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INVESTOR–STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2017

HIGHLIGHTS

- The number of new investor–State dispute settlement (ISDS) claims remains high. In 2017, at least 65 new ISDS cases were initiated pursuant to international investment agreements (IIAs), bringing the total number of known cases to 855. About 80 per cent of the new cases were brought under bilateral investment treaties (BITs). The majority of the invoked treaties date back to the 1980s and 1990s.
- The new ISDS cases in 2017 were initiated against 48 countries. Croatia was the most frequent respondent with four cases, followed by India and Spain with three cases each. Developed-country investors brought most of the 65 known cases in 2017. Investors from the Netherlands and the United States initiated the most cases with eight each, followed by investors from the United Kingdom with six.
- Intra-EU disputes accounted for about one-fifth of all investment arbitrations initiated in 2017, down from one-quarter in the preceding year. A recent judgment of the European Court of Justice found that the arbitration clause contained in the Netherlands–Slovakia BIT (1991) was incompatible with EU law. This decision may have important implications for intra-EU BITs and future intra-EU disputes.
- In 2017, ISDS tribunals rendered at least 62 substantive decisions, 34 of which are in the public domain (at the time of writing). Of these public decisions, more than 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 IIA reform topics (*WIR15*; UNCTAD, 2015). For instance, tribunals addressed changes to regulatory frameworks under the fair and equitable treatment provision, the police powers doctrine in relation to indirect expropriation claims, limitation periods for bringing claims and limitations on the treaty provisions subject to ISDS, compliance with host State law, the interpretation of the most-favoured-nation and of the umbrella clause.
- Also featuring prominently in the past year's decisions were issues surrounding the standing of State-owned enterprises, multiple ISDS claims, concurrent treaty arbitration and domestic court proceedings, corporate "seat" and abuse of rights, denial of benefits, and legislative reforms in the renewable energy sector.

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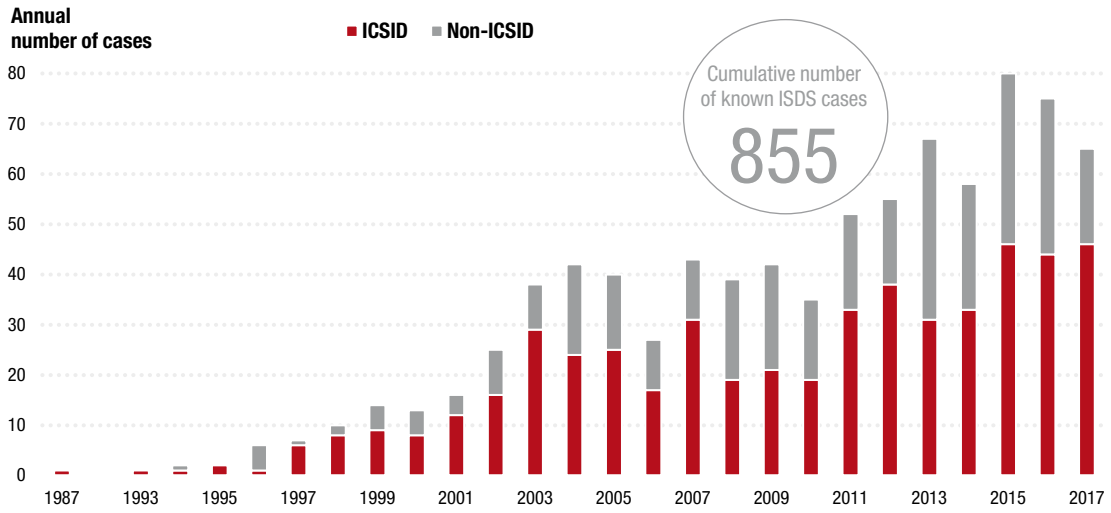
1. Trends in investor–State dispute settlement: new cases and outcomes

a. New cases initiated in 2017

In 2017, investors initiated at least 65 investor-State dispute settlement (ISDS) cases pursuant to international investment agreements (IIAs) (figure 1). As of 1 January 2018, the total number of publicly known ISDS claims had reached 855. (On the basis of newly revealed information, the number of known cases for 2016 was adjusted to 75, and for 2015 to 80.) As some arbitrations can be kept fully confidential, the actual number of disputes filed in 2017 and previous years is likely to be higher.

Figure 1. Trends in known treaty-based ISDS cases, 1987–2017



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 processes and may not match case numbers reported in previous years.

Respondent States

The new ISDS cases in 2017 were initiated against 48 countries. Croatia was the most frequent respondent with four cases, followed by India and Spain with three cases each (figure 2). Four economies – Bahrain, Benin, Iraq and Kuwait – faced their first (known) ISDS claims. As in previous years, the majority of new cases were brought against developing countries and transition economies. So far, 113 countries have been respondents to one or more known ISDS claims.

Home States of claimants

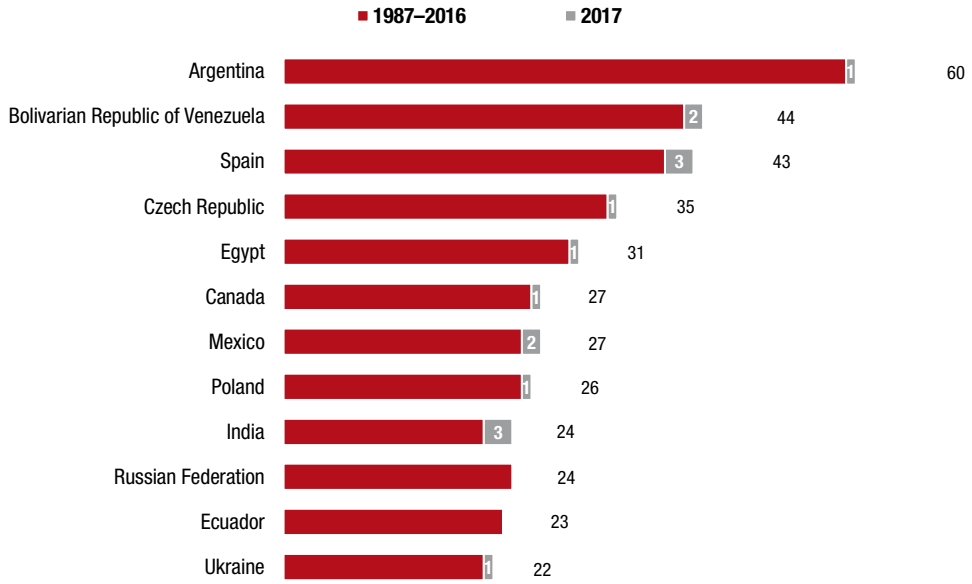
Developed-country investors brought most of the 65 known cases in 2017. Investors from the Netherlands and the United States initiated the most cases with eight cases each, followed by investors from the United Kingdom with six (figure 3). Investors from Turkey were the most active claimants from developing countries, with four cases filed in 2017.

Intra-EU disputes

Intra-EU disputes accounted for about one-fifth of all investment arbitrations initiated in 2017, down from one-quarter in the preceding year. The overall number of arbitrations initiated by an investor from one EU member State against another totalled 168 by the end of 2017, i.e. 20 per cent of the total number of cases globally.

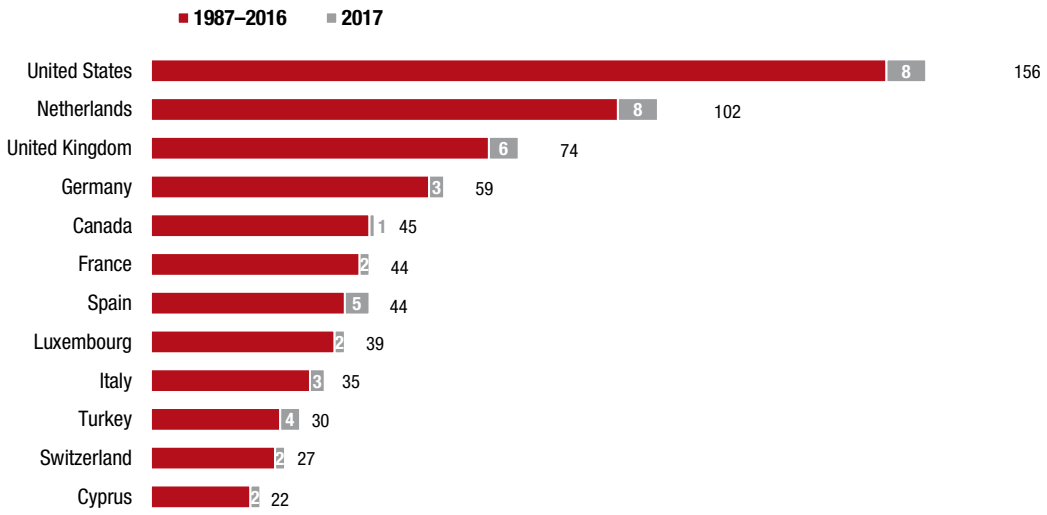
A recent judgment of the European Court of Justice (ECJ) found that the arbitration clause contained in the Netherlands–Slovakia BIT (1991) was incompatible with EU law (box 1). This decision may have important implications for intra-EU BITs and future intra-EU disputes.[1]

Figure 2. Most frequent respondent States, 1987–2017 (Number of known cases)



Source: UNCTAD, ISDS Navigator.

Figure 3. Most frequent home States of claimants, 1987–2017 (Number of known cases)



Source: UNCTAD, ISDS Navigator.

Applicable investment treaties

About 80 per cent of investment arbitrations in 2017 were brought under BITs. The remaining arbitrations were based on treaties with investment provisions (TIPs), or on BITs and TIPs in combination. The majority of the IIAs invoked in 2017 date back to the 1980s and 1990s. The IIAs most frequently invoked in 2017 were the Energy Charter Treaty (with six cases), the Austria–Croatia BIT (three cases) and the North American Free Trade Agreement

[1] ECJ, *Slovak Republic v. Achmea B.V.* (Case C-284/16), Judgment, 6 March 2018.

(NAFTA) (two cases). Looking at the overall trend, about 20 per cent of all known cases have invoked the Energy Charter Treaty (113 cases) or NAFTA (61 cases).

Box 1. ECJ judgment on arbitration clause in intra-EU BIT

The decision rendered by the ECJ on 6 March 2018 found that the arbitration clause in the Netherlands–Slovakia BIT (1991) had an adverse effect on the autonomy of EU law, and was therefore incompatible with such law.[a] The ECJ judgment related to a long-running investment arbitration brought by a Dutch claimant against Slovakia under UNCITRAL rules. An arbitral tribunal decided in favour of the claimant in 2012, after having assumed jurisdiction over the claims in a 2010 decision.[b] Slovakia sought to set aside the arbitral decisions before German courts, contending that the arbitration clause in the invoked intra-EU BIT was contrary to several provisions of the Treaty on the Functioning of the European Union. The German Federal Court of Justice (Bundesgerichtshof), hearing Slovakia's appeal case, submitted the request for a preliminary ruling to the ECJ.

Source: UNCTAD.

Notes:

[a] ECJ, *Slovak Republic v Achmea BV* (Case C-284/16), Judgment, 6 March 2018.

[b] *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic (I) (PCA Case No. 2008-13)*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010; Award, 7 December 2012.

Economic sectors involved

About 70 per cent of the cases filed in 2017 related to activities in the services sector, including these:

- Financial and insurance services (11 cases)
- Construction (9 cases)
- Supply of electricity, gas, steam and air (7 cases)
- Information and communication (6 cases)
- Transportation and storage (4 cases)

Primary industries and manufacturing each accounted for 15 per cent of new cases. This is broadly in line with the overall distribution of the 855 known ISDS cases filed to date.

Measures challenged

Investors in 2017 most frequently challenged the following types of State conduct:

- Domestic legal proceedings and decisions (at least 7 cases)
- Termination of contracts or concessions, and revocation or non-renewal of licenses (at least 7 cases)
- Placement under administration and other actions allegedly resulting in bankruptcy or liquidation (at least 6 cases)
- Alleged takeover, seizure or nationalization of investments (at least 5 cases)
- Legislation prescribing changes in the currency of loans and mortgages (at least 4 cases)
- Tax-related measures such as allegedly unlawful tax assessments or the denial of tax exemptions (at least 4 cases)
- Legislative reforms in the renewable energy sector (at least 2 cases)

Other conduct that was challenged included alleged harassment by State authorities, unfair or discriminatory treatment, fraudulent misrepresentation and anti-money laundering regulations.

Amounts claimed

Where information regarding the amounts sought by investors has been disclosed (in about one-quarter of the new cases), the amounts claimed range from $15 million (*Arin Capital and Khudyan v. Armenia*) to $1.5 billion (*MAKAE v. Saudi Arabia*).[2]

[2] Reference to "dollars" ($) means United States dollars, unless otherwise indicated.

b. ISDS outcomes

Decisions and outcomes in 2017

In 2017, ISDS tribunals rendered at least 62 substantive decisions, 34 of which are in the public domain (at the time of writing).[3] Of these public decisions, more than 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:

- Thirteen decisions (including rulings on preliminary objections) principally addressed jurisdictional issues, with five upholding the tribunal's jurisdiction and eight denying jurisdiction.
- Eighteen decisions on the merits were rendered in 2017, with 12 accepting at least some investor claims and 6 dismissing all of the claims. In the decisions holding the State liable, tribunals most frequently found breaches of the expropriation and the fair and equitable treatment (FET) provisions. In one decision, the tribunal found that the State had breached the IIA but decided that no compensation was due.
- Three publicly known decisions were rendered in ICSID annulment proceedings. ICSID ad hoc committees rejected two applications for annulment and partially annulled one award.

Overall outcomes

By the end of 2017, some 548 ISDS proceedings had been concluded. The relative shares of case outcomes changed only slightly from that in 2016. About one-third of all 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. A quarter of cases were settled; in most cases, the specific terms of settlements remain confidential. In the remaining proceedings, cases were either discontinued or the tribunal found a treaty breach but did not award monetary compensation (figure 4).

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

Overall amounts claimed and awarded

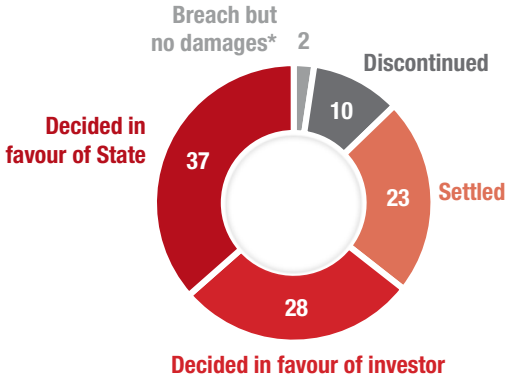
On average, successful claimants were awarded about 40 per cent of the amounts they claimed. In cases decided in favour of the investor, the average amount claimed was $1.3 billion and the median $118 million. The average amount awarded was $504 million and the median $20 million.[4] These amounts do not include interest or legal costs, and some of the awarded sums may have been subject to set-aside or annulment proceedings.

The combined $114 billion claimed and $50 billion awarded in three cases related to the Yukos company (brought by Hulley Enterprises, Veteran Petroleum and Yukos Universal against the Russian Federation) were the highest in the history of investment treaty arbitration. These arbitration awards have been set aside by The Hague District Court; its judgment was appealed and the appeal is currently pending. Excluding these values from the calculations above, the average amount claimed falls to $454 million and the amount awarded to $125 million, i.e. about 28 per cent of the amount claimed.

