



# IIA ISSUES NOTE

INTERNATIONAL INVESTMENT AGREEMENTS



UNITED NATIONS  
UNCTAD

## INVESTOR–STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2016

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

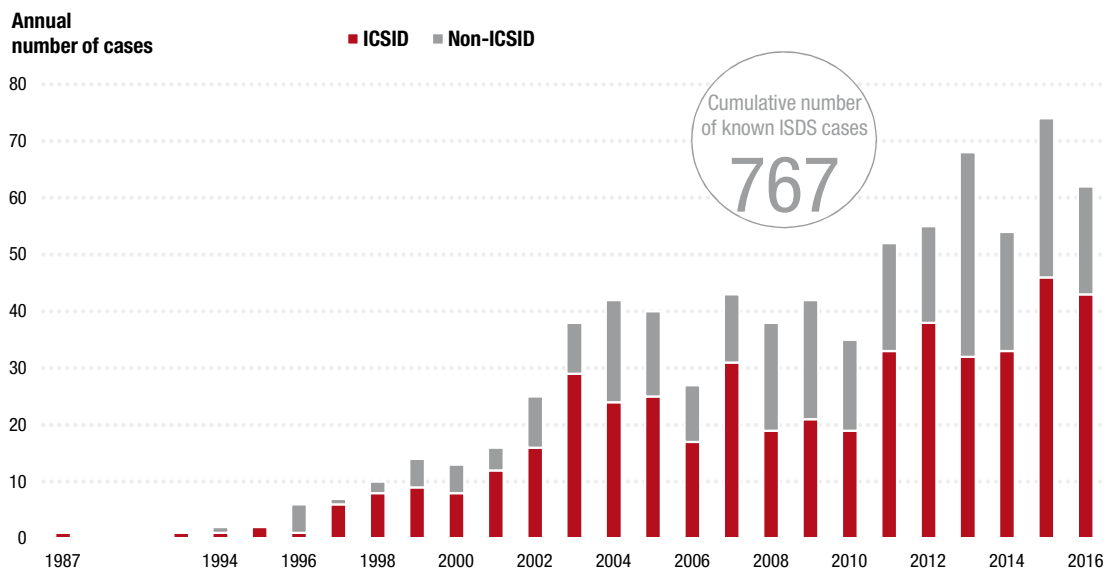
- The rate of new treaty-based investor–State dispute settlement (ISDS) cases continued unabated. In 2016, 62 new cases were initiated pursuant to international investment agreements (IIAs), bringing the total number of known cases to 767. Looking at the totality of decisions on the merits by the end of 2016, about 60 per cent were decided in favour of the investor and 40 per cent in favour of the State.
- The new ISDS cases in 2016 were commenced against 41 countries. With four cases each, Colombia, India and Spain were the most frequent respondents. Developed-country investors brought most of the 62 known cases in 2016. Investors from the Netherlands and the United States initiated the most cases with 10 each, followed by investors from the United Kingdom with 7.
- About two thirds of ISDS cases in 2016 were brought under bilateral investment treaties (BITs), most of them dating back to the 1980s and 1990s. The remaining arbitrations were based on treaties with investment provisions (TIPs). The IIAs most frequently invoked in 2016 were the Energy Charter Treaty (ECT) (with 10 cases), the North American Free Trade Agreement (NAFTA) and the Russian Federation–Ukraine BIT (3 each).
- In 2016, ISDS tribunals rendered at least 57 substantive decisions, 41 of which are in the public domain (at the time of writing). Of these public decisions, half of the decisions on jurisdictional issues were decided in favour of the State, whereas those on the merits were mostly decided in favour of the investor.
- In the past year's decisions tribunals considered many issues that touched upon topics identified in UNCTAD's Road Map for IIA Reform (*WIR15*) and its Investment Policy Framework for Sustainable Development (UNCTAD, 2015). For instance, tribunals addressed the right to regulate to protect public health under the fair and equitable treatment (FET) and indirect expropriation clauses (*Philip Morris v. Uruguay*), the limitation period for bringing ISDS claims (*Berkowitz and others v. Costa Rica*), a State counterclaim concerning the investors' alleged violation of human rights (*Urbaser and CABB v. Argentina*), and the interpretation of the most-favoured-nation (MFN) clause in IIAs (*Içkale v. Turkmenistan*) as well as in the WTO General Agreement on Trade in Services (GATS) (*MMEA and AHSI v. Senegal*).
- The wording of specific treaty provisions is a key factor in case outcomes, underlining the importance of balanced and careful treaty drafting. This not only applies to future treaties, but also calls for modernizing the existing stock of old-generation treaties. UNCTAD's World Investment Report 2017 presents and analyses the pros and cons of 10 policy options that countries can take to reform their old-generation treaties (chapter III, *WIR17*).

## 1. Trends in investor–State dispute settlement

### a. New cases initiated in 2016

In 2016, investors initiated 62 known ISDS cases pursuant to IIAs (figure 1). This number is lower than the 74 initiated in the preceding year, but higher than the 10-year average of 49 cases per year (2006–2015). As of 1 January 2017, the total number of publicly known ISDS claims had reached 767. So far, 109 countries have been respondents to one or more known ISDS claims. As arbitrations can be kept confidential under certain circumstances, the actual number of disputes filed for this and previous years is likely to be higher.

**Figure 1. Trends in known treaty-based ISDS cases, 1987–2016**



Source: ©UNCTAD, ISDS Navigator.

*Note:* Information has been compiled on the basis of public sources, including specialized reporting services. UNCTAD's statistics do not cover investor–State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signalled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continuously adjusted as a result of verification and may not match case numbers reported in previous years.

### Respondent States

The new ISDS cases in 2016 were commenced against 41 countries. With four cases each, Colombia, India and Spain were the most frequent respondents (figure 2). The cases against Colombia are the first known in the country's history. At 29 per cent, the relative share of cases against developed countries was lower than in 2015 (45 per cent).

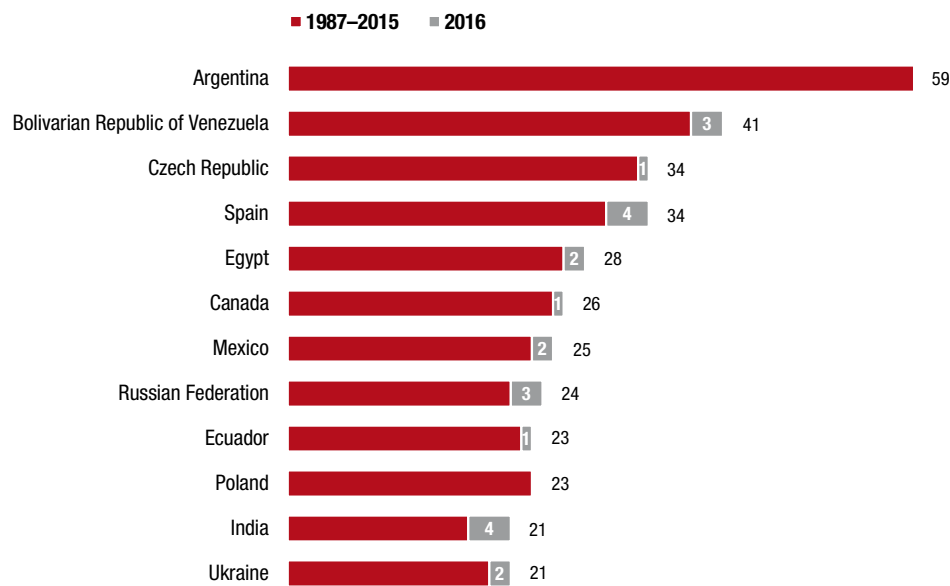
### Home States of claimants

Developed-country investors brought most of the 62 known cases in 2016. Investors from the Netherlands and the United States initiated the most cases with 10 each, followed by investors from the United Kingdom with 7 (figure 3). Investors from the Russian Federation, Turkey, Ukraine and the United Arab Emirates were the most active claimants from developing countries and transition economies, with two cases each filed in 2016.

### Intra-EU disputes

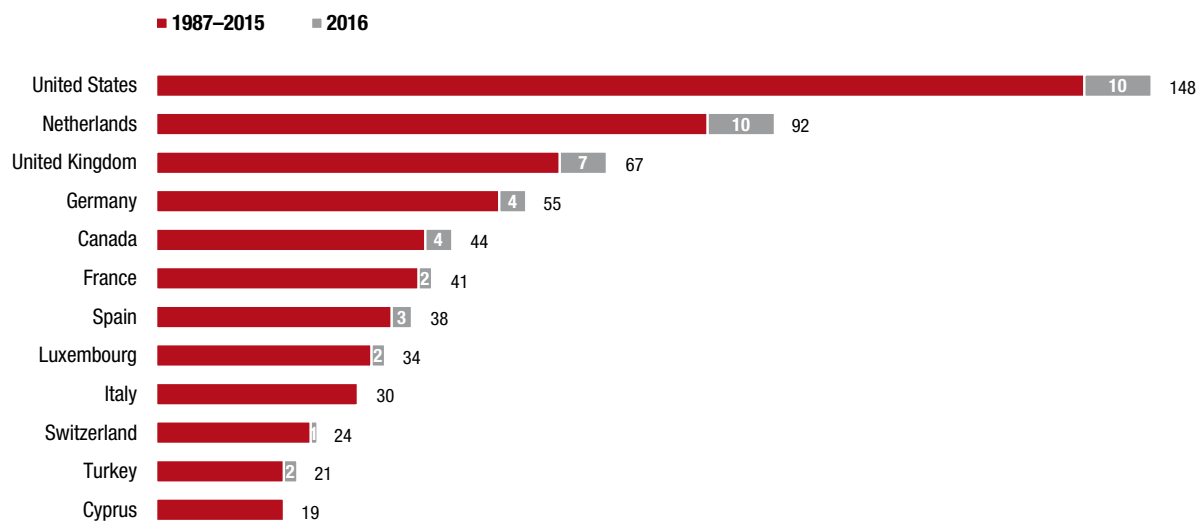
Intra-EU disputes accounted for about one quarter of investment arbitrations initiated in 2016, down from one third in the three preceding years. The overall number of known intra-EU investment arbitrations initiated by an investor from one EU member State against another member State, totalled 147 by the end of 2016, i.e. approximately 19 per cent of all known cases globally.

**Figure 2. Most frequent respondent States, 1987–2016** (Number of known cases)



Source: ©UNCTAD, ISDS Navigator.

**Figure 3. Most frequent home States of claimants, 1987–2016** (Number of known cases)



Source: ©UNCTAD, ISDS Navigator.

### Applicable investment treaties

About two thirds of investment arbitrations in 2016 were brought under BITs, most of them dating back to the 1980s and 1990s. The remaining arbitrations were based on treaties with investment provisions (TIPs). The IIAs most frequently invoked in 2016 were the ECT (with 10 cases), NAFTA and the Russian Federation–Ukraine BIT (3 cases each). Looking at the overall trend, virtually all of today’s known ISDS cases are based on treaties concluded before the year 2010; about 20 per cent of all known cases invoked the ECT (99 cases) or NAFTA (59 cases).

### Economic sectors involved

About 60 per cent of the cases filed in 2016 related to activities in the services sector, including the following:

- Supply of electricity and gas (11 cases)
- Construction (6 cases)

- Information and communication (6 cases)
- Financial and insurance services (4 cases)
- Real estate (3 cases)
- Transportation and storage; and arts, entertainment and recreation (2 cases each)
- Accommodation and food service, and administrative and support service (1 case each)

Primary industries accounted for 24 per cent of new cases, and manufacturing for the remaining 16 per cent. This is broadly in line with the overall distribution of the 767 known ISDS cases filed to date.

### Measures challenged

Investors in 2016 most frequently challenged the following types of State conduct:

- Alleged direct expropriations of investments (at least 7 cases)
- Legislative reforms in the renewable energy sector (at least 6 cases)
- Tax-related measures such as allegedly unlawful tax assessments or the denial of tax exemptions (at least 5 cases)
- Termination, non-renewal or alleged interference with contracts or concessions (at least 5 cases)
- Revocation or denial of licences or permits (at least 5 cases)

Other measures that were challenged included the designation of national heritage sites, environmental conservation zones, indigenous protected areas and national parks; and money laundering and anti-corruption investigations.<sup>1</sup>

### Amounts claimed

The amounts claimed ranged from \$10 million (*Grot and others v. Moldova* and *Görkem Insaat v. Turkmenistan*) to \$16.5 billion (*Cosigo Resources and others v. Colombia*).<sup>2</sup> Information regarding the amounts sought by investors has been reported for about half of the new cases.

## b. ISDS outcomes

### Decisions and outcomes in 2016

In 2016, ISDS tribunals rendered at least 57 substantive decisions in investor–State disputes, 41 of which are in the public domain (at the time of writing).<sup>3</sup> Of these public decisions, half of the decisions on jurisdictional issues were decided in favour of the State, whereas those on the merits were mostly decided in favour of the investor.

More specifically:

- Twelve decisions (including rulings on preliminary objections) principally addressed jurisdictional issues, with six upholding the tribunal's jurisdiction<sup>4</sup> and six denying jurisdiction over the investors' claims.
- Twenty decisions on the merits were rendered in 2016, with 14 accepting at least some investor claims and 6 dismissing all the claims. In the decisions holding the State liable, tribunals most frequently found breaches of the FET provision and the expropriation provision. In two decisions, tribunals found that the State breached the IIA but decided that no compensation was due.
- One decision in an ICSID resubmitted case confirmed the breaches found by the original tribunal but held that no monetary compensation was due.
- Eight publicly known decisions were rendered in ICSID annulment proceedings. ICSID *ad hoc* committees rejected six applications for annulment and partially annulled two awards.

<sup>1</sup> Information about several cases is lacking.

<sup>2</sup> Reference to "dollars" (\$) means United States dollars, unless otherwise indicated.

<sup>3</sup> This number includes decisions (awards) on jurisdiction and awards on liability and damages (partial and final) as well as follow-on decisions such as decisions rendered in ICSID annulment proceedings and ICSID resubmission proceedings. It does not include decisions on provisional measures, disqualification of arbitrators, procedural orders, discontinuance orders, settlement agreements or decisions of domestic courts.

<sup>4</sup> Four out of the six decisions upholding the tribunal's jurisdiction were rendered in the course of proceedings concerning preliminary objections to jurisdiction raised by the respondent State.

### Overall outcomes

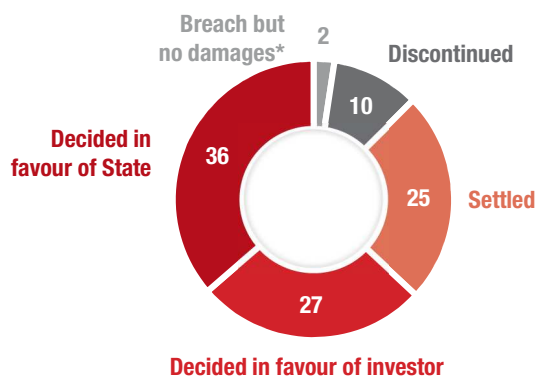
By the end of 2016, some 495 ISDS proceedings had been concluded. The relative shares of case outcomes changed only slightly from those of 2015. About one third of concluded cases were decided in favour of the State (claims were dismissed either on jurisdictional grounds or on the merits), and about one quarter were decided in favour of the investor, with monetary compensation awarded (figure 4). A quarter of cases were settled; in most, the specific terms of settlements remain confidential.<sup>5</sup> In the remaining proceedings, either cases were discontinued or the tribunal found a treaty breach but did not award monetary compensation.

Of the cases that ended in favour of the State, about half were dismissed for lack of jurisdiction.<sup>6</sup> Looking at the totality of decisions on the merits (i.e. where a tribunal determined whether the challenged measure breached any of the IIA's substantive obligations), about 60 per cent were decided in favour of the investor and 40 per cent in favour of the State (figure 5).

### Average amounts claimed and awarded

On average, successful claimants were awarded about 40 per cent of the amounts they claimed. In cases decided in favour of the investor, the average amount claimed was \$1.4 billion and the median \$100 million. The average amount awarded was \$545 million and the median \$20 million.<sup>7</sup>

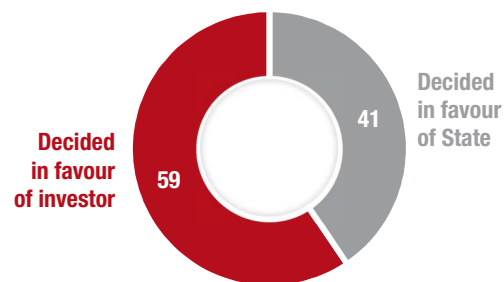
**Figure 4. Results of concluded cases, 1987–2016 (Per cent)**



Source: ©UNCTAD, ISDS Navigator.

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

**Figure 5. Results of decisions on the merits, 1987–2016 (Per cent)**



Source: ©UNCTAD, ISDS Navigator.

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

<sup>5</sup> One of the important cases settled in 2016 is *Abaclat and others v. Argentina*, the largest mass claims dispute brought to investment arbitration to date (over 60,000 claimants). The case was settled for \$1.35 billion. See *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic* (ICSID Case No. ARB/07/5), Consent Award under ICSID Arbitration Rule 43(2), 29 December 2016. This settlement follows the discontinuance of two other (smaller) sovereign debt-related claims against Argentina (*Ambiente Ufficio and others v. Argentina* and *Alemanni and others v. Argentina*).

<sup>6</sup> These are cases in which a tribunal found, for example, that the asset or transaction did not constitute a “covered investment”, that the claimant was not a “covered investor”, that the dispute arose before the treaty entered into force or fell outside the scope of the ISDS clause, that the investor had failed to comply with certain IIA-imposed conditions (e.g. the mandatory local litigation requirement) or other reasons that deprived the tribunal of the competence to decide the case on the merits.

<sup>7</sup> The amount claimed or awarded refers to the amount of monetary compensation awarded by the arbitral tribunal to the claimant, not including interest, legal costs or costs of arbitration.

