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REVIEW OF ISDS DECISIONS IN 2018: SELECTED IIA REFORM ISSUES

HIGHLIGHTS

- In 2018, arbitral tribunals rendered at least 50 substantive decisions in investor–State dispute settlement (ISDS) cases. Most decisions were based on old-generation international investment agreements (IIAs) signed in the 1990s or earlier. Twenty-nine of the ISDS decisions, including five ICSID annulment decisions, were publicly available as of January 2019.
- For policymakers, arbitral decisions can be a useful source for learning how IIA provisions work in practice and which areas are most in need of improvement.
- Decisions rendered in 2018 touched upon many IIA reform topics, 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. limitation periods for bringing ISDS claims, local litigation requirements as a prerequisite to arbitration, counterclaims)
    - Ensuring investor responsibility (e.g. legality of investment under host State law)
- Decisions from 2018 show some important developments. 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 are instances in which respondent States lacked sufficient legal basis in the treaty to defend themselves more effectively. On certain issues, arbitral decisions gradually converge, while arbitrators and tribunals continue to be divided on others. Decisions issued in 2018 also reveal novel elements of legal reasoning by arbitral tribunals.
- Policymakers may wish to consider the implications of these developments for treaty drafting (e.g. by identifying options to add, clarify, circumscribe or omit certain formulations). They may wish to do so in a holistic manner, i.e. considering substantive and procedural issues (e.g. different approaches to ISDS reform) during the development of future treaties as well as the modernization of existing ones.
- UNCTAD's next High-level IIA Conference, to be held in November 2019, will offer an opportunity to take stock of IIA reform progress and lessons learned. The High-level IIA Conference 2019 will aim to pave the way for further inclusive, transparent and synchronized IIA reform processes in the pursuit of sustainable development.

Introduction: Selected IIA reform issues addressed in ISDS decisions

This note provides an overview of arbitral findings in the previous year's publicly available ISDS decisions (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 which areas are most in need of improvement. Most arbitral decisions rendered in 2018 relied 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) and the Investment Policy Framework for Sustainable Development (2015).

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 2018 (covering publicly available decisions as of January 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 ISDS. The "Fact Sheet on Investor–State Dispute Settlement Cases in 2018" (IIA Issues Note, No. 2, May 2019) provides an overview of known treaty-based ISDS cases initiated in the previous year and overall ISDS case outcomes. The IIA Issues Note on "Reforming Investment Dispute Settlement: A Stocktaking" (No. 1, March 2019) summarizes ISDS reform developments and identifies five principal approaches to ISDS reform that emerged from IIAs signed in 2018: (I) no ISDS, (ii) a standing ISDS tribunal, (iii) limited ISDS, (iv) improved ISDS procedures, and (v) an unreformed ISDS mechanism.

When considering lessons learned for treaty drafting, policymakers may also consult Chapter III of the World Investment Report 2019, which documents progress on IIA reform involving countries at all levels of development and from all geographical regions.

Box 1. ISDS decisions in 2018 and overall outcomes

In 2018, ISDS tribunals rendered at least 50 substantive decisions, 29 of which were in the public domain as of January 2019.[a] Of these public decisions, most – about 70 per cent – were decided in favour of the investor, either on jurisdictional grounds or on the merits.

- Eight decisions (including rulings on preliminary objections) principally addressed jurisdictional issues, with six upholding the tribunal's jurisdiction and two denying jurisdiction.
- Sixteen decisions on the merits were rendered, with 11 accepting at least some investor claims and 5 dismissing all the claims. In the decisions holding the State liable, tribunals most frequently found breaches of the fair and equitable treatment (FET) provision.

In addition, five publicly known decisions were rendered in ICSID annulment proceedings. ICSID ad hoc committees rejected the applications for annulment in all five cases.

Ten awards of damages were rendered in 2018, ranging from approx. $3.2 million (*Gavrilovic v. Croatia*) to $2 billion (*Unión Fenosa v. Egypt*). These amounts do not include interest or legal costs, and some awards may be subject to set-aside or annulment proceedings.