[3] 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.

[4] 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.

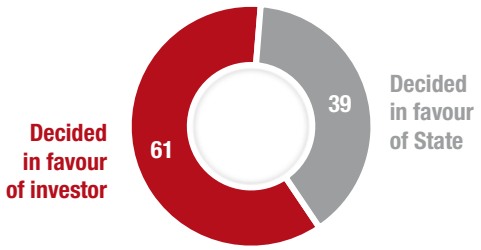
Figure 4. Results of concluded cases, 1987–2017 (Per cent)



Source: UNCTAD, ISDS Navigator.

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

Figure 5. Results of decisions on the merits, 1987–2017 (Per cent)



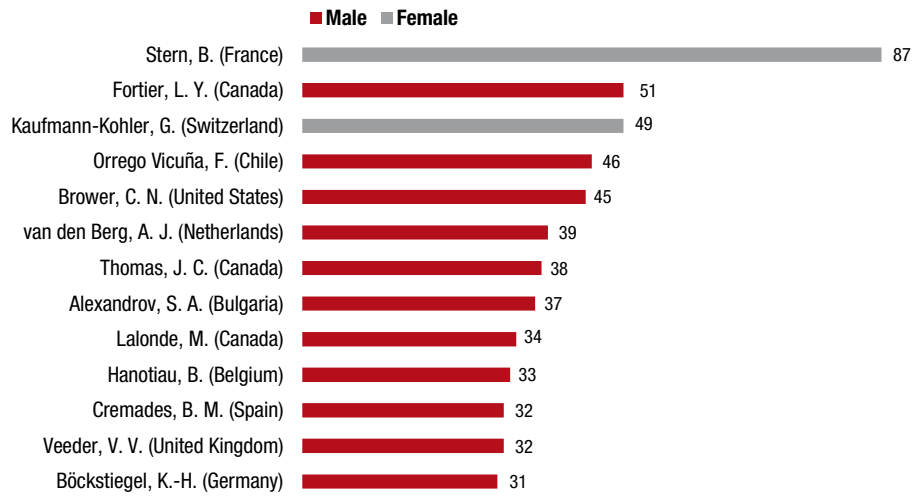
Source: UNCTAD, ISDS Navigator.

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).

Appointments of arbitrators

About 500 people have been appointed as arbitrators in known ISDS cases (original proceedings). About half have served on more than one known case. A small number of people have been appointed to more than 30 cases each (figure 6), with three having received the most appointments. All but one are citizens of European or North American countries. Interesting from a gender perspective is that 11 of the 13 are men, and that the two women are among the three people having received the most appointments.

Figure 6. Most frequently appointed ICSID arbitrators, 1987–2017 (Number of appointments)



Source: UNCTAD, ISDS Navigator.

Note: Information on nationality and gender compiled on the basis of ICSID's database of arbitrators, conciliators and ad hoc Committee members.

2. Decisions in 2017: an overview

a. Jurisdictional and admissibility issues

The standing of State-owned enterprises

In *Beijing Urban Construction v. Yemen*, the respondent State argued that the claimant, a State-owned entity, did not qualify as "a national of another Contracting State" under ICSID Convention Article 25(1) because it was allegedly an agent of the Chinese Government and discharged governmental functions even in its ostensibly commercial undertakings.[5] The tribunal accepted that the ICSID dispute resolution mechanism "is not open to State-owned companies as claimants when acting as agents of the State or when engaged in activities where they exercise governmental functions".[6] It concluded, however, that the claimant in the case before it was neither acting as an agent nor fulfilling Chinese governmental functions within the territory of the respondent State.[7] In the tribunal's view, the respondent State's assertion that the Chinese Government was the ultimate decision maker for the claimant, a contractor for an international airport project in Yemen, was "too remote from the facts of the [claimant's] project to be relevant".[8]

In *China Heilongjiang and others v. Mongolia*, the respondent State argued that the claimants did not qualify as "investors" under the China–Mongolia BIT (1991) on the ground that they were "not motivated to make a profit"; did not function with "sufficient independence" from their owner, the Chinese State; and were in fact "quasi-instrumentalities of the Chinese government", "under the direct control of the Chinese government, and […] under express instruction to invest abroad in order to serve China's foreign policy goals".[9]

The UNCITRAL tribunal rejected the argument. It found "no basis" in the BIT to impose restrictions on investors based upon their organization, business purpose, ownership, or control.[10] Instead, it considered that the treaty simply required that an investor be "any kind of legal entity engaging in economic or business activities".[11] Accordingly, the tribunal determined that "the fact that the Chinese State directly or indirectly own[ed] Beijing Shougang and China Heilongjiang ha[d] no relevance for the purpose of their qualification as 'economic entities' under Article 1(2) of the Treaty".[12] The tribunal found no evidence in support of the respondent State's assertion that the claimants had acted as "quasi-instrumentalities of the Chinese government" or otherwise acted under the express instructions of the Chinese Government.[13] It concluded that, in the circumstances of the case, all three claimants qualified as investors under the applicable treaty.

Whether a trustee qualifies as investor

In *Blue Bank v. Venezuela*, the claimant brought the action as the trustee for a trust whose assets included shareholdings in companies that had indirectly made investments in Venezuela.[14] The tribunal concluded that the trustee was not an "investor" as it had not "made an 'investment'" pursuant to the terms of the Barbados–Venezuela BIT (1994).[15] Looking to the law of Barbados – the law under which the trust had been established – the tribunal observed that "by acting in its capacity as trustee, the Claimant cannot be considered as having committed any assets in its own right, as having incurred any risk, or as sharing the loss or profit resulting from the investment".[16] As a result, the tribunal concluded that the trustee had "no ownership rights in respect of the assets of the [trust],

[5] *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (ICSID Case No. ARB/14/30), Decision on Jurisdiction, 31 May 2017, para. 147.
[6] Ibid., para. 31.
[7] Ibid., paras. 41 and 44.
[8] Ibid., para. 43.
[9] *Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia* (PCA Case No. 2010-20), Award, 30 June 2017, para. 408.
[10] Ibid., para. 412.
[11] Ibid., para. 415.
[12] Ibid., para. 417.
[13] Ibid., para. 418.
[14] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20), Award, 26 April 2017, para. 135.
[15] Ibid., para. 172.
[16] Ibid., para. 163.

that it ha[d] not brought a claim on its own behalf – whether as a nominal or beneficial owner – and that, accordingly, [it] ha[d] not invested the relevant assets under the terms of the BIT".[17]

Trademark as investment

In *Bridgestone v. Panama*, the tribunal considered whether a trademark could qualify as an investment under the Panama–United States Trade Promotion Agreement (2007), which lists intellectual property rights among the assets covered and requires such assets to have the characteristics of an investment (e.g. commitment of capital or other resources, expectation of gain or profit, assumption of risk).[18]

Considering the characteristics of investment an "overriding" but not "inflexible" requirement,[19] the tribunal drew a distinction between "the mere registration of a trademark", which it concluded would "manifestly […] not amount to, or have the characteristics of, an investment", and the situation presented "if the trademark is exploited".[20] Exploitation, the tribunal observed, could take a variety of forms, including "the manufacture, promotion and sale of goods that bear the mark", or the grant of a license to exploit the trademark under a franchise agreement.[21] For the tribunal, the key was to determine whether the trademark was being "exploited by its owner by activities that, together with the trademark itself, have the normal characteristics of an investment".[22] The tribunal determined that one of the claimants, Bridgestone Americas, carried out the activities involved in exploiting the two trademarks at issue and that they constituted investments in Panama owned or controlled by the claimant.[23]

Contractual rights as an investment

In *Koch Minerals v. Venezuela*, the tribunal considered whether the claimants' rights under an off-take agreement (which granted the claimants the right to purchase a guaranteed quantity of fertilizers at a discounted price for a 20-year term) constituted an "investment" under the relevant BIT and under Article 25 of the ICSID Convention. With respect to the meaning of "investment" under the BIT, the tribunal observed that the treaty defined "investment" broadly, as including "every kind of asset", and identified claims to performance under a contract as an asset meeting the definition of "investment".[24]

For the purposes of Article 25 of the ICSID Convention, the tribunal looked at the "unity of investment".[25] While it accepted that a "pure sales contract" could not, by itself, constitute an investment under Article 25,[26] the tribunal established that the off-take agreement was part of a much larger investment operation – "by any standards, a legal and economic behemoth".[27] On this basis, looking at the unity of the investment, the tribunal concluded that the off-take agreement satisfied the requirements of an investment under both the BIT and the ICSID Convention.[28]

Tribunal's duty to assess legality of investment

In *Infinito Gold v. Costa Rica*, a non-disputing party, in its submission under ICSID Rule 37, urged the tribunal to decline jurisdiction asserting that the claimant's investment had not been made in accordance with Costa Rican law.[29] In particular, the non-disputing party alleged that the public officials involved in the granting of the claimant's concession had intentionally violated the law, leading to criminal proceedings for malfeasance in office that were pending in Costa Rica. Both the claimant and the respondent State disagreed with the non-disputing

[17] Ibid., para. 173.
[18] *Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama* (ICSID Case No. ARB/16/34), Decision on Expedited Objections, 13 December 2017, para. 164.
[19] Ibid., paras. 164-165.
[20] Ibid., paras. 171-172. The tribunal distinguished the *Bridgestone* case from *Arif v. Moldova* and *Philip Morris v. Uruguay*, which were based on treaties that specifically included trademarks in the list of assets (unlike the Panama–United States Trade Promotion Agreement).
[21] Ibid., paras. 172-173.
[22] Ibid., para. 177.
[23] Ibid., paras. 210, 216-217. The tribunal added: "So far as the Tribunal is aware, this is the first case in which it has been necessary to analyse the different types of investments that can arise in relation to trademarks." (Ibid., para. 222.)
[24] *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/19), Award, 30 October 2017, paras. 6.52-6.53.
[25] Ibid., para. 6.55.
[26] Ibid., para. 6.57.
[27] Ibid., para. 6.58.
[28] Ibid., para. 6.60-6.67.
[29] *Infinito Gold Ltd. v. Republic of Costa Rica* (ICSID Case No. ARB/14/5), Decision on Jurisdiction, 4 December 2017, paras. 122-127. The non-disputing party was Asociación Preservacionista de Flora y Fauna Silvestre, a non-governmental organization active in the area of environmental protection.

party's submission, denying the allegations of illegality and any impact on the tribunal's jurisdiction.[30] Nevertheless, the tribunal observed that it had an obligation to assess its own jurisdiction "*ex officio*", noting that "[t]his is particularly true when there are allegations of corruption, which is a matter of international public policy".[31] On the record before it, the tribunal found "no clear concrete evidence of malfeasance in office or extortion".[32] Nevertheless, because the allegations were serious and because criminal proceedings had been initiated in Costa Rica against public officials, the tribunal decided to defer a final ruling on the issue until the merits phase.

The principle of proportionality in legality requirement analysis

In *Kim and others v. Uzbekistan*, the respondent State accused the claimants of seriously violating Uzbek laws at the time of acquiring their shares in two local cement companies. In particular, Uzbekistan pointed to the claimants' allegedly false disclosure as regards the purchase price paid for the shares, which amounted – in the respondent's view – to securities fraud.[33]

The tribunal found that the legality requirement in the applicable Kazakhstan–Uzbekistan BIT (1997) applied at the time of making the investment and covered "actions regarded as 'law' by the Host State's legal system".[34] The tribunal decided further that the compliance with the legality requirement had to be assessed in light of the principle of proportionality:[35] "The denial of the protections of the BIT is a harsh consequence that is a proportional response only when its application is triggered by noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State."[36] The tribunal's majority found no acts of non-compliance with host State laws that reached this threshold and, for this reason, rejected the State's jurisdictional objection.[37]

Allegation of investment illegality in the absence of express treaty language

In *Bear Creek Mining v. Peru*, the respondent State argued that the tribunal lacked jurisdiction under the Canada–Peru FTA (2008) on the ground that the claimant had not made a legal investment in the host State. Relying on several earlier arbitral awards,[38] Peru argued that it was not necessary for the treaty to expressly require the investment to be made in accordance with host State law.[39] Instead, the respondent State asserted, such a requirement derived independently from generally applicable principles of public international law.

The tribunal disagreed, holding that there was "no jurisdictional requirement" under the FTA that the investment must be "legally constituted under the laws of Peru".[40] The tribunal took the view that it could "not import a requirement that limits its jurisdiction when such a limit is not specified by the parties"[41] and affirmed its jurisdiction over the claims. The tribunal noted that its conclusion did "not exclude the possible relevance of illegality or lack of good faith with respect to the merits".[42]

Jurisdiction limited to compensation for expropriation

[30] Ibid., para. 136.
[31] Ibid., para. 137.
[32] Ibid., para. 139.
[33] *Pavel Borissov, Aibar Burkitbayev, Almas Chukin and others v. Republic of Uzbekistan* (ICSID Case No. ARB/13/6), Decision on Jurisdiction, 8 March 2017, para. 144.
[34] Ibid., paras. 410-411.
[35] Ibid., para. 404.
[36] Ibid., para. 413. See further paras. 384-409.
[37] Ibid., para. 541. One arbitrator concluded, however, that the claimants' actions amounted to "fraud" as understood in Uzbek law, and that treaty protections should be therefore denied to them (ibid., paras. 440, 541).
[38] *Bear Creek Mining Corporation v. Republic of Peru* (ICSID Case No. ARB/14/21), Award, 30 November 2017, para. 299 (footnote 375), citing, e.g. *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award, 2 August 2006, paras. 101-122, 231, 239-242; *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Award, 27 August 2008, paras. 138-146; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010, paras. 123-124.
[39] Ibid., paras. 299-302.
[40] Ibid., para. 319. In coming to this conclusion, it found Article 816 (Special Formalities and Information Requirements) of the FTA's investment chapter particularly relevant: "Article 816 identifies the legality requirement as a '*special formality*' that the host State is entitled to adopt if it so wishes." (Ibid., emphasis in the original.)
[41] Ibid., para. 320.
[42] Ibid., para. 324. It noted as well that "further considerations may be necessary in case of fraud by the investor", but that the present case did not raise the issue (ibid., para. 322).

In *China Heilongjiang and others v. Mongolia*, the tribunal considered the scope of jurisdiction under the China–Mongolia BIT (1991), which referred to "dispute[s] involving the amount of compensation for expropriation".[43] According to the respondent State, the tribunal could not decide whether or not there had been an expropriation in the first place.[44] The claimants, conversely, argued that the tribunal's jurisdiction extended to "disputes involving the existence and lawfulness of the expropriation of the Claimants' investments, as well as the reparation to be granted to the Claimants".[45] The tribunal rejected the broad interpretation called for by the claimants. It concluded that the jurisdiction of the tribunal was limited exclusively to disputes concerning the respondent State's compliance with the obligation to pay compensation "equivalent to the value of the expropriated investments" and dismissed the case for lack of jurisdiction *ratione materiae*.[46]

The tribunal in *Beijing Urban Construction v. Yemen* reached the opposite conclusion in relation to Article 10(2) of the China–Yemen BIT (1998).[47] Having considered the context, object and purpose of the BIT, the tribunal held that the words "relating to the amount of compensation for expropriation" must be read "to include disputes relating to whether or not an expropriation has occurred".[48]

Reliance on MFN clause to expand tribunal's jurisdiction

In *Beijing Urban Construction v. Yemen*, the claimant invoked the MFN clause in the China–Yemen BIT (1998) in an attempt to expand the jurisdiction of the tribunal to hear claims other than those regarding expropriation. The tribunal noted that the BIT's MFN clause referred to treatment accorded by the host State "in its territory" and interpreted this reference as "invok[ing] territorial limits that are directed to substantive provisions in relation to local treatment of the investment, and are not apt to describe international arbitration".[49] On that basis, the tribunal rejected the claimant's plea.

