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REVIEW OF 2021 INVESTOR–STATE ARBITRATION DECISIONS: INSIGHTS FOR IIA REFORM

H I G H L I G H T S

- This note reviews 31 investor–State dispute settlement (ISDS) decisions rendered by arbitral tribunals in 2021. It covers high-profile decisions such as *Eco Oro v. Colombia* and several renewable energy-related cases under the Energy Charter Treaty such as *Infracapital v. Spain*.
- About 95 per cent of the reviewed decisions concerned claims based on old-generation international investment agreements (IIAs) signed between 1980 and 2010. UNCTAD’s IIA Reform Accelerator, launched in November 2020, was developed to facilitate the interpretation, amendment and replacement of such IIAs.
- ISDS decisions from 2021 touched upon important issues on the reform agenda for the investment treaty regime, including:
 - Criteria for covered investments and investors
 - Exclusions of taxation or other subject matters from the treaty scope
 - 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
 - Public policy exceptions
 - Consent to investor–State arbitration, requirements and limitation periods for bringing ISDS claims
- The review of recent ISDS decisions highlights the need to speed up the reform of the IIA regime. Reforms are essential to ensure that investment treaties and associated risks of investor–State disputes do not hinder countries’ efforts to address public policy concerns. While new-generation IIAs feature a larger number of reformed provisions aimed at safeguarding States’ right to regulate and reforming ISDS, questions remain whether the refinements are sufficiently robust to achieve the desired effects.
- Building on its recent work on the reform of the IIA regime, UNCTAD’s World Investment Report 2023 presents a new toolbox to transform IIAs into instruments that actively support sustainable investment. This review of ISDS decisions, together with UNCTAD’s IIA reform tools, can help countries and regions make strategic choices concerning the future of the IIA regime.

Introduction: Recent ISDS decisions and their relevance for IIA reform

This note provides an overview of tribunals' findings in ISDS decisions rendered in 2021. 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 research (box 1; annex 1). This includes high-profile decisions such as *Eco Oro v. Colombia* and several renewable energy-related cases under the Energy Charter Treaty such as *Infracapital v. Spain*.

The tables on selected issues present the main facts of the reviewed ISDS decisions and the questions addressed by tribunals. The accompanying analysis draws on policy options put forward in UNCTAD's IIA Reform Accelerator (2020a), the Reform Package for the International Investment Regime (2018) and the Investment Policy Framework for Sustainable Development (2015). It can be read together with other UNCTAD publications related to IIAs and ISDS. Chapter II of the World Investment Report 2023 gives an update on global IIA policymaking and ISDS claims (UNCTAD, 2023).

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

This review of recent ISDS decisions highlights the need to speed up the reform of the IIA regime. About 95 per cent of the reviewed decisions for 2021 concerned claims based on old-generation IIAs signed between 1980 and 2010. Reforms are essential to ensure that investment treaties and associated investor–State disputes do not hinder countries' efforts to meet core global objectives and respond to challenges, such as tackling climate change. Amendment, replacement or termination are the predominant options for reforming the stock of treaties. While new-generation IIAs feature more reformed provisions aimed at safeguarding States' right to regulate and reforming ISDS, questions remain whether the refinements are sufficiently robust to achieve the desired effects.

Building on its recent work on the reform of the IIA regime (UNCTAD, 2022b and 2022c), UNCTAD's World Investment Report 2023 presents a toolbox to transform IIAs into instruments that actively support sustainable investment. Together with UNCTAD's IIA reform tools, this analysis of ISDS decisions can help countries and regions make strategic choices concerning the future of the regime.

Box 1. Outcomes of ISDS decisions in 2021

In 2021, ISDS tribunals rendered at least 54 substantive decisions in investor–State disputes, 31 of which were in the public domain at the time of research.^a Eleven of the public decisions principally addressed jurisdictional issues (including preliminary objections), with 4 upholding the tribunal's jurisdiction and 7 declining jurisdiction. The remaining 20 public decisions were rendered on the merits, with 12 holding the State liable for IIA breaches and 8 dismissing all investor claims.

In addition, six publicly known decisions were rendered in annulment proceedings at the International Centre for Settlement of Investment Disputes (ICSID). ICSID ad hoc committees rejected the applications for annulment in five cases; in one case, the award at issue was partially annulled.

Source: UNCTAD, 2022a.

^a These numbers include decisions on jurisdiction and preliminary objections, 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 ICSID annulment proceedings or decisions of domestic courts.

1. Treaty scope and definitions

a. Definitions of investment and investor

Characteristics of investment

In five decisions rendered in 2021, tribunals examined whether certain characteristics or criteria for covered investment were met (table 1).

ISDS tribunals' findings:

- The tribunals in all five cases decided that the respective claimants had satisfied the relevant criteria. In one of the cases jurisdiction was declined on other grounds.

Old-generation IIAs typically use an open-ended definition of “investment” that grants protection to all types of assets, without explicitly listing the specific characteristics of a covered 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).

To target investments that have a sustainable development impact on host countries, the definition of investment in IIAs could detail characteristics of sustainable investment (UNCTAD, 2022b). This can be accompanied by obligations for investors and investments to comply with specific sustainability requirements such as environmental impact assessments and maintenance of environmental management systems (UNCTAD, 2022b).

Table 1. Characteristics of investment		
Case details	Investment at issue	Selected issues and tribunals' findings
Air Canada v. Venezuela <ul style="list-style-type: none"> • Canada–Venezuela, Bolivarian Republic of BIT (1996) • Award, 13 September 2021 • Decision finding IIA breaches • Tercier, P. (President); Poncet, C.; Villanúa Gómez, D. 	Investment in air transportation services.	<ul style="list-style-type: none"> • Whether the claimant has made an investment that is protected under the BIT (→YES; the claims for money, rights to operate certain international air services in Venezuela and cash deposited in the claimant’s bank account constitute assets that fall within the BIT’s definition of investment)
Çap and Sehil v. Turkmenistan <ul style="list-style-type: none"> • Türkiye–Turkmenistan BIT (1992) • Award, 4 May 2021 • Decision dismissing claims • Lew, J. D. M. (President); Hanotiau, B.; Boisson de Chazournes, L. 	Rights under numerous contracts entered into with Turkmenistan concerning building projects.	<ul style="list-style-type: none"> • Whether the claimants had an investment in Turkmenistan that satisfies Article 25 of the ICSID Convention and the BIT (→YES; a series of increasingly large contracts over several years indicates commitment and establishment in Turkmenistan)
Festorino and others v. Poland <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Award, 30 June 2021 • Decision dismissing claims • Cremades, B. M. (President); Hobér, K.; Douglas, Z. 	Ownership (100%) of Blue Gas N’R’G Holding sp. z o.o., holding four Blue Gas subsidiaries to develop six natural gas mining projects with power plants (Uników, Wrzosowo, Stanowice, Międzyzdroje, Zakrzewo and Lelików).	<ul style="list-style-type: none"> • Whether the claimants have made an investment that is protected by the ECT, fulfilling the requirement to have made a contribution (→YES; even if the claimants have not established that the relevant shares were acquired with personal funds of each claimant, the relevant connection stressed by the respondent is present; the claimants directly own and control 100% of the shares in the parent company Blue Gas Holding; there is a direct economic link through that ownership structure to each of the claimants as indirect owners)
Fynerdale v. Czechia <ul style="list-style-type: none"> • Czechia–Netherlands BIT (1991) • Award, 29 April 2021 • Decision rejecting jurisdiction • Wolfrum, R. (President); Kühn, W. (Separate Opinion); Boisson de Chazournes, L. 	Loans to Czech company YTRIX a.s. and Maltese company Poppyseed Limited, to be used for trade in poppy seeds produced in Czechia.	<ul style="list-style-type: none"> • Whether the loan agreements granted by the claimant are protected investments under the BIT (→YES; the loans, as planned by the claimant, were meant to serve the agricultural economy of the host country; however, they have been paid back and there can be no injury in their respect)

Table 1. Characteristics of investment		
Case details	Investment at issue	Selected issues and tribunals' findings
Pawłowski and Projekt Sever v. Czechia <ul style="list-style-type: none"> • Czechia–Switzerland BIT (1990) • Award, 1 November 2021 • Decision finding IIA breaches • Fernández-Armesto, J. (President); Beechey, J.; Lowe, V. 	Ownership of land acquired for real estate development in Benice, a district in the southeast of Prague.	<ul style="list-style-type: none"> • Whether the claimants have protected investments under the BIT (→YES; Pawłowski AG's shareholding in Projekt Sever and its equity contributions as well as Projekt Sever's land purchases and project expenditure each qualify as protected investments)

Source: UNCTAD.

Ownership and control, investor nationality, place of incorporation, corporate restructuring and denial of benefits

Nine decisions examined the concepts of ownership and control, investor nationality, place of incorporation and corporate restructuring (table 2).¹

ISDS tribunals' findings:

- Four tribunals affirmed jurisdiction over the relevant claimants, rejecting the respondent States' objections related to the above issues.
- Four tribunals declined jurisdiction over the claimants.
- One tribunal ultimately did not decide the issue as it had declined jurisdiction on another basis.

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 (UNCTAD, 2016). With respect to natural persons, most IIAs are silent on dual nationals and typically they do not explicitly refer to effective and dominant nationality.

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 2. Ownership and control, investor nationality, place of incorporation, corporate restructuring and denial of benefits		
Case details	Investment at issue	Selected issues and tribunals' findings
Çap and Sehil v. Turkmenistan <ul style="list-style-type: none"> • Türkiye–Turkmenistan BIT (1992) • Award, 4 May 2021 • Decision dismissing claims • Lew, J. D. M. (President); Hanotiau, B.; Boisson de Chazournes, L. 	Rights under numerous contracts entered into with Turkmenistan concerning building projects.	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over the claimants considering the allegation that the claims had been assigned to a third-party funder with non-Turkish nationality (→YES; no evidence has been presented to show or even suggest that the claimants are no longer the proper owners of the claims in this case)
Carrizosa Gelzis v. Colombia (I) <ul style="list-style-type: none"> • Colombia–United States TPA (2006) • Award, 7 May 2021 • Decision rejecting jurisdiction • Beechey, J. (President); Ferrari, F.; Söderlund, C. 	Shareholding in Banco Granahorrar, a Colombian bank.	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over the claimants as dual nationals of the United States and of Colombia, the respondent (→NO; Colombia was the centre of the claimants' professional, private and public lives at the critical dates; no compelling case has been made for a finding that the dominant and effective nationality of the claimants is that of the United States)

¹ Several 2021 decisions that were not publicly available at the time of research addressed related issues. In [Cascade Investments v. Turkey](#) and [Clorox v. Venezuela](#), the tribunals examined abuse of process allegations, corporate restructuring and nationality planning. In [GCM \(formerly Gran Colombia\) v. Colombia](#) and [Big Sky Energy v. Kazakhstan](#), the tribunals addressed issues related to the application of the denial-of-benefits clause.

Table 2. Ownership and control, investor nationality, place of incorporation, corporate restructuring and denial of benefits

Case details	Investment at issue	Selected issues and tribunals' findings
<p>Eco Oro v. Colombia</p> <ul style="list-style-type: none"> • Canada–Colombia FTA (2008) • Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021 • Decision finding IIA breaches • Blanch, J. (President); Grigera Naón, H. A. (Partial Dissenting Opinion); Sands, P. (Partial Dissent) 	<p>Mining rights held under a concession contract, comprising the Angostura gold and silver deposit in the Santurbán region of northeastern Colombia.</p>	<ul style="list-style-type: none"> • Whether Eco Oro is a protected Canadian investor meeting the FTA's nationality requirement (→YES; Eco Oro is incorporated in accordance with the applicable laws of Canada and is a Canadian enterprise; the respondent did not identify any provisions in the FTA requiring investigation into Eco Oro's beneficial ownership) • Whether Eco Oro was owned or controlled by Canadian investors on the relevant date (→YES; despite the respondent's allegation that 49.61% of Eco Oro's shareholding was owned by just three Delaware corporations and one Bermudan company, no evidence of actual control by non-Party investors was presented; even under the alleged scenario, a shareholding of 49.61% by investors of a non-Party could not result in control) • Whether the tribunal has jurisdiction over the claimants considering the respondent's exercise of the denial of benefits clause under Article 814(2) of the FTA, by letter dated 15 December 2016 (→YES; the respondent was not entitled to deny the benefits to the claimant; the claimant was neither owned nor controlled by investors of a non-party on the relevant date; its business activities were sufficient to constitute substantial business activities in Canada)
<p>Fynerdale v. Czechia</p> <ul style="list-style-type: none"> • Czechia–Netherlands BIT (1991) • Award, 29 April 2021 • Decision rejecting jurisdiction • Wolfrum, R. (President); Kühn, W. (Separate Opinion); Boisson de Chazournes, L. 	<p>Loans to Czech company YTRIX a.s. and Maltese company Poppyseed Limited, to be used for trade in poppy seeds produced in Czechia.</p>	<ul style="list-style-type: none"> • Whether the alleged investments in Czechia made by the claimant, a Dutch entity, through a Maltese company were protected under the BIT (→NOT DECIDED; unnecessary to entertain the arguments as jurisdiction has been declined on another basis)
<p>Hope Services v. Cameroon</p> <ul style="list-style-type: none"> • Cameroon–United States of America BIT (1986) • Award, 23 December 2021 (French) • Decision rejecting jurisdiction • Scherer, M. (President); Ziadé, N.; Mayer, P. 	<p>Investments in the operation of an online platform for private donor funding of community development projects allegedly made through local subsidiary Hope Services SA.</p>	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over the claims despite the respondent's invocation of the denial of benefits clause (→YES; the respondent's 2020 invocation of the denial of benefits clause against the claimant is not valid; after receiving the 2017 draft request for arbitration, the respondent failed to "promptly consult" with the United States, the other contracting party to the BIT, as required under Article 1(3) of the BIT) • Whether the claimant, a United States entity, owned or controlled investments in the online platform and related government contracts (→NO; the claimant was not a party to the 2010 and 2011 contracts signed with the Cameroon's Ministry of Economy for the deployment of the platform; Hope Finance SAS, incorporated in France, was the contractor; the claimant has not provided proof of the acquisition of the French company's shares, of a transfer/ownership of rights to the platform or through Cameroonian companies Hope Finance SA and Hope Services SA)
<p>Infracapital v. Spain</p> <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021 • Decision finding IIA breaches • Siqueiros, E. (President); Cameron, P. D. (Partial Dissenting Opinion); González García, L. 	<p>Investments in photovoltaic plants.</p>	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over the claims considering the respondent's objection that there was an abuse of process or lack of good faith on the part of the claimants (→YES; no elements were presented to sustain such allegations; nothing in the record suggests that the investment was restructured for the sole purpose of gaining access to investment arbitration)

Table 2. Ownership and control, investor nationality, place of incorporation, corporate restructuring and denial of benefits

Case details	Investment at issue	Selected issues and tribunals' findings
Litpop and others v. Ukraine <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Award, 4 February 2021 • Decision rejecting jurisdiction • Lew, J. D. M. (President); Fortier, L. Y.; Oreamuno Blanco, R. 	Minority shareholding in PJSC Ukrnafta, an oil and gas company.	<ul style="list-style-type: none"> • Whether the claimants had an investment under the ECT at the time the arbitration was commenced (→NO; they failed to prove to have owned any Ukrnafta shares at that time) • Whether the tribunal has jurisdiction over the claimants despite the respondent's invocation of the ECT's denial of benefits clause (→NO; based on the provided evidence, the claimants did not have substantial business activities in Cyprus, the alleged home state, as required under the ECT)
MAKAE v. Saudi Arabia <ul style="list-style-type: none"> • France–Saudi Arabia BIT (2002) • Award, 30 August 2021 • Decision rejecting jurisdiction • Crook, J. R. (President); Van Houtte, V.; Hafez, K. 	Investments in Saudi Arabia's fashion retail sector.	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over the claims considering the respondent's allegation that the claimant does not control the investment in the host State (→NO; the claimant has no ownership interest in the alleged investment; the evidence does not establish that the claimant exercised <i>de facto</i> control over the investment at any relevant time; the claimant had a physical presence in France, but its activities were modest and limited in scope)
Pawłowski and Projekt Sever v. Czechia <ul style="list-style-type: none"> • Czechia–Switzerland BIT (1990) • Award, 1 November 2021 • Decision finding IIA breaches • Fernández-Armesto, J. (President); Beechey, J.; Lowe, V. 	Ownership of land acquired for real estate development in Benice, a district in the southeast of Prague.	<ul style="list-style-type: none"> • Whether the claimants qualify as protected investors under the BIT considering the respondent's objection that Pawłowski AG has neither real economic activities nor its seat in the alleged home state Switzerland (→YES; Pawłowski AG was incorporated under the laws of Switzerland and fully owned and controlled by a Swiss national)

Source: UNCTAD.

