestic court decisions

Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic (I) (PCA Case No. 2008-13), Decision of the German Federal Supreme Court, 31 October 2018[12]
🗎 Netherlands–Slovakia BIT (1991)

AWG Group Ltd. v. The Argentine Republic (UNCITRAL), Judgment of the United States Court of Appeals for the District of Columbia, 3 July 2018
🗎 Argentina–United Kingdom BIT (1990)

Clayton and Bilcon of Delaware Inc. v. Government of Canada (UNCITRAL), Judgment of the Federal Court of Canada, 2 May 2018
🗎 NAFTA (1992)

Crimea-Petrol LLC, Elefteria LLC, Novel-Estate LLC and others v. The Russian Federation (PCA Case No. 2015-35), Judgment of the Swiss Federal Tribunal, 16 October 2018
🗎 Russian Federation–Ukraine BIT (1998)

Deutsche Telekom AG v. The Republic of India (PCA Case No. 2014-10), Judgment of the Swiss Federal Supreme Court, 11 December 2018
🗎 Germany–India BIT (1995)

GPF GP S.à.r.l v. Poland (SCC Case No. 2014/168), Judgment of the High Court of Justice of England and Wales, 2 March 2018
🗎 BLEU (Belgium-Luxembourg Economic Union)–Poland BIT (1987)

[12] See also *Slovak Republic v. Achmea BV* (Case C-284/16), Judgment of the Grand Chamber of the European Court of Justice, 6 March 2018.

PJSC Ukrnafta v. The Russian Federation (PCA Case No. 2015-34), Judgment of the Swiss Federal Tribunal, 16 October 2018
Russian Federation–Ukraine BIT (1998)

Swissbourgh Diamond Mines (Pty) Limited, Josias Van Zyl, The Josias Van Zyl Family Trust and others v. The Kingdom of Lesotho (PCA Case No. 2013-29), Judgment of the Singapore Court of Appeal, 27 November 2018
SADC Investment Protocol (2006)

Annex 2. ISDS decisions rendered in 2018 not publicly available[13]

A. Original proceedings

Abed El Jaouni and Imperial Holding SAL v. Lebanese Republic (ICSID Case No. ARB/15/3), Decision on Jurisdiction, Liability and Certain Aspects of Quantum, 25 June 2018

Alpiq AG v. Romania (ICSID Case No. ARB/14/28), Award, 9 November 2018

Álvarez y Marín Corporación S.A., Estudios Tributarios AP S.A., Stichting Administratiekantoor Anbadi, Bartus van Noordenne and Cornelis Willem van Noordenne v. Republic of Panama (ICSID Case No. ARB/15/14), Award, 12 October 2018, with Dissenting Opinion by Horacio Grigera Naón*

Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya (ICC), Award, 2018

City-State N.V., Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v. Ukraine (ICSID Case No. ARB/14/9), Award, 26 July 2018, with Dissenting Opinion by Brigitte Stern

Everest Estate LLC, Edelveis-2000 PE, Fortuna CJSC and others v. The Russian Federation (PCA Case No. 2015-36), Award on the Merits, 2 May 2018

Federal Elektrik Yatırım ve Ticaret A.S. and others v. Republic of Uzbekistan (ICSID Case No. ARB/13/9), Decision on Jurisdiction and Liability, 29 October 2018

Krederi Ltd. v. Ukraine (ICSID Case No. ARB/14/17), Award, 2 July 2018

Kunsttrans Holding GmbH and Kunsttrans d.o.o. Beograd v. Republic of Serbia (ICSID Case No. ARB/16/10), Award, 19 November 2018

Louis Dreyfus Armateurs SAS v. The Republic of India (PCA Case No. 2014-26), Award, 11 September 2018

Magdenli Yer Hizmetleri ve Tasıma Anonim Sirketi v. Kazakhstan (ICC), Award, 8 November 2018, with Dissenting Opinion of Sebnem Akipek Öcal

Merck Sharpe & Dohme (I.A.) Corporation v. The Republic of Ecuador (PCA Case No. 2012-10), Partial Final Award, 25 January 2018

Mohammad Reza Dayyani and others v. Republic of Korea (PCA Case No. 2015-38), Award, 6 June 2018

Oschadbank v. Russian Federation (UNCITRAL/PCA), Award, 26 November 2018

[13] Not publicly available as of January 2019. Decisions marked with an asterisk have become publicly available by the time this document was published.

Portigon AG v. Kingdom of Spain (ICSID Case No. ARB/17/15), Decision on Respondent's Preliminary Objections pursuant to ICSID Arbitration Rule 41(5), 31 May 2018

RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain (ICSID Case No. ARB/13/30), Decision on Responsibility and on the Principles of Quantum, 30 November 2018, with Partially Dissenting Opinion of Robert Volterra*

Sorelec v. Libya (ICC), Final Award, 10 April 2018

Veolia Propreté v. Arab Republic of Egypt (ICSID Case No. ARB/12/15), Award, 25 May 2018

WCV Capital Ventures Cyprus Limited and Channel Crossings Limited v. The Czech Republic (UNCITRAL/PCA), Partial Award on Jurisdiction, 2018

Zbigniew Piotr Grot, Grot Cimarron LLC, I.C.S. Laguardia SRL and Laguardia USA LLC v. Republic of Moldova (ICSID Case No. ARB/16/8), Award, 28 June 2018

Zelena N.V. and Energo-Zelena d.o.o Indija v. Republic of Serbia (ICSID Case No. ARB/14/27), Award, 9 November 2018

B. Follow-on decisions

Aaron C. Berkowitz, Brett E. Berkowitz, Trevor B. Berkowitz v. Republic of Costa Rica (ICSID Case No. UNCT/13/2), Memorandum Opinion of the United States District Court for the District of Columbia, 20 January 2018*

Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe (ICSID Case No. ARB/10/25), Decision on Annulment, 21 November 2018

Cem Cenzig Uzan v. Republic of Turkey (SCC Case No. 2014/023), Judgment of the Svea Court of Appeal, 25 February 2018*

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UNCTAD Investment Policy Online Databases

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

IIA Mapping Project
https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping

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

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

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