

SUPPLEMENTARY MATERIAL

REVIEW OF ISDS DECISIONS IN 2019: SELECTED IIA REFORM ISSUES (IIA ISSUES NOTE, NO. 1, JANUARY 2021)

Case-by-case tables on key issues addressed by ISDS tribunals in 2019

These case-by-case tables give an overview of key issues addressed by investor–State dispute settlement (ISDS) tribunals in 2019. The tables summarize 39 ISDS decisions that were publicly available as of January 2020.¹ The arbitral decisions and more detailed information on each case are available at <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

Most arbitral decisions in 2019 concerned cases based on old-generation international investment agreements (IIAs). A factual summary of the questions addressed by ISDS tribunals in publicly available awards and 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.

Selected issues and cases of relevance for treaty drafting and IIA reform are highlighted in the IIA Issues Note “Review of ISDS Decisions in 2019: Selected IIA Reform Issues” (No. 1, January 2021), 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

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.

¹ This number includes decisions (awards) on jurisdiction and awards on liability and damages (partial and final). The four publicly available decisions rendered in ICSID annulment proceedings in 2019 are not covered.

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
<p><i>B-Mex and others v. Mexico</i></p> <p><i>Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States</i> (ICSID Case No. ARB(AF)/16/3)</p> <p>NAFTA (1992)</p> <p>Partial Award, 19 July 2019</p> <p>Arbitrators:</p> <ul style="list-style-type: none"> • Verhoosel, G. (President) • Born, G. B. • Vinuesa, R. E. (Partial Dissenting Opinion) 	<p>Disputed measure(s): Government’s alleged unlawful interference with the claimants’ casino business in Mexico, including raids on facilities, seizure of equipment and bank account funds, closure of facilities and invalidation of a gaming permit.</p> <p>Investment at issue: Ownership interests in several gaming facilities in Mexico.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether request for arbitration submitted by Claimants’ legal counsel established their consent to arbitration and was conveyed in the manner prescribed by NAFTA, despite the absence of a separate letter affirming Claimants’ consent to arbitration (→YES; counsel was authorized to initiate arbitration; request referred to and expressly accepted Mexico’s offer to arbitrate; consent was conveyed in writing, delivered to Respondent and was included in the submission of the claim to arbitration; no separate letter was required) • Whether Tribunal had jurisdiction over additional Claimants not mentioned in the initial notice of intent (→YES – BY MAJORITY; the subsequent inclusion of additional Claimants in the request for arbitration does not vitiate Respondent’s consent to arbitration or automatically render their claims inadmissible) • Whether Claimants must also establish that they owned or controlled the investment (Mexican companies) at the time of the submission of the claim, in addition to establishing that they owned or controlled it at the time of the treaty breaches (→YES; the use of the present tense in the provision (“owns or controls”) suggests that the investor must own or control the enterprise at the time arbitration is commenced) • Whether “control” under NAFTA Article 1117 means both legal capacity to control and de facto control (→YES; “any ability to ‘exercise restraining or directing influence over’ or to ‘have power over’ a company would satisfy the ordinary meaning of control”) • Whether Claimants had control over a local company in which they held enough shares to have legal capacity to control, despite temporarily losing de facto control (→YES) • Whether Claimants had control over a local company in which they only had de facto control (and no sufficient shares to have legal capacity to control) (→YES) • Whether local companies had also consented to arbitration and waived their rights to pursue domestic proceedings so as to allow Claimants to bring claims on their behalf (→YES)

