

SUPPLEMENTARY MATERIAL

REVIEW OF ISDS DECISIONS IN 2019: SELECTED IIA REFORM ISSUES (IIA ISSUES NOTE, NO. 1, JANUARY 2021)

Case-by-case tables on key issues addressed by ISDS tribunals in 2019

These case-by-case tables give an overview of key issues addressed by investor–State dispute settlement (ISDS) tribunals in 2019. The tables summarize 39 ISDS decisions that were publicly available as of January 2020.¹ The arbitral decisions and more detailed information on each case are available at <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

Most arbitral decisions in 2019 concerned cases based on old-generation international investment agreements (IIAs). A factual summary of the questions addressed by ISDS tribunals in publicly available awards and decisions can be a useful source for learning how IIA provisions work in practice and for identifying which areas are most in need of reform.

Selected issues and cases of relevance for treaty drafting and IIA reform are highlighted in the IIA Issues Note “Review of ISDS Decisions in 2019: Selected IIA Reform Issues” (No. 1, January 2021), available at <https://investmentpolicy.unctad.org/publications/series/2/international-investment-agreements>.

Abbreviations

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

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

¹ This number includes decisions (awards) on jurisdiction and awards on liability and damages (partial and final). The four publicly available decisions rendered in ICSID annulment proceedings in 2019 are not covered.

Decisions on jurisdiction

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

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

Table 1. Decisions upholding jurisdiction (at least in part) (without examining the merits)		
Case details	Case summary	Key issues and tribunals' findings
<p><i>B-Mex and others v. Mexico</i></p> <p><i>Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States</i> (ICSID Case No. ARB(AF)/16/3)</p> <p>NAFTA (1992)</p> <p>Partial Award, 19 July 2019</p> <p>Arbitrators:</p> <ul style="list-style-type: none"> • Verhoosel, G. (President) • Born, G. B. • Vinuesa, R. E. (Partial Dissenting Opinion) 	<p>Disputed measure(s): Government’s alleged unlawful interference with the claimants’ casino business in Mexico, including raids on facilities, seizure of equipment and bank account funds, closure of facilities and invalidation of a gaming permit.</p> <p>Investment at issue: Ownership interests in several gaming facilities in Mexico.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether request for arbitration submitted by Claimants’ legal counsel established their consent to arbitration and was conveyed in the manner prescribed by NAFTA, despite the absence of a separate letter affirming Claimants’ consent to arbitration (→YES; counsel was authorized to initiate arbitration; request referred to and expressly accepted Mexico’s offer to arbitrate; consent was conveyed in writing, delivered to Respondent and was included in the submission of the claim to arbitration; no separate letter was required) • Whether Tribunal had jurisdiction over additional Claimants not mentioned in the initial notice of intent (→YES – BY MAJORITY; the subsequent inclusion of additional Claimants in the request for arbitration does not vitiate Respondent’s consent to arbitration or automatically render their claims inadmissible) • Whether Claimants must also establish that they owned or controlled the investment (Mexican companies) at the time of the submission of the claim, in addition to establishing that they owned or controlled it at the time of the treaty breaches (→YES; the use of the present tense in the provision (“owns or controls”) suggests that the investor must own or control the enterprise at the time arbitration is commenced) • Whether “control” under NAFTA Article 1117 means both legal capacity to control and de facto control (→YES; “any ability to ‘exercise restraining or directing influence over’ or to ‘have power over’ a company would satisfy the ordinary meaning of control”) • Whether Claimants had control over a local company in which they held enough shares to have legal capacity to control, despite temporarily losing de facto control (→YES) • Whether Claimants had control over a local company in which they only had de facto control (and no sufficient shares to have legal capacity to control) (→YES) • Whether local companies had also consented to arbitration and waived their rights to pursue domestic proceedings so as to allow Claimants to bring claims on their behalf (→YES)

Table 1. Decisions upholding jurisdiction (at least in part) (without examining the merits)		
Case details	Case summary	Key issues and tribunals' findings
<p><i>Eskosol v. Italy</i></p> <p><i>Eskosol S.p.A. in liquidazione v. Italian Republic</i> (ICSID Case No. ARB/15/50)</p> <p>ECT (1994)</p> <p>Decision on Termination Request and Intra-EU Objection, 7 May 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Kalicki, J. E. (President) • Tawil, G. S. • Stern, B. 	<p>Disputed measure(s): A series of governmental decrees to cut tariff incentives for some solar power projects.</p> <p>Investment at issue: Investments in a 120 megawatt photovoltaic energy project in Italy.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether ECT applies to intra-EU disputes (→YES) • Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT) • Whether Tribunal had jurisdiction despite the Contracting Parties' signature of the January 2019 Declaration expressing that ISDS clause in ECT was inapplicable (→YES; January 2019 Declaration is not a "binding instrument" amounting to a 'shared understanding [...] regarding the interpretation of the ECT'")
<p><i>Landesbank Baden-Württemberg and others v. Spain</i></p> <p><i>Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain</i> (ICSID Case No. ARB/15/45)</p> <p>ECT (1994)</p> <p>Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019</p>	<p>Disputed measure(s): A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p> <p>Investment at issue: Investments in renewable energy generation enterprises (photovoltaic and solar thermal plants).</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether ECT applies to intra-EU disputes (→YES) • Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT)

Table 1. Decisions upholding jurisdiction (at least in part) (without examining the merits)		
Case details	Case summary	Key issues and tribunals' findings
<p>Arbitrators</p> <ul style="list-style-type: none"> Greenwood, C. (President) Poncet, C. Oreamuno Blanco, R. 		
<p><i>Nissan v. India</i></p> <p><i>Nissan Motor Co., Ltd. v. Republic of India</i> (PCA Case No. 2017-37)</p> <p>India–Japan EPA (2011)</p> <p>Decision on Jurisdiction, 29 April 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> Kalicki, J. E. (President) Hobér, K. Khehar, J. S. 	<p>Disputed measure(s): Non-payment of incentives by the Indian State government of Tamil Nadu, which had been allegedly promised to the claimant under the agreement for building of a car plant, signed with the State government in 2008.</p> <p>Investment at issue: 70 per cent share in Renault Nissan Automotive India Private Limited, a consortium that built an industrial automotive facility in Chennai, the capital of Tamil Nadu.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> Whether Tribunal had jurisdiction despite pending domestic proceedings brought by Claimant's affiliate (→YES; domestic proceedings did not concern an "investment dispute" under the treaty's fork-in-the-road provision as they did not allege treaty breaches and "disputing investor" was not the same) Whether Tribunal had jurisdiction despite the presence of an exclusive arbitration clause in an investment contract between Respondent and Claimant (→YES; Claimant did not waive its treaty right to international arbitration) Whether Claimant can bring umbrella claims about an investment contract which contains an exclusive arbitration clause (→YES; existence of an arbitration clause does not preclude umbrella claims) Whether Claimant's FET and umbrella claims were time-barred, therefore depriving Tribunal of jurisdiction (→NO; Claimant was pursuing only claims falling within the 3-year limitation period)
<p><i>Rockhopper v. Italy</i></p> <p><i>Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic</i> (ICSID Case No. ARB/17/14)</p> <p>ECT (1994)</p> <p>Decision on the Intra-EU Jurisdictional Objection, 26 June 2019</p>	<p>Disputed measure(s): Decision in February 2016 by the Ministry of Economic Development not to award the claimants a production concession covering the Ombrina Mare field located within 12 miles of the coast of Italy, following the Government's re-introduction of a general ban on oil and gas exploration and production activity within the 12 mile limit of the coastline.</p> <p>Investment at issue: 100% working interest in the Ombrina Mare oil and gas discovery project and a related offshore exploration permit.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> Whether ECT applies to intra-EU disputes (→YES) Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT) Whether Tribunal had jurisdiction despite the Contracting Parties' signature of the January 2019 Declaration expressing that ISDS clause in ECT was inapplicable (→YES; declaration was not signed by all EU member States and was not adopted within the EU legal order)

Table 1. Decisions upholding jurisdiction (at least in part) (without examining the merits)		
Case details	Case summary	Key issues and tribunals' findings
Arbitrators: <ul style="list-style-type: none"> • Reichert, K. (President) • Poncet, C. • Dupuy, P.-M. 		

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

Table 2. Decisions rejecting jurisdiction (in toto), including rulings on preliminary objections		
Case details	Case summary	Key issues and tribunals' findings
<p><i>Almasryia v. Kuwait</i></p> <p><i>Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait</i> (ICSID Case No. ARB/18/2)</p> <p>Egypt–Kuwait BIT (2001)</p> <p>Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Ramírez Hernández, R (President) • Dévaud, P. (Dissenting Opinion) • Knieper, R. 	<p>Disputed measure(s): Government's alleged conduct preventing the claimant from taking ownership of land for a real estate development project under a joint venture investment agreement concluded by the claimant and a Kuwaiti national.</p> <p>Investment at issue: Participation in a joint venture agreement with a Kuwaiti national to develop and construct touristic hotels on land located north of Al-Khafji city in the Kuwaiti Region of Wafra.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether Claimant complied with requirement to notify Respondent of dispute, request amicable settlement and initiate the six-month cooling-off period before submitting the dispute to arbitration (→NO – BY MAJORITY; BIT required written notice and six-month cooling-off period) • Whether Tribunal had jurisdiction despite Claimant's failure to comply with notice requirement and waiting period (→NO – BY MAJORITY; failure renders the claim manifestly without legal merit pursuant to ICSID Arbitration Rule 41(5)) • Whether Tribunal had jurisdiction over Claimant's expropriation claim (→NO – BY MAJORITY; claim is manifestly without legal merit as Claimant did not have property rights over the allegedly expropriated land)

