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

HIGHLIGHTS

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

Introduction: Recent ISDS decisions and their relevance for IIA reform

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

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

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

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

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

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

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

Box 1. ISDS decisions in 2020

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

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

Source: UNCTAD, 2021a.

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

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

1. Treaty scope and definitions

a. Definitions of investment and investor

Characteristics of investment

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

ISDS tribunals' findings:

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

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

Table 1. Characteristics of investment

Case details	Investment at issue	Selected issues and tribunals' findings
Adamakopoulos and others v. Cyprus • Cyprus–Greece BIT (1992) • BLEU (Belgium-Luxembourg Economic Union)–Cyprus BIT (1991) • Decision on Jurisdiction, 7 February 2020 • Decision upholding jurisdiction • McRae, D. M. (President); Escobar, A. A.; Kohen, M. G. (Dissenting Opinion)	Deposits and bonds in two Cypriot banks, Laiki Bank (also known as Cyprus Popular Bank) and the Bank of Cyprus.	• Whether bonds, deposits and life insurance constitute a protected investment (→YES – BY MAJORITY; they are explicitly covered by the BITs, the Salini criteria should be applied holistically and subordinated to the ordinary meaning of the term investment)
A.M.F. Aircraftleasing v. Czechia • Czechia–Germany BIT (1990) • Final Award, 11 May 2020 • Decision dismissing claims • Tercier, P. (President); Alexandrov, S. A.; Kalicki, J. E.	Ownership of two aircrafts and related leasing activities.	• Whether the claimant has a protected investment under the BIT (→YES; the Lease Agreements are an "investment" entailing a contribution that extends over a certain period of time and involves some risk, which is more than a simple commercial risk)

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

Table 1. Characteristics of investment

Case details	Investment at issue	Selected issues and tribunals' findings
Eyre and Montrose Developments v. Sri Lanka • Sri Lanka–United Kingdom BIT (1980) • Award, 5 March 2020 • Decision rejecting jurisdiction • Reed, L. (President); Lew, J. D. M.; Stern, B.	Ownership of land plot on the banks of Lake Diyawanna for a hotel development project.	• Whether the claimants' alleged investment satisfies the Salini test criteria ((i) contribution to the host State; (ii) a certain duration; (iii) participation in the risk of the operation) (→NO; lack of contribution and no operational risk)
Strabag v. Libya • Austria–Libya BIT (2002) • Award, 29 June 2020 • Decision finding IIA breaches • Crook, J. R. (President); Crivellaro, A.; Ziadé, N. (Partial Dissenting Opinion)	Contracts for road projects (in the vicinity of Benghazi and Misurata) and other infrastructure projects assigned to Al Hani General Construction Co., a joint venture between Strabag International and the Libyan Investment and Development Company.	• Whether the claimant's alleged investment satisfies the Salini criteria (→YES; but the tribunal does not need to decide this, since Article 25 of the ICSID Convention is not applicable to Additional Facility arbitrations)
Vento v. Mexico • NAFTA (1992) • Award, 6 July 2020 • Decision dismissing claims • Rigo Sureda, A. (President); Gantz, D. A.; Perezcano Diaz, H.	Investments in manufacturing of motorcycles.	• Whether a loan to an enterprise where the original maturity is at least three years qualifies as an investment under NAFTA (→YES; however, loan agreements are not sufficient proof of an investment) • Whether the claimant made an investment in the form of loans under NAFTA (→NO; no evidence that any funds were transferred under the loan agreements)

Source: UNCTAD.

Coverage of indirect investments

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

ISDS tribunals' findings:

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

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

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

Table 2. Coverage of indirect investments

Case details	Investment at issue	Selected issues and tribunals' findings
Adamakopoulos and others v. Cyprus • Cyprus–Greece BIT (1992) • BLEU (Belgium-Luxembourg Economic Union)–Cyprus BIT (1991) • Decision on Jurisdiction, 7 February 2020 • Decision upholding jurisdiction • McRae, D. M. (President); Escobar, A. A.; Kohen, M. G. (Dissenting Opinion)	Deposits and bonds in two Cypriot banks, Laiki Bank (also known as Cyprus Popular Bank) and the Bank of Cyprus.	• Whether the Cyprus–Greece BIT covers the claimants' indirect investments, held via Cypriot entities or entities in third States, in the absence of explicit wording on the issue (→YES – BY MAJORITY; ownership may be direct or indirect and may be full or partial)
Eyre and Montrose Developments v. Sri Lanka • Sri Lanka–United Kingdom BIT (1980) • Award, 5 March 2020 • Decision rejecting jurisdiction • Reed, L. (President); Lew, J. D. M.; Stern, B.	Ownership of land plot on the banks of Lake Diyawanna for a hotel development project.	• Whether the BIT covers investments held indirectly by one claimant via a company in a third State (→YES; the broad definition of investment with "every kind of asset" confirms that indirect investments are covered; the claimants have met the indirect foreign control test)
Lee-Chin v. Dominican Republic • CARICOM–Dominican Republic FTA (1998) • Partial Award on Jurisdiction, 15 July 2020 • Decision upholding jurisdiction • Fernández Arroyo, D. P. (President); Leathley, C.; Kohen, M. G. (Dissenting Opinion)	Indirect majority shareholding of 90 per cent in Lajún Corporation, a locally incorporated company that held a concession to operate the La Duquesa landfill in the municipality of Santo Domingo Norte.	• Whether the treaty protects the claimant's indirect investments via two companies in a third State, Panama, and protects the claimant as an indirect investor (→YES – BY MAJORITY; the treaty includes an open definition of covered investments and uses the formula "though not exclusively, includes" which is much more expressive even if the text makes no specific reference to direct or indirect investments)
Strabag and others v. Poland • Austria–Poland BIT (1988) • Partial Award on Jurisdiction, 4 March 2020 • Decision upholding jurisdiction • Veeder, V. V. (President); Böckstiegel, K.-H.; van den Berg, A. J.	Indirect shareholding in Hotele Warszawakie "Syrena" Sp. z.o.o. (Syrena Hotels), a local company operating two hotels in Warsaw (Hotel Polonia and Hotel Metropol).	• Whether ownership includes direct and indirect ownership of an investment in the absence of express treaty language (→YES; given the term's context and the treaty's object and purpose a wide reading is warranted) • Whether the BIT protects the claimants' investments indirectly owned through their subsidiary in a third State, Cyprus (→YES)

Source: UNCTAD.

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

Five decisions examined the concepts of ownership and control, investor nationality, place of incorporation and corporate restructuring (table 3).[3]

ISDS tribunals' findings:

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

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

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

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

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

Case details	Investment at issue	Selected issues and tribunals' findings
Adamakopoulos and others v. Cyprus • Cyprus–Greece BIT (1992) • BLEU (Belgium-Luxembourg Economic Union)–Cyprus BIT (1991) • Decision on Jurisdiction, 7 February 2020 • Decision upholding jurisdiction • McRae, D. M. (President); Escobar, A. A.; Kohen, M. G. (Dissenting Opinion)	Deposits and bonds in two Cypriot banks, Laiki Bank (also known as Cyprus Popular Bank) and the Bank of Cyprus.	• Whether under the Cyprus–Greece BIT legal entities, incorporated in the home State, Greece, but wholly owned or controlled by natural persons of the host State, Cyprus, would be covered (→YES – BY MAJORITY; the BIT does not define the nationality of investors who are legal persons on the basis of their control)
Eskosol v. Italy • Energy Charter Treaty (1994) • Award, 4 September 2020 • Decision dismissing claims • Kalicki, J. E. (President); Tawil, G. S.; Stern, B.	Investments in a 120 megawatt photovoltaic energy project in Italy.	• Whether the claimant being the company incorporated in the host State, Italy, met the foreign control requirement for jurisdiction under the ECT and ICSID (→YES; the company was under the control of a Belgian company at the time of the challenged measures, prior to the claimant's bankruptcy)
García Armas v. Venezuela • Spain–Venezuela, Bolivarian Republic of BIT (1995) • Decision on Jurisdiction, 24 July 2020 • Decision upholding jurisdiction • Nunes Pinto, J. E. (President); Gómez-Pinzón, E.; Torres Bernárdez, S.	Investments in food products enterprises Frigoríficos Ordaz, S.A.; García Armas Inversiones, S.A.; Koma Inversiones, S.A.; and La Fuente Delicatesses, C.A.	• Whether the claimant had the nationality of Spain as the home State (→YES; there was no evidence that the claimant had renounced its home State nationality (Spain) and had acquired that of the host State (Venezuela); obtaining the status of national investor under host State law, receiving pension payments in Venezuela, and being a permanent resident does not equate to the acquisition of Venezuelan citizenship)
Global Telecom Holding v. Canada • Canada–Egypt BIT (1996) • Award, 27 March 2020 • Decision dismissing claims • Affaki, G. (President); Born, G. B. (Dissenting Opinion); Lowe, V.	Interests in a Canadian telecommunications enterprise, Globalive Wireless Management Corporation ("Wind Mobile"), from 2008 to 2014.	• Whether the claimant qualifies for protection under the BIT, meeting its establishment and permanent residence requirements for the purposes of the "home State" (→YES; the two criteria are cumulative; the corporate register proves that the claimant is established as an Egyptian entity; a registered office suffices to show permanent residence; no support in the BIT that "permanent residence" is a separate and additional requirement for strong and enduring ties to the home State)
Strabag and others v. Poland • Austria–Poland BIT (1988) • Partial Award on Jurisdiction, 4 March 2020 • Decision upholding jurisdiction • Veeder, V. V. (President); Böckstiegel, K.-H.; van den Berg, A. J.	Indirect shareholding in Hotele Warszawakie "Syrena" Sp. z.o.o. (Syrena Hotels), a local company operating two hotels in Warsaw (Hotel Polonia and Hotel Metropol).	• Whether the tribunal has jurisdiction under the invoked BIT despite the claimants' access to a second BIT under which claims could potentially be brought by virtue of the claimants' corporate structure (→YES; the claimants retained standing; investment may be legitimately restructured as long as this is not done "to gain access to treaty protection when the dispute has already arisen or is foreseeable")

Source: UNCTAD.

b. Exclusions from the treaty scope (taxation measures)

Five decisions in 2020 examined whether certain measures challenged by the claimants were "taxation measures" excluded from the scope of the invoked IIA (table 4).[4] All five decisions concerned the Energy Charter Treaty (ECT).[5]

ISDS tribunals' findings:

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

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

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

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

Case details	Disputed measure(s)	Selected issues and tribunals' findings
ESPF and others v. Italy • Energy Charter Treaty (1994) • Award, 14 September 2020 • Decision finding IIA breaches • Álvarez, H. C. (President); Pryles, M. C.; Boisson de Chazournes, L.	A series of governmental decrees to cut tariff incentives for some solar power projects.	• Whether the tribunal has jurisdiction over some of the claims concerning tax measures (→NO; the ECT carves out tax measures; the Robin Hood Tax and the reclassification of PV plants for tax purposes are genuine tax measures; other measures such as administrative charges and imbalance fees are not tax measures)
Hydro Energy 1 and Hydroxana v. Spain • Energy Charter Treaty (1994) • Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020 • Decision finding IIA breaches • Collins, L. (President); Rees, P.; Knieper, R.	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	• Whether the tribunal has jurisdiction in respect of Act 15/2012 that introduced a tax on production of electricity other than for the purposes of the expropriation claim (→NO; tax measures are carved out from the scope of the ECT; the measure is regarded as a tax measure under Spanish law and is a *prima facie* tax measure under international law; it was not imposed in bad faith)
STEAG v. Spain • Energy Charter Treaty (1994) • Decision on Jurisdiction, Liability and Directions on Quantum, 8 October 2020 (Spanish) • Decision finding IIA breaches • Zuleta, E. (President); Tawil, G. S.; Dupuy, P.-M. (Dissenting Opinion)	A series of energy reforms undertaken by the Government affecting the renewables sector.	• Whether the tribunal has jurisdiction over the alleged FET breach arising from Act 15/2012 that introduced a tax on the production of electricity (→NO; tax measures are carved out from the scope of the FET clause; the measure is regarded as a tax measure under Spanish law and is a *prima facie* tax measure under international law; it was not imposed in bad faith) • Whether the claim is admissible that the tax introduced by Act 15/2012 violates the ECT's expropriation provision (→NO; the ECT requires submission of this question to the relevant competent tax authority; a letter to the prime minister is insufficient)

[4] The 2020 decision in Cavalum SGPS v. Spain also addressed this issue; the decision was not publicly available at the time of writing.
[5] The Article 21 of the ECT contains a tax carve-out, with a definition of the term "taxation measure" in Article 21(7).

Table 4.	Exclusions from the treaty scope (taxation measures)	
Case details	Disputed measure(s)	Selected issues and tribunals' findings
SunReserve v. Italy • Energy Charter Treaty (1994) • Final Award, 25 March 2020 • Decision dismissing claims • van den Berg, A. J. (President); Sachs, K.; Giardina, A.	A series of governmental decrees to cut tariff incentives for some solar power projects.	• Whether the tribunal has jurisdiction over some of the claims concerning tax measures (→NO; the ECT carves out tax measures; the Robin Hood Tax and the reclassification of PV plants for tax purposes are genuine tax measures; administrative charges and imbalance fees are not tax measures)
Watkins and others v. Spain • Energy Charter Treaty (1994) • Award, 21 January 2020 • Decision finding IIA breaches • Abraham, C. W. M. (President); Pryles, M. C.; Ruiz Fabri, H. (Dissenting Opinion)	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	• Whether the tribunal has jurisdiction in respect of Act 15/2012 that introduced a tax on production of electricity (→NO; tax measures are carved out from the scope of the ECT; the measure was not imposed in bad faith and is not a disguised tariff cut)

Source: UNCTAD.

2. Standards of treatment and protection

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

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

ISDS tribunals' findings:

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

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

Table 5.	National treatment and most-favoured-nation treatment (comparators and exceptions)	
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Global Telecom Holding v. Canada • Canada–Egypt BIT (1996) • Award, 27 March 2020 • Decision dismissing claims • Affaki, G. (President); Born, G. B. (Dissenting Opinion); Lowe, V.	Government's alleged failure to create a fair, competitive and favourable regulatory environment for new investors in the telecommunications sector.	• Whether the tribunal has jurisdiction over the claimant's NT claim despite the NT exceptions for sectors listed in the Annex to the BIT (→ NO – BY MAJORITY; the Annex for NT exceptions covers "services in any other sector" and this language includes telecommunications services; the BIT does not impose any procedural requirements to trigger the application of this exception)
Vento v. Mexico • NAFTA (1992) • Award, 6 July 2020 • Decision dismissing claims • Rigo Sureda, A. (President); Gantz, D. A.; Perezcano Diaz, H.	Mexico's allegedly discriminatory treatment of the claimant, which includes subjecting Vento's motorcycles to a 30 per cent import duty (on the ground that they are in fact made in China, not in the United States), whereas the claimant's competitors do not pay such import duty.	• Whether the challenged measures breached NAFTA NT and MFN obligations (→NO; the claimant failed to identify "comparators" in like circumstances; the structure of the claimant's joint venture was "in very different circumstances from those of the Relevant Mexican Investments")

Source: UNCTAD.

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

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

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

ISDS tribunals' findings:

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

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

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

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Consutel v. Algeria • Algeria–Italy BIT (1991) • Final Award, 3 February 2020 (French) • Decision dismissing claims • Mourre, A. (President); Tanzi, A. M.; Mahiou, A.	Alleged actions and omissions of state-owned Algérie Télécom related to a partnership agreement concluded with the claimant's local subsidiary, Spec-Com, for a fiber-optic telecommunications project.	• Whether it is possible to invoke the umbrella clause in the Algeria–Switzerland BIT by virtue of the MFN clause (→YES; however, certain limitations apply in the specific case)
Micula v. Romania (II) • Romania–Sweden BIT (2002) • Award, 5 March 2020 • Decision dismissing claims • McRae, D. M. (President); Beechey, J.; Crook, J. R.	Government's alleged failure to enforce its tax laws and to prevent the growth of illegal alcohol sales, causing harm to the claimants' spirits business; and the Government's imposition of unilateral price increases related to the claimants' mineral water business conducted under a long-term sale and purchase contract with a national company.	• Whether it is possible to incorporate the full protection and security (FPS) standard in the Albania–Romania BIT and Romania–Iran BIT by virtue of the MFN clause (→YES)
Itisaluna Iraq and others v. Iraq • OIC Investment Agreement (1981) • Award, 3 April 2020 • Decision rejecting jurisdiction • Bethlehem, D. (President); Peter, W. (Dissenting Opinion); Stern, B.	Government's alleged impairment of the claimants' rights under a telecommunications licence and subsequent non-renewal of the licence.	• Whether the claimants can incorporate into the OIC Agreement, by operation of its MFN clause, the ICSID arbitration clause in the Iraq–Japan BIT (→NO – BY MAJORITY; due to manifest public policy considerations going to issues of systemic overreach)

Source: UNCTAD.

c. Fair and equitable treatment (FET)

Legitimate expectations and (regulatory) stability

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

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

[7] The tribunal in Güriş and Yamantürk v. Syria also addressed this question in a 2020 award; the award was not publicly available at the time of writing.

