



# IIA ISSUES NOTE

INTERNATIONAL INVESTMENT AGREEMENTS



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## REVIEW OF 2020 INVESTOR–STATE ARBITRATION DECISIONS: IIA REFORM ISSUES AT A GLANCE

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

- This note reviews investor–State dispute settlement (ISDS) decisions rendered by arbitral tribunals in 2020. Thirty-one ISDS decisions on jurisdiction and merits were publicly available at the time of writing. Most claims were based on old-generation international investment agreements (IIAs) signed in the 1990s or earlier.
- The review of recent ISDS decisions highlights the need to speed up the reform of the old stock of IIAs currently in force. UNCTAD’s IIA Reform Accelerator, launched in November 2020, was developed to facilitate such efforts.
- ISDS decisions from 2020 touched upon important issues on the reform agenda for the IIA regime, including:
  - Coverage of tax measures
  - Use of most-favoured-nation treatment to import provisions from respondent States’ IIAs with third countries
  - Scope of fair and equitable treatment, legitimate expectations and regulatory stability
  - Indirect expropriation
  - Umbrella clauses, contract claims and other obligations
  - Consent to investor–State arbitration, requirements and limitation periods for bringing ISDS claims
- For policymakers and IIA negotiators, arbitral decisions are a useful source of knowledge on IIAs: How do IIA provisions work in practice, and which areas are most in need of reform? Together with UNCTAD’s IIA policy tools, this analysis can also help countries and regions make strategic choices concerning old-generation IIAs with ISDS. One way of addressing the challenges is to clarify key provisions through the interpretation, amendment or replacement of the old IIA. Countries may choose to pursue other available policy options (e.g. terminating an old IIA by consent or unilaterally).

## Introduction: Recent ISDS decisions and their relevance for IIA reform

This note provides an overview of tribunals' findings in ISDS decisions rendered in 2020. It focuses on selected issues that are relevant for the reform of the IIA regime. Thirty-one ISDS decisions on jurisdiction and merits were publicly available at the time of writing (box 1; annex 1). The cases and issues highlighted in this note were selected after a detailed mapping of the 31 ISDS decisions, which is available as additional material.<sup>1</sup>

For policymakers and IIA negotiators, arbitral decisions are a useful source of knowledge on IIAs: How do IIA provisions work in practice, and which areas are most in need of reform? Most arbitral decisions rendered in 2020 concerned claims based on old-generation IIAs signed in the 1990s or earlier. The review of recent ISDS decisions highlights the need to speed up the reform of the old stock of IIAs currently in force. UNCTAD's IIA Reform Accelerator, launched in November 2020, was developed to facilitate such efforts (UNCTAD, 2020a).

This note also draws on policy options put forward in UNCTAD's Reform Package for the International Investment Regime (2018) and the Investment Policy Framework for Sustainable Development (2015). Together with UNCTAD's IIA policy tools, this analysis can help countries and regions make strategic choices concerning old-generation IIAs with ISDS.

The selected issues addressed in the ISDS decisions are arranged in the order of the typical IIA structure (rather than being divided into jurisdictional, admissibility or merits issues):

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

The tables on selected issues present the main facts of the reviewed ISDS decisions and the questions addressed by tribunals.

This review of ISDS decisions can be read together with other recent UNCTAD publications related to IIAs and ISDS. Chapter II of the World Investment Report 2022 (UNCTAD, 2022) gives an update on global IIA policymaking and ISDS claims.

### Box 1. ISDS decisions in 2020

In 2020, ISDS tribunals rendered at least 52 substantive decisions in investor–State disputes, 31 of which were in the public domain at the time of writing.<sup>a</sup> Eleven of the public decisions principally addressed jurisdictional issues (including preliminary objections), with eight upholding the tribunal's jurisdiction and three declining jurisdiction. The remaining 20 public decisions were rendered on the merits, with 6 holding the State liable for IIA breaches and 14 dismissing all investor claims.

In addition, four publicly known decisions were rendered in ICISD annulment proceedings. Ad hoc committees of the ICSID rejected the applications for annulment in three cases; in one case, the award at issue was annulled in its entirety.

*Source:* UNCTAD, 2021a.

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

<sup>1</sup> "Detailed Mapping of 2020 ISDS Decisions", available at <https://investmentpolicy.unctad.org/publications/series/2/international-investment-agreements>.

# 1. Treaty scope and definitions

## a. Definitions of investment and investor

### Characteristics of investment

In five decisions rendered in 2020, tribunals examined whether certain characteristics or criteria for covered investment were met (table 1).

#### ISDS tribunals' findings:

- In *A.M.F. Aircraftleasing v. Czechia*, the tribunal decided that the type of investment in question satisfied the relevant criteria. In *Adamakopoulos and others v. Cyprus*, the tribunal's majority came to a similar finding.
- In *Strabag v. Libya*, the tribunal considered that the Salini criteria were not applicable,<sup>2</sup> but they would have been met if it were to apply them.
- In *Eyre and Montrose Developments v. Sri Lanka*, the tribunal determined that the alleged investment was not protected, since it did not meet certain criteria (the claimants had not paid any funds or contributions and did not carry an operational risk).
- In *Vento v. Mexico*, the tribunal found that the loan agreements at issue did not constitute an investment because there was no evidence of transfers made under the loan agreements.

Old-generation IIAs typically use an open-ended definition of "investment" that grants protection to all types of assets, without explicitly listing specific characteristics of investment. Many recent IIAs, however, list characteristics in definitions of the term "investment" (UNCTAD, 2019c). They also often exclude certain types of assets from coverage. As drafting options for the definition of investment, UNCTAD's IIA Reform Accelerator suggests requiring investments to fulfill specific characteristics to be covered by the treaty (UNCTAD, 2020a).

Table 1. Characteristics of investment		
Case details	Investment at issue	Selected issues and tribunals' findings
<p><b>Adamakopoulos and others v. Cyprus</b></p> <ul style="list-style-type: none"> <li>• Cyprus–Greece BIT (1992)</li> <li>• BLEU (Belgium–Luxembourg Economic Union)–Cyprus BIT (1991)</li> <li>• Decision on Jurisdiction, 7 February 2020</li> <li>• Decision upholding jurisdiction</li> <li>• McRae, D. M. (President); Escobar, A. A.; Kohen, M. G. (Dissenting Opinion)</li> </ul>	<p>Deposits and bonds in two Cypriot banks, Laiki Bank (also known as Cyprus Popular Bank) and the Bank of Cyprus.</p>	<ul style="list-style-type: none"> <li>• Whether bonds, deposits and life insurance constitute a protected investment (→YES – BY MAJORITY; they are explicitly covered by the BITs, the Salini criteria should be applied holistically and subordinated to the ordinary meaning of the term investment)</li> </ul>
<p><b>A.M.F. Aircraftleasing v. Czechia</b></p> <ul style="list-style-type: none"> <li>• Czechia–Germany BIT (1990)</li> <li>• Final Award, 11 May 2020</li> <li>• Decision dismissing claims</li> <li>• Tercier, P. (President); Alexandrov, S. A.; Kalicki, J. E.</li> </ul>	<p>Ownership of two aircrafts and related leasing activities.</p>	<ul style="list-style-type: none"> <li>• Whether the claimant has a protected investment under the BIT (→YES; the Lease Agreements are an "investment" entailing a contribution that extends over a certain period of time and involves some risk, which is more than a simple commercial risk)</li> </ul>

<sup>2</sup> According to this test, an "investment" (in the sense of Article 25(1) of the ICSID Convention) is characterized by the following elements: (1) the existence of a substantial contribution by the foreign national, (2) a certain duration of the economic activity in question, (3) the assumption of risk by the foreign national, and (4) the contribution of the activity to the host State's development.

Table 1. Characteristics of investment		
Case details	Investment at issue	Selected issues and tribunals' findings
<b>Eyre and Montrose Developments v. Sri Lanka</b> <ul style="list-style-type: none"> <li>• Sri Lanka–United Kingdom BIT (1980)</li> <li>• Award, 5 March 2020</li> <li>• Decision rejecting jurisdiction</li> <li>• Reed, L. (President); Lew, J. D. M.; Stern, B.</li> </ul>	Ownership of land plot on the banks of Lake Diyawanna for a hotel development project.	<ul style="list-style-type: none"> <li>• Whether the claimants' alleged investment satisfies the Salini test criteria ((i) contribution to the host State; (ii) a certain duration; (iii) participation in the risk of the operation) (→NO; lack of contribution and no operational risk)</li> </ul>
<b>Strabag v. Libya</b> <ul style="list-style-type: none"> <li>• Austria–Libya BIT (2002)</li> <li>• Award, 29 June 2020</li> <li>• Decision finding IIA breaches</li> <li>• Crook, J. R. (President); Crivellaro, A.; Ziadé, N. (Partial Dissenting Opinion)</li> </ul>	Contracts for road projects (in the vicinity of Benghazi and Misurata) and other infrastructure projects assigned to Al Hani General Construction Co., a joint venture between Strabag International and the Libyan Investment and Development Company.	<ul style="list-style-type: none"> <li>• Whether the claimant's alleged investment satisfies the Salini criteria (→YES; but the tribunal does not need to decide this, since Article 25 of the ICSID Convention is not applicable to Additional Facility arbitrations)</li> </ul>
<b>Vento v. Mexico</b> <ul style="list-style-type: none"> <li>• NAFTA (1992)</li> <li>• Award, 6 July 2020</li> <li>• Decision dismissing claims</li> <li>• Rigo Sureda, A. (President); Gantz, D. A.; Perezcano Diaz, H.</li> </ul>	Investments in manufacturing of motorcycles.	<ul style="list-style-type: none"> <li>• Whether a loan to an enterprise where the original maturity is at least three years qualifies as an investment under NAFTA (→YES; however, loan agreements are not sufficient proof of an investment)</li> <li>• Whether the claimant made an investment in the form of loans under NAFTA (→NO; no evidence that any funds were transferred under the loan agreements)</li> </ul>

Source: UNCTAD.

### Coverage of indirect investments

Four decisions rendered in 2020 addressed whether investments indirectly held by claimants through third State or host State entities were protected by the applicable IIA (table 2).

#### ISDS tribunals' findings:

- In *Eyre and Montrose Developments v. Sri Lanka* and *Strabag and others v. Poland*, the tribunals unanimously decided that the claimants' indirect investments were protected.
- In *Adamakopoulos and others v. Cyprus* and *Lee-Chin v. Dominican Republic*, the tribunal majorities came to similar conclusions.

In these four cases, the arbitral tribunals determined that the indirect investments in question were covered, since the applicable IIAs contained a broad or open definition of investment and did not explicitly exclude indirect investments.

The broad asset-based definition of investment, combined with a broad definition of investor, is common in the old stock of IIAs in force. Considering past arbitral awards, different types of indirect investments could come within the ambit of unreformed IIAs. Complex ownership structures and ownership chains with multiple cross-border links have significant implications for access to IIA protections and the ISDS mechanism (UNCTAD, 2016). UNCTAD's IIA Reform Accelerator contains options to address such issues in the definitions of investment and investor (UNCTAD, 2020a).

**Table 2. Coverage of indirect investments**

Case details	Investment at issue	Selected issues and tribunals' findings
<b>Adamakopoulos and others v. Cyprus</b> <ul style="list-style-type: none"> <li>• Cyprus–Greece BIT (1992)</li> <li>• BLEU (Belgium-Luxembourg Economic Union)–Cyprus BIT (1991)</li> <li>• Decision on Jurisdiction, 7 February 2020</li> <li>• Decision upholding jurisdiction</li> <li>• McRae, D. M. (President); Escobar, A. A.; Kohen, M. G. (Dissenting Opinion)</li> </ul>	Deposits and bonds in two Cypriot banks, Laiki Bank (also known as Cyprus Popular Bank) and the Bank of Cyprus.	<ul style="list-style-type: none"> <li>• Whether the Cyprus–Greece BIT covers the claimants' indirect investments, held via Cypriot entities or entities in third States, in the absence of explicit wording on the issue (→YES – BY MAJORITY; ownership may be direct or indirect and may be full or partial)</li> </ul>
<b>Eyre and Montrose Developments v. Sri Lanka</b> <ul style="list-style-type: none"> <li>• Sri Lanka–United Kingdom BIT (1980)</li> <li>• Award, 5 March 2020</li> <li>• Decision rejecting jurisdiction</li> <li>• Reed, L. (President); Lew, J. D. M.; Stern, B.</li> </ul>	Ownership of land plot on the banks of Lake Diyawanna for a hotel development project.	<ul style="list-style-type: none"> <li>• Whether the BIT covers investments held indirectly by one claimant via a company in a third State (→YES; the broad definition of investment with “every kind of asset” confirms that indirect investments are covered; the claimants have met the indirect foreign control test)</li> </ul>
<b>Lee-Chin v. Dominican Republic</b> <ul style="list-style-type: none"> <li>• CARICOM–Dominican Republic FTA (1998)</li> <li>• Partial Award on Jurisdiction, 15 July 2020</li> <li>• Decision upholding jurisdiction</li> <li>• Fernández Arroyo, D. P. (President); Leathley, C.; Kohen, M. G. (Dissenting Opinion)</li> </ul>	Indirect majority shareholding of 90 per cent in Lajún Corporation, a locally incorporated company that held a concession to operate the La Duquesa landfill in the municipality of Santo Domingo Norte.	<ul style="list-style-type: none"> <li>• Whether the treaty protects the claimant's indirect investments via two companies in a third State, Panama, and protects the claimant as an indirect investor (→YES – BY MAJORITY; the treaty includes an open definition of covered investments and uses the formula “though not exclusively, includes” which is much more expressive even if the text makes no specific reference to direct or indirect investments)</li> </ul>
<b>Strabag and others v. Poland</b> <ul style="list-style-type: none"> <li>• Austria–Poland BIT (1988)</li> <li>• Partial Award on Jurisdiction, 4 March 2020</li> <li>• Decision upholding jurisdiction</li> <li>• Veeder, V. V. (President); Böckstiegel, K.-H.; van den Berg, A. J.</li> </ul>	Indirect shareholding in Hotele Warszawskie “Syrena” Sp. z.o.o. (Syrena Hotels), a local company operating two hotels in Warsaw (Hotel Polonia and Hotel Metropol).	<ul style="list-style-type: none"> <li>• Whether ownership includes direct and indirect ownership of an investment in the absence of express treaty language (→YES; given the term's context and the treaty's object and purpose a wide reading is warranted)</li> <li>• Whether the BIT protects the claimants' investments indirectly owned through their subsidiary in a third State, Cyprus (→YES)</li> </ul>

Source: UNCTAD.