Legality of investment

In six decisions rendered in 2021, tribunals examined allegations that the claimants had made their investments in an illegal manner which disqualified them from treaty protection (table 3).

ISDS tribunals' findings:

- In four cases, the tribunals rejected the allegations related to the above issues.
- In two cases, the tribunals – unanimously or by majority – decided that the investments were not protected.

Many IIAs explicitly require covered investments to be made “in accordance with host State law” (UNCTAD, 2018; UNCTAD, 2020a).² Going further, a reform option is to specify that host State laws should be complied with at both the entry and the post-entry stages of an investment, i.e. after the making of the initial investment (UNCTAD, 2015b). A few recent IIAs and model treaties encourage or require investor compliance with human rights, labour and environmental standards (UNCTAD, 2019a).

Table 3. Legality of investment

Case details	Investment at issue	Selected issues and tribunals' findings
Bank Melli and Bank Saderat v. Bahrain <ul style="list-style-type: none"> • Bahrain–Iran, Islamic Republic of BIT (2002) • Award, 9 November 2021 • Decision finding IIA breaches • Kaufmann-Kohler, G. (President); Hanotiau, B.; Collins, L. 	Investments in Future Bank, a local commercial bank.	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over the claims considering the alleged illegal activities of Future Bank, including sanctions violations (→YES; Future Bank's unlawful conduct is not sufficient to constitute a bar to the tribunal's jurisdiction or admissibility of the claims; however, the evidence and the consequences of the illegalities must be assessed as an issue of the merits)

² Some past tribunals confirmed that the legality requirement applied even when it was not explicitly mentioned in the IIA, see UNCTAD, 2019b.

Table 3. Legality of investment		
Case details	Investment at issue	Selected issues and tribunals' findings
Festorino and others v. Poland <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Award, 30 June 2021 • Decision dismissing claims • Cremades, B. M. (President); Hobér, K.; Douglas, Z. 	Ownership (100%) of Blue Gas N'R'G Holding sp. z o.o., holding four Blue Gas subsidiaries to develop six natural gas mining projects with power plants (Uników, Wrzosowo, Stanowice, Międzyzdroje, Zakrzewo and Lelików).	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over the claims considering the respondent's "clean hands" objection alleging that the investment was made in a deceitful and fraudulent manner, in breach of the host state's laws (→YES; the claimants did not engage in fraudulent or deceitful acts or acts in bad faith when portraying the financial plan for the investment; the clean hands doctrine does not apply)
Fynerdale v. Czechia <ul style="list-style-type: none"> • Czechia–Netherlands BIT (1991) • Award, 29 April 2021 • Decision rejecting jurisdiction • Wolfrum, R. (President); Kühn, W. (Separate Opinion); Boisson de Chazournes, L. 	Loans to Czech company YTRIX a.s. and Maltese company Poppyseed Limited, to be used for trade in poppy seeds produced in Czechia.	<ul style="list-style-type: none"> • Whether certain loans granted by the claimant were legal investments protected under the BIT (→NO – BY MAJORITY; nearly 50 per cent of loan 3 was generated by a fraudulent activity and thus not protected by the BIT; for loans 6 to 9, the claimants provided insufficient evidence to convince the tribunal of the legality of the funds in light of the red flags)
Infracapital v. Spain <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021 • Decision finding IIA breaches • Siqueiros, E. (President); Cameron, P. D. (Partial Dissenting Opinion); González García, L. 	Investments in photovoltaic plants.	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over the claims considering the respondent's objection alleging the lack of clean hands on the part of the claimants, including criminal wrongdoing (→YES; the clean hands objection is meritless and untimely)
Infinito Gold v. Costa Rica <ul style="list-style-type: none"> • Canada–Costa Rica BIT (1998) • Award, 3 June 2021 • Decision finding IIA breaches • Kaufmann-Kohler, G. (President); Hanotiau, B.; Stern, B. (Separate Opinion) 	Rights under an exploration permit and an exploitation concession for the development of a gold mine in Costa Rica, known as Las Crucitas Project.	<ul style="list-style-type: none"> • Whether the claimant has a protected investment under the BIT despite the respondent's allegation that the 2008 concession and related approvals were acquired illegally (→YES; the claimant acquired shares in Industrias Infinito in 2000, which is the relevant investment for present purposes; there was no allegation that the claimant had acquired these shares illegally, nor that its ownership or control of these shares had been vitiated in any way; the shares were owned in accordance with host state law) • Whether, as a matter of international public policy, the claimant's investment was within the scope of the BIT's protections and Costa Rica's consent to arbitration considering the allegation that the 2008 concession was procured through corruption (→YES; there are insufficient signals in the record that the concession was obtained through corruption; the tribunal cannot conclude that the 2008 concession was procured by corruption even if adopting a less demanding standard of proof, relying on indicia or red flags)
Litpop and others v. Ukraine <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Award, 4 February 2021 • Decision rejecting jurisdiction • Lew, J. D. M. (President); Fortier, L. Y.; Oreamuno Blanco, R. 	Minority shareholding in PJSC Ukrnafta, an oil and gas company.	<ul style="list-style-type: none"> • Whether the claimants have a protected investment under the ECT considering respondent's objection alleging bribery and corruption (→NO; the claimants' alleged investment, including their conduct in obtaining and maintaining management control of Ukrnafta, is tainted by bribery and corruption and violates international public policy)

Source: UNCTAD.

b. Exclusions from the treaty scope: taxation measures

Five decisions in 2021 examined whether certain measures challenged by the claimants were “taxation measures” excluded from the scope of the invoked IIA (table 4).³ All five decisions concerned claims brought under the Energy Charter Treaty (ECT) against Spain (with 4 cases) and Italy (1 case).⁴

ISDS tribunals’ findings:

- In 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 one case against Spain, the tribunal determined that the FET claim concerning the challenged measure was carved out under the ECT, while the expropriation claim for the same measure was within the tribunal’s jurisdiction.
- In one case against Italy, the challenged measure was not considered to be a “tax measure” (i.e. it did not qualify for the ECT’s tax carve-out).

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

Most IIAs do not exclude taxation from their scope, which means that they cover a wide range of tax-related measures (UNCTAD, 2022a). 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).

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.

Table 4. Exclusions from the treaty scope: taxation measures

Case details	Disputed measure(s)	Selected issues and tribunals’ findings
<p>Eurus Energy v. Spain</p> <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Decision on Jurisdiction and Liability, 17 March 2021 • Decision finding IIA breaches • Hoffmann, A. (President); Garibaldi, O. M. (Partial Dissent); Giardina, A. 	<p>A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.</p>	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over the FET claims related to the TVPEE, a 7% tax introduced by Law 15/2012, considering the respondent’s objection that it is a tax measure within the meaning of the ECT tax carve-out in Article 21 (→NO) • Whether the indirect expropriation claim related to the TVPEE is admissible despite the fact that the claimant has not referred the issue to the relevant competent tax authority under ECT Article 21(5) (→YES; ECT Article 21(5) reapplies the expropriation provision to taxation measures; the sole consequence of the claimant’s failure to notify the tax authority is that the tribunal is called on to notify the authorities itself; the position of the competent Spanish authority is already known; the tribunal will not refer this to it since this “would be the purest formalism and a waste of time”; the expropriation claim is admissible but fails on the merits) • Whether, considering the ECT tax carve-out, the tribunal has jurisdiction over the claim for an additional tax gross-up on a potential amount of damages, so as to off-set taxes on the award due in Japan (→YES; the claim concerns the quantum of the obligation to pay compensation)

³ The 2021 decision in *Yukos Capital v. Russia* also addressed this issue; the decision was not publicly available at the time of research.

⁴ 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
FREIF Eurowind v. Spain <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Final Award, 8 March 2021 • Decision dismissing claims • Jones, D. (President); Hobér, K.; Clay, T. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over FET and other claims under ECT Article 10(1) related to the TVPEE, a 7% tax introduced by Law 15/2012, considering the respondent's objection that it is a tax measure within the meaning of the ECT tax carve-out in Article 21 (→NO; the TVPEE is taxation measure and fulfils the requirements of a <i>bona fide</i> tax; the TVPEE does not fall within any exceptions provided for in ECT Article 21 "Taxation")
Infracapital v. Spain <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021 • Decision finding IIA breaches • Siqueiros, E. (President); Cameron, P. D. (Partial Dissenting Opinion); González García, L. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over FET and other claims under ECT Article 10(1) related to the TVPEE, a 7% tax introduced by Law 15/2012, considering the respondent's objection that it is a tax measure within the meaning of the ECT tax carve-out (→NO; the TVPEE is a tax and protection is not available for such tax measures under the ECT)
Kruck and others v. Spain <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Decision on Jurisdiction and Admissibility, 19 April 2021 • Decision upholding jurisdiction • Lowe, V. (President); Pryles, M. C.; Douglas, Z. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenue of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over the FET claim under ECT Article 10(1) related to the TVPEE, a 7% tax introduced by Law 15/2012, considering the respondent's objection that it is a tax measure within the meaning of the ECT tax carve-out (→NO; for taxation, there is no jurisdiction over alleged breaches of ECT provisions other than expropriation) • Whether the tribunal can address the indirect expropriation claim related to the TVPEE (→YES; the ECT's tax carve-out does not affect expropriation claims; the claimants have notified the competent tax authority of Spain about the expropriation claim; the issue will be addressed at the merits)
Silver Ridge v. Italy <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Award, 26 February 2021 • Decision dismissing claims • Simma, B. (President); Johnson, O. T. (Dissenting Opinion); Cremades, B. M. 	A series of governmental decrees to cut tariff incentives for some solar power projects.	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over the FET and umbrella clause claims under ECT Article 10(1) related to an administrative fee imposed on energy producers by a regulatory act (the Fifth Energy Account) considering the respondent's objection that it is a taxation measure within the meaning of the ECT tax carve-out (→YES; the amounts charged are actually a fee and not a tax within the meaning of ECT Article 21; the tribunal also has jurisdiction over the related indirect expropriation claims)

Source: UNCTAD.

2. Standards of treatment and protection

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

In three decisions, tribunals examined claims related to national treatment (NT) and most-favoured-nation (MFN) treatment clauses (table 5).

ISDS tribunals' findings:

- Tribunals dismissed the discrimination claims under the NT or MFN provisions respectively in all three cases.

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, accompanied by 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
Festorino and others v. Poland <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Award, 30 June 2021 • Decision dismissing claims • Cremades, B. M. (President); Hobér, K.; Douglas, Z. 	Government authorities' alleged arbitrary and discriminatory conduct in administrative proceedings to grant licenses for the claimants' gas exploration and mining projects, including unjustified delays that resulted in the bankruptcy and shutdown of the claimants' Blue Gas subsidiaries.	<ul style="list-style-type: none"> • Whether the respondent discriminated against the claimants' investment regarding the granting of licenses compared to the large, state-controlled upstream gas producer "PGNiG" (→NO; the claimants primarily based their discrimination allegation on limited information concerning licenses held by PGNiG; the tribunal lacks evidence proving (i) that the claimants and PGNiG were afforded noticeably different treatment in proceedings similar enough to be compared; and (ii) that such a discrepancy was nationality-based and not the result of some other confounding variable unrelated to nationality)
Pawlowski and Projekt Sever v. Czechia <ul style="list-style-type: none"> • Czechia–Switzerland BIT (1990) • Award, 1 November 2021 • Decision finding IIA breaches • Fernández-Armesto, J. (President); Beechey, J.; Lowe, V. 	The Government's alleged frustration of the claimants' real estate development project through legal proceedings related to a land use plan which had permitted construction on the claimants' land.	<ul style="list-style-type: none"> • Whether the Prague Municipality discriminated against the claimants and breached NT provisions when it approved zoning changes for other projects while simultaneously terminating the claimants' rezoning project (→NO; the claimants were unable to identify a comparator in a similar situation, which received more favourable treatment; they failed to show that the disparities between the two projects did not justify the difference in treatment)
Naturgy (formerly Gas Natural) v. Colombia <ul style="list-style-type: none"> • Colombia–Spain BIT (2005) • Award, 12 March 2021 (Spanish) • Decision dismissing claims • Drymer, S. L. (President); Schwartz, E.; Mourre, A. 	The Government's decision to seize and liquidate Electricaribe and other alleged actions, such as the harassment of the investor and its employees.	<ul style="list-style-type: none"> • Whether the respondent breached MFN through measures that disproportionately affected the claimants as foreign investors compared to other electricity enterprises (→NO; no discriminatory conduct was found with respect to the previously examined FET claims; the same findings thus apply to claims alleging discrimination under the MFN clause)

Source: UNCTAD.

b. Most-favoured-nation treatment and importation of provisions from third country IIAs

In five 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).⁵

ISDS tribunals' findings:

- In two cases, the tribunals decided not to resolve the principal question of importation through MFN but they dismissed the claims after a review of the facts.
- In two cases, the tribunals did not allow the importation of substantive clauses.
- In another case, the claimant abandoned the claim and the tribunal did not decide the matter.