ISDS tribunals' findings (renewable energy cases):

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

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

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

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Eskosol v. Italy • Energy Charter Treaty (1994) • Award, 4 September 2020 • Decision dismissing claims • Kalicki, J. E. (President); Tawil, G. S.; Stern, B.	A series of governmental decrees to cut tariff incentives for some solar power projects. According to the claimant, two State measures adopted in March and May 2011 (the Romani Decree and the Fourth Energy Account) rendered its photovoltaic project unviable and led to the company's bankruptcy.	• Whether ending the incentive regime early and replacing it violated the claimant's legitimate expectations regarding stability and consistency of the legal regime (→NO)
ESPF and others v. Italy • Energy Charter Treaty (1994) • Award, 14 September 2020 • Decision finding IIA breaches • Álvarez, H. C. (President); Pryles, M. C.; Boisson de Chazournes, L. (partial dissenting opinion in certain paragraphs)	A series of governmental decrees to cut tariff incentives for some solar power projects.	• Whether the respondent made a specific commitment through its acts and regulations such as to create a legitimate expectation that the FiT would remain constant for the lifetime of the investment (→YES – BY MAJORITY)
Hydro Energy 1 and Hydroxana v. Spain • Energy Charter Treaty (1994) • Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020 • Decision finding IIA breaches • Collins, L. (President); Rees, P.; Knieper, R.	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	• Whether the respondent's regulatory framework gave rise to the claimants' legitimate expectations of receiving the same tariff for the installations' operational life (→NO) • Whether specific commitments existed justifying claimants' legitimate expectations of receiving the same tariff for the installations' operational life (→NO) • Whether the regulatory regime gave rise to the claimants' legitimate expectation of receiving a "reasonable rate of return" (→YES)

Table 7.	FET: legitimate expectations and regulatory stability (renewable energy cases)	
Case details	Disputed measure(s)	Selected issues and tribunals' findings
STEAG v. Spain • Energy Charter Treaty (1994) • Decision on Jurisdiction, Liability and Directions on Quantum, 8 October 2020 (Spanish) • Decision finding IIA breaches • Zuleta, E. (President); Tawil, G. S.; Dupuy, P.-M. (Dissenting Opinion)	A series of energy reforms undertaken by the Government affecting the renewables sector.	• Whether the claimant had a legitimate expectation that the feed-in-tariffs, the premium option and the upper and lower limits for changes to this option would remain stable for the facility's operational life (→YES – BY MAJORITY) • Whether the respondent frustrated the claimant's legitimate expectation and breached FET (→YES – BY MAJORITY)
SunReserve v. Italy • Energy Charter Treaty (1994) • Final Award, 25 March 2020 • Decision dismissing claims • van den Berg, A. J. (President); Sachs, K.; Giardina, A.	A series of governmental decrees to cut tariff incentives for some solar power projects.	• Whether the respondent frustrated the claimants' legitimate expectations by changing the regulatory regime (→NO)
The PV Investors v. Spain • Energy Charter Treaty (1994) • Final Award, 28 February 2020 • Decision finding IIA breaches • Kaufmann-Kohler, G. (President); Brower, C. N. (Concurring and Dissenting Opinion); Sepúlveda Amor, B.	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	• Whether "stability is a stand-alone or absolute requirement under the ECT" (→NO) • Whether the respondent's regulatory framework gave rise to the claimants' legitimate expectations of receiving the same tariff for the installations' operational life (→NO – BY MAJORITY) • Whether the claimants were entitled to a "reasonable rate of return" (→YES – BY MAJORITY) • Whether the respondent frustrated the claimants' legitimate expectations of a "reasonable return" (→YES)
Watkins and others v. Spain • Energy Charter Treaty (1994) • Award, 21 January 2020 • Decision finding IIA breaches • Abraham, C. W. M. (President); Pryles, M. C.; Ruiz Fabri, H. (Dissenting Opinion)	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	• Whether the respondent violated the FET standard by failing to protect the claimants' legitimate expectations (→YES – BY MAJORITY)

Source: UNCTAD.

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

ISDS tribunals' findings (excluding renewable energy cases):

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

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

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

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

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Consutel v. Algeria • Algeria–Italy BIT (1991) • Final Award, 3 February 2020 (French) • Decision dismissing claims • Mourre, A. (President); Tanzi, A. M.; Mahiou, A.	Alleged actions and omissions of state-owned Algérie Télécom related to a partnership agreement concluded with the claimant's local subsidiary, Spec-Com, for a fiber-optic telecommunications project.	• Whether the challenged measures frustrated the claimant's legitimate expectations and thereby breached the FET standard (→NO)
EBO Invest and others v. Latvia • Latvia–Norway BIT (1992) • Award, 28 February 2020 • Decision dismissing claims • Schwartz, E. (President); Hobér, K.; Landau, T.	Actions of the Riga airport administration, a State-owned entity, relating to the claimants' project to develop the Riga Airport Business Park. The claimants' project allegedly failed due to the airport administration's frequent changes to the development plans for the airport and other related actions.	• Whether the respondent violated the claimants' legitimate expectations thereby breaching the FET standard (→NO) • Whether the respondent failed to provide the claimants with a transparent, consistent and stable business framework in breach of FET (→NO)
Global Telecom Holding v. Canada • Canada–Egypt BIT (1996) • Award, 27 March 2020 • Decision dismissing claims • Affaki, G. (President); Born, G. B. (Dissenting Opinion); Lowe, V.	Government's alleged failure to create a fair, competitive and favourable regulatory environment for new investors in the telecommunications sector.	• Whether the BIT's FET clause – "fair and equitable treatment in accordance with the principles of international law" – goes beyond the minimum standard of treatment (MST) under customary international law (→YES) • Whether the respondent's adoption and implementation of the Transfer Framework violated the claimant's legitimate expectations (→NO) • Whether the respondent's national security review breached the FET standard (→NO)
Griffin v. Poland • BLEU (Belgium-Luxembourg Economic Union)–Poland BIT (1987) • Final Award, 29 April 2020 • Decision dismissing claims • Kaufmann-Kohler, G. (President); Williams, D. A. R.; Sands, P.	Alleged expropriation of the claimant's rights to a historic former barracks site adjacent to Lazienki Park in central Warsaw, including alleged arbitrary conduct of the City of Warsaw related to construction works on the site and a decision of the Warsaw Court of Appeal confirming the termination of the claimant's usufruct rights to the property.	• Whether the respondent violated the FET standard by frustrating the claimant's legitimate expectations (→NO)
Lidercón v. Peru • Peru–Spain BIT (1994) • Award, 6 March 2020 • Decision dismissing claims • Paulsson, J. (President); Gonzalez de Cossio, F.; Perezcano Diaz, H.	A municipality's alleged non-compliance with a concession contract that grants the claimant an exclusive right to operate vehicle inspection centres in Lima.	• Whether the respondent violated the claimant's legitimate expectations (→NO)
Micula v. Romania (II) • Romania–Sweden BIT (2002) • Award, 5 March 2020 • Decision dismissing claims • McRae, D. M. (President); Beechey, J.; Crook, J. R.	Government's alleged failure to enforce its tax laws and to prevent the growth of illegal alcohol sales, causing harm to the claimants' spirits business; and the Government's imposition of unilateral price increases related to the claimants' mineral water business conducted under a long-term sale and purchase contract with a national company.	• Whether the respondent breached FET by failing to enforce its tax laws in a consistent manner and by frustrating the claimants' legitimate expectations (→NO) • Whether the respondent breached FET by failing to provide a stable and consistent legal framework (→NO)
Ortiz v. Algeria • Algeria–Spain BIT (1994) • Award, 29 April 2020 (French) • Decision dismissing claims • Lévy, L. (President); Fortier, L. Y.; Hanotiau, B.	Alleged refusal of Algerian authorities to award investor's joint venture company procurement contracts for the construction and sale of 5,000 housing units.	• Whether the challenged measures frustrated the claimant's legitimate expectations and thereby breached FET (→NO)

Source: UNCTAD.

Arbitrary, discriminatory, disproportionate or non-transparent State conduct

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

ISDS tribunals' findings:

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

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

Case details	Disputed measure(s)	Selected issues and tribunals' findings
A.M.F. Aircraftleasing v. Czechia • Czechia–Germany BIT (1990) • Final Award, 11 May 2020 • Decision dismissing claims • Tercier, P. (President); Alexandrov, S. A.; Kalicki, J. E.	Acts of Czech bankruptcy administrators and courts concerning two aircrafts that are allegedly owned by the claimant and were wrongly included in the bankruptcy proceedings of Czech company Air Charter Ltd, which had leased the planes. The aircrafts were subsequently sold as part of the bankruptcy proceedings.	• Whether the respondent breached FET through arbitrary, abusive or discriminatory conduct (→NO)
EBO Invest and others v. Latvia • Latvia–Norway BIT (1992) • Award, 28 February 2020 • Decision dismissing claims Schwartz, E. (President); Hobér, K.; Landau, T.	Actions of the Riga airport administration, a State-owned entity, relating to the claimants' project to develop the Riga Airport Business Park. The claimants' project allegedly failed due to the airport administration's frequent changes to the development plans for the airport and other related actions.	• Whether the respondent failed to provide the claimants with a transparent, consistent and stable business framework in breach of FET (→NO)
Eskosol v. Italy • Energy Charter Treaty (1994) • Award, 4 September 2020 • Decision dismissing claims • Kalicki, J. E. (President); Tawil, G. S.; Stern, B.	A series of governmental decrees to cut tariff incentives for some solar power projects. According to the claimant, two State measures adopted in March and May 2011 (the Romani Decree and the Fourth Energy Account) rendered its photovoltaic project unviable and led to the company's bankruptcy.	• Whether the Romani Decree and Conto Energia IV were arbitrary or unreasonable (→NO) • Whether the Romani Decree and Conto Energia IV were disproportionate or non-transparent (→NO)
Global Telecom Holding v. Canada • Canada–Egypt BIT (1996) • Award, 27 March 2020 • Decision dismissing claims • Affaki, G. (President); Born, G. B. (Dissenting Opinion); Lowe, V.	Government's alleged failure to create a fair, competitive and favourable regulatory environment for new investors in the telecommunications sector.	• Whether the respondent's adoption and implementation of the Transfer Framework were unreasonable, arbitrary and lacked transparency, were politically motivated or without any legitimate policy objective, thereby violating the FET standard (→NO) • Whether the respondent violated the FET standard through an arbitrary national security review process that lacked transparency and due process (→NO)
The PV Investors v. Spain • Energy Charter Treaty (1994) • Final Award, 28 February 2020 • Decision finding IIA breaches • Kaufmann-Kohler, G. (President); Brower, C. N. (Concurring and Dissenting Opinion); Sepúlveda Amor, B.	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	• Whether the respondent's measures were unreasonable, arbitrary, disproportionate and lacked transparency under FET (→NO)

Table 9.	FET: arbitrary, discriminatory, disproportionate or non-transparent State conduct	
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Vento v. Mexico • NAFTA (1992) • Award, 6 July 2020 • Decision dismissing claims • Rigo Sureda, A. (President); Gantz, D. A.; Perezcano Diaz, H.	Mexico's allegedly discriminatory treatment of the claimant, which includes subjecting Vento's motorcycles to a 30 per cent import duty (on the ground that they are in fact made in China, not in the United States), whereas the claimant's competitors do not pay such import duty.	• Whether the challenged measures breached the MST obligation through a lack of due process, arbitrary and discriminatory treatment (→NO)
Watkins and others v. Spain • Energy Charter Treaty (1994) • Award, 21 January 2020 • Decision finding IIA breaches • Abraham, C. W. M. (President); Pryles, M. C.; Ruiz Fabri, H. (Dissenting Opinion)	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	• Whether the respondent's measures lacked transparency, were unreasonable or disproportionate under FET (→YES – BY MAJORITY)

Source: UNCTAD.

Denial of justice

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

ISDS tribunals' findings:

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

Table 10.	FET: denial of justice	
Case details	Disputed measure(s)	Selected issues and tribunals' findings
A.M.F. Aircraftleasing v. Czechia • Czechia–Germany BIT (1990) • Final Award, 11 May 2020 • Decision dismissing claims Tercier, P. (President); Alexandrov, S. A.; Kalicki, J. E.	Acts of Czech bankruptcy administrators and courts concerning two aircrafts that are allegedly owned by the claimant and were wrongly included in the bankruptcy proceedings of Czech company Air Charter Ltd, which had leased the planes. The aircrafts were subsequently sold as part of the bankruptcy proceedings.	• Whether the respondent's actions amounted to denial of justice (→NO)
Bridgestone v. Panama • Panama–United States FTA (2007) • Award, 14 August 2020 • Decision dismissing claims • Phillips, N. (President); Grigera Naón, H. A.; Thomas, J. C.	A decision of the Supreme Court of Panama which held that Bridgestone's motion to oppose the registration of the Riverstone trademark by tyre-maker Muresa had been in bad faith, and awarded USD 5.4 million in damages to Muresa. According to the claimants, their challenge to the trademark application was a good-faith effort due to the trademark's similarity to two of Bridgestone's own registered trademarks.	• Whether the claimant can assert a breach of FET through denial of justice even if it was not part of the proceedings in which the alleged denial of justice occurred (→YES) • Whether the decision taken by the Supreme Court of Panama constituted denial of justice (→NO; defects in the decision "are no more than errors of judgment"; "[t]hey fall far short of demonstrating that the judgment was the product of incompetence or corruption")
EBO Invest and others v. Latvia • Latvia–Norway BIT (1992) • Award, 28 February 2020 • Decision dismissing claims • Schwartz, E. (President); Hobér, K.; Landau, T.	Actions of the Riga airport administration, a State-owned entity, relating to the claimants' project to develop the Riga Airport Business Park. The claimants' project allegedly failed due to the airport administration's frequent changes to the development plans for the airport and other related actions.	• Whether the claimants have a legitimate claim for denial of justice (→NO; the very high threshold that is required for denial of justice was not met)

Table 10. FET: denial of justice

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Lidercón v. Peru • Peru–Spain BIT (1994) • Award, 6 March 2020 • Decision dismissing claims • Paulsson, J. (President); Gonzalez de Cossio, F.; Perezcano Diaz, H.	A municipality's alleged non-compliance with a concession contract that grants the claimant an exclusive right to operate vehicle inspection centres in Lima.	• Whether the respondent breached FET through a denial of justice (→NO; the domestic judgments are not "aberrant to the point of being explicable only as a denial of justice")
Nelson v. Mexico • NAFTA (1992) • Award, 5 June 2020 • Decision dismissing claims • Zuleta, E. (President); Veeder, V. V.; Gomezperalta Casali, M.	Certain decisions by Mexico's federal telecommunications regulator IFT related to a disagreement between Tele Fácil and a large telecommunications provider in Mexico, Telmex, over the terms of an interconnection agreement. Among others, IFT allegedly subjected Tele Fácil to disproportionate enforcement actions and Mexican courts failed to address IFT's misconduct.	• Whether the claimant was denied justice through decisions of domestic courts (→NO; a first decision that is not final and a mere disagreement with the reasoning of the courts do not amount to denial of justice)

Source: UNCTAD.

d. Full protection and security

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

ISDS tribunals' findings:

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

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

Table 11. Full protection and security

Case details	Disputed measure(s)	Selected issues and tribunals' findings
A.M.F. Aircraftleasing v. Czechia • Czechia–Germany BIT (1990) • Final Award, 11 May 2020 • Decision dismissing claims • Tercier, P. (President); Alexandrov, S. A.; Kalicki, J. E.	Acts of Czech bankruptcy administrators and courts concerning two aircrafts that are allegedly owned by the claimant and were wrongly included in the bankruptcy proceedings of Czech company Air Charter Ltd, which had leased the planes. The aircrafts were subsequently sold as part of the bankruptcy proceedings.	• Whether the respondent's actions breached FPS (→NO; the FPS standard extends beyond physical protection to include the provision of legal security maintaining a functioning judicial system; there was no breach of FPS as the claimant had full access to the judicial system)
Eskosol v. Italy • Energy Charter Treaty (1994) • Award, 4 September 2020 • Decision dismissing claims • Kalicki, J. E. (President); Tawil, G. S.; Stern, B.	A series of governmental decrees to cut tariff incentives for some solar power projects. According to the claimant, two State measures adopted in March and May 2011 (the Romani Decree and the Fourth Energy Account) rendered its photovoltaic project unviable and led to the company's bankruptcy.	• Whether the respondent's changes to the regulatory regime violated the ECT's FPS clause (→NO; the standard does not entail an element of legal stability and even if it were, it would be a standard of due diligence, not one of strict liability)