## 2. Decisions in 2016: an overview

### a. Jurisdictional and admissibility issues

#### The meaning of “investment” and extra-textual criteria (characteristics of investment)

In *RREEF v. Spain*,<sup>8</sup> the respondent State argued that the claimants had not made an investment in Spain within the meaning of the ECT (1994) or the ICSID Convention. In particular, the respondent State contended that the claimants had not contributed economic resources into Spain or assumed any risk in the projects; the funds had been contributed by other entities.<sup>9</sup> According to the respondent State, the claimants were simply shell companies without any real business or economic object.<sup>10</sup>

The tribunal found that the claimants’ assets fell within the ECT’s open asset-based definition of “investment”.<sup>11</sup> The tribunal rejected the attempt to add extra-textual elements to that definition: “There is no test, set of criteria or guidelines that can or should be relied upon in international law to restrict or replace the definition that exists in the ECT. There is no reason to place any such test, set of criteria or guidelines on the language of Article 25 of the ICSID Convention.”<sup>12</sup> Turning to the respondent State’s argument that the assumption of risk was an intrinsic characteristic of “investment”, the tribunal decided that it would be “improper” to read this or criteria such as the contribution of economic resources and duration into the ECT or the ICSID Convention.<sup>13</sup>

#### The meaning of corporate “seat” for purposes of coverage under a BIT

In *CEAC v. Montenegro*,<sup>14</sup> the claimant sought protection under the Cyprus–Montenegro BIT (2005), alleging that – as required by the BIT – its “seat” of business was in Cyprus. The claimant relied on a certificate of registered office issued by the Cypriot authorities. The tribunal ruled that it was “not bound by the nationality determinations and the certificates issued by domestic authorities, but must make its own determination under international law”.<sup>15</sup> Having examined the available evidence, the tribunal concluded that the “Claimant has not proven [...] that the [office building] is accessible to the public for purposes of inspecting the company’s registers, that CEAC is amenable to service at that address, that the company’s records are kept there or that the address bears a plate with CEAC’s name”.<sup>16</sup> On this basis, the tribunal’s majority held that the claimant had failed to establish that it had its seat, in the meaning of a registered office, in Cyprus.<sup>17</sup>

The tribunal in *Tenaris and Talta v. Venezuela (II)*<sup>18</sup> found that the concept of “seat” could not be understood as statutory seat, but rather as *effective seat*, i.e. the place where the company’s management activities took place.<sup>19</sup> To this effect, it tested three criteria to determine whether the seat was effective, namely (i) where shareholder and board administration meetings took place, (ii) where the management activities (establishing contacts with clients, conclusion of the principal contracts, main financial activities) took place, and finally (iii)

<sup>8</sup> *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/30), Decision on Jurisdiction, 6 June 2016.

<sup>9</sup> *Ibid.*, paras. 149-150.

<sup>10</sup> *Ibid.*, para. 134.

<sup>11</sup> *Ibid.*, paras. 156, 160.

<sup>12</sup> *Ibid.*, para. 157.

<sup>13</sup> *Ibid.*, para. 158. In *Garanti Koza LLP v. Turkmenistan*, the tribunal similarly refused to graft extra-textual elements onto the definition of “investment” in the Turkmenistan–United Kingdom BIT (1995) or Article 25 of the ICSID Convention (see *Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20), Award, 19 December 2016, paras. 231-234; 239-242). However, the opposite conclusion was reached in *Vestey Group Ltd v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/06/4), Award, 15 April 2016, para. 187 (“[T]he term ‘investment’ in Article 25 of the ICSID Convention has an independent meaning [and] comprises three components: a commitment or allocation of resources, risk, and duration”).

<sup>14</sup> *CEAC Holdings Limited v. Montenegro* (ICSID Case No. ARB/14/8), Award, 26 July 2016.

<sup>15</sup> *Ibid.*, para. 155.

<sup>16</sup> *Ibid.*, para. 199.

<sup>17</sup> *Ibid.*, paras. 200-201. The tribunal additionally rejected the claimant’s alternative arguments that it was managed and controlled from Cyprus at the relevant time (*ibid.*, para. 207), and that the term “seat” under the BIT should be equated to tax residency (*ibid.*, paras. 210-211).

<sup>18</sup> *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela (II)* (ICSID Case No. ARB/12/23), Award, 12 December 2016.

<sup>19</sup> *Ibid.*, paras. 189-190.

where the books and accounts were located.<sup>20</sup> The tribunal concluded that the claimants had fulfilled these criteria.<sup>21</sup>

In another ICSID case between the same disputing parties, *Tenaris and Talta v. Venezuela (I)*,<sup>22</sup> the tribunal – consisting of three different arbitrators – similarly interpreted the notion of “seat” to mean “the place of actual or effective management”.<sup>23</sup> The tribunal emphasized that it must take into account the precise nature of the company in question. In this case, it found that either of the claimants was a “holding company” whose “day-to-day ‘management’ will necessarily be very limited, and so will its physical links with its corporate seat”.<sup>24</sup> The tribunal explained that “it would be entirely unreasonable to expect a mere holding company [...] to maintain extensive offices or workforce, or to be able to provide evidence of extensive activities, at its corporate location”.<sup>25</sup> To the tribunal, the claimants met the legal test of “actual or effective management” as they had premises in the respective home States, held annual general meetings and/or board meetings there, and had certain other documented ties.<sup>26</sup>

### **Illegality in the operation of the investment**

In *Copper Mesa v. Ecuador*,<sup>27</sup> the host State alleged that the investor had operated its investment in violation of the host State’s law and that, as a result, the claims were jurisdictionally barred.<sup>28</sup> Relying on the definition of “investment” in the IIA, which required that investments be “owned or controlled [...] in accordance with the [host State’s] laws”, the host State alleged that the investor was under an obligation to operate its investment in accordance with the host State’s law throughout the lifetime of the investment.<sup>29</sup>

Disagreeing with the host State’s interpretation, the tribunal considered that the cited article “does not extend to the subsequent operation, management or conduct of an investment” and “it would take clear wording to produce such an important jurisdictional bar”.<sup>30</sup> Moreover, the tribunal reasoned, that even if the language of the IIA was read in the way suggested by the respondent, it would be difficult to determine “the exact dividing-line between minor and non-minor violations of the local law” which might (or might not) justify imposing the jurisdictional bar.<sup>31</sup>

### **Document forgery and admissibility**

In *Churchill Mining and Planet Mining v. Indonesia*,<sup>32</sup> the tribunal concluded on the balance of probabilities that some 34 documents in the arbitration – 30 of which had been submitted by the claimants – were forgeries.<sup>33</sup> Included in these documents were the mining licences, held by the investors’ local partner (an Indonesian group of companies called Ridlatama), which were at the centre of the investors’ claims. The tribunal concluded that Ridlatama was most likely responsible for the forgeries.<sup>34</sup>

In assessing the legal consequences of the forgeries, the tribunal held that an investor’s “deliberate closing of eyes to evidence of serious misconduct or crime, or an unreasonable failure to perceive such evidence” would vitiate its claim.<sup>35</sup> Looking to the facts before it, the tribunal focused on “the level of institutional control and oversight deployed by the Claimants in relation to the licensing process, whether the claimants were put on notice by evidence of fraud that a reasonable investor in the Indonesian mining sector should have investigated, and

<sup>20</sup> *Ibid.*, para. 193.

<sup>21</sup> *Ibid.*, para. 230.

<sup>22</sup> *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda v. Bolivarian Republic of Venezuela (I)* (ICSID Case No. ARB/11/26), Award, 29 January 2016.

<sup>23</sup> *Ibid.*, para. 154.

<sup>24</sup> *Ibid.*, para. 199.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, paras. 201-226.

<sup>27</sup> *Copper Mesa Mining Corporation v. Republic of Ecuador* (PCA No. 2012-2), Award, 15 March 2016.

<sup>28</sup> *Ibid.*, para. 5.29.

<sup>29</sup> *Ibid.*, paras. 5.30, 5.55.

<sup>30</sup> *Ibid.*, paras. 5.54-5.55.

<sup>31</sup> *Ibid.*, para. 5.56.

<sup>32</sup> *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/40 and 12/14), Award, 6 December 2016.

<sup>33</sup> *Ibid.*, para. 510.

<sup>34</sup> *Ibid.*, para. 476.

<sup>35</sup> *Ibid.*, para. 502 (quoting *David Minnotte and Robert Lewis v. Republic of Poland* (ICSID Case No. ARB(AF)/10/1), Award, 16 May 2014, para. 131).

whether or not they took appropriate corrective steps”.<sup>36</sup> In the tribunal’s view, the claimants failed to act with reasonable diligence in the circumstances, especially given the seriousness of the fraud. Accordingly, it held the claims to be inadmissible.<sup>37</sup>

### Limitation period for claims

In *Berkowitz and others v. Costa Rica*,<sup>38</sup> the claimants brought a variety of claims under the Central America–Dominican Republic–United States Free Trade Agreement (CAFTA) (2004) in connection with the expropriations of numerous plots of land for inclusion in an ecological park. In relation to many of the plots of land at issue, the respondent State acknowledged that the expropriations had occurred, but argued that compensation had already been awarded to the claimants in domestic proceedings. In response, the claimants argued that the domestic proceedings had been tainted by delays and unfairness and that the levels of compensation awarded were insufficient under the standards imposed by the CAFTA.

The tribunal examined whether the claims were precluded by the three-year time-bar (CAFTA Article 10.18.1). Under the facts of the case, this meant that the claimants acquired (or should have acquired) knowledge of Costa Rica’s alleged CAFTA breaches no earlier than 10 June 2010.<sup>39</sup> The tribunal concluded that it would have jurisdiction to hear claims regarding those local-court rulings that had been made after 10 June 2010; they could constitute actionable state measures under the CAFTA if found to be manifestly arbitrary or blatantly unfair.<sup>40</sup> Moreover, the tribunal held that the claims could be assessed without examining conduct that occurred before the CAFTA’s entry into force (1 January 2009).<sup>41</sup>

In *Rusoro Mining v. Venezuela*,<sup>42</sup> the tribunal applied a similar time-bar found in the Canada–Venezuela BIT (1996). Under the provision, the cut-off date for claims was three years before the claimant’s July 2012 request for arbitration.<sup>43</sup> The tribunal’s task was therefore to determine which claims met this cut-off date by identifying the dates when the alleged breaches to the BIT occurred.<sup>44</sup> Reviewing the measures on which the claims were based, the tribunal found that the claimant was aware of certain measures taking place before the cut-off date and that, accordingly, claims based upon those measures were barred.<sup>45</sup> The tribunal rejected the claimant’s argument that these earlier measures should be treated as intrinsically linked to later measures, and instead decided to “[break] down each alleged composite claim into individual breaches, each referring to a certain governmental measure, and to apply the time bar to each of such breaches separately”.<sup>46</sup>

### “Treaty shopping” and abuse of rights – transfer of investment interests<sup>47</sup>

In *Transglobal v. Panama*,<sup>48</sup> the tribunal considered whether a transfer of interests in a concession by a Panamanian national to a United States corporation was an abuse of rights designed to establish jurisdiction under the Panama–United States BIT (1982). At the time of the transfer, there was an ongoing dispute between the Panamanian concessionaire and the Government of Panama, which had resulted in litigation in the Panamanian courts. In considering whether the transfer amounted to an abuse of rights, the tribunal identified elements relied upon in the analyses of previous tribunals, including “the timing of the purported investment, the

<sup>36</sup> *Ibid.*, para. 504.

<sup>37</sup> *Ibid.*, para. 528.

<sup>38</sup> *Aaron C. Berkowitz, Brett E. Berkowitz, Trevor B. Berkowitz and others v. Republic of Costa Rica* (ICSID Case No. UNCT/13/2), Interim Award, 25 October 2016.

<sup>39</sup> *Ibid.*, para. 163; see also para. 209 (quoting with approval the tribunal’s view of “constructive knowledge” in *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL), Decision on Objections to Jurisdiction, 20 July 2006, para. 59).

<sup>40</sup> *Ibid.*, paras. 276, 286.

<sup>41</sup> *Ibid.*, para. 276.

<sup>42</sup> *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5), Award, 22 August 2016.

<sup>43</sup> *Ibid.*, para. 204, 209.

<sup>44</sup> *Ibid.*, para. 210.

<sup>45</sup> *Ibid.*, para. 232.

<sup>46</sup> *Ibid.*, para. 231. Similarly, in *Corona Materials v. Dominican Republic*, the tribunal agreed with the United States (non-disputing party) that the claimant cannot use the latest in a series of alleged breaches to bring all of them within the three-year limitation period. *Corona Materials, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3), Award on the Respondent’s expedited preliminary objections in accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, para. 215.

<sup>47</sup> The World Investment Report 2016 contains a brief analysis of corporate restructuring for the purpose of bringing an ISDS case and possible policy responses for IIA negotiators (chapter IV, *WIR16*).

<sup>48</sup> *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama* (ICSID Case No. ARB/13/28), Award, 2 June 2016.



timing of the claim, the substance of the transaction, the true nature of the operation, and the degree of foreseeability of the governmental action at the time of restructuring”.<sup>49</sup> Examining the record before it, the tribunal concluded that the transfer had clearly been undertaken “to create artificial international jurisdiction over a pre-existing domestic dispute”,<sup>50</sup> upholding the respondent’s objection of abuse of process.

### **Use of the WTO GATS Agreement to access BIT protection**

In *MMEA and AHSI v. Senegal*,<sup>51</sup> one of the two claimants, a company incorporated in Luxembourg, argued that – in the absence of a BIT between Senegal and Luxembourg – it was entitled to benefit from the Netherlands–Senegal BIT (1979). The case related to aircraft ground-handling services at the Dakar airport in Senegal. According to the claimant MMEA, it qualified as a “service supplier” under the WTO GATS, and the latter’s MFN treatment clause in Article II entitled it to access investor–State arbitration under any BIT signed by Senegal, since Senegal did not exempt ISDS or BITs from the GATS MFN clause as some other WTO members had done. In other words, the claimant did not allege any breaches of the GATS itself, but used the GATS as a “bridge” to BIT protections otherwise unavailable to it.

The tribunal rejected the claimant’s arguments on the basis that it could not be established that Senegal had clearly and unequivocally consented to arbitration with respect to investors from Luxembourg.<sup>52</sup> In this respect, the tribunal determined that Article II of the GATS was silent on international arbitration or dispute resolution in general and did not contain any type of consent to arbitrate, neither itself providing consent nor extending consent given under BITs.<sup>53</sup> It concluded that the claimant could thus not benefit from the invoked BITs. The tribunal further cautioned that an interpretation of the GATS’ MFN clause as put forward by the claimant would have considerable consequences in that investors could avail themselves of selected provisions in different BITs signed by the host State with third countries, even in the absence of any BITs signed by the investors’ home States.<sup>54</sup> In its view, WTO members’ (continued and increasing) activity in signing BITs with an arbitration option suggested that they had not intended to provide this option through the GATS.

### **The scope and application of the “fork-in-the-road” provision**

In *H&H v. Egypt*,<sup>55</sup> the dispute concerned a management and operation contract regarding a resort in Egypt. Following commercial arbitration and court proceedings in Egypt, the claimant brought ICSID proceedings pursuant to the Egypt–United States BIT (1986) claiming, among others, that the respondent State’s eviction of the investor from the resort and its refusal to recognize the investor’s option to buy the resort breached the BIT. The tribunal held that the bulk of the claims were barred as a result of the prior arbitral and judicial proceedings in Egypt and the application of the BIT’s “fork-in-the-road” provision.

In reaching its conclusion, the tribunal rejected the claimant’s argument that claims are only barred by a fork-in-the-road clause when the claims in the domestic proceedings and the claims in the international proceedings meet the so-called “triple identity test”: involving the same parties, same object and same cause of action.<sup>56</sup> Rather than relying on interpretations developed by other tribunals in the context of other investment treaties,<sup>57</sup> the tribunal focused on the BIT before it, concluding that the purpose of the fork-in-the-road clause was “to ensure that the same dispute is not litigated before different fora”.<sup>58</sup> As a result, the tribunal held that instead of “requir[ing] specifically that the parties be the same” or focusing on “whether the causes of actions relied upon in the claims brought to the local courts and the arbitration are identical”, it would look to “determine whether the Treaty claims have the same fundamental basis as the claims submitted before the local fora”.<sup>59</sup> On the basis of

<sup>49</sup> *Ibid.*, para. 103 (footnotes omitted).

<sup>50</sup> *Ibid.*, para. 118.

<sup>51</sup> *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal* (ICSID Case No. ARB/15/21), Award, 5 August 2016.

<sup>52</sup> *Ibid.*, paras. 129-130.

<sup>53</sup> *Ibid.*, paras. 130-135, 139.

<sup>54</sup> *Ibid.*, para. 145.

<sup>55</sup> *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt* (ICSID Case No. ARB/09/15), Award, 6 May 2014.

<sup>56</sup> *Ibid.*, para. 363.

<sup>57</sup> *Ibid.*, paras. 363-365.

<sup>58</sup> *Ibid.*, para. 367.

<sup>59</sup> *Ibid.*, paras. 367-369.

the facts before it, the tribunal concluded that the fork-in-the-road provision had been triggered and that it was without jurisdiction to decide on the claimant's BIT claims.<sup>60</sup>

The tribunal in *Charanne and Construction Investments v. Spain*<sup>61</sup> dismissed the respondent State's objection that the claimants, by bringing local administrative proceedings and a proceeding before the European Court of Human Rights (ECtHR), triggered the fork-in-the-road provision of the ECT and were precluded from bringing the case before an ISDS tribunal. The tribunal considered, in particular, that there was no identity of parties in the local or the ECtHR proceedings as required under a "triple identity test" (same parties, same object and same cause of action), and that the ECtHR did not constitute a court or administrative tribunal of a contracting party to the ECT.<sup>62</sup>

### Waiver of local legal proceedings

In *Renco v. Peru*,<sup>63</sup> the tribunal analysed whether the claimant had given a valid waiver of other claims as a prerequisite to commencing arbitration under the Peru–United States FTA (2006). Under Article 10.18(2)(b), in order to engage Peru's consent to arbitrate, the claimant was required to submit a written waiver "of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach [of the investment chapter]".<sup>64</sup> The claimant, however, had "purported to qualify its written waiver by reserving its right to bring claims in another forum for resolution on the merits if the investment treaty tribunal were to decline to hear any claims on jurisdictional or admissibility grounds".<sup>65</sup> The tribunal concluded that the claimant's waiver did not comply with the requirements of the treaty and dismissed it for lack of jurisdiction.<sup>66</sup> In addition, the majority of the tribunal rejected the claimant's arguments that it should be allowed the opportunity to cure the defect in its waiver or that the incompatible language should be severed.<sup>67</sup>

### Parallel proceedings, abuse of process and consolidation

*Ampal-American and others v. Egypt*<sup>68</sup> arose in connection with "four parallel arbitrations with, essentially, the same factual matrix, the same witnesses and many identical claims [...]".<sup>69</sup> In ICSID proceedings brought under the Egypt–United States BIT (1986), Egypt argued that all of the claims should be dismissed as being part of an abusive and improper effort by the claimants to multiply their chances of recovery. The tribunal largely disagreed with Egypt, noting that there was a legal distinction between causes of action under contract and those under treaty and that Egypt had declined offers by the claimants to consolidate the proceedings.<sup>70</sup>

Nevertheless, the tribunal did find troubling an overlap in claims between the present ICSID proceeding and a parallel UNCITRAL proceeding under another BIT.<sup>71</sup> While the tribunal accepted that "the same party in interest might reasonably seek to protect its claim in two fora where the jurisdiction of each tribunal is unclear, once jurisdiction is otherwise confirmed, it would crystallize in an abuse of process for in substance the same claim is to be pursued on the merits before two tribunals".<sup>72</sup> Given that the UNCITRAL tribunal had confirmed its jurisdiction over the claims before it (as had the tribunal in the present case), the tribunal indicated "that the abuse of process constituted by the double pursuit of [...] the claim in both proceedings must now be treated as having crystallized".<sup>73</sup> The tribunal, however, did not dismiss the overlapping claim as abusive. Instead, it "invited" the claimant to make an election to pursue the claim either in the ICSID or in the UNCITRAL proceeding by a date

<sup>60</sup> *Ibid.*, para. 385.