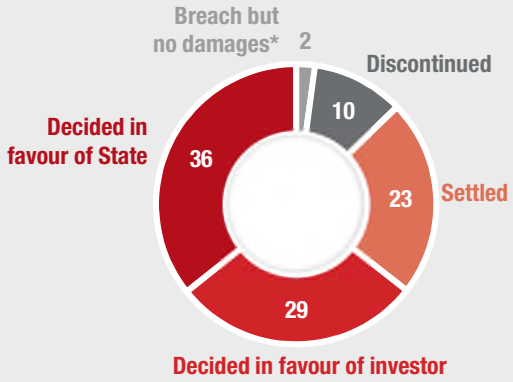
[1] The case-by-case mapping records a larger set of issues (e.g. attribution of conduct to the respondent State, intra-EU application of the Energy Charter Treaty). Available at https://investmentpolicy.unctad.org/publications/series/2/international-investment-agreements.

Box 1 (continued)

By the end of 2018, about 600 ISDS cases had been concluded. The relative share of overall case outcomes changed only slightly from that in previous years (box figure 1).

Of the cases that were decided 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).

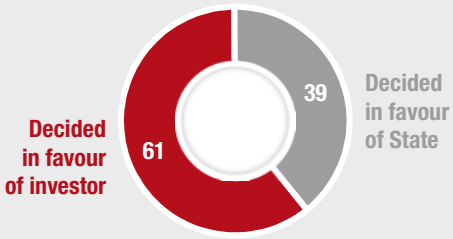
Box figure 1. Results of concluded cases, 1987–2018 (Per cent)



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, 1987–2018 (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, 2019a and 2019d).

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) as well as decisions in ICSID annulment proceedings. They do not include decisions on provisional measures, disqualification of arbitrators, procedural orders, discontinuance orders, settlement agreements or decisions of domestic courts.

1. Treaty scope and definitions

a. Definition of investment

Coverage of indirect investments

Several decisions in 2018 addressed whether investments held by claimants indirectly – e.g. through a local company or through foreign entities not covered by the applicable IIA – qualified for IIA protection (table 1). The question arose particularly in those cases where the applicable IIA was silent on whether it applied to indirect investments. In the decisions reviewed, tribunals have interpreted such silence as meaning that indirect investments were covered by the IIA concerned.

Table 1. Coverage of indirect investments

Case details	Investment at issue	Selected issues and tribunals' findings
Antin v. Spain • Energy Charter Treaty (ECT) (1994) • Award, 15 June 2018 • Zuleta, E. (President); Reichert, K.; Thomas, J. C.	Direct and indirect shareholding in two solar thermo plants in Andalucía, Spain.	• Whether certain assets were "directly and indirectly owned" by Claimants and related claims can be submitted to arbitration, despite ultimate ownership by third party (→YES; ECT covers indirect investments, protects intermediary companies)
Chevron and TexPet v. Ecuador (II) • Ecuador–United States of America bilateral investment treaty (BIT) (1993) • Second Partial Award on Track II, 30 August 2018 • Veeder, V. V. (President); Grigera Naón, H. A.; Lowe, V.	Oil exploration and production rights in Ecuador's Amazon region through concession contracts concluded with the Government.	• Whether Chevron's indirect investment in Ecuador (through its stake in TexPet) qualified for BIT protection (→YES; BIT did not require investment to be direct)
Mera Investment v. Serbia • Cyprus–Serbia BIT (2005) • Decision on Jurisdiction, 30 November 2018 • von Segesser, G. (President); Fortier, L. Y.; Cremades, B. M.	Ownership of a locally incorporated investment fund, Mera Invest d.o.o, holding shares in a construction company in Southeastern Serbia and local banks.	• Whether assets held by Claimant indirectly through local company constituted investments protected by BIT (→YES; BIT's object and purpose ("broad investment protection") and broad definition of investment confirm that indirect investments are covered)
South American Silver v. Bolivia • Bolivia–United Kingdom BIT (1988) • Award, 30 August 2018 • Zuleta, E. (President); Orrego Vicuña, F. (Separate opinion); Guglielmino, O. C. (Dissenting opinion)	Rights under mining concessions held through claimant's wholly-owned subsidiary, Compañia Minera Malku Khota.	• Whether BIT covers investments held indirectly (Claimant held its investment through Bahamian holding companies) (→YES – BY MAJORITY; BIT does not expressly exclude indirect investments)

Source: UNCTAD.