Table 11. Full protection and security

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Global Telecom Holding v. Canada • Canada–Egypt BIT (1996) • Award, 27 March 2020 • Decision dismissing claims • Affaki, G. (President); Born, G. B.; Lowe, V.	Government's alleged failure to create a fair, competitive and favourable regulatory environment for new investors in the telecommunications sector.	• Whether the respondent's cumulative actions threatened the commercial and legal security of the claimant's investment, in breach of FPS (→NO; the respondent's conduct was consistent with the statutes and regulations; FPS includes legal security; the qualified "full" indicates that protection and security goes beyond mere physical security; the standard is not one of strict liability but requires a duty of due diligence on part of the State)
Strabag v. Libya • Austria–Libya BIT (2002) • Award, 29 June 2020 • Decision finding IIA breaches • Crook, J. R. (President); Crivellaro, A.; Ziadé, N. (Partial Dissenting Opinion)	Alleged non-payment for services under contracts entered into prior to the revolution in Libya, and damages to property during and after the 2011 civil war.	• Whether the respondent breached the FPS provision (→NO; FPS is not absolute and requires a duty of due diligence which "cannot be viewed in the abstract and in isolation from the conditions prevailing in Libya"; "Claimant's evidence is not sufficient to establish a failure of due diligence by Respondent")
The PV Investors v. Spain • Energy Charter Treaty (1994) • Final Award, 28 February 2020 • Decision finding IIA breaches • Kaufmann-Kohler, G. (President); Brower, C. N. (Concurring and Dissenting Opinion); Sepúlveda Amor, B.	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	• Whether the respondent breached the FPS standard by destroying the legal framework of the investments (→NO)

Source: UNCTAD.

e. Umbrella clause

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

ISDS tribunals' findings:

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

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

Table 12. Umbrella clause		
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Consutel v. Algeria • Algeria–Italy BIT (1991) • Final Award, 3 February 2020 (French) • Decision dismissing claims • Mourre, A. (President); Tanzi, A. M.; Mahiou, A.	Alleged actions and omissions of state-owned Algérie Télécom related to a partnership agreement concluded with the claimant's local subsidiary, Spec-Com, for a fiber-optic telecommunications project.	• Whether the tribunal has jurisdiction over claims that were contractual in nature (→NO; none of the alleged violations go beyond the contractual sphere to involve the exercise of sovereign powers) • Whether Article 10(1) is an umbrella clause (→NO; the clause does not allow to raise the contractual violations to the level of treaty violations) • Whether it is possible to invoke the umbrella clause in the Algeria–Switzerland BIT by virtue of the MFN clause (→YES; however, certain limitations apply in the specific case) • Whether the tribunal has jurisdiction over the contractual claims under the imported umbrella clause (→NO)
EBO Invest and others v. Latvia • Latvia–Norway BIT (1992) • Award, 28 February 2020 • Decision dismissing claims • Schwartz, E. (President); Hobér, K.; Landau, T.	Actions of the Riga airport administration, a State-owned entity, relating to the claimants' project to develop the Riga Airport Business Park. The claimants' project allegedly failed due to the airport administration's frequent changes to the development plans for the airport and other related actions.	• Whether the respondent breached the umbrella clause (→NO; the tribunal had already decided that the contract was not attributable to the State)
Eskosol v. Italy • Energy Charter Treaty (1994) • Award, 4 September 2020 • Decision dismissing claims • Kalicki, J. E. (President); Tawil, G. S.; Stern, B.	A series of governmental decrees to cut tariff incentives for some solar power projects. According to the claimant, two State measures adopted in March and May 2011 (the Romani Decree and the Fourth Energy Account) rendered its photovoltaic project unviable and led to the company's bankruptcy.	• Whether the respondent's change of the regulatory regime violated the ECT's umbrella clause (→NO; the investor never qualified for the incentives and the State, thus, did not "enter into" any obligations)
ESPF and others v. Italy • Energy Charter Treaty (1994) • Award, 14 September 2020 • Decision finding IIA breaches • Álvarez, H. C. (President); Pryles, M. C.; Boisson de Chazournes, L. (partial dissenting opinion in certain paragraphs)	A series of governmental decrees to cut tariff incentives for some solar power projects.	• Whether a system of general legislation, given effect through regulations, letters and agreements is covered by the ECT's umbrella clause (→YES – BY MAJORITY) • Whether the respondent breached the umbrella clause (→YES – BY MAJORITY)
Ortiz v. Algeria • Algeria–Spain BIT (1994) • Award, 29 April 2020 (French) • Decision dismissing claims • Lévy, L. (President); Fortier, L. Y.; Hanotiau, B.	Alleged refusal of Algerian authorities to award investor's joint venture company procurement contracts for the construction and sale of 5,000 housing units.	• Whether there has been a breach of the umbrella clause (→NO; there is no unilateral or contractual commitment binding the respondent, who is not party to the contracts concluded by the claimant)
Strabag and others v. Poland • Austria–Poland BIT (1988) • Partial Award on Jurisdiction, 4 March 2020 • Decision upholding jurisdiction • Veeder, V. V. (President); Böckstiegel, K.-H.; van den Berg, A. J.	Polish authorities' alleged denial of legal titles to two hotels and related land plots in Warsaw that were held by Syrena Hotels, a formerly state-owned entity that the claimants had acquired during a privatization process; the legal titles were transferred to the successors of previous property owners.	• Whether the respondent breached the umbrella clause Article 7(2) by failing to comply with certain provisions of the Share Purchase Agreement (→Pending; issue joined to the merits)

Table 12.	Umbrella clause	
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Strabag v. Libya • Austria–Libya BIT (2002) • Award, 29 June 2020 • Decision finding IIA breaches • Crook, J. R. (President); Crivellaro, A.; Ziadé, N. (Partial Dissenting Opinion)	Alleged non-payment for services under contracts entered into prior to the revolution in Libya, and damages to property during and after the 2011 civil war.	• Whether the BIT's umbrella clause covers claims for breaches of the contracts at issue (→YES) • Whether the tribunal has jurisdiction over the claims despite the local litigation requirement in the contracts (→YES; the conditions in Libya make it impossible to pursue the contract claims in local courts "in tranquillity and safety") • Whether the respondent breached the umbrella clause (→YES)
SunReserve v. Italy • Energy Charter Treaty (1994) • Final Award, 25 March 2020 • Decision dismissing claims • van den Berg, A. J. (President); Sachs, K.; Giardina, A.	A series of governmental decrees to cut tariff incentives for some solar power projects.	• Whether the respondent's conduct breached the umbrella clause (→NO; the respondent did not have any "obligations" entered into with the claimants for the purposes of the umbrella clause)

Source: UNCTAD.

f. Indirect expropriation

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

ISDS tribunals' findings:

- In all seven cases, the tribunals dismissed the indirect expropriation claims.[8]

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

Table 13.	Indirect expropriation	
Case details	Disputed measure(s)	Selected issues and tribunals' findings
A.M.F. Aircraftleasing v. Czechia • Czechia–Germany BIT (1990) • Final Award, 11 May 2020 • Decision dismissing claims • Tercier, P. (President); Alexandrov, S. A.; Kalicki, J. E.	Acts of Czech bankruptcy administrators and courts concerning two aircrafts that are allegedly owned by the claimant and were wrongly included in the bankruptcy proceedings of Czech company Air Charter Ltd, which had leased the planes. The aircrafts were subsequently sold as part of the bankruptcy proceedings.	• Whether the respondent's acts and omissions amounted to expropriation (→NO; bankruptcy trustees and Czech courts acted in accordance with Czech law and therefore lawfully)
Consutel v. Algeria • Algeria–Italy BIT (1991) • Final Award, 3 February 2020 • Decision dismissing claims • Mourre, A. (President); Tanzi, A. M.; Mahiou, A.	Alleged actions and omissions of state-owned Algérie Télécom related to a partnership agreement concluded with the claimant's local subsidiary, Spec-Com, for a fiber-optic telecommunications project.	• Whether the respondent's measures constituted indirect expropriation (→NO; the measure had a limited and temporary effect and the claimant was not deprived in whole or in part of the enjoyment of its investment)

[8] In Griffin v. Poland, the tribunal also dismissed the direct expropriation claim.

Table 13. Indirect expropriation

Case details	Disputed measure(s)	Selected issues and tribunals' findings
EBO Invest and others v. Latvia • Latvia–Norway BIT (1992) • Award, 28 February 2020 • Decision dismissing claims • Schwartz, E. (President); Hobér, K.; Landau, T.	Actions of the Riga airport administration, a State-owned entity, relating to the claimants' project to develop the Riga Airport Business Park. The claimants' project allegedly failed due to the airport administration's frequent changes to the development plans for the airport and other related actions.	• Whether the respondent's acts amounted to indirect expropriation (→NO; the claimants have failed to establish that their contractual rights were adversely affected and that such changes led to an 'absolute loss' of the claimants' investments)
Gosling and others v. Mauritius • Mauritius–United Kingdom BIT (1986) • Award, 18 February 2020 • Decision dismissing claims • Rigo Sureda, A. (President); Alexandrov, S. A. (Dissenting Opinion); Stern, B.	Government's changes to its planning guidance policy and the designation of Le Morne area in southwest Mauritius as a UNESCO World Heritage Site in 2008, with the claimants alleging that these actions rendered worthless their investments in two planned tourist resorts.	• Whether the respondent indirectly expropriated the claimants' investment (→NO – BY MAJORITY; the claimants did not acquire development rights, interference with which might have given rise to a justifiable claim for compensation)
Griffin v. Poland • BLEU (Belgium-Luxembourg Economic Union)–Poland BIT (1987) • Final Award, 29 April 2020 • Decision dismissing claims • Kaufmann-Kohler, G. (President); Williams, D. A. R.; Sands, P.	Alleged expropriation of the claimant's rights to a historic former barracks site adjacent to Lazienki Park in central Warsaw, including alleged arbitrary conduct of the City of Warsaw related to construction works on the site and a decision of the Warsaw Court of Appeal confirming the termination of the claimant's usufruct rights to the property.	• Whether the measures adopted by the respondent amounted to an indirect expropriation (→NO) • Whether the measures adopted by the respondent amounted to a direct expropriation (→NO; "judgments of domestic courts are not expropriatory if they enforce or give effect to a State's legitimate contractual rights"; the investor used the property in a manner that was inconsistent with the purpose of the usufruct agreement with the City)
Hydro Energy 1 and Hydroxana v. Spain • Energy Charter Treaty (1994) • Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020 • Decision finding IIA breaches • Collins, L. (President); Rees, P.; Knieper, R.	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	• Whether the respondent's measures constitute an indirect expropriation (→NO; a substantial deprivation of all economic value is required; a loss of some anticipated returns or a mere loss in value is generally not an indirect expropriation)
Nelson v. Mexico • NAFTA (1992) • Award, 5 June 2020 • Decision dismissing claims • Zuleta, E. (President); Veeder, V. V.; Gomezperalta Casali, M.	Certain decisions by Mexico's federal telecommunications regulator IFT related to a disagreement between Tele Fácil and a large telecommunications provider in Mexico, Telmex, over the terms of an interconnection agreement. Among others, IFT allegedly subjected Tele Fácil to disproportionate enforcement actions and Mexican courts failed to address IFT's misconduct.	• Whether the respondent unlawfully expropriated the claimant's investments (→NO; claimant cannot claim that a right it does not have under Mexican law is capable of being expropriated)

Source: UNCTAD.

3. Public policy exceptions and other exceptions

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

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

4. Other issues

Compensation for losses: armed conflict

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

ISDS tribunals' findings:

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

Table 14. Compensation for losses: armed conflict

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Strabag v. Libya • Austria–Libya BIT (2002) • Award, 29 June 2020 • Decision finding IIA breaches • Crook, J. R. (President); Crivellaro, A.; Ziadé, N. (Partial Dissenting Opinion)	Alleged non-payment for services under contracts entered into prior to the revolution in Libya, and damages to property during and after the 2011 civil war.	• Whether the respondent breached the war loss clause (→YES; a significant amount of the equipment owned by the local joint venture was requisitioned by regular armed forces; other destruction of property was due to three causes: rebel groups and NATO air bombardment, civilians and employees, as well as military personnel; as a consequence, 1/3 of the losses are attributable to the respondent)

Source: UNCTAD.

5. ISDS scope, conditions for access and procedural issues

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

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

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

ISDS tribunals' findings (intra-EU application):

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

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

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Adamakopoulos and others v. Cyprus • Cyprus–Greece BIT (1992) • BLEU (Belgium-Luxembourg Economic Union)–Cyprus BIT (1991) • Decision on Jurisdiction, 7	Alleged discriminatory treatment as a result of the €10 billion bailout package for Cyprus by the European Commission, the European Central Bank and the International Monetary Fund.	• Whether the contracting parties' consent to arbitrate under the BITs is unaffected by EU law as interpreted in the CJEU's decision in *Achmea v. Slovakia (I) (2018)* (→YES – BY MAJORITY) • Whether the contracting parties' consent to arbitrate is valid despite the respondent's objection that there is a conflict within the meaning of the Vienna

[9] The tribunal in Güriş and Yamantürk v. Syria also addressed this issue; the award was not public at the time of writing.

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

Case details	Disputed measure(s)	Selected issues and tribunals' findings
February 2020 • Decision upholding jurisdiction • McRae, D. M. (President); Escobar, A. A.; Kohen, M. G. (Dissenting Opinion)		Convention on the Law of Treaties (VCLT) between the EU treaties and the BITs that prevents the claimants from having recourse to arbitration (→YES – BY MAJORITY)
Addiko Bank v. Croatia • Austria–Croatia BIT (1997) • Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020 • Decision upholding jurisdiction • Kalicki, J. E. (President); Tawil, G. S.; Olik, M.	The law that prescribed a change in the currency of loans, issued in Croatia, from Swiss Franc to the Euro.	• Whether the tribunal has jurisdiction despite the objection that an incompatibility exists between the EU acquis (EU treaties, EU legislation, etc.) and the BIT in question (→YES) • Whether the tribunal has jurisdiction under the BIT despite the declarations by EU member States on the consequences of the *Achmea* judgment preventing recourse to ISDS (→YES) • Whether the contracting parties' consent to arbitrate is valid despite the respondent's objection that there is a conflict within the meaning of the VCLT between the EU treaties and the BIT that prevents the claimants from having recourse to arbitration (→YES) • Whether the contracting parties' consent to arbitrate is valid despite the respondent's objections that the BIT provisions are incompatible with EU anti-discrimination rules (→YES)
A.M.F. Aircraftleasing v. Czechia • Czechia–Germany BIT (1990) • Final Award, 11 May 2020 • Decision dismissing claims • Tercier, P. (President); Alexandrov, S. A.; Kalicki, J. E.	Acts of Czech bankruptcy administrators and courts concerning two aircrafts that are allegedly owned by the claimant and were wrongly included in the bankruptcy proceedings of Czech company Air Charter Ltd, which had leased the planes. The aircrafts were subsequently sold as part of the bankruptcy proceedings.	• Whether the tribunal has jurisdiction despite the CJEU'S decision in *Achmea v. Slovakia (I)* (2018) (→YES) • Whether the tribunal has jurisdiction despite the contracting parties' signature of the January 2019 Declarations (→YES)
ESPF and others v. Italy • Energy Charter Treaty (1994) • Award, 14 September 2020 • Decision finding IIA breaches • Álvarez, H. C. (President); Pryles, M. C.; Boisson de Chazournes, L.	A series of governmental decrees to cut tariff incentives for some solar power projects.	• Whether the ECT is applicable to intra-EU disputes (→YES)
Griffin v. Poland • BLEU (Belgium-Luxembourg Economic Union)–Poland BIT (1987) • Final Award, 29 April 2020 • Decision dismissing claims • Kaufmann-Kohler, G. (President); Williams, D. A. R.; Sands, P.	Alleged expropriation of the claimant's rights to a historic former barracks site adjacent to Lazienki Park in central Warsaw, including alleged arbitrary conduct of the City of Warsaw related to construction works on the site and a decision of the Warsaw Court of Appeal confirming the termination of the claimant's usufruct rights to the property.	• Whether the contracting parties' consent to arbitrate is valid despite the respondent's objection that the BIT's dispute settlement clause was rendered inapplicable by Poland's accession to the EU (→YES)
Hydro Energy 1 and Hydroxana v. Spain • Energy Charter Treaty (1994) • Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	• Whether the tribunal has jurisdiction over disputes under the ECT despite the *Achmea* ruling (→YES)

