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REVIEW OF ISDS DECISIONS IN 2019: SELECTED IIA REFORM ISSUES

HIGHLIGHTS

- In 2019, arbitral tribunals rendered at least 71 substantive decisions in investor–State dispute settlement (ISDS) cases. Thirty-nine of the ISDS decisions were publicly available at the time of writing. Most decisions concerned cases based on old-generation international investment agreements (IIAs) signed in the 1990s or earlier.
- For policymakers and IIA negotiators, arbitral decisions can be a useful source for learning how IIA provisions work in practice and for identifying which areas are most in need of reform.
- Decisions from 2019 touched upon important issues on the reform agenda for the IIA regime, including:
  - Preserving the right to regulate (e.g. exclusions from treaty scope, interpretation of fair and equitable treatment, expropriation and umbrella clauses)
  - Improving investment dispute settlement (e.g. ISDS scope, relationship with domestic proceedings, counterclaims)
  - Ensuring investor responsibility (e.g. legality of investment under host State law)
- Decisions rendered in 2019 displayed some divergent interpretations by arbitrators and tribunals on certain key issues. Questions of interpretation typically arise where the applicable treaty does not provide enough details on the matter at issue and leaves a wider margin of discretion to tribunals. There were instances in which respondent States lacked sufficient legal basis in the treaty to defend themselves more effectively.
- Policymakers and IIA negotiators may wish to consider the implications of these developments for treaty drafting (e.g. by identifying options to add, clarify, circumscribe or omit certain provisions). They can adopt a holistic approach, combining substantive and procedural reform options (e.g. different approaches to ISDS reform) during the development of future treaties as well as the modernization of existing ones. UNCTAD's Investment Policy Framework for Sustainable Development (2015), the Road Map for IIA Reform included in the World Investment Report 2015 and the Reform Package for the International Investment Regime (2018) offer a variety of tools and policy options in this regard.
- UNCTAD's next Annual IIA Conference, to be held at the World Investment Forum 2021, will focus on accelerating the reform of old-generation treaties based on options suggested in UNCTAD's IIA Reform Accelerator launched in November 2020. It will also build on the outcome of UNCTAD's Virtual IIA Conference 2020.

Introduction: Selected IIA reform issues addressed in ISDS decisions

This note provides an overview of arbitral findings in publicly available ISDS decisions rendered in 2019 (box 1) that may have implications for the drafting of future IIAs and the modernization of old-generation treaties. A factual summary of the questions addressed by ISDS tribunals in publicly available decisions can be a useful source for learning how IIA provisions work in practice and for identifying which areas are most in need of reform. Most arbitral decisions rendered in 2019 concerned cases that were based on provisions in old-generation treaties signed in the 1990s or earlier.

Against this background, this note draws on policy options for Phases 1 and 2 of IIA Reform put forward in UNCTAD's Reform Package for the International Investment Regime (2018), the Investment Policy Framework for Sustainable Development (2015) and the Road Map for IIA Reform included in the World Investment Report 2015. It also highlights the relevance of UNCTAD's IIA Reform Accelerator, launched in November 2020, to help speed up the reform of unbalanced treaty provisions prevalent in the old stock of IIAs.

The cases and issues highlighted in this note were selected after a comprehensive case-by-case mapping of key issues addressed by ISDS tribunals in 2019, which is available as supplementary material.[1]

Selected issues addressed by arbitral tribunals 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 exceptions
- ISDS scope, conditions for access and procedural issues

The analysis of ISDS decisions should be read in conjunction with other recent UNCTAD publications related to IIAs and ISDS. The IIA Issues Note "Investor–State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019" (No. 2, July 2020) provides an overview of known treaty-based ISDS cases initiated in 2019 and overall ISDS case outcomes. The IIA Issues Note on "The Changing IIA Landscape: New Treaties and Recent Policy Developments" (No. 1, July 2020) summarizes ISDS reform developments and outlines four ISDS reform approaches countries implemented in recent IIAs: (I) No ISDS, (ii) Standing ISDS tribunal, (iii) Limited ISDS, and (iv) Improved ISDS procedures. It also documents progress on IIA reform involving countries at all levels of development and from all geographical regions.

Box 1. ISDS decisions in 2019 and overall outcomes

In 2019, ISDS tribunals rendered at least 71 substantive decisions in investor–State disputes, 39 of which were in the public domain at the time of writing.[a] More than half of the public decisions on jurisdictional issues were decided in favour of the State, whereas on the merits more decisions were decided in favour of the investor.