Table 1. Decisions upholding jurisdiction (at least in part) (without examining the merits)		
Case details	Case summary	Key issues and tribunals' findings
<p><i>Eskosol v. Italy</i></p> <p><i>Eskosol S.p.A. in liquidazione v. Italian Republic</i> (ICSID Case No. ARB/15/50)</p> <p>ECT (1994)</p> <p>Decision on Termination Request and Intra-EU Objection, 7 May 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Kalicki, J. E. (President) • Tawil, G. S. • Stern, B. 	<p>Disputed measure(s): A series of governmental decrees to cut tariff incentives for some solar power projects.</p> <p>Investment at issue: Investments in a 120 megawatt photovoltaic energy project in Italy.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether ECT applies to intra-EU disputes (→YES) • Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT) • Whether Tribunal had jurisdiction despite the Contracting Parties' signature of the January 2019 Declaration expressing that ISDS clause in ECT was inapplicable (→YES; January 2019 Declaration is not a "binding instrument" amounting to a 'shared understanding [...] regarding the interpretation of the ECT'")
<p><i>Landesbank Baden-Württemberg and others v. Spain</i></p> <p><i>Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain</i> (ICSID Case No. ARB/15/45)</p> <p>ECT (1994)</p> <p>Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019</p>	<p>Disputed measure(s): A series of energy reforms undertaken by the Government affecting the renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.</p> <p>Investment at issue: Investments in renewable energy generation enterprises (photovoltaic and solar thermal plants).</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether ECT applies to intra-EU disputes (→YES) • Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT)

Table 1. Decisions upholding jurisdiction (at least in part) (without examining the merits)		
Case details	Case summary	Key issues and tribunals' findings
<p>Arbitrators</p> <ul style="list-style-type: none"> Greenwood, C. (President) Poncet, C. Oreamuno Blanco, R. 		
<p><i>Nissan v. India</i></p> <p><i>Nissan Motor Co., Ltd. v. Republic of India</i> (PCA Case No. 2017-37)</p> <p>India–Japan EPA (2011)</p> <p>Decision on Jurisdiction, 29 April 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> Kalicki, J. E. (President) Hobér, K. Khehar, J. S. 	<p>Disputed measure(s): Non-payment of incentives by the Indian State government of Tamil Nadu, which had been allegedly promised to the claimant under the agreement for building of a car plant, signed with the State government in 2008.</p> <p>Investment at issue: 70 per cent share in Renault Nissan Automotive India Private Limited, a consortium that built an industrial automotive facility in Chennai, the capital of Tamil Nadu.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> Whether Tribunal had jurisdiction despite pending domestic proceedings brought by Claimant's affiliate (→YES; domestic proceedings did not concern an "investment dispute" under the treaty's fork-in-the-road provision as they did not allege treaty breaches and "disputing investor" was not the same) Whether Tribunal had jurisdiction despite the presence of an exclusive arbitration clause in an investment contract between Respondent and Claimant (→YES; Claimant did not waive its treaty right to international arbitration) Whether Claimant can bring umbrella claims about an investment contract which contains an exclusive arbitration clause (→YES; existence of an arbitration clause does not preclude umbrella claims) Whether Claimant's FET and umbrella claims were time-barred, therefore depriving Tribunal of jurisdiction (→NO; Claimant was pursuing only claims falling within the 3-year limitation period)
<p><i>Rockhopper v. Italy</i></p> <p><i>Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic</i> (ICSID Case No. ARB/17/14)</p> <p>ECT (1994)</p> <p>Decision on the Intra-EU Jurisdictional Objection, 26 June 2019</p>	<p>Disputed measure(s): Decision in February 2016 by the Ministry of Economic Development not to award the claimants a production concession covering the Ombrina Mare field located within 12 miles of the coast of Italy, following the Government's re-introduction of a general ban on oil and gas exploration and production activity within the 12 mile limit of the coastline.</p> <p>Investment at issue: 100% working interest in the Ombrina Mare oil and gas discovery project and a related offshore exploration permit.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> Whether ECT applies to intra-EU disputes (→YES) Whether Tribunal had jurisdiction despite the CJEU's decision in <i>Achmea v. Slovakia (I)</i> (2018) (→YES; CJEU decision concerned intra-EU BITs, not ECT) Whether Tribunal had jurisdiction despite the Contracting Parties' signature of the January 2019 Declaration expressing that ISDS clause in ECT was inapplicable (→YES; declaration was not signed by all EU member States and was not adopted within the EU legal order)

Table 1. Decisions upholding jurisdiction (at least in part) (without examining the merits)		
Case details	Case summary	Key issues and tribunals' findings
Arbitrators: <ul style="list-style-type: none"> • Reichert, K. (President) • Poncet, C. • Dupuy, P.-M. 		