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

Case details	Disputed measure(s)	Selected issues and tribunals' findings
• Decision finding IIA breaches • Collins, L. (President); Rees, P.; Knieper, R.		
Micula v. Romania (II) • Romania–Sweden BIT (2002) • Award, 5 March 2020 • Decision dismissing claims • McRae, D. M. (President); Beechey, J.; Crook, J. R.	Government's alleged failure to enforce its tax laws and to prevent the growth of illegal alcohol sales, causing harm to the claimants' spirits business; and the Government's imposition of unilateral price increases related to the claimants' mineral water business conducted under a long-term sale and purchase contract with a national company.	• Whether the tribunal has jurisdiction despite the CJEU'S decision in *Achmea v. Slovakia (I)* (2018) (→YES) • Whether the tribunal has jurisdiction despite the contracting parties' signature of the January 2019 Declarations (→YES)
Raiffeisen Bank v. Croatia (I) • Austria–Croatia BIT (1997) • Decision on the Respondent's Jurisdictional Objections, 30 September 2020 • Decision upholding jurisdiction • Reed, L. (President); Alexandrov, S. A.; Tomov, L. (dissenting in part)	The law that prescribed a change in the currency of loans, issued in Croatia, from Swiss Franc to the Euro.	• Whether the contracting parties' consent to arbitrate is valid despite the respondent's objection that an incompatibility exists between the EU acquis (EU treaties, EU legislation, etc.) and the BIT in question (→YES) • Whether the contracting parties' consent to arbitrate is valid despite the respondent's objection that the BIT provisions are incompatible with EU anti-discrimination rules (→YES)
STEAG v. Spain • Energy Charter Treaty (1994) • Decision on Jurisdiction, Liability and Directions on Quantum, 8 October 2020 (Spanish) • Decision finding IIA breaches • Zuleta, E. (President); Tawil, G. S.; Dupuy, P.-M. (Dissenting Opinion)	A series of energy reforms undertaken by the Government affecting the renewables sector.	• Whether the tribunal has jurisdiction despite the CJEU's decision in *Achmea v. Slovakia (I)* (2018) (→YES) • Whether the ECT is applicable to intra-EU disputes (→YES) • Whether the contracting parties' consent to arbitrate is valid despite the respondent's objection that a conflict exists within the meaning of the VCLT between the EU treaties and the ECT that prevents the claimants from having recourse to arbitration (→YES)
Strabag and others v. Poland • Austria–Poland BIT (1988) • Partial Award on Jurisdiction, 4 March 2020 • Decision upholding jurisdiction • Veeder, V. V. (President); Böckstiegel, K.-H.; van den Berg, A. J.	Polish authorities' alleged denial of legal titles to two hotels and related land plots in Warsaw that were held by Syrena Hotels, a formerly state-owned entity that the claimants had acquired during a privatization process; the legal titles were transferred to the successors of previous property owners.	• Whether the contracting parties' arbitration agreement under the BIT in the present case is unaffected by EU law as interpreted in the CJEU's decision in *Achmea v. Slovakia* (I) (2018) (→YES) • Whether the contracting parties' ISDS consent is valid despite the respondent's objection that there is a conflict within the meaning of the VCLT between the EU treaties and the BIT that prevents the claimants from having recourse to arbitration (→YES)
SunReserve v. Italy • Energy Charter Treaty (1994) • Final Award, 25 March 2020 • Decision dismissing claims • van den Berg, A. J. (President); Sachs, K.; Giardina, A.	A series of governmental decrees to cut tariff incentives for some solar power projects.	• Whether the tribunal has jurisdiction under the ECT despite objections that EU law rendered it inapplicable (→YES) • Whether the ECT applies to intra-EU disputes regardless of EU law (→YES)
Watkins and others v. Spain • Energy Charter Treaty (1994) • Award, 21 January 2020 • Decision finding IIA breaches • Abraham, C. W. M. (President); Pryles, M. C.; Ruiz Fabri, H. (Dissenting Opinion)	A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.	• Whether the ECT is applicable to intra-EU disputes (→YES)

Source: UNCTAD.

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

ISDS tribunals' findings:

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

Table 16. Consent to ISDS

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Adamakopoulos and others v. Cyprus • Cyprus–Greece BIT (1992) • BLEU (Belgium-Luxembourg Economic Union)–Cyprus BIT (1991) • Decision on Jurisdiction, 7 February 2020 • Decision upholding jurisdiction • McRae, D. M. (President); Escobar, A. A.; Kohen, M. G. (Dissenting Opinion)	Alleged discriminatory treatment as a result of the €10 billion bailout package for Cyprus by the European Commission, the European Central Bank and the International Monetary Fund.	• Whether the respondent had provided consent to arbitration brought by a group of claimants and the tribunal has jurisdiction over the claimants' mass claim proceedings (→YES – BY MAJORITY; additional consent by the respondent for mass claims is not required as proceedings are not consolidated but joint proceedings)
Itisaluna Iraq and others v. Iraq • OIC Investment Agreement (1981) • Award, 3 April 2020 • Decision rejecting jurisdiction • Bethlehem, D. (President); Peter, W. (Dissenting Opinion); Stern, B.	Government's alleged impairment of the claimants' rights under a telecommunications licence and subsequent non-renewal of the licence.	• Whether Article 17 of the OIC Investment Agreement can be said to constitute consent to investor-State arbitration (→YES) • Whether the claimants can incorporate into the OIC Agreement, by operation of its MFN clause, the ICSID arbitration clause in the Iraq–Japan BIT (→NO – BY MAJORITY; due to manifest public policy considerations going to issues of systemic overreach)
Lee-Chin v. Dominican Republic • CARICOM–Dominican Republic FTA (1998) • Partial Award on Jurisdiction, 15 July 2020 • Decision upholding jurisdiction • Fernández Arroyo, D. P. (President); Leathley, C.; Kohen, M. G. (Dissenting Opinion)	Government's termination of a concession for the operation of a waste facility owned by the claimant's subsidiary and the alleged illegal expropriation of the landfill site.	• Whether Article XIII paragraph 1 of the Investment Chapter of the CARICOM–Dominican Republic FTA contains a clear expression of consent by the contracting parties to international arbitration (→YES – BY MAJORITY) • Whether the institution of arbitration proceedings by the claimant is the acceptance of the standing consent offered by the State (→YES – BY MAJORITY)

Source: UNCTAD.

b. Pre-arbitration requirements

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

ISDS tribunals' findings:

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

Table 17. ISDS: pre-arbitration requirements

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Adamakopoulos and others v. Cyprus • Cyprus–Greece BIT (1992), BLEU (Belgium-Luxembourg Economic Union)–Cyprus BIT (1991) • Decision on Jurisdiction, 7 February 2020 • Decision upholding jurisdiction • McRae, D. M. (President); Escobar, A. A.; Kohen, M. G. (Dissenting Opinion)	Alleged discriminatory treatment as a result of the €10 billion bailout package for Cyprus by the European Commission, the European Central Bank and the International Monetary Fund.	• Whether the 930 additional claimants under the Cyprus–Greece BIT listed in the amended request for arbitration had complied with the 6-month prior notice requirement although they were not included in the notice of dispute submitted by the 21 initial claimants (→YES – BY MAJORITY) • Whether the tribunal has jurisdiction over the Luxembourg claimant under the Cyprus–BLEU BIT considering the 6-month prior notice requirement, as the Luxembourg claimant was added to the amended request for arbitration less than 6 months after the claimant's individual notice of dispute (→YES – BY MAJORITY; the requirement was met because ICSID registered the amended request for arbitration 6 months after the notice of the Luxembourg claimant)
Itisaluna Iraq and others v. Iraq • OIC Investment Agreement (1981) • Award, 3 April 2020 • Decision rejecting jurisdiction • Bethlehem, D. (President); Peter, W. (Dissenting Opinion); Stern, B.	Government's alleged impairment of the claimants' rights under a telecommunications licence and subsequent non-renewal of the licence.	• Whether the claimants complied with the mandatory conciliation requirement (→NO – BY MAJORITY)

Source: UNCTAD.

c. Limitation periods for bringing claims

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

ISDS tribunals' findings:

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

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

Table 18.	ISDS: limitation periods for bringing claims	
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Global Telecom Holding v. Canada • Canada–Egypt BIT (1996) • Award, 27 March 2020 • Decision dismissing claims • Affaki, G. (President); Born, G. B. (Dissenting Opinion); Lowe, V.	Government's alleged failure to create a fair, competitive and favourable regulatory environment for new investors in the telecommunications sector.	• Whether the tribunal has jurisdiction over the claims considering the BIT's three-year limitation period (→YES; the alleged actions or omissions that occurred before the three-year period form part of a claim for a cumulative or composite breach within the limitation period, and are a question for the merits)
Renco v. Peru (II) • Peru–United States FTA (2006) • Decision on Expedited Preliminary Objections, 30 June 2020 • Decision upholding jurisdiction • Simma, B. (President); Grigera Naón, H. A.; Thomas, J. C. (Dissenting Opinion)	Government's alleged imposition of additional environmental obligations related to the La Oroya mining operations in which the claimant's affiliate Doe Rue Peru held interests and the Government's refusal to grant reasonable extensions to complete environmental projects at the site, allegedly forcing the company to cease operations, followed by bankruptcy and liquidation.	• Whether the tribunal has jurisdiction over the claims considering the IIA's three-year limitation period (→YES – BY MAJORITY; the limitation period was suspended with the start of and during the preceding arbitration proceedings in Renco I which concerned the same alleged breaches)

Source: UNCTAD.

d. Relationship with domestic court proceedings

In one decision, the tribunal examined the relationship between domestic court proceedings and ISDS (table 19).[10]

ISDS tribunals' findings:

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

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

Table 19.	ISDS: relationship with domestic proceedings	
Case details	Disputed measure(s)	Selected issues and tribunals' findings
Strabag and others v. Poland • Austria–Poland BIT (1988) • Partial Award on Jurisdiction, 4 March 2020 • Decision upholding jurisdiction • Veeder, V. V. (President); Böckstiegel, K.-H.; van den Berg, A. J.	Polish authorities' alleged denial of legal titles to two hotels and related land plots in Warsaw that were held by Syrena Hotels, a formerly state-owned entity that the claimants had acquired during a privatization process; the legal titles were transferred to the successors of previous property owners.	• Whether the tribunal has jurisdiction despite the objection that the claimants' pursuit of ISDS proceedings is abuse of process because they submitted related contractual claims to domestic courts (→YES; raising contract claims based on domestic law before domestic courts does not make it an abuse of process to raise treaty claims under the BIT)

Source: UNCTAD.

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

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

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

ISDS tribunals' findings:

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

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

Case details	Disputed measure(s)	Selected issues and tribunals' findings
Renco v. Peru (II) • Peru–United States FTA (2006) • Decision on Expedited Preliminary Objections, 30 June 2020 • Decision upholding jurisdiction • Simma, B. (President); Grigera Naón, H. A.; Thomas, J. C. (Dissenting Opinion)	Government's alleged imposition of additional environmental obligations related to the La Oroya mining operations in which the claimant's affiliate Doe Rue Peru held interests and the Government's refusal to grant reasonable extensions to complete environmental projects at the site, allegedly forcing the company to cease operations, followed by bankruptcy and liquidation.	• Whether the tribunal has jurisdiction over certain claims linked to acts or facts predating the IIA's entry into force in February 2009 (→YES; on a *prima facie* basis, a treaty breach could have occurred; "the allegedly wrongful conduct postdating the entry into force of the Treaty must 'constitute an actionable breach in its own right'"; "acts or facts that predate the entry into force of the Treaty" can inform the tribunal's evaluation; the tribunal defers the examination of the full factual record to the merits phase)

Source: UNCTAD.

Conclusions

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

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

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

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

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Annex 1. Publicly available ISDS decisions rendered in 2020[11]

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

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

Adamakopoulos and others v. Cyprus

Theodoros Adamakopoulos, Ilektra Adamantidou, Vasileios Adamopoulos and others v. Republic of Cyprus (ICSID Case No. ARB/15/49)
Decision on Jurisdiction, 7 February 2020
McRae, D. M. (President); Escobar, A. A.; Kohen, M. G. (Dissenting Opinion)
Cyprus–Greece BIT (1992); BLEU (Belgium-Luxembourg Economic Union)–Cyprus BIT (1991)

Addiko Bank v. Croatia

Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia (ICSID Case No. ARB/17/37)
Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020
Kalicki, J. E. (President); Tawil, G. S.; Olik, M.
Austria–Croatia BIT (1997)

García Armas v. Venezuela

Luis García Armas v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/16/1)
Decision on Jurisdiction, 24 July 2020
Nunes Pinto, J. E. (President); Gómez-Pinzón, E.; Torres Bernárdez, S.
Spain–Venezuela, Bolivarian Republic of BIT (1995)

Kappes v. Guatemala

Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala (ICSID Case No. ARB/18/43)
Decision on the Respondent's Preliminary Objections, 13 March 2020
Kalicki, J. E. (President); Townsend, J. M.; Douglas, Z. (Partial Dissenting Opinion)
CAFTA–DR (2004)

Lee-Chin v. Dominican Republic

Michael Anthony Lee-Chin v. Dominican Republic (ICSID Case No. UNCT/18/3)
Partial Award on Jurisdiction, 15 July 2020
Fernández Arroyo, D. P. (President); Leathley, C.; Kohen, M. G. (Dissenting Opinion)
CARICOM–Dominican Republic FTA (1998)

Raiffeisen Bank v. Croatia (I)

Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia (I) (ICSID Case No. ARB/17/34)
Decision on the Respondent's Jurisdictional Objections, 30 September 2020
Reed, L. (President); Alexandrov, S. A.; Tomov, L. (dissenting in part)
Austria–Croatia BIT (1997)

Renco v. Peru (II)

The Renco Group, Inc. v. The Republic of Peru (II) (PCA Case No. 2019-46)
Decision on Expedited Preliminary Objections, 30 June 2020
Simma, B. (President); Grigera Naón, H. A.; Thomas, J. C. (Dissenting Opinion)
Peru–United States FTA (2006)

[11] Publicly available as of January 2021.

Strabag and others v. Poland

Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Republic of Poland (ICSID Case No. ADHOC/15/1)
Partial Award on Jurisdiction, 4 March 2020
Veeder, V. V. (President); Böckstiegel, K.-H.; van den Berg, A. J.
Austria–Poland BIT (1988)

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

Eyre and Montrose Developments v. Sri Lanka

Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/16/25)
Award, 5 March 2020
Reed, L. (President); Lew, J. D. M.; Stern, B.
Sri Lanka–United Kingdom BIT (1980)

Itisaluna Iraq and others v. Iraq

Itisaluna Iraq LLC, Munir Sukhtian International Investment LLC, VTEL Holdings Ltd., VTEL Middle East and Africa Limited v. Republic of Iraq (ICSID Case No. ARB/17/10)
Award, 3 April 2020
Bethlehem, D. (President); Peter, W. (Dissenting Opinion); Stern, B.
OIC Investment Agreement (1981)

Lotus v. Turkmenistan

Lotus Holding Anonim Şirketi v. Turkmenistan (ICSID Case No. ARB/17/30)
Award, 6 April 2020
Lowe, V. (President); Boykin, J. H.; Stern, B.
Türkiye–Turkmenistan BIT (1992); Energy Charter Treaty (1994)

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

ESPF and others v. Italy

ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic (ICSID Case No. ARB/16/5)
Award, 14 September 2020
Álvarez, H. C. (President); Pryles, M. C.; Boisson de Chazournes, L. (partial dissenting opinion in certain paragraphs)
Energy Charter Treaty (1994)

Hydro Energy 1 and Hydroxana v. Spain

Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain (ICSID Case No. ARB/15/42)
Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020
Collins, L. (President); Rees, P.; Knieper, R.
Energy Charter Treaty (1994)

STEAG v. Spain

STEAG GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/4)
Decision on Jurisdiction, Liability and Directions on Quantum, 8 October 2020 (Spanish)
Zuleta, E. (President); Tawil, G. S.; Dupuy, P.-M. (Dissenting Opinion)
Energy Charter Treaty (1994)

Strabag v. Libya

Strabag SE v. Libya (ICSID Case No. ARB(AF)/15/1)
Award, 29 June 2020
Crook, J. R. (President); Crivellaro, A.; Ziadé, N. (Partial Dissenting Opinion)
Austria–Libya BIT (2002)

The PV Investors v. Spain
The PV Investors v. Spain (PCA Case No. 2012-14)
Final Award, 28 February 2020
Kaufmann-Kohler, G. (President); Brower, C. N. (Concurring and Dissenting Opinion); Sepúlveda Amor, B.
Energy Charter Treaty (1994)

Watkins Holdings and others v. Spain
Watkins Holdings S.à r.l. and others v. Kingdom of Spain (ICSID Case No. ARB/15/44)
Award, 21 January 2020
Abraham, C. W. M. (President); Pryles, M. C.; Ruiz Fabri, H. (Dissenting Opinion)
Energy Charter Treaty (1994)

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

A.M.F. Aircraftleasing v. Czechia
A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic (PCA Case No. 2017-15)
Final Award, 11 May 2020
Tercier, P. (President); Alexandrov, S. A.; Kalicki, J. E.
Czechia–Germany BIT (1990)