Table 2. Decisions rejecting jurisdiction (in toto), including rulings on preliminary objections		
Case details	Case summary	Key issues and tribunals' findings
<p><i>Ballantine v. Dominican Republic</i></p> <p><i>Michael Ballantine and Lisa Ballantine v. The Dominican Republic</i> (PCA Case No. 2016-17)</p> <p>CAFTA–DR (2004)</p> <p>Final Award, 3 September 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Ramírez Hernández, R. (President) • Cheek, M. L. (Partial Dissent) • Vinuesa, R. E. 	<p>Disputed measure(s): Rejection by the Ministry of Environment and Natural Resources of the claimants' request to expand Jamaca de Dios, a residential and tourism project in the municipality of Jarabacoa, as well as other actions by the central and local government.</p> <p>Investment at issue: Ownership of Jamaca de Dios SRL and Aroma de la Montaña, E.I.R.L that were used to make investments in real estate and infrastructure to create a gated complex of luxury homes, restaurants, a hotel and a spa.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether Tribunal had jurisdiction over Claimants, dual Dominican-American, after having determined that their effective and dominant nationality was Dominican (→NO – BY MAJORITY; effective and dominant nationality requirement in CAFTA–DR was not met) • Whether the relevant time for determining Claimants' nationality is the time of the making of the investment (→NO; the relevant times for assessing the nationality requirement are the moment of submission of the claim and the moment of the alleged breach) • Whether the place of birth has a special bearing over other factors in determining which nationality is dominant and effective at any critical date (→NO) • Whether the place where the majority of life was spent is dispositive in determining the dominant and effective nationality (→NO; the determination of dominant and effective may not be reduced to mathematical day counting, further examination is required) • Whether Claimants' permanent residence at the relevant times was in the United States such as to make it the more likely effective and dominant nationality (→NO) • Whether the centre of the Claimants' economic, social and family life was at the relevant time in the United States such as to make it the more likely effective and dominant nationality (→NO)
<p><i>Besserglik v. Mozambique</i></p> <p><i>Oded Besserglik v. Republic of Mozambique</i> (ICSID Case No. ARB(AF)14/2)</p> <p>Mozambique–South Africa BIT (1997)</p> <p>Award, 28 October 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Khan, M. A. (President) • Fortier, L. Y. • von Wobeser, C. 	<p>Disputed measure(s): Alleged expropriation of the claimant's two fishing vessels and its interests in a joint fishing venture in Mozambique involving two Mozambican State-owned entities (Emopesca and Sulpesca).</p> <p>Investment at issue: Interests in contractual arrangements with State-owned entities, Mozambicana de Pesca EE (“Emopesca”) and Sulpesca Lda (“Sulpesca”), through a shareholding in South African company Natal Ocean Trawling (Pty) Ltd; ownership of two fishing vessels.</p>	<p>Jurisdiction issues:</p> <ul style="list-style-type: none"> • Whether Tribunal had jurisdiction despite the BIT having never entered into force (→NO; since BIT never entered into force, there is no consent of the Respondent to arbitration) • Whether Respondent objected to the competence of the Tribunal in a timely manner (→NO) • Whether Tribunal should decline to exercise its discretion to consider, on its own initiative and at any stage of the proceedings, issues of jurisdiction because jurisdictional objection was submitted with delay (→NO; Tribunal cannot decline to consider objection of a fundamental nature such as consent to arbitration)

Table 2. Decisions rejecting jurisdiction (in toto), including rulings on preliminary objections		
Case details	Case summary	Key issues and tribunals' findings
<p><i>Clorox v. Venezuela</i></p> <p><i>Clorox Spain S.L. v. Bolivarian Republic of Venezuela</i> (PCA Case No. 2015-30)</p> <p>Spain–Bolivarian Republic of Venezuela BIT (1995)</p> <p>Award, 20 May 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Derains, Y. (President) • Hanotiau, B. • Vinuesa, R. E. 	<p>Disputed measure(s): Government measures that allegedly forced Clorox Venezuela to discontinue its operations in the country, and the alleged expropriation of its production facilities and offices after Clorox had announced its plans to exit the country and to sell its assets.</p> <p>Investment at issue: Ownership of Corporación Clorox de Venezuela S.A. (“Clorox Venezuela”), a local company engaged in manufacturing of cleaning products.</p>	<p>Jurisdiction issues:</p> <ul style="list-style-type: none"> • Whether mere ownership of shares in a local company is sufficient for Claimant to be considered a protected investor holding a protected investment (→NO; BIT further requires the investor to carry out an “action of investing” (payment of a value when acquiring shares)) • Whether Claimant made any contribution or payment in exchange of the shares (→NO) • Whether Claimant qualified as protected investor (→NO) • Whether Tribunal had jurisdiction over the dispute (→NO)
<p><i>Doutremepuich v. Mauritius</i></p> <p><i>Christian Doutremepuich and Antoine Doutremepuich v. Mauritius</i> (PCA Case No. 2018-37)</p> <p>France–Mauritius BIT (1973)</p> <p>Award on Jurisdiction, 23 August 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Scherer, M. (President) • Caprasse, O. • Paulsson, J. 	<p>Disputed measure(s): Termination by the Government of the claimants’ project to open a new medical laboratory, after the Government had initially approved the project.</p> <p>Investment at issue: Ownership of three locally incorporated enterprises for the construction and operation of a forensic DNA and paternity testing laboratory in Mauritius.</p>	<p>Jurisdiction issues:</p> <ul style="list-style-type: none"> • Whether Claimants’ alleged investment satisfied the Salini test criteria ((i) contribution to the host State; (ii) a certain duration; (iii) participation in the risk of the operation) (→NO; Tribunal applied Salini test based on disputing parties’ agreement to do so) • Whether the transfer of funds made by the Claimants from one bank account in France to local bank accounts in Mauritius met the Salini test criterion of contribution to the host state (→NO) • Whether contribution to the host state can take non-financial forms (→YES; non-financial inputs may also satisfy the test as long as they have an economic value that can be contributed) • Whether Claimants made any contribution of know-how of economic value constitutive of investment (→NO) • Whether one-off payments for goods and services (in the form of payments of bills and invoices in Mauritius) made by Claimants as part of the preparations for a project which was not yet off the ground constituted a contribution of a discernible duration (→NO) • Whether one-off payment of bills and invoices and transfer of funds entailed any risk pursuant to the Salini test (→NO) • Whether planned future investments qualify as an investment (→NO; Tribunal is to determine whether or not at the time of the termination of the project an investment had occurred that qualifies as such under BIT)

Table 2. Decisions rejecting jurisdiction (in toto), including rulings on preliminary objections		
Case details	Case summary	Key issues and tribunals' findings
		<ul style="list-style-type: none"> • Whether Claimants can invoke the investor-State arbitration clause in Finland–Mauritius BIT (host State BIT with third country) on the basis of the MFN clause contained in France–Mauritius BIT (base treaty) (→NO; base treaty contains no consent to arbitrate investor-State disputes and such consent cannot be imported via MFN)
<p><i>García Armas and others v. Venezuela</i></p> <p><i>Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela</i> (PCA Case No. 2016-08)</p> <p>Spain–Bolivarian Republic of Venezuela BIT (1995)</p> <p>Award on Jurisdiction, 13 December 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Nunes Pinto, J. E. (President) • Gómez-Pinzón, E. • Torres Bernárdez, S. 	<p>Disputed measure(s): Alleged expropriation of the claimants' investments in six Venezuelan companies engaged in food distribution and marketing.</p> <p>Investment at issue: Investments in six locally incorporated companies (Friosa, La Fuente, Koma, Gaisa, La Meseta, Ingahersa).</p>	<p>Jurisdiction issues:</p> <ul style="list-style-type: none"> • Whether the BIT allows dual nationals of both parties to bring any claims against one of their home States (→NO; BIT implicitly excludes claims by such dual nationals) • Whether, even if BIT allowed claims by dual nationals, Claimants' dominant nationality was Spanish (→NO; Claimants' State of habitual residence, their personal attachment, and the centre of their economic, social and family life indicated Venezuela as their dominant nationality) • Whether dual nationals can never bring claims against one of their home States (→NO; under certain circumstances, claims by dual nationals can be allowed provided the dominant and effective nationality of the investor is not the respondent State)
<p><i>Heemsen v. Venezuela</i></p> <p><i>Enrique Heemsen and Jorge Heemsen v. Bolivarian Republic of Venezuela</i> (PCA Case No. 2017-18)</p>	<p>Disputed measure(s): Governmental Decree No. 8.838 of 2012 for the expropriation of all assets on the “La Salina” land plot, in which the claimants held indirect interests, to construct a new container terminal at the Puerto Cabello port.</p> <p>Investment at issue: Indirect minority shareholding in a 643-hectare land plot (“La Salina”) owned by Sucesión Heemsen, C.A., in the city of Puerto Cabello in northern Venezuela.</p>	<p>Jurisdiction issues:</p> <ul style="list-style-type: none"> • Whether Claimants could resort to UNCITRAL arbitration (→NO; UNCITRAL arbitration was a secondary option, only available as long as Venezuela had not become party to the ICSID Convention; Venezuela eventually acceded to the ICSID Convention) • Whether BIT's MFN clause allows Claimants to import laxer jurisdictional conditions contained in Venezuela's BITs with third countries (→NO; MFN clause only applies to the treatment with regard to the investors' “activities related to their investments” and jurisdictional questions are not an “activity” related to the investment)