### Ownership and control, investor nationality, place of incorporation and corporate restructuring

Five decisions examined the concepts of ownership and control, investor nationality, place of incorporation and corporate restructuring (table 3).<sup>3</sup>

#### ISDS tribunals' findings:

- The five tribunals affirmed jurisdiction over the relevant claimants, rejecting the respondent States' objections related to the above issues.

Most IIAs contain a broad definition of investor and do not set out requirements for direct ownership, majority ownership or ultimate beneficial ownership of an investment in the host State. For legal entities, old-generation IIAs typically use the incorporation approach to determine the home state, without references to substantial business activities, seat, effective management and control. With respect to natural persons, most IIAs are silent on dual nationals and typically they do not explicitly refer to effective and dominant nationality.

<sup>3</sup> In *GCM (formerly Gran Colombia) v. Colombia*, the tribunal addressed issues related to the application of the denial-of-benefits clause; the decision was not publicly available at the time of writing.

UNCTAD's IIA Reform Accelerator lists different reform-oriented options for the definition of investor: (a) specifying the circumstances under which natural persons with dual nationality are covered, (b) excluding legal entities that do not have their seat and substantial business activities in one of the parties, and (c) including a denial-of-benefits clause (UNCTAD, 2020a).

**Table 3. Ownership and control, investor nationality, place of incorporation and corporate restructuring**

Case details	Investment at issue	Selected issues and tribunals' findings
<p><b>Adamakopoulos and others v. Cyprus</b></p> <ul style="list-style-type: none"> <li>• Cyprus–Greece BIT (1992)</li> <li>• BLEU (Belgium–Luxembourg Economic Union)–Cyprus BIT (1991)</li> <li>• Decision on Jurisdiction, 7 February 2020</li> <li>• Decision upholding jurisdiction</li> <li>• McRae, D. M. (President); Escobar, A. A.; Kohen, M. G. (Dissenting Opinion)</li> </ul>	<p>Deposits and bonds in two Cypriot banks, Laiki Bank (also known as Cyprus Popular Bank) and the Bank of Cyprus.</p>	<ul style="list-style-type: none"> <li>• Whether under the Cyprus–Greece BIT legal entities, incorporated in the home State, Greece, but wholly owned or controlled by natural persons of the host State, Cyprus, would be covered (→YES – BY MAJORITY; the BIT does not define the nationality of investors who are legal persons on the basis of their control)</li> </ul>
<p><b>Eskosol v. Italy</b></p> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Award, 4 September 2020</li> <li>• Decision dismissing claims</li> <li>• Kalicki, J. E. (President); Tawil, G. S.; Stern, B.</li> </ul>	<p>Investments in a 120 megawatt photovoltaic energy project in Italy.</p>	<ul style="list-style-type: none"> <li>• Whether the claimant being the company incorporated in the host State, Italy, met the foreign control requirement for jurisdiction under the ECT and ICSID (→YES; the company was under the control of a Belgian company at the time of the challenged measures, prior to the claimant's bankruptcy)</li> </ul>
<p><b>García Armas v. Venezuela</b></p> <ul style="list-style-type: none"> <li>• Spain–Venezuela, Bolivarian Republic of BIT (1995)</li> <li>• Decision on Jurisdiction, 24 July 2020</li> <li>• Decision upholding jurisdiction</li> <li>• Nunes Pinto, J. E. (President); Gómez-Pinzón, E.; Torres Bernárdez, S.</li> </ul>	<p>Investments in food products enterprises Frigoríficos Ordaz, S.A.; García Armas Inversiones, S.A.; Koma Inversiones, S.A.; and La Fuente Delicatesses, C.A.</p>	<ul style="list-style-type: none"> <li>• Whether the claimant had the nationality of Spain as the home State (→YES; there was no evidence that the claimant had renounced its home State nationality (Spain) and had acquired that of the host State (Venezuela); obtaining the status of national investor under host State law, receiving pension payments in Venezuela, and being a permanent resident does not equate to the acquisition of Venezuelan citizenship)</li> </ul>
<p><b>Global Telecom Holding v. Canada</b></p> <ul style="list-style-type: none"> <li>• Canada–Egypt BIT (1996)</li> <li>• Award, 27 March 2020</li> <li>• Decision dismissing claims</li> <li>• Affaki, G. (President); Born, G. B. (Dissenting Opinion); Lowe, V.</li> </ul>	<p>Interests in a Canadian telecommunications enterprise, Globalive Wireless Management Corporation ("Wind Mobile"), from 2008 to 2014.</p>	<ul style="list-style-type: none"> <li>• Whether the claimant qualifies for protection under the BIT, meeting its establishment and permanent residence requirements for the purposes of the "home State" (→YES; the two criteria are cumulative; the corporate register proves that the claimant is established as an Egyptian entity; a registered office suffices to show permanent residence; no support in the BIT that "permanent residence" is a separate and additional requirement for strong and enduring ties to the home State)</li> </ul>
<p><b>Strabag and others v. Poland</b></p> <ul style="list-style-type: none"> <li>• Austria–Poland BIT (1988)</li> <li>• Partial Award on Jurisdiction, 4 March 2020</li> <li>• Decision upholding jurisdiction</li> <li>• Veeder, V. V. (President); Böckstiegel, K.-H.; van den Berg, A. J.</li> </ul>	<p>Indirect shareholding in Hotele Warszawskie "Syrena" Sp. z.o.o. (Syrena Hotels), a local company operating two hotels in Warsaw (Hotel Polonia and Hotel Metropol).</p>	<ul style="list-style-type: none"> <li>• Whether the tribunal has jurisdiction under the invoked BIT despite the claimants' access to a second BIT under which claims could potentially be brought by virtue of the claimants' corporate structure (→YES; the claimants retained standing; investment may be legitimately restructured as long as this is not done "to gain access to treaty protection when the dispute has already arisen or is foreseeable")</li> </ul>

Source: UNCTAD.

### b. Exclusions from the treaty scope (taxation measures)

Five decisions in 2020 examined whether certain measures challenged by the claimants were “taxation measures” excluded from the scope of the invoked IIA (table 4).<sup>4</sup> All five decisions concerned the Energy Charter Treaty (ECT).<sup>5</sup>

#### ISDS tribunals’ findings:

- In the three cases against Spain, the tribunals decided that the relevant measure was outside of the ECT’s scope due to the ECT’s tax carve-out.
- In the two cases against Italy, the tribunals determined that some of challenged measures were carved out under the ECT, while some other measures were not considered to be “tax measures” (i.e. they did not qualify for the ECT’s tax carve-out).

Whether a specific measure is a “tax” within the meaning of a carve-out provision has been a contentious issue in many past decisions (see also UNCTAD, 2019b; UNCTAD, 2021b).

Most IIAs do not exclude taxation from their scope, which means that they cover a wide range of tax-related measures (UNCTAD, 2022). Exclusions of specific policy areas from the treaty scope (e.g. taxation, subsidies and grants, government procurement, sovereign debt) are more frequently encountered in recent IIAs, as compared to old IIAs. However, not all recent IIAs include them. UNCTAD’s World Investment Report 2022 suggests that the strongest safeguard for tax policymaking would perhaps be a complete and unambiguous tax carve-out from the scope of an IIA (e.g. accompanied by a mechanism that gives the host State discretion to determine whether the carve-out applies in a specific dispute or that gives the competent authorities of the contracting parties the power to decide).

**Table 4. Exclusions from the treaty scope (taxation measures)**

Case details	Disputed measure(s)	Selected issues and tribunals’ findings
<b>ESPF and others v. Italy</b> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Award, 14 September 2020</li> <li>• Decision finding IIA breaches</li> <li>• Álvarez, H. C. (President); Pryles, M. C.; Boisson de Chazournes, L.</li> </ul>	A series of governmental decrees to cut tariff incentives for some solar power projects.	<ul style="list-style-type: none"> <li>• Whether the tribunal has jurisdiction over some of the claims concerning tax measures (→NO; the ECT carves out tax measures; the Robin Hood Tax and the reclassification of PV plants for tax purposes are genuine tax measures; other measures such as administrative charges and imbalance fees are not tax measures)</li> </ul>
<b>Hydro Energy 1 and Hydroxana v. Spain</b> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020</li> <li>• Decision finding IIA breaches</li> <li>• Collins, L. (President); Rees, P.; Knieper, R.</li> </ul>	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators’ revenues and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> <li>• Whether the tribunal has jurisdiction in respect of Act 15/2012 that introduced a tax on production of electricity other than for the purposes of the expropriation claim (→NO; tax measures are carved out from the scope of the ECT; the measure is regarded as a tax measure under Spanish law and is a <i>prima facie</i> tax measure under international law; it was not imposed in bad faith)</li> </ul>
<b>STEAG v. Spain</b> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Decision on Jurisdiction, Liability and Directions on Quantum, 8 October 2020 (Spanish)</li> <li>• Decision finding IIA breaches</li> <li>• Zuleta, E. (President); Tawil, G. S.; Dupuy, P.-M. (Dissenting Opinion)</li> </ul>	A series of energy reforms undertaken by the Government affecting the renewables sector.	<ul style="list-style-type: none"> <li>• Whether the tribunal has jurisdiction over the alleged FET breach arising from Act 15/2012 that introduced a tax on the production of electricity (→NO; tax measures are carved out from the scope of the FET clause; the measure is regarded as a tax measure under Spanish law and is a <i>prima facie</i> tax measure under international law; it was not imposed in bad faith)</li> <li>• Whether the claim is admissible that the tax introduced by Act 15/2012 violates the ECT’s expropriation provision (→NO; the ECT requires submission of this question to the relevant competent tax authority; a letter to the prime minister is insufficient)</li> </ul>

<sup>4</sup> The 2020 decision in *Cavalum SGPS v. Spain* also addressed this issue; the decision was not publicly available at the time of writing.

<sup>5</sup> The Article 21 of the ECT contains a tax carve-out, with a definition of the term “taxation measure” in Article 21(7).

**Table 4. Exclusions from the treaty scope (taxation measures)**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>SunReserve v. Italy</b> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Final Award, 25 March 2020</li> <li>• Decision dismissing claims</li> <li>• van den Berg, A. J. (President); Sachs, K.; Giardina, A.</li> </ul>	A series of governmental decrees to cut tariff incentives for some solar power projects.	<ul style="list-style-type: none"> <li>• Whether the tribunal has jurisdiction over some of the claims concerning tax measures (→NO; the ECT carves out tax measures; the Robin Hood Tax and the reclassification of PV plants for tax purposes are genuine tax measures; administrative charges and imbalance fees are not tax measures)</li> </ul>
<b>Watkins and others v. Spain</b> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Award, 21 January 2020</li> <li>• Decision finding IIA breaches</li> <li>• Abraham, C. W. M. (President); Pryles, M. C.; Ruiz Fabri, H. (Dissenting Opinion)</li> </ul>	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> <li>• Whether the tribunal has jurisdiction in respect of Act 15/2012 that introduced a tax on production of electricity (→NO; tax measures are carved out from the scope of the ECT; the measure was not imposed in bad faith and is not a disguised tariff cut)</li> </ul>

Source: UNCTAD.

## 2. Standards of treatment and protection

### a. National treatment and most-favoured-nation treatment (comparators and exceptions)

In two decisions, tribunals examined claims related to national treatment (NT) and most-favoured-nation (MFN) treatment clauses (table 5).<sup>6</sup>

#### ISDS tribunals' findings:

- In *Global Telecom Holding v. Canada*, the tribunal's majority rejected jurisdiction over the NT claim, determining that telecommunications were excluded from the scope of NT in the applicable BIT.
- In *Vento v. Mexico*, the tribunal unanimously decided that there was no breach of the NT and MFN obligations.