Bridgestone v. Panama
Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama (ICSID Case No. ARB/16/34)
Award, 14 August 2020
Phillips, N. (President); Grigera Naón, H. A.; Thomas, J. C.
Panama–United States FTA (2007)

Consutel v. Algeria
Consutel Group S.p.A. in liquidazione v. People's Democratic Republic of Algeria (PCA No. 2017-33)
Final Award, 3 February 2020 (French)
Mourre, A. (President); Tanzi, A. M.; Mahiou, A.
Algeria–Italy BIT (1991)

EBO Invest and others v. Latvia
EBO Invest AS, Rox Holding AS and Staur Eiendom AS v. Republic of Latvia (ICSID Case No. ARB/16/38)
Award, 28 February 2020
Schwartz, E. (President); Hobér, K.; Landau, T.
Latvia–Norway BIT (1992)

Eskosol v. Italy
Eskosol S.p.A. in liquidazione v. Italian Republic (ICSID Case No. ARB/15/50)
Award, 4 September 2020
Kalicki, J. E. (President); Tawil, G. S.; Stern, B.
Energy Charter Treaty (1994)

Global Telecom Holding v. Canada
Global Telecom Holding S.A.E. v. Canada (ICSID Case No. ARB/16/16)
Award, 27 March 2020
Affaki, G. (President); Born, G. B. (Dissenting Opinion); Lowe, V.
Canada–Egypt BIT (1996)

Gosling and others v. Mauritius
Thomas Gosling, Property Partnerships Development Managers (UK), Property Partnerships Developments (Mauritius) Ltd, Property Partnerships Holdings (Mauritius) Ltd and TG Investments Ltd v. Republic of Mauritius (ICSID Case No. ARB/16/32)
Award, 18 February 2020
Rigo Sureda, A. (President); Alexandrov, S. A. (Dissenting Opinion); Stern, B.
Mauritius–United Kingdom BIT (1986)

Griffin v. Poland
GPF GP S.à.r.l v. Poland (SCC Case No. 2014/168)
Final Award, 29 April 2020
Kaufmann-Kohler, G. (President); Williams, D. A. R.; Sands, P.
BLEU (Belgium-Luxembourg Economic Union)–Poland BIT (1987)

Lidercón v. Peru
Lidercón, S.L. v. Republic of Peru (ICSID Case No. ARB/17/9)
Award, 6 March 2020
Paulsson, J. (President); Gonzalez de Cossio, F.; Perezcano Diaz, H.
Peru–Spain BIT (1994)

Micula v. Romania (II)
Ioan Micula, Viorel Micula and others v. Romania (II) (ICSID Case No. ARB/14/29)
Award, 5 March 2020
McRae, D. M. (President); Beechey, J.; Crook, J. R.
Romania–Sweden BIT (2002)

Nelson v. Mexico
Joshua Dean Nelson v. United Mexican States (ICSID Case No. UNCT/17/1)
Award, 5 June 2020
Zuleta, E. (President); Veeder, V. V.; Gomezperalta Casali, M.
NAFTA (1992)

Ortiz v. Algeria
Ortiz Construcciones y Proyectos S.A. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/17/1)
Award, 29 April 2020 (French)
Lévy, L. (President); Fortier, L. Y.; Hanotiau, B.
Algeria–Spain BIT (1994)

SunReserve v. Italy
SunReserve Luxco Holdings v. Italy (SCC Case No. 2016/32)
Final Award, 25 March 2020
van den Berg, A. J. (President); Sachs, K.; Giardina, A.
Energy Charter Treaty (1994)

Vento v. Mexico
Vento Motorcycles, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/17/3)
Award, 6 July 2020
Rigo Sureda, A. (President); Gantz, D. A.; Perezcano Diaz, H.
NAFTA (1992)

UNCTAD Policy Tools for IIA Reform

Investment Policy Framework for Sustainable Development (2015)
https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf

Reform Package for the International Investment Regime (2018)
https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf

Reforming Investment Dispute Settlement: A Stocktaking (IIA Issues Note, No. 1, March 2019)
https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d3_en.pdf

International Investment Agreements Reform Accelerator (2020)
https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d8_en.pdf

UNCTAD Investment Policy Online Databases

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

IIA Mapping Project
https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping

Investment Dispute Settlement Navigator
https://investmentpolicy.unctad.org/investment-dispute-settlement

Investment Laws Navigator
https://investmentpolicy.unctad.org/investment-laws

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DETAILED MAPPING OF 2020 ISDS DECISIONS

REVIEW OF 2020 INVESTOR–STATE ARBITRATION DECISIONS: IIA REFORM ISSUES AT A GLANCE (IIA ISSUES NOTE, NO. 2, AUGUST 2022)

This document contains a detailed mapping of key issues addressed by investor–State dispute settlement (ISDS) tribunals in 2020. The tables summarize 31 ISDS decisions on jurisdiction and merits that were publicly available as of January 2021. The texts of the arbitral decisions and more detailed information on each case are available at https://investmentpolicy.unctad.org/investment-dispute-settlement.

Arbitral decisions are a useful source of knowledge on IIAs: How do IIA provisions work in practice, and which areas are most in need of reform? Most of the 2020 arbitral decisions concerned cases based on old-generation international investment agreements (IIAs). Together with UNCTAD's IIA policy tools, this analysis can help countries and regions make strategic choices concerning old-generation IIAs with ISDS.

Selected issues and cases of relevance for treaty drafting and IIA reform are highlighted in the IIA Issues Note "Review of 2020 Investor–State Arbitration Decisions: IIA Reform Issues at a Glance" (No. 2, August 2022), available at https://investmentpolicy.unctad.org/publications/series/2/international-investment-agreements.

Abbreviations

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

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

Decisions on jurisdiction

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

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

Table 1.	Decisions upholding jurisdiction (at least in part) (without examining the merits)	
Case details	Case summary	Key issues and tribunals' findings
Adamakopoulos and others v. Cyprus Theodoros Adamakopoulos, Ilektra Adamantidou, Vasileios Adamopoulos and others v. Republic of Cyprus (ICSID Case No. ARB/15/49) Cyprus–Greece BIT (1992) BLEU (Belgium-Luxembourg Economic Union)–Cyprus BIT (1991) Decision on Jurisdiction, 7 February 2020 • McRae, D. M. (President) • Escobar, A. A. • Kohen, M. G. (Dissenting Opinion)	**Disputed measure(s):** Alleged discriminatory treatment as a result of the € 10 billion bailout package for Cyprus by the European Commission, the European Central Bank and the International Monetary Fund. **Investment at issue:** Deposits and bonds in two Cypriot banks, Laiki Bank (also known as Cyprus Popular Bank) and the Bank of Cyprus.	Jurisdictional issues: • Whether the contracting parties' consent to arbitrate under the BITs is unaffected by EU law as interpreted in the CJEU's decision in *Achmea v. Slovakia (I) (2018)* (→YES – BY MAJORITY; EU law does not form part of the applicable law to decide questions of jurisdiction) • Whether the contracting parties' consent to arbitrate is valid despite the respondent's objection that there is a conflict within the meaning of the VCLT between the EU treaties and the BITs that prevents the claimants from having recourse to arbitration (→YES – BY MAJORITY; EU law and the BITs do not deal with "the same subject matter" as required under the conflict rules of the VCLT; EU law does not take priority over the earlier BITs; the BITs have not been terminated as a result of the conclusion of the relevant EU Treaties or rendered inapplicable at a result of the respondent's 2004 EU accession) • Whether the respondent had provided consent to arbitration brought by a group of claimants and the tribunal has jurisdiction over the claimants' mass claim proceedings (→YES – BY MAJORITY; additional consent by the respondent for mass claims is not required as proceedings are not consolidated but joint proceedings; it is relevant that there is "'a dispute' within the meaning of the relevant BITs and not just a myriad of separate disputes"; the procedural rights of both parties can be preserved) • Whether the Cyprus–Greece BIT covers the claimants' indirect investments, held via Cypriot entities or entities in third States, in the absence of explicit wording on the issue (→YES – BY MAJORITY; ownership may be direct or indirect and may be full or partial) • Whether bonds, deposits and life insurance constitute a protected investment (→YES – BY MAJORITY; they are explicitly covered by the BITs, the Salini criteria should be applied holistically and subordinated to the ordinary meaning of the term investment) • Whether the 930 additional claimants under the Cyprus–Greece BIT listed in the amended request for arbitration had complied with a 6-month prior notice requirement although they were not included in the notice of dispute submitted by the 21 initial claimants (→YES – BY MAJORITY; all additional claimants have complied with access requirements; the terms of the Cyprus–Greece BIT "should not be understood rigidly as referring exclusively to a single investor" but "as embracing multiple investors"; it is sufficient for only some claimants to comply with a prior notice requirement (6 months in casu) in joint proceedings by multiple claimants; the "notice requirement is not cast in terms of a narrow or rigid access requirement to investor-state arbitration under the BIT")

Table 1.	Decisions upholding jurisdiction (at least in part) (without examining the merits)	
Case details	Case summary	Key issues and tribunals' findings
		• Whether the tribunal has jurisdiction over the Luxembourg claimant under the Cyprus–BLEU BIT considering the 6-month prior notice requirement, as the Luxembourg claimant was added to the amended request for arbitration less than 6 months after the claimant's individual notice of dispute (→YES – BY MAJORITY; the requirement was met because ICSID registered the amended request for arbitration 6 months after the notice of the Luxembourg claimant) • Whether under the Cyprus–Greece BIT legal entities, incorporated in the home State, Greece, but wholly owned or controlled by natural persons of the host State, Cyprus, would be covered (→YES – BY MAJORITY; the applicable BIT defines investors "on the basis of the laws in accordance with which such legal persons are constituted and the place of their seat"; it does not define the nationality of investors who are legal persons on the basis of their control)
Addiko Bank v. Croatia Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia (ICSID Case No. ARB/17/37) Austria–Croatia BIT (1997) Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020 • Kalicki, J. E. (President) • Tawil, G. S. • Olik, M.	**Disputed measure(s):** The law that prescribed a change in the currency of loans, issued in Croatia, from Swiss Franc to the Euro. **Investment at issue:** Investments in the banking industry in Croatia.	Jurisdictional issues: • Whether the tribunal has jurisdiction despite the objection that an incompatibility exists between the EU acquis (EU treaties, EU legislation, case law, EU declaration, and resolutions and treaties the EU is a party to) and the BIT in question (→YES; Article 11(2) of the treaty is lex specialis and directs the tribunal to determine any incompatibility, this does not include a "same subject matter" test as under VCLT Art. 30; the CJEU's judgment in *Achmea v. Slovakia (I) (2018)* predates the request for arbitration and thus does not constitute part of the acquis; if the incompatibility found in *Achmea* predated the ruling, the CJEU's analysis applied to treaties whose applicable law clause directs arbitral tribunals to apply domestic (and, hence, EU) law; the Austria–Croatia BIT does not contain an express choice-of-law clause and is governed by its own terms and international law; ICSID Convention Article 42(1), mandating the application of domestic law, is inapplicable to the BIT) • Whether the tribunal has jurisdiction under the BIT despite the declarations by EU member States on the consequences of the *Achmea* judgment preventing recourse to ISDS (→YES; it does not form part of the EU acquis in force at the relevant time; it does not constitute an interpretation of the TFEU that goes beyond the *Achmea* decision; it does not constitute a subsequent agreement for the interpretation of the BIT and in any case became effective after the relevant date) • Whether the contracting parties' consent to arbitrate is valid despite the respondent's objection that there is a conflict within the meaning of the VCLT between the EU treaties and the BIT that prevents the claimants from having recourse to arbitration (→YES; the BIT and the EU Treaties do not concern the same subject matter under either Article 30 or 59 of the VCLT) • Whether the contracting parties' consent to arbitrate is valid despite the respondent's objections that the BIT provisions are incompatible with EU anti-discrimination rules (→YES; different procedural rights do not constitute discrimination per se; the BIT does not require more favourable treatment than that granted to other EU investors)

Table 1.	Decisions upholding jurisdiction (at least in part) (without examining the merits)	
Case details	Case summary	Key issues and tribunals' findings
García Armas v. Venezuela Luis García Armas v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/16/1) Spain–Venezuela, Bolivarian Republic of BIT (1995) Decision on Jurisdiction, 24 July 2020 • Nunes Pinto, J. E. (President) • Gómez-Pinzón, E. • Torres Bernárdez, S.	**Disputed measure(s):** Alleged expropriation of the claimant's investments in food products enterprises. **Investment at issue:** Investments in food products enterprises Frigoríficos Ordaz, S.A.; García Armas Inversiones, S.A.; Koma Inversiones, S.A.; and La Fuente Delicatesses, C.A.	Jurisdictional issues: • Whether the claimant had the nationality of Spain as the home State (→YES; there was no evidence that the claimant had renounced its home State nationality (Spain) and had acquired that of the host State (Venezuela); obtaining the status of national investor under host State law, receiving pension payments in Venezuela, and being a permanent resident does not equate to the acquisition of Venezuelan citizenship)
Kappes v. Guatemala Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala (ICSID Case No. ARB/18/43) CAFTA–DR (2004) Decision on the Respondent's Preliminary Objections, 13 March 2020 • Kalicki, J. E. (President) • Townsend, J. M. • Douglas, Z. (Partial Dissenting Opinion)	**Disputed measure(s):** Guatemalan courts' suspension of Exmingua's mining licences for the "El Tambor" project and the company's right to export minerals, related to amparo actions for alleged failure to conduct consultations with local communities. According to the claimants, the Government has also failed to provide Exmingua with access to the "Santa Margarita" mining site, which was blocked by protesters. **Investment at issue:** Ownership of Exploraciones Mineras de Guatemala, S.A. ("Exmingua"), which holds a licence to develop and operate the "El Tambor" gold and silver mining project and an exploration licence for the "Santa Margarita" mining project.	Jurisdictional issues: • Whether shareholders can bring a claim for reflective losses under the IIA (→YES – BY MAJORITY; the claimant itself must have incurred harm that was caused by the challenged State conduct, this can be shown through a multi-step analysis; the explicit avenue for controlling shareholders to bring claims on behalf of an enterprise for direct loss suffered by that enterprise does not exclude reflective loss claims by the same shareholders)

Table 1.	Decisions upholding jurisdiction (at least in part) (without examining the merits)	
Case details	Case summary	Key issues and tribunals' findings
Lee-Chin v. Dominican Republic Michael Anthony Lee-Chin v. Dominican Republic (ICSID Case No. UNCT/18/3) CARICOM–Dominican Republic FTA (1998) Partial Award on Jurisdiction, 15 July 2020 • Fernández Arroyo, D. P. (President) • Leathley, C. • Kohen, M. G. (Dissenting Opinion)	**Disputed measure(s):** Government's termination of a concession for the operation of a waste facility owned by the claimant's subsidiary and the alleged illegal expropriation of the landfill site. **Investment at issue:** Majority shareholding in Lajún Corporation, a locally incorporated company that held a concession to operate the La Duquesa landfill in the municipality of Santo Domingo Norte.	Jurisdictional issues: • Whether Article XIII paragraph 1 of the Investment Chapter of the CARICOM–Dominican Republic FTA contains a clear expression of consent by the contracting parties to international arbitration (→YES – BY MAJORITY; the obligation undertaken by the contracting parties to settle disputes by international arbitration among other dispute resolution options undoubtedly constitutes the State's consent) • Whether the institution of arbitration proceedings by the claimant is the acceptance of the standing consent offered by the State (→YES – BY MAJORITY) • Whether the treaty protects the claimant's indirect investments via two companies in a third State, Panama, and protects the claimant as an indirect investor (→YES – BY MAJORITY; the treaty includes an open definition of covered investments and uses the formula "though not exclusively, includes" which is much more expressive even if the text makes no specific reference to direct or indirect investments)
Raiffeisen Bank v. Croatia (I) Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia (I) (ICSID Case No. ARB/17/34) Austria–Croatia BIT (1997) Decision on the Respondent's Jurisdictional Objections, 30 September 2020 • Reed, L. (President) • Alexandrov, S. A. • Tomov, L. (dissenting in part)	**Disputed measure(s):** The law that prescribed a change in the currency of loans, issued in Croatia, from Swiss Franc to the Euro. **Investment at issue:** Investments in the banking industry in Croatia through Raiffeisenbank Austria d.d., a company organized under the laws of the Republic of Croatia and 100 per cent indirectly owned by Raiffeisen Bank International AG.	Jurisdictional issues: • Whether the contracting parties' consent to arbitrate is valid despite the respondent's objection that an incompatibility exists between the EU acquis (EU treaties, EU legislation, case law, EU declaration and resolutions and treaties the EU is a party to) and the BIT in question (→YES; Article 11(2) of the treaty is lex specialis and directs the tribunal to determine any incompatibility; this does not include a "same subject matter" test as under VCLT Art. 30; BY MAJORITY: the CJEU's judgment in *Achmea v. Slovakia (I) (2018)* postdates the request for arbitration and thus does not constitute part of the relevant acquis; apart from *Achmea*, on the date of the request for arbitration, the ISDS clause in the BIT was not incompatible with the EU acquis) • Whether the contracting parties' consent to arbitrate is valid despite the respondent's objection that the BIT provisions are incompatible with EU anti-discrimination rules (→YES; the BIT does not require more favourable treatment than that granted to other EU investors)