Old-generation IIAs often feature broad MFN clauses, even though exclusions related to double tax treaties or regional economic cooperation are common. As several arbitral decisions have read the MFN obligation as allowing

⁵ The tribunal in *Big Sky Energy v. Kazakhstan* also addressed this question in a 2021 award; the award was not publicly available at the time of research.

claimants 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
Agility v. Iraq <ul style="list-style-type: none"> • Iraq–Kuwait BIT (2013) • Award, 22 February 2021 • Decision dismissing claims • Bull, C. (President); Beechey, J.; Murphy, S. D. 	A regulatory agency's decision to annul the claimant's acquisition of shares in Korek Telecom and the Government's order to transfer these shares back to the original Iraqi shareholders.	<ul style="list-style-type: none"> • Whether the claimant can use the MFN clause to invoke the umbrella clause of the Japan–Iraq BIT (→NOT DECIDED; the MFN/umbrella clause claim can be disposed of on the facts; there is no factual basis for the claimant's assertions)
América Móvil v. Colombia <ul style="list-style-type: none"> • Colombia–Mexico–Venezuela FTA (1994) • Award, 7 May 2021 (Spanish) • Decision dismissing claims • Radicati di Brozolo, L. (President); Martínez de Hoz, J. A. (Dissenting Opinion); Oreamuno Blanco, R. 	Measures that allegedly prevented the claimant's Colombian subsidiary Comcel from freely using or selling its wireless telecommunications assets after the termination of its concession contracts. The challenged measures include, among others, the Colombian Constitutional Court's decision of 2013 ordering the reversion of certain telecommunication assets to state control on a concession's expiry or termination and the subsequent refusal of the Government to recognize Comcel's property rights over those assets following the contract termination.	<ul style="list-style-type: none"> • Whether the claimant can use the MFN clause to import an FET clause from another IIA (→NOT DECIDED; the claimant abandoned the claim since the invoked base IIA contained a reservation by Colombia excluding telecommunications from the MFN scope)
Çap and Sehil v. Turkmenistan <ul style="list-style-type: none"> • Türkiye–Turkmenistan BIT (1992) • Award, 4 May 2021 • Decision dismissing claims • Lew, J. D. M. (President); Hanotiau, B.; Boisson de Chazournes, L. 	A series of governmental measures that allegedly led to the unlawful expropriation of claimants' construction projects in Turkmenistan, including defaulted payments and the termination of some of the contracts at issue before domestic courts.	<ul style="list-style-type: none"> • Whether the MFN provision can be relied upon to import substantive standards – FPS, non-impairment and the umbrella clause –from the UK–Turkmenistan BIT (→NO; MFN clause in the present case applies only where there is <i>de facto</i> discrimination; the MFN clause under applicable BIT clearly states that its scope of application is restricted to instances where the investors are in a “similar situation”)
Infinito Gold v. Costa Rica <ul style="list-style-type: none"> • Canada–Costa Rica BIT (1998) • Award, 3 June 2021 • Decision finding IIA breaches • Kaufmann-Kohler, G. (President); Hanotiau, B.; Stern, B. (Separate Opinion) 	The Government's revocation of claimant's concession for a gold mining project at Crucitas de Cutris, in northern Costa Rica, through alleged court and executive measures without payment of adequate compensation.	<ul style="list-style-type: none"> • Whether the claimant can use the MFN clause to rely on two substantive obligations from other treaties, (1) the obligation to do “what is necessary” in the Costa Rica–France BIT; and (2) the obligations under the umbrella clause of the Taiwan Province of China–Costa Rica BIT and the Republic of Korea–Costa Rica BIT (→NOT DECIDED; the tribunal concluded that it can dispense with resolving this question; even if the claimant's theory were to prevail, the latter's claim would still fail under the terms of the BIT and the facts on record)
VEB v. Ukraine <ul style="list-style-type: none"> • Russian Federation–Ukraine BIT (1998) • Partial Award on Preliminary Objections, 31 January 2021 • Decision upholding jurisdiction • Partasides, C. (President); Patocchi, P. M.; Malintoppi, L. 	The Government's alleged confiscation of shares held by the claimant, a state-owned Russian company, in its Ukrainian subsidiary Prominvestbank and the ban of the subsidiary's business operations with the parent company.	<ul style="list-style-type: none"> • Whether the claimant can use the MFN clause to import other standards of protection, such as the FET, FPS and an umbrella clause (→NO; the narrow scope of protection set out in the BIT's MFN clause is confirmed by consideration of the <i>travaux préparatoires</i> and the drafting history of the clause)

Source: UNCTAD.

c. Fair and equitable treatment (FET)

Legitimate expectations and (regulatory) stability

In many decisions rendered in 2021, arbitral tribunals examined investors' legitimate expectations, regulatory stability and other notions of stability under FET.

Seven cases related to a diverse set of challenged measures (table 7), leaving aside measures related to renewable energy which are addressed in table 8.

ISDS tribunals' findings:

- In two cases, tribunals or tribunal majorities found breaches of legitimate expectations.
- In four cases, tribunals rejected the claims.
- In one case, the tribunal did not decide the claim as it already found a breach of indirect expropriation.

Many past ISDS awards have dealt with the concept of legitimate expectations, although legitimate expectations are not explicitly referred to in the FET provisions of old-generation IIAs. The expansive interpretation of the FET clause to protect investor expectations has added high costs for legislative and regulatory changes, for example with regard to the modification or withdrawal of renewable energy incentives (table 8).

Old-generation IIAs typically include FET clauses drafted in a minimalist, open-ended way. Recent IIAs tend to contain more circumscribed FET clauses with clarifications, limitations or lists of specific obligations (UNCTAD, 2020c). A few IIAs use a closed list of State obligations. Some of them 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). Governments are in greater need of regulatory flexibility to address urgent global challenges such as the climate crisis.

Table 7. FET: legitimate expectations (excluding renewable energy cases)

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Air Canada v. Venezuela <ul style="list-style-type: none"> • Canada–Venezuela, Bolivarian Republic of BIT (1996) • Award, 13 September 2021 • Decision finding IIA breaches • Tercier, P. (President); Poncet, C.; Villanúa Gómez, D. 	The Government's alleged failure to approve the claimant's requests to convert its Bolivar-denominated returns into U.S. dollars for repatriation.	<ul style="list-style-type: none"> • Whether the respondent treated the claimant's investments and returns in violation of the claimant's legitimate expectations (→YES; the respondent failed to address or process the claimant's 15 foreign currency acquisition requests pursuant to the applicable procedure of the government's foreign currency administration commission)
Eco Oro v. Colombia <ul style="list-style-type: none"> • Canada–Colombia FTA (2008) • Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021 • Decision finding IIA breaches • Blanch, J. (President); Grigera Naón, H. A. (Partial Dissenting Opinion); Sands, P. (Partial Dissent) 	The National Mining Agency's decision (2016) that deprived the claimant of its mining rights in respect of 50% of the concession area (a gold and silver deposit) held by it since the mid-1990s. The relevant area was found to fall within the Santurbán Páramo, an environmental conservation zone. The Mining Agency's actions followed the decision of Colombia's Constitutional Court that broadened restrictions on mining in high-mountain ecosystems known as páramos (sources of the country's freshwater supply), striking down legal provisions that had stabilized the rights of mining projects in those areas negotiated before 2010.	<ul style="list-style-type: none"> • Whether the respondent frustrated the claimant's legitimate expectations and thereby breached the FET standard (→YES – BY MAJORITY; the respondent's actions comprise conduct that failed to provide the claimant with a stable and predictable regulatory environment) • Whether the respondent's frustration of the claimant's legitimate expectations also breached customary international law (→YES – BY MAJORITY; the respondent failed to act coherently, consistently or definitively in its management of the Santurbán Páramo and in so doing has infringed a sense of fairness, equity and reasonableness; the respondent has shown a flagrant disregard for the basic principles of fairness; a finding of bad faith is not required and the respondent did not act in bad faith in implementing the challenged measures)

Table 7. FET: legitimate expectations (excluding renewable energy cases)		
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Infinito Gold v. Costa Rica <ul style="list-style-type: none"> Canada–Costa Rica BIT (1998) Award, 3 June 2021 Decision finding IIA breaches Kaufmann-Kohler, G. (President); Hanotiau, B.; Stern, B. (<i>Separate Opinion</i>) 	The Government's revocation of claimant's concession for a gold mining project at Crucitas de Cutris, in northern Costa Rica, through alleged court and executive measures without payment of adequate compensation.	<ul style="list-style-type: none"> Whether the combined effect of four challenged measures related to the loss of the claimant's 2008 exploitation concession breached legitimate expectations (→NO; the tribunal does not consider that the respondent's conduct should be assessed under the prism of legitimate expectations; the claimant could have no legitimate expectation of legal stability)
Naturgy (formerly Gas Natural) v. Colombia <ul style="list-style-type: none"> Colombia–Spain BIT (2005) Award, 12 March 2021 (Spanish) Decision dismissing claims Drymer, S. L. (President); Schwartz, E.; Mourre, A. 	The Government's decision to seize and liquidate Electricaribe and other alleged actions, such as the harassment of the investor and its employees.	<ul style="list-style-type: none"> Whether the respondent's conduct was in breach of the claimants' legitimate expectations (→NO)
Olympic Entertainment v. Ukraine <ul style="list-style-type: none"> Estonia–Ukraine BIT (1995) Award, 15 April 2021 Decision finding IIA breaches Kaplan, N. (President); Pryles, M. C.; Thomas, J. C. 	The Government's ban on gambling in 2009, which revoked operators' licenses for gambling activities and resulted in the bankruptcy of the claimant's local subsidiaries.	<ul style="list-style-type: none"> Whether the respondent frustrated the claimant's legitimate expectation (→NOT DECIDED; the tribunal does not need to decide on the FET claim as it already found a breach of indirect expropriation)
Pawlowski and Projekt Sever v. Czechia <ul style="list-style-type: none"> Czechia–Switzerland BIT (1990) Award, 1 November 2021 Decision finding IIA breaches Fernández-Armesto, J. (President); Beechey, J.; Lowe, V. 	The Government's alleged frustration of the claimants' real estate development project through legal proceedings related to a land use plan which had permitted construction on the claimants' land.	<ul style="list-style-type: none"> Whether the claimants' legitimate expectations were frustrated by the Prague City Assembly's 2015 termination of a zoning plan change that it had initially approved in 2010 for the conversion of the claimants' agricultural land to a residential use zone (→NO; the initial approval did not create an acquired right; the conduct of the district and municipal authorities supporting the zoning plan change did not generate a legitimate expectation)
Venezuela US v. Venezuela <ul style="list-style-type: none"> Barbados–Venezuela, Bolivarian Republic of BIT (1994) Partial Award (Jurisdiction and Liability), 5 February 2021 Decision finding IIA breaches Tomka, P. (President); Fortier, L. Y.; Kohen, M. G. (<i>Declaration</i>) 	The Government's refusal to grant the claimant's request to sell its stake in Petroritupano to a third party as well as other alleged wrongful conduct related to Petroritupano, a mixed company controlled by state-owned Corporación Venezolana de Petróleo (CVP). According to the claimant, CVP and Petróleos de Venezuela S.A. (PDVSA) manipulated Petroritupano's finances and failed to pay the share of dividends to the claimant.	<ul style="list-style-type: none"> Whether the respondent violated the claimant's legitimate expectations and the obligation to act in good faith under FET through acts and omissions of its state organs (→NO; except for one, the acts of the state-owned or mixed companies at issue cannot be attributed to the respondent; the acts have not been carried out in the exercise of governmental authority under Venezuelan law; however, the Energy Minister's refusal to give consent to the transfer of the claimant's shares in Petroritupano to a qualified third party are attributable to the respondent and are analysed under the indirect expropriation claim) Whether the non-payment of dividends to the claimant for the fiscal years 2008 and 2009 breached FET (→NO; there is no evidence in the record that the respondent instructed or directed the relevant companies not to pay dividends to the claimant; however, for the same fiscal years, the respondent instructed the payment of dividends to another foreign investor participating in Petroritupano; this constituted a discriminatory measure in breach of the non-impairment obligation)

Source: UNCTAD.

Four decisions related to Spain's and Italy's reforms in the renewable energy sector (table 8).

ISDS tribunals' findings:

- In two cases, the tribunals or tribunal majorities found no breaches of legitimate expectations.
- In another two cases, some challenged measures were found to breach legitimate expectations.

Table 8. FET: legitimate expectations and regulatory stability (renewable energy cases)		
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Eurus Energy v. Spain <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Decision on Jurisdiction and Liability, 17 March 2021 • Decision finding IIA breaches • Hoffmann, A. (President); Garibaldi, O. M. (<i>Partial Dissent</i>); Giardina, A. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> • Whether the claimant had legitimate expectations to the remuneration of Royal Decree 661/2007 (→NO – BY MAJORITY; most of the claimant's plants were commissioned between March 1997 and May 2006, under the regulatory regime existing before 2007) • Whether the challenged measures breached the claimant's legitimate expectations to a reasonable return (→NO – BY MAJORITY; after the enactment of the measures, the total project internal rate of return calculated by the claimant's and respondent's experts was well above the target of the Spanish regulator) • Whether the claw-back feature of the challenged measures breached the principle of stability under ECT Article 10(1) (→YES)
FREIF Eurowind v. Spain <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Final Award, 8 March 2021 • Decision dismissing claims • Jones, D. (President); Hobér, K.; Clay, T. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> • Whether the respondent breached the claimant's legitimate expectation of specific incentive rates (→NO; the claimant's alleged expectation was not legitimate based on its level of due diligence at the time of making the investment in 2011; under the new regulatory regime introduced between 2012 and 2014, the claimant "may have lost the opportunity to earn higher profits, but it did not lose the expectation of a reasonable return")
Infracapital v. Spain <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021 • Decision finding IIA breaches • Siqueiros, E. (President); Cameron, P. D. (<i>Partial Dissenting Opinion</i>); González García, L. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> • Whether the respondent's economic regime of Royal Decree 1578/2008 gave rise to the claimants' legitimate expectations to receive a fixed tariff for 25 years (→NO – BY MAJORITY) • Whether the respondent's legal framework under the 1997 Electricity Law contained a guarantee of receiving a reasonable rate of return on the claimants' investment during the lifetime of the installations (→YES) • Whether the respondent frustrated the claimants' legitimate expectations of a reasonable rate of return, constituting a breach of FET (→YES)
Silver Ridge v. Italy <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Award, 26 February 2021 • Decision dismissing claims • Simma, B. (President); Johnson, O. T. (<i>Dissenting Opinion</i>); Cremades, B. M. 	A series of governmental decrees to cut tariff incentives for some solar power projects.	<ul style="list-style-type: none"> • Whether the respondent frustrated the claimant's legitimate expectations by (1) adopting the Spalma-incentivi Decree or (2) through the reduction in feed-in tariffs for the claimant's Frosinone plants under the Fifth Energy Account (→NO – BY MAJORITY; the changes were reasonable, foreseeable and proportionate and did not constitute a fundamental or radical alteration of the applicable legal framework to the detriment of the investor)

Source: UNCTAD.