Old-generation IIAs often include broad NT and MFN clauses. UNCTAD's IIA Reform Accelerator suggests including criteria for determining "like circumstances" for NT and MFN, reservations to NT and other limitations (UNCTAD, 2020a).

**Table 5. National treatment and most-favoured-nation treatment (comparators and exceptions)**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>Global Telecom Holding v. Canada</b> <ul style="list-style-type: none"> <li>• Canada–Egypt BIT (1996)</li> <li>• Award, 27 March 2020</li> <li>• Decision dismissing claims</li> <li>• Affaki, G. (President); Born, G. B. (Dissenting Opinion); Lowe, V.</li> </ul>	Government's alleged failure to create a fair, competitive and favourable regulatory environment for new investors in the telecommunications sector.	<ul style="list-style-type: none"> <li>• Whether the tribunal has jurisdiction over the claimant's NT claim despite the NT exceptions for sectors listed in the Annex to the BIT (→ NO – BY MAJORITY; the Annex for NT exceptions covers "services in any other sector" and this language includes telecommunications services; the BIT does not impose any procedural requirements to trigger the application of this exception)</li> </ul>
<b>Vento v. Mexico</b> <ul style="list-style-type: none"> <li>• NAFTA (1992)</li> <li>• Award, 6 July 2020</li> <li>• Decision dismissing claims</li> <li>• Rigo Sureda, A. (President); Gantz, D. A.; Perezcano Diaz, H.</li> </ul>	Mexico's allegedly discriminatory treatment of the claimant, which includes subjecting Vento's motorcycles to a 30 per cent import duty (on the ground that they are in fact made in China, not in the United States), whereas the claimant's competitors do not pay such import duty.	<ul style="list-style-type: none"> <li>• Whether the challenged measures breached NAFTA NT and MFN obligations (→NO; the claimant failed to identify "comparators" in like circumstances; the structure of the claimant's joint venture was "in very different circumstances from those of the Relevant Mexican Investments")</li> </ul>

Source: UNCTAD.

<sup>6</sup> In the 2020 award in *Cairn v. India*, the tribunal discussed the implications of the tax-related exclusion in the NT and MFN clause of the India–United Kingdom BIT (1994); the award was not publicly available at the time of writing.



### b. Most-favoured-nation treatment (importation of provisions from third country IIAs)

In three decisions, the tribunals considered whether the MFN clause in the base IIA could be relied upon to import provisions from IIAs between the host State and a third country (table 6).<sup>7</sup>

#### ISDS tribunals' findings:

- In *Micula v. Romania (II)* and *Consutel v. Algeria*, the tribunals allowed the claimants to import substantive clauses (full protection and security, and the umbrella clause respectively) that were not included in the base treaty.
- In *Itisaluna Iraq and others v. Iraq*, the tribunal's majority rejected the importation of consent to ICSID arbitration via the MFN clause in the OIC Agreement.

Old-generation IIAs often feature broad MFN clauses, even though exclusions related to double tax treaties or regional economic cooperation are common. As a number of arbitral decisions have read the MFN obligation as allowing investors to invoke more investor-friendly provisions (procedural or substantive) from third treaties, UNCTAD's IIA Reform Accelerator suggests excluding this possibility by clarifying that (a) MFN obligations do not encompass investor-State dispute settlement procedures or mechanisms, and (b) substantive obligations in other IIAs do not in themselves constitute "treatment" (UNCTAD, 2020a).

**Table 6. Most-favoured-nation treatment (importation of provisions from third country IIAs)**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>Consutel v. Algeria</b> <ul style="list-style-type: none"> <li>• Algeria–Italy BIT (1991)</li> <li>• Final Award, 3 February 2020 (French)</li> <li>• Decision dismissing claims</li> <li>• Mourre, A. (President); Tanzi, A. M.; Mahiou, A.</li> </ul>	Alleged actions and omissions of state-owned Algérie Télécom related to a partnership agreement concluded with the claimant's local subsidiary, Spec-Com, for a fiber-optic telecommunications project.	<ul style="list-style-type: none"> <li>• Whether it is possible to invoke the umbrella clause in the Algeria–Switzerland BIT by virtue of the MFN clause (→YES; however, certain limitations apply in the specific case)</li> </ul>
<b>Micula v. Romania (II)</b> <ul style="list-style-type: none"> <li>• Romania–Sweden BIT (2002)</li> <li>• Award, 5 March 2020</li> <li>• Decision dismissing claims</li> <li>• McRae, D. M. (President); Beechey, J.; Crook, J. R.</li> </ul>	Government's alleged failure to enforce its tax laws and to prevent the growth of illegal alcohol sales, causing harm to the claimants' spirits business; and the Government's imposition of unilateral price increases related to the claimants' mineral water business conducted under a long-term sale and purchase contract with a national company.	<ul style="list-style-type: none"> <li>• Whether it is possible to incorporate the full protection and security (FPS) standard in the Albania–Romania BIT and Romania–Iran BIT by virtue of the MFN clause (→YES)</li> </ul>
<b>Itisaluna Iraq and others v. Iraq</b> <ul style="list-style-type: none"> <li>• OIC Investment Agreement (1981)</li> <li>• Award, 3 April 2020</li> <li>• Decision rejecting jurisdiction</li> <li>• Bethlehem, D. (President); Peter, W. (Dissenting Opinion); Stern, B.</li> </ul>	Government's alleged impairment of the claimants' rights under a telecommunications licence and subsequent non-renewal of the licence.	<ul style="list-style-type: none"> <li>• Whether the claimants can incorporate into the OIC Agreement, by operation of its MFN clause, the ICSID arbitration clause in the Iraq–Japan BIT (→NO – BY MAJORITY; due to manifest public policy considerations going to issues of systemic overreach)</li> </ul>

Source: UNCTAD.

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

#### Legitimate expectations and (regulatory) stability

In many decisions rendered in 2020, arbitral tribunals examined investors' legitimate expectations, regulatory stability and other notions of stability under FET.

Seven out of the 14 decisions related to Spain's and Italy's reforms in the renewable energy sector (table 7).

<sup>7</sup> The tribunal in *Gürüş and Yamantürk v. Syria* also addressed this question in a 2020 award; the award was not publicly available at the time of writing.

### ISDS tribunals' findings (renewable energy cases):

- In *Hydro Energy 1 and Hydroxana v. Spain*, the tribunal considered that the general regulatory framework did not give rise to legitimate expectations entitling the claimants to the same tariff during the installations' operational life. However, the tribunal decided that the claimants were entitled to a "reasonable rate of return". The tribunal's majority in *The PV Investors v. Spain* came to similar conclusions.
- In *STEAG v. Spain* and *Watkins and others v. Spain*, the tribunal majorities found that the claimants had legitimate expectations that feed-in tariffs and related regulations would remain stable during the respective investment's operational life.
- In *ESPF and others v. Italy*, the tribunal's majority decided that the claimants held legitimate expectations of regulatory stability related to feed-in tariffs.
- In *SunReserve v. Italy*, the tribunal found that there were no legitimate expectations of regulatory stability. The tribunal's majority in *Eskosol v. Italy* came to similar conclusions.

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

**Table 7. FET: legitimate expectations and regulatory stability (renewable energy cases)**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>Eskosol v. Italy</b> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Award, 4 September 2020</li> <li>• Decision dismissing claims</li> <li>• Kalicki, J. E. (President); Tawil, G. S.; Stern, B.</li> </ul>	A series of governmental decrees to cut tariff incentives for some solar power projects. According to the claimant, two State measures adopted in March and May 2011 (the Romani Decree and the Fourth Energy Account) rendered its photovoltaic project unviable and led to the company's bankruptcy.	<ul style="list-style-type: none"> <li>• Whether ending the incentive regime early and replacing it violated the claimant's legitimate expectations regarding stability and consistency of the legal regime (→NO)</li> </ul>
<b>ESPF and others v. Italy</b> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Award, 14 September 2020</li> <li>• Decision finding IIA breaches</li> <li>• Álvarez, H. C. (President); Pryles, M. C.; Boisson de Chazournes, L. (partial dissenting opinion in certain paragraphs)</li> </ul>	A series of governmental decrees to cut tariff incentives for some solar power projects.	<ul style="list-style-type: none"> <li>• Whether the respondent made a specific commitment through its acts and regulations such as to create a legitimate expectation that the FiT would remain constant for the lifetime of the investment (→YES – BY MAJORITY)</li> </ul>
<b>Hydro Energy 1 and Hydroxana v. Spain</b> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020</li> <li>• Decision finding IIA breaches</li> <li>• Collins, L. (President); Rees, P.; Knieper, R.</li> </ul>	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> <li>• Whether the respondent's regulatory framework gave rise to the claimants' legitimate expectations of receiving the same tariff for the installations' operational life (→NO)</li> <li>• Whether specific commitments existed justifying claimants' legitimate expectations of receiving the same tariff for the installations' operational life (→NO)</li> <li>• Whether the regulatory regime gave rise to the claimants' legitimate expectation of receiving a "reasonable rate of return" (→YES)</li> </ul>

**Table 7. FET: legitimate expectations and regulatory stability (renewable energy cases)**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>STEAG v. Spain</b> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Decision on Jurisdiction, Liability and Directions on Quantum, 8 October 2020 (Spanish)</li> <li>• Decision finding IIA breaches</li> <li>• Zuleta, E. (President); Tawil, G. S.; Dupuy, P.-M. (<i>Dissenting Opinion</i>)</li> </ul>	A series of energy reforms undertaken by the Government affecting the renewables sector.	<ul style="list-style-type: none"> <li>• Whether the claimant had a legitimate expectation that the feed-in-tariffs, the premium option and the upper and lower limits for changes to this option would remain stable for the facility's operational life (→YES – BY MAJORITY)</li> <li>• Whether the respondent frustrated the claimant's legitimate expectation and breached FET (→YES – BY MAJORITY)</li> </ul>
<b>SunReserve v. Italy</b> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Final Award, 25 March 2020</li> <li>• Decision dismissing claims</li> <li>• van den Berg, A. J. (President); Sachs, K.; Giardina, A.</li> </ul>	A series of governmental decrees to cut tariff incentives for some solar power projects.	<ul style="list-style-type: none"> <li>• Whether the respondent frustrated the claimants' legitimate expectations by changing the regulatory regime (→NO)</li> </ul>
<b>The PV Investors v. Spain</b> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Final Award, 28 February 2020</li> <li>• Decision finding IIA breaches</li> <li>• Kaufmann-Kohler, G. (President); Brower, C. N. (<i>Concurring and Dissenting Opinion</i>); Sepúlveda Amor, B.</li> </ul>	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> <li>• Whether "stability is a stand-alone or absolute requirement under the ECT" (→NO)</li> <li>• Whether the respondent's regulatory framework gave rise to the claimants' legitimate expectations of receiving the same tariff for the installations' operational life (→NO – BY MAJORITY)</li> <li>• Whether the claimants were entitled to a "reasonable rate of return" (→YES – BY MAJORITY)</li> <li>• Whether the respondent frustrated the claimants' legitimate expectations of a "reasonable return" (→YES)</li> </ul>
<b>Watkins and others v. Spain</b> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Award, 21 January 2020</li> <li>• Decision finding IIA breaches</li> <li>• Abraham, C. W. M. (President); Pryles, M. C.; Ruiz Fabri, H. (<i>Dissenting Opinion</i>)</li> </ul>	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> <li>• Whether the respondent violated the FET standard by failing to protect the claimants' legitimate expectations (→YES – BY MAJORITY)</li> </ul>

Source: UNCTAD.

The remaining seven cases related to a more diverse set of challenged measures (table 8).

#### ISDS tribunals' findings (excluding renewable energy cases):

- In all seven cases, the tribunals decided that no legitimate expectations arose under the specific circumstances of the cases.

Many past ISDS awards have dealt with the concept of legitimate expectations, although it is not explicitly referred to in the FET provisions of old-generation IIAs. Old-generation IIAs typically include FET clauses drafted in a minimalist, open-ended way.

Most of the more recent IIAs contain a circumscribed FET clause, e.g. by replacing it with an exhaustive list of State obligations (UNCTAD, 2020c). Some IIAs that have opted for a closed list retain the label of "fair and equitable treatment", while others entirely omit this term (UNCTAD, 2020a). Reform-oriented formulations and recent treaty examples can be found in the IIA Reform Accelerator (UNCTAD, 2020a).

