JUNE 2018 ISSUE 2

IIA ISSUES NOTE
INTERNATIONAL INVESTMENT AGREEMENTS

UNITED NATIONS
UNCTAD

INVESTOR–STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2017

HIGHLIGHTS

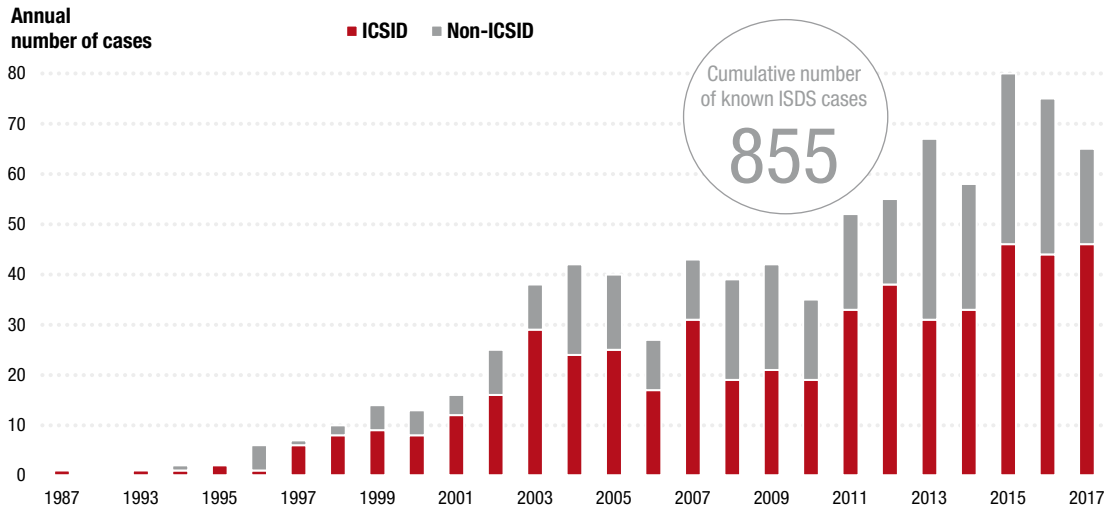
- The number of new investor–State dispute settlement (ISDS) claims remains high. In 2017, at least 65 new ISDS cases were initiated pursuant to international investment agreements (IIAs), bringing the total number of known cases to 855. About 80 per cent of the new cases were brought under bilateral investment treaties (BITs). The majority of the invoked treaties date back to the 1980s and 1990s.
- The new ISDS cases in 2017 were initiated against 48 countries. Croatia was the most frequent respondent with four cases, followed by India and Spain with three cases each. Developed-country investors brought most of the 65 known cases in 2017. Investors from the Netherlands and the United States initiated the most cases with eight each, followed by investors from the United Kingdom with six.
- Intra-EU disputes accounted for about one-fifth of all investment arbitrations initiated in 2017, down from one-quarter in the preceding year. A recent judgment of the European Court of Justice found that the arbitration clause contained in the Netherlands–Slovakia BIT (1991) was incompatible with EU law. This decision may have important implications for intra-EU BITs and future intra-EU disputes.
- In 2017, ISDS tribunals rendered at least 62 substantive decisions, 34 of which are in the public domain (at the time of writing). Of these public decisions, more than half of the decisions on jurisdictional issues were decided in favour of the State, whereas those on the merits were mostly decided in favour of the investor.
- In the past year's decisions, tribunals considered many issues that touched upon IIA reform topics (*WIR15*; UNCTAD, 2015). For instance, tribunals addressed changes to regulatory frameworks under the fair and equitable treatment provision, the police powers doctrine in relation to indirect expropriation claims, limitation periods for bringing claims and limitations on the treaty provisions subject to ISDS, compliance with host State law, the interpretation of the most-favoured-nation and of the umbrella clause.
- Also featuring prominently in the past year's decisions were issues surrounding the standing of State-owned enterprises, multiple ISDS claims, concurrent treaty arbitration and domestic court proceedings, corporate "seat" and abuse of rights, denial of benefits, and legislative reforms in the renewable energy sector.