Arbitrary, discriminatory, disproportionate or non-transparent State conduct

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

ISDS tribunals' findings:

- In five cases, the tribunals unanimously dismissed claims related to these elements.
- In four cases, tribunals or tribunal majorities found breaches of these elements.

Moreover, in *Çap and Sehil v. Turkmenistan*, the claimants alleged a breach of FET relying on a reference to “fair and equitable treatment” in the preamble of the invoked BIT, in the absence of an FET provision. The tribunal determined that the preamble of the BIT cannot give rise to an FET obligation.

Table 9. FET: arbitrary, discriminatory, disproportionate or non-transparent State conduct		
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Air Canada v. Venezuela <ul style="list-style-type: none"> • Canada–Venezuela, Bolivarian Republic of BIT (1996) • Award, 13 September 2021 • Decision finding IIA breaches • Tercier, P. (President); Poncet, C.; Villanúa Gómez, D. 	The Government's alleged failure to approve the claimant's requests to convert its Bolivar-denominated returns into U.S. dollars for repatriation.	<ul style="list-style-type: none"> • Whether the respondent failed to act transparently in relation to the claimant's investment (→YES; the claimant had the right to be informed of the status of its foreign currency acquisition requests and the reasons for the government commission's decisions) • Whether the respondent discriminated against the claimant and treated it inconsistently or arbitrarily compared to other international airlines with similar foreign currency acquisition requests (→YES)
Eurus Energy v. Spain <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Decision on Jurisdiction and Liability, 17 March 2021 • Decision finding IIA breaches • Hoffmann, A. (President); Garibaldi, O. M. (Partial Dissent); Giardina, A. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> • Whether the challenged measures were unreasonable or discriminatory, in breach of the ECT's FET standard (→NO; no separate finding of unreasonableness or discrimination can be made except for the retroactive aspect of the claw-back feature, which is found to be in breach of the stability principles under FET)
Festorino and others v. Poland <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Award, 30 June 2021 • Decision dismissing claims • Cremades, B. M. (President); Hobér, K.; Douglas, Z. 	Government authorities' alleged arbitrary and discriminatory conduct in administrative proceedings to grant licenses for the claimants' gas exploration and mining projects, including unjustified delays that resulted in the bankruptcy and shutdown of the claimants' Blue Gas subsidiaries.	<ul style="list-style-type: none"> • Whether Government authorities caused delays in the administrative proceedings for the granting of licenses which was contrary to the FET obligation of stable, favourable and transparent conditions (→NO; the respondent's conduct did not reach the threshold of inordinate delay that would justify a finding of FET breach; the tribunal cannot draw a causal connection between the respondent's conduct and the project's failure; the bankruptcy of the claimants' subsidiary Blue Gas Unikow is likely to have been unrelated to the administrative procedures; the project could not generate revenue; the claimants' decision to put Blue Gas Unikow into bankruptcy effectively ended the other projects)
FREIF Eurowind v. Spain <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Final Award, 8 March 2021 • Decision dismissing claims • Jones, D. (President); Hobér, K.; Clay, T. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> • Whether the respondent breached FET by treating the claimant's investments in an untransparent and inconsistent manner that lacked good faith and procedural fairness (→NO)

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

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Infinito Gold v. Costa Rica <ul style="list-style-type: none"> • Canada–Costa Rica BIT (1998) • Award, 3 June 2021 • Decision finding IIA breaches • Kaufmann-Kohler, G. (President); Hanotiau, B.; Stern, B. (<i>Separate Opinion</i>) 	The Government's revocation of claimant's concession for a gold mining project at Crucitas de Cutris, in northern Costa Rica, through alleged court and executive measures without payment of adequate compensation.	<ul style="list-style-type: none"> • Whether the combined effect of four challenged measures related to the loss of the claimant's 2008 exploitation concession constituted arbitrary, inconsistent and unpredictable treatment (→NO) • Whether the respondent was in breach of FET when it prevented the claimant from applying for a new concession after the 2011 legislative mining ban (→YES – BY MAJORITY; the application of the 2011 legislative mining ban to the Crucitas Project was unfair, inequitable and disproportionate to the public policy objective that was pursued)
Infracapital v. Spain <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021 • Decision finding IIA breaches • Siqueiros, E. (President); Cameron, P. D. (<i>Partial Dissenting Opinion</i>); González García, L. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> • Whether the new remuneration regime under Law 24/2013 and subsequent measures were unreasonable, disproportionate, discriminatory as the measures clawed back previous earnings by offsetting them against future earnings (→YES; the challenged measures were unreasonable and excessive as applied to the claimants; they clawed back remuneration which was legitimately obtained under the previous regime, breaching FET and the non-impairment clause)
Manolium-Processing v. Belarus <ul style="list-style-type: none"> • Treaty on the Eurasian Economic Union (2014) • Final Award, 22 June 2021 • Decision finding IIA breaches • Fernández-Armesto, J. (President); Alexandrov, S. A.; Stern, B. 	The Government's termination of a 2003 investment agreement to develop land in Minsk for the construction of a luxury hotel, upon vacating the area from a trolley bus parking facility and rebuilding it on the city outskirts. Challenged measures also include the alleged confiscation of the relocated facility by the Government to cover a USD 20 million tax debt imposed on the claimant.	<ul style="list-style-type: none"> • Whether the respondent's tax and enforcement measures violated FET (→YES; tribunal's findings under indirect expropriation confirmed that State organs committed an abuse of tax law and the measures were arbitrary; these measures are on their face incompatible with the FET standard) • Whether the Minsk Municipality's 2017 public auction awarding a third party the right to develop the Mall Land Plot violated FET (→NO; the claimant lost its right to develop the Mall Land Plot with the 2014 decision terminating the investment contract)
Naturgy (formerly Gas Natural) v. Colombia <ul style="list-style-type: none"> • Colombia–Spain BIT (2005) • Award, 12 March 2021 (Spanish) • Decision dismissing claims • Drymer, S. L. (President); Schwartz, E.; Mourre, A. 	The Government's decision to seize and liquidate Electricaribe and other alleged actions, such as the harassment of the investor and its employees.	<ul style="list-style-type: none"> • Whether the respondent's conduct was discriminatory, arbitrary or disproportionate (→NO)
Ríos v. Chile <ul style="list-style-type: none"> • Chile–Colombia FTA (2006) • Award, 11 January 2021 (Spanish) • Decision dismissing claims • Kaufmann-Kohler, G. (President); Garibaldi, O. M. (<i>Partial Dissent</i>); Stern, B. 	The Government's measures and conduct in relation to Transantiago, allegedly creating unfavourable operating conditions for the claimants' subsidiaries and resulting in bankruptcy proceedings.	<ul style="list-style-type: none"> • Whether the respondent's conduct towards the claimants' companies, including their alleged exclusion from future bidding processes in Chile, was arbitrary and discriminatory (→NO)

Source: UNCTAD.

Denial of justice

In four decisions, tribunals addressed denial of justice claims (table 10).⁶

ISDS tribunals' findings:

- In three cases, the tribunals found no denial of justice.
- In one case, the tribunal decided that the challenged measures amounted to a denial of justice.

Table 10. FET: denial of justice		
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Agility v. Iraq <ul style="list-style-type: none"> • Iraq–Kuwait BIT (2013) • Award, 22 February 2021 • Decision dismissing claims • Bull, C. (President); Beechey, J.; Murphy, S. D. 	A regulatory agency's decision to annul the claimant's acquisition of shares in Korek Telecom and the Government's order to transfer these shares back to the original Iraqi shareholders.	<ul style="list-style-type: none"> • Whether the claimant had been prevented from accessing administrative court proceedings to challenge the regulatory agency's decision, amounting to denial of justice (→NO; the respondent's law offered an avenue for judicial recourse) • Whether the respondent's administrative courts misapplied domestic law, amounting to a denial of justice (→NO; the high threshold for a denial of justice claim was not met)
Infinito Gold v. Costa Rica <ul style="list-style-type: none"> • Canada–Costa Rica BIT (1998) • Award, 3 June 2021 • Decision finding IIA breaches • Kaufmann-Kohler, G. (President); Hanotiau, B.; Stern, B. (<i>Separate Opinion</i>) 	The Government's revocation of claimant's concession for a gold mining project at Crucitas de Cutris, in northern Costa Rica, through alleged court and executive measures without payment of adequate compensation.	<ul style="list-style-type: none"> • Whether the 2011 decision of the Administrative Chamber failed to comply with previous rulings of the Constitutional Chamber, amounting to a procedural denial of justice (→NO; the 2011 decision was not inconsistent with previous rulings) • Whether there is a lack of remedy within the host State's judicial system which amounts to a procedural denial of justice (→NO; there is a mechanism to resolve conflicts of competence between the Constitutional Chamber and administrative courts; the limitations to the conflict resolution mechanism does not amount to a denial of justice) • Whether the respondent committed a substantive denial of justice (→NO)
Lion v. Mexico <ul style="list-style-type: none"> • NAFTA (1992) • Award, 20 September 2021 • Decision finding IIA breaches • Fernández-Armesto, J. (President); Cairns, D. J. A.; Boisson de Chazournes, L. 	The Mexican authorities' cancellation of promissory notes held by the claimant and of related mortgages which designated the claimant as the beneficiary.	<ul style="list-style-type: none"> • Whether the claimant was denied justice by Mexico's judiciary (→YES; the claimant was never given the opportunity to defend itself in the judicial proceeding that its debtors had brought to request the cancellation of mortgages held by the claimant as a security for loans it had granted; the claimant was denied the right to appeal the cancellation judgement; it was denied the right to allege in the Amparo proceeding that the forged settlement agreement had indeed been forged and to present evidence to prove this claim; the claimant had exhausted the reasonably available and effective remedies; it was excused from continuing the Amparo proceeding in light of its obvious futility)

⁶ The tribunal in *Big Sky Energy v. Kazakhstan* also addressed denial of justice claims in a 2021 award; the award was not publicly available at the time of research.

Table 10. FET: denial of justice

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Manolium-Processing v. Belarus <ul style="list-style-type: none"> • Treaty on the Eurasian Economic Union (2014) • Final Award, 22 June 2021 • Decision finding IIA breaches • Fernández-Armesto, J. (President); Alexandrov, S. A.; Stern, B. 	The Government's termination of a 2003 investment agreement to develop land in Minsk for the construction of a luxury hotel, upon vacating the area from a trolley bus parking facility and rebuilding it on the city outskirts. Challenged measures also include the alleged confiscation of the relocated facility by the Government to cover a USD 20 million tax debt imposed on the claimant.	<ul style="list-style-type: none"> • Whether a 2015 cassation decision by the Supreme Court confirming the respondent's 2014 termination of the investment contract with the claimant constituted a denial of justice (→NO) • Whether the Minsk Municipality's 2017 public auction awarding the right to develop the Mall Land Plot to a third party violated FET (→NO; the claimant lost its right to develop the Mall Land Plot with the 2014 decision terminating the investment contract)

Source: UNCTAD.

d. Full protection and security

In four decisions, tribunals addressed claims under the full protection and security (FPS) provisions of the applicable IIAs (table 11).⁷

ISDS tribunals' findings:

- In three cases, the tribunals dismissed the FPS claims.
- In one case, the tribunal did not decide on the FPS claim as it had already established a breach of the indirect expropriation provision.

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 clarifying 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
Eurus Energy v. Spain <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Decision on Jurisdiction and Liability, 17 March 2021 • Decision finding IIA breaches • Hoffmann, A. (President); Garibaldi, O. M. (Partial Dissent); Giardina, A. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> • Whether the challenged measures were in breach of constant protection and security as contained in ECT Article 10(1) third sentence (→NO; no evidence of any physical harm or deterioration to the claimant's investment)
Infinito Gold v. Costa Rica <ul style="list-style-type: none"> • Canada–Costa Rica BIT (1998) • Award, 3 June 2021 • Decision finding IIA breaches • Kaufmann-Kohler, G. (President); Hanotiau, B.; Stern, B. (Separate Opinion) 	The Government's revocation of claimant's concession for a gold mining project at Crucitas de Cutris, in northern Costa Rica, through alleged court and executive measures without payment of adequate compensation.	<ul style="list-style-type: none"> • Whether the respondent breached the FPS standard by failing to provide legal security to the claimant's investments (→NO; the BIT's FPS standard only protects against physical harm; the claimant has not pointed to any physical harm)

⁷ The tribunal in *Big Sky Energy v. Kazakhstan* also addressed FPS claims in a 2021 award; the award was not publicly available at the time of research.

Table 11. Full protection and security		
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Naturgy (formerly Gas Natural) v. Colombia <ul style="list-style-type: none"> Colombia–Spain BIT (2005) Award, 12 March 2021 (Spanish) Decision dismissing claims Drymer, S. L. (President); Schwartz, E.; Mourre, A. 	The Government's decision to seize and liquidate Electricaribe and other alleged actions, such as the harassment of the investor and its employees.	<ul style="list-style-type: none"> Whether the respondent violated FPS in relation to the claimants' investment in Electricaribe (→NO)
Olympic Entertainment v. Ukraine <ul style="list-style-type: none"> Estonia–Ukraine BIT (1995) Award, 15 April 2021 Decision finding IIA breaches Kaplan, N. (President); Pyles, M. C.; Thomas, J. C. 	The Government's ban on gambling in 2009, which revoked operators' licenses for gambling activities and resulted in the bankruptcy of the claimant's local subsidiaries.	<ul style="list-style-type: none"> Whether the respondent breached FPS (→The tribunal does not need to examine the FPS claim as it already found a breach of indirect expropriation)

Source: UNCTAD.

e. Umbrella clause

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

ISDS tribunals' findings:

- The tribunals found no breach of the umbrella clause in all six cases.

