



# IIA ISSUES NOTE

## INTERNATIONAL INVESTMENT AGREEMENTS

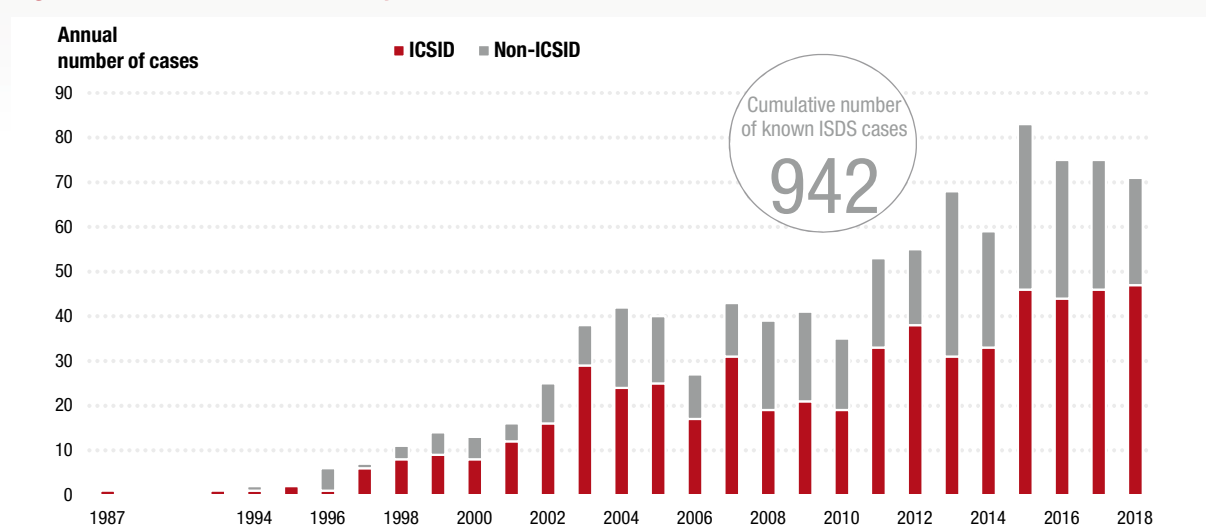


## FACT SHEET ON INVESTOR–STATE DISPUTE SETTLEMENT CASES IN 2018

### H I G H L I G H T S

- At least 71 treaty-based investor–State dispute settlement (ISDS) cases were initiated in 2018 (figure 1), all but one under old-generation treaties signed before 2012.
- As of 1 January 2019, the total number of known ISDS cases pursuant to international investment agreements (IIAs) had reached 942. To date, 117 countries are known to have been respondents to one or more ISDS claims.
- The new ISDS cases in 2018 were initiated against 41 countries. As in previous years, the majority of new cases were brought against developing countries and transition economies. Developed-country investors brought most of the 71 known cases.
- UNCTAD's World Investment Report 2019 (chapter III), to be launched on 12 June 2019, reviews reform-oriented provisions and new approaches to ISDS in IIAs signed in 2018 (Phase 1 of IIA Reform). It also analyses countries' reform actions to tackle old-generation treaties (Phase 2).

**Figure 1. Trends in known treaty-based ISDS cases, 1987–2018**



Source: UNCTAD, ISDS Navigator.

Note: Information has been compiled from public sources, including specialized reporting services. UNCTAD's statistics do not cover investor–State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signaled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continually adjusted as a result of verification processes and may not match exactly case numbers reported in previous years.