Table 1.	Decisions upholding jurisdiction (at least in part) (without examining the merits)	
Case details	Case summary	Key issues and tribunals' findings
Renco v. Peru (II) The Renco Group, Inc. v. The Republic of Peru (II) (PCA Case No. 2019-46) Peru–United States FTA (2006) Decision on Expedited Preliminary Objections, 30 June 2020 • Simma, B. (President) • Grigera Naón, H. A. • Thomas, J. C. (Dissenting Opinion)	**Disputed measure(s):** Government's alleged imposition of additional environmental obligations related to the La Oroya mining operations in which the claimant's affiliate Doe Rue Peru held interests and the Government's refusal to grant reasonable extensions to complete environmental projects at the site, allegedly forcing the company to cease operations, followed by bankruptcy and liquidation. **Investment at issue:** Investments in the La Oroya Metallurgical Complex through Doe Run Peru S.R. LTDA ("DRP"), an indirectly owned affiliate through Doe Run Cayman.	Jurisdictional issues: • Whether the tribunal has jurisdiction over certain claims linked to acts or facts predating the IIA's entry into force in February 2009 (→YES; on a *prima facie* basis, a treaty breach could have occurred; "the allegedly wrongful conduct postdating the entry into force of the Treaty must 'constitute an actionable breach in its own right'"; "acts or facts that predate the entry into force of the Treaty" can inform the tribunal's evaluation; the tribunal defers the examination of the full factual record to the merits phase) • Whether the tribunal has jurisdiction over the claims considering the IIA's three-year limitation period (→YES – BY MAJORITY; the limitation period was suspended with the start of and during the preceding arbitration proceedings in Renco I which concerned the same alleged breaches; the notice of arbitration in Renco I was submitted within the limitation period; there is a general principle of law that limitation periods are suspended during ongoing legal proceedings; the previous claim was "submitted to arbitration" even in the absence of a waiver as required under the IIA; the aim of a limitation period to provide legal predictability by protecting States against late claims as well as ensuring a resolution of the conflict when evidence is available and fresh does not contradict the suspension of the limitation period even in the absence of an effective waiver)
Strabag and others v. Poland Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Republic of Poland (ICSID Case No. ADHOC/15/1) Austria–Poland BIT (1988) Partial Award on Jurisdiction, 4 March 2020 • Veeder, V. V. (President) • Böckstiegel, K.-H. • van den Berg, A. J.	**Disputed measure(s):** Polish authorities' alleged denial of legal titles to two hotels and related land plots in Warsaw that were held by Syrena Hotels, a formerly state-owned entity that the claimants had acquired during a privatization process; the legal titles were transferred to the successors of previous property owners. According to the claimants, government authorities had concealed contentious ownership issues prior to their acquisition of Syrena Hotels. **Investment at issue:** Indirect shareholding in Hotele Warszawakie "Syrena" Sp. z.o.o. (Syrena Hotels), a local company operating two hotels in Warsaw (Hotel Polonia and Hotel Metropol).	Jurisdictional issues: • Whether the tribunal has jurisdiction despite the objection that the claimants' pursuit of ISDS proceedings is abuse of process because they submitted related contractual claims to domestic courts (→YES; raising contract claims based on domestic law before domestic courts does not make it an abuse of process to raise treaty claims under the BIT; no treaty claims were raised before domestic courts; threshold for finding an abusive initiation of an investment claim is high) • Whether the tribunal has jurisdiction under the invoked BIT despite the claimants' access to a second BIT under which claims could potentially be brought by virtue of the claimants' corporate structure (→YES; the claimants retained standing; investment may be legitimately restructured as long as this is not done "to gain access to treaty protection when the dispute has already arisen or is foreseeable") • Whether ownership includes direct and indirect ownership of an investment in the absence of express treaty language (→YES; given the term's context and the treaty's object and purpose a wide reading is warranted) • Whether the BIT protects the claimants' investments indirectly owned through their subsidiary in a third State, Cyprus (→YES)

Table 1.	Decisions upholding jurisdiction (at least in part) (without examining the merits)	
Case details	Case summary	Key issues and tribunals' findings
		• Whether the contracting parties' arbitration agreement under the BIT in the present case is unaffected by EU law as interpreted in the CJEU's decision in *Achmea v. Slovakia* (I) (2018) (→YES; EU law does not form part of the applicable law to decide questions of jurisdiction; it does not constitute "a part of international public order or international principles […] of fundamental requirements of justice in international trade" as required by the law of the place of arbitration) • Whether the contracting parties' ISDS consent is valid despite the respondent's objection that there is a conflict within the meaning of the VCLT between the EU treaties and the BIT that prevents the claimants from having recourse to arbitration (→YES; EU law and the BIT do not deal with "the same subject matter" as required by the conflict rules of the VCLT; the CJEU's *Achmea v. Slovakia* (I) (2018) judgment exclusively interprets rules of EU law) • Whether, based on Article 7(1) of the BIT (the "other obligations" or non-derogation clause), the tribunal has jurisdiction to decide on the claimants' assertions that the respondent breached Article 6 "Right to a fair trial" of the European Convention on Human Rights as well as other human rights obligations (→NO; the claimants failed to meet the *prima facie* test; it appeared that the claimants were no longer pursuing this claim; however, the tribunal can decide questions of human rights violations and human rights violations may be relevant to an investment dispute) • Whether the respondent breached the umbrella clause Article 7(2) by failing to comply with certain provisions of the Share Purchase Agreement (→Pending; issue joined to the merits)

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

Table 2.	Decisions rejecting jurisdiction (in toto), including rulings on preliminary objections	
Case details	Case summary	Key issues and tribunals' findings
Eyre and Montrose Developments v. Sri Lanka Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/16/25) Sri Lanka–United Kingdom BIT (1980)	**Disputed measure(s):** The allegedly insufficient compensation paid by the Government to the claimants for the expropriation of a land plot to be used for a hotel development project. **Investment at issue:** Ownership of land plot on the banks of Lake Diyawanna for a hotel development project.	Jurisdictional issues: • Whether the BIT covers investments held indirectly by one claimant via a company in a third State (→YES; the broad definition of investment with "every kind of asset" confirms that indirect investments are covered; the claimants have met the indirect foreign control test) • Whether the claimants' alleged investment satisfies the Salini test criteria ((i) contribution to the host State; (ii) a certain duration; (iii) participation in the risk of the operation) (→NO; lack of contribution and no operational risk)

Table 2.	Decisions rejecting jurisdiction (in toto), including rulings on preliminary objections	
Case details	Case summary	Key issues and tribunals' findings
Award, 5 March 2020 • Reed, L. (President) • Lew, J. D. M. • Stern, B.		
Itisaluna Iraq and others v. Iraq Itisaluna Iraq LLC, Munir Sukhtian International Investment LLC, VTEL Holdings Ltd., VTEL Middle East and Africa Limited v. Republic of Iraq (ICSID Case No. ARB/17/10) OIC Investment Agreement (1981) Award, 3 April 2020 • Bethlehem, D. (President) • Peter, W. (Dissenting Opinion) • Stern, B.	**Disputed measure(s):** Government's alleged impairment of the claimants' rights under a telecommunications licence and subsequent non-renewal of the licence. **Investment at issue:** Licence for telecommunications services.	Jurisdictional issues: • Whether Article 17 of the OIC Investment Agreement can be said to constitute consent to investor-State arbitration (→YES) • Whether the claimants can incorporate into the OIC Agreement, by operation of its MFN clause, the ICSID arbitration clause in the Iraq–Japan BIT (→NO – BY MAJORITY; due to manifest public policy considerations going to issues of systemic overreach) • Whether the claimants complied with the mandatory conciliation requirement (→NO – BY MAJORITY; conciliation is a condition precedent to resort to arbitration; there was no suggestion of any meaningful endeavour to resort to conciliation, and no suggestion of any agreement to resort to conciliation)
Lotus v. Turkmenistan Lotus Holding Anonim Şirketi v. Turkmenistan (ICSID Case No. ARB/17/30) Türkiye–Turkmenistan BIT (1992)	**Disputed measure(s):** Government's alleged failure to make a retention payment for the construction of two 254-megawatt electric power plants, and of unlawfully terminating the agreement relating to the refinery. **Investment at issue:** Investments in two electric power plants and a refinery.	Jurisdictional issues: • Whether the claimant, as a shareholder, can make claims on behalf of its subsidiary for harm suffered directly by the subsidiary (→NO; parties to arbitral proceedings can only make claims in respect of their own rights and the rights and claims to money in this case do not belong to the claimant)

Table 2.	Decisions rejecting jurisdiction (in toto), including rulings on preliminary objections	
Case details	Case summary	Key issues and tribunals' findings
Energy Charter Treaty (1994) Award, 6 April 2020 • Lowe, V. (President) • Boykin, J. H. • Stern, B.		

Decisions on the merits

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

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

Table 3.	Decisions finding State's liability for IIA breaches (at least in part)	
Case details	Case summary	Key issues and tribunals' findings
ESPF and others v. Italy ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic (ICSID Case No. ARB/16/5) Energy Charter Treaty (1994) Award, 14 September 2020 • Álvarez, H. C. (President) • Pryles, M. C.	**Disputed measure(s):** A series of governmental decrees to cut tariff incentives for some solar power projects. **Investment at issue:** Investments in renewable energy generation enterprise.	Jurisdictional issues: • Whether the ECT is applicable to intra-EU disputes (→YES; Article 16 on the applicability of the more investor-friendly framework does not mean that the EU treaties apply to the exclusion of the ECT, even if they were more favourable; the ECT does not contain a disconnection clause; the Lisbon treaty is not an *inter se* modification of the ECT; the ECT is not incompatible with EU law; the *Achmea* declaration adopted by some EU members does not limit the tribunal's jurisdiction; the *Achmea* decision itself was not concerned with ECT disputes where EU law does not apply) • Whether the tribunal has jurisdiction over some of the claims concerning tax measures (→NO; the ECT carves out tax measures; the Robin Hood Tax is a genuine tax measure and the claimants do not contest this; the reclassification of PV plants for tax purposes is a genuine tax measure; other measures (administrative charges and imbalance fees) are not tax measures as they were not imposed to raise general revenue, the tax authorities are not involved in enacting, imposing or collecting them, they are not subject to double tax treaties and they are subject to income tax)

Table 3.	Decisions finding State's liability for IIA breaches (at least in part)	
Case details	Case summary	Key issues and tribunals' findings
• Boisson de Chazournes, L. (partial dissenting opinion in certain paragraphs)		Merits issues: • Whether the respondent made a specific commitment through its acts and regulations such as to create a legitimate expectation that the FiT would remain constant for the lifetime of the investment (→YES – BY MAJORITY; the government decrees "satisf[y] the requisite degree of specificity needed in order for legitimate expectations to arise from legislation"; the legal "regime was not just a general framework, it provided specific incentives to investors who met specific requirements") • Whether a system of general legislation, given effect through regulations, letters and agreements is covered by the ECT's umbrella clause (→YES – BY MAJORITY; the ECT covers commitments entered into "via legislation or decree, or unilaterally through statements made in offering memoranda"; a certain degree of specificity must exist with respect to the obligations; the general decrees were converted into a protected obligation through the letters and agreements entered into with the respective plants) • Whether the respondent breached the umbrella clause (→YES – BY MAJORITY) Awarded: €16 million ($19 million)
Hydro Energy 1 and Hydroxana v. Spain Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain (ICSID Case No. ARB/15/42) Energy Charter Treaty (1994) Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020 Award, 5 August 2020 (not public) • Collins, L. (President) • Rees, P. • Knieper, R.	**Disputed measure(s):** A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers. **Investment at issue:** Investments in two portfolios of small-hydro power plants.	Jurisdictional issues: • Whether the tribunal has jurisdiction over the two claimants despite their alleged dual Luxembourg-European and Swedish-European nationality respectively (→YES; the claimants do not hold dual nationality; the EU Treaties establish a separate category of European citizenship, they do not create dual nationality) • Whether the tribunal has jurisdiction over disputes under the ECT despite the *Achmea* ruling (→YES; there is a possibility "and perhaps the probability" that the CJEU would apply the *Achmea* ruling to the ECT, however, it is a decision on the EU constitutional order and not "an orthodox application of the rules of treaty interpretation"; under VCLT rules, the tribunal does not find the ECT's dispute resolution provision to be incompatible with the EU treaties; "the declaration of the majority of the Member States of January 2019 is a political declaration … [it] does not affect the jurisdiction of the tribunal and does not constitute a subsequent agreement on the interpretation of the ECT") • Whether the tribunal has jurisdiction in respect of Act 15/2012 that introduced a tax on production of electricity other than for the purposes of the expropriation claim (→NO; tax measures are carved out from the scope of the ECT; the measure is regarded as a tax measure under Spanish law and is a *prima facie* tax measure under international law; it was not imposed in bad faith) Merits issues: • Whether the respondent's measures constitute an indirect expropriation (→NO; a substantial deprivation of all economic value is required; a loss of some anticipated returns or a mere loss in value is generally not an indirect expropriation)

Table 3.	Decisions finding State's liability for IIA breaches (at least in part)	
Case details	Case summary	Key issues and tribunals' findings
		• Whether the respondent's regulatory framework gave rise to the claimants' legitimate expectations of receiving the same tariff for the installations' operational life (→NO; the tribunal assumes that the claimants must have been aware that there was a regulatory risk; the guarantee of a reasonable return was hierarchically superior in Spanish law than the exact tariff fixed by royal decree) • Whether specific commitments existed justifying claimants' legitimate expectations of receiving the same tariff for the installations' operational life (→NO; a rational investor would have been aware that the role of the IDAE, a public agency, was technical and advisory and it had "no authority to regulate the Special Regime", its representative did not have the authority to make commitments or give assurances; press releases or general presentations did not constitute specific assurances) • Whether the regulatory regime gave rise to the claimants' legitimate expectation of receiving a "reasonable rate of return" (→YES; the obligation of stability contained in ECT Article 10(1) prohibits "radical changes"; "there has to be a weighing of an investor's expectations and the State's regulatory interests"; a reasonable return had been a feature of the regime since its inception; the legitimate expectation was frustrated and FET was breached if the remuneration of the facilities under new regulatory regime did not accord a reasonable rate of return) (case proceeded to the damages phase)
STEAG v. Spain STEAG GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/4) Energy Charter Treaty (1994) Decision on Jurisdiction, Liability and Directions on Quantum, 8 October 2020 (Spanish) • Zuleta, E. (President) • Tawil, G. S. • Dupuy, P.-M. (Dissenting Opinion)	**Disputed measure(s):** A series of energy reforms undertaken by the Government affecting the renewables sector. **Investment at issue:** Shareholding in the Spanish thermosolar power plant Arenales.	Jurisdictional issues: • Whether the tribunal has jurisdiction despite the CJEU's decision in *Achmea v. Slovakia (I)* (2018) (→YES) • Whether the ECT is applicable to intra-EU disputes (→YES; the investment was made in the area of another contracting party even where the host and home State are EU members; there is no disconnection clause, explicit or implicit, that prevents the full application of the ECT in the relationship between EU members) • Whether the contracting parties' consent to arbitrate is valid despite the respondent's objection that a conflict exists within the meaning of the VCLT between the EU treaties and the ECT that prevents the claimants from having recourse to arbitration (→YES; EU law and the ECT do not deal with "the same subject matter" as required by the conflict rules of the VCLT; Article 16 of the ECT provides for a conflict rule, which replaces recourse to Article 30 of the VCLT; in any case, there is no incompatibility) • Whether the tribunal has jurisdiction over the alleged FET breach arising from Act 15/2012 that introduced a tax on the production of electricity (→NO; tax measures are carved out from the scope of the FET clause; the measure is regarded as a tax measure under Spanish law and is a *prima facie* tax measure under international law; it was not imposed in bad faith) • Whether the claim is admissible that the tax introduced by Act 15/2012 violates the ECT's expropriation provision (→NO; the ECT requires submission of the question whether the tax is an expropriation to the relevant competent tax authority; a letter to the prime minister is insufficient as the specific issue was not raised and the prime minister is not the competent tax authority)