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
Festorino and others v. Poland <ul style="list-style-type: none"> Energy Charter Treaty (1994) Award, 30 June 2021 Decision dismissing claims Cremades, B. M. (President); Hobér, K.; Douglas, Z. 	Government authorities' alleged arbitrary and discriminatory conduct in administrative proceedings to grant licenses for the claimants' gas exploration and mining projects, including unjustified delays that resulted in the bankruptcy and shutdown of the claimants' Blue Gas subsidiaries.	<ul style="list-style-type: none"> Whether Government authorities caused delays in the administrative proceedings for the granting of licenses in breach of the umbrella clause (→NO; something more than administrative inefficiencies is required to find such a violation; the tribunal acknowledges a level of failure on the part of the respondent to act in an efficient manner without finding a violation of good faith actionable under the umbrella clause; the claimants have failed to establish that a general duty of good faith under Polish law can be equated with an obligation under the umbrella clause)
FREIF Eurowind v. Spain <ul style="list-style-type: none"> Energy Charter Treaty (1994) Final Award, 8 March 2021 Decision dismissing claims Jones, D. (President); Hobér, K.; Clay, T. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> Whether the respondent breached the ECT's umbrella clause by contravening the obligations under the Royal Decree 1614/2010 (→NO; the enactment of the 2010 Royal Decree was not the manifestation of an agreement entered into with the claimant or its investments)

Table 12. Umbrella clause		
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Infinito Gold v. Costa Rica <ul style="list-style-type: none"> • Canada–Costa Rica BIT (1998) • Award, 3 June 2021 • Decision finding IIA breaches • Kaufmann-Kohler, G. (President); Hanotiau, B.; Stern, B. (<i>Separate Opinion</i>) 	The Government's revocation of claimant's concession for a gold mining project at Crucitas de Cutris, in northern Costa Rica, through alleged court and executive measures without payment of adequate compensation.	<ul style="list-style-type: none"> • Whether the respondent breached the umbrella clauses if it were assumed that the BIT's MFN clause allowed its importation from other treaties (→NO; for an obligation to be protected under the umbrella clause, it must be valid under domestic law; both the 2002 and the 2008 Concessions were granted in violation of Costa Rican law)
Infracapital v. Spain <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021 • Decision finding IIA breaches • Siqueiros, E. (President); Cameron, P. D. (<i>Partial Dissenting Opinion</i>); González García, L. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> • Whether the respondent breached the umbrella clause through changes to the remuneration regime, contrary to the specific commitments under Royal Decrees 1578/2008 and 661/2007 (→NO; the legislative or administrative undertakings did not create an obligation the investor and Spain "entered into"; the claimants did not show the existence of a consensual or bilateral obligation)
Silver Ridge v. Italy <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Award, 26 February 2021 • Decision dismissing claims • Simma, B. (President); Johnson, O. T. (<i>Dissenting Opinion</i>); Cremades, B. M. 	A series of governmental decrees to cut tariff incentives for some solar power projects.	<ul style="list-style-type: none"> • Whether the respondent breached the umbrella clause with the adoption of the Spalma-incentivi Decree (→NO; the "GSE conventions" – tariff recognition agreements entered into with Italy's Management of Electricity Services Company and the respective energy producers – relied upon by the claimants do not fall within the ambit of the ECT's umbrella clause as obligations "entered into" with the claimant's investment; there is no added value for the claimant in relying on the ECT's umbrella clause with regard to the pertinent legislative and regulatory acts, and thus no need for the tribunal to further delve into the question)
Venezuela US v. Venezuela <ul style="list-style-type: none"> • Barbados–Venezuela, Bolivarian Republic of BIT (1994) • Partial Award (Jurisdiction and Liability), 5 February 2021 • Decision finding IIA breaches • Tomka, P. (President); Fortier, L. Y.; Kohen, M. G. (<i>Declaration</i>) 	The Government's refusal to grant the claimant's request to sell its stake in Petroritupano to a third party as well as other alleged wrongful conduct related to Petroritupano, a mixed company controlled by state-owned Corporación Venezolana de Petróleo (CVP). According to the claimant, CVP and Petróleos de Venezuela S.A. (PDVSA) manipulated Petroritupano's finances and failed to pay the share of dividends to the claimant.	<ul style="list-style-type: none"> • Whether the respondent's conduct breached the umbrella clause, with regard to a conversion contract (→NO; the respondent had not entered into any contractual obligation with regard to the claimant's investment; the conversion contract was concluded by the claimant with other parties; the acts and omissions of these parties were not attributable to the respondent)

Source: UNCTAD.

f. Indirect expropriation

In fourteen decisions, tribunals determined whether certain measures challenged by the claimants amounted to an indirect expropriation (table 13).⁸

⁸ The tribunals in *Big Sky Energy v. Kazakhstan* and *Yukos Capital v. Russia* addressed indirect and judicial expropriation claims in the 2021 decisions; the decisions were not publicly available at the time of research.

ISDS tribunals' findings:

- In ten cases, tribunals or tribunal majorities dismissed the indirect expropriation claims.
- In four cases, tribunals or tribunal majorities considered that the respondent States had indirectly expropriated the claimants' investments.

Most old-generation IIAs include protection in case of 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
América Móvil v. Colombia <ul style="list-style-type: none"> • Colombia–Mexico–Venezuela FTA (1994) • Award, 7 May 2021 (Spanish) • Decision dismissing claims • Radicati di Brozolo, L. (President); Martínez de Hoz, J. A. (Dissenting Opinion); Oreamuno Blanco, R. 	Measures that allegedly prevented the claimant's Colombian subsidiary Comcel from freely using or selling its wireless telecommunications assets after the termination of its concession contracts. The challenged measures include, among others, the Colombian Constitutional Court's decision of 2013 ordering the reversion of certain telecommunication assets to state control on a concession's expiry or termination and the subsequent refusal of the Government to recognize Comcel's property rights over those assets following the contract termination.	<ul style="list-style-type: none"> • Whether the respondent's reversion of certain assets to state control amounted to indirect expropriation (→NO – BY MAJORITY; the claimant had no ownership rights over infrastructure assets following the respondent's termination of the concession contract; no rights existed under domestic law that were capable of being expropriated) • Whether the 2013 decision of the Colombian Constitutional Court amounted to judicial expropriation (→NO – BY MAJORITY; it cannot be said that the local court decisions were arbitrary or in violation of due process; the claimant failed to prove the existence of property rights under domestic law)
Air Canada v. Venezuela <ul style="list-style-type: none"> • Canada–Venezuela, Bolivarian Republic of BIT (1996) • Award, 13 September 2021 • Decision finding IIA breaches • Tercier, P. (President); Poncet, C.; Villanúa Gómez, D. 	The Government's alleged failure to approve the claimant's requests to convert its Bolivar-denominated returns into U.S. dollars for repatriation.	<ul style="list-style-type: none"> • Whether the respondent directly or indirectly expropriated the claimant's legal right to a free transfer of funds under the BIT (→NO; the free transfer right is not a property right that in itself is subject to direct expropriation; no evidence of indirect expropriation; however, the respondent is liable for breach of this right under both the free transfer of funds and FET provisions)
Bank Melli and Bank Saderat v. Bahrain <ul style="list-style-type: none"> • Bahrain–Iran, Islamic Republic of BIT (2002) • Award, 9 November 2021 • Decision finding IIA breaches • Kaufmann-Kohler, G. (President); Hanotiau, B.; Collins, L. 	The decision of Bahrain's central bank to close Future Bank in 2016, after placing it under administration in 2015.	<ul style="list-style-type: none"> • Whether the respondent's measures constituted an indirect expropriation of the claimants' shareholding interests in Future Bank (→YES; the administration and liquidation of Future Bank were not <i>bona fide</i> regulatory measures; the deprivation has become permanent)
Çap and Sehil v. Turkmenistan <ul style="list-style-type: none"> • Türkiye–Turkmenistan BIT (1992) • Award, 4 May 2021 • Decision dismissing claims • Lew, J. D. M. (President); Hanotiau, B.; Boisson de Chazournes, L. 	A series of governmental measures that allegedly led to the unlawful expropriation of claimants' construction projects in Turkmenistan, including defaulted payments and the termination of some of the contracts at issue before domestic courts.	<ul style="list-style-type: none"> • Whether the respondent's alleged acts and omissions amounted to indirect expropriation (→NO; no proof that the respondent directed the alleged acts; the presented evidence is insufficient to prove that state-owned entities or state organs, as the contractual counterparties, exercised sovereign power related to the contracts with the claimants; the alleged acts are pure contractual issues and there is no evidence that they resulted in deprivation of value or control of the investment)

Table 13. Indirect expropriation

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Casinos Austria v. Argentina <ul style="list-style-type: none"> Argentina–Austria BIT (1992) Award, 5 November 2021 Decision finding IIA breaches van Houtte, H. (President); Schill, S.; Torres Bernárdez, S. (<i>Dissenting Opinion</i>) 	The revocation by an Argentinean province of a licence to operate games of chance and lottery held by claimants' local subsidiary under alleged concerns of money laundering.	<ul style="list-style-type: none"> Whether the revocation of the licence amounted to indirect expropriation (→YES – BY MAJORITY; due to arbitrariness and the lack of proportionality, the revocation carried out by the Province's regulatory authority for the gaming sector was not a regular exercise of regulatory and supervisory powers; it was also unlawful)
Eco Oro v. Colombia <ul style="list-style-type: none"> Canada–Colombia FTA (2008) Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021 Decision finding IIA breaches Blanch, J. (President); Grigera Naón, H. A. (<i>Partial Dissenting Opinion</i>); Sands, P. (<i>Partial Dissent</i>) 	The National Mining Agency's decision (2016) that deprived the claimant of its mining rights in respect of 50% of the concession area (a gold and silver deposit) held by it since the mid-1990s. The relevant area was found to fall within the Santurbán Páramo, an environmental conservation zone. The Mining Agency's actions followed the decision of Colombia's Constitutional Court that broadened restrictions on mining in high-mountain ecosystems known as páramos (sources of the country's freshwater supply), striking down legal provisions that had stabilized the rights of mining projects in those areas negotiated before 2010.	<ul style="list-style-type: none"> Whether the respondent indirectly expropriated the claimant's investment (→NO – BY MAJORITY; the challenged measures were a legitimate exercise of the respondent's police powers; the measures were non-discriminatory and designed and applied to protect a legitimate public welfare objective, namely the protection of the environment; pursuant to the FTA's annex on indirect expropriation, under international law, no compensation is payable)
Eurus Energy v. Spain <ul style="list-style-type: none"> Energy Charter Treaty (1994) Decision on Jurisdiction and Liability, 17 March 2021 Decision finding IIA breaches Hoffmann, A. (President); Garibaldi, O. M. (<i>Partial Dissent</i>); Giardina, A. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> Whether the respondent indirectly expropriated the claimant's public law right to the feed-in tariffs (→NO; the right claimed to have been expropriated was not an acquired right susceptible of expropriation; if the expropriation claim had been made in respect of the claimant's 100% indirect interest in the project companies, that claim would have also failed)
Manolium-Processing v. Belarus <ul style="list-style-type: none"> Treaty on the Eurasian Economic Union (2014) Final Award, 22 June 2021 Decision finding IIA breaches Fernández-Armesto, J. (President); Alexandrov, S. A.; Stern, B. 	The Government's termination of a 2003 investment agreement to develop land in Minsk for the construction of a luxury hotel, upon vacating the area from a trolley bus parking facility and rebuilding it on the city outskirts. Challenged measures also include the alleged confiscation of the relocated facility by the Government to cover a USD 20 million tax debt imposed on the claimant.	<ul style="list-style-type: none"> Whether the respondent's imposition of allegedly illegitimate tax liabilities and the seizure of facilities resulted in indirect expropriation (→YES; the taxation and enforcement measures adopted by the respondent caused consequences equivalent to those of an expropriation in breach of the treaty's protocol; the value of the claimant's shareholding was reduced to nil; State organs committed an abuse of tax law; the measures were arbitrary) Whether the 2015 cassation decision by the Supreme Court, confirming the respondent's decision to terminate an investment contract with the claimant and upholding an appellate court decision, constituted an indirect expropriation (→NO; since the tribunal already found the 2015 decision not to constitute a denial of justice, it reasoned – by majority – that this also precludes the possibility that the 2015 decision gives rise to a judicial expropriation)

Table 13. Indirect expropriation

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Naturgy (formerly Gas Natural) v. Colombia <ul style="list-style-type: none"> Colombia–Spain BIT (2005) Award, 12 March 2021 (Spanish) Decision dismissing claims Drymer, S. L. (President); Schwartz, E.; Mourre, A. 	The Government's decision to seize and liquidate Electricaribe and other alleged actions, such as the harassment of the investor and its employees.	<ul style="list-style-type: none"> Whether the administration and forced liquidation of Electricaribe amounted to expropriation (→NO; the forced administration of Electricaribe was an act of good faith and permissible within the regulatory powers of Colombia; no compensation is due)
Olympic Entertainment v. Ukraine <ul style="list-style-type: none"> Estonia–Ukraine BIT (1995) Award, 15 April 2021 Decision finding IIA breaches Kaplan, N. (President); Pryles, M. C.; Thomas, J. C. 	The Government's ban on gambling in 2009, which revoked operators' licenses for gambling activities and resulted in the bankruptcy of the claimant's local subsidiaries.	<ul style="list-style-type: none"> Whether the gambling ban law amounted to an indirect expropriation of the claimant's investment (→YES; Ukraine was entitled to ban gambling; however, Ukraine was not entitled to indirectly expropriate the claimant's investments overnight and without any compensation)
Pawlowski and Projekt Sever v. Czechia <ul style="list-style-type: none"> Czechia–Switzerland BIT (1990) Award, 1 November 2021 Decision finding IIA breaches Fernández-Armesto, J. (President); Beechey, J.; Lowe, V. 	The Government's alleged frustration of the claimants' real estate development project through legal proceedings related to a land use plan which had permitted construction on the claimants' land.	<ul style="list-style-type: none"> Whether the City of Prague's 2015 termination of a zoning plan change, converting the claimants' agricultural land to residential use zone, amounted to an indirect expropriation (→NO; the claimants had purchased agricultural land; they never had an acquired right that the project area be considered as residential; the re-zoning plan for residential use initially approved in 2010 did not become final and definitive)
Ríos v. Chile <ul style="list-style-type: none"> Chile–Colombia FTA (2006) Award, 11 January 2021 (Spanish) Decision dismissing claims Kaufmann-Kohler, G. (President); Garibaldi, O. M. (Partial Dissent); Stern, B. 	The Government's measures and conduct in relation to Transantiago (the public transportation system in Santiago de Chile), allegedly creating unfavourable operating conditions for the claimants' subsidiaries and resulting in bankruptcy proceedings.	<ul style="list-style-type: none"> Whether the respondent's conduct amounted to creeping expropriation (→NO; the respondent's failure to fully implement a master plan for infrastructure did not interfere with the claimants' "unequivocal and reasonable" expectations; the respondent's failure to support the claimants' efforts to combat transportation fare evasion and to protect against acts of vandalism did not result in the substantial deprivation of the claimants' investment)
Silver Ridge v. Italy <ul style="list-style-type: none"> Energy Charter Treaty (1994) Award, 26 February 2021 Decision dismissing claims Simma, B. (President); Johnson, O. T. (Dissenting Opinion); Cremades, B. M. 	A series of governmental decrees to cut tariff incentives for some solar power projects.	<ul style="list-style-type: none"> Whether the respondent's measures indirectly expropriated the claimant's investment in the Frosinone plants (→NO; at adoption and entry into force of the reduction of feed-in tariffs in July 2012 the investment essentially consisted of the completed PV plants; the claimants did not have an acquired right to an expected income under the previous feed-in tariff regime)
Venezuela US v. Venezuela <ul style="list-style-type: none"> Barbados–Venezuela, Bolivarian Republic of BIT (1994) Partial Award (Jurisdiction and Liability), 5 February 2021 Decision finding IIA breaches Tomka, P. (President); Fortier, L. Y.; Kohen, M. G. (Declaration) 	The Government's refusal to grant the claimant's request to sell its stake in Petroritupano to a third party as well as other alleged wrongful conduct related to Petroritupano, a mixed company controlled by state-owned Corporación Venezolana de Petróleo (CVP). According to the claimant, CVP and Petróleos de Venezuela S.A. (PDVSA) manipulated Petroritupano's finances and failed to pay the share of dividends to the claimant.	<ul style="list-style-type: none"> Whether the respondent indirectly expropriated the claimant's investment through a discriminatory action of not paying the claimant dividends from Petroritupano for two fiscal years (→NO; the claimant remained the owner of its shares in Petroritupano; Petroritupano's acts are not attributable to the respondent) Whether the respondent indirectly expropriated the claimant's investment by preventing the sale of its interest in Petroritupano to a qualified third-party buyer (→NO; written consent by the energy minister was required for such transfer under the conversion contract to which the claimant had freely agreed; the minister had no obligation to grant the requested consent, nor to provide any justification for his decision)

Source: UNCTAD.