- Fourteen decisions (including rulings on preliminary objections) principally addressed jurisdictional issues, with five upholding the tribunal's jurisdiction and nine declining jurisdiction.
- Twenty-five decisions on the merits were rendered, with 14 accepting at least some investor claims and 11 dismissing all the claims. In the decisions holding the State liable, tribunals most frequently found breaches of the fair and equitable treatment (FET) provision. The amounts awarded ranged from less than 10 million ($7.9 million in *Magyar Farming and others v. Hungary*) to several billions ($4 billion in *Tethyan Copper v. Pakistan* and $8.4 billion in *ConocoPhillips v. Venezuela*).

In addition, four publicly known decisions were rendered in annulment proceedings at the International Centre for Settlement of Investment Disputes (ICSID). Ad hoc committees of ICSID rejected the applications for annulment in all four cases.

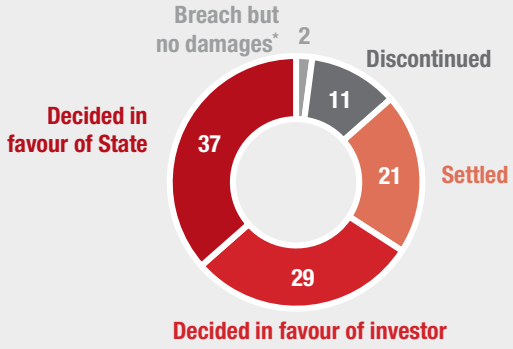
[1] This analysis covers publicly available decisions as of January 2020. The case-by-case mapping records a larger set of issues. Available at https://investmentpolicy.unctad.org/publications/series/2/international-investment-agreements.

Box 1 (continued)

By the end of 2019, at least 674 ISDS proceedings had been concluded. The relative share of case outcomes changed only slightly from that in previous years (box figure 1).

Of the cases that were resolved in favour of the State, about half were dismissed for lack of jurisdiction. Looking at the totality of decisions on the merits (i.e. where a tribunal determined whether the challenged measure breached any of the IIA's substantive obligations), about 60 per cent were decided in favour of the investor and the remainder in favour of the State (box figure 2).

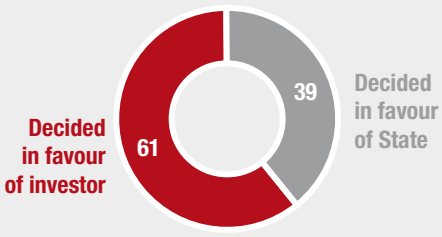
Box figure 1. Results of concluded cases, 1987–2019 (Per cent)



Source: UNCTAD, ISDS Navigator.

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

Box figure 2. Results of decisions on the merits, 1987–2019 (Per cent)



Source: UNCTAD, ISDS Navigator.

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

Source: UNCTAD (based on UNCTAD, 2020b).

Note: Reference to "dollars" ($) means United States dollars, unless otherwise indicated.

[a] These numbers include decisions (awards) 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. Treaty scope and definitions

a. Definition of investment

Coverage of indirect investments

One decision rendered in 2019 analysed whether investments held by claimants indirectly were protected by the applicable IIA (table 1). The tribunal determined that the investments held through a local company were covered by the applicable bilateral investment treaty (BIT).

This question can also arise with regard to investments controlled indirectly through a series of foreign entities in third States, particularly where the applicable IIA is silent on whether it applies to indirect investments (i.e. does not expressly exclude them).

Table 1. Coverage of indirect investments

Case details	Investment at issue	Selected issues and tribunals' findings
Anglo American v. Venezuela • United Kingdom–Bolivarian Republic of Venezuela BIT (1995) • Award, 18 January 2019 • Derains, Y. (President); Tawil, G. S. (Dissenting Opinion); Vinuesa, R. E.	Rights under nickel-mining concessions owned by Anglo American's local subsidiary, Minera Loma de Níquel C.A. (indirect participation of 91.37 per cent).	• Whether Claimant's indirect shareholding in local company through another local company, which in turn was owned by a Panamanian subsidiary of the Claimant, was covered by the BIT (→YES; BIT protected both direct and indirect investments)

Source: UNCTAD.

Ultimate ownership of investment

In at least three cases, respondent States objected to the tribunals' jurisdiction on the basis that the investment was ultimately owned by nationals of the respondent State, the invested capital was of domestic origin, or the investment made through holding companies was ultimately owned by nationals of third States not covered by the applicable IIA (table 2).

In the publicly available decisions rendered in 2019, the tribunals rejected such objections. They held that in the absence of a requirement of substantial business activity, the decisive factor remained the place of incorporation and therefore holding companies were protected by the respective IIAs. Two of the tribunals also considered that invested funds need not be of foreign origin to be protected.