In *Anglia v. Czech Republic* and *Busta v. Czech Republic*, the claimants sought to expand the jurisdiction of the arbitral tribunal by relying on the MFN clause in the Czech Republic–United Kingdom BIT (1990).[50] Under the terms of the BIT, only disputes arising under certain, enumerated articles could be submitted to arbitration. The claimants alleged that the MFN clause could act to expand the range of these articles. The tribunal rejected the argument, with a majority concluding that because the MFN clause itself was not included in the list of articles upon which claims could be submitted to arbitration, the claimant could not rely upon the MFN clause to expand the arbitral tribunal's jurisdiction.[51] The dissenting arbitrator disagreed with the majority's reasoning but agreed with the result, noting that the language of the applicable MFN clause referred to treatment "under [a Contracting Party's] laws", and thus only concerned treatment under the domestic law of the Contracting Parties.[52]

In *Ansung Housing v. China*, the claimant attempted to overcome a three-year limitation period for bringing claims under the China–Republic of Korea BIT (2007) by using the treaty's MFN provision. It argued that by virtue of the MFN clause, more favourable time requirements contained in other Chinese BITs could be applied (most BITs signed by China do not prescribe a time limit for claims).[53] The tribunal noted that "the ambit of an MFN clause is dependent on its wording".[54] In relation to the MFN provision in question, the tribunal found that it did not extend to "a State's consent to arbitrate with investors and, in particular, not to the temporal limitation period for investor-State arbitration".[55]

[43] *Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia* (PCA Case No. 2010-20), Award, 30 June 2017, para. 424.
[44] Ibid., para. 254.
[45] Ibid., para. 262.
[46] Ibid., paras. 445, 448-449, 452.
[47] *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (ICSID Case No. ARB/14/30), Decision on Jurisdiction, 31 May 2017, para. 51.
[48] Ibid., para. 87.
[49] *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (ICSID Case No. ARB/14/30), Decision on Jurisdiction, 31 May 2017, para. 116.
[50] *Anglia Auto Accessories Ltd v. The Czech Republic* (SCC Case No. 2014/181), Final Award, 10 March 2017, para. 161; *J.P. Busta and I.P. Busta v. The Czech Republic* (SCC Case No. 2015/014), Final Award, 10 March 2017, para. 136.
[51] *Anglia v. Czech Republic*, para. 191; *Busta v. Czech Republic*, para. 166.
[52] *Anglia v. Czech Republic*, para. 193; *Busta v. Czech Republic*, para. 168.
[53] *Ansung Housing Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/14/25), Award, 9 March 2017, paras. 124-125.
[54] Ibid., para. 137.
[55] Ibid., para. 138.

The meaning of corporate "seat" and abuse of rights

In *Capital Financial Holdings v. Cameroon*, the tribunal's majority declined jurisdiction over the claims advanced under the BIT between the Belgium-Luxembourg Economic Union and Cameroon (1980). The majority held that the claimant did not fulfil the nationality requirements and had committed an abuse of rights.[56] The claimant had alleged unlawful expropriation of its shareholding in the Commercial Bank of Cameroon in 2009 when the bank was placed under State control and restructured.

The claimant (a legal entity) was constituted in Luxembourg in 2005; a Cameroonian national held, first directly and then indirectly, over 98 per cent of its shares.[57] The tribunal analysed whether the claimant had its "*siège social*" (head office, or seat) in Luxembourg, as required by the treaty.[58] Having determined that Luxembourg law was the applicable law for its enquiry, the majority held that to determine the corporate nationality, it had to establish whether the company had its "real" (i.e. not only "statutory") seat in Luxembourg, which referred to the place of central or effective administration.[59] Having analysed a number of "real seat" indicators (including in particular: the place where shareholder and board meetings are held; the place where financial statements are prepared and filed; the location of the company's records; and the existence of a physical office in Luxembourg), the majority concluded that the company did not have its real seat in Luxembourg at the time when the dispute arose, and thus could not claim the Luxembourg nationality.[60]

The same considerations proved to be determinative on the issue of abuse of right. The majority considered it decisive that the company was inactive for several years and suddenly revived after the treaty dispute was notified in 2014. [61] The majority noted in particular that no annual general meetings or board meetings were held in Luxembourg during four years, no directors were appointed during the same period, no accounts had been approved and no fiscal declarations submitted;[62] it was only in 2015 that these steps were taken retroactively. [63] The tribunal concluded that these actions constituted an abuse of right.[64]

Multiple claims and abuse of rights

In *Orascom v. Algeria*, the respondent State sought dismissal of the investor's claims on the ground that the proceeding was an abuse of rights.[65] The proceeding was one of three arbitrations that had been notified or initiated under different investment treaties by different companies controlled by the same shareholder.[66] Each arbitration concerned the State's measures that were "in essence identical" and sought recovery for damage that "was, in its economic essence, the same".[67] The tribunal noted that "structuring an investment through several layers of corporate entities in different states is not illegitimate".[68] At the same time, it recognised that "where multiple treaties offer entities in a vertical chain similar procedural rights of access to an arbitral forum and comparable substantive guarantees, the initiation of multiple proceedings to recover for essentially the same economic harm would entail the exercise of rights for purposes that are alien to those for which these rights were established".[69] It therefore dismissed the claims as inadmissible.

[56] *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon* (ICSID Case No. ARB/15/18), Award, 22 June 2017, para. 366.
[57] Ibid., paras. 8, 13.
[58] Ibid., para. 198.
[59] Ibid., paras. 221, 233, 237.
[60] Ibid., para. 356.
[61] Ibid., para. 364.
[62] Ibid., para. 363.
[63] Ibid., paras. 362-365.
[64] The dissenting arbitrator disagreed with the majority's analysis. He considered that the requirement of a "statutory" seat was determinative in Luxembourg. Furthermore, in his view, the company also met the indicators used by the majority to determine the existence of a "real" seat. Neither did he see abuse of rights by the claimant, emphasizing that the entity was constituted without fraud and *in tempore non suspecto*. See ibid., Dissenting Opinion of Mourre, A., paras. 35-36.
[65] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35), Award, 31 May 2017, para. 173.
[66] Ibid., paras. 390, 495. One dispute was notified by Weather Investments under the Algeria–Italy BIT (1991), but the arbitration had not been commenced; another arbitration – *Orascom Telecom Holding S.A.E v. People's Democratic Republic of Algeria* (PCA Case No. 2012-20) – was initiated under the Algeria–Egypt BIT (1997) and settled in 2015.
[67] Ibid., para. 546.
[68] Ibid., para. 542.
[69] Ibid., para. 543. The tribunal acknowledged that some other arbitral tribunals had adopted different approaches to similar issues: In *CME v. Czech Republic* and *Lauder v. Czech Republic,* the respective tribunals allowed claims based on the same facts and seeking reparation for the same harm to proceed under different investment treaties. The tribunal noted that the Czech Republic had refused a number of offers of consolidation in those cases, and "[t]he tribunals then reached contradicting outcomes, which was one of the reasons for which

Concurrent investment treaty arbitration and domestic court proceedings

In ***Busta v. Czech Republic***, the respondent State argued that the investors' claim was inadmissible on the ground of *lis pendens*, i.e. because a related lawsuit was pending in the Czech courts.[70] Although the tribunal recognised the applicability of the principle of *lis pendens* to international proceedings, it observed that "there can be no *lis pendens* when the jurisdiction of each court or tribunal is established on a different basis (or involves a different cause of action), between different parties, with a view to obtaining different remedies".[71] Reviewing the facts before it, the tribunal concluded that *lis pendens* did not apply because (a) the proceedings in question were pending in distinct legal orders (the Czech courts and an international tribunal); (b) the claimants in each proceeding were distinct (shareholders in the international tribunal and the local company in the Czech courts); and (c) the causes of action in each proceeding were different (treaty claims and domestic law claims).[72]

The tribunal in ***Supervision v. Costa Rica*** faced a similar issue but it concluded, by majority, that all IIA claims related to a dispute previously submitted to the respondent State's courts were inadmissible.[73] A company controlled by the claimant had brought these local court proceedings and had not discontinued them when the arbitration commenced. Comparing the claims in the domestic and international legal proceedings at issue, the majority of the tribunal applied the "fundamental basis of the claim" test and concluded that the proceedings "share[d] a fundamental normative source and pursue[d] ultimately the same purposes", namely compensation for lost profits due to Costa Rica's conduct.[74] This conclusion was not affected by the fact that the causes of action in the two proceedings were distinct (international treaty vs. domestic law), that they were brought by different, although related, parties and that "the specific administrative acts alleged in each proceeding may not [have been] exactly the same".[75]

Time-barring of claims in case of continuing breach

In ***Ansung Housing v. China***, the tribunal dismissed the investor's claims as being "manifestly without legal merit" under ICSID Arbitration Rule 41(5) on the ground that the investor had failed to bring its claim within the three-year limitation period set forth in the China–Republic of Korea BIT (2007).[76] The claimant argued that because China's conduct (failure to provide the additional land for the project) was of "continuing" nature, it was entitled to claim damages from a date later than its first knowledge of China's continuing breach.[77] The tribunal rejected this argument and dismissed the claims: "To allow Claimant to adjust that date of first knowledge by selecting the date from which it wants to claim damages for continuing breach would be […] to allow an 'endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period.'"[78]

Failure to comply with BIT's waiting period

In ***Supervision v. Costa Rica***, the tribunal considered the effect of the claimant's failure to comply with the waiting period requirement in the Costa Rica–Spain BIT (1997). Under the terms of the treaty, the investor must notify any dispute in writing, including detailed information. Only if the dispute first notified is not settled within six months may it be submitted to an arbitral tribunal.[79] In the case before it, the tribunal determined that in its claim memorial,

these decisions attracted wide criticism". It further explained that "in the fifteen years that have followed those cases, the investment treaty jurisprudence has evolved, including on the application of the principle of abuse of rights (or abuse of process) […]. The resort to such principle has allowed tribunals to apply investment treaties in such a manner as to avoid consequences unforeseen by their drafters and at odds with the very purposes underlying the conclusion of those treaties." (Ibid., para. 547.)

[70] *J.P. Busta and I.P. Busta v. The Czech Republic* (SCC Case No. 2015/014), Final Award, 10 March 2017, para. 180.

[71] Ibid., para. 210.

[72] Ibid., paras. 212-214. The tribunal also observed that the domestic proceedings had been pending since 2001, with no sign of completion (ibid., para. 226).

[73] *Supervision y Control S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/12/4), Award, 18 January 2017, para. 330.

[74] Ibid., paras. 308-315. The tribunal used the "fundamental basis of a claim" based on the approach established in *Pantechniki v. Albania*. See *Pantechniki S.A. Contractors & Engineers v. Republic of Albania* (ICSID Case No. ARB/07/21), Award 30 July 2009, paras. 61-64.

[75] Ibid., paras. 312, 315, 329. See also Dissenting Opinion of Klock, J. P., pp. 7-10.

[76] *Ansung Housing Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/14/25), Award, 9 March 2017, para. 106. Under the BIT, the claimant was required to deposit its request for arbitration with ICSID within three years from when it "first acquired, or should have first acquired, the knowledge that [it] had incurred loss or damage" in connection with its investment (ibid., para. 114).

[77] Ibid., paras. 95, 98.

[78] Ibid., paras. 113-114 (quoting *Aaron C. Berkowitz, Brett E. Berkowitz, Trevor B. Berkowitz v. Republic of Costa Rica* (ICSID Case No. UNCT/13/2), Interim Award, 25 October 2016, para. 213).

[79] *Supervision y Control S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/12/4), Award, 18 January 2017, paras. 336-337.

the claimant had added claims not directly related to those previously presented in its notice of intent. Because those claims did not comply with the requirements of the waiting period in the BIT, they were held inadmissible.[80]

Denial of benefits

In *Bridgestone v. Panama*, the respondent State invoked the denial of benefits clause in the Panama–United States Trade Promotion Agreement (2007), alleging that one of the claimants, Bridgestone Licensing Services, had "no substantial business activities" in the territory of the United States.[81] The tribunal disagreed, taking the view that "benefits should not be denied to '*firms that* […] *have a real and continuous link with, the country where they are established*'".[82] On the facts of the case, the tribunal concluded that Bridgestone Licensing Services, a company organized to manage trademarks within a large, global group of companies, had substantial business activities within the United States, even though it shared its address (in the United States) with another company within the corporate group and had no employees of its own.[83]

Attribution of State-owned company conduct to the State

In *UAB v. Latvia*, the tribunal addressed whether the conduct of two municipally-owned companies responsible for the provision of public heating was attributable to the host State. Looking at the issue under Article 5 of the International Law Commission's Articles on State Responsibility (ILC Articles), the tribunal concluded that the companies were not exercising "any element of governmental authority".[84] The tribunal observed that "[a]s a matter of first principles […] the mere fact that the Municipality was responsible for organising district heating is not enough to transform the consequent provision of such heating (whether by private or semi-private entities) into an exercise of governmental authority".[85] The tribunal further examined, however, whether the actions of the companies might be attributable to the host State under Article 8 of the ILC Articles, which covers situations in which an entity "is in fact acting on the instructions of, or under the direction or control of" the host State.[86] In the tribunal's analysis, the issue was not whether the State exercised general control over the companies but whether the State "instructed, directed or controlled" the challenged actions.[87] The tribunal concluded that there was a sufficient "body of circumstantial evidence" to attribute certain, specific acts of the companies to the host State, despite "a dearth of direct evidence".[88]

Case filed after notice of denunciation of ICSID Convention

In *Fabrica de Vidrios v. Venezuela*, an ICSID tribunal declined jurisdiction on the ground that the arbitration had been filed after Venezuela had notified its denunciation of the ICSID Convention in January 2012. In accordance with Article 71 of the ICSID Convention, the denunciation took effect six months later, on 25 July 2012. The claimants submitted their request for arbitration a few days before that date.[89] Interpreting Articles 71 and 72 of the ICSID Convention, the tribunal concluded that for a tribunal to have jurisdiction, consent must be perfected (i.e. accepted by both the respondent State and the investor) before the *notice* of denunciation.[90] This decision contradicts certain earlier rulings in which tribunals affirmed jurisdiction over claims filed prior to the expiry of the six-months denunciation notice period, such as *Venoklim* and *Blue Bank*.[91]

b. Substantive issues

Fair and equitable treatment (FET): threshold of liability

[80] Ibid., paras. 346-348.
[81] *Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama* (ICSID Case No. ARB/16/34), Decision on Expedited Objections, 13 December 2017, para. 287.
[82] Ibid., para. 302 (quoting the non-disputing party submission of the United States).
[83] Ibid., para. 302.
[84] *UAB E energija (Lithuania) v. Republic of Latvia* (ICSID Case No. ARB/12/33), Award, 22 December 2017, para. 816.
[85] Ibid., para. 817.
[86] Ibid., para. 823.
[87] Ibid., para. 825.
[88] Ibid., paras. 826-827.
[89] *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/21), Award, 13 November 2017, paras. 250-251.
[90] Ibid., paras. 282, 295.
[91] Ibid., paras. 297-298. See *Venoklim Holding B.V. v. Venezuela* (ICSID Case No. ARB/12/22), Award, 3 April 2015; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20), Award, 26 April 2017.