3. Public policy exceptions and other exceptions

In two decisions in 2021, respondent States invoked exceptions for environmental measures (table 14).

ISDS tribunals' findings:

- In the two cases, the tribunals considering the relevant provisions assumed jurisdiction over the claims and found the respondent States liable for breaches (unanimously or by majority).

Public policy exceptions are mostly absent in old-generation IIAs. They are more prevalent in recently concluded treaties (UNCTAD, 2018; UNCTAD, 2020c; UNCTAD, 2023). UNCTAD's IIA Reform Accelerator suggests including exceptions for domestic regulatory measures in pursuit of policy objectives or for prudential measures (UNCTAD, 2020a).

Recent ISDS cases addressing public policy exceptions raise doubts whether such clauses are effective in safeguarding the right to regulate. ISDS tribunals have applied general exception clauses in narrow and unexpected ways (e.g. *Eco Oro v. Colombia*, *Bear Creek Mining v. Peru*). Treaty partners should consider providing clarifications and additional guidance for the interpretation of public policy exceptions by arbitral tribunals (e.g. in treaty texts, amendments, protocols or declarations). Together with other needed reforms, this could help increase the relevance of public policy exceptions in ISDS proceedings, provide a stronger legal basis for respondent States to defend public policies and influence case outcomes.

Table 14. Public policy exceptions		
Case details	Disputed measure(s)	Selected issues and tribunals' findings
<p>Eco Oro v. Colombia</p> <ul style="list-style-type: none"> • Canada–Colombia FTA (2008) • Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021 • Decision finding IIA breaches • Blanch, J. (President); Grigera Naón, H. A. (<i>Partial Dissenting Opinion</i>); Sands, P. (<i>Partial Dissent</i>) 	<p>The National Mining Agency's decision (2016) that deprived the claimant of its mining rights in respect of 50% of the concession area (a gold and silver deposit) held by it since the mid-1990s. The relevant area was found to fall within the Santurbán Páramo, an environmental conservation zone. The Mining Agency's actions followed the decision of Colombia's Constitutional Court that broadened restrictions on mining in high-mountain ecosystems known as páramos (sources of the country's freshwater supply), striking down legal provisions that had stabilized the rights of mining projects in those areas negotiated before 2010.</p>	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over the claims under Chapter Eight of the FTA considering the general exceptions in Article 2201(3) which cover environmental measures necessary to protect human, animal or plant life and health (→YES; the claims concern measures that fall within the FTA's environmental carve-out; however, the tribunal does not accept the respondent's submissions that this provision can operate as a bar to the existence or exercise of jurisdiction) • Whether the claimant is entitled to the payment of compensation for an FET breach considering that the respondent's actions pursued a legitimate objective and were covered by the general exception clause in Article 2201(3) of the FTA (→YES – BY MAJORITY; the tribunal's majority found a breach of FET giving rise to compensation; while a State may adopt or enforce a measure pursuant to the stated objectives in Article 2201(3) without finding itself in breach of the FTA, this does not prevent an investor from claiming under the FTA's Chapter Eight that such a measure entitles it to the payment of compensation; Article 2201(3) does not exclude liability to pay compensation for the FET breach)
<p>Infinito Gold v. Costa Rica</p> <ul style="list-style-type: none"> • Canada–Costa Rica BIT (1998) • Award, 3 June 2021 • Decision finding IIA breaches • Kaufmann-Kohler, G. (President); Hanotiau, B.; Stern, B. (<i>Separate Opinion</i>) 	<p>The Government's revocation of claimant's concession for a gold mining project at Crucitas de Cutris, in northern Costa Rica, through alleged court and executive measures without payment of adequate compensation.</p>	<ul style="list-style-type: none"> • Whether the respondent is liable for the FET breach considering a provision in Section III(1) of the BIT's Annex I, which the respondent invoked as an "environmental exception" (→YES; the provision is not a carve-out from the BIT's protections, but rather a reaffirmation of the State's right to regulate;^a it cannot exempt the respondent from liability for breaches of the substantive protections, including FET; however, the claimant has not established that this breach caused a quantifiable harm)

Source: UNCTAD.

^a The respondent did not invoke the general exception clause in section III(2) of the BIT's Annex I and the tribunal did not discuss it.

4. ISDS scope, conditions for access and procedural issues

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

In eleven decisions rendered in 2021, ISDS tribunals examined questions surrounding consent to ISDS.

Three decisions dealt with objections to ISDS consent related to issues other than intra-European Union matters (table 15). Eight decisions concerned intra-EU objections and are addressed in table 16.

ISDS tribunals' findings:

- In two cases, the tribunals decided that the claims were fully or in part covered by the respondents' consent to ISDS.
- In one case, the tribunal declined jurisdiction over the claims due to the respondent's lack of consent.

Table 15. Consent to ISDS		
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Kimberly-Clark v. Venezuela <ul style="list-style-type: none"> • BLEU (Belgium-Luxembourg Economic Union)–Venezuela, Bolivarian Republic of BIT (1998); Spain–Venezuela, Bolivarian Republic of BIT (1995); Netherlands–Venezuela, Bolivarian Republic of BIT (1991) • Award, 5 November 2021 • Decision rejecting jurisdiction • Kaufmann-Kohler, G. (President); Haigh, D.; Stern, B. 	The Government's seizure of the claimants' factory, following the claimants' decision to suspend business operations in Venezuela.	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over the claims brought under the ICSID Additional Facility (AF) Rules considering the respondent's objection that it has not consented to arbitrate such claims under these rules (→NO; the ICSID Convention entered into force for Venezuela in 1995 and it was effectively denounced in 2012; under the BIT with the Netherlands, the offer to arbitrate under the ICSID AF Rules was only valid until Venezuela (first) acceded to the ICSID Convention in 1995; the BIT with Spain contained an ICSID AF option, which also became moot with Venezuela's accession to the ICSID Convention; the BIT with Belgium did not provide for consent to arbitration under the ICSID AF Rules)
Kruck and others v. Spain <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Decision on Jurisdiction and Admissibility, 19 April 2021 • Decision upholding jurisdiction • Lowe, V. (President); Pyles, M. C.; Douglas, Z. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> • Whether the respondent's consent covers this multi-party arbitration involving the 43 "TS Claimants" and the 73 "DSG Claimants" in a single case (→YES IN PART; there are two distinct disputes and the case cannot proceed in the form in which it is presented; the respondent's unconditional consent relates to the submission of "a dispute", in the singular; it has not consented to hearing two sets of claims, brought by the "DSG Claimants" and "TS Claimants") • Whether the tribunal has jurisdiction over the "TS Claimants" (→NO; they are not part of 'the dispute' that the respondent agreed to arbitrate) • Whether the tribunal has jurisdiction over the "DSG claimants" (→YES; with a reservation concerning the status of their alleged investments)
Silver Ridge v. Italy <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Award, 26 February 2021 • Decision dismissing claims • Simma, B. (President); Johnson, O. T. (<i>Dissenting Opinion</i>); Cremades, B. M. 	A series of governmental decrees to cut tariff incentives for some solar power projects.	<ul style="list-style-type: none"> • Whether the claims related to a regulatory act, the GSE conventions, satisfied the ECT requirement for unconditional consent considering exclusive jurisdiction clauses in the GSE conventions in favour of the courts of Rome (→YES; the claimant was free to choose among the three options offered by ECT Article 26, including international arbitration) • Whether the claims related to a legislative measure, the Romani decree, met the requirement of prior request for amicable settlement (→YES; the ECT does not define in what form and in what degree of specificity the respondent should be put on notice; 3 months after the notice of dispute, the request of arbitration was registered)

Source: UNCTAD.

Eight 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 16).

ISDS tribunals' findings (intra-EU application):

- In all eight cases, the tribunals or tribunal majorities upheld jurisdiction, rejecting the respondents' objections that the ISDS clause in the respective IIA was invalid or the IIA was inapplicable.

Table 16. Objections to validity of ISDS consent in intra-EU disputes		
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Eurus Energy v. Spain <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Decision on Jurisdiction and Liability, 17 March 2021 • Decision finding IIA breaches • Hoffmann, A. (President); Garibaldi, O. M. (Partial Dissent); Giardina, A. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over the claimant, an indirect investor of Japan, considering the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; the respondent's intra-EU objection became futile with Eurus Europe's withdrawal as a claimant; there was no doubt as to the jurisdiction over Eurus Japan)
Festorino and others v. Poland <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Award, 30 June 2021 • Decision dismissing claims • Cremades, B. M. (President); Hobér, K.; Douglas, Z. 	Government authorities' alleged arbitrary and discriminatory conduct in administrative proceedings to grant licenses for the claimants' gas exploration and mining projects, including unjustified delays that resulted in the bankruptcy and shutdown of the claimants' Blue Gas subsidiaries.	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over this intra-EU dispute under the ECT (→YES)
FREIF Eurowind v. Spain <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Final Award, 8 March 2021 • Decision dismissing claims • Jones, D. (President); Hobér, K.; Clay, T. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over this intra-EU dispute under the ECT (→YES)
Fynerdale v. Czechia <ul style="list-style-type: none"> • Czechia–Netherlands BIT (1991) • Award, 29 April 2021 • Decision rejecting jurisdiction • Wolfrum, R. (President); Kühn, W. (Separate Opinion); Boisson de Chazournes, L. 	The Government's alleged failure to act on the claimant's criminal complaint regarding its business partners' fraudulent activities, which allegedly entailed the loss of the claimant's assets.	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over this intra-EU dispute under the BIT considering the respondent's objection that the arbitration agreement contained in the BIT is incompatible with European law (→YES)
Infracapital v. Spain <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021 • Decision finding IIA breaches • Siqueiros, E. (President); Cameron, P. D. (Partial Dissenting Opinion); González García, L. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over this intra-EU dispute under the ECT (→YES)
Kruck and others v. Spain <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Decision on Jurisdiction and Admissibility, 19 April 2021 • Decision upholding jurisdiction • Lowe, V. (President); Pyles, M. C.; Douglas, Z. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over this intra-EU dispute under the ECT (→YES)

Table 16. Objections to validity of ISDS consent in intra-EU disputes

Case details	Disputed measure(s)	Selected issues and tribunals' findings
PNB Banka and others (formerly Norvik Banka) v. Latvia <ul style="list-style-type: none"> Latvia–United Kingdom BIT (1994) Decision on the Intra-EU Objection, 14 May 2021 Decision upholding jurisdiction Spigelman, J. (President); Townsend, J. M.; Tomka, P. 	Sanctions imposed by the Government on the claimants' bank for its alleged failure to comply with anti-money laundering and terrorist-financing regulations.	<ul style="list-style-type: none"> Whether the tribunal has jurisdiction over this dispute considering the respondent's intra-EU objection (→YES)
Silver Ridge v. Italy <ul style="list-style-type: none"> Energy Charter Treaty (1994) Award, 26 February 2021 Decision dismissing claims Simma, B. (President); Johnson, O. T. (<i>Dissenting Opinion</i>); Cremades, B. M. 	A series of governmental decrees to cut tariff incentives for some solar power projects.	<ul style="list-style-type: none"> Whether the tribunal has jurisdiction over this intra-EU dispute under the ECT (→YES)

Source: UNCTAD.

b. Pre-arbitration requirements

In five decisions rendered in 2021, tribunals determined whether the claimants met the requirements in the applicable IIAs prior to resorting to arbitration (table 17).

ISDS tribunals' findings:

- In the four cases, the tribunals decided that the claimants had met the relevant requirements such as cooling-off periods and waivers to pursue other proceedings.
- In one case, the tribunal dismissed the respondent's preliminary objection related to the exhaustion of local remedies, finding that there was no such requirement in the invoked IIA and thus no failure by the claimants.

Table 17. ISDS: pre-arbitration requirements

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Air Canada v. Venezuela <ul style="list-style-type: none"> Canada–Venezuela, Bolivarian Republic of BIT (1996) Award, 13 September 2021 Decision finding IIA breaches Tercier, P. (President); Poncet, C.; Villanúa Gómez, D. 	The Government's alleged failure to approve the claimant's requests to convert its Bolivar-denominated returns into U.S. dollars for repatriation.	<ul style="list-style-type: none"> Whether the claimant has complied with the BIT's requirement to waive its right to initiate or continue any other proceedings (→YES; the claimant had satisfied the formal requirement of the waiver provision in its notice; the two distinct third-party dispute settlement procedures that took place after the formal waiver did not violate the material waiver requirement)
Bank Melli and Bank Saderat v. Bahrain <ul style="list-style-type: none"> Bahrain–Iran, Islamic Republic of BIT (2002) Award, 9 November 2021 Decision finding IIA breaches Kaufmann-Kohler, G. (President); Hanotiau, B.; Collins, L. 	The decision of Bahrain's central bank to close Future Bank in 2016, after placing it under administration in 2015.	<ul style="list-style-type: none"> Whether the tribunal can adjudicate the claims considering the respondent's allegation that the claimants were required to and failed to exhaust local remedies before resorting to international arbitration (→YES; the applicable BIT does not contain this requirement)

Table 17. ISDS: pre-arbitration requirements

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Eco Oro v. Colombia <ul style="list-style-type: none"> • Canada–Colombia FTA (2008) • Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021 • Decision finding IIA breaches • Blanch, J. (President); Grigera Naón, H. A. (Partial Dissenting Opinion); Sands, P. (Partial Dissent) 	The National Mining Agency's decision (2016) that deprived the claimant of its mining rights in respect of 50% of the concession area (a gold and silver deposit) held by it since the mid-1990s. The relevant area was found to fall within the Santurbán Páramo, an environmental conservation zone. The Mining Agency's actions followed the decision of Colombia's Constitutional Court that broadened restrictions on mining in high-mountain ecosystems known as páramos (sources of the country's freshwater supply), striking down legal provisions that had stabilized the rights of mining projects in those areas negotiated before 2010.	<ul style="list-style-type: none"> • Whether the claimant has complied with the conditions preceding the arbitration, including the six-month cooling-off period and the waiver requirements (→YES)
Ríos v. Chile <ul style="list-style-type: none"> • Chile–Colombia FTA (2006) • Award, 11 January 2021 (Spanish) • Decision dismissing claims • Kaufmann-Kohler, G. (President); Garibaldi, O. M. (Partial Dissent); Stern, B. 	The Government's measures and conduct in relation to Transantiago (the public transportation system in Santiago de Chile), allegedly creating unfavourable operating conditions for the claimants' subsidiaries and resulting in bankruptcy proceedings.	<ul style="list-style-type: none"> • Whether the claimants have complied with the waiver requirement considering domestic proceedings initiated by the claimants' companies (→YES; the claimants complied with the waiver; the claimants seek compensation for any damages or losses they allegedly suffered themselves as shareholders of the companies)
VEB v. Ukraine <ul style="list-style-type: none"> • Russian Federation–Ukraine BIT (1998) • Partial Award on Preliminary Objections, 31 January 2021 • Decision upholding jurisdiction • Partasides, C. (President); Patocchi, P. M.; Malintoppi, L. 	The Government's alleged confiscation of shares held by the claimant, a state-owned Russian company, in its Ukrainian subsidiary Prominvestbank and the ban of the subsidiary's business operations with the parent company.	<ul style="list-style-type: none"> • Whether the claimant has met the pre-conditions for access to arbitration, including a written notification of the dispute and the six-month cooling-off period (→YES)

Source: UNCTAD.

c. Limitation periods for bringing claims

In seven decisions rendered in 2021, arbitral tribunals examined whether they could adjudicate certain claims in light of limitation periods prescribed by the respective IIAs (table 18).