<sup>61</sup> *Charanne B.V. and Construction Investments S.a.r.l. v. Spain* (SCC Case No. 062/2012), Final Award, 21 January 2016.

<sup>62</sup> *Ibid.*, paras. 408-409.

<sup>63</sup> *The Renco Group, Inc. v. Republic of Peru* (ICSID Case No. UNCT/13/1), Partial Award on Jurisdiction, 15 July 2016.

<sup>64</sup> *Ibid.*, para. 78.

<sup>65</sup> *Ibid.*, para. 80.

<sup>66</sup> *Ibid.*, paras. 119, 189.

<sup>67</sup> *Ibid.*, paras. 160, 173.

<sup>68</sup> *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11), Decision on Jurisdiction, 1 February 2016.

<sup>69</sup> *Ibid.*, para. 328. One of these arbitrations is an investment treaty case: *Yosef Maiman, Merhav (MNF), Merhav-Ampal Group, Merhav-Ampal Energy Holdings v. Arab Republic of Egypt* (PCA Case No. 2012/26).

<sup>70</sup> *Ibid.*, para. 329.

<sup>71</sup> *Ibid.*, paras. 330-331.

<sup>72</sup> *Ibid.*, para. 331.

<sup>73</sup> *Ibid.*, para. 333.

set by the tribunal and indicated that it would “then revisit the question of abuse of process in relation to this portion of the claim in the light of [the claimant’s] response”.<sup>74</sup>

### Denial of benefits clause – timing and procedure

In *Ampal-American and others v. Egypt*,<sup>75</sup> brought under the Egypt–United States BIT (1986), the respondent State sought to deny benefits to one claimant, Ampal, a United States corporation controlled by the national of a third state (Israel). Ampal had given notice of dispute to Egypt in May 2011 and filed a request for arbitration with ICSID in May 2012. In January 2013, Egypt notified Ampal that it was denying benefits pursuant to the treaty. Thereafter, Egypt approached the United States, and the two governments exchanged diplomatic notes on the matter. The United States did not express disagreement with Egypt’s action and considered that the matter was resolved to “mutual satisfaction”.<sup>76</sup>

The tribunal decided, however, that Egypt had not complied with the treaty’s requirements. Under the BIT, “whenever one Party concludes that the benefits of this Treaty should not be extended [...], it shall promptly consult with the other Party to seek a mutually satisfactory resolution of this matter”.<sup>77</sup> The tribunal interpreted this provision as requiring Egypt to consult with the United States prior to its denial of benefits. Since the consultations took place after Egypt’s decision to deny the treaty benefits, the tribunal considered that the United States “was presented with a ‘fait accompli’ rather than invited to engage in a process of consultation in order to seek a mutually satisfactory resolution of the issue”.<sup>78</sup> Accordingly, the tribunal considered the denial of benefits to be ineffective.<sup>79</sup>

### Contractual waiver of rights under an investment treaty

In *MNSS and RCA v. Montenegro*,<sup>80</sup> the tribunal considered whether investors may effectively waive, in a contract, the rights conferred by an investment treaty.<sup>81</sup> It concluded that investors may waive treaty rights “provided waivers are explicit and freely entered into by investors”.<sup>82</sup> However, the tribunal indicated that a waiver would not be permitted if it violated the “public purpose” of the investment treaty.<sup>83</sup> Looking at the contractual waiver in the case before it, the tribunal determined, first, that it was limited to contractual claims under the treaty’s umbrella clause (i.e. did not encompass claims under other treaty obligations).<sup>84</sup> Secondly, it established that the contract provided for the said contractual claims to be heard through commercial arbitration, and decided that this was “evidently congruent with the public purpose pursued by the State parties to the BIT”.<sup>85</sup>

### State counterclaim against investors based on alleged human rights violations

In *Urbaser and CABB v. Argentina*,<sup>86</sup> the respondent State submitted a counterclaim for the claimants’ alleged violation of the international human right to water.<sup>87</sup> The investors contested the jurisdiction of the tribunal to hear the counterclaim, arguing, *inter alia*, “that investment [t]reaties do not impose obligations upon investors”.<sup>88</sup> The tribunal began by noting that unlike other cases in which State counterclaims had been rejected, the Argentina–Spain BIT (1991) expressly provided that a dispute could be submitted to arbitration “at the

<sup>74</sup> *Ibid.*, para. 339.

<sup>75</sup> *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11), Decision on Jurisdiction, 1 February 2016.

<sup>76</sup> *Ibid.*, paras. 138-143.

<sup>77</sup> Egypt–United States BIT (1986), Protocol, para. 1.

<sup>78</sup> *Ibid.*, paras. 149, 154.

<sup>79</sup> *Ibid.*, para. 151.

<sup>80</sup> *MNSS B.V. and Recuperero Credito Acciaio N.V. v. Montenegro* (ICSID Case No. ARB(AF)/12/8), Award, 4 May 2016.

<sup>81</sup> In this case, the privatization agreement at issue included a clause whereby the buyer had waived “any right which it might otherwise have under international law to assert claims against the Sellers or the [Government of Montenegro] other than pursuant to the express terms of this Agreement”.

<sup>82</sup> *Ibid.*, para. 163 (citing *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/1), Decision on Responsibility, 15 January 2008, para. 173).

<sup>83</sup> *Ibid.* (“Thus the question is not whether the rights may or may not be waived, but to what extent, if they have been waived, the waiver is in detriment of the public purpose pursued by the State parties to the BIT.”).

<sup>84</sup> *Ibid.*, para. 159.

<sup>85</sup> *Ibid.*, para. 164.

<sup>86</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic* (ICSID Case No. ARB/07/26), Award, 8 December 2016.

<sup>87</sup> *Ibid.*, para. 36.

<sup>88</sup> *Ibid.*, para. 1120.

request of either party”, meaning that the BIT was “completely neutral as to the identity of the claimant or respondent in an investment dispute arising ‘between the parties’”.<sup>89</sup> With respect to the claimants’ argument that they had not consented to arbitration of counterclaims by the State, the tribunal noted that the claimants could not split their consent between claims and counterclaims. It was deemed to “[cover] all disputes in connection with investments within the meaning of the BIT”.<sup>90</sup>

The claimants further maintained that any counterclaim brought before the tribunal on the basis of an alleged violation of human rights would be outside of the tribunal’s jurisdiction.<sup>91</sup> The tribunal considered that “such argument is not sufficient to go so far as excluding on a simple *prima facie* basis any such claim as if it could not imply a dispute relating to an investment”.<sup>92</sup> The tribunal accepted that in the case at hand it remained to be determined whether the counterclaim brought by the respondent State did in fact concern violations of rights and obligations within the scope of the BIT. It joined this aspect of the claimants’ objections to its consideration of the merits of the counterclaim, concluding that it had jurisdiction over the counterclaim.<sup>93</sup>

### Attribution for the acts of State entities

In *Álmas v. Poland*,<sup>94</sup> the claimants, shareholders in a business that held a lease to agricultural land, alleged a series of violations of the Norway–Poland BIT (1990) arising out of the termination of the lease by its contractual counter-party, the Polish Agricultural Property Agency (ANR). At issue was the attribution of ANR’s conduct to Poland as a matter of customary international law.

First, the tribunal found that ANR was not an organ of the Polish state within the meaning of Article 4 of the International Law Commission’s Draft Articles on State Responsibility (ILC Articles).<sup>95</sup> According to the tribunal, ANR did not have that status in Polish law, and there was no objective evidence that it was acting *de facto* as a state organ, for instance, by performing core governmental functions, being under direct day-to-day subordination to central government, or lacking operational autonomy.<sup>96</sup> Second, the tribunal found that Poland was not responsible for the acts of ANR when considered under Article 5 of the ILC Articles. The tribunal stated in that respect that to be attributable to the State, “[f]irst, the act must be carried out by an entity empowered to exercise governmental authority; and [s]econd, the act itself must involve the exercise of that governmental authority”.<sup>97</sup> The tribunal concluded that ANR’s termination of the lease was an exercise not of public power but of a purported contractual right.<sup>98</sup> Finally, the tribunal decided that ANR’s conduct was not attributable to Poland under Article 8 of the ILC Articles because there was no evidence of any instruction on the part of the Polish Government to terminate the lease.<sup>99</sup>

In *Mesa Power v. Canada*,<sup>100</sup> the tribunal concluded that the conduct of the Ontario Power Authority (“OPA”) was attributable to Canada under the terms of the NAFTA. The OPA was the statutorily created entity responsible for, among other things, awarding contracts related to the feed-in tariff (FIT) subsidy scheme for renewable energy. The tribunal observed that the NAFTA “establishes a special regime which distinguishes between a NAFTA Party and its enterprises, specifies what control obligations the former has over the latter, and thus organises the

<sup>89</sup> *Ibid.*, para. 1143.

<sup>90</sup> *Ibid.*, para. 1147.

<sup>91</sup> *Ibid.*, para. 1154 (footnote 427), referring to *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investment Centre and the Government of Ghana*, Awards of 27 October 1989 and 30 June 1990, XIX Yearbook Commercial Arbitration (1994).

<sup>92</sup> *Ibid.*, para. 1154.

<sup>93</sup> *Ibid.*, paras. 1153-1155.

<sup>94</sup> *Kristian Almás and Geir Almás v. The Republic of Poland* (PCA Case No. 2015-13), Award, 27 June 2016.

<sup>95</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001).

<sup>96</sup> *Kristian Almás and Geir Almás v. The Republic of Poland* (PCA Case No. 2015-13), Award, 27 June 2016, paras. 209-210 (citing Draft Articles, Art. 4, Commentary (1)).

<sup>97</sup> *Ibid.*, paras. 215-216 (following *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, para. 163 and *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010, paras. 192-193).

<sup>98</sup> *Ibid.*, paras. 247-251.

<sup>99</sup> *Ibid.*, paras. 268-272. Similarly, in *Tenaris and Talta v. Venezuela* (I), the tribunal declined to attribute the actions of a State-owned enterprise to the host State because the enterprise was neither an organ of the state for the purposes of Article 4 of the ILC Articles nor was it empowered by the host State to exercise elements of governmental authority under Article 5. See *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda v. Bolivarian Republic of Venezuela* (I) (ICSID Case No. ARB/11/26), Award, 29 January 2016, paras. 412-417.

<sup>100</sup> *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Award, 24 March 2016.

NAFTA Party's responsibility for acts of its enterprises".<sup>101</sup> According to the tribunal, the rules of the NAFTA served as a *lex specialis* regime for attribution, displacing the rules of customary international law contained in the ILC Articles on State Responsibility. Applying those rules in the case at hand, the tribunal concluded that the actions of the OPA, which included preparing the FIT Rules, ranking applications, establishing evaluation criteria, and, ultimately, awarding contracts, met the standards set out in the NAFTA and were thus attributable to Canada.<sup>102</sup>

In *Flemingo DutyFree v. Poland*,<sup>103</sup> the tribunal addressed whether the actions of the Polish Airport State Enterprise (PPL) were attributable to Poland. The PPL was a legal entity that had been created to develop and operate airports in Poland, and whose shares were wholly owned by the Polish State Treasury.<sup>104</sup> Poland described the PPL as an independent "State enterprise, and not a State organ", operating without interference or influence in its commercial policies,<sup>105</sup> while the claimant characterized the PPL as operating under the control and supervision of the Ministry of Transport.<sup>106</sup>

The tribunal stated that its task was to examine the actual functions and roles played by the PPL. Applying this approach, the tribunal concluded that the PPL was a *de facto* State organ. Of particular relevance to the tribunal was the fact that the PPL was owned by the Polish State Treasury, and that the PPL was required to obtain State approval for various transactions, including the approval of airport lease agreements, such as the one at issue in the case. Moreover, the tribunal noted that the PPL's function of operating a large airport was not one that was typically a private business function, and that Poland itself had said in other contexts that the PPL was performing a "strategic" function for the State.<sup>107</sup>

### The application of the ECT to intra-EU disputes

In *Charanne and Construction Investments v. Spain*,<sup>108</sup> the respondent State argued that the ECT either explicitly or implicitly contained a "disconnection clause", which prohibited arbitral tribunals from deciding intra-EU investor-State disputes. Dismissing the objection, the arbitrators deemed that there was no conflict between the ECT and EU law (Treaty on the Functioning of the European Union, TFEU). In the tribunal's view, no norm of EU law existed that prevented EU member States from resolving their disputes with investors of other member States through arbitration, nor was there any norm of EU law that prevented an arbitral tribunal from applying EU law to resolve such dispute.<sup>109</sup>

The same arguments were put forward by the respondent in *RREEF v. Spain*.<sup>110</sup> Spain contended that the ECT did not apply to intra-EU disputes and that the EU judicial system had exclusive jurisdiction over such disputes. The tribunal reasoned that the ECT was its "constitutional" instrument, and that in case of any contradiction between the ECT and EU law, the "hierarchy" of norms "must be determined from the perspective of public international law" – concluding that the ECT would prevail.<sup>111</sup> At the same time, like in the *Charanne* arbitration, the tribunal held that in this instance there was no conflict between the ECT and EU law, and that – in the absence of an explicit treaty reservation or "disconnection clause" – it could not accept that intra-EU disputes had been excluded from the ECT's scope.<sup>112</sup>

<sup>101</sup> *Ibid.*, para. 362.

<sup>102</sup> *Ibid.*, paras. 371-377.

<sup>103</sup> *Flemingo DutyFree Shop Private Limited v. Republic of Poland* (UNCITRAL), Award, 12 August 2016.

<sup>104</sup> *Ibid.*, para. 427.

<sup>105</sup> *Ibid.*, paras. 364-365.

<sup>106</sup> *Ibid.*, para. 352.

<sup>107</sup> *Ibid.*, paras. 427-429. Having concluded that the PPL was a *de facto* State organ within the meaning of Article 4 of the ILC's Articles, the tribunal went on to hold in the alternative that the PPL was also an entity empowered by the law of Poland to exercise elements of governmental authority within the scope of Article 5 of the ILC Articles. In support of this alternative holding, the tribunal pointed again to Poland's statements that the PPL was performing "strategic functions for the existence of the State" and that it had "general defense obligations" (*ibid.*, para. 436). It noted further that the PPL had been empowered to exercise its powers by direct grant from the Ministry of Transport (*ibid.*, para. 439).

<sup>108</sup> *Charanne B.V. and Construction Investments S.a.r.l. v. Spain* (SCC Case No. 062/2012), Final Award, 21 January 2016.

<sup>109</sup> *Ibid.*, para. 438.

<sup>110</sup> *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/30), Decision on Jurisdiction, 6 June 2016.

<sup>111</sup> *Ibid.*, paras. 74-75, 87.

<sup>112</sup> *Ibid.*, paras. 79-86. The question of compatibility between the TFEU and the ISDS mechanism in intra-EU BITs is currently pending before the Court of Justice of the EU (CJEU) (Case C-284/16). A request for the CJEU's preliminary ruling on this issue was lodged by the German Bundesgerichtshof (Federal Court of Justice) on 23 May 2016 as part of the set-aside proceedings that had been initiated by the Slovak

## b. Substantive issues

### The meaning of the international minimum standard of treatment

In *Mesa Power v. Canada*,<sup>113</sup> the tribunal addressed the content of the international minimum standard of treatment (MST) under Article 1105 of the NAFTA. The investor claimed that the MST had evolved and should now be considered equivalent to the so-called “autonomous” fair and equitable treatment (FET) standard found in other IIAs.<sup>114</sup> In response, Canada, supported by the non-disputing NAFTA parties (Mexico and the United States), rejected this view, emphasizing that as a standard defined by customary international law, the content of the international MST is established through by State practice and *opinio juris*.<sup>115</sup>

The tribunal referred to an earlier NAFTA award in *Waste Management v. Mexico (II)*<sup>116</sup> as correctly identifying the content of the MST and affirmed the following components of it: “arbitrariness; ‘gross’ unfairness; discrimination; ‘complete’ lack of transparency and candour in an administrative process; lack of due process ‘leading to an outcome which offends judicial propriety’; and ‘manifest failure’ of natural justice in judicial proceedings”.<sup>117</sup> The tribunal also upheld the view of the NAFTA State parties that the failure to respect legitimate expectations of an investor does not in and of itself constitute a breach of Article 1105, but should simply be considered as a circumstance when applying the standard.<sup>118</sup> In addition, the tribunal cautioned that “international law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs”.<sup>119</sup>

The tribunal in *Windstream Energy v. Canada*<sup>120</sup> rejected the respondent State’s argument that the burden of proving the content of the MST under Article 1105 rested exclusively upon the claimant.<sup>121</sup> Instead, the tribunal held, “it is for each Party to support its position as to the content of the rule with appropriate legal authorities and evidence”.<sup>122</sup> Noting that neither party had produced evidence of State practice and *opinio juris* in the case before it, the tribunal concluded that it would need to “rely on other, indirect evidence in order to ascertain the content of the [MST], [including] decisions taken by other NAFTA tribunals [...] as well as relevant legal scholarship”.<sup>123</sup>

### Denial of justice and the exhaustion of domestic remedies

In *Corona Materials v. Dominican Republic*,<sup>124</sup> the investor claimed that it had been the victim of a denial of justice because following the refusal of its application for a licence to operate a mine it had received no reply to its “Motion for Reconsideration” of the decision from the host State’s Ministry of Environment. In dismissing the investor’s claim, the tribunal stressed that it “[did] not believe that an administrative act, in and of itself, particularly at the level of a first instance decision-maker, can constitute a denial of justice under customary international law, when further remedies or avenues of appeal are potentially available under municipal law”.<sup>125</sup> In other words, the tribunal clarified, a denial of justice requires exhaustion of remedies under the host State’s domestic legal system.<sup>126</sup>

Republic in relation to the arbitral award rendered against it under the Czech and Slovak Federal Republic–Netherlands BIT (1991) (*Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic (I)*) (PCA Case No. 2008-13), Award, 7 December 2012).