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
<p><i>Almasryia v. Kuwait</i></p> <p><i>Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait</i> (ICSID Case No. ARB/18/2)</p> <p>Egypt–Kuwait BIT (2001)</p> <p>Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Ramírez Hernández, R (President) • Dévaud, P. (Dissenting Opinion) • Knieper, R. 	<p>Disputed measure(s): Government's alleged conduct preventing the claimant from taking ownership of land for a real estate development project under a joint venture investment agreement concluded by the claimant and a Kuwaiti national.</p> <p>Investment at issue: Participation in a joint venture agreement with a Kuwaiti national to develop and construct touristic hotels on land located north of Al-Khafji city in the Kuwaiti Region of Wafra.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • Whether Claimant complied with requirement to notify Respondent of dispute, request amicable settlement and initiate the six-month cooling-off period before submitting the dispute to arbitration (→NO – BY MAJORITY; BIT required written notice and six-month cooling-off period) • Whether Tribunal had jurisdiction despite Claimant's failure to comply with notice requirement and waiting period (→NO – BY MAJORITY; failure renders the claim manifestly without legal merit pursuant to ICSID Arbitration Rule 41(5)) • Whether Tribunal had jurisdiction over Claimant's expropriation claim (→NO – BY MAJORITY; claim is manifestly without legal merit as Claimant did not have property rights over the allegedly expropriated land)

Table 2. Decisions rejecting jurisdiction (in toto), including rulings on preliminary objections		
Case details	Case summary	Key issues and tribunals' findings
<p><i>Ballantine v. Dominican Republic</i></p> <p><i>Michael Ballantine and Lisa Ballantine v. The Dominican Republic</i> (PCA Case No. 2016-17)</p> <p>CAFTA–DR (2004)</p> <p>Final Award, 3 September 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Ramírez Hernández, R. (President) • Cheek, M. L. (Partial Dissent) • Vinuesa, R. E. 	<p>Disputed measure(s): Rejection by the Ministry of Environment and Natural Resources of the claimants' request to expand Jamaca de Dios, a residential and tourism project in the municipality of Jarabacoa, as well as other actions by the central and local government.</p> <p>Investment at issue: 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.</p>	<p>Jurisdictional issues:</p> <ul style="list-style-type: none"> • 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 the relevant time for determining Claimants' nationality is the time of the making of the investment (→NO; the relevant times for assessing the nationality requirement are the moment of submission of the claim and the moment of the alleged breach) • Whether the place of birth has a special bearing over other factors in determining which nationality is dominant and effective at any critical date (→NO) • Whether the place where the majority of life was spent is dispositive in determining the dominant and effective nationality (→NO; the determination of dominant and effective may not be reduced to mathematical day counting, further examination is required) • 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 such as to make it the more likely effective and dominant nationality (→NO)
<p><i>Besserglik v. Mozambique</i></p> <p><i>Oded Besserglik v. Republic of Mozambique</i> (ICSID Case No. ARB(AF)14/2)</p> <p>Mozambique–South Africa BIT (1997)</p> <p>Award, 28 October 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Khan, M. A. (President) • Fortier, L. Y. • von Wobeser, C. 	<p>Disputed measure(s): Alleged expropriation of the claimant's two fishing vessels and its interests in a joint fishing venture in Mozambique involving two Mozambican State-owned entities (Emopesca and Sulpesca).</p> <p>Investment at issue: Interests in contractual arrangements with State-owned entities, Mozambicana de Pesca EE (“Emopesca”) and Sulpesca Lda (“Sulpesca”), through a shareholding in South African company Natal Ocean Trawling (Pty) Ltd; ownership of two fishing vessels.</p>	<p>Jurisdiction issues:</p> <ul style="list-style-type: none"> • Whether Tribunal had jurisdiction despite the BIT having never entered into force (→NO; since BIT never entered into force, there is no consent of the Respondent to arbitration) • Whether Respondent objected to the competence of the Tribunal in a timely manner (→NO) • Whether Tribunal should decline to exercise its discretion to consider, on its own initiative and at any stage of the proceedings, issues of jurisdiction because jurisdictional objection was submitted with delay (→NO; Tribunal cannot decline to consider objection of a fundamental nature such as consent to arbitration)