ISDS tribunals' findings:

- In six cases, the tribunals or tribunal majorities considered that all or some of the claims were brought within the relevant limitation periods and they were thus not time-barred.
- In one case, the tribunal determined that the claims were time-barred.

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
Air Canada v. Venezuela <ul style="list-style-type: none"> Canada–Venezuela, Bolivarian Republic of BIT (1996) Award, 13 September 2021 Decision finding IIA breaches Tercier, P. (President); Poncet, C.; Villanúa Gómez, D. 	The Government's alleged failure to approve the claimant's requests to convert its Bolivar-denominated returns into U.S. dollars for repatriation.	<ul style="list-style-type: none"> Whether the tribunal has jurisdiction over the claims considering the BIT's three-year limitation period (→YES; there is no sufficiently clear evidence that the claimant had first knowledge of alleged BIT breaches and resulting consequences prior to the December 2013 time-bar)
Carrizosa v. Colombia (II) <ul style="list-style-type: none"> Colombia–United States TPA (2006) Award, 19 April 2021 Decision rejecting jurisdiction Kaufmann-Kohler, G. (President); Fernández Arroyo, D. P.; Söderlund, C. 	The Government's allegedly disproportionate and discriminatory measures against Banco Granahorrar, including placing the bank under new management and its ultimate nationalization in 1998, as well as the Colombian Constitutional Court's 2014 decision that no compensation was due to the claimant.	<ul style="list-style-type: none"> Whether the tribunal has jurisdiction over the claims considering the three-year limitation period contained in the TPA (→NO; the claimant commenced the arbitration in 2018, more than three years after the relevant date in 2014) Whether, based on the MFN provision, the claimant can rely on the five-year limitation period from the Colombia–Switzerland BIT, instead of the three-year limitation period in the TPA (→NO; based on the provision of the TPA's Chapter on Financial Services under which the claim is brought, MFN is not covered by the tribunal's jurisdiction; the jurisdiction only covers claims for breaches of four specific provisions of the investment chapter of the TPA)
Eco Oro v. Colombia <ul style="list-style-type: none"> Canada–Colombia FTA (2008) Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021 Decision finding IIA breaches Blanch, J. (President); Grigera Naón, H. A. (Partial Dissenting Opinion); Sands, P. (Partial Dissent) 	The National Mining Agency's decision (2016) that deprived the claimant of its mining rights in respect of 50% of the concession area (a gold and silver deposit) held by it since the mid-1990s. The relevant area was found to fall within the Santurbán Páramo, an environmental conservation zone. The Mining Agency's actions followed the decision of Colombia's Constitutional Court that broadened restrictions on mining in high-mountain ecosystems known as páramos (sources of the country's freshwater supply), striking down legal provisions that had stabilized the rights of mining projects in those areas negotiated before 2010.	<ul style="list-style-type: none"> Whether the claimant has complied with the three-year limitation period for bringing claims (→YES; the claim concern only those measures that took place after the cut-off date in 2013; the measures that took place before the cut-off date are not relevant; even if, as alleged by the respondent, the claimant knew or ought to have known of the prior measures, the claimant could not have had actual or constructive knowledge of the events that occurred after the cut-off date; the respondent's objection that the claimant should have anticipated the measures is not sufficient)
Infinito Gold v. Costa Rica <ul style="list-style-type: none"> Canada–Costa Rica BIT (1998) Award, 3 June 2021 Decision finding IIA breaches Kaufmann-Kohler, G. (President); Hanotiau, B.; Stern, B. (Separate Opinion) 	The Government's revocation of claimant's concession for a gold mining project at Crucitas de Cutris, in northern Costa Rica, through alleged court and executive measures without payment of adequate compensation.	<ul style="list-style-type: none"> Whether the tribunal has jurisdiction over the claims considering the BIT's three-year limitation period, with a cut-off date of February 2011 (→YES – BY MAJORITY; as to the expropriation claim, the claimant acquired knowledge of the alleged breach and of the loss after the cut-off date, through the November 2011 Decision of the Administrative Chamber of the Costa Rican Supreme Court which upheld the 2010 Decision of the Contentious Administrative Tribunal; the FET, denial of justice, FPS, umbrella clause and other claims are also not time-barred)

Table 18. ISDS: limitation periods for bringing claims

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Min v. Korea <ul style="list-style-type: none"> China–Korea, Republic of BIT (2007) Decision on the Respondent's preliminary objections pursuant to ICSID Arbitration Rule 41(5), 18 June 2021 Decision upholding jurisdiction Glick, I. (President); Drymer, S. L.; McRae, D. M. 	The forced sale of the claimant's shares in a local real estate company by Woori Bank, a South Korean bank allegedly controlled by the Government.	<ul style="list-style-type: none"> Whether the tribunal can adjudicate claims related to the allegedly wrongful Woori Bank enforcement measures as a self-standing matter that occurred before the July 2017 cut-off date for the BIT's three-year limitation period (→NO; however, insofar as measures are challenged as composite acts together with other measures, they are not manifestly without legal merit, see below) Whether the tribunal can adjudicate claims related to the Korean criminal proceedings as a continuing breach that started in 2010, considering the July 2017 cut-off date (→YES; whether or not breaches and loss/damage occurred after the cut-off date is a matter to be determined on the merits) Whether the tribunal can adjudicate the claims for composite acts – the Woori Bank enforcement, the Korean criminal proceedings and the Korean civil proceedings – allegedly completed after the cut-off date (→YES; it cannot be said that the claims for composite acts are manifestly without legal merit)
Naturgy (formerly Gas Natural) v. Colombia <ul style="list-style-type: none"> Colombia–Spain BIT (2005) Award, 12 March 2021 (Spanish) Decision dismissing claims Drymer, S. L. (President); Schwartz, E.; Mourre, A. 	The Government's decision to seize and liquidate Electricaribe and other alleged actions, such as the harassment of the investor and its employees.	<ul style="list-style-type: none"> Whether the tribunal has jurisdiction over the claimants' historical claims in light of the three-year limitation period (→YES; even if the claimants had some knowledge of conduct by the respondent inconsistent with treaty obligations before the cut-off date of March 2014, the claims at issue relate to alleged breaches and resulting damages of which the claimants became aware only after March 2014; any infringement of which the claimants should have been reasonably aware prior to March 2014 would be time-barred; whether the respondent committed the alleged breaches is a substantive issue)
Ríos v. Chile <ul style="list-style-type: none"> Chile–Colombia FTA (2006) Award, 11 January 2021 (Spanish) Decision dismissing claims Kaufmann-Kohler, G. (President); Garibaldi, O. M. (Partial Dissent); Stern, B. 	The Government's measures and conduct in relation to Transantiago (the public transportation system in Santiago de Chile), allegedly creating unfavourable operating conditions for the claimants' subsidiaries and resulting in bankruptcy proceedings.	<ul style="list-style-type: none"> Whether the creeping expropriation claim is within the treaty's 39-month limitation period (→YES; the companies' financial default occurred after the cut-off date of February 2014, i.e. the claimants could not have been aware of the alleged expropriation before such date; as a composite act, the entire period between the first and last state measure forming part of the breach is covered) Whether the tribunal has jurisdiction over FET, NT and FPS claims relating to the respondent's alleged breaches prior to the February 2014 time-bar (→NO – BY MAJORITY; prior to that date, the claimants knew or should have known of such alleged violations and the fact that they caused harm) Whether the tribunal has jurisdiction over other FET, NT and FPS claims relating to alleged breaches after the cut-off date (→YES)

Source: UNCTAD.

d. Relationship with domestic court proceedings

In one decision, the tribunal examined the relationship between domestic court proceedings and ISDS (table 19).

ISDS tribunals' findings:

- The tribunal in the case assumed jurisdiction over the claims, considering that the claimants in the arbitration and the domestic court proceeding were not identical.

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 create unpredictable outcomes and incoherent tribunal decisions.

Table 19. ISDS: relationship with domestic proceedings

Case details	Disputed measure(s)	Selected issues and tribunals' findings
FREIF Eurowind v. Spain <ul style="list-style-type: none"> • Energy Charter Treaty (1994) • Final Award, 8 March 2021 • Decision dismissing claims • Jones, D. (President); Hobér, K.; Clay, T. 	A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on the revenues of power generators and a reduction in subsidies for renewable energy producers.	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over the claims considering the respondent's allegation that the claimant had submitted the same subject-matter to the Spanish Courts two years before the request for arbitration (→YES; there is no identity of the parties in the arbitration and the Spanish lawsuits; the triple identity test has not been met)

Source: UNCTAD.

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

In four decisions, tribunals 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 two cases, the tribunals dismissed jurisdiction over the challenged measures as they predated the respective IIA's entry into force.
- In another two cases, the tribunals assumed jurisdiction over all or some of the challenged measures.

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
Agility v. Iraq <ul style="list-style-type: none"> • Iraq–Kuwait BIT (2013) • Award, 22 February 2021 • Decision dismissing claims • Bull, C. (President); Beechey, J.; Murphy, S. D. 	A regulatory agency's decision to annul the claimant's acquisition of shares in Korek Telecom and the Government's order to transfer these shares back to the original Iraqi shareholders.	<ul style="list-style-type: none"> • Whether the tribunal has jurisdiction over alleged breaches through a 2019 administrative order, occurring after the BIT's entry into force (→NO; the claims related to the 2019 administrative order were not independently actionable under the BIT, since they implemented a 2014 decision; the tribunal had already decided that the government authority's 2014 decision was outside the BIT's scope, which had entered into force in 2015)
Carrizosa v. Colombia (II) <ul style="list-style-type: none"> • Colombia–United States TPA (2006) • Award, 19 April 2021 • Decision rejecting jurisdiction • Kaufmann-Kohler, G. (President); Fernández Arroyo, D. P.; Söderlund, C. 	The Government's allegedly disproportionate and discriminatory measures against Banco Granahorrar, including placing the bank under new management and its ultimate nationalization in 1998, as well as the Colombian Constitutional Court's 2014 decision that no compensation was due to the claimant.	<ul style="list-style-type: none"> • Whether the claims concerning the respondent's prior conduct – including the respondent's 1998 measures related to Banco Granahorrar and the Constitutional Court's 2011 decision – fall within the temporal scope of the TPA, which entered into force on 15 May 2012 (→NO; the TPA does not apply to conduct that predates its entry into force) • Whether the tribunal has jurisdiction over one of the challenged measures, the 2014 Constitutional Court order, which had occurred after the TPA's effective date (→NO; it is not an independently actionable breach of the TPA, as it concerns the claimant's annulment petition for the outcome of the Constitutional Court's 2011 decision)

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>Eco Oro v. Colombia</p> <ul style="list-style-type: none"> • Canada–Colombia FTA (2008) • Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021 • Decision finding IIA breaches • Blanch, J. (President); Grigera Naón, H. A. (Partial Dissenting Opinion); Sands, P. (Partial Dissent) 	<p>The National Mining Agency's decision (2016) that deprived the claimant of its mining rights in respect of 50% of the concession area (a gold and silver deposit) held by it since the mid-1990s. The relevant area was found to fall within the Santurbán Páramo, an environmental conservation zone. The Mining Agency's actions followed the decision of Colombia's Constitutional Court that broadened restrictions on mining in high-mountain ecosystems known as páramos (sources of the country's freshwater supply), striking down legal provisions that had stabilized the rights of mining projects in those areas negotiated before 2010.</p>	<ul style="list-style-type: none"> • Whether the claims are within the tribunal's temporal jurisdiction considering the entry into force of the prohibition on mining in the páramo areas of Concession 3452 in 2010, i.e. before the entry into force of the FTA on 15 August 2011 (→YES; the claimant relies only on post-15 August 2011 measures; the tribunal does not have jurisdiction to determine whether prior acts are compatible with the FTA, although it is entitled to have regard to those acts in establishing the facts as they occurred after 15 August 2011)
<p>Manolium-Processing v. Belarus</p> <ul style="list-style-type: none"> • Treaty on the Eurasian Economic Union (2014) • Final Award, 22 June 2021 • Decision finding IIA breaches • Fernández-Armesto, J. (President); Alexandrov, S. A.; Stern, B. 	<p>The Government's termination of a 2003 investment agreement to develop land in Minsk for the construction of a luxury hotel, upon vacating the area from a trolley bus parking facility and rebuilding it on the city outskirts. Challenged measures also include the alleged confiscation of the relocated facility by the Government to cover a USD 20 million tax debt imposed on the claimant.</p>	<ul style="list-style-type: none"> • Whether the invoked IIA can be applied retroactively to acts and facts which took place before its entry into force (→NO; the general rule is that the treaty does not apply to acts or omissions that occurred before its entry into force, based on the principle of non-retroactivity of international treaties in Art. 28 of the VCLT) • Whether the invoked IIA can apply to pre-existing disputes, as it does not specifically exclude such disputes from coverage (→YES; this, however, does not bear on the application of the principle of non-retroactivity; the tribunal has temporal jurisdiction over the dispute which had arisen before the treaty's entry into force, but only with regard to measures which the State adopted after entry into force) • Whether the tax dispute is within the temporal jurisdiction of the tribunal (→YES; all measures related to the tax dispute took place after the 2015 entry into force of the invoked treaty) • Whether the tribunal has temporal jurisdiction over the 2014 decision to terminate an investment contract with the claimant and a 2014 appellate court decision that occurred before the 2015 entry into force of the invoked treaty (→NO; it lacks jurisdiction regardless of whether the measures are analysed as a composite act or as a single act as part of the claimant's creeping expropriation claim; the FET claims related to these measures are also not covered; the tribunal had already found that the 2014 termination decision is excluded from its jurisdiction) • Whether the 2015 cassation decision by the Supreme Court, confirming the respondent's 2014 decision to terminate an investment contract with the claimant and a related appellate court decision, is within the tribunal's temporal jurisdiction (→YES; the breaches were allegedly committed after the effective date and are a question for the merits)

Source: UNCTAD.