<sup>113</sup> *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Award, 24 March 2016.

<sup>114</sup> *Ibid.*, para. 485.

<sup>115</sup> *Ibid.*, paras. 488-489.

<sup>116</sup> *Ibid.*, para. 501. *Waste Management v. United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, paras. 98-99.

<sup>117</sup> *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Award, 24 March 2016, para. 502.

<sup>118</sup> *Ibid.*, para. 502.

<sup>119</sup> *Ibid.*, para. 505.

<sup>120</sup> *Windstream Energy LLC v. The Government of Canada* (PCA Case No. 2013-22), Award, 27 September 2016.

<sup>121</sup> *Ibid.*, para. 350. In so doing, the tribunal rejected the concurrent views put forward by the United States and Mexico in their non-disputing party submissions (*ibid.*, paras. 332, 335).

<sup>122</sup> *Ibid.*, para. 350.

<sup>123</sup> *Ibid.*, para. 351.

<sup>124</sup> *Corona Materials, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3), Award on the Respondent’s expedited preliminary objections in accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016.

<sup>125</sup> *Ibid.*, para. 248.

<sup>126</sup> *Ibid.*, para. 264.

### “Outrageous failure” of the judicial system as a requirement for denial of justice

In *Philip Morris v. Uruguay*,<sup>127</sup> the tribunal noted that “[f]or a denial of justice to exist under international law there must be ‘clear evidence of [...] an outrageous failure of the judicial system’ or a demonstration of ‘systemic injustice’ or that ‘the impugned decision was clearly improper and discreditable.’”<sup>128</sup> As a result, in the *Philip Morris* case, even though “there were a number of procedural improprieties and a failure of form” in the relevant domestic proceedings,<sup>129</sup> the majority concluded that there had been no denial of justice as a matter of international law.<sup>130</sup>

### Fair and equitable treatment (FET) and legitimate expectations

*Crystallex v. Venezuela*<sup>131</sup> concerned a contract to develop gold mining deposits located within the Imataca National Forest Reserve. After the contract was concluded in 2002, Crystallex sought the necessary permits to commence operations, and in May 2007 it received a letter from the Ministry of Environment assuring Crystallex that the authorization will be granted once the company posts a bond. Crystallex posted the bond as required, but nevertheless in April 2008 the Ministry of Environment denied the environmental permit, based on then stated concerns about the project’s impact on the environment and indigenous peoples in the Imataca reserve.

With respect to Crystallex’s FET claims, the tribunal described the FET standard as including “protection of legitimate expectations, protection against arbitrary and discriminatory treatment, transparency and consistency”.<sup>132</sup> It further noted that in contrast to some formulations of the international MST, the conduct need not rise to the level of outrageousness or bad faith to breach the FET standard.<sup>133</sup> Looking at the Ministry’s May 2007 letter, the tribunal found that it created legitimate expectations on which Crystallex relied and acted. The tribunal held further that Venezuela had frustrated these legitimate expectations and thereby breached the FET standard.<sup>134</sup> Ultimately, the tribunal ordered Venezuela to pay \$1.2 billion plus interest to the Canadian investor.

In *Allard v. Barbados*,<sup>135</sup> the tribunal identified “three factual cumulative conditions” for determining whether protected legitimate expectations were present: “(i) was there a specific representation?; (ii) did the investor rely on it, i.e., was it critical to his making of the investment?; and (iii) was the investor’s reliance reasonable?”<sup>136</sup> On the facts of the case, the tribunal found that Barbados had not made any sufficiently specific representations and that, in any event, many of the alleged representations were made *after* the investment had been made and, therefore, could not have been relied upon by the investor in his decision to make the investment.<sup>137</sup>

The tribunal in *Charanne and Construction Investments v. Spain*<sup>138</sup> dismissed the claim that the 2010 laws reducing the financial incentives for photovoltaic facilities frustrated legitimate investor expectations in violation of the FET standard under Article 10(1) of the ECT. In the tribunal’s view, the claimants had – in the absence of a specific commitment by Spain to this effect – no legitimate expectation that the regulatory framework relating to the financial incentives for renewable energy investments would remain forever unchanged.<sup>139</sup>

In *Rusoro Mining v. Venezuela*,<sup>140</sup> the claimant alleged that the respondent State had violated the FET provision in the Canada–Venezuela BIT (1996) when it decided to close a previously tolerated parallel market for foreign

<sup>127</sup> *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award, 8 July 2016.

<sup>128</sup> *Ibid.*, para. 500.

<sup>129</sup> *Ibid.*, para. 578.

<sup>130</sup> Dissenting from this view, one arbitrator concluded that Uruguay had committed a denial of justice and a breach of FET under the applicable BIT. *Ibid.*, Concurring and Dissenting Opinion of Born, G. B., paras. 2-5, 9, 179.

<sup>131</sup> *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016.

<sup>132</sup> *Ibid.*, para. 543.

<sup>133</sup> *Ibid.*, paras. 543-544 (citing *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, 11 October 2002, para. 116).

<sup>134</sup> *Ibid.*, para. 575. The tribunal further found that Venezuela had subjected the investor to a “roller-coaster” of contradictory and inconsistent statements” in the lead-up to the formal rescission of the mining operation contract, thus also breaching the FET standard under the BIT (*ibid.*, para. 606).

<sup>135</sup> *Peter A. Allard v. The Government of Barbados* (PCA Case No. 2012-06), Award, 27 June 2016.

<sup>136</sup> *Ibid.*, para. 194.

<sup>137</sup> *Ibid.*, paras. 226-228.

<sup>138</sup> *Charanne B.V. and Construction Investments S.a.r.l. v. Spain* (SCC Case No. 062/2012), Final Award, 21 January 2016.

<sup>139</sup> *Ibid.*, para. 504.

<sup>140</sup> *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5), Award, 22 August 2016.

currency, which had permitted exchange transactions at more favourable rates than those provided by the official exchange rate.<sup>141</sup> The tribunal observed that at the time when the investment was made, there already was an exchange control regime in place (even though the parallel exchange market had been tolerated).<sup>142</sup> Moreover, it found that the respondent State had not made any representation to the claimant “that Rusoro would somehow be exempted from the application of the general exchange control regime” or that tolerance of the parallel market would continue indefinitely.<sup>143</sup>

### **Legitimate expectations in light of State’s obligation to support general welfare**

The dispute in *Urbaser and CABB v. Argentina*<sup>144</sup> arose out of a water and sewage concession, awarded in 1999.<sup>145</sup> In 2000-2001, Argentina experienced an economic and financial crisis and imposed a number of macroeconomic measures that adversely affected the investor. Following an extended period of attempted renegotiation of the concession, the concession was terminated in 2006.

The claimants alleged that Argentina had reversed commitments it had made (and on which the claimants had relied) in the concession and the regulatory framework.<sup>146</sup> The tribunal took the view that an investor’s expectations needed to be placed “in a legal framework embracing the rights and obligations of the host State and of its authorities”.<sup>147</sup> In particular, the tribunal noted Argentina’s constitutional obligations “to ensure the population’s health and access to water and to take all measures required to that effect”.<sup>148</sup> Such obligations, the tribunal held, “must prevail over the [concession] Contract”, although “[t]he Government must exercise such responsibility in a manner that comports with the [FET] standard”.<sup>149</sup>

The tribunal further observed that the FET standard could not be understood as creating “a standard according to which the investor would remain completely isolated and immune” from the State’s endeavours to address situations and circumstances beyond the interests of the investor.<sup>150</sup> Rather, under the FET standard, the State must be understood to retain the right “to take all measures required by the situation even if this implies hurting investors’ interests, provided that the authorities proceed with deference to those interests and with the aim to restore their efficient preservation as soon as the circumstances so allow”.<sup>151</sup> The tribunal concluded that the measures taken by Argentina had not violated the FET standard, except with respect to the manner in which Argentina had handled efforts to renegotiate the concession agreement between 2003 and 2005.

### **FET and reasonable public health regulations**

In *Philip Morris v. Uruguay*,<sup>152</sup> Philip Morris raised claims arising out of two measures enacted by Uruguay affecting the marketing of the company’s Marlboro cigarettes: (i) the Single Presentation Regulation, and (ii) the 80/80 Regulation.<sup>153</sup>

The claimants alleged that these measures were unfair and inequitable, failed to serve a public purpose and undermined legitimate expectations.<sup>154</sup> Dismissing these claims, the tribunal concluded that the 80/80 Regulation was a “reasonable measure adopted in good faith to implement an obligation assumed by the State under the

<sup>141</sup> *Ibid.*, para. 511.

<sup>142</sup> *Ibid.*, para. 532.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic* (ICSID Case No. ARB/07/26), Award, 8 December 2016.

<sup>145</sup> *Ibid.*, paras. 62-64. This was the same concession as was the subject of *Impregilo S.p.A. v. Argentine Republic (I)* (ICSID Case No. ARB/07/17), Award, 21 June 2011.

<sup>146</sup> *Ibid.*, para. 579 (relying on *BG Group Plc v. The Republic of Argentina* (UNCITRAL), Final Award, 24 December 2007).

<sup>147</sup> *Ibid.*, para. 619.

<sup>148</sup> *Ibid.*, para. 622.

<sup>149</sup> *Ibid.*, para. 622. See *ibid.*, para. 624 (“Respondent rightly recalls that the Province had to guarantee the continuation of the basic water supply to millions of Argentines. The protection of this universal basic human right constitutes the framework within which Claimants should frame their expectations.”).

<sup>150</sup> *Ibid.*, para. 628.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award, 8 July 2016.

<sup>153</sup> The Single Presentation Regulation required the use of pictograms and health warnings on 50 per cent of the display areas of all cigarette packs and required each brand to have a single presentation. The 80/80 Regulation increased the size of health warnings from 50 to 80 per cent. *Ibid.*, paras. 109-112, 121.

<sup>154</sup> *Ibid.*, para. 309.



[Framework Convention on Tobacco Control of the World Health Organization]” with a “relatively minor impact” on the claimants’ business.<sup>155</sup> By majority, it reached a similar conclusion for the Single Presentation Regulation.<sup>156</sup>

The tribunal further noted that the challenged measures were adopted “against the background of a strong scientific consensus as to the lethal effects of tobacco” and “substantial deference” was due “to national authorities’ decisions as to the measures which should be taken to address an acknowledged and major public health problem”.<sup>157</sup>

### Changes to the host State’s legal framework and FET

In *Murphy v. Ecuador*,<sup>158</sup> the tribunal addressed the lawfulness of a windfall levy on oil sector profits. The measure, Law 42 amending the country’s hydrocarbons law, was passed in 2006 (“when oil prices spiked”) with an aim to increase Ecuador’s share in the profits from the sale of crude oil, imposing a 50 per cent windfall levy, which was later raised to 99 per cent.<sup>159</sup> The claimant alleged that as a result of Law 42 it “had no other choice but to forego its investment by selling its interest in the Consortium”.<sup>160</sup>

The tribunal held that Law 42 at 50 per cent did not breach the FET standard as it did not “fundamentally change [...] the operation of the Participation Contract for the Consortium”.<sup>161</sup> In the tribunal’s view, it was not reasonable for the claimant to expect no government response in light of the sharp increase in oil prices: “States retain flexibility to respond to changing circumstances unless they have stabilised their relationship with an investor. Ecuador was within its sovereign right to react to the significant change in oil prices, as many States did.”<sup>162</sup>

As to the levy imposed at the 99 per cent rate, however, the tribunal found that Ecuador had breached the FET standard, violating the claimant’s legitimate expectations.<sup>163</sup> According to the tribunal, “[n]ot only did this development fundamentally change the nature of the Participation Contract, it occurred within the context of an increasingly hostile and coercive investment environment”.<sup>164</sup>

### Disregard of contractual commitments as a violation of FET

The case of *Garanti Koza v. Turkmenistan*<sup>165</sup> concerned a contract to construct highway bridges concluded by the claimant with a State-owned enterprise, acting as an organ of the respondent State.<sup>166</sup> Under the contract, payment was to be made to the claimant against invoices prepared in the manner specified in the contract.<sup>167</sup> Throughout the performance of the contract, however, multiple agencies of the respondent State – with authority over the State-owned company – insisted that the claimant’s progress invoices be resubmitted in conformity with an alleged local invoicing requirement (“Smeta”) requiring that an invoice be built up from cost figures plus a fixed profit margin.<sup>168</sup>

The tribunal found that the “inconsistency of behaviour” between different organs of the respondent State with respect to its contractual obligations resulted in a violation of the FET provision.<sup>169</sup> Of further concern to the tribunal was that the respondent State’s insistence on the “Smeta” approach to invoicing “effectively forced [the claimant] to choose between submitting accurate invoices, and consequently accepting less compensation than it had bargained for, or manipulating its invoices in order to receive the full compensation that [the State-owned

<sup>155</sup> *Ibid.*, para. 420.

<sup>156</sup> *Ibid.*, para. 410. The dissenting arbitrator characterized the Single Presentation Regulation as “unprecedented” and “manifestly arbitrary and disproportionate” in breach of FET. (*Ibid.*, Concurring and Dissenting Opinion of Born, G. B., para. 5.)

<sup>157</sup> *Ibid.*, para. 418. As to the issue of legitimate expectations, the tribunal found no evidence of specific undertakings or representations made by Uruguay vis-à-vis the claimants. (*Ibid.*, Award, 8 July 2016, paras. 429-430).

<sup>158</sup> *Murphy Exploration & Production Company – International v. The Republic of Ecuador (II)* (PCA Case No. 2012-16), Partial Final Award, 6 May 2016.

<sup>159</sup> *Ibid.*, para. 4.

<sup>160</sup> *Ibid.*, para. 5.

<sup>161</sup> *Ibid.*, paras. 278-280.

<sup>162</sup> *Ibid.*, paras. 276, 280.

<sup>163</sup> *Ibid.*, para. 292.

<sup>164</sup> *Ibid.*, para. 281.

<sup>165</sup> *Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20), Award, 19 December 2016.

<sup>166</sup> *Ibid.*, para. 335.

<sup>167</sup> *Ibid.*, paras. 336-337.

<sup>168</sup> *Ibid.*, para. 349.

<sup>169</sup> *Ibid.*, para. 382. See also, para. 381 (quoting *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* (ICSID Case No. ARB/01/7), Award, 25 May 2004, para. 163).

company] had agreed to pay”.<sup>170</sup> As a result, the tribunal held that “using governmental power to put an investor in such a situation is so fundamentally unfair as to amount by itself to a denial of fair and equitable treatment”.<sup>171</sup>

### Indirect expropriation and legitimate regulation (police powers doctrine)

In *Philip Morris v. Uruguay*,<sup>172</sup> the tribunal considered whether Uruguay’s cigarette packaging measures, the Single Presentation Regulation (SPR) and the 80/80 Regulation, constituted an indirect expropriation. The tribunal found that “the SPR and the 80/80 Regulation have been adopted in fulfilment of Uruguay’s national and international legal obligations for the protection of public health”.<sup>173</sup> The tribunal further noted that measures satisfied commonly mentioned conditions for the exercise of regulatory powers, in particular “that the action must be taken bona fide for the purpose of protecting the public welfare, must be non-discriminatory and proportionate”.<sup>174</sup> Concluding that the measures “were a valid exercise by Uruguay of its police powers for the protection of public health”, the tribunal rejected the expropriation claim.<sup>175</sup>

### Indirect expropriation of a discrete right or asset

In *Philip Morris v. Uruguay*,<sup>176</sup> the claimants argued that the host State’s cigarette packaging regulations indirectly expropriated their “brand assets, including the intellectual property and goodwill associated with each of the [...] brand variants”<sup>177</sup> and “destroyed the brand equity” of the remaining variants, with a substantial effect on profits.<sup>178</sup> Rather than considering each brand asset as an “individual investment in its own right”, as the claimants had suggested,<sup>179</sup> the tribunal opted to examine the alleged expropriation of the business as a whole.<sup>180</sup> The arbitrators observed that, despite the regulatory measures, the business as a whole remained profitable; this lent support to the tribunal’s finding that no expropriation had occurred.<sup>181</sup>

### Unlawful expropriation: failure to offer compensation

*Rusoro Mining v. Venezuela*<sup>182</sup> concerned the direct expropriation of the claimant’s gold mining rights. The tribunal determined that the expropriation had respected the BIT requirements of public purpose, due process and non-discrimination, but was not accompanied by “prompt, adequate and effective compensation”.<sup>183</sup>

The tribunal noted: “[T]he mere fact that an investor has not received compensation does not in itself render an expropriation unlawful. An offer of compensation may have been made to the investor and, in such case, the legality of the expropriation will depend on the terms of that offer.”<sup>184</sup> Under the BIT, the claimant was entitled to receive the fair market value of its investment, while the government’s expropriation decree established a cap for compensating investors, “which was not foreseen either in the BIT or in domestic Venezuelan law”.<sup>185</sup> Since the respondent State’s eventual offer of compensation “was significantly below the cap established by the Decree” and had never been paid or deposited, the tribunal concluded that the expropriation was unlawful.<sup>186</sup>

<sup>170</sup> *Ibid.*, para. 383.

<sup>171</sup> *Ibid.* In another case, *Flemingo DutyFree v. Poland*, the tribunal found that the respondent State had terminated the contract with the claimant in bad faith and thereby violated the FET obligation in the India–Poland BIT (1996). (*Flemingo DutyFree Shop Private Limited v. Republic of Poland* (UNCITRAL), Award, 12 August 2016.)

<sup>172</sup> *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award, 8 July 2016.

<sup>173</sup> *Ibid.*, para. 302.

<sup>174</sup> *Ibid.*, para. 305.

<sup>175</sup> *Ibid.*, para. 307.

<sup>176</sup> *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award, 8 July 2016.

<sup>177</sup> *Ibid.*, para. 180. In connection with the allegations regarding goodwill, Philip Morris asserted that “the awareness of their brands was valuable in that consumers were willing to pay more for products that carried the Claimants’ well-known brands” (*ibid.*, para. 73).

<sup>178</sup> *Ibid.*, para. 194. Brand equity is the commercial value that derives from consumer perception of the brand name.

<sup>179</sup> *Ibid.*, para. 195.

<sup>180</sup> *Ibid.*, para. 283.

<sup>181</sup> *Ibid.*, paras. 284–287.

<sup>182</sup> *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5), Award, 22 August 2016.