# 1. Trends in ISDS: new cases and outcomes

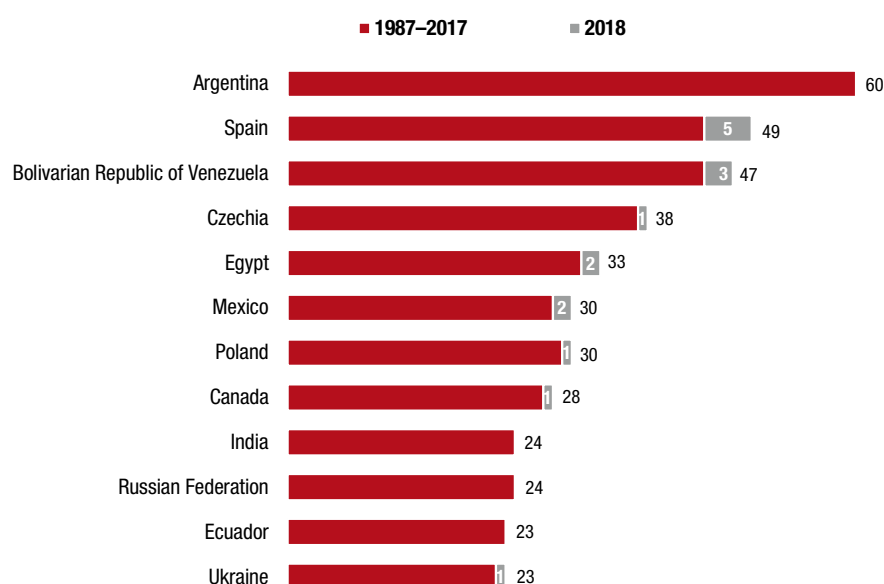
## (i) New cases initiated in 2018

In 2018, investors initiated 71 publicly known ISDS cases pursuant to IIAs (figure 1), a number nearly as high as in the previous three years. As of 1 January 2019, the total number of publicly known ISDS claims had reached 942. To date, 117 countries are known to have been respondents to one or more ISDS claims. As some arbitrations can be kept fully confidential, the actual number of disputes filed in 2018 and previous years is likely to be higher.

## Respondent States

The new ISDS cases in 2018 were initiated against 41 countries. Colombia was the most frequent respondent, with six known cases, followed by Spain with five. Three economies – Belarus, Qatar and Rwanda – faced their first known ISDS claim. As in previous years, the majority of new cases were brought against developing countries and transition economies. Overall, Argentina, Spain and Venezuela have received the largest share of claims over the years (figure 2).

**Figure 2. Most frequent respondent States, 1987–2018** (Number of known cases)

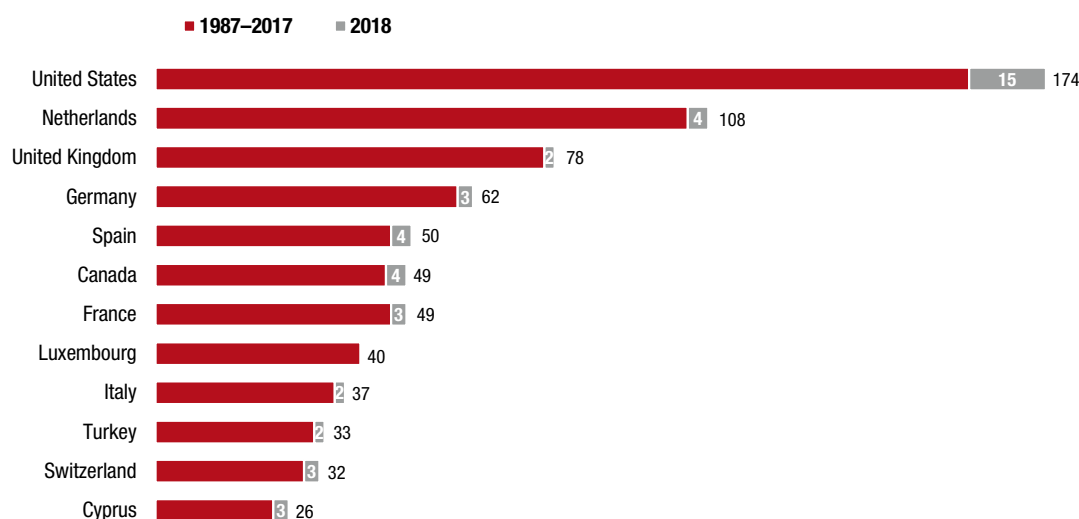


Source: UNCTAD, ISDS Navigator.