In *Cervin and Rhone v. Costa Rica*, the claimants alleged that the respondent State violated the FET provision in the Costa Rica–Switzerland BIT (2000) by setting the tariffs for Liquid Petroleum Gas (LPG) without regard to the financial equilibrium of the market participants. According to the tribunal, the BIT's FET provision enshrined an autonomous standard (not linked to customary international law),[92] and FET elements similar to those identified by the *MTD* tribunal – justice, reason and equity – were applicable in the case at hand.[93] The tribunal held that, depending on the facts of each case, legitimate expectations, good faith, procedural propriety and due process, coherence and consistency of state conduct, transparency and arbitrary acts could give rise to violations of the FET standard.[94] The tribunal stressed, however, that the mere existence of an error in the interpretation or the application of the regulatory framework would not suffice to support a finding of treaty breach.[95]

The tribunal found that there had been no deliberate repudiation of the principles of the regulatory framework by the respondent State.[96] Even though the methodology applied by the regulator to set the tariffs had resulted in a distortion in the principle of financial equilibrium and the regulatory framework lacked clarity, the tribunal concluded that the alleged shortcomings did not rise to the level of an international breach.[97] Drawing on the *Generation Ukraine* award, the tribunal found it critical that the claimants had not made efforts to seek clarifications in the Costa Rican courts.[98] While acknowledging that the BIT did not require the claimants to exhaust local remedies, the tribunal observed that there had been remedies available for the claimants to pursue in the Costa Rican courts which might have been able to resolve the matter.[99]

FET and stability of the host State legal framework

In *Eiser and Energía Solar v. Spain*, claims under the Energy Charter Treaty (ECT) arose out of changes in Spain's legislative framework for renewable energy. In 2007, in order to incentivise investments in the sector, Spain had established a tariff regime guaranteeing profitability for renewable energy producers. In reliance on this regime, the claimants established three renewable energy plants. Between 2012 and 2014, facing mounting costs from the regime, Spain formally repealed the tariff framework and introduced a new regime, guaranteeing a "reasonable return" based upon a different economic model for tariff calculation.[100] The new regime was made applicable to existing investments in renewables. As a result, revenue from the investors' plants fell below costs, and their Spanish operating companies were forced into debt rescheduling negotiations with their lenders.[101]

The claimants alleged violations of the FET obligation in Article 10(1) of the ECT. The tribunal noted that "[a]bsent explicit undertakings directly extended to investors and guaranteeing that States will not change their laws or regulations, investment treaties do not eliminate States' right to modify their regulatory regimes to meet evolving circumstances and public needs".[102] In light of the particular context of the ECT, however, the tribunal concluded that Article 10(1)'s obligation to accord FET "embrace[d] an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments".[103]

The tribunal found that the "Respondent eliminated a favorable regulatory regime previously extended to Claimants and other investors to encourage their investment […]. It was then replaced with an unprecedented and wholly different regulatory approach [that] was profoundly unfair and inequitable as applied to Claimants' existing

[92] *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/13/2), Award, 7 March 2017, paras. 452-453.
[93] Ibid., paras. 460-461, quoting the following interpretation of the *MTD* tribunal: "[I]n terms of the BIT, fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement – 'to promote', 'to create', 'to stimulate' – rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors." (*MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* (ICSID Case No. ARB/01/7), Award, 25 May 2004, para. 113).
[94] Ibid., para. 462.
[95] Ibid., para. 471.
[96] Ibid., para. 508.
[97] Ibid., paras. 490, 499.
[98] Ibid., paras. 505-506 (quoting *Generation Ukraine v. Ukraine* (ICSID Case No. ARB/00/9), Award, 16 September 2003, para. 20.30).
[99] Ibid. The tribunal found a separate FET violation due to Costa Rica's "shocking" delay in resolving the investors' administrative complaint against one of the regulator's decisions (which took over two years to resolve, instead of eight days prescribed by Costa Rican law). However, the claimants had failed to demonstrate any particular damage arising out of that breach (ibid., paras. 659-703).
[100] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/36), Award, 4 May 2017, paras. 144-150, 392.
[101] Ibid., paras. 152-153.
[102] Ibid., para. 362.
[103] Ibid., para. 382.

investment, stripping Claimants of virtually all of the value of their investment".[104] In particular, the tribunal noted, Spain "retroactively applied these 'one size fits all' standards to existing facilities, like Claimants', that were previously designed, financed and constructed based on the very different regulatory regime […]. No account was taken of existing plants' specific financial and operating characteristics in establishing their remuneration".[105] The tribunal awarded the investors €128 million (approx. $140 million) plus interest.

The tribunal in ***Blusun v. Italy*** also addressed the qualification under the ECT of changes to regulations in the renewables sector. The investors complained that Italy had violated the FET obligation by amending the feed-in tariff scheme, thereby allegedly destroying the stability of the legal and regulatory framework within which they had made their investment and causing the eventual liquidation of their solar power project in southern Italy.[106]

The tribunal dismissed these claims, noting that although Article 10(1) of the ECT obligates States to "create stable, equitable, favourable and transparent conditions", it also "preserves the regulatory authority of the host state to make and change its laws and regulations to adapt to changing needs, including fiscal needs, subject to respect for specific commitments made".[107] With respect to the granting of subsidies, such as feed-in tariffs, the tribunal noted that "if it becomes necessary to modify them, this should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime".[108]

Reviewing the measures taken by Italy, the tribunal concluded that the changes to the feed-in tariff scheme had been done in good faith and were not disproportionate.[109] Moreover, the tribunal stated that there was no question of legitimate expectations in the present case, because there had been no specific commitment by the Italian government that the relevant regulations would not change.[110] It observed that "tribunals [had] so far declined to sanctify laws as promises" and drew on *Charanne and Construction Investments v. Spain*, *El Paso v. Argentina* and *Philip Morris v. Uruguay*, which had noted that general commitments or legislation of the host State, by themselves, did not amount to promises that could serve to create legitimate expectations. [111] While the State was obligated not to make changes in a disproportionate manner, the tribunal considered that "[c]ircumstances change and in the absence of specific commitments, the risk of change is for entrepreneurs to assess and assume".[112]

In ***JSW Solar and Wirtgen v. Czech Republic***, yet another tribunal considered claims concerning modifications of a regulatory scheme established, this time by the Czech Republic, to incentivise investments in solar energy. Under the scheme enacted in 2005, investors were promised that a feed-in tariff would be set by the State regulator that would allow their initial investments to be recovered over a period of fifteen years with a 7 per cent annual rate of return.[113] The scheme also guaranteed investors an exemption from income tax for a period of five years following the start of operation of their plants.[114] Several years after the scheme was adopted, however, economic conditions changed in the solar energy market, making the original scheme unsustainable. As a result, the host State adopted a series of reforms that had the effect of reducing the feed-in tariff, imposing a new "Solar Levy" on producers of solar energy and abolishing the income tax exemption with immediate effect.[115]

[104] Ibid., para. 365 (footnote omitted). The tribunal distinguished the facts before it from those in *Charanne and Construction Investments v. Spain*, noting that the measures challenged in *Charanne* had only marginally decreased the investments' profitability, and were not as sweeping as the entirely new regulatory regime later imposed by Spain, at issue in *Eiser and Energía Solar* (ibid., paras. 367-369).
[105] Ibid., para. 400.
[106] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3), Award, 27 December 2016, para. 170.
[107] Ibid., para. 319(4).
[108] Ibid., para. 319(5).
[109] See, e.g. ibid., paras. 329-330, 342-343, 350.
[110] Ibid., paras. 372, 374.
[111] Ibid., paras. 367-369, 371 (quoting *Charanne B.V. and Construction Investments S.a.r.l. v. Spain* (SCC Case No. 062/2012), Final Award, 21 January 2016, para. 510; *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Award, 31 October 2011, para. 372; *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, para. 426).
[112] *Blusun v. Italy*, para. 372-373.
[113] *JSW Solar (zwei) GmbH & Co.KG, Gisela Wirtgen, Jürgen Wirtgen, and Stefan Wirtgen v. Czech Republic* (PCA Case No. 2014-03), Final Award, 11 October 2017, para. 369.
[114] Ibid., para. 16.
[115] Ibid., paras. 375-392.

The claimants alleged that the host State's adjustments to the tariff scheme violated the FET standard in the Czech Republic–Germany BIT (1990). A majority of the tribunal disagreed, finding that when designing the reform, the government was careful not to undermine the original guarantees of 15-year investment payback and 7 per cent rate of return.[116] Individual investors disproportionately affected by the modifications of the support scheme had access to a specific redress procedure with the Czech Republic's Ministry of Finance.[117] The majority concluded that "[t]he contested measures were reasonable, being a carefully calibrated response to developments in the Czech solar sector at a time of economic and political uncertainty".[118] The dissenting arbitrator reasoned that since "the Claimants were guaranteed a minimum level of [feed-in tariffs] over a specified statutory period", the tariff reduction constituted an "obvious violation" of FET.[119]

The question of regulatory stability in patent law was at the heart of ***Eli Lilly v. Canada***. In that case, the investor claimed that Canada had violated Article 1105 (Minimum Standard of Treatment) of the North American Free Trade Agreement (NAFTA) when its courts allegedly effected a "dramatic change" in Canadian patent law, leading to the invalidation of two patents by the Canadian Supreme Court.[120] Finding in favour of the respondent, the tribunal noted that it was "mindful of the role of the judiciary in common law jurisdictions" and that in such jurisdictions "evolution of the law through court decisions is natural, and departures from precedent are to be expected".[121]

In reaction to the claimant's allegation that the decisions of the Canadian courts had been unprecedented, the tribunal observed that certain elements of these decisions could be seen in earlier Canadian case law. While one of the elements – the promise standard – had not previously played a "*significant* role [it] was clearly 'out there', to be ignored at a patentee's peril".[122] Moreover, the tribunal recognized that one of the Canadian Supreme Court's rulings had been "unexpected", but it concluded that it had not effected a dramatic change from previously well-established law.[123] In the context of the claimant's legitimate expectations, the tribunal added that "all patentees, including Claimant, understand that their patents are subject to challenge before the courts" and "[the claimant] should have, and could have, anticipated that the law would change over time as a function of judicial decision-making".[124] The investor's claims were dismissed.[125]

Protection of legitimate expectations under the FET standard

In ***Cervin and Rhone v. Costa Rica***, the claimants alleged that the respondent State had violated the FET obligation in the Costa Rica–Switzerland BIT (2000) by announcing certain revisions to a tariff scheme in 2010 and 2011 (thereby giving rise to legitimate expectations) but ultimately failing to adopt them into law. The tribunal found no violation, noting that the announcements did not constitute specific commitments by the State on which the claimants had relied when making the investment.[126] It found that the announcements upon which the claimants sought to rely had occurred *after* they had made their investments in Costa Rica, and had not been sufficiently definite so as to support complaints that the respondent State had acted in contradictory ways.[127] Accordingly, the tribunal declared that they could not form the basis for any reasonable and legitimate expectations by the claimants. As explained by the tribunal, the legitimate expectations protected in international law are those that the investors have at the time of making the investment, based on the commitments or promises made by the state to attract such investment.[128]

In ***Teinver and others v. Argentina***, the tribunal rejected the claim that Argentina had breached the investors' legitimate expectations in the way in which it set domestic airfares under the relevant regulatory regime. The tribunal found that the applicable legislation had been very general in nature, not reflecting any specific commitment

[116] Ibid., para. 399.
[117] Ibid., para. 403.
[118] Ibid., para. 406.
[119] Ibid., Dissenting Opinion of Born, G. B., paras. 3, 18.
[120] *Eli Lilly and Company v. Canada* (ICSID Case No. UNCT/14/2), Final Award, 16 March 2017, para. 171.
[121] Ibid., para. 310.
[122] Ibid., para. 324 (emphasis in the original).
[123] Ibid., para. 337.
[124] Ibid., paras. 382, 384.
[125] Ibid., paras. 386-387.
[126] *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/13/2), Award, 7 March 2017, para. 518.
[127] Ibid., paras. 512-518.
[128] Ibid., para. 509.

to protect airfares in the way claimed by the investors.[129] Moreover, the tribunal observed, the investors had done "very little in the way of due diligence" before investing in the airlines and "[t]here was no evidence that Claimants had made any inquiries or sought any clarification or assurances in respect of the regulatory framework".[130] Finally, with respect to Argentina's actual decisions regarding airfares, the tribunal accepted that "some deference or leeway should be granted to Respondent in balancing" the relevant interests at stake, such as the maintenance of service to various parts of the country and prices to users.[131]

Violation of FET due to breach of contract

In *Teinver and others v. Argentina*, the investors alleged that Argentina had violated its FET obligation by failing to abide by the terms of a 2008 agreement whereby the investors agreed to sell two airlines to the Argentine government. Under the terms of the agreement, the claimants were to appoint valuators to determine the airlines' price on a discounted-cash-flow (DCF) basis with specific agreed-upon assumptions, and the respondent was to do the same. If the valuators appointed by both sides arrived at differing results, a third-party valuator was to determine the price.[132] The valuation produced by the investors' valuator was between $330 and $540 million. The valuation produced by Argentina's valuator was negative $832 million.[133] Argentina rejected the investors' valuation as invalid and declined to agree on the appointment of an independent valuator.

The tribunal's majority upheld the investors' claim that Argentina's failure to appoint an independent expert for the valuation breached both the agreement and the FET provision of the Argentina–Spain BIT (1991).[134] The majority found that Argentina's objections to the investors' valuation were artificial and lacked transparency, thereby violating the investors' legitimate expectations that Argentina would purchase the airlines according to the agreed valuation methodology and subjecting the investors to arbitrary treatment.[135] In reaching its conclusion, the majority accepted that not all breaches of contract are necessarily breaches of the FET standard, but noted that the agreement at issue "was not a simple commercial agreement" but one which had been entered into in order for the Argentine government to carry out "its public obligation to guarantee the provision and continuity of air transportation services in Argentina".[136]

In the dissenting arbitrator's view, the 2008 agreement was merely "a memorandum to explore the option of the sale of shares", rather than a binding agreement for a share purchase.[137] The dissenting arbitrator considered that due to the non-binding nature of the agreement, the parties' failure to agree on a purchase price or on the appointment of an independent expert did not breach the treaty. He further noted that in light of the "very bad" financial position of the two airlines, the respondent State's negative price valuation appeared more credible than the claimants'.[138]

[129] *Autobuses Urbanos del Sur S.A., Teinver S.A. and Transportes de Cercanías S.A. v. Argentine Republic* (ICSID Case No. ARB/09/1), Award, 21 July 2017, para. 677.
[130] Ibid., paras. 673-674.
[131] Ibid., para. 688.
[132] Ibid., para. 962.
[133] Ibid., para. 444.
[134] Ibid., para. 1010.
[135] Ibid., para. 925.
[136] Ibid., para. 854.
[137] Ibid., Dissenting Opinion of Hossain, K., para. 97.
[138] Ibid., Dissenting Opinion of Hossain, K., para. 94.