<sup>183</sup> *Ibid.*, para. 410.

<sup>184</sup> *Ibid.*, paras. 400–401.

<sup>185</sup> *Ibid.*, para. 408.

<sup>186</sup> *Ibid.*, paras. 408–409.

In *Crystallex v. Venezuela*,<sup>187</sup> which concerned an investment in a mining concession, the tribunal – having found that an indirect expropriation had occurred<sup>188</sup> – held that Venezuela’s expropriation was unlawful on the “undisputed” ground that no “prompt, adequate and effective compensation” was “either paid or offered” to the claimant by Venezuela.<sup>189</sup>

### **Unlawful expropriation: failure to act with due process**

In *Vestey v. Venezuela*,<sup>190</sup> the tribunal found that the expropriation of the claimant’s cattle farm was unlawful. The tribunal held that the respondent State had failed to act with due process, as required under the applicable BIT, by introducing and applying new legislation which removed the claimant’s farm from the scope of coverage of the respondent State’s existing expropriation law.<sup>191</sup> In so doing, the claimant had been deprived “not only of the opportunity to have the valuation of its investment reviewed by an independent authority, but of the right to be compensated altogether”.<sup>192</sup> In addition, the tribunal found that the respondent State had failed to comply with the procedures established under the new legislation, for example, by depriving the claimant of the opportunity to appeal administrative decisions before a judicial authority.<sup>193</sup>

### **Full protection and security: host State obligations with respect to the acts of third parties**

*Copper Mesa v. Ecuador*<sup>194</sup> concerned a mining concession that faced significant opposition from the local population. Protesters imposed a physical blockade, which interfered with the investor’s ability to carry out its activities, including the completion of a required environmental impact study.<sup>195</sup> In response, the host State issued an administrative resolution, prohibiting access to the site, including by the investor.<sup>196</sup>

The tribunal found that the host State had not made any efforts to assist the investor in gaining access to the concession in order to carry out consultations and other activities required for its environmental impact study.<sup>197</sup> To the contrary, by issuing the resolution prohibiting access to the site, the host State had given “legal force to the factual effect of the anti-miners’ physical blockade of the Junín concessions”.<sup>198</sup> To do so, the tribunal held, “was arbitrary, in the sense that it was unreasonable and disproportionate at that time to side so completely with the anti-miners as to make it impossible, both legally and physically, for the Claimant to complete its [environmental impact study], with inevitable consequences”.<sup>199</sup> The arbitrators thus concluded that the State breached the BIT’s full protection and security obligation (as well as the FET standard).<sup>200</sup>

In *MNSS and RCA v. Montenegro*,<sup>201</sup> the claimants alleged a violation of the “most constant protection and security” obligation of the relevant BIT on the grounds that the host State had failed to act with reasonable diligence to protect the claimants’ property from occupation for a period of seven days by striking workers and to protect its CEO, who was physically assaulted.<sup>202</sup> The tribunal concluded that the host State should have adopted “a more pro-active attitude to ensure the protection of persons and property”.<sup>203</sup> The claimants received no

<sup>187</sup> *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016.

<sup>188</sup> *Ibid.*, para. 672.

<sup>189</sup> *Ibid.*, paras. 716-718. Essentially the same approach was adopted in *Vestey Group Ltd v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/06/4), Award, 15 April 2016. All three decisions (*Rusoro*, *Crystallex* and *Vestey*) stand in contrast to a decision rendered in 2015 in a case that also involved Venezuela: *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Award, 13 March 2015. There, the tribunal concluded that “[a]n expropriation only wanting fair compensation has to be considered as a provisionally lawful expropriation, precisely because the tribunal dealing with the case will determine and award such compensation” (para. 141).

<sup>190</sup> *Vestey Group Ltd v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/06/4), Award, 15 April 2016.

<sup>191</sup> *Ibid.*, para. 309.

<sup>192</sup> *Ibid.*, para. 305.

<sup>193</sup> *Ibid.*, para. 307.

<sup>194</sup> *Copper Mesa Mining Corporation v. Republic of Ecuador* (PCA No. 2012-2), Award, 15 March 2016.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*, para. 6.78.

<sup>197</sup> *Ibid.*, paras. 6.83-6.84.

<sup>198</sup> *Ibid.*, para. 6.83.

<sup>199</sup> *Ibid.*, para. 6.84.

<sup>200</sup> *Ibid.*, para. 6.85. The tribunal considered that “[f]or present purposes, although the FET and FPS standards impose legally distinct obligations under the Treaty, it is not necessary to distinguish between them” (*ibid.*, para. 6.82).

<sup>201</sup> *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro* (ICSID Case No. ARB(AF)/12/8), Award, 4 May 2016.

<sup>202</sup> *Ibid.*, paras. 352-353.

<sup>203</sup> *Ibid.*, para. 356.

compensation for the breach, however, as they failed to provide any evidence that they had “suffered damage as a result of the Respondent’s actions”.<sup>204</sup>

### The due diligence standard under full protection and security

The dispute in *Houben v. Burund*<sup>205</sup> concerned the alleged indirect expropriation of land purchased by the claimant in 2005 for residential use in Burundi’s capital. The claimant argued that the State, among others, failed to provide full protection and security by allowing the permanent occupation of the claimant’s property. The claimant had sent several letters to the authorities urging them to intervene and put an end to the illegal activities on its property, but allegedly to no avail. The respondent State contended that the general attorney had taken certain actions in respect of the illegal occupation by sending letters to the local administration and also pointed out that serious doubts existed concerning the validity of the claimant’s title to the land.<sup>206</sup>

The tribunal noted that the duty to provide full protection and security required due diligence by the State, and that the level of due diligence partly depended on the circumstances and the resources of the State in question.<sup>207</sup> On the basis of the evidence before it, it concluded that the respondent State had failed to take the necessary minimum measures to protect the occupied land (having had the resources to do so).<sup>208</sup> The tribunal also found evidence supporting the local authorities’ direct and indirect contribution to the occupation of the land.<sup>209</sup>

### Scope of umbrella clause protection

In *Philip Morris v. Uruguay*,<sup>210</sup> the claimants argued that Uruguay had violated Article 11 of the Switzerland–Uruguay BIT (1988), providing for each State party to “constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party”. The claimants alleged that Uruguay had committed to ensure “the full range of rights that trademark holders enjoy in Uruguay” (through Uruguay’s decision to accept the claimants’ trademark registrations)<sup>211</sup> and that Uruguay breached those commitments when it enacted measures restricting the claimants’ packaging of their cigarette products.

Proceeding from the proposition that the treaty’s umbrella clause in Article 11 would protect contractual commitments made by the State but not general obligations imposed by the law of the host State,<sup>212</sup> the tribunal concluded: “Uruguay entered into no commitment ‘with respect to the investment’ by granting a trademark. It did not actively agree to be bound by any obligation or course of conduct; it simply allowed the investor to access the same domestic IP system available to anyone eligible to register a trademark.”<sup>213</sup> As a result, the claim failed.<sup>214</sup>

In *Garanti Koza v. Turkmenistan*,<sup>215</sup> the claimant had entered into a contract to construct highway bridges with a State-owned enterprise, which acted as an organ of the respondent State. In considering the claim under the umbrella clause, the tribunal reasoned that it would be too broad to read the clause as raising a “pure” breach of contract to the level of an internationally wrongful act simply because one of the parties is an organ of the State. Rather, the tribunal concluded, the clause was better understood as covering the breach of a contractual

<sup>204</sup> *Ibid.*

<sup>205</sup> *Joseph Houben v. Republic of Burundi* (ICSID Case No. ARB/13/7), Award, 12 January 2016.

<sup>206</sup> *Ibid.*, paras. 169-170.

<sup>207</sup> *Ibid.*, paras. 161-163 (citing *Pantechniki S.A. Contractors & Engineers v. Republic of Albania* (ICSID Case No. ARB/07/21), Award, 30 July 2009, paras. 77, 81.)

<sup>208</sup> *Ibid.*, paras. 171-175.

<sup>209</sup> The tribunal dismissed the State’s assertion that an eviction of the occupants would have been incompatible with its domestic law and international human rights obligations under the International Covenant on Civil and Political Rights, finding that the respondent State had not taken all necessary measures to prevent the illegal occupation in the first place. *Ibid.*, para. 177.

<sup>210</sup> *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award, 8 July 2016.

<sup>211</sup> *Ibid.*, paras. 450, 473.

<sup>212</sup> *Ibid.*, para. 478. (In concluding that the language contained in Article 11 of the Switzerland–Uruguay BIT (1988) was broad enough to encompass the observance of contractual commitments, the tribunal expressly noted its agreement with the decision in *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay* (ICSID Case No. ARB/07/29), Decision on Jurisdiction, 12 February 2010, and its disagreement with the decision in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Jurisdiction, 6 August 2003.)

<sup>213</sup> *Ibid.*, para. 480.

<sup>214</sup> *Ibid.*, para. 482.

<sup>215</sup> *Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20), Award, 19 December 2016.

obligation “especially where the immediate cause of the breach is an action by an organ of the state other than the agency that is the party to the agreement”.<sup>216</sup>

The claimant alleged, in particular, that the respondent State breached the umbrella clause with regard to its obligation to make progress payments to the claimant against invoices prepared in the manner specified in the contract.<sup>217</sup> The tribunal agreed with the claimant, finding that multiple State organs, not themselves parties to the contract but with control over the State’s contracting entity, insisted that progress invoices be resubmitted in conformity with a local invoicing requirement known as “Smeta”, rather than in accordance with the terms of the contract.<sup>218</sup> As a consequence, the tribunal found that the respondent State had violated its obligations under the umbrella clause.<sup>219</sup>

### **Reliance on the MFN clause to expand the subject-matter scope of the treaty**

In *Mesa Power v. Canada*,<sup>220</sup> the tribunal’s majority concluded that the Canadian feed-in tariff (FIT) programme, which was at issue in this case, constituted “procurement” under the reservations and exceptions in Articles 1108(7)(a) and 1108(8)(b) of the NAFTA.<sup>221</sup> This meant that the claimant could not pursue its claims under the national treatment or MFN provisions, but was limited to claims under the NAFTA’s guarantee of MST (Article 1105).

Seeking to circumvent this limitation, the claimant argued that the NAFTA’s MFN clause should be read to allow it to take advantage of the protections provided in other Canadian treaties in which there was no limitation in situations involving procurement.<sup>222</sup> The tribunal rejected the argument on the grounds that an MFN provision cannot be used to expand the subject-matter scope of the base treaty. It held: “For an MFN clause in a base treaty to allow the importation of a more favorable standard of protection from a third party treaty, the applicability of the MFN clause in the base treaty must first be established. Put differently, one must first be *under* the treaty to claim *through* the treaty. Thus, [...] for the Claimant to establish that [the MFN clause] of the NAFTA applies, it must show that the FIT Program does not constitute procurement.”<sup>223</sup>

### **Reliance on the MFN clause to “import” substantive protections from third treaties**

In *Içkale v. Turkmenistan*,<sup>224</sup> the claimant sought to rely on the applicable BIT’s MFN clause to invoke Turkmenistan’s substantive commitments found in its investment treaties with third States. According to the tribunal, the words “treatment accorded in similar situations” in the applicable MFN provision suggested that the MFN obligation required a comparison of the factual situation of the investments for the purpose of determining whether the treatment accorded to investors under the base treaty could be said to be less favourable than that accorded to investments of the investors of any third State.<sup>225</sup> In other words, it was not enough that standards of protection included in other investment treaties might create legal rights for investors under those treaties because differences between applicable legal standards could not be said to amount to “treatment accorded in similar situations”.<sup>226</sup> The claimant was required to demonstrate actual treatment, which, in the circumstances of the case, it could not.<sup>227</sup>

<sup>216</sup> *Ibid.*, para. 330.

<sup>217</sup> *Ibid.*, paras. 336-337.

<sup>218</sup> *Ibid.*, paras. 347-348, 354.

<sup>219</sup> *Ibid.*, para. 354. The tribunal concluded that the breach was not the sole cause of the failure of the claimant’s investment and that the claimant’s own actions caused delays to the project (*ibid.*, paras. 356-357). The claimant’s contribution to its loss was considered in connection with the tribunal’s assessment of damages.

<sup>220</sup> *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Award, 24 March 2016.

<sup>221</sup> *Ibid.*, paras. 402, 448.

<sup>222</sup> *Ibid.*, para. 386.

<sup>223</sup> *Ibid.*, paras. 401-402 (emphasis in the original).

<sup>224</sup> *Içkale Insaat Limited Sirketi v. Turkmenistan* (ICSID Case No. ARB/10/24), Award, 8 March 2016.

<sup>225</sup> *Ibid.*, paras. 328-329.

<sup>226</sup> *Ibid.*, para. 329.

<sup>227</sup> *Ibid.*, para. 332. The tribunal’s interpretation finds no precedent in prior reported decisions. Earlier decisions in which tribunals have applied an MFN clause so as to incorporate a provision in a third treaty without evidence of “actual treatment”, include, among others, *White Industries Australia Limited v. The Republic of India* (UNCITRAL), Final Award, 30 November 2011, and *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction, 14 November 2005.

## c. Other issues

### Necessity defence in customary international law

In *Urbaser and CABB v. Argentina*,<sup>228</sup> the tribunal considered, as a number of prior tribunals have done in cases involving Argentina, the scope of the necessity defence in customary international law. Similar to many of those prior cases, this dispute arose out of a concession to operate a privatized public utility that was affected by Argentina's economic and financial crisis of 2000-2001, and which led to the imposition of a number of macroeconomic measures that adversely affected the claimants. Unlike most of those cases, the *Urbaser* tribunal accepted Argentina's necessity plea.

On the question whether Argentina had contributed to the crisis (which would have precluded the defence's application), the tribunal acknowledged that Argentina had "failed to exercise sufficient fiscal discipline" for a number of years prior to the crisis, but disagreed that these failures were of such a magnitude as to lead to the crisis.<sup>229</sup> Moreover, the tribunal questioned why, if the likely result of Argentina's policies had been so obvious already before 2001, the claimants would have invested in Argentina in the first place.<sup>230</sup>

Argentina also convinced the tribunal that the emergency measures taken "were the only ones available to the Argentine Government at the time, taking into account the extreme economic, institutional and social disturbances suffered by the country and its population".<sup>231</sup> The arbitrators rejected the claimants' suggestion that Argentina could have adopted alternative measures that would have had a less damaging impact.<sup>232</sup>

### State counterclaim against investors for human rights violations

In *Urbaser and CABB v. Argentina*,<sup>233</sup> Argentina filed a counterclaim seeking damages for the claimants' alleged "failure to provide the necessary investment into the Concession, thus violating its commitments and its obligations under international law based on the human right to water".<sup>234</sup>

The arbitrators rejected the claimants' objection that as a matter of principle the human right to water, like other human rights obligations, was a duty borne solely by States.<sup>235</sup> While noting that in the past only States had been subjects of international law, the tribunal observed that this principle "has lost its impact and relevance".<sup>236</sup> Pointing to developments with respect to corporate social responsibility and the United Nations Guiding Principles on Business and Human Rights, the tribunal stated that it could no longer be said "that companies operating internationally are immune from becoming subjects of international law". At the same time, however, the tribunal accepted that such developments were not sufficient on their own "to oblige corporations to put their policies in line with human rights".<sup>237</sup>

Having examined the BIT's dispute settlement clause, the applicable law clause and a so-called "more favourable terms" clause,<sup>238</sup> the tribunal concluded that each permitted or required reference to sources of law external to the BIT.<sup>239</sup> To determine the content of international law with respect to a human right to water, the tribunal examined a number of international instruments, including the 1948 Universal Declaration of Human Rights<sup>240</sup> and the 1966 International Covenant on Economic, Social and Cultural Rights.<sup>241</sup> It concluded that "the human right to water and sanitation is recognized today as part of human rights and that [States bear a corresponding

<sup>228</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic* (ICSID Case No. ARB/07/26), Award, 8 December 2016.

<sup>229</sup> *Ibid.*, paras. 712-713.

<sup>230</sup> *Ibid.*, para. 715.

<sup>231</sup> *Ibid.*, para. 717.

<sup>232</sup> *Ibid.*, para. 724.

<sup>233</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic* (ICSID Case No. ARB/07/26), Award, 8 December 2016.

<sup>234</sup> *Ibid.*, para. 36. The tribunal's ruling with respect to jurisdiction over the counterclaim is discussed on p. 11.

<sup>235</sup> *Ibid.*, para. 1193.

<sup>236</sup> *Ibid.*, para. 1194.

<sup>237</sup> *Ibid.*, para. 1195.

<sup>238</sup> Article VII(1) of the BIT states: "Where a matter is governed by this Agreement and also by another international agreement to which both Parties are a party or by general international law, the Parties and their investors shall be subject to whichever terms are more favorable."

<sup>239</sup> *Ibid.*, para. 1192.

<sup>240</sup> *Ibid.*, para. 1196.

<sup>241</sup> *Ibid.*, para. 1197.

duty] to provide all persons living under their jurisdiction with safe and clean drinking water and sewage services”.<sup>242</sup> Moreover, the tribunal concluded that “in order to ensure that such rights be enjoyed by each person, it must necessarily also be ensured that no other individual or entity, public or private, may act in disregard of such rights”.<sup>243</sup>

According to Argentina, given that the claimants were responsible under the concession for providing water and sanitation services, the human rights obligation to provide safe and clean drinking water and sewage services fell to them.<sup>244</sup> The tribunal disagreed and ultimately dismissed Argentina’s counterclaim, finding that the alleged obligation on the claimants was created by the concession and simply did not exist as a matter of international law.<sup>245</sup>

#### d. ICSID annulment decisions

This sub-section provides an overview of decisions rendered by ICSID *ad hoc* committees in annulment proceedings brought under Article 52 of the ICSID Convention.

##### Standard for annulment on grounds of alleged lack of arbitrator independence and impartiality

In *EDF and others v. Argentina*,<sup>246</sup> Argentina sought annulment of a \$136 million award on the ground that two of the arbitrators, Gabrielle Kaufmann-Kohler and Jesús Remón, lacked independence and impartiality.<sup>247</sup> Arbitrator Kaufmann-Kohler had been challenged during the arbitral proceedings (challenge denied) while arbitrator Remón had not (the facts giving rise to the challenge became known after the arbitral proceedings had been closed).

The committee decided that where a challenge to an arbitrator had been first raised before the tribunal, a committee should limit itself to the facts found in the original decision on disqualification and “may not find a ground of annulment exists [...] unless the decision not to disqualify the arbitrator in question is so plainly unreasonable that no reasonable decision-maker could have come to such a decision”.<sup>248</sup> Reviewing the original tribunal’s decision regarding arbitrator Kaufmann-Kohler, the committee concluded that it had been “carefully reasoned and comprehensive”<sup>249</sup> and thus should not be annulled.