## Claimant home States

Developed-country investors brought most of the 71 known cases in 2018. The highest numbers of cases were brought by investors from the United States and the Russian Federation, with 15 and six cases respectively. Of all known cases, investors from the United States, the Netherlands and the United Kingdom have filed the largest shares (figure 3).

**Figure 3. Most frequent home States of claimants, 1987–2018** (Number of known cases)



Source: UNCTAD, ISDS Navigator.

### Intra-EU disputes

Less than 10 per cent of the 71 known cases filed in 2018 were intra-EU disputes (six cases), down from the historical average of 20 per cent. Four of these six disputes were brought on the basis of the Energy Charter Treaty; the remaining two invoked intra-EU BITs. The overall number of known arbitrations initiated by an investor from one EU member State against another totalled 178 at the end of 2018.

The decrease in intra-EU disputes has to be seen in the context of recent EU-level developments related to the *Achmea* case. EU member States' declarations on the (in)applicability of intra-EU BITs and the Energy Charter Treaty (to intra-EU relations), as well as related BIT termination actions, are likely to greatly reduce and eventually eliminate new treaty-based intra-EU disputes.<sup>1</sup>

### Applicable investment treaties

About 60 per cent of investment arbitrations in 2018 were brought under BITs and TIPs originally signed in the 1990s or earlier. The remaining cases were based on treaties signed between 2000 and 2011, except for one case that was based solely on a later treaty (*Manolium Processing v. Belarus*). The Energy Charter Treaty (1994) was the IIA invoked most frequently in 2018 (with seven cases), followed by the Canada–Colombia FTA (2008), the Republic of Korea–United States FTA (2007) and the Treaty on the Eurasian Economic Union (2014), with three cases each. Looking at the overall trend, about 20 per cent of the 942 known cases have invoked the Energy Charter Treaty (121 cases) or the North American Free Trade agreement (NAFTA) (63 cases).

### Economic sectors involved

About two thirds of the cases filed in 2018 related to activities in the services sector:

- Construction (12 cases)
- Supply of electricity, gas, steam and air (10 cases)
- Financial and insurance services (nine cases)
- Information and communication (eight cases)
- Real estate (four cases)
- Transportation and storage (three cases)

Primary industries accounted for 18 per cent of the new cases and manufacturing for 8 per cent; no sector data are available for the remaining cases (8 per cent).

<sup>1</sup> Following up on the legal consequences of the *Achmea* ruling, EU member States issued declarations in January 2019 that set a timeline for the termination of intra-EU BITs by 6 December 2019.

## Measures challenged

Investors in 2018 most frequently challenged the following types of State conduct:

- Alleged takeover, seizure or nationalization of investments (at least 12 cases)
- Termination, non-renewal or alleged interference with contracts or concessions (at least 12 cases)
- Alleged harassment by State authorities, improper criminal prosecution (including on fraud, corruption, money laundering or financing of terrorism charges) or wrongful detention or imprisonment (at least seven cases)
- Placement under administration and other actions allegedly resulting in bankruptcy or liquidation (at least five cases)
- Revocation or denial of licences or permits (at least five cases)
- Legislative reforms in the renewable energy sector (at least three cases)
- Alleged failure to exercise financial oversight functions over publicly listed companies (at least three cases)
- Alleged failure to address civil strikes and local community protests (at least two cases)

## Amounts claimed

Where information regarding the amounts sought by investors has been disclosed (in about half of the new cases), the reported amounts claimed range from \$3 million (*Seo v. Republic of Korea*) to \$15 billion (*International Holding Project Group and others v. Egypt*).

## (ii) ISDS outcomes

### Decisions and outcomes in 2018

In 2018, ISDS tribunals rendered at least 50 substantive decisions in investor–State disputes, 29 of which are in the public domain (at the time of writing). 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 provision.