Table 2. Ultimate ownership of investment

Case details	Investment at issue	Selected issues and tribunals' findings
Europa Nova v. Czechia • Cyprus–Czechia BIT (2001); Energy Charter Treaty (ECT) (1994) • Award, 15 May 2019 • van Houtte, H. (President); Beechey, J.; Landau, T.	Majority shareholding (90 per cent) in Czech company SolarOne s.r.o., which owned two special purpose vehicles with solar plants (the Tomsan and Slunecní projects).	• Whether Tribunal had jurisdiction over Claimant under the Cyprus–Czechia BIT (→NO; Tribunal lacked jurisdiction because Claimant did not meet the condition of having a permanent seat in the other Contracting Party to qualify as investor under the BIT; Claimant only had registered office) • Whether, under ECT, Tribunal had jurisdiction over investment owned by domestic investors through a foreign shell company (in Cyprus) (→YES; ECT does not preclude the protection of an investment made by an entity which mainly serves as a holding company) • Whether Claimant qualified as investor if funds used to make investment originated from a national of the host State (→YES; under ECT, investment refers to "every kind of asset", no requirement that funds of an investment be of foreign origin)
I.C.W. v. Czechia • Czechia–United Kingdom BIT (1990); ECT (1994) • Award, 15 May 2019 • van Houtte, H. (President); Beechey, J.; Landau, T.	Sole shareholding in a Czech special purpose vehicle, Hutira FVE-Omice a.s., which owned and operated a solar plant in South Moravia.	• Whether Claimant qualified as investor if funds used to make investment originated from a national of the host State (→YES; under both ECT and BIT, investment refers to "every kind of asset", no requirement that funds of an investment be of foreign origin)
NextEra v. Spain • ECT (1994) • Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019 • McRae, D. M. (President); Fortier, L. Y.; Boisson de Chazournes, L.	Construction and operation of two thermosolar plants in Extremadura, Spain.	• Whether Claimants, as pure holding companies incorporated in the Netherlands with no economic activity in the Netherlands (and ultimately owned by an American corporation), qualified as investors within the meaning of the ECT (→YES; holding companies are covered investors; the decisive factor is whether the company is organized under the laws of a Contracting Party and not the existence of economic activity)

Source: UNCTAD.

Characteristics of investment (contribution of resources)

In four decisions rendered in 2019, tribunals examined whether the investments at issue in the disputes met the characteristics of investment, particularly the criterion of contribution of resources (table 3). While respondent States raised jurisdictional objections relying on the *Salini* test in three cases,[2] only one tribunal applied it (based on the disputing parties' agreement). The other tribunals focused their analysis on specific elements provided for in the definitions of investment or investor of the respective IIAs (and applied tests on this basis).

In one case, the tribunal ruled that ownership of shares in a local company acquired by the claimant (from its parent company) without any payment in exchange could not be considered a protected investment as there was no contribution of any kind from the claimant. Other tribunals examined whether a contribution must take a financial form or whether loans to local companies could be considered a protected investment.

Old-generation treaties typically use an open-ended definition of "investment" that grants protection to all types of assets. Many recent IIAs, however, list the "commitment of capital or other resources" (alongside other characteristics such as the expectation of profit and the assumption of risk) in definitions of the term "investment" (UNCTAD, 2019c). They also often exclude certain types of assets from coverage. Some recent IIAs and model treaties include the "contribution to sustainable (or economic) development" as a characteristic of a covered investment (UNCTAD, 2020a).

Table 3. Characteristics of investment: contribution of resources

Case details	Investment at issue	Selected issues and tribunals' findings
Clorox v. Venezuela • Spain–Bolivarian Republic of Venezuela BIT (1995) • Award, 20 May 2019 • Derains, Y. (President); Hanotiau, B.; Vinuesa, R. E.	Ownership of Corporación Clorox de Venezuela S.A. ("Clorox Venezuela"), a local company engaged in manufacturing of cleaning products.	• Whether mere ownership of shares in a local company is sufficient for Claimant to be considered a protected investor holding a protected investment (➜NO; BIT further requires the investor to carry out an "action of investing" (payment of a value when acquiring shares)) • Whether Claimant made any contribution or payment in exchange of the shares (➜NO)
Doutremepuich v. Mauritius • France–Mauritius BIT (1973) • Award on Jurisdiction, 23 August 2019 • Scherer, M. (President); Caprasse, O.; Paulsson, J.	Ownership of three locally incorporated enterprises for the construction and operation of a forensic DNA and paternity testing laboratory in Mauritius.	• Whether Claimants' alleged investment satisfied the Salini test criteria ((i) contribution to the host State; (ii) a certain duration; (iii) participation in the risk of the operation) (➜NO; Tribunal applied Salini test based on disputing parties' agreement to do so) • Whether the transfer of funds made by Claimants from one bank account in France to local bank accounts in Mauritius met the Salini test criterion of contribution to the host state (➜NO) • Whether contribution to the host state can take non-financial forms (➜YES; non-financial inputs may also satisfy the test as long as they have an economic value that can be contributed) • Whether Claimants made any contribution of know-how of economic value constitutive of investment (➜NO) • Whether planned future investments qualify as an investment (➜NO; Tribunal is to determine whether or not at the time of the termination of the project an investment had occurred that qualifies as such under BIT)