Table 2. Decisions rejecting jurisdiction (in toto), including rulings on preliminary objections		
Case details	Case summary	Key issues and tribunals' findings
<p>Germany–Bolivarian Republic of Venezuela BIT (1996)</p> <p>Award on Jurisdiction, 29 October 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Derains, Y. (President) • Gómez-Pinzón, E. • Stern, B. 		<ul style="list-style-type: none"> • Whether BIT contemplates claims by dual nationals against one of their home States (→NO; Contracting Parties' choice of ICSID as principal forum for ISDS claims demonstrated their intent to exclude dual nationals) • Whether Claimant's dominant and effective nationality was German (→NO; dominant and effective nationality test – applied as part of general international law – showed that Claimant was Venezuelan)
<p><i>Italba v. Uruguay</i></p> <p><i>Italba Corporation v. Oriental Republic of Uruguay</i> (ICSID Case No. ARB/16/9)</p> <p>United States of America–Uruguay BIT (2005)</p> <p>Award, 22 March 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Oreamuno Blanco, R. (President) • Beechey, J. • Douglas, Z. 	<p>Disputed measure(s): Revocation in 2011 of a wireless spectrum licence held since 2000 by the claimant's subsidiary Trigosul. The State regulatory authority allegedly transferred the licence to another telecommunications company and did not comply with an administrative court's decision to reinstate the licence.</p> <p>Investment at issue: Ownership of subsidiary Trigosul S.A., which held a wireless spectrum licence.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether Claimant qualified as a protected investor pursuant to the BIT (→NO; Claimant did not own or control the investment (local company))
<p><i>Seo v. Korea</i></p> <p><i>Jin Hae Seo v. Republic of Korea</i> (HKIAC Case No. 18117)</p>	<p>Disputed measure(s): Allegedly insufficient amount of compensation set by the Government for the claimant's real estate property that had been expropriated following the municipal government's designation of the relevant area for redevelopment.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether Tribunal lacked jurisdiction over investment because it was procured by Claimant using domestic funds (→NO; there is no requirement that such funds be of foreign origin) • Whether Claimant's real estate property met the characteristics of an investment (→NO; there was no expectation of gain or profit as the property was acquired and predominantly served as a private residence for Claimant and her family, nor was there any assumption of risk)

Table 2. Decisions rejecting jurisdiction (in toto), including rulings on preliminary objections		
Case details	Case summary	Key issues and tribunals' findings
<p>Republic of Korea–United States of America FTA (2007)</p> <p>Final Award, 24 September 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Simma, B. (President) • Lo, B. (Concurring Opinion) • McRae, D. M. 	<p>Investment at issue: Partial ownership (76%) of a residential property in Seoul.</p>	<ul style="list-style-type: none"> • Whether, assuming the property had the characteristics of an investment, the property was a covered investment in the sense of the FTA (→NO; covered investment is defined as an investment of <i>an investor of the other Party</i> that is <i>in existence as of the date of entry into force of the FTA</i>; Claimant became United States national after entry into force of the FTA)

Decisions on the merits

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

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

Table 3. Decisions finding State's liability for IIA breaches (at least in part)		
Case details	Case summary	Key issues and tribunals' findings
<p><i>9REN Holding v. Spain</i></p> <p><i>9REN Holding S.a.r.l v. Kingdom of Spain</i> (ICSID Case No. ARB/15/15)</p> <p>ECT (1994)</p> <p>Award, 31 May 2019</p>	<p>Disputed measure(s): A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p> <p>Investment at issue: Investments in eight solar parks through local subsidiaries, Solaica Power S.L.U. and 9Ren España S.L.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether ECT applies to intra-EU disputes (→YES) • Whether Claimant carried out substantial business operations in Luxembourg (→YES) • Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; Law 15/2012 is a taxation measure and ECT carves out taxation measures from its scope) <p>Merits issues:</p> <ul style="list-style-type: none"> • Whether Respondent made a specific commitment through its acts and regulations such as to create a legitimate expectation that benefits under the legal regime in existence at the time of the investment would remain irrevocable (→YES) • Whether challenged measures frustrated Claimant's legitimate expectations and thereby breached FET standard (→YES)

Table 3. Decisions finding State's liability for IIA breaches (at least in part)		
Case details	Case summary	Key issues and tribunals' findings
<p>Arbitrators</p> <ul style="list-style-type: none"> • Binnie, I. (President) • Haigh, D. • Veeder, V. V. 		<ul style="list-style-type: none"> • Whether Respondent breached the ECT's umbrella clause by changing the legal regime that contained a specific commitment (→NO; a State's public legislation or administrative regulations do not fall within the scope of ECT's umbrella clause) • Whether the impact of the regulatory change on Claimant's investment (shares) amounted to expropriation (→NO; Claimant retained ownership of shares) <p>Awarded: approx. \$44.4 million (€40 million)</p>
<p>BayWa r.e. v. Spain</p> <p><i>BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain</i> (ICSID Case No. ARB/15/16)</p> <p>ECT (1994)</p> <p>Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Crawford, J.R. (President) • Grigera Naón, H. A. (Dissenting Opinion) • Malintoppi, L. 	<p>Disputed measure(s): A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p> <p>Investment at issue: Investments in the Spanish solar energy sector; including majority ownership of a 99-megawatt solar power plant in Aragon, a 70-megawatt solar power plant in Valencia and investments in solar power plants in Barcelona, Mallorca and Madrid.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether ECT applies to intra-EU disputes (→YES) • Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; Law 15/2012 is a taxation measure and ECT carves out taxation measures from its scope) <p>Merits issues:</p> <ul style="list-style-type: none"> • Whether the disputed measures, by allegedly affecting Claimants' management and enjoyment of their investment, amounted to an indirect expropriation (→NO; expropriation, direct or indirect, requires substantial deprivation of assets) • Whether the effect of the disputed measures amounted to a de facto expropriation of the shares because shareholder would not be able to receive dividend (→NO; financial impact of change in the subsidy regime is not to be equated to the taking of rights) • Whether obligations assumed by Respondent through general legislation (as opposed to contractual obligations) fall within the scope of the umbrella clause with the effect that a change to the legislation would breach the umbrella clause (→NO; general laws cannot be considered a commitment under ECT's umbrella clause) • Whether Respondent breached umbrella clause (→NO) • Whether unilateral statements made by Respondent's officials are binding commitments in international law under the doctrine of binding unilateral statements (→NO; that doctrine does not apply to statements made vis-à-vis private parties in a domestic context) • Whether Claimants had a legitimate expectation that the special regime subsidies would continue to be paid for the lifetime of their investment (→NO – BY MAJORITY) • Whether the retrospective nature of the new regulatory regime breached the stability guarantee under the FET clause (→YES – BY MAJORITY) <p>(Case proceeded to damages phase)</p>

Table 3. Decisions finding State's liability for IIA breaches (at least in part)		
Case details	Case summary	Key issues and tribunals' findings
<p>CEF Energia v. Italy</p> <p><i>CEF Energia BV v. Italian Republic</i> (SCC Case No. 158/2015)</p> <p>ECT (1994)</p> <p>Award, 16 January 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Reichert, K. (President) • Sachs, K. • Sacerdoti, G. 	<p>Disputed measure(s): A series of governmental decrees to cut tariff incentives for some solar power projects.</p> <p>Investment at issue: Investments in three photovoltaic plants (Enersol, Megasol and Phenix) through direct and indirect shareholdings in related local companies.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether ECT applies to intra-EU disputes (→YES) • Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT) <p>Merits issues:</p> <ul style="list-style-type: none"> • Whether, at the time of making its investment, Claimant enjoyed a legitimate expectation that the specific incentive regime would be maintained by Respondent for a period of twenty years (→YES; only in relation to one out of the three photovoltaic plants) • Whether challenged measures frustrated Claimant's legitimate expectations and thereby breached FET standard (→YES – BY MAJORITY) • Whether Respondent, by altering the incentive regime, breached ECT's umbrella clause (→NO; Respondent did not breach the obligations it owed to Claimant) <p>Awarded: approx. \$11 million (€9.60 million)</p>
<p>ConocoPhillips v. Venezuela</p> <p><i>ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela</i> (ICSID Case No. ARB/07/30)</p> <p>Netherlands–Bolivarian Republic of Venezuela BIT (1991)</p> <p>Award, 8 March 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Zuleta, E. (President) • Fortier, L. Y. • Bucher, A. 	<p>Disputed measure(s): Venezuela's nationalization of three oil projects in which the claimants had interests, after having increased their applicable royalty rate and income tax.</p> <p>Investment at issue: Interests in two extra-heavy oil projects located in the Venezuelan region of the Orinoco Oil Belt, and in an offshore project for the extract of light to medium crude oil, under profit sharing agreements concluded with the Government.</p>	<p>Merits issues:</p> <ul style="list-style-type: none"> • Whether provisions on compensation contained in investment contracts (with domestic standard of compensation) prevail over BIT's compensation standard (→NO; as the investors brought their claim under the BIT's expropriation provision, it follows that the applicable standard of compensation is that of the BIT) • Whether Respondent's failure to respect its obligation to negotiate in good faith on the basis of market value for compensation for its taking of Claimants' investment rendered the expropriation unlawful (→YES – BY MAJORITY) • Whether full reparation is the standard to be adopted in a case of unlawful expropriation rather than the BIT's standard of "just compensation" at the time of expropriation (→YES; with "just compensation", there would be no sanction of a manifest breach of the provision of the BIT) • Whether the appropriate date of valuation of the investment is the date of the Award (ex post valuation) as opposed to the date of the taking (ex ante valuation) (→YES; otherwise the host State, as the new owner, would benefit from a market value higher than the investment's market value when it was expropriated) <p>Awarded: \$8.4 billion</p>