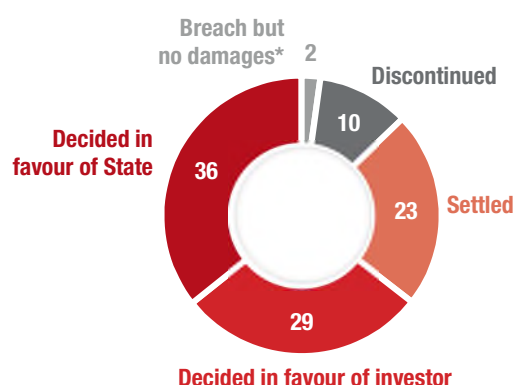
In addition, five publicly known decisions were rendered in annulment proceedings at the International Centre for Settlement of Investment Disputes (ICSID). Ad hoc committees of ICSID rejected the applications for annulment in all five cases.

### Overall outcomes

By the end of 2018, some 602 ISDS proceedings had been concluded. The relative share of case outcomes changed only slightly from that in previous years (figure 4). About 36 per cent of all concluded cases were decided in favour of the State (claims were dismissed either on jurisdictional grounds or on the merits), and about 29 per cent were decided in favour of the investor, with monetary compensation awarded. A quarter of the cases were settled; in most cases, the terms of settlement remained confidential. In the remaining proceedings, either the cases were discontinued or the tribunal found a treaty breach but did not award monetary compensation.

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 (figure 5).

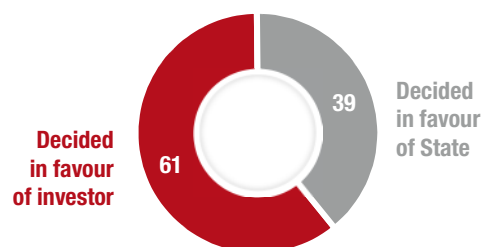
**Figure 4. Results of concluded cases, 1987–2018 (Per cent)**



Source: UNCTAD, ISDS Navigator.

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

**Figure 5. Results of decisions on the merits, 1987–2018 (Per cent)**



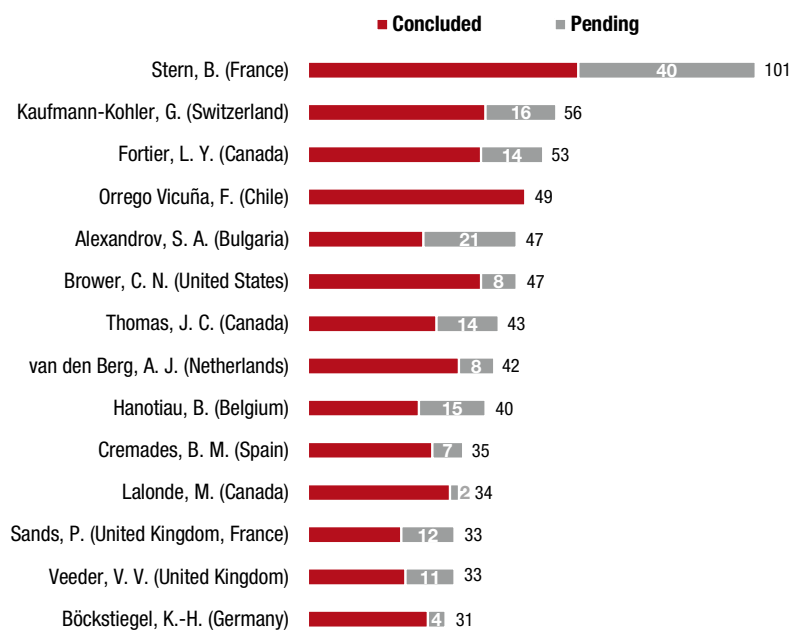
Source: UNCTAD, ISDS Navigator.

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).

### Appointments of arbitrators

Some 537 people have been appointed as arbitrators in the 942 known ISDS cases (original proceedings). About half have served on more than one known case, and 14 have been appointed to more than 30 cases each (figure 6). Many of those most frequently appointed are currently serving on more than 10 pending treaty-based ISDS cases.