Denial of justice and arbitrary treatment

In *Alghanim v. Jordan*, the claimants challenged the lawfulness of the respondent State's imposition of a tax on proceeds from the claimants' sale of a telecommunications license. The claimants had previously challenged the imposition of the tax unsuccessfully in Jordanian courts, including through final appeal to the Court of Cassation. According to the claimants, the tax measure had been an arbitrary, politically motivated decision, and the failure of the local courts to provide a relief had been a denial of justice, in breach of several substantive guarantees – including the protection from arbitrary measures and the FET standard – in the Jordan–Kuwait BIT (2001).[139]

The tribunal relied on the dictum in *Azinian v. Mexico* which noted: "A governmental authority surely cannot be faulted for acting in a manner validated by its courts *unless the courts themselves are disavowed at the international level* […]. *What must be shown is that the court decision itself constitutes a violation of the treaty.*"[140] The tribunal framed the issue before it as "whether the judgment of the Court of Cassation was inexcusable (being one that no reasonably competent court could arrive at) in order to decide whether the Claimants have suffered a denial of justice and thus been subjected to arbitrary treatment".[141] Applying these criteria to the facts, a majority concluded that the State had not breached its treaty obligations.[142] Although some of the steps taken by the State with respect to the imposition of the tax measure had been "unusual, and even unprecedented", the majority determined that "these steps [were] all consistent with a State conducting itself according to basic principles of constitutional government and the Rule of Law".[143]

Reliance on the MFN clause to "import" substantive protections from third treaties

In *Teinver and others v. Argentina*, the claimants relied on the MFN clause in the applicable Argentina–Spain BIT (1991) to invoke an umbrella clause included in another BIT concluded by Argentina. The tribunal considered that the MFN clause's language – referring to "all matters governed by this Agreement" – was critical to determining its scope.[144] It rejected as "too broad" the interpretation, proposed by the claimants, that this language should be deemed to refer generally to the protection of foreign investors. The tribunal decided instead that the MFN clause in question did not allow the importation of "a new right or standard of treatment not provided for [in the applicable] Treaty".[145] It explained that "the parties to the Treaty were in all likelihood aware of the existence of umbrella clauses and if they had intended to include such a clause in the Treaty, they would have done so".[146]

Full protection and security (FPS)

In *Ampal-American and others v. Egypt*, the respondent State was held to have breached its obligation to provide FPS to the claimants' investment under the Egypt–United States BIT (1986). Between February 2011 and April 2012, the gas pipeline, on which the claimants' investment relied, sustained 13 attacks by certain terrorist organizations. The tribunal acknowledged that the security situation was difficult because of ongoing political events in Egypt and the region, and that armed militant groups took advantage of the political instability. While accepting that the first attacks could not have been prevented, the tribunal concluded that these attacks "should have been seen as a warning to the Egyptian State that further attacks might be carried out if security measures were not taken and implemented".[147] Having found that the Egyptian authorities had failed to take "any concrete steps" to protect the claimants' investment from further third-party attacks, the tribunal concluded that the State breached its FPS obligation.[148]

[139] *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Mr. Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/13/38), Award, 14 December 2017, paras. 187, 218, 227.
[140] Ibid., para. 293 (quoting *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* (ICSID Case No. ARB (AF)/97/2), Award, 1 November 1999, paras. 97-100, emphasis in the original).
[141] Ibid., para. 366(b).
[142] Ibid., paras. 480-492. The third arbitrator considered that Jordan acted in an arbitrary manner by imposing a tax, but agreed with the tribunal's *dispositif* that the decisions of the Jordanian courts did not amount to a denial of justice. See ibid., Separate Opinion of Fortier, L. Y., paras. 18-19.
[143] Ibid., paras. 391, 393.
[144] *Autobuses Urbanos del Sur S.A., Teinver S.A. and Transportes de Cercanías S.A. v. Argentine Republic* (ICSID Case No. ARB/09/1), Award, 21 July 2017, paras. 880, 884.
[145] Ibid., para. 884.
[146] Ibid.
[147] *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 Liability and Heads of Loss, 21 February 2017, paras. 285, 289.
[148] Ibid., para. 290.

Police powers and indirect expropriation

In *WNC v. Czech Republic*, the claimant alleged that several measures by the respondent State resulted in the indirect expropriation of its investment in a state-owned company and led to the insolvency of the company after its privatization. Among the measures challenged was the freezing of the company's accounts by the Central Bank, allegedly based on "false and unsubstantiated charges".[149] The tribunal determined that the Central Bank's decision had been a normal exercise of police powers with respect to suspected money laundering and that the respondent State had exercised its powers in good faith, for a public purpose, and in a proportionate and non-discriminatory manner.[150]

General exceptions and police powers doctrine in indirect expropriation

In *Bear Creek Mining v. Peru*, the tribunal held that the respondent State had indirectly expropriated the claimant's investment by enacting a decree that revoked certain mining rights in response to the local opposition against the project. Peru argued that the revocation had been a valid exercise of police powers and, therefore, was not compensable.[151]

Looking at the Canada–Peru FTA (2008), the tribunal's majority stated that, in view of its "very detailed provisions" regarding expropriation and the inclusion of a general exceptions provision, "no other exceptions from general international law or otherwise can be considered applicable in this case".[152] The majority thus held that the doctrine of police powers was not applicable. The tribunal then considered whether the Peruvian measure was covered by the general exceptions provision and found that it was not. While the tribunal accepted that the decree could arguably come within the provision's exception for measures necessary to protect human life or health, it noted that nothing in the measure had indicated that this was in fact the purpose for its adoption.[153] Moreover, the tribunal continued, that even if the exception did apply, it would not insulate the respondent State from liability for an unlawful expropriation. Thus, while the general exceptions provision addressed measures necessary for human life or health, it did not relieve Peru of the obligation for such measures to comply with the provisions of the FTA relating to expropriation, e.g. with respect to due process and the payment of compensation to the investor.[154]

Proportionality and indirect expropriation

In *PL Holdings v. Poland*, the tribunal found that certain measures by the host State's banking regulator amounted to an indirect expropriation. In particular, the tribunal concluded that by prohibiting the investor from being able to exercise shareholder-voting rights and to dispose of its investment without restriction, "the [regulator's] measures severely restricted […] rights that constitute essential elements of the right of ownership, […] to such an extent as to constitute an expropriation".[155]

Having concluded that the host State measures had a "similar effect" to an expropriation,[156] the tribunal considered whether the measures had been proportionate. The claimant invoked the proportionality principle as part of EU and Polish law, contending that the challenged measures "were arbitrary, inappropriate, out of proportion with the public purpose allegedly served, and not taken in good faith".[157] The respondent State argued that the proportionality analysis of the expropriation claim should primarily be based on Polish law.[158] Both the claimant and the respondent suggested elements for a proportionality test similar to those used by the tribunal for its analysis.[159] The tribunal noted that, "the principle [of proportionality] is understood in largely similar terms across jurisdictions".[160] It then reviewed whether each measure at issue was (a) "suitable by nature for achieving a legitimate public purpose", (b)

[149] *WNC Factoring Ltd (WNC) v. The Czech Republic* (PCA Case No. 2014-34), Award, 22 February 2017, para. 389.
[150] Ibid., paras. 394-395.
[151] *Bear Creek Mining Corporation v. Republic of Peru* (ICSID Case No. ARB/14/21), Award, 30 November 2017, paras. 460, 469.
[152] Ibid., para. 473. See also ibid., Partial Dissenting Opinion by Sands, P., para. 41.
[153] Ibid., para. 475.
[154] Ibid., paras. 477-478. The tribunal also determined that the decree fulfilled the three factors identified in the FTA's Annex 812.1(b) on indirect expropriation (referring to the economic impact of the measure; the extent of interference with distinct, reasonable investment-backed expectations; and the character of the measure) (ibid., paras. 415-416). The respondent State had argued that the decree was not an indirect expropriation, since it was not discriminatory and addressed legitimate public welfare objectives, falling under Annex 812.1(c) of the FTA (ibid., para. 360).
[155] *PL Holdings S.a.r.l. v. Poland* (SCC Case No. 2014/163), Partial Award, 28 June 2017, para. 320.
[156] Ibid., paras. 320-323.
[157] Ibid., paras. 248-250, 256.
[158] Ibid., paras. 278-279.
[159] Ibid., paras. 256, 278.
[160] Ibid., para. 355.

"necessary for achieving that purpose in that no less burdensome measure would suffice", and (c) "not be excessive in that its advantages are outweighed by its disadvantages".[161] Applying the test to the facts before it, the tribunal concluded that the State's measures were neither suitable, nor necessary, nor proportionate *strictu sensu*.[162]

Expropriation due to difficulties in enforcement of commercial arbitration award

In ***Anglia v. Czech Republic***, the claimant alleged that the respondent State had indirectly expropriated the claimant's "contractual rights to damages", which its former business partner, Kyjovan, was ordered to pay following an arbitral award rendered in favour of the claimant in 1997. Kyjovan had become bankrupt before the award could be enforced, allegedly because of undue delays in the Czech courts. The claimant maintained that it had been deprived of the value of the award.[163]

The tribunal rejected the claim for expropriation. It noted that the claimant had in fact been able to recover some 77 per cent of the principal amount of the award and therefore had not been deprived of the award's value.[164] Moreover, even though the claimant had experienced some difficulty and delay in its enforcement proceedings in the Czech courts, the tribunal was "not convinced that the deficiencies in the enforcement process could be said to be systematically attributable to the Czech Courts", but were, in a number of instances, attributable to the claimant's own litigation decisions.[165]

Expropriation due to contract termination

In ***Ampal-American and others v. Egypt***, the tribunal found that relevant authorities of the respondent State wrongfully terminated a long-term supply contract with the claimants. In addition to establishing that the contract did not permit termination for non-payment of an invoice,[166] the tribunal held that the termination was a "disproportionate act", noting that the unpaid invoice, allegedly amounting to $37 million, was for a small amount compared to the potential economic benefits of billions of dollars, and came "at a time when many in Egypt voiced strong opposition to the supply of gas to Israel".[167] As a consequence, the tribunal concluded, that the termination constituted unlawful expropriation, since "the 'irreparable cessation' of an investment activity caused by the disproportionate act of a State is tantamount to an expropriation".[168]

Expropriation of a discrete right or asset

In ***Ampal-American and others v. Egypt***, the respondent State was also found to have taken measures tantamount to expropriation when it withdrew the tax-free status of the claimants' investment.[169] Following its conclusion that a license to operate as a tax-free company was an "investment" under the applicable BIT, the tribunal considered whether the withdrawal of that license constituted an expropriation.[170] The respondent State argued that the withdrawal of the license could not be an expropriation as it had not deprived the claimants of the totality of their investment, only the right to operate tax-free, but the tribunal rejected the argument.[171] Relying on the decision in *GAMI v. Mexico*, which stated that "[t]he taking of 50 acres of a farm is equally expropriatory whether that is the whole farm or just a fraction",[172] the tribunal in *Ampal* held that Egypt's decision to remove "tax-free status took away a defined and valuable interest that had been validly conferred according to Egyptian law at the time that the investment was made and that had been guaranteed by the State for a defined period".[173]

Whether umbrella clause covers claimants not party to underlying contract

In ***Supervision v. Costa Rica***, the tribunal considered the scope of the umbrella clause in the Costa Rica–Spain BIT (1997). At issue was whether the claimant could invoke the umbrella clause in relation to commitments made

[161] Ibid., para. 355.
[162] Ibid., paras. 373, 383, 389, 391.
[163] *Anglia Auto Accessories Ltd v. The Czech Republic* (SCC Case No. 2014/181), Final Award, 10 March 2017, para. 3.
[164] Ibid., para. 293.
[165] Ibid., paras. 296-297.
[166] *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 Liability and Heads of Loss, 21 February 2017, paras. 331-332.
[167] Ibid., para. 344.
[168] Ibid., paras. 346-347.
[169] Ibid., paras. 183, 187.
[170] Ibid., paras. 173-175.
[171] Ibid., paras. 178-183.
[172] Ibid., para. 180 (quoting *GAMI Investments, Inc. v. United Mexican States*, Final Award, 15 November 2004, paras. 126-127).
[173] Ibid., para. 183.

in a contract between Costa Rica and another entity, Riteve, controlled by the claimant. Noting that the language in the umbrella clause went "beyond the simple direct contractual relationship between the investor and the host State", but also encompassed obligations "*related to* investments by investors of the other Contracting Party", the tribunal's majority concluded that the clause was sufficiently broad to cover the claimant's umbrella clause claims.[174]

The case of ***WNC v. Czech Republic***, which also concerned a situation where the claimant's subsidiary was party to the relevant contract, produced the opposite result. Having reviewed prior arbitral decisions, the arbitrators concluded that "tribunals have rather consistently resolved that they have no jurisdiction under umbrella clauses to consider contractual obligations between host States and investors' locally incorporated subsidiaries".[175] On the basis of the contract before it, which did not create rights or obligations for the claimant directly, the tribunal held that it lacked jurisdiction over the umbrella clause claim.[176]

c. Other issues

Tribunal's power to reconsider its own pre-award decisions

In the quantum phase of the ***Burlington v. Ecuador*** proceedings, Ecuador requested the tribunal to reconsider its Decision on Liability (issued in 2012) arguing that the Decision was "fundamentally and fatally flawed" (on the question of whether the expropriation had occurred) in light of certain exceptional circumstances.[177] Contrary to the conclusions of some prior tribunals,[178] the *Burlington* tribunal held that pre-award decisions did not carry *res judicata* effects and that, in principle, it had the power to reconsider them.[179] In that regard, the tribunal decided that it would apply by analogy the ICSID Convention Article 51 on the revision of awards, and held that "a pre-award decision (other than a procedural order or decision on provisional measures) may be revised [...], provided (i) a fact is discovered; (ii) of such a nature as decisively to affect the pre-award decision; (iii) which was unknown to the Tribunal and to the applicant when the pre-award decision was rendered; (iv) the applicant's ignorance not being due to negligence; and (v) the request for reconsideration being made within 90 days after the discovery of the fact".[180]

Turning to the application before it, the tribunal observed that some aspects of the request for reconsideration concerned alleged legal errors in the tribunal's earlier decision. As these submissions "amount[ed] to an appeal", the tribunal ruled that they were impermissible.[181] With respect to aspects of the application based upon allegedly new information, the tribunal observed that the information had been available to the respondent State since 2011, and that it had been given a full opportunity to present the information earlier in the proceedings.[182] As a consequence, the tribunal deemed the application untimely, although it added further that the information provided would not have changed the outcome of its earlier ruling.[183]

[174] *Supervision y Control S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/12/4), Award, 18 January 2017, para. 287 (emphasis added).
[175] *WNC Factoring Ltd (WNC) v. The Czech Republic* (PCA Case No. 2014-34), Award, 22 February 2017, para. 334.
[176] Ibid., para. 341.
[177] *Burlington Resources, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Reconsideration and Award, 7 February 2017, paras. 48-49.
[178] Ibid., para. 85 (quoting *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, 10 March 2014, para. 21). In this context, the tribunal also referred to *Perenco Ecuador Limited v. Republic of Ecuador (Petroecuador)* (ICSID Case No. ARB/08/6), Decision on Ecuador's Reconsideration Motion, 10 April 2015, para. 43.
[179] It noted that "there may be circumstances where a tribunal should consider reopening a decision that it has made" (ibid., para. 92, quoting *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited* (ICSID Case No. ARB/10/20), Award, 12 September 2016, para. 320).
[180] Ibid., para. 105.
[181] Ibid., para. 111.
[182] Ibid., paras. 117-118.
[183] Ibid., paras. 122-124.