**Table 8. FET: legitimate expectations (excluding renewable energy cases)**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>Consutel v. Algeria</b> <ul style="list-style-type: none"> <li>Algeria–Italy BIT (1991)</li> <li>Final Award, 3 February 2020 (French)</li> <li>Decision dismissing claims</li> <li>Mourre, A. (President); Tanzi, A. M.; Mahiou, A.</li> </ul>	Alleged actions and omissions of state-owned Algérie Télécom related to a partnership agreement concluded with the claimant's local subsidiary, Spec-Com, for a fiber-optic telecommunications project.	<ul style="list-style-type: none"> <li>Whether the challenged measures frustrated the claimant's legitimate expectations and thereby breached the FET standard (→NO)</li> </ul>
<b>EBO Invest and others v. Latvia</b> <ul style="list-style-type: none"> <li>Latvia–Norway BIT (1992)</li> <li>Award, 28 February 2020</li> <li>Decision dismissing claims</li> <li>Schwartz, E. (President); Hobér, K.; Landau, T.</li> </ul>	Actions of the Riga airport administration, a State-owned entity, relating to the claimants' project to develop the Riga Airport Business Park. The claimants' project allegedly failed due to the airport administration's frequent changes to the development plans for the airport and other related actions.	<ul style="list-style-type: none"> <li>Whether the respondent violated the claimants' legitimate expectations thereby breaching the FET standard (→NO)</li> <li>Whether the respondent failed to provide the claimants with a transparent, consistent and stable business framework in breach of FET (→NO)</li> </ul>
<b>Global Telecom Holding v. Canada</b> <ul style="list-style-type: none"> <li>Canada–Egypt BIT (1996)</li> <li>Award, 27 March 2020</li> <li>Decision dismissing claims</li> <li>Affaki, G. (President); Born, G. B. (Dissenting Opinion); Lowe, V.</li> </ul>	Government's alleged failure to create a fair, competitive and favourable regulatory environment for new investors in the telecommunications sector.	<ul style="list-style-type: none"> <li>Whether the BIT's FET clause – "fair and equitable treatment in accordance with the principles of international law" – goes beyond the minimum standard of treatment (MST) under customary international law (→YES)</li> <li>Whether the respondent's adoption and implementation of the Transfer Framework violated the claimant's legitimate expectations (→NO)</li> <li>Whether the respondent's national security review breached the FET standard (→NO)</li> </ul>
<b>Griffin v. Poland</b> <ul style="list-style-type: none"> <li>BLEU (Belgium–Luxembourg Economic Union)–Poland BIT (1987)</li> <li>Final Award, 29 April 2020</li> <li>Decision dismissing claims</li> <li>Kaufmann-Kohler, G. (President); Williams, D. A. R.; Sands, P.</li> </ul>	Alleged expropriation of the claimant's rights to a historic former barracks site adjacent to Lazienki Park in central Warsaw, including alleged arbitrary conduct of the City of Warsaw related to construction works on the site and a decision of the Warsaw Court of Appeal confirming the termination of the claimant's usufruct rights to the property.	<ul style="list-style-type: none"> <li>Whether the respondent violated the FET standard by frustrating the claimant's legitimate expectations (→NO)</li> </ul>
<b>Lidercón v. Peru</b> <ul style="list-style-type: none"> <li>Peru–Spain BIT (1994)</li> <li>Award, 6 March 2020</li> <li>Decision dismissing claims</li> <li>Paulsson, J. (President); Gonzalez de Cossio, F.; Perezcano Diaz, H.</li> </ul>	A municipality's alleged non-compliance with a concession contract that grants the claimant an exclusive right to operate vehicle inspection centres in Lima.	<ul style="list-style-type: none"> <li>Whether the respondent violated the claimant's legitimate expectations (→NO)</li> </ul>
<b>Micula v. Romania (II)</b> <ul style="list-style-type: none"> <li>Romania–Sweden BIT (2002)</li> <li>Award, 5 March 2020</li> <li>Decision dismissing claims</li> <li>McRae, D. M. (President); Beechey, J.; Crook, J. R.</li> </ul>	Government's alleged failure to enforce its tax laws and to prevent the growth of illegal alcohol sales, causing harm to the claimants' spirits business; and the Government's imposition of unilateral price increases related to the claimants' mineral water business conducted under a long-term sale and purchase contract with a national company.	<ul style="list-style-type: none"> <li>Whether the respondent breached FET by failing to enforce its tax laws in a consistent manner and by frustrating the claimants' legitimate expectations (→NO)</li> <li>Whether the respondent breached FET by failing to provide a stable and consistent legal framework (→NO)</li> </ul>
<b>Ortiz v. Algeria</b> <ul style="list-style-type: none"> <li>Algeria–Spain BIT (1994)</li> <li>Award, 29 April 2020 (French)</li> <li>Decision dismissing claims</li> <li>Lévy, L. (President); Fortier, L. Y.; Hanotiau, B.</li> </ul>	Alleged refusal of Algerian authorities to award investor's joint venture company procurement contracts for the construction and sale of 5,000 housing units.	<ul style="list-style-type: none"> <li>Whether the challenged measures frustrated the claimant's legitimate expectations and thereby breached FET (→NO)</li> </ul>

Source: UNCTAD.

### Arbitrary, discriminatory, disproportionate or non-transparent State conduct

In seven decisions, tribunals assessed whether the respondent States violated FET through arbitrary, discriminatory, disproportionate or non-transparent conduct (table 9).

#### ISDS tribunals' findings:

- In six cases, the tribunals unanimously dismissed claims related to these elements.
- In *Watkins Holdings v. Spain*, the tribunal's majority decided that the respondent's conduct was non-transparent, unreasonable and disproportionate.

**Table 9. FET: arbitrary, discriminatory, disproportionate or non-transparent State conduct**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>A.M.F. Aircraftleasing v. Czechia</b> <ul style="list-style-type: none"> <li>• Czechia–Germany BIT (1990)</li> <li>• Final Award, 11 May 2020</li> <li>• Decision dismissing claims</li> <li>• Tercier, P. (President); Alexandrov, S. A.; Kalicki, J. E.</li> </ul>	Acts of Czech bankruptcy administrators and courts concerning two aircrafts that are allegedly owned by the claimant and were wrongly included in the bankruptcy proceedings of Czech company Air Charter Ltd, which had leased the planes. The aircrafts were subsequently sold as part of the bankruptcy proceedings.	<ul style="list-style-type: none"> <li>• Whether the respondent breached FET through arbitrary, abusive or discriminatory conduct (→NO)</li> </ul>
<b>EBO Invest and others v. Latvia</b> <ul style="list-style-type: none"> <li>• Latvia–Norway BIT (1992)</li> <li>• Award, 28 February 2020</li> <li>• Decision dismissing claims</li> <li>• Schwartz, E. (President); Hobér, K.; Landau, T.</li> </ul>	Actions of the Riga airport administration, a State-owned entity, relating to the claimants' project to develop the Riga Airport Business Park. The claimants' project allegedly failed due to the airport administration's frequent changes to the development plans for the airport and other related actions.	<ul style="list-style-type: none"> <li>• Whether the respondent failed to provide the claimants with a transparent, consistent and stable business framework in breach of FET (→NO)</li> </ul>
<b>Eskosol v. Italy</b> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Award, 4 September 2020</li> <li>• Decision dismissing claims</li> <li>• Kalicki, J. E. (President); Tawil, G. S.; Stern, B.</li> </ul>	A series of governmental decrees to cut tariff incentives for some solar power projects. According to the claimant, two State measures adopted in March and May 2011 (the Romani Decree and the Fourth Energy Account) rendered its photovoltaic project unviable and led to the company's bankruptcy.	<ul style="list-style-type: none"> <li>• Whether the Romani Decree and Conto Energia IV were arbitrary or unreasonable (→NO)</li> <li>• Whether the Romani Decree and Conto Energia IV were disproportionate or non-transparent (→NO)</li> </ul>
<b>Global Telecom Holding v. Canada</b> <ul style="list-style-type: none"> <li>• Canada–Egypt BIT (1996)</li> <li>• Award, 27 March 2020</li> <li>• Decision dismissing claims</li> <li>• Affaki, G. (President); Born, G. B. (Dissenting Opinion); Lowe, V.</li> </ul>	Government's alleged failure to create a fair, competitive and favourable regulatory environment for new investors in the telecommunications sector.	<ul style="list-style-type: none"> <li>• Whether the respondent's adoption and implementation of the Transfer Framework were unreasonable, arbitrary and lacked transparency, were politically motivated or without any legitimate policy objective, thereby violating the FET standard (→NO)</li> <li>• Whether the respondent violated the FET standard through an arbitrary national security review process that lacked transparency and due process (→NO)</li> </ul>
<b>The PV Investors v. Spain</b> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Final Award, 28 February 2020</li> <li>• Decision finding IIA breaches</li> <li>• Kaufmann-Kohler, G. (President); Brower, C. N. (Concurring and Dissenting Opinion); Sepúlveda Amor, B.</li> </ul>	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> <li>• Whether the respondent's measures were unreasonable, arbitrary, disproportionate and lacked transparency under FET (→NO)</li> </ul>

**Table 9. FET: arbitrary, discriminatory, disproportionate or non-transparent State conduct**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>Vento v. Mexico</b> <ul style="list-style-type: none"> <li>• NAFTA (1992)</li> <li>• Award, 6 July 2020</li> <li>• Decision dismissing claims</li> <li>• Rigo Sureda, A. (President); Gantz, D. A.; Perezcano Diaz, H.</li> </ul>	Mexico's allegedly discriminatory treatment of the claimant, which includes subjecting Vento's motorcycles to a 30 per cent import duty (on the ground that they are in fact made in China, not in the United States), whereas the claimant's competitors do not pay such import duty.	<ul style="list-style-type: none"> <li>• Whether the challenged measures breached the MST obligation through a lack of due process, arbitrary and discriminatory treatment (→NO)</li> </ul>
<b>Watkins and others v. Spain</b> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Award, 21 January 2020</li> <li>• Decision finding IIA breaches</li> <li>• Abraham, C. W. M. (President); Pryles, M. C.; Ruiz Fabri, H. (Dissenting Opinion)</li> </ul>	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> <li>• Whether the respondent's measures lacked transparency, were unreasonable or disproportionate under FET (→YES – BY MAJORITY)</li> </ul>

Source: UNCTAD.

### Denial of justice

In five decisions, tribunals addressed denial of justice claims (table 10).

#### ISDS tribunals' findings:

- In the five cases, the tribunals found no denial of justice.

**Table 10. FET: denial of justice**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>A.M.F. Aircraftleasing v. Czechia</b> <ul style="list-style-type: none"> <li>• Czechia–Germany BIT (1990)</li> <li>• Final Award, 11 May 2020</li> <li>• Decision dismissing claims</li> <li>• Tercier, P. (President); Alexandrov, S. A.; Kalicki, J. E.</li> </ul>	Acts of Czech bankruptcy administrators and courts concerning two aircrafts that are allegedly owned by the claimant and were wrongly included in the bankruptcy proceedings of Czech company Air Charter Ltd, which had leased the planes. The aircrafts were subsequently sold as part of the bankruptcy proceedings.	<ul style="list-style-type: none"> <li>• Whether the respondent's actions amounted to denial of justice (→NO)</li> </ul>
<b>Bridgestone v. Panama</b> <ul style="list-style-type: none"> <li>• Panama–United States FTA (2007)</li> <li>• Award, 14 August 2020</li> <li>• Decision dismissing claims</li> <li>• Phillips, N. (President); Grigera Naón, H. A.; Thomas, J. C.</li> </ul>	A decision of the Supreme Court of Panama which held that Bridgestone's motion to oppose the registration of the Riverstone trademark by tyre-maker Muresa had been in bad faith, and awarded USD 5.4 million in damages to Muresa. According to the claimants, their challenge to the trademark application was a good-faith effort due to the trademark's similarity to two of Bridgestone's own registered trademarks.	<ul style="list-style-type: none"> <li>• Whether the claimant can assert a breach of FET through denial of justice even if it was not part of the proceedings in which the alleged denial of justice occurred (→YES)</li> <li>• Whether the decision taken by the Supreme Court of Panama constituted denial of justice (→NO; defects in the decision "are no more than errors of judgment"; "[t]hey fall far short of demonstrating that the judgment was the product of incompetence or corruption")</li> </ul>
<b>EBO Invest and others v. Latvia</b> <ul style="list-style-type: none"> <li>• Latvia–Norway BIT (1992)</li> <li>• Award, 28 February 2020</li> <li>• Decision dismissing claims</li> <li>• Schwartz, E. (President); Hobér, K.; Landau, T.</li> </ul>	Actions of the Riga airport administration, a State-owned entity, relating to the claimants' project to develop the Riga Airport Business Park. The claimants' project allegedly failed due to the airport administration's frequent changes to the development plans for the airport and other related actions.	<ul style="list-style-type: none"> <li>• Whether the claimants have a legitimate claim for denial of justice (→NO; the very high threshold that is required for denial of justice was not met)</li> </ul>

**Table 10. FET: denial of justice**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>Lidercón v. Peru</b> <ul style="list-style-type: none"> <li>Peru–Spain BIT (1994)</li> <li>Award, 6 March 2020</li> <li>Decision dismissing claims</li> <li>Paulsson, J. (President); Gonzalez de Cossio, F.; Perezcano Diaz, H.</li> </ul>	A municipality's alleged non-compliance with a concession contract that grants the claimant an exclusive right to operate vehicle inspection centres in Lima.	<ul style="list-style-type: none"> <li>Whether the respondent breached FET through a denial of justice (→NO; the domestic judgments are not "aberrant to the point of being explicable only as a denial of justice")</li> </ul>
<b>Nelson v. Mexico</b> <ul style="list-style-type: none"> <li>NAFTA (1992)</li> <li>Award, 5 June 2020</li> <li>Decision dismissing claims</li> <li>Zuleta, E. (President); Veeder, V. V.; Gomezperalta Casali, M.</li> </ul>	Certain decisions by Mexico's federal telecommunications regulator IFT related to a disagreement between Tele Fácil and a large telecommunications provider in Mexico, Telmex, over the terms of an interconnection agreement. Among others, IFT allegedly subjected Tele Fácil to disproportionate enforcement actions and Mexican courts failed to address IFT's misconduct.	<ul style="list-style-type: none"> <li>Whether the claimant was denied justice through decisions of domestic courts (→NO; a first decision that is not final and a mere disagreement with the reasoning of the courts do not amount to denial of justice)</li> </ul>

Source: UNCTAD.