Table 3. Decisions finding State's liability for IIA breaches (at least in part)		
Case details	Case summary	Key issues and tribunals' findings
<p><i>Cube Infrastructure and others v. Spain</i></p> <p><i>Cube Infrastructure Fund SICAV and others v. Kingdom of Spain</i> (ICSID Case No. ARB/15/20)</p> <p>ECT (1994)</p> <p>Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019; Award, 15 July 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Lowe, V. (President) • Spigelman, J. • Tomuschat, C. (Separate and Partial Dissenting Opinion) 	<p>Disputed measure(s): A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p> <p>Investment at issue: Majority shareholding (66.5 per cent) in a Madrid-based renewable energy company, RPI.</p>	<p>Jurisdictional issues (Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019):</p> <ul style="list-style-type: none"> • Whether ECT applies to intra-EU disputes (→YES) • Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT) • Whether Claimants, as shareholders in the local companies and not directly owning damaged assets, were allowed to bring arbitration claims (→YES; ECT provides standing to indirect owners) • Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; Law 15/2012 is a taxation measure and ECT carves out taxation measures from its scope) <p>Merits issues (Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019):</p> <ul style="list-style-type: none"> • Whether a legitimate expectation can arise from a regulatory regime that does not make any specific commitment to each individual claimant (→YES; regulatory regimes aimed at attracting investments by providing that investments will be subject to a set of specific regulatory principles for a certain length of time will create legitimate expectations insofar as they are objectively reasonable and investments are made in reliance upon them) • Whether Claimants were entitled to rely upon representations made by Respondent in the absence of evidence that they had conducted detailed or formal legal due diligence affirming that the regulatory regime could not be significantly changed retroactively (→YES – BY MAJORITY; it is sufficient that Claimants addressed question of regulatory stability, sought expert advice, and reached understanding of the significance of the representations made) • Whether Claimants were justified in relying upon Respondent's commitment to stability despite Respondent's sovereign authority to amend or revoke any law (→YES – BY MAJORITY; Respondent committed itself in certain respects and for a certain limited time not to exercise its undoubted power to amend the law) • Whether any deviation by Respondent from initial regulatory regime will breach FET (→NO; FET does not require maintenance of every aspect or detail of the initial regulatory regime; the State is however required not to defeat basic expectations taken into account by investor to make the investment) • Whether Respondent breached FET standard in respect of Claimants' PV plants (→YES) • Whether Respondent breached FET standard in respect of Claimants' hydro plants (→YES – BY MAJORITY) • Whether Respondent, by changing the incentive scheme, breached ECT's umbrella clause (→NO; there were no specific engagements between Respondent and Claimants; general legislative measures cannot trigger a violation of the umbrella clause) <p>Awarded: approx. \$38 million (€33.7 million)</p>

Table 3. Decisions finding State's liability for IIA breaches (at least in part)		
Case details	Case summary	Key issues and tribunals' findings
<p><i>García Armas and García Gruber v. Venezuela</i></p> <p><i>Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela</i> (PCA Case No. 2013-3)</p> <p>Spain–Bolivarian Republic of Venezuela BIT (1995)</p> <p>Final Award, 26 April 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Grebler, E. (President) • Tawil, G. S. • Oreamuno Blanco, R. 	<p>Disputed measure(s): Government authorities' alleged administrative takeover, occupation and confiscation of goods of two companies in which the claimants had invested.</p> <p>Investment at issue: Shareholding in the Venezuelan food companies Alimentos Frisa, C.A. and Transporte Dole, C.A.</p>	<p>Merits issues:</p> <ul style="list-style-type: none"> • Whether Respondent's measures of confiscation, occupation and administration of local companies amounted to indirect expropriation (→YES) • Whether the expropriation was unlawful (→YES; the measures did not constitute a legitimate exercise of police powers and no compensation was paid; failure to meet one of the conditions, such as the non-payment of prompt, adequate and effective compensation, is sufficient to render expropriation unlawful) • Whether Respondent's occupation of Claimants' companies in violation of Venezuelan law on expropriation breached Claimant's due process rights thereby violating the FET standard (→YES) • Whether Respondent's military intervention on the companies' premises in response to irregularities allegedly committed by Claimants was a proportionate measure (→NO) <p>Awarded: \$214 million</p>
<p><i>Glencore International and C.I. Prodeco v. Colombia (I)</i></p> <p><i>Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia (I)</i> (ICSID Case No. ARB/16/6)</p> <p>Colombia–Switzerland BIT (2006)</p> <p>Award, 27 August 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Fernández-Armesto, J. (President) • Garibaldi, O. M. • Thomas, J. C. 	<p>Disputed measure(s): Government's alleged unlawful interference with the coal concession contract, including its initiation of proceedings to challenge the validity of the amendment agreed by the parties in 2010 and imposition of royalties allegedly in excess of what is owed under the contract.</p> <p>Investment at issue: Ownership of C.I. Prodeco S.A., a thermal coal producer holding a concession for the Calenturitas mine in Northern Colombia.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether Claimants' investment should be denied treaty protection because of allegations that it had been made illegally through corruption and bad faith in violation of Colombia's laws and regulations (→NO; Tribunal found no indication of corruption or bad faith) • Whether Tribunal had jurisdiction despite ongoing proceedings in domestic courts (→YES; the domestic proceedings prior to the start of the arbitration proceedings were "prejudicial conciliation procedures" and did not involve "the courts or administrative tribunals"; Claimants validly opted for ICSID arbitration first under the BIT's fork-in-the road provision; the procedure before a domestic administrative tribunal was initiated after the request for arbitration and could thus not deprive the Tribunal of jurisdiction) • Whether Tribunal had jurisdiction in respect of umbrella clause claims under the ISDS provision (→NO; BIT's ISDS provision expressly excludes umbrella claims from the scope of consent to arbitration) <p>Merits issues:</p> <ul style="list-style-type: none"> • Whether breach of due process, in judicial or administrative proceedings, may result in the violation of the FET standard (→YES) • Whether due process operates differently in administrative proceedings (in comparison to judicial proceedings) (→YES; the decision maker is often the investigator, the accuser, and the adjudicator, and a related officer (who may be the senior officer of the decision-maker) is often the one who rules on appeal)

Table 3. Decisions finding State's liability for IIA breaches (at least in part)		
Case details	Case summary	Key issues and tribunals' findings
		<ul style="list-style-type: none"> • Whether Respondent denied Claimants' due process rights during domestic administrative fiscal liability proceedings (→NO) • Whether bias of a decision maker may result in a breach of the FET Standard (→YES; whether the biased decision maker is a court or an administrative authority, a decision based on prejudice cannot be fair and equitable) • Whether Respondent acted with bias and bad faith (→NO) • Whether the decisions resulting from the fiscal liability proceedings amounted to unreasonable measures which impaired Claimants' investment (→YES; the methodology used to establish the damages in the proceedings was unreasonable) • Whether Claimants had legitimate expectations to a non-arbitrary and not unreasonable application of the fiscal regime (→YES) • Whether Respondent's unreasonable measures frustrated Claimants' legitimate expectations that the fiscal liability regime would be applied in a reasonable manner (→YES) <p>Awarded: \$19.1 million</p>
<p>Magyar Farming and others v. Hungary</p> <p><i>Inicia Zrt, Kintyre Kft and Magyar Farming Company Ltd v. Hungary</i> (ICSID Case No. ARB/17/27)</p> <p>Hungary–United Kingdom BIT (1987)</p> <p>Award, 13 November 2019</p> <p>Arbitrators:</p> <ul style="list-style-type: none"> • Kaufmann-Kohler, G. (President) • Alexandrov, S. A. • Hanefeld, I. 	<p>Disputed measure(s): Alleged expropriation by the National Land Agency of the claimants' leasehold rights to agricultural land, following new legislation and amendments in 2010-2013 which concerned the re-distribution of certain State-owned agricultural land through tenders. According to the claimants, a tender conducted by the National Land Agency resulted in the conclusion of lease contracts with third parties for the land leased by the claimants, which allegedly breached the claimants' contractual and statutory pre-lease rights.</p> <p>Investment at issue: Leasehold rights to 760 hectares of State-owned agricultural land located in Hungary's North-Western region of Ikrény.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether Tribunal must conduct its own determination on jurisdiction and is not bound by CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; an ICSID Tribunal must carry out its own analysis of whether there is valid consent to arbitrate; it cannot blindly follow another adjudicatory body's determination) • Whether Tribunal had jurisdiction despite the Contracting Parties' signature of the January 2019 Declaration expressing that ISDS clause in intra-EU BITs was inapplicable (→YES; January 2019 Declaration is not an agreement to terminate all intra-EU BITs and even if it were, it could not retroactively invalidate the pre-existing consent to arbitration that has been accepted by the investor) • Whether Tribunal had jurisdiction <i>ratione materiae</i> (→YES) <p>Merits issues:</p> <ul style="list-style-type: none"> • Whether Claimants' statutory rights of lease constituted vested or acquired rights protected by the BIT (→YES; the doctrine of acquired or vested rights is well recognized in international and municipal law) • Whether deprivation of already acquired statutory rights via legislation changes amounted to expropriation (→YES; if a general statute gives private parties a possibility to acquire rights of economic value, changes to that legislation should not affect rights that had already been acquired under the statute) • Whether the legislation change was a <i>bona fide</i> measure which exempted Respondent from duty to pay compensation (→NO)