Table 2. Decisions rejecting jurisdiction (in toto), including rulings on preliminary objections		
Case details	Case summary	Key issues and tribunals' findings
<p><i>Clorox v. Venezuela</i></p> <p><i>Clorox Spain S.L. v. Bolivarian Republic of Venezuela</i> (PCA Case No. 2015-30)</p> <p>Spain–Bolivarian Republic of Venezuela BIT (1995)</p> <p>Award, 20 May 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Derains, Y. (President) • Hanotiau, B. • Vinuesa, R. E. 	<p>Disputed measure(s): Government measures that allegedly forced Clorox Venezuela to discontinue its operations in the country, and the alleged expropriation of its production facilities and offices after Clorox had announced its plans to exit the country and to sell its assets.</p> <p>Investment at issue: Ownership of Corporación Clorox de Venezuela S.A. (“Clorox Venezuela”), a local company engaged in manufacturing of cleaning products.</p>	<p>Jurisdiction issues:</p> <ul style="list-style-type: none"> • 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) • Whether Claimant qualified as protected investor (→NO) • Whether Tribunal had jurisdiction over the dispute (→NO)
<p><i>Doutremepuich v. Mauritius</i></p> <p><i>Christian Doutremepuich and Antoine Doutremepuich v. Mauritius</i> (PCA Case No. 2018-37)</p> <p>France–Mauritius BIT (1973)</p> <p>Award on Jurisdiction, 23 August 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> • Scherer, M. (President) • Caprasse, O. • Paulsson, J. 	<p>Disputed measure(s): Termination by the Government of the claimants’ project to open a new medical laboratory, after the Government had initially approved the project.</p> <p>Investment at issue: Ownership of three locally incorporated enterprises for the construction and operation of a forensic DNA and paternity testing laboratory in Mauritius.</p>	<p>Jurisdiction issues:</p> <ul style="list-style-type: none"> • 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 the 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 one-off payments for goods and services (in the form of payments of bills and invoices in Mauritius) made by Claimants as part of the preparations for a project which was not yet off the ground constituted a contribution of a discernible duration (→NO) • Whether one-off payment of bills and invoices and transfer of funds entailed any risk pursuant to the Salini test (→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)

Table 2. Decisions rejecting jurisdiction (in toto), including rulings on preliminary objections		
Case details	Case summary	Key issues and tribunals' findings
		<ul style="list-style-type: none"> Whether Claimants can invoke the investor-State arbitration clause in Finland–Mauritius BIT (host State BIT with third country) on the basis of the MFN clause contained in France–Mauritius BIT (base treaty) (→NO; base treaty contains no consent to arbitrate investor-State disputes and such consent cannot be imported via MFN)
<p><i>García Armas and others v. Venezuela</i></p> <p><i>Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela</i> (PCA Case No. 2016-08)</p> <p>Spain–Bolivarian Republic of Venezuela BIT (1995)</p> <p>Award on Jurisdiction, 13 December 2019</p> <p>Arbitrators</p> <ul style="list-style-type: none"> Nunes Pinto, J. E. (President) Gómez-Pinzón, E. Torres Bernárdez, S. 	<p>Disputed measure(s): Alleged expropriation of the claimants' investments in six Venezuelan companies engaged in food distribution and marketing.</p> <p>Investment at issue: Investments in six locally incorporated companies (Friosa, La Fuente, Koma, Gaisa, La Meseta, Ingahersa).</p>	<p>Jurisdiction issues:</p> <ul style="list-style-type: none"> Whether the 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)

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