With respect to arbitrator Remón who had not been challenged in the original proceedings, the committee held that *de novo* review must be carried out and formulated the relevant legal standard as consisting of three prongs: “(a) was the right [of a disputing party] to [challenge the arbitrator] waived because the party concerned had not raised it sufficiently promptly? (b) if not, has the party seeking annulment established facts the existence of which would cause a reasonable person, with knowledge of all the facts, to consider that there were reasonable grounds for doubting that an arbitrator possessed the requisite qualities of independence and impartiality? and (c) if so, could the lack of impartiality or independence on the part of that arbitrator – assuming for this purpose that the doubts were well-founded – have had a material effect on the award?”<sup>250</sup> Having examined these questions with respect to arbitrator Remón, the committee dismissed Argentina’s application.

##### Alleged violation of EU law

*Micula v. Romania* (I)<sup>251</sup> concerned application for annulment of an award rendered under the Romania–Sweden BIT (2002). In that case a majority of the original tribunal held that Romania violated the FET obligation by revoking certain incentives previously given to the claimants.<sup>252</sup> The majority found that Romania had created

<sup>242</sup> *Ibid.*, para. 1205.

<sup>243</sup> *Ibid.*, para. 1196 (relying on Article 30 of the 1948 Universal Declaration of Human Rights).

<sup>244</sup> *Ibid.*, para. 1206.

<sup>245</sup> *Ibid.*, paras. 1206-1212 (“No human rights obligation to provide access to water existed on part of Claimants before they entered into the Concession. The acceptance of the Bid and the Concession Contract could not have as an effect that the obligations arising out under this Contract became, in addition or in parallel, obligations based on international law.” (*Ibid.*, para. 1212)).

<sup>246</sup> *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Decision on Annulment, 5 February 2016.

<sup>247</sup> The specific grounds for annulment invoked by Argentina under Article 52 of the ICSID Convention were Article 52(1)(a) and (d).

<sup>248</sup> *Ibid.*, para. 145.

<sup>249</sup> *Ibid.*, para. 161.

<sup>250</sup> *Ibid.*, para. 136.

<sup>251</sup> *Ioan Micula, Viorel Micula and others v. Romania* (I) (ICSID Case No. ARB/05/20), Decision on Annulment, 26 February 2016.

<sup>252</sup> *Ibid.*, para. 109.

legitimate expectations that the incentives would remain in place for a 10-year period, and then prematurely revoked them in 2005 (as part of its accession to the EU).<sup>253</sup>

In its application for annulment, Romania identified the following three main defects in the award: (i) the tribunal failed to apply the law to the dispute that it had found was applicable; (ii) the tribunal failed to determine whether Romania was prohibited from paying compensation as a matter of EU law; and (iii) the tribunal had failed to require each of the claimants to prove that it had suffered harm, and failed to award compensation to each claimant only for the harm that it had suffered.<sup>254</sup> In addressing these arguments, the tribunal emphasized its agreement with the annulment committee in *CMS v. Argentina* that “a committee ‘has only limited jurisdiction under Article 52 of the Convention’ and ‘cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal.’”<sup>255</sup>

The ad hoc committee rejected all of Romania’s arguments. As to its first ground, the committee found that there was no manifest failure to apply the law.<sup>256</sup> In the committee’s view, Romania’s criticism concerned “the correctness of the application of the law rather than its application”.<sup>257</sup> On the second issue, whether the ICSID award would be enforceable under EU law, the committee observed that the tribunal had given particular consideration to the positions of Romania, the claimants and the EU (through non-disputing party submissions) on this issue and had decided, as it was entitled to do, that it would not base its award “on matters of EU law that may come to apply after the Award has been rendered”.<sup>258</sup>

Finally, the committee rejected Romania’s complaint regarding the tribunal’s approach of issuing a “collective” damages award. Although the committee accepted that certain aspects of the tribunal’s reasoning in support of its collective damages award appeared to be contradictory,<sup>259</sup> it nevertheless concluded that they did not rise to the level of a “failure to state reasons” under Article 52 of the ICSID Convention: “In order for an award to be annulable [...] the contradiction between the reasons given must be serious enough so that the reasons will not enable the reader to understand the tribunal’s motives and reasoning in issues of fact or law.”<sup>260</sup>

### **Annulable error for failure to state reasons and serious departure from a fundamental rule of procedure**

In *TECO v. Guatemala*,<sup>261</sup> the ad hoc committee partially annulled the award, finding a “failure to state reasons” under Article 52(1)(e) of the ICSID Convention and a “serious departure from a fundamental rule of procedure” under Article 52(1)(d). In the original arbitration concerning Guatemala’s treatment of an electric company, the claimant had sought damages in excess of \$200 million and was awarded \$21.1 million.<sup>262</sup> The claimant sought annulment of the damages section of the award;<sup>263</sup> Guatemala sought annulment of the award in its entirety.<sup>264</sup>

The ad hoc committee denied Guatemala’s application but granted the claimant’s application with respect to certain aspects of the award relating to damages. It described the relevant portion of the original tribunal’s reasoning as “not clear at all”, noting that the committee “has struggled to understand” it.<sup>265</sup> Specifically, the committee pointed to the tribunal’s failure to “discuss *at all* the Parties’ respective expert reports” and the tribunal’s summary conclusion that four expert reports, amounting to some 1200 pages, submitted by the parties were “unsatisfactory and amounted to ‘no sufficient evidence’”.<sup>266</sup> As observed by the committee, a tribunal cannot “simply gloss over evidence upon which the Parties have placed significant emphasis, without any

<sup>253</sup> *Ibid.*, paras. 101, 109.

<sup>254</sup> *Ibid.*, para. 140. The specific grounds for annulment invoked by Romania under Article 52 of the ICSID Convention were Article 52(1)(b), (d) and (e) (*ibid.*, para. 120).

<sup>255</sup> *Ibid.*, para. 122 (quoting *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8), Decision of the Ad hoc Committee on Argentina’s application for annulment, 25 September 2007, para. 136).

<sup>256</sup> *Ibid.*, para. 179.

<sup>257</sup> *Ibid.*, para. 186.

<sup>258</sup> *Ibid.*, para. 229.

<sup>259</sup> *Ibid.*, para. 297.

<sup>260</sup> *Ibid.*, para. 300.

<sup>261</sup> *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment, 5 April 2016.

<sup>262</sup> *Ibid.*, para. 67.

<sup>263</sup> *Ibid.*, para. 29.

<sup>264</sup> *Ibid.*, para. 31.

<sup>265</sup> *Ibid.*, para. 128.

<sup>266</sup> *Ibid.*, para. 130 (emphasis in the original).



analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory”.<sup>267</sup>

The committee found further fault with the way in which the tribunal had addressed the calculation of interest, noting that part of the claim for interest was rejected on the basis of a legal concept – unjust enrichment – that neither party had raised in its arguments and that the tribunal had not previously identified as being an issue in the case.<sup>268</sup> Relying on the annulment committee’s decision in *Caratube v. Kazakhstan*, the committee observed that a tribunal deprives parties of the opportunity to be heard when it “effectively surprises the parties with an issue that neither party has invoked, argued or reasonably could have anticipated during the proceedings”.<sup>269</sup> On this basis, the committee annulled the tribunal’s decision with respect to the award of interest.<sup>270</sup>

### e. Judicial review by national courts

This sub-section provides an overview of decisions rendered by national courts in set-aside proceedings. Set-aside proceedings provide a mechanism to challenge non-ICSID Convention awards in the country that has served as the “legal seat” of the arbitration.

#### Provisional application of the ECT to Russia

In the joined set-aside proceedings in *Russia v. Veteran Petroleum, Yukos Universal, and Hulley Enterprises*,<sup>271</sup> the Hague District Court in the Netherlands set aside the combined \$50 billion award issued by a consolidated tribunal in favour of three majority shareholders in the former Russian oil company Yukos. In its ruling, the Dutch court held that the tribunal had lacked jurisdiction over the investors’ claims under the ECT.

The Court disagreed with the tribunal’s decision to accept jurisdiction over the case even though Russia had only signed but never ratified the ECT.<sup>272</sup> The tribunal had held that the ECT could be applied to Russia by virtue of its acceptance of the provisional application of the treaty pursuant to Article 45 of the ECT. In the tribunal’s view, so long as the principle of provisional application was not in and of itself contrary to the Russian Constitution, laws or other regulations, then the ECT as a whole must be given provisional application to Russia.<sup>273</sup> The Court, however, concluded that the tribunal had misread Article 45, and agreed with Russia’s argument that each individual provision of the ECT must be assessed for its compatibility with Russian law before it could be provisionally applied, i.e. “the Russian Federation was only bound by the treaty provisions reconcilable with Russian law”.<sup>274</sup>

The Court then considered whether the ECT’s Article 26 on investor–State arbitration was compatible with Russian law. It rejected as “too limited” the investors’ argument that all that the ECT required was showing that there was nothing in Russian law expressly prohibiting such arbitration.<sup>275</sup> Instead, the Court concluded, for a dispute such as the one at issue in the Yukos cases (i.e. a dispute of the public-law nature concerning compensation for damages caused by the government action) to be amenable to arbitration, it was necessary to show that there had been the specific approval of the Russian Parliament – effectively, ratification of the ECT – which had never been given.<sup>276</sup> On the basis of this analysis, the Dutch court concluded that “the Russian Federation was not bound by the provisional application of the arbitration regulations of Article 26 ECT” and therefore “never made an unconditional offer for arbitration”.<sup>277</sup> It held that the tribunal “wrongly declared itself competent in the Arbitration to take cognizance of the claims and issue the ensuing award”.<sup>278</sup>

<sup>267</sup> *Ibid.*, para. 131.

<sup>268</sup> *Ibid.*, paras. 189-190.

<sup>269</sup> *Ibid.*, para. 184 (citing *Caratube International Oil Company LLP v. Republic of Kazakhstan* (I) (ICSID Case No. ARB/08/12), Decision on the Annulment Application of Caratube International Oil Company LLP, 21 February 2014, paras. 93-94).

<sup>270</sup> *Ibid.*, para. 198. As a result of its annulment of the tribunal’s award with respect to damages and interest, the committee further annulled the tribunal’s award with respect to costs, which it found had been predicated on Guatemala having been partially successful on quantum (*ibid.*, paras. 361-362).

<sup>271</sup> *Russian Federation v. Veteran Petroleum Limited, Russian Federation v. Yukos Universal Limited, and Russian Federation v. Hulley Enterprises Limited*, Judgment of the Hague District Court, 20 April 2016.

<sup>272</sup> *Ibid.*, paras. 2.2, 2.4.

<sup>273</sup> *Ibid.*, para. 5.7.

<sup>274</sup> *Ibid.*, paras. 5.18, 5.23.

<sup>275</sup> *Ibid.*, para. 5.33.

<sup>276</sup> *Ibid.*, para. 5.93.

<sup>277</sup> *Ibid.*, para. 5.95.

<sup>278</sup> *Ibid.*, para. 5.96.

### Applicability of China's BIT to Macao

In *Sanum Investments v. Laos*,<sup>279</sup> the Court of Appeal of Singapore reviewed an arbitral award in which the tribunal had affirmed its jurisdiction over the investor's claims brought under the China–Lao People's Democratic Republic BIT (1993). This appeal was brought by the investor against the decision of a lower Singaporean court, which had set aside the arbitral award and decided that the arbitral tribunal did not have jurisdiction over the investor's claims. The key issue was whether following Macao's transfer of sovereignty from Portugal to China in December 1999, the China–Laos BIT (1993) had become applicable to Macao (Special Administrative Region, China), the home territory of the investor. Applying the “moving treaty frontier” (MTF) rule,<sup>280</sup> the Court of Appeal held that the China–Laos BIT would be “presumed to automatically apply to the territory of Macao upon restoration of Chinese sovereignty”.<sup>281</sup>

The Court observed that the BIT itself was silent on whether it was intended to apply to Macao, despite the fact that it had been concluded in 1993, six years after a 1987 joint declaration between Portugal and China regarding Macao's return to Chinese sovereignty.<sup>282</sup> Even though the 1987 joint declaration indicated that China would determine on a case-by-case basis whether particular treaties would apply to Macao after its return to China, and China had never made a positive decision to apply the China–Laos BIT to Macao, the Court held that the declaration had been entered into between China and Portugal, and thus could not affect Laos' rights or obligations.<sup>283</sup>

The Court further found that a 2014 exchange of notes between Laos and China indicating their joint intention that the China–Laos BIT not apply to Macao was irrelevant to its interpretation of the BIT.<sup>284</sup> Of critical importance for the Court was that the notes had been exchanged *after* the arbitration had been commenced in August 2012 (the “critical date”). On this basis, the Court refused to accord any weight to the notes.<sup>285</sup> The Court rejected Laos' attempt to characterize the 2014 notes as “a subsequent agreement or practice” within the meaning of Article 31(3) of the Vienna Convention on the Law of Treaties, finding that this “would amount to effecting a retroactive amendment of the BIT”.<sup>286</sup>

Having concluded that the China–Laos BIT applied to Macao, the Court of Appeal went on to confirm the arbitral tribunal's interpretation of the dispute settlement clause in the BIT, according to which the clause covered disputes regarding the amount of compensation for an expropriation as well as disputes about whether the expropriation as such had occurred.<sup>287</sup>

### Power of the arbitral tribunal to issue orders to respondent State's courts

In *Ecuador v. Chevron and TexPet*,<sup>288</sup> Ecuador brought an action in the Hague District Court in the Netherlands to set aside a number of interim awards issued by an ISDS tribunal constituted under the Ecuador–United States BIT (1993). The underlying arbitration concerned claims brought in 2009 by Chevron and its subsidiary, Texaco Petroleum Company (“TexPet”), arising out of an action brought against them in the Lago Agrio Court in Ecuador for payment of damages for severe environmental pollution. In February 2011, the Lago Agrio Court in Ecuador

<sup>279</sup> *Sanum Investments Limited v. Government of the Lao People's Democratic Republic*, Judgment of the Court of Appeals of Singapore, 29 September 2016.

<sup>280</sup> The “moving treaty frontier” rule addresses the situation in which part of the territory of a State becomes part of the territory of another State. Under Article 15 of the Vienna Convention on Succession of States in Respect of Treaties, the general rule is that treaties of the successor State come into force with respect to the newly added territory, unless it otherwise appears from the treaty or to do so would be incompatible with the object and purpose of the treaty, or would radically change the conditions for its operation.

<sup>281</sup> *Ibid.*, paras. 48–50.

<sup>282</sup> *Ibid.*, para. 57.

<sup>283</sup> *Ibid.*, para. 76.

<sup>284</sup> *Ibid.*, paras. 54, 64.

<sup>285</sup> *Ibid.*, para. 108 (emphasis omitted).

<sup>286</sup> *Ibid.*, para. 116. The Court also rejected Laos' attempt to draw support from practice under the NAFTA, noting that the 2001 NAFTA Free Trade Commission's Notes of Interpretation, which were applied in a number of then-pending cases, took place through a process expressly provided for in the NAFTA and not found in the China–Laos BIT. *Ibid.*, paras. 117–118.

<sup>287</sup> *Ibid.*, paras. 130, 147. In an unrelated case, the Swedish Svea Court of Appeal considered a similar question in the context of Article 10 of the Russian Federation–Spain BIT (1990), coming to the opposite conclusion. It decided that Article 10 of the invoked BIT covers issues regarding the amount of compensation due to an investor, but does *not* cover disputes about whether an expropriation had occurred. *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. v. The Russian Federation*, Judgment of the Svea Court of Appeal, 18 January 2016, p. 7.

<sup>288</sup> *Republic of Ecuador v. Chevron Corporation and Texaco Petroleum Company*, Judgment of the District Court of The Hague, 20 January 2016.

issued a judgment ordering Chevron to pay damages of \$8.6 billion and to pay punitive damages of another \$8.6 billion if TexPet did not offer its apologies within 15 days. Chevron and TexPet alleged that the domestic Lago Agrio proceedings had been tainted by fraud involving the Government of Ecuador.<sup>289</sup>

The interim awards at issue before the Dutch court were rendered by the arbitral tribunal against Ecuador during 2012 to 2013. In the first two interim awards, Ecuador was ordered, *inter alia*, to take “all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgement against [Chevron] in the Lago Agrio Case”.<sup>290</sup> In its fourth interim award, the tribunal declared that Ecuador “has violated the First and Second Interim Awards under the Treaty, the UNCITRAL Rules and international law in regard to the finalisation and enforcement subject to execution of the Lago Agrio Judgement within and outside Ecuador, including (but not limited to) Canada, Brazil and Argentina”.<sup>291</sup>

Two grounds of Ecuador’s challenge to the awards are noteworthy. First, Ecuador argued that the tribunal violated public policy by “intervening in the [Ecuadorian] judicial process and wrongly dictating to the Ecuadorian courts and other foreign courts, in an unacceptable manner and, moreover, without substantiation and a proper establishment of relevant facts”.<sup>292</sup> Second, Ecuador argued, the tribunal’s awards violated public policy by effectively deciding on the rights of the claimants in the Lago Agrio lawsuit without those claimants being parties to the arbitration.<sup>293</sup>

The Court rejected both of Ecuador’s arguments. It concluded that “as Ecuador voluntarily, unambiguously and unconditionally bound itself to the BIT, including the provisions concerning arbitration”, it had no grounds to complain that a tribunal constituted under the BIT would take measures with respect to its enforcement.<sup>294</sup> Moreover, an order to take measures “directed at Ecuador’s judiciary is not contrary to public policy, as this judiciary is a body that is an inextricable part of the State of Ecuador (bound to the BIT)”.<sup>295</sup>

With respect to Ecuador’s second ground of complaint, the Court acknowledged that “the interim measures (may) have direct consequences for the Lago Agrio claimants”.<sup>296</sup> Nevertheless, the Court concluded that “considering the special circumstances [...], there has been no breach of (national or international) public policy”.<sup>297</sup> For the Court, those “special circumstances” included “serious indications that the judgment rendered at first instance in the Lago Agrio proceedings [...] came into being fraudulently [...] and under political pressure”.<sup>298</sup>

### Interpretation of Canada’s reservation under the NAFTA

In *Attorney General of Canada v. Mobil Investments and Murphy Oil*,<sup>299</sup> the Canadian Government applied to the Superior Court of Ontario seeking to set aside a C\$17.3 million (approx. \$13.9 million) NAFTA arbitration award rendered against it in favour of U.S. investors. In the arbitral proceeding, a majority had held that certain guidelines enacted by the Canada-Newfoundland Offshore Petroleum Board had violated the prohibition on performance requirements in Article 1106 of the NAFTA and did not fall within the scope of Canada’s reservation under Article 1108(1)(a).<sup>300</sup> Canada argued that the majority had used the wrong criteria for determining whether the guidelines fell within the scope of the reservation, and accordingly that the tribunal had exceeded its jurisdiction by ruling on a measure which had been properly reserved.<sup>301</sup>

The Superior Court of Ontario rejected Canada’s application. While it acknowledged that it had the power to review jurisdictional decision for correctness, it cautioned that this power “does not give the courts a broad scope for intervention [...] [and] courts are expected to intervene only in rare circumstances where there is a true

<sup>289</sup> *Ibid.*, paras. 2.6-2.7.