Table 3. Decisions finding State's liability for IIA breaches (at least in part)		
Case details	Case summary	Key issues and tribunals' findings
		<ul style="list-style-type: none"> Whether the expropriation was unlawful because of lack of compensation (→YES) <p>Awarded: approx. \$7.9 million (€7.1 million)</p>
<p>NextEra v. Spain</p> <p><i>NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain</i> (ICSID Case No. ARB/14/11)</p> <p>ECT (1994)</p> <p>Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019; Award, 31 May 2019</p> <p>Arbitrators:</p> <ul style="list-style-type: none"> McRae, D. M. (President) Fortier, L. Y. Boisson de Chazournes, L. 	<p>Disputed measure(s): A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p> <p>Investment at issue: Construction and operation of two thermosolar plants in Extremadura, Spain.</p>	<p>Jurisdictional issues (Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019):</p> <ul style="list-style-type: none"> Whether ECT applies to intra-EU disputes (→YES) Whether Claimants, as pure holding companies incorporated in the Netherlands with no economic activity in the Netherlands (and ultimately owned by an American corporation), qualified as investors within the meaning of the ECT (→YES; holding companies are covered investors; the decisive factor is whether the company is organized under the laws of a Contracting Party and not the existence of economic activity) Whether Tribunal had jurisdiction despite Respondent's invocation of the denial of benefits clause (→YES; Respondent's assertion of the right to deny benefits three years after becoming aware of such right was too late and lacked good faith) Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; Law 15/2012 is a taxation measure and ECT carves out taxation measures from its scope) <p>Merits issues (Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019):</p> <ul style="list-style-type: none"> Whether the protection of legitimate expectations is an essential element of the FET provision (→Yes) Whether the regulatory framework alone (without specific assurances or representations) can give rise to legitimate expectations (→NO; legislation cannot create legitimate expectations because it can be changed) Whether letters from Respondent's officials to Claimants created legitimate expectations that the investment regime would not be changed in a way that would undermine the security and viability of their investment (→Yes) Whether Respondent's failure to protect Claimants' legitimate expectations amounted to a breach of the FET standard (→Yes) <p>Awarded: approx. \$323.6 million (€290.6 million)</p>
<p>OperaFund and Schwab v. Spain</p> <p><i>OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain</i> (ICSID Case No. ARB/15/36)</p>	<p>Disputed measure(s): A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> Whether ECT applies to intra-EU disputes (→YES) Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT)

Table 3. Decisions finding State's liability for IIA breaches (at least in part)		
Case details	Case summary	Key issues and tribunals' findings
<p>ECT (1994)</p> <p>Award, 6 September 2019</p> <p>Arbitrators:</p> <ul style="list-style-type: none"> • Böckstiegel, K.-H. (President) • Reinisch, A. • Sands, P. (Dissenting Opinion on Liability and Quantum) 	<p>Investment at issue: Investments in two photovoltaic projects, the “PASO Project” in Majorca and the “ECO 3 Project” in Badajoz, through special purpose vehicles and participative loans held by wholly-owned subsidiaries Paso-Palma Sol Gestión de Proyectos, S.L. and Ecoinversión en Extremadura 3 S.L.</p>	<ul style="list-style-type: none"> • Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; Law 15/2012 is a taxation measure and ECT carves out taxation measures from its scope) <p>Merits issues:</p> <ul style="list-style-type: none"> • Whether the renewable energy regulatory framework contained a stability promise (→YES – BY MAJORITY; it contained an express stability commitment whose purpose was to induce investment by shielding investors from legislative or regulatory change) • Whether modifications to the regulatory framework revoked the stability promise thereby breaching Claimants’ legitimate expectations (→YES – BY MAJORITY) • Whether the absence of “real due diligence” on the part of the investors would vitiate a legitimate expectations claim (→YES) • Whether Claimants conducted appropriate due diligence (→YES – BY MAJORITY; Claimants did what could be expected from a prudent investor under the circumstances and at the time of their investments) • Whether the new regulatory framework amounted to a fundamental change that breached the stability requirement inherent in the ECT’s FET clause (→YES – BY MAJORITY) <p>Awarded: \$29.3 million</p>
<p><i>Perenco v. Ecuador</i></p> <p><i>Perenco Ecuador Limited v. Republic of Ecuador (Petroecuador)</i> (ICSID Case No. ARB/08/6)</p> <p>Ecuador–France BIT (1994)</p> <p>Award, 27 September 2019</p> <p>Arbitrators:</p> <ul style="list-style-type: none"> • Tomka, P. (President) • Kaplan, N. • Thomas, J. C. 	<p>Disputed measure(s): Ecuador’s enactment of Law No. 42 imposing a 99 per cent windfall levy on foreign oil revenues that allegedly resulted in the expropriation of Perenco’s investment in Blocks 7 and 21 situated in the Ecuadorian Amazon region; particularly by depriving Perenco of its contractual right to an agreed participation percentage of the crude oil produced in the Blocks.</p>	<p>Merits issues (Award, 27 September 2019, incorporating Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014):</p> <ul style="list-style-type: none"> • Whether Respondent’s measure imposing a 99% windfall tax on Claimant’s extraordinary revenues (resulting from rise of oil prices in the mid-2000’s) breached the FET standard (→YES; the purpose of the measure was to force Claimant to renegotiate contracts and to meet Respondent’s escalating demands) • Whether Respondent’s measure imposing a 50% windfall tax on Claimant’s extraordinary revenues breached the FET standard (→NO; experienced oil companies would likely have anticipated that the state would seek to revisit the terms governing investments in their natural resources in light of rise of oil prices) • Whether Respondent’s “declaration of <i>caducidad</i>”, terminating participation contracts under which Claimant held rights, during ICSID arbitration proceedings amounted to an expropriation of Claimant’s contractual rights (→YES; Respondent should have waited for outcome of arbitration) <p>Awarded: \$416.5 million</p>

Table 3. Decisions finding State's liability for IIA breaches (at least in part)		
Case details	Case summary	Key issues and tribunals' findings
	<p>Investment at issue: Sole operator and majority shareholder of rights in two oil blocks under two production sharing contracts concluded between Ecuador's oil company Petroecuador and several foreign investors; rights under joint operating agreements concluded with other entities holding interests in such blocks; contributions in personnel, equipment, technology, goods and services.</p>	
<p><i>RWE Innogy v. Spain</i></p> <p><i>RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain</i> (ICSID Case No. ARB/14/34)</p> <p>ECT (1994)</p> <p>Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Wordsworth, S. (President) • Kessler, J. L. • Joubin-Bret, A. 	<p>Disputed measure(s): A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p> <p>Investment at issue: Ownership of several renewable energy generation enterprises in Spain, including the thermosolar plant Andasol 3 in Granada.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether ECT applies to intra-EU disputes (→YES) • Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; Law 15/2012 is a taxation measure and ECT carves out taxation measures from its scope) <p>Merits issues:</p> <ul style="list-style-type: none"> • Whether any specific commitment had been made to Claimants, through acts and regulations, that the subsidy regime would remain unchanged such as to generate legitimate expectations (→NO) • Whether the tariff changes, despite being suitable and necessary to achieve legislative intent, imposed an excessive and disproportionate burden on the Claimants (→YES) • Whether such an excessive burden amounts to a breach of the FET standard (→YES) • Whether requiring Claimants to repay subsidies previously paid by the Respondent under the regime in place prior to the changes to the regulatory regime breached the FET standard (→YES) <p>(Case proceeded to damages phase.)</p>
<p><i>SolEs Badajoz v. Spain</i></p> <p><i>SolEs Badajoz GmbH v. Kingdom of Spain</i> (ICSID Case No. ARB/15/38)</p> <p>ECT (1994)</p> <p>Award, 31 July 2019</p>	<p>Disputed measure(s): A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether ECT applies to intra-EU disputes (→YES) • Whether Tribunal had jurisdiction under the ECT despite the CJEU's reasoning in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; even if assuming that ECT's ISDS clause is in conflict with EU law, pursuant to Article 16 of the ECT on the relationship with other agreements: for EU law to take precedence over the dispute settlement chapter of the ECT, EU law must provide a more favourable regime to investors; however, it does not)

Table 3. Decisions finding State's liability for IIA breaches (at least in part)		
Case details	Case summary	Key issues and tribunals' findings
<p>Arbitrators:</p> <ul style="list-style-type: none"> • Donoghue, J. E. (President) • Williams, D. A. R. • Sacerdoti, G. 	<p>Investment at issue: Ownership of Fotonos de Castuera, a Spanish company operating two photovoltaic plants (Badajoz I and Badajoz II) in the Autonomous Region of Extremadura, Spain.</p>	<ul style="list-style-type: none"> • Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; Law 15/2012 is a taxation measure and ECT carves out taxation measures from its scope) <p>Merits issues:</p> <ul style="list-style-type: none"> • Whether legitimate expectations under FET can arise from provisions of law and regulations and statements made for inducing investment (→YES; legitimate expectations do not solely arise from specific commitments made to an investor by the State) • Whether Claimant had legitimate expectations to be protected against disproportionate changes that removed the essential features of the regulatory regime (→YES) • Whether Respondent's reform of its regulatory framework had been disproportionate and thereby undermined the Claimant's legitimate expectations (→YES; the severity of the impact of those measures on the value of Claimant's investment exceeded what a prudent investor could have reasonably anticipated) • Whether legitimate expectations claim can be successful without a formal due diligence process (→YES; formal due diligence process is not a precondition; objective standard for assessment should be information regarding the regulatory regime that a prudent investor should have known) <p>Awarded: approx. \$44.9 million (€40.5 million)</p>
<p><i>Tethyan Copper v. Pakistan</i></p> <p><i>Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan</i> (ICSID Case No. ARB/12/1)</p> <p>Australia–Pakistan BIT (1998)</p> <p>Award, 12 July 2019</p> <p>Arbitrators:</p> <ul style="list-style-type: none"> • Sachs, K. (President) • Alexandrov, S. A. • Hoffmann, L. 	<p>Disputed measure(s): Decision by the Pakistani province of Balochistan to refuse the application by claimant's local operating subsidiary for a mining lease in respect of the Reko Diq gold and copper site.</p> <p>Investment at issue: Rights under a joint venture agreement concluded with the Province of Balochistan for the development of a copper-gold mine.</p>	<p>Merits issues:</p> <ul style="list-style-type: none"> • Whether Respondent's conduct created legitimate expectations that Claimant would be granted a mining lease (→YES; Respondent's assurances in the joint venture agreement, its regulatory framework and direct assurances from government officials created legitimate expectations) • Whether Claimant's legitimate expectations formed the basis for Claimant's investment decisions (→YES) • Whether Respondent breached Claimant's legitimate expectations thereby violating the FET standard (→YES; Respondent's decision not to grant mining lease to Claimant was based on invalid grounds and motivated by Respondent's plan to take over the project) • Whether Respondent's refusal to grant mining lease amounted to indirect expropriation (→YES; refusal deprived the investment of its value; it was not a <i>bona fide</i> regulatory measure) • Whether the expropriation was unlawful (→YES; it was discriminatory and without payment of compensation) • Whether Respondent's refusal to grant mining lease breached the BIT's non-impairment obligation (→YES; refusal prevented the use of Claimant's investment)