Ultimate ownership of investment

In several cases, respondent States objected to the tribunals' jurisdiction on the basis that the investment at issue was ultimately owned either by nationals of the respondent State itself or by third-state nationals not covered by the applicable IIA (table 2).

In publicly available decisions rendered in 2018, tribunals dealing with this issue have rejected such objections. They typically reasoned that the applicable IIA did not refer to ultimate ownership or the origin of invested capital as relevant attributes of investment. Notably, the IIAs applicable in those cases contained a simple incorporation test for determining the nationality of an investor (legal entity).

The incorporation approach to defining qualifying corporate investors is used in most of today's stock of IIAs.[2] In recent IIAs, however, there has been a growing tendency to clarify clauses and concepts related to ownership and control with a view to circumscribing treaty coverage. For example, recent treaties more frequently include a "substantial business activities" requirement (combined with the incorporation or the seat approach) (UNCTAD, 2016).

[2] The World Investment Report 2016 (chapter IV) analysed different approaches to ownership and control in relevant IIA clauses (UNCTAD, 2016, 172-181).

Table 2. Ultimate ownership of investment

Case details	Investment at issue	Selected issues and tribunals' findings
A11Y v. Czechia • Czechia–United Kingdom BIT (1990) • Decision on Jurisdiction, 9 February 2017 (became public in 2018); Award, 29 June 2018 • Fortier, L. Y. (President); Alexandrov, S. A.; Joubin-Bret, A.	Company engaged in the supply of high quality compensation aids to blind and visually impaired people.	(Decision on Jurisdiction, 9 February 2017) • Whether Claimant company, majority owned by host State national, qualified as protected United Kingdom investor (➜YES; BIT set out simple incorporation test of nationality)
Cortec Mining v. Kenya • Kenya–United Kingdom BIT (1999) • Award, 22 October 2018 • Binnie, I. (President); Dharmananda, K.; Stern, B.	Investments in the Kenyan mining sector, including a 21-year mining license for the extraction of rare earths at the Mrima Hill project in the southern part of the country.	• Whether Claimants qualified for BIT protection (Respondent alleged that they were "shell" United Kingdom companies, with ultimate investors having third-party nationality) (➜YES; origin of funds is irrelevant under BIT)
Mera Investment v. Serbia • Cyprus–Serbia BIT (2005) • Decision on Jurisdiction, 30 November 2018 • von Segesser, G. (President); Fortier, L. Y.; Cremades, B. M.	Ownership of a locally incorporated investment fund, Mera Invest d.o.o, holding shares in a construction company in Southeastern Serbia and local banks.	• Whether granting jurisdiction goes against object and purpose of BIT and ICSID Convention (investment was ultimately owned by host State nationals; invested capital originated in host State) (➜NO; BIT and ICSID Convention do not require foreign origin of capital or foreign effective control of investment)
Rawat v. Mauritius • France–Mauritius BIT (1973) • Award on Jurisdiction, 6 April 2018 • Reed, L. (President); Honlet, J.-C.; Lowe, V.	Indirect controlling shareholding in an investment holding company (British American Investment Co. (Mtius) Ltd) with a subsidiary life insurance company (British American Insurance Company Ltd) and a bank (Bramer Banking Corporation Ltd).	• Whether Claimant, dual Mauritian-French national, is eligible for BIT protection (➜NO; BIT does not expressly exclude dual nationals from definition of investor, but specific treaty context suggests that they are not covered)
South American Silver v. Bolivia • Bolivia–United Kingdom BIT (1988) • Award, 30 August 2018 • Zuleta, E. (President); Orrego Vicuña, F. (Separate opinion); Guglielmino, O. C. (Dissenting opinion)	Rights under mining concessions held through claimant's wholly-owned subsidiary, Compañia Minera Malku Khota.	• Whether Claimant qualified as investor if invested capital originated from Claimant's parent company (Canadian) (➜YES; origin of capital is irrelevant under BIT)

Source: UNCTAD.

Characteristics of investment (contribution of resources)

In at least three decisions, tribunals addressed the related question of "contribution of resources" (table 3). In a case brought under UNCITRAL rules, the tribunal examined whether there may be a covered investment in a situation where the claimant – an intermediary company owned by a host State national – had not contributed any resources to the host State. The respondent State argued that the "contribution, risk and duration" criteria must be met. The applicable BIT did not explicitly define or limit the terms "every kind of asset".