<sup>290</sup> *Ibid.*, para. 2.9.

<sup>291</sup> *Ibid.*, para. 2.12.

<sup>292</sup> *Ibid.*, para. 3.2.2.

<sup>293</sup> *Ibid.*

<sup>294</sup> *Ibid.*, para. 4.27.

<sup>295</sup> *Ibid.*

<sup>296</sup> *Ibid.*, para. 4.28.

<sup>297</sup> *Ibid.*

<sup>298</sup> *Ibid.*, para. 4.30.

<sup>299</sup> *Attorney General of Canada v. Mobil Investments Canada Inc. and Murphy Oil Corporation*, Decision of the Superior Court of Justice of Ontario, 16 February 2016.

<sup>300</sup> *Ibid.*, paras. 18-19.

<sup>301</sup> *Ibid.*, paras. 28-29.

question of jurisdiction”.<sup>302</sup> Assessing the arguments put forward by Canada, the court held that the issues raised did not concern the jurisdiction of the tribunal but rather the merits of the tribunal’s decision and Canada’s disagreement with the interpretative approach adopted by the majority.<sup>303</sup>

### Arbitrator partiality

In *Argentina v. AWG*,<sup>304</sup> the United States District Court refused to set aside a \$21 million award against Argentina under the Argentina–United Kingdom BIT (1990). Among the grounds raised by Argentina was that one of the arbitrators, Gabrielle Kaufmann-Kohler, had acted with “evident partiality”.<sup>305</sup> Argentina referred to the fact that after the commencement of the arbitration the said arbitrator had become a non-executive member of the board of UBS bank, which in turn was a shareholder in two members of the consortium involved in the privatization of the water and sanitation sector in Buenos Aires.<sup>306</sup>

In the course of the arbitral proceedings, Argentina had filed a challenge to disqualify arbitrator Kaufmann-Kohler, which was rejected by the two unchallenged arbitrators.<sup>307</sup> The Court noted that under U.S. law the “[r]eview of arbitral awards is ‘extremely limited’ and is ‘not an occasion for *de novo* review’”.<sup>308</sup> Moreover, the Court observed that Argentina bore a “heavy” burden of proof in establishing grounds of “evident partiality” sufficient to meet the “onerous standard for vacatur”.<sup>309</sup> Against this background, the Court held that the evidence presented by Argentina was “wholly insufficient to establish Argentina’s claim of evident partiality”.<sup>310</sup>

## 3. Conclusions

In 2016, investor–State arbitration remained in high demand as investors initiated over 60 new claims, challenging different types of State measures across a variety of sectors. The year also saw a large number of new arbitral decisions rendered (although over a quarter remain unpublished).

Some of the past year’s awards showed a significant degree of deference to States’ regulatory powers when assessing governmental conduct. One example is the full dismissal of Philip Morris’s claims in recognition of Uruguay’s right to regulate to protect public health (the case was decided in favour of the State). Another one, *Urbaser and CABB v. Argentina*, relates to the acceptance of Argentina’s “necessity” defence for emergency measures taken to address the country’s economic and financial crisis of the early 2000s (ultimately, the tribunal found that the State breached the IIA, but decided that no compensation was due).

Many issues considered by tribunals in the past year touched upon topics identified in UNCTAD’s Investment Policy Framework for Sustainable Development (UNCTAD, 2015) and its Road Map for IIA Reform (*WIR15*), in particular:

- Safeguarding the right to regulate, while providing protection (e.g. application of the legitimate expectations doctrine and the police powers doctrine)
- Reforming investment dispute settlement (e.g. consideration of certain jurisdictional requirements such as the limitation period and the waiver requirement)
- Ensuring responsible investment (e.g. consideration of a State counterclaim concerning the investors’ alleged violation of human rights)

<sup>302</sup> *Ibid.*, para. 37 (citing *United Mexican States v. Cargill, Incorporated*, Application to set aside award (Court of Appeal for Ontario), 4 October 2011, paras. 27-51).

<sup>303</sup> *Ibid.*, paras. 40, 46-49, 51.

<sup>304</sup> *Argentine Republic v. AWG Group Ltd.*, Memorandum Opinion (on Argentina’s application to vacate award), U.S. District Court for the District of Columbia, 30 September 2016.

<sup>305</sup> *Ibid.*, p. 3. Argentina also sought the setting aside of the award on the ground that the tribunal had exceeded its powers by failing to apply the applicable law in its computation of damages and its evaluation of Argentina’s necessity defence (*ibid.*, p. 31). The court rejected these arguments, noting the strong position in U.S. law that review for excess-of-authority by arbitral tribunals does not “confer on courts a general equitable power to substitute a judicial resolution of a dispute for an arbitral one” (*ibid.*, p. 31).

<sup>306</sup> *Ibid.*, p. 17. AWG had made its investment in Argentina as part of the consortium, but UBS had no ownership interest in AWG itself. *Ibid.*, p. 24.

<sup>307</sup> *Ibid.*, p. 19.

<sup>308</sup> *Ibid.*, p. 10 (citations omitted).

<sup>309</sup> *Ibid.*, pp. 23-24.

<sup>310</sup> *Ibid.*, p. 24.

- Enhancing the systemic consistency of the IIA regime (e.g. interpretation of the MFN clause, including – for the first time – the one in the GATS)

Also featuring prominently in the past year’s decisions were issues surrounding investor nationality (the special theme of *WIR16*), including “treaty shopping”, denial of treaty benefits to “mailbox” companies and criteria for determining whether a company has its “seat” in the alleged home State.

This review of arbitral decisions – as well as previous reviews – shows that the outcome of many disputes hinged upon the wording of specific provisions in the applicable IIA. This underlines the importance of balanced and careful treaty drafting and the need to reduce uncertainty arising from (broadly worded) provisions. UNCTAD’s policy tools, including its Investment Policy Framework for Sustainable Development and its Road Map for IIA Reform provide policymakers with options in this regard.

Over the past years, IIA reform has made significant progress. Consolidating phase 1 of IIA reform, most new treaties contain reform-oriented features. It is now time to move to phase 2 of IIA reform: modernizing the existing stock of old-generation treaties. Several factors make a strong case for such reform, including the fact that virtually all known ISDS cases were based on treaties concluded prior to 2010 (and most cases invoked those from the 1980s or 1990s). The World Investment Report 2017 presents and analyses the pros and cons of 10 policy options that countries can take to reform their old-generation treaties (chapter III, *WIR17*).

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Elisabeth Tuerk leads UNCTAD’s IIA programme, under the supervision of Joerg Weber and the overall guidance of James Zhan.

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*WIR17. World Investment Report 2017. Investment and the Digital Economy*. New York and Geneva: United Nations.

## Annex 1. Known treaty-based ISDS cases initiated in 2016

Key information about each case is available at: <http://investmentpolicyhub.unctad.org/ISDS/FilterByCaseName>

No.	Case name	Respondent State	Home State of claimant	Applicable IIA
1	<i>A.M.F. Aircraftleasing Meier &amp; Fischer GmbH &amp; Co. KG v. Czech Republic</i>	Czech Republic	Germany	Czech Republic–Germany BIT (1990)
2	<i>Agroinsumos Ibero-Americanos, S.L., Inica Latinoamericana, S.L., Proyefa Internacional, S.L., Verica Atlántica, S.L. v. Bolivarian Republic of Venezuela</i> (ICSID Case No. ARB/16/23)	Venezuela, Bolivarian Republic of	Spain	Spain–Venezuela, Bolivarian Republic of BIT (1995)
3	<i>Aharon Naftali Biram, Gilatz Spain SL, Redmill Holdings Ltd and Sun-Flower Olmeda GmbH v. Kingdom of Spain</i> (ICSID Case No. ARB/16/17)	Spain	Germany; United Kingdom	The Energy Charter Treaty (1994)
4	<i>Al Jazeera Media Network v. Arab Republic of Egypt</i> (ICSID Case No. ARB/16/1)	Egypt	Qatar	Egypt–Qatar BIT (1999)
5	<i>Albacora S.A. v. Republic of Ecuador</i> (UNCITRAL)	Ecuador	Spain	Ecuador–Spain BIT (1996)
6	<i>Alhambra Resources Ltd. and Alhambra Coöperatief U.A. v. Republic of Kazakhstan</i> (ICSID Case No. ARB/16/12)	Kazakhstan	Netherlands; Canada	Kazakhstan–Netherlands BIT (2002)
7	<i>América Móvil S.A.B. de C.V. v. Republic of Colombia</i> (ICSID Case No. ARB(AF)/16/5)	Colombia	Mexico	Colombia–Mexico–Venezuela FTA (1994)
8	<i>Amlyn Holding B.V. v. Republic of Croatia</i> (ICSID Case No. ARB/16/28)	Croatia	Netherlands	The Energy Charter Treaty (1994)
9	<i>Artashes Rafikovich Amalyan v. Russian Federation</i> (UNCITRAL)	Russian Federation	Greece	Greece–Russian Federation BIT (1993)
10	<i>Astro All Asia Networks and South Asia Entertainment Holdings Limited v. India</i> (UNCITRAL)	India	United Kingdom; Mauritius	India–United Kingdom BIT (1994); India–Mauritius BIT (1998)
11	<i>Attila Dogan Construction &amp; Installation Co. Inc. v. Sultanate of Oman</i> (ICSID Case No. ARB/16/7)	Oman	Turkey	Oman–Turkey BIT (2007)
12	<i>Boris Goljevšček, Viaduct d.o.o. Portorož and Vladimir Zevnik v. Bosnia and Herzegovina</i> (ICSID Case No. ARB/16/36)	Bosnia and Herzegovina	Slovenia	The Energy Charter Treaty (1994); Bosnia and Herzegovina–Slovenia BIT (2001)
13	<i>Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama</i> (ICSID Case No. ARB/16/34)	Panama	United States of America	Panama–United States FTA (2007)
14	<i>CEZ, a.s. v. Republic of Bulgaria</i> (ICSID Case No. ARB/16/24)	Bulgaria	Czech Republic	The Energy Charter Treaty (1994)
15	<i>Champion Holding Company, James Tarrick Wahba, John Byron Wahba and others v. Arab Republic of Egypt</i> (ICSID Case No. ARB/16/2)	Egypt	United States of America	Egypt–United States of America BIT (1986)
16	<i>CIC Renewable Energies Italy GmbH, Enernovum Asset 1 GmbH &amp; Co. KG, Enernovum GmbH &amp; Co. KG and others v. Italian Republic</i> (ICSID Case No. ARB/16/39)	Italy	Germany; United Kingdom; Luxembourg	The Energy Charter Treaty (1994)
17	<i>Cordoba Beheer B.V., Cross Retail S.L., Sevilla Beheer B.V., Spanish project companies v. Kingdom of Spain</i> (ICSID Case No. ARB/16/27)	Spain	Netherlands	The Energy Charter Treaty (1994)
18	<i>Cosigo Resources, Ltd., Cosigo Resources Sucursal Colombia, Tobie Mining and Energy, Inc. v. Republic of Colombia</i> (UNCITRAL)	Colombia	United States of America	Colombia–United States FTA (2006)
19	<i>Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States</i> (ICSID Case No. ARB(AF)/16/3)	Mexico	United States of America	NAFTA (1992)

No.	Case name	Respondent State	Home State of claimant	Applicable IIA
20	<i>Dominion Minerals Corp. v. Republic of Panama</i> (ICSID Case No. ARB/16/13)	Panama	United States of America	Panama–United States of America BIT (1982)
21	<i>EBO Invest AS, Rox Holding AS and Staur Eiendom AS v. Republic of Latvia</i> (ICSID Case No. ARB/16/38)	Latvia	Norway	Latvia–Norway BIT (1992)
22	<i>Eco Oro Minerals Corp. v. Republic of Colombia</i> (ICSID Case No. ARB/16/41)	Colombia	Canada	Canada–Colombia FTA (2008)
23	<i>Emergofin B.V. and Velbay Holdings Ltd. v. Ukraine</i> (ICSID Case No. ARB/16/35)	Ukraine	Netherlands	Netherlands–Ukraine BIT (1994)
24	<i>ENGIE International Holdings BV, ENGIE SA and GDF International SAS v. Hungary</i> (ICSID Case No. ARB/16/14)	Hungary	France; Netherlands	The Energy Charter Treaty (1994)
25	<i>ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH &amp; Co. KG v. Italian Republic</i> (ICSID Case No. ARB/16/5)	Italy	Austria; Germany	The Energy Charter Treaty (1994)
26	<i>Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Kingdom of Spain</i> (ICSID Case No. ARB/16/4)	Spain	Japan; Netherlands	The Energy Charter Treaty (1994)
27	<i>Glencore Finance (Bermuda) Ltd. v. Plurinational State of Bolivia</i>	Bolivia, Plurinational State of	United Kingdom	Bolivia, Plurinational State of–United Kingdom BIT (1988)
28	<i>Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia</i> (ICSID Case No. ARB/16/6)	Colombia	Switzerland	Colombia–Switzerland BIT (2006)
29	<i>Global Telecom Holding S.A.E. v. Canada</i> (ICSID Case No. ARB/16/16)	Canada	Egypt	Canada–Egypt BIT (1996)
30	<i>Gold Pool Limited Partnership v. Republic of Kazakhstan</i> (UNCITRAL)	Kazakhstan	Canada	Canada–Russian Federation BIT (1989)
31	<i>Görkem Insaat Sanayi ve Ticaret Limited Sirketi v. Turkmenistan</i> (ICSID Case No. ARB/16/30)	Turkmenistan	Turkey	Turkey–Turkmenistan BIT (1992)
32	<i>Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru</i> (UNCITRAL)	Peru	United States of America	Peru–United States FTA (2006)
33	<i>Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain</i> (ICSID Case No. ARB/16/18)	Spain	Luxembourg; Netherlands	The Energy Charter Treaty (1994)
34	<i>Iskandar Safa and Akram Safa v. Hellenic Republic</i> (ICSID Case No. ARB/16/20)	Greece	Lebanon	Greece–Lebanon BIT (1997)
35	<i>Italba Corporation v. Oriental Republic of Uruguay</i> (ICSID Case No. ARB/16/9)	Uruguay	United States of America	United States of America–Uruguay BIT (2005)
36	<i>J&amp;P-AVAX S.A. v. Lebanese Republic</i> (ICSID Case No. ARB/16/29)	Lebanon	Greece	Greece–Lebanon BIT (1997)
37	<i>Jorge Luis Blanco, Joshua Dean Nelson and Tele Fácil México, S.A. de C.V. v. United Mexican States</i> (UNCITRAL)	Mexico	United States of America	NAFTA (1992)
38	<i>JSC Tashkent Mechanical Plant, JSCB Asaka, JSCB Uzbek Industrial and Construction Bank, and National Bank for Foreign Economic Activity of the Republic of Uzbekistan v. Kyrgyz Republic</i> (ICSID Case No. ARB(AF)/16/4)	Kyrgyzstan	Uzbekistan	Kyrgyzstan–Uzbekistan BIT (1996)
39	<i>Kunsttrans Holding GmbH and Kunsttrans d.o.o. Beograd v. Republic of Serbia</i> (ICSID Case No. ARB/16/10)	Serbia	Austria	Austria–Serbia BIT (2001)
40	<i>Lao Holdings N.V. v. Lao People's Democratic Republic (II)</i> (ICSID Case No. ARB(AF)/16/2)	Lao People's Democratic Republic	Netherlands	Lao People's Democratic Republic–Netherlands BIT (2003)
41	<i>Luis García Armas v. Bolivarian Republic of Venezuela</i> (ICSID Case No. ARB(AF)/16/1)	Venezuela, Bolivarian Republic of	Spain	Spain–Venezuela, Bolivarian Republic of BIT (1995)