1. Trends in investor–State dispute settlement: new cases and outcomes

a. New cases initiated in 2017

In 2017, investors initiated at least 65 investor-State dispute settlement (ISDS) cases pursuant to international investment agreements (IIAs) (figure 1). As of 1 January 2018, the total number of publicly known ISDS claims had reached 855. (On the basis of newly revealed information, the number of known cases for 2016 was adjusted to 75, and for 2015 to 80.) As some arbitrations can be kept fully confidential, the actual number of disputes filed in 2017 and previous years is likely to be higher.

Figure 1. Trends in known treaty-based ISDS cases, 1987–2017



Source: UNCTAD, ISDS Navigator.

Note: Information has been compiled on the basis of 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 signalled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continuously adjusted as a result of verification processes and may not match case numbers reported in previous years.

Respondent States

The new ISDS cases in 2017 were initiated against 48 countries. Croatia was the most frequent respondent with four cases, followed by India and Spain with three cases each (figure 2). Four economies – Bahrain, Benin, Iraq and Kuwait – faced their first (known) ISDS claims. As in previous years, the majority of new cases were brought against developing countries and transition economies. So far, 113 countries have been respondents to one or more known ISDS claims.

Home States of claimants

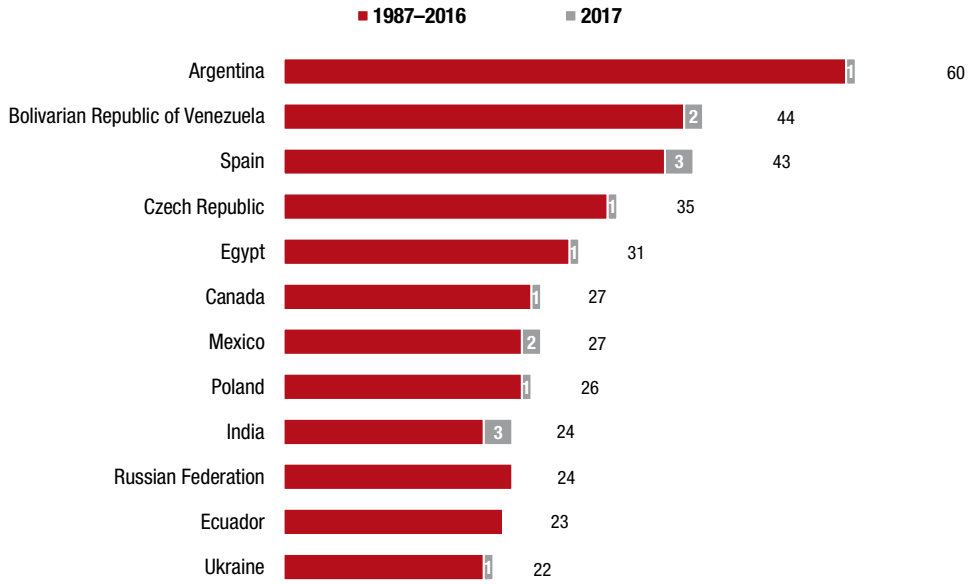
Developed-country investors brought most of the 65 known cases in 2017. Investors from the Netherlands and the United States initiated the most cases with eight cases each, followed by investors from the United Kingdom with six (figure 3). Investors from Turkey were the most active claimants from developing countries, with four cases filed in 2017.

Intra-EU disputes

Intra-EU disputes accounted for about one-fifth of all investment arbitrations initiated in 2017, down from one-quarter in the preceding year. The overall number of arbitrations initiated by an investor from one EU member State against another totalled 168 by the end of 2017, i.e. 20 per cent of the total number of cases globally.