In two cases under the ICSID Convention, respondent States alleged that the respective claimants had made no contribution of economic resources to the host State.

The contribution of resources is considered to be a necessary characteristic of an investment under the so-called *Salini* test.[3] Article 25 of the ICSID Convention, the clause having triggered the *Salini* test, uses the term "investment", but does not define it (UNCTAD, 2011). 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, 2019d). They also often exclude certain types of assets from coverage.

Table 3. Characteristics of investment: contribution of resources

Case details	Investment at issue	Selected issues and tribunals' findings
A11Y v. Czechia • Czechia–United Kingdom BIT (1990) • Decision on Jurisdiction, 9 February 2017 (became public in 2018); Award, 29 June 2018 • Fortier, L. Y. (President); Alexandrov, S. A.; Joubin-Bret, A.	Company engaged in the supply of high quality compensation aids to blind and visually impaired people.	(Award, 29 June 2018) • Whether Claimant made investment in host State (Respondent alleged that Claimant had not contributed any resources) (→YES; BIT did not require that there be flow of funds to host State; possession of know-how and goodwill in host State is sufficient to find protected investment; different view expressed by Joubin-Bret, A.)
Cortec Mining v. Kenya • Kenya–United Kingdom BIT (1999) • Award, 22 October 2018 • Binnie, I. (President); Dharmananda, K.; Stern, B.	Investments in the Kenyan mining sector, including a 21-year mining license for the extraction of rare earths at the Mrima Hill project in the southern part of the country.	• Whether Claimants made an investment in host State (Respondent alleged that Claimants had not made any financial contribution) (→YES; Claimants' investment (shares in project company) met *Salini* criteria)
Masdar v. Spain • ECT (1994) • Award, 16 May 2018 • Beechey, J. (President); Born, G. B.; Stern, B.	Shareholding in the Spanish company Torresol Energy Investments S.A. which operated three concentrated solar power plants in Spain: Gemasolar, Termesol and Arcosol.	• Whether Claimant made an investment in host State (Respondent alleged that Claimant had not contributed own economic resources) (→YES; investment met *Salini* test; BIT did not contain origin of capital requirement)

Source: UNCTAD.

b. Definition of investor

Company seat

In one case, the tribunal discussed the notion of corporate seat (table 4). The applicable IIA required that in order to be considered an investor, a company must have its corporate seat in the presumed home State.

An increasing share of recent treaties require the covered investor to have "substantial business activities" (or sometimes "real economic activities") in the contracting party whose nationality it claims. Typically, this is combined with the incorporation approach or the seat approach to defining qualifying corporate investors.[4]

[3] 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.

[4] UNCTAD, 2016, 173-174.

Table 4.	Definition of investor: company seat	
Case details	Investment at issue	Selected issues and tribunals' findings
Mera Investment v. Serbia • Cyprus–Serbia BIT (2005) • Decision on Jurisdiction, 30 November 2018 • von Segesser, G. (President); Fortier, L. Y.; Cremades, B. M.	Ownership of a locally incorporated investment fund, Mera Invest d.o.o, holding shares in a construction company in Southeastern Serbia and local banks.	• Whether Claimant had its corporate seat in Cyprus (→YES; under Cypriot law, term "seat" requires maintaining registered office and does not require effective management to be located in Cyprus)

Source: UNCTAD.

Denial of benefits

In one case, the respondent State invoked (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 5).

The denial-of-benefits clause is becoming widely used in recent treaties (UNCTAD, 2016). In light of several decisions which have held that the clause may not be invoked against an investor after it initiates a formal arbitration claim, policymakers may consider clarifying in their treaties whether the clause can also be invoked *after* the commencement of arbitral proceedings (UNCTAD, 2015b; UNCTAD, 2018).