#### d. Full protection and security

In five decisions, tribunals examined the scope of full protection and security (FPS) under the applicable IIAs (table 11).

##### ISDS tribunals' findings:

- In all five decisions, the tribunals dismissed the FPS claims.

Many old-generation IIAs contain FPS clauses without clarifications. In some ISDS cases, tribunals have interpreted the FPS obligation as extending to economic security, legal security and other notions. UNCTAD's IIA Reform Accelerator suggests explicitly linking the FPS clause to customary international law and clarify that the FPS standard refers to physical protection (UNCTAD, 2020a).

**Table 11. Full protection and security**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>A.M.F. Aircraftleasing v. Czechia</b> <ul style="list-style-type: none"> <li>Czechia–Germany BIT (1990)</li> <li>Final Award, 11 May 2020</li> <li>Decision dismissing claims</li> <li>Tercier, P. (President); Alexandrov, S. A.; Kalicki, J. E.</li> </ul>	Acts of Czech bankruptcy administrators and courts concerning two aircrafts that are allegedly owned by the claimant and were wrongly included in the bankruptcy proceedings of Czech company Air Charter Ltd, which had leased the planes. The aircrafts were subsequently sold as part of the bankruptcy proceedings.	<ul style="list-style-type: none"> <li>Whether the respondent's actions breached FPS (→NO; the FPS standard extends beyond physical protection to include the provision of legal security maintaining a functioning judicial system; there was no breach of FPS as the claimant had full access to the judicial system)</li> </ul>
<b>Eskosol v. Italy</b> <ul style="list-style-type: none"> <li>Energy Charter Treaty (1994)</li> <li>Award, 4 September 2020</li> <li>Decision dismissing claims</li> <li>Kalicki, J. E. (President); Tawil, G. S.; Stern, B.</li> </ul>	A series of governmental decrees to cut tariff incentives for some solar power projects. According to the claimant, two State measures adopted in March and May 2011 (the Romani Decree and the Fourth Energy Account) rendered its photovoltaic project unviable and led to the company's bankruptcy.	<ul style="list-style-type: none"> <li>Whether the respondent's changes to the regulatory regime violated the ECT's FPS clause (→NO; the standard does not entail an element of legal stability and even if it were, it would be a standard of due diligence, not one of strict liability)</li> </ul>

**Table 11. Full protection and security**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>Global Telecom Holding v. Canada</b> <ul style="list-style-type: none"> <li>• Canada–Egypt BIT (1996)</li> <li>• Award, 27 March 2020</li> <li>• Decision dismissing claims</li> <li>• Affaki, G. (President); Born, G. B.; Lowe, V.</li> </ul>	Government's alleged failure to create a fair, competitive and favourable regulatory environment for new investors in the telecommunications sector.	<ul style="list-style-type: none"> <li>• Whether the respondent's cumulative actions threatened the commercial and legal security of the claimant's investment, in breach of FPS (→NO; the respondent's conduct was consistent with the statutes and regulations; FPS includes legal security; the qualified "full" indicates that protection and security goes beyond mere physical security; the standard is not one of strict liability but requires a duty of due diligence on part of the State)</li> </ul>
<b>Strabag v. Libya</b> <ul style="list-style-type: none"> <li>• Austria–Libya BIT (2002)</li> <li>• Award, 29 June 2020</li> <li>• Decision finding IIA breaches</li> <li>• Crook, J. R. (President); Crivellaro, A.; Ziadé, N. (Partial Dissenting Opinion)</li> </ul>	Alleged non-payment for services under contracts entered into prior to the revolution in Libya, and damages to property during and after the 2011 civil war.	<ul style="list-style-type: none"> <li>• Whether the respondent breached the FPS provision (→NO; FPS is not absolute and requires a duty of due diligence which "cannot be viewed in the abstract and in isolation from the conditions prevailing in Libya"; "Claimant's evidence is not sufficient to establish a failure of due diligence by Respondent")</li> </ul>
<b>The PV Investors v. Spain</b> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Final Award, 28 February 2020</li> <li>• Decision finding IIA breaches</li> <li>• Kaufmann-Kohler, G. (President); Brower, C. N. (Concurring and Dissenting Opinion); Sepúlveda Amor, B.</li> </ul>	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> <li>• Whether the respondent breached the FPS standard by destroying the legal framework of the investments (→NO)</li> </ul>

Source: UNCTAD.

### e. Umbrella clause

In eight decisions, tribunals addressed claims under umbrella clauses (table 12).

#### ISDS tribunals' findings:

- In four cases, the tribunals found no breach of the umbrella clause.
- In *Consutel v. Algeria*, the tribunal declined jurisdiction over the contractual claims under the imported umbrella clause.
- In *Strabag v. Libya*, the tribunal decided that the umbrella clause was breached.
- In *ESPF and others v. Italy*, the tribunal's majority found a breach of the umbrella clause.
- In *Strabag and others v. Poland*, the questions related to the umbrella clause were joined to the merits.

About half of the old-generation IIAs contain an umbrella clause (UNCTAD, 2015a). UNCTAD's Investment Policy Framework puts forward several reform-oriented policy options, including the "no umbrella clause" option (UNCTAD, 2015b). Almost all recently concluded IIAs omit it (UNCTAD, 2019c; UNCTAD 2020b).



**Table 12. Umbrella clause**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>Consutel v. Algeria</b> <ul style="list-style-type: none"> <li>Algeria–Italy BIT (1991)</li> <li>Final Award, 3 February 2020 (French)</li> <li>Decision dismissing claims</li> <li>Mourre, A. (President); Tanzi, A. M.; Mahiou, A.</li> </ul>	Alleged actions and omissions of state-owned Algérie Télécom related to a partnership agreement concluded with the claimant's local subsidiary, Spec-Com, for a fiber-optic telecommunications project.	<ul style="list-style-type: none"> <li>Whether the tribunal has jurisdiction over claims that were contractual in nature (→NO; none of the alleged violations go beyond the contractual sphere to involve the exercise of sovereign powers)</li> <li>Whether Article 10(1) is an umbrella clause (→NO; the clause does not allow to raise the contractual violations to the level of treaty violations)</li> <li>Whether it is possible to invoke the umbrella clause in the Algeria–Switzerland BIT by virtue of the MFN clause (→YES; however, certain limitations apply in the specific case)</li> <li>Whether the tribunal has jurisdiction over the contractual claims under the imported umbrella clause (→NO)</li> </ul>
<b>EBO Invest and others v. Latvia</b> <ul style="list-style-type: none"> <li>Latvia–Norway BIT (1992)</li> <li>Award, 28 February 2020</li> <li>Decision dismissing claims</li> <li>Schwartz, E. (President); Hobér, K.; Landau, T.</li> </ul>	Actions of the Riga airport administration, a State-owned entity, relating to the claimants' project to develop the Riga Airport Business Park. The claimants' project allegedly failed due to the airport administration's frequent changes to the development plans for the airport and other related actions.	<ul style="list-style-type: none"> <li>Whether the respondent breached the umbrella clause (→NO; the tribunal had already decided that the contract was not attributable to the State)</li> </ul>
<b>Eskosol v. Italy</b> <ul style="list-style-type: none"> <li>Energy Charter Treaty (1994)</li> <li>Award, 4 September 2020</li> <li>Decision dismissing claims</li> <li>Kalicki, J. E. (President); Tawil, G. S.; Stern, B.</li> </ul>	A series of governmental decrees to cut tariff incentives for some solar power projects. According to the claimant, two State measures adopted in March and May 2011 (the Romani Decree and the Fourth Energy Account) rendered its photovoltaic project unviable and led to the company's bankruptcy.	<ul style="list-style-type: none"> <li>Whether the respondent's change of the regulatory regime violated the ECT's umbrella clause (→NO; the investor never qualified for the incentives and the State, thus, did not "enter into" any obligations)</li> </ul>
<b>ESPF and others v. Italy</b> <ul style="list-style-type: none"> <li>Energy Charter Treaty (1994)</li> <li>Award, 14 September 2020</li> <li>Decision finding IIA breaches</li> <li>Álvarez, H. C. (President); Pryles, M. C.; Boisson de Chazournes, L. (partial dissenting opinion in certain paragraphs)</li> </ul>	A series of governmental decrees to cut tariff incentives for some solar power projects.	<ul style="list-style-type: none"> <li>Whether a system of general legislation, given effect through regulations, letters and agreements is covered by the ECT's umbrella clause (→YES – BY MAJORITY)</li> <li>Whether the respondent breached the umbrella clause (→YES – BY MAJORITY)</li> </ul>
<b>Ortiz v. Algeria</b> <ul style="list-style-type: none"> <li>Algeria–Spain BIT (1994)</li> <li>Award, 29 April 2020 (French)</li> <li>Decision dismissing claims</li> <li>Lévy, L. (President); Fortier, L. Y.; Hanotiau, B.</li> </ul>	Alleged refusal of Algerian authorities to award investor's joint venture company procurement contracts for the construction and sale of 5,000 housing units.	<ul style="list-style-type: none"> <li>Whether there has been a breach of the umbrella clause (→NO; there is no unilateral or contractual commitment binding the respondent, who is not party to the contracts concluded by the claimant)</li> </ul>
<b>Strabag and others v. Poland</b> <ul style="list-style-type: none"> <li>Austria–Poland BIT (1988)</li> <li>Partial Award on Jurisdiction, 4 March 2020</li> <li>Decision upholding jurisdiction</li> <li>Veeder, V. V. (President); Böckstiegel, K.-H.; van den Berg, A. J.</li> </ul>	Polish authorities' alleged denial of legal titles to two hotels and related land plots in Warsaw that were held by Syrena Hotels, a formerly state-owned entity that the claimants had acquired during a privatization process; the legal titles were transferred to the successors of previous property owners.	<ul style="list-style-type: none"> <li>Whether the respondent breached the umbrella clause Article 7(2) by failing to comply with certain provisions of the Share Purchase Agreement (→Pending; issue joined to the merits)</li> </ul>

**Table 12. Umbrella clause**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>Strabag v. Libya</b> <ul style="list-style-type: none"> <li>• Austria–Libya BIT (2002)</li> <li>• Award, 29 June 2020</li> <li>• Decision finding IIA breaches</li> <li>• Crook, J. R. (President); Crivellaro, A.; Ziadé, N. (Partial Dissenting Opinion)</li> </ul>	Alleged non-payment for services under contracts entered into prior to the revolution in Libya, and damages to property during and after the 2011 civil war.	<ul style="list-style-type: none"> <li>• Whether the BIT's umbrella clause covers claims for breaches of the contracts at issue (→YES)</li> <li>• Whether the tribunal has jurisdiction over the claims despite the local litigation requirement in the contracts (→YES; the conditions in Libya make it impossible to pursue the contract claims in local courts "in tranquillity and safety")</li> <li>• Whether the respondent breached the umbrella clause (→YES)</li> </ul>
<b>SunReserve v. Italy</b> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Final Award, 25 March 2020</li> <li>• Decision dismissing claims</li> <li>• van den Berg, A. J. (President); Sachs, K.; Giardina, A.</li> </ul>	A series of governmental decrees to cut tariff incentives for some solar power projects.	<ul style="list-style-type: none"> <li>• Whether the respondent's conduct breached the umbrella clause (→NO; the respondent did not have any "obligations" entered into with the claimants for the purposes of the umbrella clause)</li> </ul>

Source: UNCTAD.

### f. Indirect expropriation

In seven decisions, tribunals determined whether certain measures challenged by the claimants amounted to indirect expropriation (table 13).

#### ISDS tribunals' findings:

- In all seven cases, the tribunals dismissed the indirect expropriation claims.<sup>8</sup>

Most old-generation IIAs include protection in case direct as well as indirect expropriation, typically without explicit safeguards for non-discriminatory regulatory actions in the public interest. Recent IIAs often establish criteria for a finding of indirect expropriation and define in general terms what measures do not constitute an indirect expropriation (UNCTAD, 2018; UNCTAD, 2020a). A few recent agreements omit an explicit reference to indirect expropriation. A set of reform-oriented formulations – clarifications and limitations – are included in the IIA Reform Accelerator (UNCTAD, 2020a).