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.

Application of incorrect law as "manifest excess of power"

In ***Mobil and others v. Venezuela***, the ICSID *ad hoc* committee partially annulled a $1.6 billion award in favour of five Exxon Mobil subsidiaries. The tribunal had concluded that Venezuela had lawfully expropriated the investors' investment in an oil project known as the Cerro Negro Project. In its application for annulment, Venezuela argued that aspects of Venezuelan law applicable under the Netherlands–Venezuela BIT (1991) should have limited the amount of compensation for expropriation.[184] The committee agreed, finding that the tribunal had manifestly exceeded its powers and failed to state reasons in applying the wrong law to the assessment of the compensation due for the expropriation.[185] In particular, the committee noted that the tribunal had failed to give Venezuelan law adequate application (pursuant to Article 9(5) of the BIT) and instead had applied customary international law without regard to the terms of the BIT.[186] As the committee observed, "in its anxiety to dismiss any thought that national law can be invoked as a defence to the breach of an international obligation, the Tribunal ended up falling into […] another version of exactly the same type of proposition, i.e. that some alternative source of international obligation can be invoked to displace particular rights and obligations established by treaty".[187]

Standard of review for questions of arbitrator disqualification

In ***Suez and Vivendi v. Argentina (II)***, the *ad hoc* committee considered whether it was an annullable error that the original tribunal refused to disqualify arbitrator Kaufmann-Kohler for failing to inform the parties and to take affirmative steps to investigate a potential conflict of interest. The committee applied a highly deferential standard of review to the tribunal's decision. It stated – in the words of the annulment committee in *EDF and others v. Argentina* – that "it may not find a ground of annulment exists under either Article 52(1)(a) or 52(1)(d) 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".[188] To illustrate this standard of review, the committee offered a number of examples of arbitrator challenges that would be seen as so unreasonable as to meet the threshold: "e.g., if a disqualification proposal was dismissed even though the challenged arbitrator was appointed to the Board of Directors of one of the parties, or was previously consulted by one of the parties on the subject-matter of the case [or] if a disqualification proposal was dismissed even though the challenged arbitrator failed to disclose that he or she recently served as counsel for one of the parties".[189] Considering that the present case did not involve circumstances similar to these examples, the committee refused to annul the award.[190]

Application of MFN clause to avoid 18-month local litigation requirement

The *ad hoc* committee in ***Suez and Vivendi v. Argentina (II)*** found no annullable error in the tribunal's decision to apply the MFN clause in the Argentina–Spain BIT (1991) so as to allow the investor to avoid the treaty's 18-month local litigation requirement.[191] Argentina argued that the tribunal had "manifestly exceeded" its powers in disregarding conditions placed by the State on its consent to arbitration in the relevant BIT. The committee, however, observed that "ICSID jurisprudence is far from unanimous on the question whether MFN clauses can be invoked by investors to benefit from more favourable dispute settlement provisions in third-State treaties".[192] While acknowledging that the MFN clause in the Argentina–Spain BIT "may well be susceptible to an interpretation that

[184] *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Annulment, 9 March 2017, para. 151.
[185] Ibid., para. 188.
[186] Ibid., paras. 156, 159. Article 9(5) of the Netherlands–Venezuela BIT (1991) states: "The arbitral award shall be based on: i. the law of the Contracting Party concerned; ii. the provisions of this Agreement and other relevant Agreements between the Contracting Parties; iii. the provisions of special agreements relating to the investments; iv. the general principles of international law; and v. such rules of law as may be agreed by the parties to the dispute."
[187] Ibid., para. 187.
[188] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic* (II) (ICSID Case No. ARB/03/19), Decision on Argentina's Application for Annulment, 5 May 2017, para. 133 (quoting *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, para. 145).
[189] Ibid., para. 189.
[190] Ibid., para. 207.
[191] Ibid., para. 261.
[192] Ibid., para. 252.

is different from that given by the Tribunal in the present case", the committee agreed with the *Daimler* annulment committee in that – except in extreme circumstances – "when more than one interpretation is possible, an award cannot be annulled on the ground that it suffers from an exercise of excess of powers, much less a manifest excess of powers".[193]

e. National court decisions

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.

Interim measures and public policy

In ***Ecuador v. Chevron and TexPet***, the Appeal Court of The Hague rejected Ecuador's argument that certain interim measures ordered by an arbitral tribunal violated public policy and should be set aside.[194] Specifically, the arbitral tribunal, established under the Ecuador–United States BIT (1993), had ordered Ecuador to suspend the "execution and recognition" of a number of Ecuadoran court judgments.[195] Ecuador argued that in issuing the orders, the arbitral tribunal had "wrongfully presented itself as 'global judge'".[196]

The Dutch court disagreed. It reasoned that by subjecting itself to the BIT and its provisions on arbitration, including the provisions of the UNCITRAL Rules under which the arbitration was proceeding, Ecuador had accepted the jurisdiction of the arbitral tribunal to grant interim measures and had "endorsed that she [would] execute the measures as taken by the Arbitration Tribunal without delays, and to take the measures for its enforcement that are in her influence". The court further noted: "This implies that Ecuador cannot complain that the measures as imposed by the Arbitration Tribunal would violate her independency and sovereignty, as long as the Arbitration Tribunal takes decisions that are within its jurisdiction on the basis of the applicable rules."[197] The court concluded that the tribunal had not exceeded its jurisdiction.

Deferential standard of review

In ***Mesa Power v. Canada***, the investor petitioned a United States District Court to vacate an arbitral award rendered in favour of Canada under Chapter 11 of the NAFTA. The investor alleged that the tribunal had exceeded its powers and acted "in manifest disregard of the law" in reaching its conclusion regarding the interpretation of "procurement" under Article 1108 of the NAFTA and in granting "a good deal of deference" to the decision-making discretion of the Canadian authorities with respect to the implementation of a particular renewable energy subsidy.[198] The court stressed the limited scope of its review and denied the investor's petition on both grounds.[199] With respect to the interpretation of "procurement", the court held that "the tribunal did not disregard or modify an unambiguous provision of the treaty", but simply interpreted the text in a way with which the investor disagreed.[200] Regarding the tribunal's grant of deference to the decision-making of the host State, the court held: "[T]here is nothing here to show that the tribunal treated the parties unequally or changed the standard of proof […]. Rather, the tribunal merely acknowledged that a government can make poor or mistaken decisions without violating Article 1105's prohibition on inequitable treatment. The tribunal thus simply reached a legal conclusion that Mesa [did] not agree with."[201]

In ***Crystallex v. Venezuela***, Venezuela petitioned a United States District Court to set aside a $1.2 billion arbitral award rendered against it.[202] Among several grounds of challenge, Venezuela submitted that the tribunal had

[193] Ibid., paras. 252-253 (quoting *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Decision on Annulment, 7 January 2015, para. 187).
[194] *The Republic of Ecuador v. Chevron Corporation and Texaco Petroleum Company*, Judgment of the Appeal Court of The Hague, 18 July 2017.
[195] Ibid., para. 12.1 (English translation).
[196] Ibid., para. 12.1 (English translation).
[197] Ibid., para. 12.2 (English translation).
[198] *Mesa Power Group, LLC v. Government of Canada*, Decision of the US District Court for the District of Columbia, 15 June 2017, pp. 4, 16.
[199] Ibid., pp. 9-12, 15, 20.
[200] Ibid., p. 15.
[201] Ibid., pp. 19-20.
[202] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, Memorandum Opinion of the United States District Court for the District of Columbia, 25 March 2017, p. 24.

exceeded its powers in its decision on quantum by considering valuation data preceding the valuation date specified in the BIT (in order to compensate for Venezuela's wrongful, value-decreasing acts committed prior to the valuation date). Applying a deferential standard of review, the court observed that Venezuela's arguments had been presented to the tribunal and rejected. Further, the court noted that aside from expropriation, the State had been found to have breached other treaty provisions, e.g. the FET standard and that the BIT was silent as to the method to be used to calculate an appropriate award for such breaches.[203] Accordingly, the court held that the tribunal had not erred by applying the full reparation principle of customary international law as its guide to the calculation of damages.[204]

3. Conclusions

The number of new ISDS claims filed remains high. In the past year, investors challenged a variety of host State conduct, including domestic court judgments, contract terminations, alleged nationalizations and tax-related measures – often relying on IIAs signed in the 1980s and 1990s. This points to the importance of addressing the stock of "old-generation" treaties, identified by UNCTAD as a priority area for Phase 2 of IIA Reform (*WIR17*; UNCTAD, 2017).[205]

Moreover, arbitral decisions rendered in 2017 allude to Phase 1 reform issues (*WIR15*; UNCTAD, 2015). For instance, tribunals addressed:

- changes to regulatory frameworks under the FET provision (*Blusun v. Italy*, *Cervin and Rhone v. Costa Rica, Eiser and Energía Solar v. Spain*, *JSW Solar and Wirtgen v. Czech Republic, Teinver and others v. Argentina),*
- the police powers doctrine in relation to indirect expropriation claims (*Bear Creek Mining v. Peru*, *WNC v. Czech Republic*),
- limitation periods for bringing claims and limitations on the treaty provisions subject to ISDS *(Ansung Housing v. China*, *Beijing Urban Construction v. Yemen, China Heilongjiang and others v. Mongolia),*
- compliance with host State law *(Bear Creek Mining v. Peru, Infinito Gold v. Costa Rica),*
- the interpretation of the MFN clause (*Anglia v. Czech Republic, Ansung Housing v. China, Beijing Urban Construction v. Yemen, Busta v. Czech Republic*, *Teinver and others v. Argentina)* and of the umbrella clause (*Supervision v. Costa Rica*, *WNC v. Czech Republic*).

Also featuring prominently in the past year's decisions were issues surrounding the standing of State-owned enterprises (*Beijing Urban Construction v. Yemen, China Heilongjiang and others v. Mongolia),* multiple ISDS claims (*Orascom v. Algeria*), concurrent treaty arbitration and domestic court proceedings *(Busta v. Czech Republic, Supervision v. Costa Rica)*, corporate "seat" and abuse of rights[206] (*Capital Financial Holdings v. Cameroon*), denial of benefits (*Bridgestone v. Panama)*, and legislative reforms in the renewable energy sector (*Blusun v. Italy*, *Eiser and Energía Solar v. Spain*, *JSW Solar and Wirtgen v. Czech Republic)*.

Arbitral tribunals' interpretation of these and other issues is evolving and so is treaty practice. Modern IIAs include a larger number of provisions referring to sustainable development issues and the preservation of regulatory space.[207] They carefully regulate ISDS (e.g. by specifying treaty provisions that are subject to ISDS, excluding certain policy areas from ISDS, setting out a special mechanism for taxation and prudential measures, and/or restricting the allotted time period within which claims can be submitted), or omit ISDS.

In addition, there are multilateral efforts to improve investment dispute settlement:

- In October 2016, ICSID commenced a process to modify and simplify its arbitration rules; the process is ongoing.

[203] Ibid., p. 24.
[204] Ibid., p. 25.
[205] Chapter III of *WIR18* outlines recent developments in countries' efforts to modernize "old-generation" treaties. See also UNCTAD, 2018.
[206] *WIR16* (Chapter IV) discussed how ownership and control issues feature in IIAs, what impact they have in investor-State dispute settlement (ISDS), and what approaches have been adopted by IIA negotiators to tackle the challenges posed by complex ownership structures.
[207] An overview of sustainable development-oriented features in IIAs concluded in 2017 is included in Chapter III of *WIR18*.

- The Mauritius Convention on Transparency entered into force in October 2017. As of April 2018, 23 countries signed the Convention, including 3 that have also ratified it.
- Following the UNCITRAL Commission's mandate of July 2017, multilateral discussions on the possible reform of ISDS have taken place at the UNCITRAL Working Group III in November 2017 and April 2018; the process is ongoing.

UNCTAD's High-level IIA Conference 2018, which will be held during the World Investment Forum in Geneva (22–26 October), will provide an opportunity for chief negotiators and investment stakeholders to discuss these and other investment policy developments when taking stock of Phases 1 and 2 of IIA Reform, and charting the way forward for the third phase of reform.[208]

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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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[208] For more information, visit http://worldinvestmentforum.unctad.org.