Table 3.	Decisions finding State's liability for IIA breaches (at least in part)	
Case details	Case summary	Key issues and tribunals' findings
		• Whether the investment already existed at the time the dispute arose (→YES; the contested measures were adopted after the investment was made; later capital injections that form part of the project finance do not constitute new investments) Merits issues: • Whether the claimant had a legitimate expectation that the feed-in-tariffs, the premium option and the upper and lower limits for changes to this option would remain stable for the facility's operational life (→YES – BY MAJORITY; the general regulatory framework in conjunction with the facility's registration gave rise to legitimate expectations; the investor carried out due diligence) • Whether the respondent frustrated the claimant's legitimate expectation and breached FET (→YES – BY MAJORITY) (case proceeded to the damages phase)
Strabag v. Libya Strabag SE v. Libya (ICSID Case No. ARB(AF)/15/1) Austria–Libya BIT (2002) Award, 29 June 2020 • Crook, J. R. (President) • Crivellaro, A. • Ziadé, N. (Partial Dissenting Opinion)	**Disputed measure(s):** Alleged non-payment for services under contracts entered into prior to the revolution in Libya, and damages to property during and after the 2011 civil war. **Investment at issue:** Contracts for road projects (in the vicinity of Benghazi and Misurata) and other infrastructure projects assigned to Al Hani General Construction Co., a joint venture between Strabag International and the Libyan Investment and Development Company.	Jurisdictional issues: • Whether the claimant's alleged investment satisfies the Salini criteria (→YES; but the tribunal does not need to decide this, since Article 25 of the ICSID Convention is not applicable to Additional Facility arbitrations) • Whether the claimant can bring a claim for reflective losses suffered by the local joint venture (→YES; investment is defined as any asset "owned or controlled, directly or indirectly"; the claimant has a 60 per cent stake and controls the operations of the local joint venture; the other joint venture partner failed to make contributions and played no significant role in its operations; the claimant was at the heart of the joint ventures day-to-day operations; "there was no separation between [the investor] and [the joint venture], but rather economic identity") • Whether the BIT's umbrella clause covers claims for breaches of the contracts at issue (→YES; the umbrella clause's language does not impose limitations for "ordinary commercial contract claims" and does not impose a requirement of "some exercise of sovereign authority"; the Libyan State is not a formal party to the contracts, however, under the ILC Articles on State responsibility, the State can act through "parastatal entities"; the entities that entered into the contracts carry out State functions, acted at the direction of Libyan State organs and are not independent from the State) • Whether the tribunal has jurisdiction over the claims despite the local litigation requirement in the contracts (→YES; the conditions in Libya make it impossible to pursue the contract claims in local courts "in tranquillity and safety"; due to poor security conditions, the courts are not regularly operating since 2011; "Claimant is entitled to a forum in which to pursue its claims")

Table 3.	Decisions finding State's liability for IIA breaches (at least in part)	
Case details	Case summary	Key issues and tribunals' findings
		Merits issues: • Whether the respondent breached the umbrella clause (→YES; this results in an entitlement to recover amounts claimed related to the contractual disputes) • Whether the respondent breached the FPS provision (→NO; FPS is not absolute and requires a duty of due diligence which "cannot be viewed in the abstract and in isolation from the conditions prevailing in Libya"; the obligation "exists in a setting of weak and uncertain State authority, recurring armed conflict, and widespread breakdown of the law in wide areas of the country"; the "Claimant's evidence is not sufficient to establish a failure of due diligence by Respondent") • Whether the respondent breached the war loss clause (→YES; a significant amount of the equipment owned by the local joint venture was requisitioned by regular armed forces; other destruction of property was due to three causes: rebel groups and NATO air bombardment, civilians and employees, as well as military personnel; as a consequence, 1/3 of the losses are attributable to the respondent) Awarded: €74.9 million ($84 million)
The PV Investors v. Spain The PV Investors v. Spain (PCA Case No. 2012-14) Energy Charter Treaty (1994) Final Award, 28 February 2020 • Kaufmann-Kohler, G. (President) • Brower, C. N. (Concurring and Dissenting Opinion) • Sepúlveda Amor, B.	**Disputed measure(s):** A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers. **Investment at issue:** Interests in photovoltaic energy installations in Spain.	Merits issues: • Whether "stability is a stand-alone or absolute requirement under the ECT" (→NO; stability "is intertwined with and closely linked to FET"; the treaty requires stable conditions as part of FET within well-defined limits provided by the treaty's object and purpose; the ECT aims to balance the creation of a favourable investment and the State's right to regulate) • Whether the respondent's regulatory framework gave rise to the claimants' legitimate expectations of receiving the same tariff for the installations' operational life (→NO – BY MAJORITY; general legislative frameworks do not create the same legitimate expectations as specific assurances; a change to the legislative framework must be unreasonable; States enjoy a margin of appreciation in balancing competing interests; the Spanish legal framework was subject to continuous change since its inception and Spanish courts had consistently held that tariffs and related incentives were not 'immutable'"; none of the respondent's representations and assurances were specific enough to lead an investor to believe that the regulatory regime would never change) • Whether the respondent's measures were unreasonable, arbitrary, disproportionate and lacked transparency under FET (→NO; it is insufficient that investors are in a worse position as a result of the changes; there was an appropriate correlation between the objectives pursued and the measures) • Whether the claimants were entitled to a "reasonable rate of return" (→YES – BY MAJORITY; the Spanish regulatory framework provided that investors would be entitled to reasonable profitability of their investments; if regulatory changes "deprive investors of a reasonable return, the State violates Article 10(1) of the ECT")

Table 3.	Decisions finding State's liability for IIA breaches (at least in part)	
Case details	Case summary	Key issues and tribunals' findings
		• Whether the respondent frustrated the claimants' legitimate expectations of a "reasonable return" (→YES; a breach is determined based on the economic impact of the challenged measures on the claimants' investment; "by reducing the reasonable rate of return below 7%, Spain acted unreasonably and disproportionately and hence violated FET") • Whether the respondent breached the FPS standard by destroying the legal framework of the investments (→NO) Awarded: €91.1 million ($100 million)
Watkins and others v. Spain Watkins Holdings S.à r.l. and others v. Kingdom of Spain (ICSID Case No. ARB/15/44) Energy Charter Treaty (1994) Award, 21 January 2020 • Abraham, C. W. M. (President) • Pryles, M. C. • Ruiz Fabri, H. (Dissenting Opinion)	**Disputed measure(s):** A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers. **Investment at issue:** Investments in renewable energy generation enterprises (wind farms).	Jurisdictional issues: • Whether the ECT is applicable to intra-EU disputes (→YES; the investment was made in the area of another contracting party even where the host and home State are EU members; the question of the superiority of EU law is irrelevant with respect to the tribunal's jurisdiction; there is no implicit disconnection clause that prevents the full application of the ECT in the relationship between EU members; the CJEU's *Achmea* decision does not deal with the ECT) • Whether the tribunal has jurisdiction in respect of Act 15/2012 that introduced a tax on production of electricity (→NO; tax measures are carved out from the scope of the ECT; the measure was not imposed in bad faith and is not a disguised tariff cut) Merits issues: • Whether the respondent violated the FET standard by failing to protect the claimants' legitimate expectations (→YES – BY MAJORITY; the claimants had a legitimate expectation that the regime is stable as assured in official government statements and presentations; the respondent frustrated this legitimate expectation by substantially altering the applicable legal framework; the measures were retroactive and the investors conducted appropriate due diligence prior to investing) • Whether the respondent's measures lacked transparency, were unreasonable or disproportionate under FET (→YES – BY MAJORITY) Awarded: €77 million ($84.7 million)

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

Table 4.	Decisions dismissing the investors' claims (in toto)	
Case details	Case summary	Key issues and tribunals' findings
A.M.F. Aircraftleasing v. Czechia A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic (PCA Case No. 2017-15) Czechia–Germany BIT (1990) Final Award, 11 May 2020 • Tercier, P. (President) • Alexandrov, S. A. • Kalicki, J. E.	**Disputed measure(s):** Acts of Czech bankruptcy administrators and courts concerning two aircrafts that are allegedly owned by the claimant and were wrongly included in the bankruptcy proceedings of Czech company Air Charter Ltd, which had leased the planes. The aircrafts were subsequently sold as part of the bankruptcy proceedings. **Investment at issue:** Ownership of two aircrafts and related leasing activities.	Jurisdictional issues: • Whether the tribunal has jurisdiction despite the CJEU'S decision in *Achmea v. Slovakia (I)* (2018) (→YES; the Czechia–Germany BIT does not contain an applicable law clause comparable to the one in the BIT at issue in *Achmea* and a tribunal situated on the international plane is not bound by the position adopted by the CJEU) • Whether the tribunal has jurisdiction despite the contracting parties' signature of the January 2019 Declarations (→YES; the BIT constitutes an unambiguous offer to arbitrate and the Declarations cannot change this conclusion) • Whether the claimant has a protected investment under the BIT (→YES; the Lease Agreements are an "investment" entailing a contribution that extends over a certain period of time and involves some risk, which is more than a simple commercial risk) Merits issues: • Whether the respondent's acts and omissions amounted to expropriation (→NO; bankruptcy trustees and Czech courts acted in accordance with Czech law and therefore lawfully) • Whether the respondent's actions breached FPS (→NO; the FPS standard extends beyond physical protection to include the provision of legal security maintaining a functioning judicial system; there was no breach of FPS as the claimant had full access to the judicial system) • Whether the respondent breached FET through arbitrary, abusive or discriminatory conduct (→NO; the claimant failed to demonstrate a breach of the standard; the claimant had full access to the legal system and the tribunal found no proof that the claimant or its investment were treated in a discriminatory, arbitrary or abusive manner) • Whether the respondent's actions amounted to denial of justice (→NO)
Bridgestone v. Panama Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama (ICSID Case No. ARB/16/34) Panama–United States FTA (2007)	**Disputed measure(s):** A decision of the Supreme Court of Panama which held that Bridgestone's motion to oppose the registration of the Riverstone trademark by tyre-maker Muresa had been in bad faith, and awarded USD 5.4 million in damages to Muresa. According to the claimants, their challenge to the trademark application was a good-faith effort due to the trademark's similarity to two of Bridgestone's own registered trademarks.	Jurisdictional issues: • Whether the claimant can assert a breach of FET through denial of justice even if it was not part of the proceedings in which the alleged denial of justice occurred (→YES) Merits issues: • Whether the decision taken by the Supreme Court of Panama constituted denial of justice (→NO; defects in the decision "are no more than errors of judgment"; "[t]hey fall far short of demonstrating that the judgment was the product of incompetence or corruption")

Table 4.	Decisions dismissing the investors' claims (in toto)	
Case details	Case summary	Key issues and tribunals' findings
Award, 14 August 2020 • Phillips, N. (President) • Grigera Naón, H. A. • Thomas, J. C.	**Investment at issue:** Investments in a tyre and rubber products enterprise and related registered trademarks.	
Consutel v. Algeria Consutel Group S.p.A. in liquidazione v. People's Democratic Republic of Algeria (PCA No. 2017-33) Algeria–Italy BIT (1991) Final Award, 3 February 2020 (French) • Mourre, A. (President) • Tanzi, A. M. • Mahiou, A.	**Disputed measure(s):** Alleged actions and omissions of state-owned Algérie Télécom related to a partnership agreement concluded with the claimant's local subsidiary, Spec-Com, for a fiber-optic telecommunications project. **Investment at issue:** Majority shareholding of 98,4% in Spec-Com Algérie ("Spec-Com"), a local telecommunications company.	Jurisdictional issues: • Whether the tribunal has jurisdiction over claims that were contractual in nature (→NO; none of the alleged violations go beyond the contractual sphere to involve the exercise of sovereign powers) • Whether Article 10(1) is an umbrella clause (→NO; the clause does not allow to raise the contractual violations to the level of treaty violations) • Whether it is possible to invoke the umbrella clause in the Algeria–Switzerland BIT by virtue of the MFN clause (→YES; however, certain limitations apply in the specific case) • Whether the tribunal has jurisdiction over the contractual claims under the imported umbrella clause (→NO) • Whether the tribunal has jurisdiction over the non-contractual claims (→YES) Merits issues: • Whether the respondent's measures constituted indirect expropriation (→NO; the measure had a limited and temporary effect and the claimant was not deprived in whole or in part of the enjoyment of its investment) • Whether the challenged measures frustrated the claimant's legitimate expectations and thereby breached the FET standard (→NO; the respondent had not made specific commitment to the claimant)
EBO Invest and others v. Latvia EBO Invest AS, Rox Holding AS and Staur Eiendom AS v. Republic of Latvia (ICSID Case No. ARB/16/38) Latvia–Norway BIT (1992) Award, 28 February 2020 • Schwartz, E. (President)	**Disputed measure(s):** The actions of the Riga airport administration, a State-owned entity, relating to the claimants' project to develop the Riga Airport Business Park. The investors undertook to construct a hotel connected to the airport under a lease agreement signed in 2006 and were granted exclusive rights to operate short-term parking at the airport. The projects have failed allegedly due to the airport administration's frequent changes to its plans, reducing the scale of the airport expansion, routing railway tracks through the planned location of the hotel, and cancelling the investors' rights to operate the parking.	Jurisdictional issues: • Whether the tribunal has jurisdiction despite the allegation that the claimants' claims are contract claims (→YES; unless it is manifest that the claims being advanced by the claimants could only be contract claims and could not conceivably be characterized as treaty claims, it is not appropriate for the tribunal to decline jurisdiction on the basis that they are not treaty claims) Merits issues: • Whether the respondent has failed to provide the claimants with a transparent, consistent and stable business framework thereby breaching the FET standard (→NO; the identified acts do not satisfy any of the three criteria to be considered, namely, (i) whether the acts can be said to have been contrary to the claimants' legitimate expectations, (ii) if so, whether they can properly be said to be attributable to the State; and (iii) if so, whether they adversely affected the investments)

Table 4.	Decisions dismissing the investors' claims (in toto)	
Case details	Case summary	Key issues and tribunals' findings
• Hobér, K. • Landau, T.	**Investment at issue:** Shared ownership of SIA Rixport (72% belong to EBO Invest AS, 18% to Staur Eiendom and 10% to Rox Holding), a local company established for the development of the Riga Airport Business Park.	• Whether the respondent violated the claimants' legitimate expectations thereby breaching the FET standard (→NO; in the absence of any specific undertaking, the claimants could not have expected any better treatment than the one provided by the contracts themselves) • Whether the respondent failed to provide the claimants with a transparent, consistent and stable business framework in breach of FET (→NO) • Whether the claimants have a legitimate claim for denial of justice (→NO; the very high threshold that is required for denial of justice was not met) • Whether the respondent's acts amounted to indirect expropriation (→NO; the claimants have failed to establish that their contractual rights were adversely affected and that such changes led to an 'absolute loss' of the claimants' investments) • Whether the respondent breached the umbrella clause (→NO; the tribunal had already decided that the contract was not attributable to the State)
Eskosol v. Italy Eskosol S.p.A. in liquidazione v. Italian Republic (ICSID Case No. ARB/15/50) Energy Charter Treaty (1994) Award, 4 September 2020 • Kalicki, J. E. (President) • Tawil, G. S. • Stern, B.	**Disputed measure(s):** A series of governmental decrees to cut tariff incentives for some solar power projects. According to the claimant, two State measures adopted in March and May 2011 (the Romani Decree and the Fourth Energy Account) rendered its photovoltaic project unviable and led to the company's bankruptcy. **Investment at issue:** Investments in a 120 megawatt photovoltaic energy project in Italy.	Jurisdictional issues: • Whether the claimant being the company incorporated in the host State, Italy, met the foreign control requirement for jurisdiction under the ECT and ICSID (→YES; the company was under the control of a Belgian company at the time of the challenged measures, prior to the claimant's bankruptcy) • Whether the locally incorporated company Eskosol may bring ECT claims although a majority shareholder has already pursued ISDS proceedings under the ECT in Blusun v. Italy (→YES; the local company and the majority shareholder are not the same party; the local company is not fully owned by the majority shareholder; this is an "awkward outcome in an anomalous case" as the interests of the local company and the majority shareholder are not aligned; "some indirect benefit to a prior litigant who lost a prior case, is not a reason in principle to strip a current litigant of a right to arbitration that the ECT expressly grants") Merits issues: • Whether the Romani Decree and Conto Energia IV were arbitrary or unreasonable (→NO; analysis by majority Kalicki/Stern: the policy pursued a multi-faceted legitimate policy objective, the measures were related to this objective; inaccurate good faith predictions in a highly dynamic environment are not evidence of arbitrary conduct) • Whether the Romani Decree and Conto Energia IV were disproportionate or non-transparent (→NO; analysis by majority Kalicki/Stern: the regime was left intact for investors that had already qualified and left enough time for those who were reasonably far along; incentives were not disproportionately reduced; there was no secrecy but rather ample public debate about the changes to the regulatory framework; after announcing the general principles of the regulatory framework, the details followed two months later; this short period of uncertainty is insufficient to amount to a violation)