**Table 13. Indirect expropriation**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>A.M.F. Aircraftleasing v. Czechia</b> <ul style="list-style-type: none"> <li>• Czechia–Germany BIT (1990)</li> <li>• Final Award, 11 May 2020</li> <li>• Decision dismissing claims</li> <li>• Tercier, P. (President); Alexandrov, S. A.; Kalicki, J. E.</li> </ul>	Acts of Czech bankruptcy administrators and courts concerning two aircrafts that are allegedly owned by the claimant and were wrongly included in the bankruptcy proceedings of Czech company Air Charter Ltd, which had leased the planes. The aircrafts were subsequently sold as part of the bankruptcy proceedings.	<ul style="list-style-type: none"> <li>• Whether the respondent's acts and omissions amounted to expropriation (→NO; bankruptcy trustees and Czech courts acted in accordance with Czech law and therefore lawfully)</li> </ul>
<b>Consutel v. Algeria</b> <ul style="list-style-type: none"> <li>• Algeria–Italy BIT (1991)</li> <li>• Final Award, 3 February 2020</li> <li>• Decision dismissing claims</li> <li>• Mourre, A. (President); Tanzi, A. M.; Mahiou, A.</li> </ul>	Alleged actions and omissions of state-owned Algérie Télécom related to a partnership agreement concluded with the claimant's local subsidiary, Spec-Com, for a fiber-optic telecommunications project.	<ul style="list-style-type: none"> <li>• Whether the respondent's measures constituted indirect expropriation (→NO; the measure had a limited and temporary effect and the claimant was not deprived in whole or in part of the enjoyment of its investment)</li> </ul>

<sup>8</sup> In *Griffin v. Poland*, the tribunal also dismissed the direct expropriation claim.

**Table 13. Indirect expropriation**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>EBO Invest and others v. Latvia</b> <ul style="list-style-type: none"> <li>• Latvia–Norway BIT (1992)</li> <li>• Award, 28 February 2020</li> <li>• Decision dismissing claims</li> <li>• Schwartz, E. (President); Hobér, K.; Landau, T.</li> </ul>	Actions of the Riga airport administration, a State-owned entity, relating to the claimants' project to develop the Riga Airport Business Park. The claimants' project allegedly failed due to the airport administration's frequent changes to the development plans for the airport and other related actions.	<ul style="list-style-type: none"> <li>• Whether the respondent's acts amounted to indirect expropriation (→NO; the claimants have failed to establish that their contractual rights were adversely affected and that such changes led to an 'absolute loss' of the claimants' investments)</li> </ul>
<b>Gosling and others v. Mauritius</b> <ul style="list-style-type: none"> <li>• Mauritius–United Kingdom BIT (1986)</li> <li>• Award, 18 February 2020</li> <li>• Decision dismissing claims</li> <li>• Rigo Sureda, A. (President); Alexandrov, S. A. (Dissenting Opinion); Stern, B.</li> </ul>	Government's changes to its planning guidance policy and the designation of Le Morne area in southwest Mauritius as a UNESCO World Heritage Site in 2008, with the claimants alleging that these actions rendered worthless their investments in two planned tourist resorts.	<ul style="list-style-type: none"> <li>• Whether the respondent indirectly expropriated the claimants' investment (→NO – BY MAJORITY; the claimants did not acquire development rights, interference with which might have given rise to a justifiable claim for compensation)</li> </ul>
<b>Griffin v. Poland</b> <ul style="list-style-type: none"> <li>• BLEU (Belgium-Luxembourg Economic Union)–Poland BIT (1987)</li> <li>• Final Award, 29 April 2020</li> <li>• Decision dismissing claims</li> <li>• Kaufmann-Kohler, G. (President); Williams, D. A. R.; Sands, P.</li> </ul>	Alleged expropriation of the claimant's rights to a historic former barracks site adjacent to Lazienki Park in central Warsaw, including alleged arbitrary conduct of the City of Warsaw related to construction works on the site and a decision of the Warsaw Court of Appeal confirming the termination of the claimant's usufruct rights to the property.	<ul style="list-style-type: none"> <li>• Whether the measures adopted by the respondent amounted to an indirect expropriation (→NO)</li> <li>• Whether the measures adopted by the respondent amounted to a direct expropriation (→NO; "judgments of domestic courts are not expropriatory if they enforce or give effect to a State's legitimate contractual rights"; the investor used the property in a manner that was inconsistent with the purpose of the usufruct agreement with the City)</li> </ul>
<b>Hydro Energy 1 and Hydroxana v. Spain</b> <ul style="list-style-type: none"> <li>• Energy Charter Treaty (1994)</li> <li>• Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020</li> <li>• Decision finding IIA breaches</li> <li>• Collins, L. (President); Rees, P.; Knieper, R.</li> </ul>	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> <li>• Whether the respondent's measures constitute an indirect expropriation (→NO; a substantial deprivation of all economic value is required; a loss of some anticipated returns or a mere loss in value is generally not an indirect expropriation)</li> </ul>
<b>Nelson v. Mexico</b> <ul style="list-style-type: none"> <li>• NAFTA (1992)</li> <li>• Award, 5 June 2020</li> <li>• Decision dismissing claims</li> <li>• Zuleta, E. (President); Veeder, V. V.; Gomezperalta Casali, M.</li> </ul>	Certain decisions by Mexico's federal telecommunications regulator IFT related to a disagreement between Tele Fácil and a large telecommunications provider in Mexico, Telmex, over the terms of an interconnection agreement. Among others, IFT allegedly subjected Tele Fácil to disproportionate enforcement actions and Mexican courts failed to address IFT's misconduct.	<ul style="list-style-type: none"> <li>• Whether the respondent unlawfully expropriated the claimant's investments (→NO; claimant cannot claim that a right it does not have under Mexican law is capable of being expropriated)</li> </ul>

Source: UNCTAD.

### 3. Public policy exceptions and other exceptions

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

UNCTAD's IIA Reform Accelerator suggests including exceptions in IIAs for domestic regulatory measures in pursuit of policy objectives or for prudential measures (UNCTAD, 2020a).

### 4. Other issues

#### Compensation for losses: armed conflict

In one decision, the tribunal determined whether the respondent State had breached the provision related to compensation for losses due to war or other armed conflict (table 14).<sup>9</sup>

#### ISDS tribunals' findings:

- In *Strabag v. Libya*, the tribunal found a breach of the war loss clause.

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>Strabag v. Libya</b> <ul style="list-style-type: none"> <li>• Austria–Libya BIT (2002)</li> <li>• Award, 29 June 2020</li> <li>• Decision finding IIA breaches</li> <li>• Crook, J. R. (President); Crivellaro, A.; Ziadé, N. (Partial Dissenting Opinion)</li> </ul>	Alleged non-payment for services under contracts entered into prior to the revolution in Libya, and damages to property during and after the 2011 civil war.	<ul style="list-style-type: none"> <li>• Whether the respondent breached the war loss clause (→YES; a significant amount of the equipment owned by the local joint venture was requisitioned by regular armed forces; other destruction of property was due to three causes: rebel groups and NATO air bombardment, civilians and employees, as well as military personnel; as a consequence, 1/3 of the losses are attributable to the respondent)</li> </ul>

Source: UNCTAD.

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

#### a. Consent to ISDS and objections to validity of ISDS consent

In many decisions rendered in 2020, ISDS tribunals examined questions surrounding consent to ISDS.

Twelve decisions concerned jurisdictional objections in disputes involving claimants from one European Union (EU) member State brought against another member State, so-called intra-EU disputes (table 15).

#### ISDS tribunals' findings (intra-EU application):

- In all 12 decisions, the tribunals upheld jurisdiction, rejecting the respondents' objections that the ISDS clause in the respective IIA was invalid or the IIA was inapplicable.

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>Adamakopoulos and others v. Cyprus</b> <ul style="list-style-type: none"> <li>• Cyprus–Greece BIT (1992)</li> <li>• BLEU (Belgium-Luxembourg Economic Union)–Cyprus BIT (1991)</li> <li>• Decision on Jurisdiction, 7</li> </ul>	Alleged discriminatory treatment as a result of the €10 billion bailout package for Cyprus by the European Commission, the European Central Bank and the International Monetary Fund.	<ul style="list-style-type: none"> <li>• Whether the contracting parties' consent to arbitrate under the BITs is unaffected by EU law as interpreted in the CJEU's decision in <i>Achmea v. Slovakia (I) (2018)</i> (→YES – BY MAJORITY)</li> <li>• Whether the contracting parties' consent to arbitrate is valid despite the respondent's objection that there is a conflict within the meaning of the Vienna</li> </ul>

<sup>9</sup> The tribunal in *Güriş and Yamantürk v. Syria* also addressed this issue; the award was not public at the time of writing.

**Table 15. Objections to validity of ISDS consent in intra-EU disputes**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
February 2020 <ul style="list-style-type: none"> <li>Decision upholding jurisdiction</li> <li>McRae, D. M. (President); Escobar, A. A.; Kohen, M. G. (Dissenting Opinion)</li> </ul>		Convention on the Law of Treaties (VCLT) between the EU treaties and the BITs that prevents the claimants from having recourse to arbitration (→YES – BY MAJORITY)
<b>Addiko Bank v. Croatia</b> <ul style="list-style-type: none"> <li>Austria–Croatia BIT (1997)</li> <li>Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020</li> <li>Decision upholding jurisdiction</li> <li>Kalicki, J. E. (President); Tawil, G. S.; Olik, M.</li> </ul>	The law that prescribed a change in the currency of loans, issued in Croatia, from Swiss Franc to the Euro.	<ul style="list-style-type: none"> <li>Whether the tribunal has jurisdiction despite the objection that an incompatibility exists between the EU acquis (EU treaties, EU legislation, etc.) and the BIT in question (→YES)</li> <li>Whether the tribunal has jurisdiction under the BIT despite the declarations by EU member States on the consequences of the <i>Achmea</i> judgment preventing recourse to ISDS (→YES)</li> <li>Whether the contracting parties' consent to arbitrate is valid despite the respondent's objection that there is a conflict within the meaning of the VCLT between the EU treaties and the BIT that prevents the claimants from having recourse to arbitration (→YES)</li> <li>Whether the contracting parties' consent to arbitrate is valid despite the respondent's objections that the BIT provisions are incompatible with EU anti-discrimination rules (→YES)</li> </ul>
<b>A.M.F. Aircraftleasing v. Czechia</b> <ul style="list-style-type: none"> <li>Czechia–Germany BIT (1990)</li> <li>Final Award, 11 May 2020</li> <li>Decision dismissing claims</li> <li>Tercier, P. (President); Alexandrov, S. A.; Kalicki, J. E.</li> </ul>	Acts of Czech bankruptcy administrators and courts concerning two aircrafts that are allegedly owned by the claimant and were wrongly included in the bankruptcy proceedings of Czech company Air Charter Ltd, which had leased the planes. The aircrafts were subsequently sold as part of the bankruptcy proceedings.	<ul style="list-style-type: none"> <li>Whether the tribunal has jurisdiction despite the CJEU'S decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES)</li> <li>Whether the tribunal has jurisdiction despite the contracting parties' signature of the January 2019 Declarations (→YES)</li> </ul>
<b>ESPF and others v. Italy</b> <ul style="list-style-type: none"> <li>Energy Charter Treaty (1994)</li> <li>Award, 14 September 2020</li> <li>Decision finding IIA breaches</li> <li>Álvarez, H. C. (President); Pryles, M. C.; Boisson de Chazournes, L.</li> </ul>	A series of governmental decrees to cut tariff incentives for some solar power projects.	<ul style="list-style-type: none"> <li>Whether the ECT is applicable to intra-EU disputes (→YES)</li> </ul>
<b>Griffin v. Poland</b> <ul style="list-style-type: none"> <li>BLEU (Belgium-Luxembourg Economic Union)–Poland BIT (1987)</li> <li>Final Award, 29 April 2020</li> <li>Decision dismissing claims</li> <li>Kaufmann-Kohler, G. (President); Williams, D. A. R.; Sands, P.</li> </ul>	Alleged expropriation of the claimant's rights to a historic former barracks site adjacent to Lazienki Park in central Warsaw, including alleged arbitrary conduct of the City of Warsaw related to construction works on the site and a decision of the Warsaw Court of Appeal confirming the termination of the claimant's usufruct rights to the property.	<ul style="list-style-type: none"> <li>Whether the contracting parties' consent to arbitrate is valid despite the respondent's objection that the BIT's dispute settlement clause was rendered inapplicable by Poland's accession to the EU (→YES)</li> </ul>
<b>Hydro Energy 1 and Hydroxana v. Spain</b> <ul style="list-style-type: none"> <li>Energy Charter Treaty (1994)</li> <li>Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020</li> </ul>	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> <li>Whether the tribunal has jurisdiction over disputes under the ECT despite the <i>Achmea</i> ruling (→YES)</li> </ul>