Annex 1. Known treaty-based ISDS cases initiated in 2017

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	*Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia* (ICSID Case No. ARB/17/37)	Croatia	Austria	Austria–Croatia BIT (1997)
2	*Addiko Bank AG v. Montenegro* (ICSID Case No. ARB/17/35)	Montenegro	Austria	Austria–Montenegro BIT (2001)
3	*Prenay Agarwal, Vinita Agarwal and Ritika Mehta v. Uruguay* (UNCITRAL)	Uruguay	United Kingdom	United Kingdom–Uruguay BIT (1991)
4	*Naveen Aggarwal, Neete Gupta, and Usha Industries, Inc. v. Bosnia and Herzegovina* (UNCITRAL)	Bosnia and Herzegovina	India; United States of America	Bosnia and Herzegovina–India BIT (2006)
5	*Agility Public Warehousing Company K.S.C. v. Republic of Iraq* (ICSID Case No. ARB/17/7)	Iraq	Kuwait	Iraq–Kuwait BIT (2013)
6	*Agro EcoEnergy Tanzania Limited, Bagamoyo EcoEnergy Limited, EcoDevelopment in Europe AB, EcoEnergy Africa AB v. United Republic of Tanzania* (ICSID Case No. ARB/17/33)	Tanzania, United Republic of	Sweden	Sweden–United Republic of Tanzania BIT (1999)
7	*Air Canada v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/17/1)	Venezuela, Bolivarian Republic of	Canada	Canada–Venezuela, Bolivarian Republic of BIT (1996)
8	*Mazen Al Ramahi v. Hungary* (ICSID Case No. ARB/17/45)	Hungary	Jordan	Hungary–Jordan BIT (2007)
9	*APCL Gambia B.V. v. Republic of The Gambia* (ICSID Case No. ARB/17/40)	Gambia	Netherlands	Gambia–Netherlands BIT (2002)
10	*APR Energy LLC, Power Rental Asset Co Two LLC, Power Rental Op Co Australia LLC v. Australia* (UNCITRAL)	Australia	United States of America	Australia–United States FTA (2004)
11	*Arin Capital & Investment Corp. and Edmond Khudyan v. Republic of Armenia* (ICSID Case No. ARB/17/36)	Armenia	United States of America	Armenia–United States of America BIT (1992)
12	*Bailey, David A. Barish, Walter John Bilger and others v. Republic of Nicaragua* (ICSID Case No. ARB/17/44)	Nicaragua	United States of America	CAFTA–DR (2004)
13	*Bank Melli Iran and Bank Saderat Iran v. Bahrain* (UNCITRAL)	Bahrain	Iran, Islamic Republic of	Bahrain–Iran, Islamic Republic of BIT (2002)
14	*Bank of Cyprus Public Company Limited v. Hellenic Republic* (ICSID Case No. ARB/17/4)	Greece	Cyprus	Cyprus–Greece BIT (1992)
15	*Big Sky Energy Corporation v. Republic of Kazakhstan* (ICSID Case No. ARB/17/22)	Kazakhstan	United States of America	Kazakhstan–United States of America BIT (1992)
16	*BM Mühendislik ve Insaat A.S. v. United Arab Emirates* (ICSID Case No. ARB/17/20)	United Arab Emirates	Turkey	Turkey–United Arab Emirates BIT (2005)
17	*Igor Boyko v. Ukraine* (PCA Case No. 2017-23)	Ukraine	Russian Federation	Russian Federation–Ukraine BIT (1998)
18	*Bursel Tekstil Sanayi Ve Dis Ticaret A.S., Burhan Enustekin and Selim Kaptanoglu v. Republic of Uzbekistan* (ICSID Case No. ARB/17/24)	Uzbekistan	Turkey	Turkey–Uzbekistan BIT (1992)
19	*Jochem Bernard Buse v. Republic of Panama* (ICSID Case No. ARB/17/12)	Panama	Netherlands	Netherlands–Panama BIT (2000)
20	*Carissa Investments LLC v. India* (UNCITRAL)	India	Mauritius	India–Mauritius BIT (1998)

No.	Case name	Respondent State	Home State of claimant	Applicable IIA
21	*CMC Africa Austral, LDA, CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., and CMC MuratoriCementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa v. Republic of Mozambique* (ICSID Case No. ARB/17/23)	Mozambique	Italy	Italy–Mozambique BIT (1998)
22	*Consutel Group S.p.A. in liquidazione v. Algeria* (UNCITRAL)	Algeria	Italy	Algeria–Italy BIT (1991)
23	*Cunico Resources N.V. v. Macedonia, former Yugoslav Republic of* (ICSID Case No. ARB/17/46)	Macedonia, The former Yugoslav Republic of	Netherlands	Macedonia, The former Yugoslav Republic of–Netherlands BIT (1998)
24	*DCM Energy GmbH & Co. Solar 1 KG, DCM Energy GmbH & Co. Solar 2 KG, Edisun Power Europe A.G., Hannover Leasing Sun Invest 2 Spanien Beteiligungs GmbH, and Hannover Leasing Sun Invest 2 Spanien GmbH & Co. KG v. Kingdom of Spain* (ICSID Case No. ARB/17/41)	Spain	Germany; Switzerland	The Energy Charter Treaty (1994)
25	*Kristof de Sutter, Peter de Sutter and (DS)2, S.A. v. Republic of Madagascar* (II) (ICSID Case No. ARB/17/18)	Madagascar	Luxembourg; Belgium	BLEU (Belgium-Luxembourg Economic Union)–Madagascar BIT (2005)
26	*DP World Limited v. Kingdom of Belgium* (ICSID Case No. ARB/17/21)	Belgium	United Arab Emirates	BLEU (Belgium-Luxembourg Economic Union)–United Arab Emirates BIT (2004)
27	*Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia* (ICSID Case No. ARB/17/32)	Croatia	Netherlands	Croatia–Netherlands BIT (1998)
28	*Erste & Steiermärkische Bank d.d., Erste Group Bank AG, and Steiermärkische Bank und Sparkassen AG v. Republic of Croatia* (ICSID Case No. ARB/17/49)	Croatia	Austria	Austria–Croatia BIT (1997)
29	*Eutelsat S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/17/2)	Mexico	France	France–Mexico BIT (1998)
30	*FREIF Eurowind v. Kingdom of Spain* (SCC Case No. 2017/060)	Spain	United Kingdom	The Energy Charter Treaty (1994)
31	*Future Pipe International B.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/17/31)	Egypt	Netherlands	Egypt–Netherlands BIT (1996)
32	*Gardabani Holdings B.V. and Silk Road Holdings B.V v. Georgia* (ICSID Case No. ARB/17/29)	Georgia	Netherlands	Georgia–Netherlands BIT (1998)
33	*Gas Natural Fenosa v. Republic of Colombia* (UNCITRAL)	Colombia	Spain	Colombia–Spain BIT (2005)
34	*Hela Schwarz GmbH v. People's Republic of China* (ICSID Case No. ARB/17/19)	China	Germany	China–Germany BIT (2003)
35	*ICL Europe Coöperatief U.A. v. Ethiopia* (PCA Case No. 2017-26)	Ethiopia	Netherlands	Ethiopia–Netherlands BIT (2003)
36	*Inicia Zrt, Kintyre Kft and Magyar Farming Company Ltd v. Hungary* (ICSID Case No. ARB/17/27)	Hungary	United Kingdom	Hungary–United Kingdom BIT (1987)
37	*Itisaluna Iraq LLC, Munir Sukhtian International Investment LLC, VTEL Holdings Ltd., VTEL Middle East and Africa Limited v. Republic of Iraq* (ICSID Case No. ARB/17/10)	Iraq	Jordan; United Arab Emirates	OIC Investment Agreement (1981); Iraq–Japan BIT (2012)
38	*Eugene Kazmin v. Republic of Latvia* (ICSID Case No. ARB/17/5)	Latvia	Ukraine	Latvia–Ukraine BIT (1997)

No.	Case name	Respondent State	Home State of claimant	Applicable IIA
39	*KazTransGas JSC v. Georgia* (UNCITRAL)	Georgia	Kazakhstan	The Energy Charter Treaty (1994); Georgia–Kazakhstan BIT (1996)
40	*Kingsgate Consolidated Ltd v. The Kingdom of Thailand* (UNCITRAL)	Thailand	Australia	Australia–Thailand FTA (2004)
41	*Lidercón, S.L. v. Republic of Peru* (ICSID Case No. ARB/17/9)	Peru	Spain	Peru–Spain BIT (1994)
42	*Lotus Holding Anonim Sirketi v. Turkmenistan* (ICSID Case No. ARB/17/30)	Turkmenistan	Turkey	Turkey–Turkmenistan BIT (1992); The Energy Charter Treaty (1994)
43	*LTME Mauritius Limited and Madamobil Holdings Mauritius Limited v. Republic of Madagascar* (ICSID Case No. ARB/17/28)	Madagascar	Mauritius	Madagascar–Mauritius BIT (2004)
44	*MAKAE Europe SARL v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/17/42)	Saudi Arabia	France	France–Saudi Arabia BIT (2002)
45	*Mera Investment Fund Limited v. Republic of Serbia* (ICSID Case No. ARB/17/2)	Serbia	Cyprus	Cyprus–Serbia BIT (2005)
46	*MetLife, Inc., MetLife Seguros de Retiro S.A. and MetLife Servicios S.A. v. Argentine Republic* (ICSID Case No. ARB/17/17)	Argentina	United States of America	Argentina–United States of America BIT (1991)
47	*Nissan Motor v. India* (UNCITRAL)	India	Japan	India–Japan EPA (2011)
48	*AS Norvik Banka, Alexander Guselnikov, Grigory Guselnikov and others v. Republic of Latvia* (ICSID Case No. ARB/17/47)	Latvia	United Kingdom	Latvia–United Kingdom BIT (1994)
49	*Obrascón Huarte Lain S.A., Rizzani de Eccher S.p.A. and Trevi S.p.A. v. State of Kuwait* (ICSID Case No. ARB/17/8)	Kuwait	Spain; Italy	Italy–Kuwait BIT (1987); Kuwait–Spain BIT (2005)
50	*Ortiz Construcciones y Proyectos S.A. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/17/1)	Algeria	Spain	Algeria–Spain BIT (1994)
51	*Pawlowski AG and Project Sever s.r.o. v. Czech Republic* (ICSID Case No. ARB/17/11)	Czech Republic	Switzerland	Czech Republic–Switzerland BIT (1990)
52	*Victor Pey Casado, Coral Pey Grebe and President Allende Foundation v. Republic of Chile* (PCA Case No. 2017-30)	Chile	Spain	Chile–Spain BIT (1991)
53	*Portigon AG v. Kingdom of Spain* (ICSID Case No. ARB/17/15)	Spain	Germany	The Energy Charter Treaty (1994)
54	*Puma Energy Holdings SARL v. the Republic of Benin* (SCC)	Benin	Luxembourg	BLEU (Belgium-Luxembourg Economic Union)–Benin BIT (2001)
55	*Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia* (ICSID Case No. ARB/17/34)	Croatia	Austria	Austria–Croatia BIT (1997)
56	*Carlos Ríos and Francisco Ríos v. Republic of Chile* (ICSID Case No. ARB/17/16)	Chile	Colombia	Chile–Colombia FTA (2006)
57	*Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic* (ICSID Case No. ARB/17/14)	Italy	United Kingdom	The Energy Charter Treaty (1994)
58	*Samsung Engineering Co., Ltd. v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/17/43)	Saudi Arabia	Korea, Republic of	Korea, Republic of–Saudi Arabia BIT (2002)
59	*Sanum Investments Limited v. Lao People's Democratic Republic* (II) (ICSID Case No. ADHOC/17/1)	Lao People's Democratic Republic	China	China–Lao People's Democratic Republic BIT (1993)

No.	Case name	Respondent State	Home State of claimant	Applicable IIA
60	*Slot Group a.s. v. Republic of Poland* (PCA Case No. 2017-10)	Poland	Czech Republic	Czech Republic–Poland BIT (1993)
61	*Tennant Energy, LLC. v. Canada* (UNCITRAL)	Canada	United States of America	NAFTA (1992)
62	*Ustay Yapi Taahhut ve Ticaret AS v. Libya* (ICC)	Libya	Turkey	Libya–Turkey BIT (2009)
63	*Venoklim Holding B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/17/4)	Venezuela, Bolivarian Republic of	Netherlands	Netherlands–Venezuela, Bolivarian Republic of BIT (1991)
64	*Vento Motorcycles, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/17/3)	Mexico	United States of America	NAFTA (1992)
65	*Vodafone Group Plc and Vodafone Consolidated Holdings Limited v. India* (II) (UNCITRAL)	India	United Kingdom	India–United Kingdom BIT (1994)

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	8	0
3	Argentina	60	3
4	Armenia	3	0
5	Australia	2	4
6	Austria	1	21
7	Azerbaijan	2	0
8	Bahamas	0	2
9	Bahrain	1	1
10	Bangladesh	1	0
11	Barbados	1	6
12	Belgium	2	16
13	Belize	3	0
14	Benin	1	0
15	Bermuda	0	1
16	Bolivia, Plurinational State of	14	1
17	Bosnia and Herzegovina	4	0
18	British Virgin Islands	0	1
19	Bulgaria	8	0
20	Burundi	4	0
21	Cabo Verde	1	0
22	Cameroon	1	0
23	Canada	27	45
24	Chile	5	7
25	China	3	5
26	Colombia	5	1
27	Congo, Democratic Republic of the	4	0
28	Costa Rica	9	1
29	Croatia	12	3
30	Cyprus	4	22
31	Czech Republic	35	5
32	Denmark	0	7
33	Dominican Republic	5	0
34	Ecuador	23	0
35	Egypt	31	3
36	El Salvador	3	0
37	Equatorial Guinea	1	0
38	Estonia	4	1
39	Ethiopia	2	0
40	Finland	0	2
41	France	1	44
42	Gabon	2	0
43	Gambia	2	0
44	Georgia	10	0

No.	Country	Cases as respondent State	Cases as home State of claimant
45	Germany	3	59
46	Ghana	2	0
47	Gibraltar	0	2
48	Greece	4	14
49	Grenada	1	0
50	Guatemala	3	0
51	Guyana	1	0
52	Hong Kong, China SAR	0	1
53	Hungary	16	1
54	India	24	5
55	Indonesia	7	0
56	Iran, Islamic Republic of	1	2
57	Iraq	2	0
58	Ireland	0	1
59	Israel	0	3
60	Italy	10	35
61	Japan	0	3
62	Jordan	9	7
63	Kazakhstan	17	5
64	Kenya	1	0
65	Korea, Republic of	3	4
66	Kuwait	1	6
67	Kyrgyzstan	13	0
68	Lao People's Democratic Republic	4	0
69	Latvia	9	2
70	Lebanon	5	3
71	Lesotho	2	0
72	Libya	11	0
73	Lithuania	5	3
74	Luxembourg	0	39
75	Macao, China SAR	0	1
76	Macedonia, The former Yugoslav Republic of	4	0
77	Madagascar	4	0
78	Malaysia	3	3
79	Malta	0	2
80	Mauritius	2	8
81	Mexico	27	2
82	Moldova, Republic of	11	1
83	Mongolia	4	0
84	Montenegro	4	0
85	Morocco	2	0
86	Mozambique	2	0
87	Myanmar	1	0
88	Netherlands	0	102
89	Nicaragua	2	0
90	Nigeria	1	0
91	Norway	0	5
92	Oman	3	2

No.	Country	Cases as respondent State	Cases as home State of claimant
93	Pakistan	9	0
94	Panama	8	5
95	Paraguay	3	0
96	Peru	13	2
97	Philippines	5	0
98	Poland	26	7
99	Portugal	0	5
100	Qatar	0	3
101	Romania	13	1
102	Russian Federation	24	16
103	Saudi Arabia	3	1
104	Senegal	3	0
105	Serbia	8	0
106	Seychelles	0	1
107	Singapore	0	3
108	Slovakia	13	1
109	Slovenia	3	2
110	South Africa	1	3
111	Spain	43	44
112	Sri Lanka	4	0
113	Sudan	1	0
114	Sweden	0	9
115	Switzerland	0	27
116	Syrian Arab Republic	1	0
117	Tajikistan	1	0
118	Tanzania, United Republic of	3	0
119	Thailand	2	0
120	Trinidad and Tobago	1	0
121	Tunisia	1	1
122	Turkey	11	30
123	Turkmenistan	10	0
124	Uganda	1	0
125	Ukraine	22	11
126	United Arab Emirates	3	8
127	United Kingdom	1	74
128	United States of America	16	156
129	Uruguay	3	0
130	Uzbekistan	8	1
131	Venezuela, Bolivarian Republic of	44	1
132	Viet Nam	5	0
133	Yemen	3	0
134	Zimbabwe	3	0

Annex 3. Arbitral decisions rendered in 2017

The arbitral decisions and follow-on decisions issued in 2017 are available at:
http://investmentpolicyhub.unctad.org/ISDS/FilterByYear

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

Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama (ICSID Case No. ARB/16/34), Decision on Expedited Objections, 13 December 2017 (Phillips, N. (chair), Grigera Naón, H. A. and Thomas, J. C.)

Eskosol S.p.A. in liquidazione v. Italian Republic (ICSID Case No. ARB/15/50), Decision on Respondent's Application under Rule 41(5), 20 March 2017 (Kalicki, J. E. (chair), Tawil, G. S. and Stern, B.)