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

Table 4.		Decisions dismissing the investors' claims (in toto)
Case details	Case summary	Key issues and tribunals' findings
<p><i>Anglo American v. Venezuela</i></p> <p><i>Anglo American PLC v. Bolivarian Republic of Venezuela</i> (ICSID Case No. ARB(AF)/14/1)</p> <p>United Kingdom–Bolivarian Republic of Venezuela BIT (1995)</p> <p>Award, 18 January 2019</p> <p>Arbitrators:</p> <ul style="list-style-type: none"> • Derains, Y. (President) • Tawil, G. S. (Dissenting Opinion) • Vinuesa, R. E. 	<p>Disputed measure(s): Government's cancellation and non-renewal of nickel-mining concessions owned by claimant's Venezuelan subsidiary, allegedly resulting in the permanent cease of production and mining activities.</p> <p>Investment at issue: Rights under nickel-mining concessions owned by Anglo American's local subsidiary, Minera Loma de Niquel C.A. (indirect participation of 91.37 per cent).</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether Claimant's indirect shareholding in local company through another local company, which in turn was owned by a Panamanian subsidiary of the Claimant, was covered by the BIT (→YES; BIT protected both direct and indirect investments) • Whether the assets of the local company were a protected investment (→YES; the assets of the company in which the investor has a shareholding interest are as protected as the shares themselves) • Whether Tribunal had jurisdiction despite the presence of an exclusive forum selection clause in the concession contract giving jurisdiction to domestic courts (→YES; investor's claims were for treaty breaches and not contractual claims) • Whether Tribunal had jurisdiction over counterclaims brought by Respondent (→NO; jurisdiction only covered treaty breaches by the State and not breaches by the investor) <p>Merits issues:</p> <ul style="list-style-type: none"> • Whether Respondent expropriated Claimant by seizing certain assets and inventory at the expiry of the concessions (→NO – BY MAJORITY; expropriation could not have occurred since under the contract terms ownership of those assets was to be transferred to Respondent at the expiry of the concession) • Whether Respondent's refusal to grant VAT refunds in 2010, after consistently granting them since 2001, was a breach of the FET standard (→NO – BY MAJORITY; there was no State arbitrariness or failure to ensure due process and there was no frustrated legitimate expectations) • Whether Respondent's seizure of assets and refusal to grant VAT refunds breached the FPS standard (→NO) • Whether Respondent's refusal to grant VAT refunds breached the national treatment obligation (→NO)
<p><i>Belenergia v. Italy</i></p> <p><i>Belenergia S.A. v. Italian Republic</i> (ICSID Case No. ARB/15/40)</p> <p>ECT (1994)</p> <p>Award, 6 August 2019</p>	<p>Disputed measure(s): A series of governmental decrees to cut tariff incentives for some solar power projects.</p> <p>Investment at issue: Participating interest in 10 Italian special purpose vehicles which developed and operated 20 photovoltaic plants in Southern Italy.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether ECT applies to intra-EU disputes (→YES) • Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT) • Whether Tribunal had jurisdiction despite ECT's fork-in-the road provision (→YES; the dispute had not yet been submitted to another forum) • Whether Tribunal had jurisdiction over claims relating to imbalance costs imposed by AEEG Resolution No. 444/2016 and charged to PV plant owners (→NO; imbalance costs fall within the meaning of a taxation measure under the ECT and are carved out from the scope)

Table 4. Decisions dismissing the investors' claims (in toto)		
Case details	Case summary	Key issues and tribunals' findings
<p>Arbitrators:</p> <ul style="list-style-type: none"> • Derains, Y. (President) • Hanotiau, B. • Fernández Rozas, J. C. 		<p>Merits issues:</p> <ul style="list-style-type: none"> • Whether Claimant's convention concluded with the public entity overseeing the incentive regime contained specific commitments addressed to Claimant that could give rise to legitimate expectations (→NO; convention merely reproduced content of the regulatory and legislative framework) • Whether Claimant should have legitimately expected the incentive regime not to be changed at the time of the investment (→NO; a prudent investor should have seen the clear trends towards reduction of incentives and should have been warned by Spain's earlier changes to its renewable energy regime) • Whether the regulatory changes were adopted without due process and thereby breached the FET standard (→NO) • Whether the regulatory changes were unjustified and disproportionate, constituting a breach of the FET standard (→NO) • Whether legislative changes breached the FPS standard (→NO; while FPS can extend to legal security, it does not protect against States' right to legislate in a manner that affects investment negatively) • Whether Respondent breached an obligation "entered into with" Claimant, thereby violating the umbrella clause (→NO; Claimant's convention concluded with the public entity overseeing the incentive regime did not contain specific commitments)
<p>CMC v. Mozambique</p> <p><i>CMC Africa Austral, LDA, CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., and CMC MuratoriCementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa v. Republic of Mozambique</i> (ICSID Case No. ARB/17/23)</p> <p>Italy–Mozambique BIT (1998)</p> <p>Award, 24 October 2019</p>	<p>Disputed measure(s): Alleged failure of the national roads administration and the Government to pay settlement amounts offered to the claimants for additional work related to the reconstruction of a highway, which was carried out by claimants under a contract with the national roads administration.</p> <p>Investment at issue: Participation in a project to reconstruct a portion of the principal north-south highway in Mozambique under a contract with the national roads administration.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether an alleged settlement agreement between Respondent and Claimants qualified as an investment under the BIT and ICSID Convention (→YES; it qualified as credit for sums of money connected with an investment) • Whether Tribunal had jurisdiction over claims despite Claimants' investment contract containing a dispute settlement provision referring to arbitration under the Cotonou Convention (→YES; investors' claims were for treaty breaches and not contractual claims) • Whether Respondent could rely on CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) to challenge the Tribunal's jurisdiction (→NO; the CJEU's decision concerns only intra-EU BITs; not BITs between an EU member State and a non-EU State) • Whether tribunal had jurisdiction (→YES) <p>Merits issues:</p> <ul style="list-style-type: none"> • Whether, factually, a settlement agreement had been reached between Claimants and Respondent (→NO; according to Mozambican law, no agreement was ever formed) • Whether Respondent, by refusing to honor settlement agreement, breached the just and fair standard of treatment (→NO; absent a settlement agreement, there could not be a breach)

Table 4. Decisions dismissing the investors' claims (in toto)		
Case details	Case summary	Key issues and tribunals' findings
<p>Arbitrators:</p> <ul style="list-style-type: none"> • Townsend, J. M. (President) • Rees, P. • Casey, J. B. 		<ul style="list-style-type: none"> • Whether Respondent acted in bad faith, thereby breaching the just and fair treatment (→NO) • Whether Respondent failed to maintain a legal framework sufficiently transparent so as to deny just and fair treatment (→NO) • Whether Respondent impaired Claimants' investment by unjustified or discriminatory measures (→NO)
<p>Europa Nova v. Czechia</p> <p><i>WA Investments-Europa Nova Limited v. The Czech Republic</i> (PCA Case No. 2014-19)</p> <p>Cyprus–Czechia BIT (2001); ECT (1994)</p> <p>Award, 15 May 2019</p> <p>Arbitrators:</p> <ul style="list-style-type: none"> • van Houtte, H. (President) • Beechey, J. • Landau, T. 	<p>Disputed measure(s): Amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants.</p> <p>Investment at issue: Majority shareholding (90 per cent) in Czech company SolarOne s.r.o., which owned two special purpose vehicles with solar plants (the Tomsan and Slunecní projects).</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether Tribunal had jurisdiction over Claimant under the Cyprus–Czechia BIT (→NO; Tribunal lacked jurisdiction because Claimant did not meet the condition of having a permanent seat in the other Contracting Party to qualify as investor under the BIT; Claimant only had registered office) • Whether Tribunal had jurisdiction <i>ratione personae</i> over Claimant under ECT (→YES; ECT does not have a permanent seat requirement) • Whether, under ECT, Tribunal had jurisdiction over investment owned by domestic investors through a foreign shell company (in Cyprus) (→YES; ECT does not preclude the protection of an investment made by an entity which mainly serves as a holding company) • Whether Claimant qualified as investor if funds used to make investment originated from a national of the host State (→YES; under ECT, investment refers to “every kind of asset”, no requirement that funds of an investment be of foreign origin) • Whether Tribunal had jurisdiction over the solar levy measure despite claim by Respondent that it was a taxation measure falling under the ECT tax carve-out (→YES; the measure was not a tax measure, its main objective was to reduce the incentives granted to solar investors; the ECT tax carve-out was intended to exclude measures aimed at raising general revenue for the State from the ECT’s scope) • Whether Tribunal had jurisdiction despite Respondent’s objection based on the CJEU’s decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; objection was not raised in a timely manner; Respondent had waived its right to raise such objection pursuant to procedural law of the arbitration seat; EU law does not enjoy primacy in Switzerland) • Whether, under the ECT, a call option qualifies as a protected investment (→NO) <p>Merits issues:</p> <ul style="list-style-type: none"> • Whether the obligation to provide a stable and predictable legal framework is distinct from the protection of an investor’s legitimate expectations under the ECT (→YES) • Whether Respondent, by introducing changes to the incentive scheme, failed to provide a stable and predictable legal framework thereby breaching the FET standard (→NO; the changes did not repeal the fundamental features of the incentive scheme and Respondent had not agreed to a stabilization commitment)