[2] *Clorox v. Venezuela*; *Doutremepuich v. Mauritius*; *Seo v. Korea*. The test is named after *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, 23 July 2001. 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 3.	Characteristics of investment: contribution of resources

Case details	Investment at issue	Selected issues and tribunals' findings
Seo v. Korea • Republic of Korea–United States of America FTA (2007) • Final Award, 24 September 2019 • Simma, B. (President); Lo, B. (Concurring Opinion); McRae, D. M.	Partial ownership (76%) of a residential property in Seoul.	• Whether Claimant's real estate property met the characteristics of an investment (→NO; there was no expectation of gain or profit as the property was acquired and predominantly served as a private residence for Claimant and her family, nor was there any assumption of risk)
Voltaic Network v. Czechia • Czechia–Germany BIT (1990); ECT (1994) • Award, 15 May 2019 • van Houtte, H. (President); Beechey, J.; Landau, T.	Sole shareholding in a Czech special purpose vehicle, Solarpark Rybnícek s.r.o., which owned and operated a solar plant near Rybnícek.	• Whether shares in a local company acquired by Claimant using a loan and paid for directly by the lender qualified as protected investment (→YES; the ECT and the BIT do not require that investor itself makes the investment – it is sufficient that the investor owns the asset)

Source: UNCTAD.

b. Definition of investor

Home and host country dual nationals

In three cases conducted under the UNCITRAL Arbitration Rules, respondent States challenged the tribunals' jurisdiction on the basis that the claimants were dual nationals of both parties to the IIA (home and host countries) and should not be permitted to bring any claims against one of their home States (table 4). The tribunals in the three cases rejected jurisdiction over the respective claimants.

In one decision, the tribunal assessed the effective and dominant nationality of the claimants based on the applicable treaty's explicit wording on the issue. It determined that the claimants' effective and dominant nationality was that of the respondent State.

In the two other decisions, the applicable treaties did not explicitly address the issue of double nationality in the definition of investor. In one of the cases, the tribunal considered that the definition of investor of the invoked treaty (the Spain–Venezuela BIT of 1995) implicitly excluded claims from dual nationals. It reached a different conclusion than another tribunal in a related case under the same treaty, which had held in 2014 that claims from dual nationals were permitted since the BIT did not expressly exclude them.[3]

In the third case, the tribunal found clear indications in the treaty showing the contracting parties' intent not to cover dual nationals of the home and host countries. As part of its analysis, the tribunal applied the principle of dominant and effective nationality based on general principles of international law.

Most IIAs are silent on the matter of dual nationality and typically they do not explicitly refer to effective and dominant nationality. Some recent IIAs address this issue by specifying the circumstances under which natural persons with dual nationality are covered or by excluding certain dual nationals from coverage (UNCTAD, 2020a). UNCTAD's IIA Reform Accelerator lists different reform-oriented formulations accompanied by recent treaty examples.

[3] *García Armas and García Gruber v. Venezuela,* Decision on Jurisdiction, 15 December 2014.