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

Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen (ICSID Case No. ARB/14/30), Decision on Jurisdiction, 31 May 2017 (Binnie, I. (chair), Townsend, J. M. and Douglas, Z.)

Infinito Gold Ltd. v. Republic of Costa Rica (ICSID Case No. ARB/14/5), Decision on Jurisdiction, 4 December 2017 (Kaufmann-Kohler, G. (chair), Hanotiau, B. and Stern, B.)

Pavel Borissov, Aibar Burkitbayev, Almas Chukin and others v. Republic of Uzbekistan (ICSID Case No. ARB/13/6), Decision on Jurisdiction, 8 March 2017 (Caron, D. D. (chair), Fortier, L. Y. and Landau, T.)

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

Ansung Housing Co., Ltd. v. People's Republic of China (ICSID Case No. ARB/14/25), Award, 9 March 2017 (Reed, L. (chair), Pryles, M. C. and van den Berg, A. J.)

*Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia (*PCA Case No. 2010-20), Award, 30 June 2017 (Tomka, P. (chair), Banifatemi, Y. and Clodfelter, M. A.)

Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/20), Award, 26 April 2017 (Söderlund, C. (chair), Bermann, G. and Malintoppi, L.), with Separate Opinion of Söderlund, C.

Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon (ICSID Case No. ARB/15/18), Award, 22 June 2017 (Tercier, P. (chair), Mourre, A. and Pellet, A.), with Dissenting Opinion of Mourre, A.

EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic (ICSID Case No. ARB/14/14), Award, 18 August 2017 (Mayer, P. (chair), Gaillard, E. and Stern, B.), with Dissenting Opinion by Gaillard, E.

Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/21), Award, 13 November 2017 (Shin, H.-T. (chair), Fortier, L. Y. and Douglas, Z.)

Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35), Award, 31 May 2017 (Kaufmann-Kohler, G. (chair), van den Berg, A. J. and Stern, B.)

Supervision y Control S.A. v. Republic of Costa Rica (ICSID Case No. ARB/12/4), Award, 18 January 2017 (von Wobeser, C. (chair), Klock, J. P. and Silva Romero, E.), with Dissenting Opinion of Klock, J. P.

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

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 Liability and Heads of Loss, 21 February 2017 (Fortier, L. Y. (chair), Orrego Vicuña, F. and McLachlan, C. A.)

Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica (ICSID Case No. ARB/13/2), Award, 7 March 2017 (Mourre, A. (chair), Ramírez Hernández, R. and Jana Linetzky, A.), with Separate Opinion Regarding Costs by Ramírez Hernández, R.

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), Interim Decision, 17 January 2017 (Zuleta, E. (chair), Fortier, L. Y. and Bucher, A.)

PL Holdings S.a.r.l. v. Poland (SCC Case No. 2014/163), Partial Award, 28 June 2017 (Bermann, G. (chair), Lew, J. D. M. and Schneider, M.)

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

Anglia Auto Accessories Ltd v. The Czech Republic (SCC Case No. 2014/181), Final Award, 10 March 2017 (Banifatemi, Y. (chair), Reinisch, A. and Sands, P.)

Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Mr. Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan (ICSID Case No. ARB/13/38), Award, 14 December 2017 (McLachlan, C. A. (chair), Fortier, L. Y. and Kohen, M. G.), with Separate Opinion of Fortier, L. Y.

J.P. Busta and I.P. Busta v. The Czech Republic (SCC Case No. 2015/014), Final Award, 10 March 2017 (Banifatemi, Y. (chair), Reinisch, A. and Sands, P.)

WNC Factoring Ltd (WNC) v. The Czech Republic (PCA Case No. 2014-34), Award, 22 February 2017 (Griffith, G. (chair), Volterra, R. and Crawford, J. R.)

JSW Solar (zwei) GmbH & Co.KG, Gisela Wirtgen, Jürgen Wirtgen, and Stefan Wirtgen v. Czech Republic (PCA Case No. 2014-03), Final Award, 11 October 2017 (Kaufmann-Kohler, G. (chair), Born, G. B. and Tomka, P.), with Dissenting Opinion of Born, G. B.

Eli Lilly and Company v. Canada (ICSID Case No. UNCT/14/2), Final Award, 16 March 2017 (van den Berg, A. J. (chair), Born, G. B. and Bethlehem, D.)

F. Decisions awarding compensation

Bear Creek Mining Corporation v. Republic of Peru (ICSID Case No. ARB/14/21), Award, 30 November 2017 (Böckstiegel, K.-H. (chair), Pryles, M. C. and Sands, P.), with Partial Dissenting Opinion by Sands, P.

Burlington Resources, Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5), Decision on Reconsideration and Award, 7 February 2017 (Kaufmann-Kohler, G. (chair), Drymer, S. L. and Stern, B.)

Marco Gavazzi and Stefano Gavazzi v. Romania (ICSID Case No. ARB/12/25), Award, 18 April 2017 (van Houtte, H. (chair), Veeder, V. V. and Rubino-Sammartano, M.), with Dissenting Opinion with Regard to Quantum by Rubino-Sammartano, M.; Decision on Rectification, 13 July 2017, with Dissenting Opinion on Rectification by Rubino-Sammartano, M.

Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain (ICSID Case No. ARB/13/36), Award, 4 May 2017 (Crook, J. R. (chair), Alexandrov, S. A. and McLachlan, C. A.)

Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/19), Award, 30 October 2017 (Veeder, V. V. (chair), Lalonde, M. and Douglas, Z.), with Partially Dissenting Opinion of Douglas, Z.

Murphy Exploration & Production Company – International v. The Republic of Ecuador (II) (PCA Case No. 2012-16), Final Award, 10 February 2017 (Hanotiau, B. (chair), Hobér, K. and Derains, Y.)

Autobuses Urbanos del Sur S.A., Teinver S.A. and Transportes de Cercanías S.A. v. Argentine Republic (ICSID Case No. ARB/09/1), Award, 21 July 2017 (Buergenthal, T. (chair), Álvarez, H. C. and Hossain, K.), with Dissenting Opinion of Hossain, K.

UAB E energija (Lithuania) v. Republic of Latvia (ICSID Case No. ARB/12/33), Award, 22 December 2017 (Patocchi, P. M. (chair), Wordsworth, S. and Reinisch, A.), with Dissenting Opinion on Costs of Reinisch, A.

G. Decisions on the application for ICSID annulment

Gambrinus, Corp. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/31), Decision on Annulment, 3 October 2017 (Abraham, C. W. M. (chair), Pryles, M. C. and Hassouna, H. A.)

Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/27), Decision on Annulment, 9 March 2017 (Berman, F. (chair), Abraham, C. W. M. and Knieper, R.)

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (II) (ICSID Case No. ARB/03/19), Decision on Argentina's Application for Annulment, 5 May 2017 (Sachs, K. (chair), Carmichael, T. A. and Oreamuno Blanco, R.)

H. Other public decisions

Burlington Resources, Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5), Decision on Counterclaims, 7 February 2017 (Kaufmann-Kohler, G. (chair), Drymer, S. L. and Stern, B.)

Aaron C. Berkowitz, Brett E. Berkowitz, Trevor B. Berkowitz v. Republic of Costa Rica (ICSID Case No. UNCT/13/2), Interim Award (Corrected), 30 May 2017; Procedural Order on Correction of the Interim Award and Termination of the Proceedings, 30 May 2017 (Bethlehem, D. (chair), Kantor, M. and Vinuesa, R. E.)

Lao Holdings N.V. v. Lao People's Democratic Republic (I) (ICSID Case No. ARB(AF)/12/6), Decision on the Merits of Claimants' Second Material Breach Application, 15 December 2017 (Binnie, I. (chair), Hanotiau, B. and Stern, B.)

Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12), Final Award Regarding Costs, 8 March 2017 (Böckstiegel, K.-H. (chair), Kaufmann-Kohler, G. and McRae, D. M.)

I. Decisions not publicly available (at the time of writing)

A11Y LTD. v. Czech Republic (ICSID Case No. UNCT/15/1), Decision on Jurisdiction, 9 February 2017 (Fortier, L. Y. (chair), Alexandrov, S. A., Joubin-Bret, A.)

ABCI Investments Limited v. Republic of Tunisia (ICSID Case No. ARB/04/12), Decision on Liability, 17 July 2017 (Orrego Vicuña, F. (chair), Stern, B. and Fortier, L. Y.)

Aeroport Belbek LLC and Igor Valerievich Kolomoisky v. The Russian Federation (PCA Case No. 2015-07), Interim Award, 24 February 2017 (Dupuy, P.-M. (chair), Bethlehem, D., Mikulka, V.)

Aktau Petrol Ticaret A.S. v. Republic of Kazakhstan (ICSID Case No. ARB/15/8), Award, 13 November 2017 (Binnie, I. (chair), Hanotiau, B., Bethlehem, D.)

B.V. Belegging-Maatschappij "Far East" v. Republic of Austria (ICSID Case No. ARB/15/32), Award, 30 October 2017 (Pryles, M. C. (chair), Alexandrov, S. A., Stern, B.)

Baggerwerken Decloedt En Zoon NV v. Republic of the Philippines (ICSID Case No. ARB/11/27), Award, 23 January 2017 (Tercier, P. (chair), Alexandrov, S. A., Thomas, J. C.), with Concurring Opinion by Tercier, P., and Separate Opinion by Alexandrov, S. A.

Kontinental Conseil Ingénierie v. Gabonese Republic (UNCITRAL), Decision on Jurisdiction, 2017; Final Award, 2017 (Mayer, P. (chair), Ziadé, N., Audit, M.)

Crimea-Petrol LLC, Elefteria LLC, Novel-Estate LLC and others v. The Russian Federation (PCA Case No. 2015-35), Award on Jurisdiction, 26 June 2017 (Kaufmann-Kohler, G. (chair), Price, D. M., Stern, B.)

Everest Estate LLC, Edelveis-2000 PE, Fortuna CJSC and others v. The Russian Federation (PCA Case No. 2015-36), Decision on Jurisdiction, 20 March 2017 (Rigo Sureda, A. (chair), Reisman, W. M., Knieper, R.)

Evrobalt LLC and Kompozit LLC v. Moldova (SCC), Award, 2017 (Andersson, F. (chair), Pryles, M. C., von Schlabrendorff, F.)

G.I.H.G. Limited, Natland Group Limited, Natland Investment Group NV, and Radiance Energy Holding S.A.R.L. v. The Czech Republic (PCA Case No. 2013-35), Interim Award, 2017 (Heiskanen, V. (chair), Thomas, J. C., Born, G. B.)

Horthel Systems BV, Poland Gaming Holding BV and Tesa Beheer BV v. Poland (PCA Case No. 2014-31), Award, 2017 (Lévy, L. (chair), van Leeuwen, M., Thomas, J. C.)

JKX Oil & Gas plc, Poltava Gas B.V. and Poltava Petroleum Company v. Ukraine (UNCITRAL), Award, 6 February 2017 (Crawford, J. R. (chair), Hanotiau, B., Reisman, W. M.)

Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan (ICSID Case No. ARB/13/1), Award, 22 August 2017 (Derains, Y. (chair), Grigera Naón, H. A., Edward, D. A. O.)

Longreef Investments A.V.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/5), Award, 6 November 2017 (Edward, D. A. O. (chair), Gómez-Pinzón, E., Malintoppi, L.)

Luxtona Limited v. The Russian Federation (UNCITRAL), Interim Award, 22 March 2017 (Crook, J. R. (chair), Radicati di Brozolo, L., Oreamuno Blanco, R.)

Michael Dagher v. Republic of the Sudan (ICSID Case No. ARB/14/2), Decision on Jurisdiction, 10 November 2017 (Banifatemi, Y. (chair), Park, W. W., Khan, M. A.)

Mytilineos Holdings v. Serbia (II) (PCA Case No. 2014-30), Award, August 2017 (Sachs, K. (chair), Bishop, D., Vasiljevic, M.)

PJSC CB PrivatBank and Finance Company Finilon LLC v. The Russian Federation (PCA Case No. 2015-21), Interim Award, 24 February 2017 (Dupuy, P.-M. (chair), Bethlehem, D., Mikulka, V.)

PJSC Ukrnafta v. The Russian Federation (PCA Case No. 2015-34), Award on Jurisdiction, 26 June 2017 (Kaufmann-Kohler, G. (chair), Price, D. M., Stern, B.)

PL Holdings S.a.r.l. v. Poland (SCC Case No. 2014/163), Final Award, 28 September 2017 (Bermann, G. (chair), Lew, J. D. M. and Schneider, M.)

Robert Aleksandrowicz and Tomasz Czescik v. Cyprus (SCC), Award, 21 February 2017 (Derains, Y. (chair), Nappert, S., Giardina, A.)

Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/13), Award, 3 November 2017 (Sachs, K. (chair), Brower, C. N. and Bottini, G.)

Stans Energy Corp. and Kutisay Mining LLC v. Kyrgyz Republic (II) (PCA Case No. 2015-32), Award on Jurisdictional Objections, 25 January 2017 (Böckstiegel, K.-H. (chair), Campbell, C. L., Jagusch, S.)

Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan (ICSID Case No. ARB/12/1), Decision on the Respondent's application to dismiss the claims, 20 March 2017 (Sachs, K. (chair), Alexandrov, S. A., Hoffmann, L.)

Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/13/11), Award, 25 July 2017 (Zuleta, E. (chair), Grigera Naón, H. A., Derains, Y.)

Yukos Capital SARL v. The Russian Federation (UNCITRAL), Interim Award on Jurisdiction, 18 January 2017 (McLachlan, C. A. (chair), Rowley, J. W., Stern, B.)

J. Domestic court decisions

Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II) (PCA Case No. 2009-23), Judgment of the Appeal Court of The Hague, 18 July 2017

Crystallex International Corporation v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/2), Memorandum Opinion of the United States District Court for the District of Columbia, 25 March 2017

Gold Reserve Inc. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/09/1), Decision of the Paris Court of Appeal, 7 February 2017

JKX Oil & Gas plc, Poltava Gas B.V. and Poltava Petroleum Company v. Ukraine (UNCITRAL), Ruling of the High Court of Justice of England and Wales, 27 October 2017

Kristof De Sutter, Peter De Sutter, DS 2 S.A. and Polo Garments Majunga S.A.R.L. v. Republic of Madagascar (I) (ICC), Judgment of the French Court of Cassation, 1 June 2017

Mesa Power Group LLC v. Government of Canada (PCA Case No. 2012-17), Decision of the US District Court for the District of Columbia, 15 June 2017

Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela (PCA Case No. 2013-3), Decision of the Paris Court of Appeal, 25 April 2017

Stans Energy Corp. and Kutisay Mining LLC v. Kyrgyz Republic (II) (PCA Case No. 2015-32), Judgment by the High Court of Justice of England and Wales, 13 October 2017

Swissbourgh Diamond Mines (Pty) Limited, Josias Van Zyl, The Josias Van Zyl Family Trust and others v. The Kingdom of Lesotho (PCA Case No. 2013-29), Judgment of the High Court of Singapore on the Set Aside Application, 14 August 2017

Valeri Belokon v. Kyrgyz Republic (UNCITRAL), Decision of the Paris Court of Appeal, 21 February 2017

Yukos Capital SARL v. The Russian Federation (UNCITRAL), Judgment of the Swiss Federal Supreme Court, 20 July 2017

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