Table 4. Decisions dismissing the investors' claims (in toto)		
Case details	Case summary	Key issues and tribunals' findings
		<ul style="list-style-type: none"> • Whether Respondent, by introducing changes to the incentive scheme, violated Claimant's legitimate expectations under FET (→NO; Respondent did not give any assurance that incentive scheme would always remain in place and unchanged) • Whether Respondent breached its obligation towards the Claimant to act in a transparent manner (→NO) • Whether Respondent breached the legal security dimension of the obligation to provide FPS (→NO; similar to FET, Respondent did not fail to guarantee a secure and stable investment environment to protect foreign investments) • Whether, by modifying the incentive scheme, Respondent acted in an arbitrary manner that impaired Claimant's investment (→NO; Respondent's measure was rational and reasonable)
<p><i>I.C.W. v. Czechia</i></p> <p><i>I.C.W. Europe Investments Limited v. The Czech Republic</i> (PCA Case No. 2014-22)</p> <p>Czechia–United Kingdom BIT (1990); ECT (1994)</p> <p>Award, 15 May 2019</p> <p>Arbitrators:</p> <ul style="list-style-type: none"> • van Houtte, H. (President) • Beechey, J. • Landau, T. 	<p>Disputed measure(s): Amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants.</p> <p>Investment at issue: Sole shareholding in a Czech special purpose vehicle, Hutira FVE-Omice a.s., which owned and operated a solar plant in South Moravia.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether Tribunal had jurisdiction over FET claims based on the BIT (→NO; FET claims were excluded from the ISDS scope) • Whether Tribunal had jurisdiction over claims based on the ECT (→YES) • Whether Claimant qualified as investor if funds used to make investment originated from a national of the host State (→YES; under both ECT and BIT, investment refers to "every kind of asset", no requirement that funds of an investment be of foreign origin) • Whether Tribunal had jurisdiction over the solar levy measure despite claim by Respondent that it was a taxation measure falling under the ECT tax carve-out (→YES; the measure was not a tax measure, its main objective was to reduce the incentives granted to solar investors; the ECT tax carve-out was intended to exclude measures aimed at raising general revenue for the State from the ECT's scope) • Whether Tribunal had jurisdiction despite Respondent's objection based on the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; objection was not raised in a timely manner; Respondent had waived its right to raise such objection pursuant to procedural law of the arbitration seat; EU law does not enjoy primacy in Switzerland) <p>Merits issues:</p> <ul style="list-style-type: none"> • Whether the obligation to provide a stable and predictable legal framework is distinct from the protection of an investor's legitimate expectations (→YES) • Whether Respondent, by introducing changes to the incentive scheme, failed to provide a stable and predictable legal framework thereby breaching the FET standard (→NO; the changes did not repeal the fundamental features of the incentive scheme and Respondent had not agreed to a stabilization commitment)

Table 4. Decisions dismissing the investors' claims (in toto)		
Case details	Case summary	Key issues and tribunals' findings
		<ul style="list-style-type: none"> • Whether Respondent, by introducing changes to the incentive scheme, violated Claimant's legitimate expectations (→NO; Respondent did not give any assurance that incentive scheme would always remain in place and unchanged for the duration of the PV plant) • Whether Respondent breached its obligation towards the Claimant to act in a transparent manner (→NO) • Whether Respondent breached the legal security dimension of the obligation to provide FPS (→NO; similar to FET, Respondent did not fail to guarantee a secure and stable investment environment to protect foreign investments) • Whether, by modifying the incentive scheme, Respondent acted in an arbitrary manner that impaired Claimant's investment (→NO; Respondent's measure was rational and reasonable)
<p><i>Lao Holdings v. Laos (I)</i></p> <p><i>Lao Holdings N.V. v. Lao People's Democratic Republic (I)</i> (ICSID Case No. ARB(AF)/12/6)</p> <p>Lao People's Democratic Republic–Netherlands BIT (2003)</p> <p>Award, 6 August 2019</p> <p>Arbitrators:</p> <ul style="list-style-type: none"> • Binnie, I. (President) • Hanotiau, B. • Stern, B. 	<p>Disputed measure(s): Multiplicity of the Government's actions, including an 80% tax on casino revenues and allegedly unfair and oppressive audits of the claimant's Savan Vegas Hotel and Casino. Subsequent to a settlement reached in this case in 2014, the claimant further alleged material breaches of the settlement agreement by the Government and infringement of the claimant's gambling monopoly rights.</p> <p>Investment at issue: Contributions made in the form of loans extended to local companies; majority shareholding in two hotels and casinos; Savan Vegas and Paksong Vehas; ownership stakes in certain slot clubs; business know-how.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether a temporal limit for legal disputes can be read into the BIT's ISDS clause, excluding disputes existing prior to the treaty's entry into force between Respondent and Claimant (→YES; BIT only covers legal disputes that arose after its entry into force; Article 28 of the VCLT on general principle of non-retroactivity is applicable) • Whether the legal dispute arose before the BIT's entry into force between Respondent and Claimant, thereby falling outside the jurisdiction of the Tribunal (→NO; analysis of evidence shows that dispute arose after the critical date) <p>Merits issues:</p> <ul style="list-style-type: none"> • Whether the "red-flags test" or "balance of probabilities" is sufficient as the standard of proof for corruption allegations (→NO; higher standard of clear and convincing evidence is required) • Whether a generalized doctrine of "clean hands" should be incorporated into investor-State law (→NO; however, serious financial misconduct by Claimant incompatible with good faith is not without treaty consequences) • Whether the corruption allegations levied against Claimant by Respondent met the "clear and convincing evidence" standard of proof (→NO; however, the allegations would have met the lower standard of balance of probabilities) • Whether Claimant made efforts to manipulate the Government to advance its gambling initiatives and to manipulate the arbitration process, amounting to manifest bad faith (→YES) • Whether allegedly flawed court proceedings tainted by the Respondent's interference resulted in expropriation of Claimant's investment without payment of compensation (→NO; improper interference was not established)

Table 4. Decisions dismissing the investors' claims (in toto)		
Case details	Case summary	Key issues and tribunals' findings
		<ul style="list-style-type: none"> • Whether Respondent's refusal to renew a licence to operate a gaming club, after granting several renewals in the past, amounted to expropriation (→NO; Claimant did not show that it had a right to, or legitimate expectation of, further renewals) • Whether Respondent's revocation of a licence ten days after its issuance to Claimant amounted to expropriation (→NO; licence was issued by mistake by unauthorized authority and revocation was for good and sufficient cause) • Whether the local court proceedings involving Claimant, and the resulting decision, were so flawed such as to amount to denial of justice and a breach of the FET standard (→NO) • Whether an audit initiated by Respondent of Claimant's project (in which Respondent was minority shareholder) was abusive and inconsistent with the good faith principle embedded in the FET standard (→NO; Respondent had good cause for concern and was within its rights as significant shareholder)
<p><i>Photovoltaik Knopf v. Czechia</i></p> <p><i>Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic</i> (PCA Case No. 2014-21)</p> <p>Czechia–Germany BIT (1990); ECT (1994)</p> <p>Award, 15 May 2019</p> <p>Arbitrators:</p> <ul style="list-style-type: none"> • van Houtte, H. (President) • Beechey, J. • Landau, T. 	<p>Disputed measure(s): Amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants.</p> <p>Investment at issue: Sole shareholding in a Czech special purpose vehicle, FVE Knezmost s.r.o., which owned and operated a solar plant in Knezmost-Koprnik.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether Tribunal had jurisdiction over the solar levy measure despite claim by Respondent that it was a taxation measure falling under the ECT tax carve-out (→YES; the measure was not a tax measure, its main objective was to reduce the incentives granted to solar investors; the ECT tax carve-out was intended to exclude measures aimed at raising general revenue for the State from the ECT's scope) • Whether Tribunal had jurisdiction despite Respondent's objection based on the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; objection was not raised in a timely manner; Respondent had waived its right to raise such objection pursuant to procedural law of the arbitration seat; EU law does not enjoy primacy in Switzerland) <p>Merits issues</p> <ul style="list-style-type: none"> • Whether the obligation to provide a stable and predictable legal framework is distinct from the protection of an investor's legitimate expectations (→YES) • Whether Respondent, by introducing changes to the incentive scheme, failed to provide a stable and predictable legal framework thereby breaching the FET standard (→NO; the changes did not repeal the fundamental features of the incentive scheme and Respondent had not made a stabilization commitment neither contractually nor through legislation) • Whether Respondent, by introducing changes to the incentive scheme, violated Claimant's legitimate expectations under FET (→NO; Respondent did not give any assurance that incentive scheme would always remain in place and unchanged for the duration of the PV plant) • Whether Respondent breached its obligation towards the Claimant to act in a transparent manner (→NO)