**Table 15. Objections to validity of ISDS consent in intra-EU disputes**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<ul style="list-style-type: none"> <li>Decision finding IIA breaches</li> <li>Collins, L. (President); Rees, P.; Knieper, R.</li> </ul>		
<b>Micula v. Romania (II)</b> <ul style="list-style-type: none"> <li>Romania–Sweden BIT (2002)</li> <li>Award, 5 March 2020</li> <li>Decision dismissing claims</li> <li>McRae, D. M. (President); Beechey, J.; Crook, J. R.</li> </ul>	Government's alleged failure to enforce its tax laws and to prevent the growth of illegal alcohol sales, causing harm to the claimants' spirits business; and the Government's imposition of unilateral price increases related to the claimants' mineral water business conducted under a long-term sale and purchase contract with a national company.	<ul style="list-style-type: none"> <li>Whether the tribunal has jurisdiction despite the CJEU'S decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES)</li> <li>Whether the tribunal has jurisdiction despite the contracting parties' signature of the January 2019 Declarations (→YES)</li> </ul>
<b>Raiffeisen Bank v. Croatia (I)</b> <ul style="list-style-type: none"> <li>Austria–Croatia BIT (1997)</li> <li>Decision on the Respondent's Jurisdictional Objections, 30 September 2020</li> <li>Decision upholding jurisdiction</li> <li>Reed, L. (President); Alexandrov, S. A.; Tomov, L. (dissenting in part)</li> </ul>	The law that prescribed a change in the currency of loans, issued in Croatia, from Swiss Franc to the Euro.	<ul style="list-style-type: none"> <li>Whether the contracting parties' consent to arbitrate is valid despite the respondent's objection that an incompatibility exists between the EU acquis (EU treaties, EU legislation, etc.) and the BIT in question (→YES)</li> <li>Whether the contracting parties' consent to arbitrate is valid despite the respondent's objection that the BIT provisions are incompatible with EU anti-discrimination rules (→YES)</li> </ul>
<b>STEAG v. Spain</b> <ul style="list-style-type: none"> <li>Energy Charter Treaty (1994)</li> <li>Decision on Jurisdiction, Liability and Directions on Quantum, 8 October 2020 (Spanish)</li> <li>Decision finding IIA breaches</li> <li>Zuleta, E. (President); Tawil, G. S.; Dupuy, P.-M. (Dissenting Opinion)</li> </ul>	A series of energy reforms undertaken by the Government affecting the renewables sector.	<ul style="list-style-type: none"> <li>Whether the tribunal has jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES)</li> <li>Whether the ECT is applicable to intra-EU disputes (→YES)</li> <li>Whether the contracting parties' consent to arbitrate is valid despite the respondent's objection that a conflict exists within the meaning of the VCLT between the EU treaties and the ECT that prevents the claimants from having recourse to arbitration (→YES)</li> </ul>
<b>Strabag and others v. Poland</b> <ul style="list-style-type: none"> <li>Austria–Poland BIT (1988)</li> <li>Partial Award on Jurisdiction, 4 March 2020</li> <li>Decision upholding jurisdiction</li> <li>Veeder, V. V. (President); Böckstiegel, K.-H.; van den Berg, A. J.</li> </ul>	Polish authorities' alleged denial of legal titles to two hotels and related land plots in Warsaw that were held by Syrena Hotels, a formerly state-owned entity that the claimants had acquired during a privatization process; the legal titles were transferred to the successors of previous property owners.	<ul style="list-style-type: none"> <li>Whether the contracting parties' arbitration agreement under the BIT in the present case is unaffected by EU law as interpreted in the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES)</li> <li>Whether the contracting parties' ISDS consent is valid despite the respondent's objection that there is a conflict within the meaning of the VCLT between the EU treaties and the BIT that prevents the claimants from having recourse to arbitration (→YES)</li> </ul>
<b>SunReserve v. Italy</b> <ul style="list-style-type: none"> <li>Energy Charter Treaty (1994)</li> <li>Final Award, 25 March 2020</li> <li>Decision dismissing claims</li> <li>van den Berg, A. J. (President); Sachs, K.; Giardina, A.</li> </ul>	A series of governmental decrees to cut tariff incentives for some solar power projects.	<ul style="list-style-type: none"> <li>Whether the tribunal has jurisdiction under the ECT despite objections that EU law rendered it inapplicable (→YES)</li> <li>Whether the ECT applies to intra-EU disputes regardless of EU law (→YES)</li> </ul>
<b>Watkins and others v. Spain</b> <ul style="list-style-type: none"> <li>Energy Charter Treaty (1994)</li> <li>Award, 21 January 2020</li> <li>Decision finding IIA breaches</li> <li>Abraham, C. W. M. (President); Pryles, M. C.; Ruiz Fabri, H. (Dissenting Opinion)</li> </ul>	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> <li>Whether the ECT is applicable to intra-EU disputes (→YES)</li> </ul>

Source: UNCTAD.

At least three decisions dealt with other objections to ISDS consent (table 16).

### ISDS tribunals' findings:

- In *Itisaluna Iraq and others v. Iraq*, the tribunal decided that the OIC Investment Agreement (1981) provided for consent to ISDS (but consent to ICSID arbitration could not be imported).
- In *Lee-Chin v. Dominican Republic*, the tribunal's majority determined that the CARICOM–Dominican Republic FTA (1998) contained an offer of consent to the international arbitration option.
- In *Adamakopoulos and others v. Cyprus*, the tribunal's majority decided there was consent to ISDS under the applicable IIAs and additional consent by the respondent was not required for mass claims.

**Table 16. Consent to ISDS**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b>Adamakopoulos and others v. Cyprus</b></p> <ul style="list-style-type: none"> <li>• Cyprus–Greece BIT (1992)</li> <li>• BLEU (Belgium-Luxembourg Economic Union)–Cyprus BIT (1991)</li> <li>• Decision on Jurisdiction, 7 February 2020</li> <li>• Decision upholding jurisdiction</li> <li>• McRae, D. M. (President); Escobar, A. A.; Kohen, M. G. (<i>Dissenting Opinion</i>)</li> </ul>	<p>Alleged discriminatory treatment as a result of the €10 billion bailout package for Cyprus by the European Commission, the European Central Bank and the International Monetary Fund.</p>	<ul style="list-style-type: none"> <li>• Whether the respondent had provided consent to arbitration brought by a group of claimants and the tribunal has jurisdiction over the claimants' mass claim proceedings (→YES – BY MAJORITY; additional consent by the respondent for mass claims is not required as proceedings are not consolidated but joint proceedings)</li> </ul>
<p><b>Itisaluna Iraq and others v. Iraq</b></p> <ul style="list-style-type: none"> <li>• OIC Investment Agreement (1981)</li> <li>• Award, 3 April 2020</li> <li>• Decision rejecting jurisdiction</li> <li>• Bethlehem, D. (President); Peter, W. (<i>Dissenting Opinion</i>); Stern, B.</li> </ul>	<p>Government's alleged impairment of the claimants' rights under a telecommunications licence and subsequent non-renewal of the licence.</p>	<ul style="list-style-type: none"> <li>• Whether Article 17 of the OIC Investment Agreement can be said to constitute consent to investor-State arbitration (→YES)</li> <li>• Whether the claimants can incorporate into the OIC Agreement, by operation of its MFN clause, the ICSID arbitration clause in the Iraq–Japan BIT (→NO – BY MAJORITY; due to manifest public policy considerations going to issues of systemic overreach)</li> </ul>
<p><b>Lee-Chin v. Dominican Republic</b></p> <ul style="list-style-type: none"> <li>• CARICOM–Dominican Republic FTA (1998)</li> <li>• Partial Award on Jurisdiction, 15 July 2020</li> <li>• Decision upholding jurisdiction</li> <li>• Fernández Arroyo, D. P. (President); Leathley, C.; Kohen, M. G. (<i>Dissenting Opinion</i>)</li> </ul>	<p>Government's termination of a concession for the operation of a waste facility owned by the claimant's subsidiary and the alleged illegal expropriation of the landfill site.</p>	<ul style="list-style-type: none"> <li>• Whether Article XIII paragraph 1 of the Investment Chapter of the CARICOM–Dominican Republic FTA contains a clear expression of consent by the contracting parties to international arbitration (→YES – BY MAJORITY)</li> <li>• Whether the institution of arbitration proceedings by the claimant is the acceptance of the standing consent offered by the State (→YES – BY MAJORITY)</li> </ul>

Source: UNCTAD.

### b. Pre-arbitration requirements

In two decisions rendered in 2020, the tribunals determined whether the claimants met the requirements in the applicable IIAs prior to resort to arbitration (table 17).

#### ISDS tribunals' findings:

- In *Adamakopoulos and others v. Cyprus*, the tribunal decided that the 6-month waiting period had been met by additional claimants not included in the original notice of dispute.
- In *Itisaluna Iraq and others v. Iraq*, the tribunal determined that the claimants had not satisfied the mandatory conciliation requirement.

**Table 17. ISDS: pre-arbitration requirements**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b>Adamakopoulos and others v. Cyprus</b></p> <ul style="list-style-type: none"> <li>• Cyprus–Greece BIT (1992), BLEU (Belgium–Luxembourg Economic Union)–Cyprus BIT (1991)</li> <li>• Decision on Jurisdiction, 7 February 2020</li> <li>• Decision upholding jurisdiction</li> <li>• McRae, D. M. (President); Escobar, A. A.; Kohen, M. G. (Dissenting Opinion)</li> </ul>	<p>Alleged discriminatory treatment as a result of the €10 billion bailout package for Cyprus by the European Commission, the European Central Bank and the International Monetary Fund.</p>	<ul style="list-style-type: none"> <li>• Whether the 930 additional claimants under the Cyprus–Greece BIT listed in the amended request for arbitration had complied with the 6-month prior notice requirement although they were not included in the notice of dispute submitted by the 21 initial claimants (→YES – BY MAJORITY)</li> <li>• Whether the tribunal has jurisdiction over the Luxembourg claimant under the Cyprus–BLEU BIT considering the 6-month prior notice requirement, as the Luxembourg claimant was added to the amended request for arbitration less than 6 months after the claimant's individual notice of dispute (→YES – BY MAJORITY; the requirement was met because ICSID registered the amended request for arbitration 6 months after the notice of the Luxembourg claimant)</li> </ul>
<p><b>Itisaluna Iraq and others v. Iraq</b></p> <ul style="list-style-type: none"> <li>• OIC Investment Agreement (1981)</li> <li>• Award, 3 April 2020</li> <li>• Decision rejecting jurisdiction</li> <li>• Bethlehem, D. (President); Peter, W. (Dissenting Opinion); Stern, B.</li> </ul>	<p>Government's alleged impairment of the claimants' rights under a telecommunications licence and subsequent non-renewal of the licence.</p>	<ul style="list-style-type: none"> <li>• Whether the claimants complied with the mandatory conciliation requirement (→NO – BY MAJORITY)</li> </ul>

Source: UNCTAD.

### c. Limitation periods for bringing claims

In two decisions rendered in 2020, arbitral tribunals examined whether the claims were precluded by the three-year limitation period prescribed by the respective IIA (table 18).

#### ISDS tribunals' findings:

- In *Global Telecom Holding v. Canada*, the tribunal decided that the claims were not barred because the alleged actions were challenged as composite – not separate – breaches coming to completion within the limitation period (and they should be decided at the merits stage).
- In *Renco v. Peru (II)*, the tribunal's majority decided that the claims were within its jurisdiction because the preceding *Renco I* arbitration, which concerned the same alleged breaches, was initiated timely and it suspended the three-year time limit.

While old-generation IIAs rarely contain a limitation period for bringing claims, many recent IIAs include it (UNCTAD, 2014; UNCTAD, 2019a).



**Table 18. ISDS: limitation periods for bringing claims**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>Global Telecom Holding v. Canada</b> <ul style="list-style-type: none"> <li>Canada–Egypt BIT (1996)</li> <li>Award, 27 March 2020</li> <li>Decision dismissing claims</li> <li>Affaki, G. (President); Born, G. B. (Dissenting Opinion); Lowe, V.</li> </ul>	Government's alleged failure to create a fair, competitive and favourable regulatory environment for new investors in the telecommunications sector.	<ul style="list-style-type: none"> <li>Whether the tribunal has jurisdiction over the claims considering the BIT's three-year limitation period (→YES; the alleged actions or omissions that occurred before the three-year period form part of a claim for a cumulative or composite breach within the limitation period, and are a question for the merits)</li> </ul>
<b>Renco v. Peru (II)</b> <ul style="list-style-type: none"> <li>Peru–United States FTA (2006)</li> <li>Decision on Expedited Preliminary Objections, 30 June 2020</li> <li>Decision upholding jurisdiction</li> <li>Simma, B. (President); Grigera Naón, H. A.; Thomas, J. C. (Dissenting Opinion)</li> </ul>	Government's alleged imposition of additional environmental obligations related to the La Oroya mining operations in which the claimant's affiliate Doe Rue Peru held interests and the Government's refusal to grant reasonable extensions to complete environmental projects at the site, allegedly forcing the company to cease operations, followed by bankruptcy and liquidation.	<ul style="list-style-type: none"> <li>Whether the tribunal has jurisdiction over the claims considering the IIA's three-year limitation period (→YES – BY MAJORITY; the limitation period was suspended with the start of and during the preceding arbitration proceedings in <i>Renco I</i> which concerned the same alleged breaches)</li> </ul>

Source: UNCTAD.