**Figure 6. Most frequently appointed arbitrators, 1987–2018 (Number of appointments)**



Source: UNCTAD, ISDS Navigator.

Note: Information on arbitrator nationality is based on ICSID's database of arbitrators, conciliators and ad hoc Committee members.

## UNCTAD Policy Tools for IIA Reform

Investment Policy Framework for Sustainable Development (2015 version)

[https://unctad.org/en/PublicationsLibrary/diaepcb2015d5\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf)

Improving Investment Dispute Settlement: UNCTAD's Policy Tools (IIA Issues Note, No. 4, November 2018)

[https://unctad.org/en/PublicationsLibrary/diaepcb2017d8\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcb2017d8_en.pdf)

Reform Package for the International Investment Regime (2018 edition)

[https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD\\_Reform\\_Package\\_2018.pdf](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](https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d3_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/iaa-mapping>

Investment Dispute Settlement Navigator

<https://investmentpolicy.unctad.org/investment-dispute-settlement>

Investment Laws Navigator

<https://investmentpolicy.unctad.org/investment-laws>

## Annex 1. Known treaty-based ISDS cases initiated in 2018

Key information about each case is available at:

<https://investmentpolicy.unctad.org/investment-dispute-settlement>

No.	Full case name	Respondent State	Home State of claimant	Applicable IIA
1	<i>Abd-El-Aziz Saleh Esmail Abdallah Al-Rashed, Awrad International Holding, International Holding Project Group and others v. Arab Republic of Egypt</i> (ICSID Case No. ARB/18/31)	Egypt	Kuwait	Egypt–Kuwait BIT (2001)
2	<i>ACF Renewable Energy Limited v. Republic of Bulgaria</i> (ICSID Case No. ARB/18/1)	Bulgaria	Malta	Energy Charter Treaty (1994)
3	<i>Ain Telemedia Studios LLC, Talal Al Awamleh and Arab Telemedia Services LLC v. State of Qatar</i> (ICSID Case No. ARB/18/38)	Qatar	Jordan	Jordan–Qatar BIT (2009)

No.	Full case name	Respondent State	Home State of claimant	Applicable IIA
4	<i>Alberto Carrizosa Gelzis, Enrique Carrizosa Gelzis, Felipe Carrizosa Gelzis v. Republic of Colombia (I)</i>	Colombia	United States of America	Colombia–United States FTA (2006)
5	<i>Alcor Holdings Ltd. v. The Czech Republic</i> (PCA Case No. 2018-45)	Czechia	United Arab Emirates	Czech Republic–United Arab Emirates BIT (1994)
6	<i>Alexander Nelin v. Republic of Cyprus</i> (ICSID Case No. ARB/18/41)	Cyprus	Belarus	Belarus–Cyprus BIT (1998)
7	<i>Almasryia for Operating &amp; Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait</i> (ICSID Case No. ARB/18/2)	Kuwait	Egypt	Egypt–Kuwait BIT (2001)
8	<i>Ampex Retirement Master Trust, Apple Oaks Partners, LLC, Brentwood Associates Private Equity Profit Sharing Plan and others v. United Mexican States</i> (ICSID Case No. UNCT/18/4)	Mexico	United States of America	NAFTA (1992)
9	<i>Anina Pro Invest Ltd, Core Value Capital GmbH, Core Value Investments GmbH &amp; Co KG Gamma and others v. Romania</i> (ICSID Case No. ARB/18/19)	Romania	Austria; Cyprus; Germany; Netherlands	Energy Charter Treaty (1994)
10	<i>AS Windoor v. Republic of Kazakhstan</i> (ICSID Case No. ARB/18/32)	Kazakhstan	Estonia	Estonia–Kazakhstan BIT (2011)
11	<i>Astrida Benita Carrizosa v. Republic of Colombia (II)</i> (ICSID Case No. ARB/18/5)	Colombia	United States of America	Colombia–United States FTA (2006)
12	<i>Banco Bilbao Vizcaya Argentaria S.A. v. Plurinational State of Bolivia</i> (ICSID Case No. ARB(AF)/18/5)	Bolivia, Plurinational State of	Spain	Bolivia, Plurinational State of–Spain BIT (2001)
13	<i>Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda</i> (ICSID Case No. ARB/18/21)	Rwanda	United States of America	Rwanda–United States of America BIT (2008)
14	<i>beIN Corporation v. Saudi Arabia</i>	Saudi Arabia	Qatar	OIC Investment Agreement (1981)
15	<i>Bladon Enterprises Ltd and Germen Properties Ltd v. Romania</i> (ICSID Case No. ARB/18/30)	Romania	Cyprus	Cyprus–Romania BIT (1991)
16	<i>Carlyle Commodity Management L.L.C., Carlyle Investment Management L.L.C., Celadon Commodities Fund LP and others v. Kingdom of Morocco</i> (ICSID Case No. ARB/18/29)	Morocco	United States of America	Morocco–United States FTA (2004)
17	<i>Cascade Investments NV v. Republic of Turkey</i> (ICSID Case No. ARB/18/4)	Turkey	Belgium	BLEU (Belgium–Luxembourg Economic Union)–Turkey BIT (1986)
18	<i>Cem Selçuk Ersoy v. Republic of Azerbaijan</i> (ICSID Case No. ARB/18/6)	Azerbaijan	Turkey	Azerbaijan–Turkey BIT (1994)