Table 4. Decisions dismissing the investors' claims (in toto)		
Case details	Case summary	Key issues and tribunals' findings
		<ul style="list-style-type: none"> • Whether Respondent breached the legal security dimension of the obligation to provide FPS (→NO; similar to FET, Respondent did not fail to guarantee a secure and stable investment environment to protect foreign investments) • Whether, by modifying the incentive scheme, Respondent acted in an arbitrary manner that impaired Claimant's investment (→NO; Respondent's measure was rational and reasonable)
<p><i>Sanum Investments v. Laos (I)</i></p> <p><i>Sanum Investments v. Lao People's Democratic Republic (I)</i> (PCA Case No. 2013-13)</p> <p>China–Lao People's Democratic Republic BIT (1993)</p> <p>Award, 6 August 2019</p> <p>Arbitrators:</p> <ul style="list-style-type: none"> • Rigo Sureda, A. (President) • Hanotiau, B. • Stern, B. 	<p>Disputed measure(s): Alleged series of measures by the Government of Laos, including its courts and provincial authorities, that affected claimant's bundle of rights for the construction and operation of two hotels and casinos, among other gaming facilities in which the claimant had invested.</p> <p>Investment at issue: Contributions made in the form of loans extended to local companies; majority shareholding in two hotels and casinos: Savan Vegas and Paksong Vehas; ownership stakes in certain slot clubs; business know-how.</p>	<p>Merits issues:</p> <ul style="list-style-type: none"> • Whether the “red-flags test” or “balance of probabilities” is sufficient as the standard of proof for corruption allegations (→NO; higher standard of clear and convincing evidence is required) • Whether a generalized doctrine of “clean hands” should be incorporated into investor-State law (→NO; however, serious financial misconduct by Claimant incompatible with good faith is not without treaty consequences) • Whether the corruption allegations levied against Claimant by Respondent met the “clear and convincing evidence” standard of proof (→NO; however the allegations would have met the lower standard of balance of probabilities) • Whether Claimant made efforts to manipulate the Government to advance its gambling initiatives and to manipulate the arbitration process, amounting to manifest bad faith (→YES) • Whether allegedly flawed court proceedings tainted by interference by Respondent resulted in expropriation of Claimant's investment without payment of compensation (→NO; improper interference was not established) • Whether Respondent's termination of a contract with Claimant to build a hotel casino amounted to expropriation (→NO; it was terminated for breach of contract, Claimant had failed to fulfil obligations) • Whether Respondent's refusal to renew a licence to operate a gaming club, after granting several renewals in the past, amounted to expropriation (→NO; Claimant did not show that it had a right to, or legitimate expectation of, further renewals) • Whether Respondent's revocation of a licence ten days after its issuance to Claimant amounted to expropriation (→NO; licence was issued by mistake by unauthorized authority and revocation was for good and sufficient cause)

Table 4. Decisions dismissing the investors' claims (in toto)		
Case details	Case summary	Key issues and tribunals' findings
<p><i>Stadtwerke München and others v. Spain</i></p> <p><i>Stadtwerke München GmbH and others v. Kingdom of Spain</i> (ICSID Case No. ARB/15/1)</p> <p>ECT (1994)</p> <p>Award, 2 December 2019</p> <p>Arbitrators:</p> <ul style="list-style-type: none"> • Salacuse, J. W. (President) • Hobér, K. (Dissenting Opinion) • Douglas, Z. 	<p>Disputed measure(s): A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p> <p>Investment at issue: Majority shareholding in the Spanish thermo solar plant Andasol located in Granada and held by the Spanish project company Marquesado Solar S.L.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether ECT applies to intra-EU disputes (→YES) • Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT) • Whether Tribunal had jurisdiction in respect of Law 15/2012 that introduced tax on production of electricity (→NO; Law 15/2012 is a taxation measure and ECT carves out taxation measures from its scope) <p>Merits issues:</p> <ul style="list-style-type: none"> • Whether ECT's sentence "stable, equitable, favourable and transparent conditions" contains an independent and actionable obligation separate from the FET standard (→NO – BY MAJORITY; it is part of the broader FET standard) • Whether Respondent, by modifying the incentive scheme, failed to provide a stable a regulatory regime and thus violated the FET standard (→NO – BY MAJORITY; the modifications were necessary corrective actions to remedy the unintended consequences of the scheme) • Whether Respondent, by modifying the incentive scheme, frustrated Claimants' legitimate and reasonable expectations and thus violated the FET standard (→NO – BY MAJORITY; Claimants had no reasonable or legitimate expectation for a stabilized regime not subject to change) • Whether a prudent investor, having conducted appropriate due diligence, would have reasonably expected that the incentive scheme would remain unchanged (→NO – BY MAJORITY; Claimants' expectations were not reasonable or legitimate) • Whether Respondent violated the FET standard by failing to act transparently (→NO – BY MAJORITY; the adoption of the legislative and regulatory changes was transparent and involved preliminary reports, consultations and discussions with stakeholders) • Whether Respondent's modification of its incentive scheme was irrational or unreasonable (→NO – BY MAJORITY; the modification bore a reasonable relationship to the public policy objective of reducing the State's deficit) • Whether impact of regulatory reform on Claimants' investment was disproportionate (→NO – BY MAJORITY) • Whether Respondent failed to observe obligations "it has entered" into with Claimants, thereby breaching the umbrella clause (→NO – BY MAJORITY; obligations governed by the umbrella clause are only those arising from contracts, and not those assumed via general legislation)

Table 4. Decisions dismissing the investors' claims (in toto)		
Case details	Case summary	Key issues and tribunals' findings
<p><i>United Utilities v. Estonia</i></p> <p><i>United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia</i> (ICSID Case No. ARB/14/24) Estonia–Netherlands BIT (1992)</p> <p>Award, 21 June 2019</p> <p>Arbitrators:</p> <ul style="list-style-type: none"> • Drymer, S. L. (President) • Williams, D. A. R. (Dissent) • Stern, B 	<p>Disputed measure(s): Alleged refusal by Estonian regulators to permit water tariff increases in Tallinn, which allegedly resulted in substantial losses for claimants' water services concession.</p> <p>Investment at issue: Shareholding (50.4 per cent) in the company AS Talinna Vesi, which held rights under a water and wastewater services contract for the city of Tallinn.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether, despite owning a minority shareholding in the local company, the parent company controlled the local company (→YES) • Whether Tribunal had jurisdiction despite ongoing proceedings before domestic courts initiated by the local company (→YES; the matter in local proceedings was not substantially the same as that before the Tribunal) • Whether the BIT is operative despite Estonia's accession to the EU (→YES; BIT was not terminated; BIT and EU law do not have identical subject matter) • Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; BIT is not incompatible with EU law or inoperative; Tribunal is not authoritatively bound by the CJEU's decision and the latter does not address arbitral proceedings under ICSID) <p>Merits issues:</p> <ul style="list-style-type: none"> • Whether, absent an express stabilization clause, a State's contractual commitments towards investors can give rise to legitimate expectations that regulatory framework would not be changed (→NO – BY MAJORITY; contracts involve intrinsic expectations different from legitimate expectations under public international law) • Whether Claimants had legitimate expectations of legal stability at the time of investment arising from privatization agreements with Respondent (→NO – BY MAJORITY; agreements plainly disclosed to Claimants that regulatory framework was not static) • Whether Respondent failed to afford Claimants due process and thereby breached the FET standard (→NO – BY MAJORITY)
<p><i>Voltaic Network v. Czechia</i></p> <p><i>Voltaic Network GmbH v. The Czech Republic</i> (PCA Case No. 2014-20)</p> <p>Czechia–Germany BIT (1990); ECT (1994)</p> <p>Award, 15 May 2019</p>	<p>Disputed measure(s): Amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants.</p> <p>Investment at issue: Sole shareholding in a Czech special purpose vehicle, Solarpark Rybníček s.r.o., which owned and operated a solar plant near Rybníček.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether shares in a local company acquired by Claimant using a loan and paid for directly by the lender qualified as protected investment (→YES; the ECT and the BIT do not require that investor itself makes the investment – it is sufficient that the investor owns the asset) • Whether Tribunal had jurisdiction over the solar levy measure despite claim by Respondent that it was a taxation measure falling under the ECT tax carve-out (→YES; the measure was not a tax measure, its main objective was to reduce the incentives granted to solar investors; the ECT tax carve-out was intended to exclude measures aimed at raising general revenue for the State from the ECT's scope) • Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; objection was not raised in a timely manner; Respondent had waived its right to raise such objection pursuant to procedural law of the arbitration seat; EU law does not enjoy primacy in Switzerland)

Table 4. Decisions dismissing the investors' claims (in toto)		
Case details	Case summary	Key issues and tribunals' findings
Arbitrators: <ul style="list-style-type: none"> • van Houtte, H. (President) • Beechey, J. • Landau, T. 		Merits issues: <ul style="list-style-type: none"> • Whether the obligation to provide a stable and predictable legal framework is distinct from the protection of an investor's legitimate expectations (→YES) • Whether Respondent, by introducing changes to the incentive scheme, failed to provide a stable and predictable legal framework, thereby breaching the FET standard (→NO; the changes did not repeal the fundamental features of the incentive scheme and Respondent had not agreed to a stabilization commitment neither contractually nor through legislation) • Whether Respondent, by introducing changes to the incentive scheme, violated Claimant's legitimate expectations under FET (→NO; Respondent did not give any assurance that incentive scheme would always remain in place and unchanged for the duration of the PV plant) • Whether Respondent breached its obligation towards the Claimant to act in a transparent manner (→NO) • Whether Respondent breached the legal security dimension of the obligation to provide FPS (→NO; similar to FET, Respondent did not fail to guarantee a secure and stable investment environment to protect foreign investments) • Whether, by modifying the incentive scheme, Respondent acted in an arbitrary manner that impaired Claimant's investment (→NO; Respondent's measure was rational and reasonable)