Table 4. Definition of investor: dual nationals

Case details	Investment at issue	Selected issues and tribunals' findings
Ballantine v. Dominican Republic • Dominican Republic–Central America Free Trade Agreement (CAFTA–DR) (2004) • Final Award, 3 September 2019 • Ramírez Hernández, R. (President); Cheek, M. L. (Partial Dissent); Vinuesa, R. E.	Ownership of Jamaca de Dios SRL and Aroma de la Montaña, E.I.R.L that were used to make investments in real estate and infrastructure to create a gated complex of luxury homes, restaurants, a hotel and a spa.	• Whether Tribunal had jurisdiction over Claimants, dual Dominican-American, after having determined that their effective and dominant nationality was Dominican (→NO – BY MAJORITY; effective and dominant nationality requirement in CAFTA–DR was not met) • Whether Claimants' permanent residence at the relevant times was in the United States such as to make it the more likely effective and dominant nationality (→NO) • Whether the centre of the Claimants' economic, social and family life was at the relevant time in the United States (→NO)
García Armas and others v. Venezuela • Spain–Bolivarian Republic of Venezuela BIT (1995) • Award on Jurisdiction, 13 December 2019 • Nunes Pinto, J. E. (President); Gómez-Pinzón, E.; Torres Bernárdez, S.	Investments in six locally incorporated companies (Friosa, La Fuente, Koma, Gaisa, La Meseta, Ingahersa).	• Whether BIT allows dual nationals of both parties to bring any claims against one of their home States (→NO; BIT implicitly excludes claims by such dual nationals) • Whether, even if BIT allowed claims by dual nationals, Claimants' dominant nationality was Spanish (→NO; Claimants' State of habitual residence, their personal attachment, and the centre of their economic, social and family life indicated Venezuela as their dominant nationality) • Whether dual nationals can never bring claims against one of their home States (→NO; under certain circumstances, claims by dual nationals can be allowed provided the dominant and effective nationality of the investor is not the respondent State)
Heemsen v. Venezuela • Germany–Bolivarian Republic of Venezuela BIT (1996) • Award on Jurisdiction, 29 October 2019 • Derains, Y. (President); Gómez-Pinzón, E.; Stern, B.	Indirect minority shareholding in a 643-hectare land plot ("La Salina") owned by Sucesión Heemsen, C.A., in the city of Puerto Cabello in northern Venezuela.	• Whether BIT contemplates claims by dual nationals against one of their home States (→NO; Contracting Parties' choice of ICSID as principal forum for ISDS claims demonstrated their intent to exclude dual nationals) • Whether Claimant's dominant and effective nationality was German (→NO; dominant and effective nationality test – applied as part of general international law – showed that Claimant was Venezuelan)

Source: UNCTAD.

Company seat

One decision rendered in 2019 examined whether the claimant had its "permanent seat" in the presumed home State to be considered a protected investor under the BIT (table 5). The tribunal ruled that the claimant did not meet the "permanent seat" requirement of the applicable IIA, as it merely had its "registered office" in the other contracting party.

While often absent in old-generation treaties, recent treaties increasingly require the covered investors to have "substantial business activities" (or sometimes "real economic activities") in the contracting party whose nationality they claim. Typically, this is combined with the incorporation approach or the seat approach to defining qualifying corporate investors.[4]

[4] UNCTAD, 2016, pp. 173-174.

Table 5.	Definition of investor: company seat	
Case details	Investment at issue	Selected issues and tribunals' findings
Europa Nova v. Czechia • Cyprus–Czechia BIT (2001); ECT (1994) • Award, 15 May 2019 • van Houtte, H. (President); Beechey, J.; Landau, T.	Majority shareholding (90 per cent) in Czech company SolarOne s.r.o., which owned two special purpose vehicles with solar plants (the Tomsan and Slunecní projects).	• Whether Tribunal had jurisdiction over Claimant under the Cyprus–Czechia BIT (➜NO; Tribunal lacked jurisdiction because Claimant did not meet the condition of having a permanent seat in the other Contracting Party to qualify as investor under the BIT; Claimant only had registered office) • Whether Tribunal had jurisdiction *ratione personae* over Claimant under ECT (➜YES; ECT does not have a permanent seat requirement)

Source: UNCTAD.

Denial of benefits

In one case, the respondent State invoked (in a memorial on jurisdiction, after the arbitration had been initiated against it) the denial-of-benefits clause in the applicable IIA arguing that the claimant did not have "substantial business activities" in its alleged home State (table 6). The tribunal decided that the respondent State had not asserted the denial of benefits in a timely fashion. The applicable IIA provided no explicit guidance on the time at which the right to deny benefits must be exercised.

In light of several decisions which have held that the denial-of-benefits clause may not be invoked against an investor after the commencement of arbitral proceedings, policymakers may consider providing explicit guidance on this issue in their treaties. Recent IIAs and model treaties can provide examples of reform-oriented formulations for the denial-of-benefits clause; they are illustrated in UNCTAD's IIA Reform Accelerator (UNCTAD, 2020a).

Table 6.	Denial of benefits	
Case details	Investment at issue	Selected issues and tribunals' findings
NextEra v. Spain • ECT (1994) • Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019 • McRae, D. M. (President); Fortier, L. Y.; Boisson de Chazournes, L.	Construction and operation of two thermosolar plants in Extremadura, Spain.	• Whether Tribunal had jurisdiction despite Respondent's invocation of the denial of benefits clause (➜YES; Respondent's assertion of the right to deny benefits three years after becoming aware of such right was too late and lacked good faith)

Source: UNCTAD.

c. Legality of investment