#### d. Relationship with domestic court proceedings

In one decision, the tribunal examined the relationship between domestic court proceedings and ISDS (table 19).<sup>10</sup>

##### ISDS tribunals' findings:

- In *Strabag and others v. Poland*, the tribunal considered that the existence of domestic court proceedings for contractual claims does not prevent the claimants from bringing IIA-based claims to ISDS and this does not constitute an abuse of process.

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

**Table 19. ISDS: relationship with domestic proceedings**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<b>Strabag and others v. Poland</b> <ul style="list-style-type: none"> <li>Austria–Poland BIT (1988)</li> <li>Partial Award on Jurisdiction, 4 March 2020</li> <li>Decision upholding jurisdiction</li> <li>Veeder, V. V. (President); Böckstiegel, K.-H.; van den Berg, A. J.</li> </ul>	Polish authorities' alleged denial of legal titles to two hotels and related land plots in Warsaw that were held by Syrena Hotels, a formerly state-owned entity that the claimants had acquired during a privatization process; the legal titles were transferred to the successors of previous property owners.	<ul style="list-style-type: none"> <li>Whether the tribunal has jurisdiction despite the objection that the claimants' pursuit of ISDS proceedings is abuse of process because they submitted related contractual claims to domestic courts (→YES; raising contract claims based on domestic law before domestic courts does not make it an abuse of process to raise treaty claims under the BIT)</li> </ul>

Source: UNCTAD.

<sup>10</sup> The 2020 award in *Iberdrola Energía v. Guatemala (II)* addressed the relationship between domestic proceedings, followed by ICSID and UNCITRAL proceedings; the award was not publicly available at the time of writing.

### e. Temporal coverage of disputes or acts before the IIA's entry into force

In one decision, the tribunal examined the applicable IIA's temporal scope and the principle of non-retroactivity regarding acts that occurred before the IIA's entry into force (table 20).

#### ISDS tribunals' findings:

- In *Renco v. Peru (II)*, the tribunal dismissed the respondent's preliminary objections regarding the temporal requirements on a *prima facie* basis. It deferred the examination of the full factual record to the merits phase.

**Table 20. Temporal coverage of disputes or acts before the IIA's entry into force**

Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p><b>Renco v. Peru (II)</b></p> <ul style="list-style-type: none"> <li>• Peru–United States FTA (2006)</li> <li>• Decision on Expedited Preliminary Objections, 30 June 2020</li> <li>• Decision upholding jurisdiction</li> <li>• Simma, B. (President); Grigera Naón, H. A.; Thomas, J. C. (Dissenting Opinion)</li> </ul>	<p>Government's alleged imposition of additional environmental obligations related to the La Oroya mining operations in which the claimant's affiliate Doe Rue Peru held interests and the Government's refusal to grant reasonable extensions to complete environmental projects at the site, allegedly forcing the company to cease operations, followed by bankruptcy and liquidation.</p>	<ul style="list-style-type: none"> <li>• Whether the tribunal has jurisdiction over certain claims linked to acts or facts predating the IIA's entry into force in February 2009 (→YES; on a <i>prima facie</i> basis, a treaty breach could have occurred; "the allegedly wrongful conduct postdating the entry into force of the Treaty must 'constitute an actionable breach in its own right'"; "acts or facts that predate the entry into force of the Treaty" can inform the tribunal's evaluation; the tribunal defers the examination of the full factual record to the merits phase)</li> </ul>

Source: UNCTAD.

## Conclusions

Decisions from 2020 touched upon important issues on the reform agenda for the IIA regime, including:

- Coverage of tax measures
- Use of most-favoured-nation treatment to import provisions from respondent States' IIAs with third countries
- Scope of fair and equitable treatment, legitimate expectations and regulatory stability
- Indirect expropriation
- Umbrella clauses, contract claims and other obligations
- Consent to investor–State arbitration, requirements and limitation periods for bringing ISDS claims

On certain issues, arbitral decisions rendered in 2020 converged (e.g. the threshold for denial of justice). On other issues, the decisions showed some divergent interpretations not only between different tribunals but also among the members of the same tribunal (e.g. on legitimate expectations and regulatory stability).

The review of recent ISDS decisions can help policymakers and IIA negotiators make strategic choices concerning old-generation IIAs with ISDS. One way of addressing the challenges is to clarify key provisions through the interpretation, amendment or replacement of the old IIA. UNCTAD's policy tools for IIA reform, including the IIA Reform Accelerator (2020), put forward various options for substance and processes in this regard. Countries may choose to pursue other available policy options (e.g. terminating an old IIA by consent or unilaterally; UNCTAD, 2018). This note can also inform general approaches to ISDS reform, which may involve: (i) no ISDS, (ii) a standing ISDS tribunal, (iii) limited ISDS, and (iv) improved ISDS procedures (UNCTAD, 2020b).

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The note is based on research conducted by Vincent Beyer and Maria Florencia Sarmiento, with contributions provided by Diana Rosert and comments from Hamed El-Kady.

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## Annex 1. Publicly available ISDS decisions rendered in 2020<sup>11</sup>

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

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

#### ☞ **Adamakopoulos and others v. Cyprus**

Theodoros Adamakopoulos, Ilektra Adamantidou, Vasileios Adamopoulos and others v. Republic of Cyprus (ICSID Case No. ARB/15/49)

Decision on Jurisdiction, 7 February 2020

McRae, D. M. (President); Escobar, A. A.; Kohen, M. G. (Dissenting Opinion)

Cyprus–Greece BIT (1992); BLEU (Belgium-Luxembourg Economic Union)–Cyprus BIT (1991)

#### ☞ **Addiko Bank v. Croatia**

Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia (ICSID Case No. ARB/17/37)

Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020

Kalicki, J. E. (President); Tawil, G. S.; Olik, M.

Austria–Croatia BIT (1997)

#### ☞ **García Armas v. Venezuela**

Luis García Armas v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/16/1)

Decision on Jurisdiction, 24 July 2020

Nunes Pinto, J. E. (President); Gómez-Pinzón, E.; Torres Bernárdez, S.

Spain–Venezuela, Bolivarian Republic of BIT (1995)

#### ☞ **Kappes v. Guatemala**

Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala (ICSID Case No. ARB/18/43)

Decision on the Respondent's Preliminary Objections, 13 March 2020

Kalicki, J. E. (President); Townsend, J. M.; Douglas, Z. (Partial Dissenting Opinion)

CAFTA–DR (2004)

#### ☞ **Lee-Chin v. Dominican Republic**

Michael Anthony Lee-Chin v. Dominican Republic (ICSID Case No. UNCT/18/3)

Partial Award on Jurisdiction, 15 July 2020

Fernández Arroyo, D. P. (President); Leathley, C.; Kohen, M. G. (Dissenting Opinion)

CARICOM–Dominican Republic FTA (1998)

#### ☞ **Raiffeisen Bank v. Croatia (I)**

Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia (I) (ICSID Case No. ARB/17/34)

Decision on the Respondent's Jurisdictional Objections, 30 September 2020

Reed, L. (President); Alexandrov, S. A.; Tomov, L. (dissenting in part)

Austria–Croatia BIT (1997)

#### ☞ **Renco v. Peru (II)**

The Renco Group, Inc. v. The Republic of Peru (II) (PCA Case No. 2019-46)

Decision on Expedited Preliminary Objections, 30 June 2020

Simma, B. (President); Grigera Naón, H. A.; Thomas, J. C. (Dissenting Opinion)

Peru–United States FTA (2006)

<sup>11</sup> Publicly available as of January 2021.

### 🔗 **Strabag and others v. Poland**

Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Republic of Poland (ICSID Case No. ADHOC/15/1)

Partial Award on Jurisdiction, 4 March 2020

Veeder, V. V. (President); Böckstiegel, K.-H.; van den Berg, A. J.  
Austria–Poland BIT (1988)

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

### 🔗 **Eyre and Montrose Developments v. Sri Lanka**

Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/16/25)

Award, 5 March 2020

Reed, L. (President); Lew, J. D. M.; Stern, B.  
Sri Lanka–United Kingdom BIT (1980)

### 🔗 **Itisaluna Iraq and others v. Iraq**

Itisaluna Iraq LLC, Munir Sukhtian International Investment LLC, VTEL Holdings Ltd., VTEL Middle East and Africa Limited v. Republic of Iraq (ICSID Case No. ARB/17/10)

Award, 3 April 2020

Bethlehem, D. (President); Peter, W. (Dissenting Opinion); Stern, B.  
OIC Investment Agreement (1981)

### 🔗 **Lotus v. Turkmenistan**

Lotus Holding Anonim Şirketi v. Turkmenistan (ICSID Case No. ARB/17/30)

Award, 6 April 2020

Lowe, V. (President); Boykin, J. H.; Stern, B.  
Türkiye–Turkmenistan BIT (1992); Energy Charter Treaty (1994)

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

### 🔗 **ESPF and others v. Italy**

ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic (ICSID Case No. ARB/16/5)

Award, 14 September 2020

Álvarez, H. C. (President); Pryles, M. C.; Boisson de Chazournes, L. (partial dissenting opinion in certain paragraphs)  
Energy Charter Treaty (1994)

### 🔗 **Hydro Energy 1 and Hydroxana v. Spain**

Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain (ICSID Case No. ARB/15/42)

Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020

Collins, L. (President); Rees, P.; Knieper, R.  
Energy Charter Treaty (1994)

### 🔗 **STEAG v. Spain**

STEAG GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/4)

Decision on Jurisdiction, Liability and Directions on Quantum, 8 October 2020 (Spanish)

Zuleta, E. (President); Tawil, G. S.; Dupuy, P.-M. (Dissenting Opinion)  
Energy Charter Treaty (1994)

### 🔗 **Strabag v. Libya**

Strabag SE v. Libya (ICSID Case No. ARB(AF)/15/1)

Award, 29 June 2020

Crook, J. R. (President); Crivellaro, A.; Ziadé, N. (Partial Dissenting Opinion)  
Austria–Libya BIT (2002)

🔗 **The PV Investors v. Spain**

The PV Investors v. Spain (PCA Case No. 2012-14)

Final Award, 28 February 2020

Kaufmann-Kohler, G. (President); Brower, C. N. (*Concurring and Dissenting Opinion*); Sepúlveda Amor, B. Energy Charter Treaty (1994)

🔗 **Watkins Holdings and others v. Spain**

Watkins Holdings S.à r.l. and others v. Kingdom of Spain (ICSID Case No. ARB/15/44)

Award, 21 January 2020

Abraham, C. W. M. (President); Pyles, M. C.; Ruiz Fabri, H. (*Dissenting Opinion*) Energy Charter Treaty (1994)

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

🔗 **A.M.F. Aircraftleasing v. Czechia**

A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic (PCA Case No. 2017-15)

Final Award, 11 May 2020

Tercier, P. (President); Alexandrov, S. A.; Kalicki, J. E. Czechia–Germany BIT (1990)

🔗 **Bridgestone v. Panama**

Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama (ICSID Case No. ARB/16/34)

Award, 14 August 2020

Phillips, N. (President); Grigera Naón, H. A.; Thomas, J. C. Panama–United States FTA (2007)

🔗 **Consutel v. Algeria**

Consutel Group S.p.A. in liquidazione v. People's Democratic Republic of Algeria (PCA No. 2017-33)

Final Award, 3 February 2020 (French)

Mourre, A. (President); Tanzi, A. M.; Mahiou, A. Algeria–Italy BIT (1991)

🔗 **EBO Invest and others v. Latvia**

EBO Invest AS, Rox Holding AS and Staur Eiendom AS v. Republic of Latvia (ICSID Case No. ARB/16/38)

Award, 28 February 2020

Schwartz, E. (President); Hobér, K.; Landau, T. Latvia–Norway BIT (1992)

🔗 **Eskosol v. Italy**

Eskosol S.p.A. in liquidazione v. Italian Republic (ICSID Case No. ARB/15/50)

Award, 4 September 2020

Kalicki, J. E. (President); Tawil, G. S.; Stern, B. Energy Charter Treaty (1994)

🔗 **Global Telecom Holding v. Canada**

Global Telecom Holding S.A.E. v. Canada (ICSID Case No. ARB/16/16)

Award, 27 March 2020

Affaki, G. (President); Born, G. B. (*Dissenting Opinion*); Lowe, V. Canada–Egypt BIT (1996)

**Gosling and others v. Mauritius**

Thomas Gosling, Property Partnerships Development Managers (UK), Property Partnerships Developments (Mauritius) Ltd, Property Partnerships Holdings (Mauritius) Ltd and TG Investments Ltd v. Republic of Mauritius (ICSID Case No. ARB/16/32)

Award, 18 February 2020

Rigo Sureda, A. (President); Alexandrov, S. A. (*Dissenting Opinion*); Stern, B.  
Mauritius–United Kingdom BIT (1986)

**Griffin v. Poland**

GPF GP S.à.r.l v. Poland (SCC Case No. 2014/168)

Final Award, 29 April 2020

Kaufmann-Kohler, G. (President); Williams, D. A. R.; Sands, P.  
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### UNCTAD Policy Tools for IIA Reform

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

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

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### UNCTAD Investment Policy Online Databases

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

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