No.	Full case name	Respondent State	Home State of claimant	Applicable IIA
19	<i>Christian Doutremepuich and Antoine Doutremepuich v. Mauritius</i> (PCA Case No. 2018-37)	Mauritius	France	France–Mauritius BIT (1973)
20	<i>Conseil Economique Des Pays Musulmans v. Kuwait</i> (PCA Case No. 2018-35)	Kuwait	Switzerland	Kuwait–Switzerland BIT (1998)
21	<i>Corporación América S.A. and Sociedad Aeroportuaria Kuntur Wasi S.A. v. Republic of Peru</i> (ICSID Case No. ARB/18/27)	Peru	Argentina	Argentina–Peru BIT (1994)
22	<i>Corral Morocco Holdings AB v. Kingdom of Morocco</i> (ICSID Case No. ARB/18/7)	Morocco	Sweden	Morocco–Sweden BIT (1990)
23	<i>Daniel W. Kappes and Kappes, Cassidy &amp; Associates v. Republic of Guatemala</i> (ICSID Case No. ARB/18/43)	Guatemala	United States of America	CAFTA–DR (2004)
24	<i>Delta Belarus Holding BV v. Republic of Belarus</i> (ICSID Case No. ARB/18/9)	Belarus	Netherlands	Belarus–Netherlands BIT (1995)
25	<i>Dick Fernando Abanto Ishivata v. Bolivarian Republic of Venezuela</i> (ICSID Case No. ARB(AF)/18/6)	Venezuela, Bolivarian Republic of	Peru	Peru–Venezuela, Bolivarian Republic of BIT (1996)
26	<i>Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan</i> (ICSID Case No. ARB/18/35)	Turkmenistan	Germany	Germany–Turkmenistan BIT (1997)
27	<i>EBL (Genossenschaft Elektra Baselland) and Tubo Sol PE2 S.L. v. Kingdom of Spain</i> (ICSID Case No. ARB/18/42)	Spain	Switzerland	Energy Charter Treaty (1994)
28	<i>ELA, U.S.A., INC. v. The Republic of Estonia</i>	Estonia	United States of America	Estonia–United States of America BIT (1994)
29	<i>Elías Abadi Cherem, Jaime Abadi Cherem, Abraham Abadi Tawil and others v. Kingdom of Spain</i> (ICSID Case No. ARB/18/22)	Spain	Mexico	Mexico–Spain BIT (2006)

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