Table 5.	Denial of benefits	
Case details	Investment at issue	Selected issues and tribunals' findings
Masdar v. Spain • ECT (1994) • Award, 16 May 2018 • Beechey, J. (President); Born, G. B.; Stern, B.	Shareholding in the Spanish company Torresol Energy Investments S.A. which operated three concentrated solar power plants in Spain: Gemasolar, Termesol and Arcosol.	• Whether Claimant company, incorporated in the Netherlands, is controlled by Government of Abu Dhabi and actions of Claimant are attributable to State of Abu Dhabi, falling outside of Tribunal's jurisdiction (→NO; Government of Abu Dhabi did not exercise control over Claimant) • Whether Respondent may deny treaty benefits to Claimant (→NO – BY MAJORITY; Respondent may not deny benefits after arbitration is commenced; Claimant had "substantial business activities" in home State as it was a holding company with substantial international assets under its control)

Source: UNCTAD.

c. Legality of investment

In a number of cases decided in 2018, respondent States argued that claimants had made their investments in violation of the host State law, and that such illegal investments did not qualify for IIA protection (table 6). Two tribunals confirmed that the legality requirement applied even when it was not explicitly mentioned in the IIA.[5]

Many recent as well as old-generation treaties include an explicit "in accordance with host State law" requirement for investments to be covered by the treaty (UNCTAD, 2018).

[5] A similar finding was made in another 2018 decision that recently became public: *Álvarez y Marín Corporación S.A., Estudios Tributarios AP S.A., Stichting Administratiekantoor Anbadi, Bartus van Noordenne and Cornelis Willem van Noordenne v. Republic of Panama* (ICSID Case No. ARB/15/14), Award, 12 October 2018, with Dissenting Opinion by Horacio Grigera Naón.

Table 6. Legality of investment

Case details	Investment at issue	Selected issues and tribunals' findings
Aven and others v. Costa Rica • Dominican Republic–Central America Free Trade Agreement (CAFTA–DR) (2004) • Final Award, 18 September 2018 • Siqueiros, E. (President); Baker, C. M.; Nikken, P.	Shareholdings in several enterprises engaged in a construction project in Costa Rica known as Las Olas Project; ownership of 39 hectares of land in connection with this project.	• Whether treaty protection should be denied because Claimants breached domestic law requirement that 51% of shares be held by Costa Rican person (majority of shares were held in trust by Costa Rican company for a Claimant's benefit) (➜NO; such arrangements were common in Costa Rica; "Respondent's longtime tolerance of analogous structures bars it from challenging the legality of the structure in the instant case")
Cortec Mining v. Kenya • Kenya–United Kingdom BIT (1999) • Award, 22 October 2018 • Binnie, I. (President); Dharmananda, K.; Stern, B.	Investments in the Kenyan mining sector, including a 21-year mining license for the extraction of rare earths at the Mrima Hill project in the southern part of the country.	• Whether Claimant committed serious violation of host State law when making investment, by obtaining mining license without required environmental impact assessment (➜YES; BIT protects only lawful investments even if it does not explicitly say so; violation must be sufficiently serious so that denial of treaty protection is proportionate response)
Gavrilovic v. Croatia • Austria–Croatia BIT (1997) • Award, 26 July 2018 • Pryles, M. C. (President); Alexandrov, S. A.; Thomas, J. C.	Ownership and operation of a meat processing factory; ownership of related agricultural and grazing land in Croatia.	• Whether Respondent may object to Tribunal's jurisdiction on grounds that Claimants had committed illegalities when making investment, if Respondent itself was involved in such illegalities (➜NO; the illegalities cannot be imputed to the Claimants)
Unión Fenosa v. Egypt • Egypt–Spain BIT (1992) • Award, 31 August 2018 • Veeder, V. V. (President); Rowley, J. W.; Clodfelter, M. A. (Dissenting opinion)	Majority shareholding (80 per cent) in SEGAS, an Egyptian company that operated the Damietta liquefied natural gas plant in the port of Damietta.	• Whether Claimant committed acts of corruption when developing project and concluding gas purchase agreement (➜NO – BY MAJORITY; insufficient proof)
South American Silver v. Bolivia • Bolivia–United Kingdom BIT (1988) • Award, 30 August 2018 • Zuleta, E. (President); Orrego Vicuña, F. (Separate opinion); Guglielmino, O. C. (Dissenting opinion)	Rights under mining concessions held through claimant's wholly-owned subsidiary, Compañia Minera Malku Khota.	• Whether Tribunal lacked jurisdiction because Claimant did not have "clean hands" and failed to comply with requirement of legality of investment (➜NO; legality requirement applies even when not mentioned in IIA; alleged violations do not "go to the essence" of investment; denial of BIT protection would be disproportionate)

Source: UNCTAD.