Table 4.	Decisions dismissing the investors' claims (in toto)	
Case details	Case summary	Key issues and tribunals' findings
		• Whether ending the incentive regime early and replacing it violated the claimant's legitimate expectations regarding stability and consistency of the legal regime (→NO; analysis by majority Kalicki/Stern: the claimant never received specific assurances by the Italian State; public announcements by the State related to the content of the regulatory regime and not its immutability with respect to all potential PV investors; expectations for specific returns do not arise from the general regulatory framework as the claimant has never qualified for the regime) • Whether the respondent's change of the regulatory regime violated the ECT's umbrella clause (→NO; the claimant never qualified for the incentives and the State, thus, did not "enter into" any obligations) • Whether the respondent's changes to the regulatory regime violated the ECT's FPS clause (→NO; the standard does not entail an element of legal stability and even if it were, it would be a standard of due diligence, not one of strict liability)
Global Telecom Holding v. Canada Global Telecom Holding S.A.E. v. Canada (ICSID Case No. ARB/16/16) Canada–Egypt BIT (1996) Award, 27 March 2020 • Affaki, G. (President) • Born, G. B. (Dissenting Opinion) • Lowe, V.	**Disputed measure(s):** Government's alleged failure to create a fair, competitive and favourable regulatory environment for new investors in the telecommunications sector. **Investment at issue:** Interests in a Canadian telecommunications enterprise, Globalive Wireless Management Corporation ("Wind Mobile"), from 2008 to 2014.	Jurisdictional issues: • Whether the claimant qualifies for protection under the BIT, meeting its establishment and permanent residence requirements for the purposes of the "home State" (→YES; the two criteria are cumulative; the corporate register proves that the claimant is established as an Egyptian entity; a registered office suffices to show permanent residence; no support in the BIT that "permanent residence" is a separate and additional requirement for strong and enduring ties to the home State) • Whether the tribunal has jurisdiction over Canada's national security review decision (→YES – BY MAJORITY; the exception refers to the acquisition of a new business, Canada's review relates to the conversion of non-voting shares to voting shares; acquisition of a business differs from acquisition of control over a business) • Whether the tribunal has jurisdiction over the claimant's NT claim despite the NT exceptions for sectors listed in the Annex to the BIT (→ NO – BY MAJORITY; the Annex for NT exceptions covers "services in any other sector" and this language includes telecommunications services; the BIT does not impose any procedural requirements to trigger the application of this exception) • Whether the tribunal has jurisdiction over the claims considering the BIT's three-year limitation period (→YES; the investor claimed that a cumulative breach took place within the limitation period; the alleged actions or omissions that occurred before the three-year period form part of a claim for a cumulative or composite breach within the limitation period, and are a question for the merits; for the claim to be barred, the alleged BIT violation as well as the damage resulting from the alleged violation – two-pronged test – have to become known to the investor more than three years prior to submitting the claim; this depends on the date of the last of the actions or omissions necessary to constitute the wrongful act)

Table 4.	Decisions dismissing the investors' claims (in toto)	
Case details	Case summary	Key issues and tribunals' findings
		Merits issues: • Whether the BIT's FET clause – "fair and equitable treatment in accordance with the principles of international law" – goes beyond the minimum standard of treatment (MST) under customary international law (→YES; it covers a wider range of international law principles, not limited to MST) • Whether the respondent's adoption and implementation of the Transfer Framework violated the claimant's legitimate expectations (→NO) • Whether the respondent's adoption and implementation of the Transfer Framework were unreasonable, arbitrary and lacked transparency, were politically motivated or without any legitimate policy objective, thereby violating the FET standard (→NO; no illegitimacy or irrationality was found in the respondent's conduct; the conduct satisfied any transparency requirement that might arise under the FET obligation) • Whether the respondent violated the FET standard through an arbitrary national security review process that lacked transparency and due process (→NO; the claimant knew that foreign investment in telecommunications was restricted and subject to confidential review; the security review process pursued a legitimate objective and was not arbitrary or unreasonable) • Whether the respondent's cumulative actions threatened the commercial and legal security of the claimant's investment, in breach of FPS (→NO; the respondent's conduct was consistent with the statutes and regulations; FPS includes legal security; the qualified "full" indicates that protection and security goes beyond mere physical security; the standard is not one of strict liability but requires a duty of due diligence on part of the State)
Gosling and others v. Mauritius Thomas Gosling, Property Partnerships Development Managers (UK), Property Partnerships Developments (Mauritius) Ltd, Property Partnerships Holdings (Mauritius) Ltd and TG Investments Ltd v. Republic of Mauritius (ICSID Case No. ARB/16/32) Mauritius–United Kingdom BIT (1986)	**Disputed measure(s):** Government's changes to its planning guidance policy and the designation of Le Morne area in southwest Mauritius as a UNESCO World Heritage Site in 2008, with the claimants alleging that these actions rendered worthless their investments in two planned tourist resorts. **Investment at issue:** Investments in two real estate projects (tourist resorts) in Le Morne and Pointe Jérôme.	Jurisdictional issues: • Whether the claimants have an investment under the BIT (→YES; the plain meaning of "any kind of asset" could not be more general and means every category of assets) • Whether the claims are admissible despite objections on grounds of *lis pendens* (→YES; the BIT has no fork-in-the-road provisions and applying the triple test, there is a lack of parity of parties and causes of action; the overlap in possible compensation is not by itself an issue that affects the tribunal's jurisdiction) Merits issues: • Whether the respondent indirectly expropriated the claimants' investment (→NO – BY MAJORITY; the claimants did not acquire development rights, interference with which might have given rise to a justifiable claim for compensation) • Whether the respondent breached FET obligation (→NO – BY MAJORITY; the respondent has not subjected the claimants to discriminatory treatment and while the process could be improved, the respondent was within its contractual rights to cancel the Lease)

Table 4.	Decisions dismissing the investors' claims (in toto)	
Case details	Case summary	Key issues and tribunals' findings
Award, 18 February 2020 • Rigo Sureda, A. (President) • Alexandrov, S. A. (Dissenting Opinion) • Stern, B.		
Griffin v. Poland GPF GP S.à.r.l v. Poland (SCC Case No. 2014/168) BLEU (Belgium-Luxembourg Economic Union)–Poland BIT (1987) Final Award, 29 April 2020 • Kaufmann-Kohler, G. (President) • Williams, D. A. R. • Sands, P.	**Disputed measure(s):** Alleged expropriation of the claimant's rights to a historic former barracks site adjacent to Lazienki Park in central Warsaw, including alleged arbitrary conduct of the City of Warsaw related to construction works on the site and a decision of the Warsaw Court of Appeal confirming the termination of the claimant's usufruct rights to the property. **Investment at issue:** Usufruct rights to a plot of land.	Jurisdictional issues: • Whether the contracting parties' consent to arbitrate is valid despite the respondent's objection that the BIT's dispute settlement clause was rendered inapplicable by Poland's accession to the EU (→YES; the tribunal is not bound by the CJEU's findings in the *Achmea* judgment; the EU Members' declaration on the consequences of the *Achmea* decision is not an agreement for the purpose of interpreting the BIT; the BIT and the EU treaties do not share the same subject matter; there is no conflict between the EU treaties and the BIT) Merits issues: • Whether the measures adopted by the respondent amounted to an indirect expropriation (→NO; the city of Warsaw was not obliged to extend the deadlines in the agreement with the investor; the Warsaw Conservator was competent to opine on the development of the property; the Warsaw Conservator's recommendations were not contradictory; the City had no "hidden agenda" with the Museum) • Whether the measures adopted by the respondent amounted to a direct expropriation (→NO; "judgments of domestic courts are not expropriatory if they enforce or give effect to a State's legitimate contractual rights"; the investor used the property in a manner that was inconsistent with the purpose of the usufruct agreement with the City) • Whether the respondent violated the FET standard by frustrating the claimant's legitimate expectations (→NO; none of the documents or statements presented to the tribunal could have given rise to a legitimate expectation; there were no assurances or representations – e.g. in the resolution, opinion or letter reviewed – from which legitimate expectations could be derived)
Lidercón v. Peru Lidercón, S.L. v. Republic of Peru (ICSID Case No. ARB/17/9) Peru–Spain BIT (1994)	**Disputed measure(s):** A municipality's alleged non-compliance with a concession contract that grants the claimant an exclusive right to operate vehicle inspection centres in Lima. **Investment at issue:** Concession contract with the municipality of Lima for the operation of vehicle inspection centres.	Jurisdictional issues: • Whether the tribunal has jurisdiction over the claims (→YES) Merits issues: • Whether the respondent violated the claimant's legitimate expectations (→NO; the claimant could not have had an expectation that the contract would be insulated from legislative or regulatory changes) • Whether the respondent breached FET through a denial of justice (→NO; the domestic judgments are not "aberrant to the point of being explicable only as a denial of justice")

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Case details	Case summary	Key issues and tribunals' findings
Award, 6 March 2020 • Paulsson, J. (President) • Gonzalez de Cossio, F. • Perezcano Diaz, H.		
Micula v. Romania (II) Ioan Micula, Viorel Micula and others v. Romania (II) (ICSID Case No. ARB/14/29) Romania–Sweden BIT (2002) Award, 5 March 2020 • McRae, D. M. (President) • Beechey, J. • Crook, J. R.	**Disputed measure(s):** Government's alleged failure to enforce its tax laws and to prevent the growth of illegal alcohol sales, causing harm to the claimants' spirits business; and the Government's imposition of unilateral price increases related to the claimants' mineral water business conducted under a long-term sale and purchase contract with a national company. **Investment at issue:** Interests in Romanian beverage production enterprises.	Jurisdictional issues: • Whether the tribunal has jurisdiction despite the CJEU'S decision in *Achmea v. Slovakia (I)* (2018) (→YES; an amendment to either the BIT or the ICSID Convention (or both) would be required to change the jurisdiction of the tribunal; *Achmea* changes domestic law) • Whether the tribunal has jurisdiction despite the contracting parties' signature of the January 2019 Declarations (→YES) Merits issues: • Whether the respondent breached FET by failing to enforce its tax laws in a consistent manner and by frustrating the claimants' legitimate expectations (→NO; GAMI v. Mexico test of an "outright and unjustified repudiation" of its law is not met and the claimants failed to prove the respondent's breach) • Whether the respondent breached FET by failing to provide a stable and consistent legal framework (→NO; since the claimants did not prove that the respondent failed to enforce its taxation laws, arguments related to a stable legal and business environment also fail) • Whether the claimants were treated in a discriminatory and unreasonable way (→NO; since the claim on Romania's failure to enforce its tax law fails, the discrimination and unreasonableness claims also fail) • Whether it is possible to incorporate the full protection and security (FPS) standard in the Albania–Romania BIT and Romania–Iran BIT by virtue of the MFN clause (→YES) • Whether the respondent breached the FPS standard (→NO) • Whether the respondent breached the FET standard (→NO)
Nelson v. Mexico Joshua Dean Nelson v. United Mexican States (ICSID Case No. UNCT/17/1) NAFTA (1992) Award, 5 June 2020	**Disputed measure(s):** Certain decisions by Mexico's federal telecommunications regulator IFT related to a disagreement between Tele Fácil and a large telecommunications provider in Mexico, Telmex, over the terms of an interconnection agreement. Allegedly, IFT failed to enforce a resolution, which it had rendered in Tele Fácil's favour, and subsequently issued decisions that resolved the disagreement with Telmex to the claimant's detriment, rendering Tele Fácil commercially unviable and denying it access to the	Jurisdictional issues: • Whether the claimant had "control" as in NAFTA Article 1117 (→YES; the corporate control resulting from the ownership of the majority and the decisive vote of the shareholders is more than sufficient to conclude that the claimant had legal control) Merits issues: • Whether the respondent unlawfully expropriated the claimant's investments (→NO; the claimant cannot claim that a right it does not have under Mexican law is capable of being expropriated)

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Case details	Case summary	Key issues and tribunals' findings
• Zuleta, E. (President) • Veeder, V. V. • Gomezperalta Casali, M.	Mexican telecommunications market. According to the claimant, IFT subjected Tele Fácil to disproportionate enforcement actions and Mexican courts failed to address IFT's misconduct. **Investment at issue:** Majority ownership of Tele Fácil México, S.A. de C.V ("Tele Fácil"), a locally incorporated company with a concession to operate as a telecommunications provider.	• Whether the respondent breached the FET obligation under NAFTA 1105 (→NO; the claimant challenges the same measures as in expropriation claim which were dismissed) • Whether the claimant was denied justice through decisions of domestic courts (→NO; a first decision that is not final and a mere disagreement with the reasoning of the courts do not amount to denial of justice)
Ortiz v. Algeria Ortiz Construcciones y Proyectos S.A. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/17/1) Algeria–Spain BIT (1994) Award, 29 April 2020 (French) • Lévy, L. (President) • Fortier, L. Y. • Hanotiau, B.	**Disputed measure(s):** Alleged refusal of Algerian authorities to award investor's joint venture company procurement contracts for the construction and sale of 5,000 housing units. **Investment at issue:** Investments in the construction of social housing units in Algeria.	Jurisdictional issues: • Whether the tribunal has jurisdiction (→YES) Merits issues: • Whether the challenged measures frustrated the claimant's legitimate expectations and thereby breached FET (→NO; the respondent had not made specific commitments to the claimant) • Whether there has been a breach of the umbrella clause (→NO; there is no unilateral or contractual commitment binding on the respondent, who is not party to the contracts concluded by the claimant)
SunReserve v. Italy SunReserve Luxco Holdings v. Italy (SCC Case No. 2016/32) Energy Charter Treaty (1994) Final Award, 25 March 2020	**Disputed measure(s):** A series of governmental decrees to cut tariff incentives for some solar power projects. **Investment at issue:** Ownership of nine photovoltaic plants in Italy.	Jurisdictional issues: • Whether the tribunal has jurisdiction under the ECT despite objections that EU law rendered it inapplicable (→YES; EU law, as international law, is not relevant under Art. 31(3)(c) of the VCLT; EU law, as national law of the seat of the arbitration, does not explicitly prohibit intra-EU arbitrations; there is no conflict between EU law and the ECT; it is "theoretical and speculative" whether the *Achmea* judgment was intended to apply to the ECT) • Whether the ECT applies to intra-EU disputes regardless of EU law (→YES; the text of Article 26 ECT is clear; there is no explicit disconnection clause in the ECT)

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Case details	Case summary	Key issues and tribunals' findings
• van den Berg, A. J. (President) • Sachs, K. • Giardina, A.		• Whether the tribunal has jurisdiction over some of the claims concerning tax measures (→NO; the ECT carves out tax measures; taxes are defined as being mandatory, not in exchange for benefits or services and contribute to public spending; administrative charges and imbalance fees are not tax measures under this definition; the Robin Hood Tax and the reclassification of PV plants for tax purposes are genuine tax measures) Merits issues: • Whether the respondent frustrated the claimants' legitimate expectations by changing the regulatory regime (→NO; at the time of acquisition of the investment, the only factors that could have given rise to legitimate expectations where the overall legislative framework, the implementing decrees and public statements by officials that promoted the incentive regime; the aforementioned factors are insufficient to create an expectation that incentive rates would remain fixed for 20 years) • Whether the respondent impaired the investment by unreasonable or discriminatory measures (→NO; the impairment must be significant and the measure must be "bereft of a rational policy, or unrelated to the policy objective that the host State desired to achieve, or discriminatory"; neither requirement for a finding of breach was met) • Whether the respondent's conduct breached the umbrella clause (→NO; the respondent did not have any "obligations" entered into with the claimants for the purposes of the umbrella clause and therefore there could not have been any breaches; the clause only covers "specific obligations directed at a particular investor or investment and not general legislative or regulatory frameworks"; in certain circumstances, unilateral legislative or regulatory acts can create obligations under the clause; "a legislative or regulatory framework directed equally at foreign and domestic investors cannot create specific enough obligations")
Vento v. Mexico Vento Motorcycles, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/17/3) NAFTA (1992) Award, 6 July 2020 • Rigo Sureda, A. (President) • Gantz, D. A. • Perezcano Diaz, H.	**Disputed measure(s):** Mexico's allegedly discriminatory treatment of the claimant, which includes subjecting Vento's motorcycles to a 30 per cent import duty (on the ground that they are in fact made in China, not in the United States), whereas the claimant's competitors do not pay such import duty. **Investment at issue:** Investments in manufacturing of motorcycles.	Jurisdictional issues: • Whether the claimant's joint venture qualifies as an enterprise and therefore as an investment under NAFTA (→YES; NAFTA enterprise definition is broad and not limited to "legal persons" or "corporations") • Whether a loan to an enterprise where the original maturity is at least three years qualifies as an investment under NAFTA (→YES; however, loan agreements are not sufficient proof of an investment) • Whether the claimant made an investment in the form of loans under NAFTA (→NO; no evidence that any funds were transferred under the loan agreements) Merits issues: • Whether the challenged measures breached NAFTA NT and MFN obligations (→NO; the claimant failed to identify "comparators" in like circumstances; the structure of the claimant's joint venture was "in very different circumstances from those of the Relevant Mexican Investments") • Whether the challenged measures breached the MST obligation through a lack of due process, arbitrary and discriminatory treatment (→NO)

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