Conclusions

Decisions from 2021 touched upon important issues on the reform agenda for the IIA regime, including:

- Criteria for covered investments and investors
- Exclusions of taxation or other subject matters from the treaty scope
- 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
- Public policy exceptions
- Consent to investor–State arbitration, requirements and limitation periods for bringing ISDS claims

IIAs can limit countries' ability to adapt to changing economic realities and new regulatory imperatives. The expansive interpretation of clauses such as FET and broad access to the investor–State arbitration mechanism have proven to be the most controversial features of IIAs. Reforms are essential to ensure that investment treaties and associated investor–State disputes do not hinder countries' efforts to meet core global objectives and respond to challenges, such as tackling climate change. Renegotiation, amendment or termination of existing treaties are the predominant options for aligning the IIA regime with sustainable development objectives.

Building on insights from its recent IIA reform work (UNCTAD, 2022b and 2022c), UNCTAD's World Investment Report 2023 presents a new toolbox to transform IIAs into instruments that actively support sustainable investment for the energy transition. The toolbox focuses on four areas: the promotion and facilitation of investment; technology transfer; the right to regulate; and corporate social responsibility. Novel IIA clauses can be envisaged that create balanced commitments without being subject to investor–State arbitration.

This IIA Issues Note was prepared by UNCTAD's IIA team, under the overall guidance of James X. Zhan. The IIA team is managed by Hamed El-Kady.

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REFERENCES

- UNCTAD (2014). “Investor-State Dispute Settlement: A Sequel”, UNCTAD Series on Issues in International Investment Agreements II. New York and Geneva: United Nations.
- UNCTAD (2015a). *Policy Options for IIA Reform: Treaty Examples and Data (Supplementary Material to World Investment Report 2015)*, 24 June 2015 (working draft).
- UNCTAD (2015b). *Investment Policy Framework for Sustainable Development*. New York and Geneva: United Nations.
- UNCTAD (2016). *World Investment Report 2016. Investor Nationality: Policy Challenges*. New York and Geneva: United Nations.
- UNCTAD (2018). *UNCTAD’s Reform Package for the International Investment Regime*. New York and Geneva: United Nations.
- UNCTAD (2019a). “Reforming Investment Dispute Settlement: A Stocktaking”, IIA Issues Note, No. 1, March 2019.
- UNCTAD (2019b). “Review of ISDS Decisions in 2018: Selected IIA Reform Issues”, IIA Issues Note, No. 4, July 2019.
- UNCTAD (2019c). *World Investment Report 2019: Special Economic Zones*. New York and Geneva: United Nations.
- UNCTAD (2020a). *International Investment Agreements Reform Accelerator*. New York and Geneva: United Nations.
- UNCTAD (2020b). *World Investment Report 2020: International Production Beyond the Pandemic*. New York and Geneva: United Nations.
- UNCTAD (2021). “Review of ISDS Decisions in 2019: Selected IIA Reform Issues”, IIA Issues Note, No. 1, January 2021.
- UNCTAD (2022a). *World Investment Report 2022: International Tax Reforms and Sustainable Investment*. New York and Geneva: United Nations.
- UNCTAD (2022b). “The international investment treaty regime and climate action”. IIA Issues Note, No. 3, September.
- UNCTAD (2022c). “Treaty-based investor–State dispute cases and climate action”. IIA Issues Note, No. 4, September.
- UNCTAD (2023). *World Investment Report 2023: Investing in Sustainable Energy for All*. New York and Geneva: United Nations.

Annex 1. Publicly available ISDS decisions rendered in 2021⁹

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

A. Decisions upholding jurisdiction (at least in part), including rulings on preliminary objections

☞ **Kruck and others v. Spain**

Frank Schumm, Joachim Kruck, Jürgen Reiss and others v. Kingdom of Spain (ICSID Case No. ARB/15/23)
 Energy Charter Treaty (1994)
 Decision on Jurisdiction and Admissibility, 19 April 2021
 Lowe, V. (President); Pryles, M. C.; Douglas, Z.

☞ **Min v. Korea**

Fengzhen Min v. Republic of Korea (ICSID Case No. ARB/20/26)
 China–Korea, Republic of BIT (2007)
 Decision on the Respondent's preliminary objections pursuant to ICSID Arbitration Rule 41(5), 18 June 2021
 Glick, I. (President); Drymer, S. L.; McRae, D. M.

☞ **PNB Banka and others (formerly Norvik Banka) v. Latvia**

AS PNB Banka, Alexander Guselnikov, Grigory Guselnikov and others (formerly AS Norvik Banka) v. Republic of Latvia (ICSID Case No. ARB/17/47)
 Latvia–United Kingdom BIT (1994)
 Decision on the Intra-EU Objection, 14 May 2021
 Spigelman, J. (President); Townsend, J. M.; Tomka, P.

☞ **VEB v. Ukraine**

State Development Corporation "VEB.RF" v. Ukraine (SCC Case No. V2019/088)
 Russian Federation–Ukraine BIT (1998)
 Partial Award on Preliminary Objections, 31 January 2021
 Partasides, C. (President); Patocchi, P. M.; Malintoppi, L.

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

☞ **Carrizosa Gelzis v. Colombia (I)**

Alberto Carrizosa Gelzis, Enrique Carrizosa Gelzis, Felipe Carrizosa Gelzis v. Republic of Colombia (I) (PCA Case No. 2018-56)
 Colombia–United States TPA (2006)
 Award, 7 May 2021
 Beechey, J. (President); Ferrari, F.; Söderlund, C.

☞ **Carrizosa v. Colombia (II)**

Astrida Benita Carrizosa v. Republic of Colombia (II) (ICSID Case No. ARB/18/5)
 Colombia–United States TPA (2006)
 Award, 19 April 2021
 Kaufmann-Kohler, G. (President); Fernández Arroyo, D. P.; Söderlund, C.

☞ **Fynerdale v. Czechia**

Fynerdale Holdings B.V. v. Czechia (PCA Case No. 2018-18)
 Czechia–Netherlands BIT (1991)
 Award, 29 April 2021
 Wolfrum, R. (President); Kühn, W. (*Separate Opinion*); Boisson de Chazournes, L.

☞ **Hope Services v. Cameroon**

Hope Services LLC v. Republic of Cameroon (ICSID Case No. ARB/20/2)
 Cameroon–United States of America BIT (1986)

⁹ Publicly available at the time of research.

Award, 23 December 2021 (French)
 Scherer, M. (President); Ziadé, N.; Mayer, P.

Kimberly-Clark v. Venezuela

Kimberly-Clark BVBA, Kimberly-Clark Dutch Holdings, B.V., Kimberly-Clark S.L.U. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/18/3)
 BLEU (Belgium-Luxembourg Economic Union)–Venezuela, Bolivarian Republic of BIT (1998); Spain–Venezuela, Bolivarian Republic of BIT (1995); Netherlands–Venezuela, Bolivarian Republic of BIT (1991)
 Award, 5 November 2021
 Kaufmann-Kohler, G. (President); Haigh, D.; Stern, B.

Litpop and others v. Ukraine

Litpop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine (SCC Case No. V 2015/092)
 Energy Charter Treaty (1994)
 Award, 4 February 2021
 Lew, J. D. M. (President); Fortier, L. Y.; Oreamuno Blanco, R.

MAKAE v. Saudi Arabia

MAKAE Europe SARL v. Kingdom of Saudi Arabia (ICSID Case No. ARB/17/42)
 France–Saudi Arabia BIT (2002)
 Award, 30 August 2021
 Crook, J. R. (President); Van Houtte, V.; Hafez, K.

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

Air Canada v. Venezuela

Air Canada v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/17/1)
 Canada–Venezuela, Bolivarian Republic of BIT (1996)
 Award, 13 September 2021
 Tercier, P. (President); Poncet, C.; Villanúa Gómez, D.

Bank Melli and Bank Saderat v. Bahrain

Bank Melli Iran and Bank Saderat Iran v. Bahrain (PCA Case No. 2017-25)
 Bahrain–Iran, Islamic Republic of BIT (2002)
 Award, 9 November 2021
 Kaufmann-Kohler, G. (President); Hanotiau, B.; Collins, L.

Casinos Austria v. Argentina

Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic (ICSID Case No. ARB/14/32)
 Argentina–Austria BIT (1992)
 Award, 5 November 2021
 van Houtte, H. (President); Schill, S.; Torres Bernárdez, S. (*Dissenting Opinion*)

Eco Oro v. Colombia

Eco Oro Minerals Corp. v. Republic of Colombia (ICSID Case No. ARB/16/41)
 Canada–Colombia FTA (2008)
 Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021
 Blanch, J. (President); Grigera Naón, H. A. (*Partial Dissenting Opinion*); Sands, P. (*Partial Dissent*)

Eurus Energy v. Spain

Eurus Energy Holdings Corporation v. Kingdom of Spain (ICSID Case No. ARB/16/4)
 Energy Charter Treaty (1994)
 Decision on Jurisdiction and Liability, 17 March 2021
 Hoffmann, A. (President); Garibaldi, O. M. (*Partial Dissent*); Giardina, A.

Infinito Gold v. Costa Rica

Infinito Gold Ltd. v. Republic of Costa Rica (ICSID Case No. ARB/14/5)
 Canada–Costa Rica BIT (1998)
 Award, 3 June 2021
 Kaufmann-Kohler, G. (President); Hanotiau, B.; Stern, B. (*Separate Opinion*)

Infracapital v. Spain

Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain (ICSID Case No. ARB/16/18)
 Energy Charter Treaty (1994)
 Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021
 Siqueiros, E. (President); Cameron, P. D. (*Partial Dissenting Opinion*); González García, L.

Lion v. Mexico

Lion Mexico Consolidated L.P. v. United Mexican States (ICSID Case No. ARB(AF)/15/2)
 NAFTA (1992)
 Award, 20 September 2021
 Fernández-Armesto, J. (President); Cairns, D. J. A.; Boisson de Chazournes, L.

Manolium-Processing v. Belarus

OOO Manolium-Processing v. The Republic of Belarus (PCA Case No. 2018-06)
 Treaty on the Eurasian Economic Union (2014)
 Final Award, 22 June 2021
 Fernández-Armesto, J. (President); Alexandrov, S. A.; Stern, B.

Olympic Entertainment v. Ukraine

Olympic Entertainment Group AS (Estonia) v. Republic of Ukraine (PCA Case No. 2019-18)
 Estonia–Ukraine BIT (1995)
 Award, 15 April 2021
 Kaplan, N. (President); Pryles, M. C.; Thomas, J. C.

Pawlowski and Projekt Sever v. Czechia

Pawlowski AG and Projekt Sever s.r.o. v. Czechia (ICSID Case No. ARB/17/11)
 Czechia–Switzerland BIT (1990)
 Award, 1 November 2021
 Fernández-Armesto, J. (President); Beechey, J.; Lowe, V.

Venezuela US v. Venezuela

Venezuela US, S.R.L. v. Bolivarian Republic of Venezuela (PCA Case No. 2013-34)
 Barbados–Venezuela, Bolivarian Republic of BIT (1994)
 Partial Award (Jurisdiction and Liability), 5 February 2021
 Tomka, P. (President); Fortier, L. Y.; Kohen, M. G. (*Declaration*)

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

Agility v. Iraq

Agility Public Warehousing Company K.S.C. v. Republic of Iraq (ICSID Case No. ARB/17/7)
 Iraq–Kuwait BIT (2013)
 Award, 22 February 2021
 Bull, C. (President); Beechey, J.; Murphy, S. D.

América Móvil v. Colombia

América Móvil S.A.B. de C.V. v. Republic of Colombia (ICSID Case No. ARB(AF)/16/5)
 Colombia–Mexico–Venezuela FTA (1994)
 Award, 7 May 2021 (Spanish)
 Radicati di Brozolo, L. (President); Martínez de Hoz, J. A. (*Dissenting Opinion*); Oreamuno Blanco, R.

Çap and Sehil v. Turkmenistan

Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd. Sti. v. Turkmenistan (ICSID Case No. ARB/12/6)
 Türkiye–Turkmenistan BIT (1992)
 Award, 4 May 2021
 Lew, J. D. M. (President); Hanotiau, B.; Boisson de Chazournes, L.

Festorino and others v. Poland

Festorino Invest Limited, Fosontal Limited, Petra Salesny, Peter Derendinger and Petr Rojicek v. Republic of Poland (SCC Case No. 2018/098)
 Energy Charter Treaty (1994)
 Award, 30 June 2021
 Cremades, B. M. (President); Hobér, K.; Douglas, Z.

FREIF Eurowind v. Spain

FREIF Eurowind Holdings Ltd. v. Kingdom of Spain (SCC Case No. 2017/060)
 Energy Charter Treaty (1994)
 Final Award, 8 March 2021
 Jones, D. (President); Hobér, K.; Clay, T.

Naturgy (formerly Gas Natural) v. Colombia

Naturgy Energy Group, S.A. and Naturgy Electricidad Colombia, S.L. (formerly Gas Natural SDG, S.A. and Gas Natural Fenosa Electricidad Colombia, S.L.) v. Republic of Colombia (ICSID Case No. UNCT/18/1)
 Colombia–Spain BIT (2005)
 Award, 12 March 2021 (Spanish)
 Drymer, S. L. (President); Schwartz, E.; Mourre, A.

Ríos v. Chile

Carlos Ríos and Francisco Ríos v. Republic of Chile (ICSID Case No. ARB/17/16)
 Chile–Colombia FTA (2006)
 Award, 11 January 2021 (Spanish)
 Kaufmann-Kohler, G. (President); Garibaldi, O. M. (Partial Dissent); Stern, B.

Silver Ridge v. Italy

Silver Ridge Power BV v. Italian Republic (ICSID Case No. ARB/15/37)
 Energy Charter Treaty (1994)
 Award, 26 February 2021
 Simma, B. (President); Johnson, O. T. (Dissenting Opinion); Cremades, B. M.

UNCTAD Policy Tools for IIA Reform

Investment Policy Framework for Sustainable Development (2015)

https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf

Reform Package for the International Investment Regime (2018)

https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf

Reforming Investment Dispute Settlement: A Stocktaking (IIA Issues Note, No. 1, March 2019)

https://unctad.org/system/files/official-document/diaepcbinf2019d3_en.pdf

International Investment Agreements Reform Accelerator (2020)

https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf

IIA Toolbox for Promoting Sustainable Energy Investment (2023)

https://unctad.org/system/files/official-document/wir2023_en.pdf

UNCTAD Investment Policy Online Databases

International Investment Agreements Navigator

<https://investmentpolicy.unctad.org/international-investment-agreements>

IIA Mapping Project

<https://investmentpolicy.unctad.org/international-investment-agreements/iaa-mapping>

Investment Dispute Settlement Navigator

<https://investmentpolicy.unctad.org/investment-dispute-settlement>

Investment Laws Navigator

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