No.	Case name	Respondent State	Home State of claimant	Applicable IIA
42	<i>Ministry of Land and Property of the Republic of Tatarstan v. Ukraine</i> (UNCITRAL)	Ukraine	Russian Federation	Russian Federation–Ukraine BIT (1998)
43	<i>NJSC Naftogaz of Ukraine, PJSC State Joint Stock Company Chornomornaftogaz, PJSC Ukrasvydobuvannya and others v. The Russian Federation</i>	Russian Federation	Ukraine	Russian Federation–Ukraine BIT (1998)
44	<i>Nova Group Investments, B.V. v. Romania</i> (ICSID Case No. ARB/16/19)	Romania	Netherlands	Netherlands–Romania BIT (1994)
45	<i>Oleg Deripaska v. Montenegro</i> (UNCITRAL)	Montenegro	Russian Federation	Montenegro–Russian Federation BIT (1995)
46	<i>Oleovest Pte. Ltd. v. Republic of Indonesia</i> (ICSID Case No. ARB/16/26)	Indonesia	Singapore	Indonesia–Singapore BIT (2005)
47	<i>Omega Engineering LLC and Oscar Rivera v. Republic of Panama</i> (ICSID Case No. ARB/16/42)	Panama	United States of America	Panama–United States of America BIT (1982); Panama–United States FTA (2007)
48	<i>Oschadbank v. Russian Federation</i> (UNCITRAL)	Russian Federation	Ukraine	Russian Federation–Ukraine BIT (1998)
49	<i>Ras-Al-Khaimah Investment Authority v. India</i> (UNCITRAL)	India	United Arab Emirates	India–United Arab Emirates BIT (2013)
50	<i>Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka</i> (ICSID Case No. ARB/16/25)	Sri Lanka	United Kingdom	Sri Lanka–United Kingdom BIT (1980)
51	<i>Saint Patrick Properties Corporation v. Bolivarian Republic of Venezuela</i> (ICSID Case No. ARB/16/40)	Venezuela, Bolivarian Republic of	Barbados	Barbados–Venezuela, Bolivarian Republic of BIT (1994)
52	<i>Shell Philippines Exploration B.V. v. Republic of the Philippines</i> (ICSID Case No. ARB/16/22)	Philippines	Netherlands	Netherlands–Philippines BIT (1985)
53	<i>Silverton Finance Service Inc. v. Dominican Republic</i> (UNCITRAL)	Dominican Republic	Panama	Dominican Republic–Panama BIT (2003)
54	<i>Spółdzielnia Pracy Muszynianka v. Slovak Republic</i> (UNCITRAL)	Slovakia	Poland	Poland–Slovakia BIT (1994)
55	<i>Strategic Infrasel Foodstuff LLC and The Joint Venture of Thakur Family Trust, UAE with Ace Hospitality Management DMCC, UAE v. India</i> (UNCITRAL)	India	United Arab Emirates	India–United Arab Emirates BIT (2013)
56	<i>The Burmilla Trust, The Josias Van Zyl Family Trust and Josias Van Zyl v. The Kingdom of Lesotho</i> (UNCITRAL)	Lesotho	South Africa	SADC Investment Protocol (2006)
57	<i>Thomas Gosling, Property Partnerships Development Managers (UK), Property Partnerships Developments (Mauritius) Ltd, Property Partnerships Holdings (Mauritius) Ltd and TG Investments Ltd v. Republic of Mauritius</i> (ICSID Case No. ARB/16/32)	Mauritius	United Kingdom	Mauritius–United Kingdom BIT (1986)
58	<i>TransCanada Corporation and TransCanada PipeLines Limited v. United States of America</i> (ICSID Case No. ARB/16/21)	United States of America	Canada	NAFTA (1992)
59	<i>UAB Litesko, UAB Vilniaus Energija, Veolia Baltics and Eastern Europe S.A.S., Veolia Environnement S.A. v. Republic of Lithuania</i> (ICSID Case No. ARB/16/3)	Lithuania	France	France–Lithuania BIT (1992)
60	<i>UniCredit Bank Austria AG and Zagrebacka Banka d.d. v. Republic of Croatia</i> (ICSID Case No. ARB/16/31)	Croatia	Austria	Austria–Croatia BIT (1997)
61	<i>Vedanta Resources plc v. India</i> (UNCITRAL)	India	United Kingdom	India–United Kingdom BIT (1994)
62	<i>Zbigniew Piotr Grot, Grot Cimarron LLC, I.C.S. Laguardia SRL and Laguardia USA LLC v. Republic of Moldova</i> (ICSID Case No. ARB/16/8)	Moldova, Republic of	United States of America; Poland	Moldova, Republic of–United States of America BIT (1993)



## Annex 2. Respondent and home States in known treaty-based ISDS cases

Only countries with at least one known case in either category are included. Further information is available at: <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>

No.	Country	Cases as respondent State	Cases as home State of claimant
1	Albania	7	0
2	Algeria	6	0
3	Argentina	59	3
4	Armenia	2	0
5	Australia	1	3
6	Austria	1	17
7	Azerbaijan	2	0
8	Bahamas	0	2
9	Bangladesh	1	0
10	Barbados	1	6
11	Belgium	1	16
12	Belize	3	0
13	Bermuda	0	1
14	Bolivia, Plurinational State of	14	1
15	Bosnia and Herzegovina	3	0
16	British Virgin Islands	0	1
17	Bulgaria	8	0
18	Burundi	4	0
19	Cabo Verde	1	0
20	Cameroon	1	0
21	Canada	26	44
22	Chile	3	7
23	China	2	4
24	Colombia	4	0
25	Congo, Democratic Republic of the	4	0
26	Costa Rica	9	1
27	Croatia	8	3
28	Cyprus	3	19
29	Czech Republic	34	4
30	Denmark	0	5
31	Dominican Republic	5	0
32	Ecuador	23	0
33	Egypt	28	3
34	El Salvador	3	0
35	Equatorial Guinea	1	0
36	Estonia	4	1
37	Ethiopia	1	0
38	Finland	0	2
39	France	1	41
40	Gabon	2	0
41	Gambia	1	0
42	Georgia	8	0
43	Germany	3	55
44	Ghana	2	0

No.	Country	Cases as respondent State	Cases as home State of claimant
45	Gibraltar	0	2
46	Greece	3	14
47	Grenada	1	0
48	Guatemala	3	0
49	Guyana	1	0
50	Hong Kong, China SAR	0	1
51	Hungary	14	1
52	India	21	4
53	Indonesia	7	0
54	Iran, Islamic Republic of	1	1
55	Ireland	0	1
56	Israel	0	3
57	Italy	8	30
58	Japan	0	2
59	Jordan	8	5
60	Kazakhstan	17	4
61	Kenya	1	0
62	Korea, Republic of	3	3
63	Kuwait	0	5
64	Kyrgyzstan	13	0
65	Lao People's Democratic Republic	3	0
66	Latvia	7	2
67	Lebanon	5	3
68	Lesotho	2	0
69	Libya	2	0
70	Lithuania	5	3
71	Luxembourg	0	34
72	Macao, China SAR	0	1
73	Macedonia, The former Yugoslav Republic of	3	0
74	Madagascar	2	0
75	Malaysia	3	3
76	Malta	0	2
77	Mauritius	2	6
78	Mexico	25	2
79	Moldova, Republic of	10	1
80	Mongolia	4	0
81	Montenegro	3	0
82	Morocco	2	0
83	Mozambique	1	0
84	Myanmar	1	0
85	Netherlands	0	92
86	Nicaragua	1	0
87	Nigeria	1	0
88	Norway	0	5
89	Oman	3	2
90	Pakistan	9	0
91	Panama	7	4
92	Paraguay	3	0

No.	Country	Cases as respondent State	Cases as home State of claimant
93	Peru	12	2
94	Philippines	5	0
95	Poland	23	6
96	Portugal	0	5
97	Qatar	0	2
98	Romania	13	1
99	Russian Federation	24	14
100	Saudi Arabia	1	1
101	Senegal	3	0
102	Serbia	7	0
103	Seychelles	0	1
104	Singapore	0	3
105	Slovakia	13	1
106	Slovenia	3	2
107	South Africa	1	3
108	Spain	34	38
109	Sri Lanka	4	0
110	Sudan	1	0
111	Sweden	0	8
112	Switzerland	0	24
113	Syrian Arab Republic	1	0
114	Tajikistan	1	0
115	Tanzania, United Republic of	2	0
116	Thailand	1	0
117	Trinidad and Tobago	1	0
118	Tunisia	1	1
119	Turkey	11	21
120	Turkmenistan	9	0
121	Uganda	1	0
122	Ukraine	21	10
123	United Arab Emirates	2	5
124	United Kingdom	1	67
125	United States of America	16	148
126	Uruguay	2	0
127	Uzbekistan	7	1
128	Venezuela, Bolivarian Republic of	41	1
129	Viet Nam	4	0
130	Yemen	3	0
131	Zimbabwe	3	0

## Annex 3. Arbitral decisions rendered in 2016

The arbitral decisions and follow-on decisions issued in 2016 are available at: <http://investmentpolicyhub.unctad.org/ISDS/FilterByYear>

### A. Decisions dismissing preliminary objections to jurisdiction (at least in part)

*Aaron C. Berkowitz, Brett E. Berkowitz, Trevor B. Berkowitz and others v. Republic of Costa Rica* (ICSID Case No. UNCT/13/2), Interim Award, 25 October 2016 (Bethlehem, D. (chair), Kantor, M. and Vinuesa, R. E.)

*Álvarez y Marín Corporación S.A., Estudios Tributarios AP S.A., Stichting Administratiekantoor Anbadi, Bartus van Noordenne and Cornelis Willem van Noordenne v. Republic of Panama* (ICSID Case No. ARB/15/14), Reasoning of the decision on Respondent's preliminary objections pursuant to ICSID Arbitration Rule 41(5), 4 April 2016 (Fernández-Armesto, J. (chair), Grigera Naón, H. A. and Álvarez, H. C.)

*Lion Mexico Consolidated L.P. v. United Mexican States* (ICSID Case No. ARB(AF)/15/2), Decision on the Respondent's preliminary objection under Art. 45(6) of the ICSID Arbitration (Additional Facilities) Rules, 12 December 2016 (Fernández-Armesto, J. (chair), Cairns, D. J. A. and Ramírez Hernández, R.)

*Venezuela US, S.R.L. v. Bolivarian Republic of Venezuela* (PCA Case No. 2013-34), Interim Award on Jurisdiction, 26 July 2016 (Tomka, P. (chair), Fortier, L. Y. and Kohen, M. G.), with Dissenting Opinion of Kohen, M. G.

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

*Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11), Decision on Jurisdiction, 1 February 2016 (Fortier, L. Y. (chair), Orrego Vicuña, F. and McLachlan, C. A.)

*RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/30), Decision on Jurisdiction, 6 June 2016 (Pellet, A. (chair), Volterra, R. and Nikken, P.)

### C. Decisions rejecting jurisdiction (in toto)

*CEAC Holdings Limited v. Montenegro* (ICSID Case No. ARB/14/8), Award, 26 July 2016 (Hanotiau, B. (chair), Park, W. W. and Stern, B.), with Separate Opinion of Park, W. W.

*Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/40 and 12/14), Award, 6 December 2016 (Kaufmann-Kohler, G. (chair), van den Berg, A. J. and Hwang, M.)

*Corona Materials, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3), Award on the Respondent's expedited preliminary objections in accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (Dupuy, P.-M. (chair), Mantilla-Serrano, F. and Thomas, J. C.)

*Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal* (ICSID Case No. ARB/15/21), Award, 5 August 2016 (Hanotiau, B. (chair), Gharavi, H. G. and Mayer, P.)

*The Renco Group, Inc. v. Republic of Peru* (ICSID Case No. UNCT/13/1), Partial Award on Jurisdiction, 15 July 2016, and Final Award, 9 November 2016 (Moser, M. J. (chair), Fortier, L. Y. and Landau, T.)

*Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama* (ICSID Case No. ARB/13/28), Award, 2 June 2016 (Rigo Sureda, A. (chair), Schreuer, C. H. and Paulsson, J.)

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

*MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro* (ICSID Case No. ARB(AF)/12/8), Award, 4 May 2016 (Rigo Sureda, A. (chair), Gaillard, E. and Stern, B.)

*Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic* (ICSID Case No. ARB/07/26), Award, 8 December 2016 (Bucher, A. (chair), Martínez-Fraga, P. J. and McLachlan, C. A.)

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

*Charanne B.V. and Construction Investments S.a.r.l. v. Spain* (SCC Case No. 062/2012), Final Award, 21 January 2016 (Mourre, A. (chair), Tawil, G. S. and von Wobeser, C.), with Dissenting Opinion of Tawil, G. S.

*Içkale Insaat Limited Sirketi v. Turkmenistan* (ICSID Case No. ARB/10/24), Award, 8 March 2016, with Partially Dissenting Opinion of Sands, P., and Partially Dissenting Opinion of Lamm, C. B.; and Decision on Claimant's Request for Supplementary Decision and Rectification of the Award, 4 October 2016 (Heiskanen, V. (chair), Lamm, C. B. and Sands, P.)

*Kristian Almås and Geir Almås v. The Republic of Poland* (PCA Case No. 2015-13), Award, 27 June 2016 (Crawford, J. R. (chair), Mestad, O. and Reinisch, A.)

*Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Award, 24 March 2016 (Kaufmann-Kohler, G. (chair), Brower, C. N. and Landau, T.), Concurring and Dissenting Opinion of Brower, C. N.

*Peter A. Allard v. The Government of Barbados* (PCA Case No. 2012-06), Award, 27 June 2016 (Griffith, G. (chair), Newcombe, A. and Reisman, W. M.)

*Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award, 8 July 2016, with Concurring and Dissenting Opinion of Born, G. B.; and Decision on Rectification, 26 September 2016 (Bernardini, P. (chair), Born, G. B. and Crawford, J. R.)

### **F. Decisions awarding compensation**

*Copper Mesa Mining Corporation v. Republic of Ecuador* (PCA No. 2012-2), Award, 15 March 2016 (Veeder, V. V. (chair), Cremades, B. M. and Simma, B.)

*Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016 (Lévy, L. (chair), Gotanda, J. Y. and Boisson de Chazournes, L.)

*Flemingo DutyFree Shop Private Limited v. Republic of Poland* (UNCITRAL), Award, 12 August 2016 (van Houtte, H. (chair), Townsend, J. M. and Kühn, W.)

*Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20), Award, 19 December 2016 (Townsend, J. M. (chair), Boisson de Chazournes, L. and Lambrou, G. C.)

*HOCHTIEF Aktiengesellschaft v. Argentine Republic* (ICSID Case No. ARB/07/31), Award, 21 December 2016 (Lowe, V. (chair), Brower, C. N. and Thomas, J. C.)

*Joseph Houben v. Republic of Burundi* (ICSID Case No. ARB/13/7), Award, 12 January 2016 (Guillaume, G. (chair), Banifatemi, Y. and Stern, B.)

*Murphy Exploration & Production Company – International v. The Republic of Ecuador (II)* (PCA Case No. 2012-16), Partial Final Award, 6 May 2016 (Hanotiau, B. (chair), Hobér, K. and Derains, Y.)

*Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5), Award, 22 August 2016 (Fernández-Armesto, J. (chair), Orrego Vicuña, F. and Simma, B.)

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### **G. Decisions in ICSID resubmission proceedings**

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*TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment, 5 April 2016 (Hanotiau, B. (chair), Oyekunle, T. and Sachs, K.)

*Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Decision on Annulment, 27 December 2016 (Yusuf, A. A. (chair), Abraham, C. W. M. and Knieper, R.)

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### **I. Other public decisions**

*Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic* (ICSID Case No. ARB/07/5), Consent Award under ICSID Arbitration Rule 43(2), 29 December 2016 (Tercier, P. (chair), van den Berg, A. J. and Torres Bernárdez, S.), with Declaration appended to the Award by Torres Bernárdez, S.; Additional Declaration by Tercier, P. and van den Berg, A. J.; and Additional Declaration by Torres Bernárdez, S.

*ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on Respondent's Request for Reconsideration, 9 February 2016 (Zuleta Jaramillo, E. (chair), Fortier, L. Y. and Bucher, A.), with Dissenting Opinion of Bucher, A.

*Dunkeld International Investment Limited v. The Government of Belize* (I) (PCA Case No. 2010-13), Award, 28 June 2016 (van den Berg, A. J. (chair), Beechey, J. and Oreamuno Blanco, R.)

### **J. Decisions not publicly available (at the time of writing)**

*Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/11/8), Award, 1 August 2016 (Fortier, L. Y. (chair), Brower, C. N. and Moollan, S.)

*Ali Allawi v. Islamic Republic of Pakistan* (UNCITRAL), Award, 2016 (Fortier, L. Y. (chair), Brower, C. N. and Thomas, J. C.)

*Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3), Award, 27 December 2016 (Crawford, J. R. (chair), Alexandrov, S. A. and Dupuy, P.-M.)

*CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India* (PCA Case No. 2013-09), Award, 25 July 2016 (Lalonde, M. (chair), Haigh, D. and Orrego Vicuña, F. and Singh, A. D.)

*Cem Uzan v. Republic of Turkey* (SCC), Award on Respondent's Bifurcated Preliminary Objection, 20 April 2016 (Cremades, B. M. (chair), Carreau, D. and Sands, P.)

*Chantal C. van Riet, Christopher van Riet and Lieven J. van Riet v. Republic of Croatia* (ICSID Case No. ARB/13/12), Award, 2 November 2016 (Böckstiegel, K.-H. (chair), Fadlallah, I. and Landau, T.)

*Edenred S.A. v. Hungary* (ICSID Case No. ARB/13/21), Award, 13 December 2016 (Fernández-Armesto, J. (chair), Orrego Vicuña, F. and von Wobeser, C.)

*Frank Schumm, Joachim Kruck, Jürgen Reiss and others v. Kingdom of Spain* (ICSID Case No. ARB/15/23), Decision on the Respondent's preliminary objections pursuant to ICSID Arbitration Rule 41(5), 14 March 2016 (Lowe, V. (chair), Born, G. B. and Douglas, Z.)

*Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain* (SCC), Award, 2016 (Derains, Y. (chair), Tawil, G. S. and von Wobeser, C.)

*Le Chèque Déjeuner and C.D Holding Internationale v. Hungary* (ICSID Case No. ARB/13/35), Decision on Jurisdiction, 3 March 2016 (Böckstiegel, K.-H. (chair), Fortier, L. Y. and Bethlehem, D.)

*Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic* (ICSID Case No. ARB/04/16), Award, 25 February 2016 (Moller, G. (chair), Bernardini, P. and Remiro Brotóns, A.), with Dissenting Opinion of Remiro Brotóns, A.

*Progas Energy Ltd v. Pakistan* (UNCITRAL), Award, 2016 (Fortier, L. Y. (chair), Brower, C. N. and Thomas, J. C.)

*Samsung Engineering Co., Ltd. v. Sultanate of Oman* (ICSID Case No. ARB/15/30), Decision on the Respondent's request to address the objections to jurisdiction as a preliminary question, 4 August 2016 (McLachlan, C. A. (chair), Lalonde, M. and Heiskanen, V.)

*Seventhsun Holding Ltd, Jevelinia Ltd, Aventon Ltd, Stanorode Ltd and Wildoro Ltd v. Poland* (SCC), Award on Costs, 4 January 2016 (Sekolec, J. (chair), Hobér, K. and Nowaczyk, P.)

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*Swissbourn Diamond Mines (Pty) Limited, Josias Van Zyl, The Josias Van Zyl Family Trust and others v. The Kingdom of Lesotho* (UNCITRAL), Partial Award on Jurisdiction and the Merits, 18 April 2016, and Interpretation

Award, 27 June 2016 (Williams, D. A. R. (chair), Bishop, D. and Nienaber, P. M.), with Dissenting Opinion by Nienaber, P. M.

### **K. Domestic court decisions**

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*Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Trading Ltd. v. Republic of Kazakhstan* (SCC Case No. 116/2010), Judgment of the Svea Court of Appeal, 9 December 2016

*AWG Group Ltd. v. The Argentine Republic* (UNCITRAL), Memorandum Opinion (on Argentina's application to vacate award), U.S. District Court for the District of Columbia, 30 September 2016

*Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II)* (PCA Case No. 2009-23), Judgment of the District Court of The Hague, 20 January 2016

*Energoalians SARL v. the Republic of Moldova* (UNCITRAL), Judgment of the Paris Court of Appeal, 12 April 2016

*Hulley Enterprises Ltd. v. Russian Federation* (PCA Case No. AA 226), Judgment of the Hague District Court, 20 April 2016

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*RECOFI v. Viet Nam* (UNCITRAL), Judgment of the Federal Supreme Court of Switzerland, 20 September 2016

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