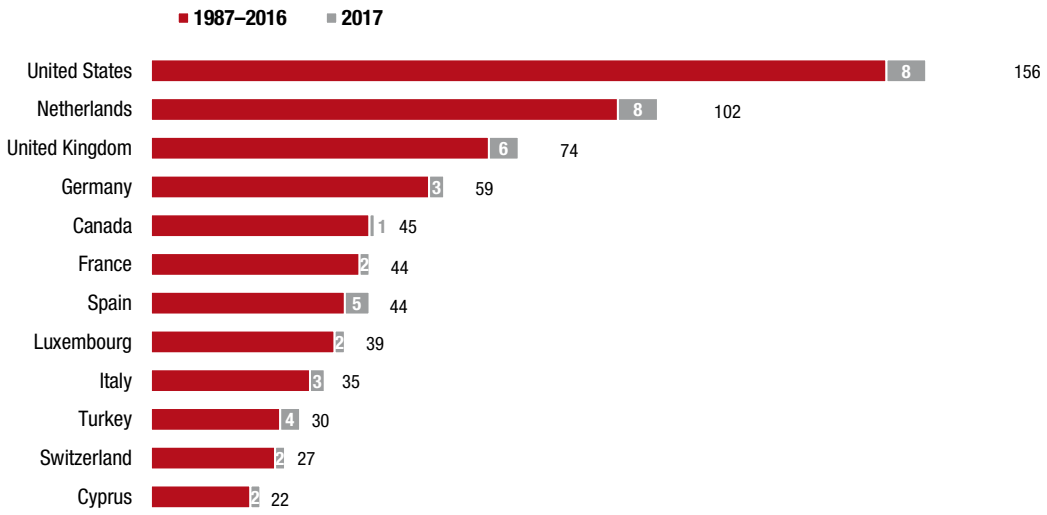
A recent judgment of the European Court of Justice (ECJ) found that the arbitration clause contained in the Netherlands–Slovakia BIT (1991) was incompatible with EU law (box 1). This decision may have important implications for intra-EU BITs and future intra-EU disputes.[1]

Figure 2. Most frequent respondent States, 1987–2017 (Number of known cases)



Source: UNCTAD, ISDS Navigator.

Figure 3. Most frequent home States of claimants, 1987–2017 (Number of known cases)



Source: UNCTAD, ISDS Navigator.

Applicable investment treaties

About 80 per cent of investment arbitrations in 2017 were brought under BITs. The remaining arbitrations were based on treaties with investment provisions (TIPs), or on BITs and TIPs in combination. The majority of the IIAs invoked in 2017 date back to the 1980s and 1990s. The IIAs most frequently invoked in 2017 were the Energy Charter Treaty (with six cases), the Austria–Croatia BIT (three cases) and the North American Free Trade Agreement

[1] ECJ, *Slovak Republic v. Achmea B.V.* (Case C-284/16), Judgment, 6 March 2018.

(NAFTA) (two cases). Looking at the overall trend, about 20 per cent of all known cases have invoked the Energy Charter Treaty (113 cases) or NAFTA (61 cases).

Box 1. ECJ judgment on arbitration clause in intra-EU BIT

The decision rendered by the ECJ on 6 March 2018 found that the arbitration clause in the Netherlands–Slovakia BIT (1991) had an adverse effect on the autonomy of EU law, and was therefore incompatible with such law.[a] The ECJ judgment related to a long-running investment arbitration brought by a Dutch claimant against Slovakia under UNCITRAL rules. An arbitral tribunal decided in favour of the claimant in 2012, after having assumed jurisdiction over the claims in a 2010 decision.[b] Slovakia sought to set aside the arbitral decisions before German courts, contending that the arbitration clause in the invoked intra-EU BIT was contrary to several provisions of the Treaty on the Functioning of the European Union. The German Federal Court of Justice (Bundesgerichtshof), hearing Slovakia's appeal case, submitted the request for a preliminary ruling to the ECJ.

Source: UNCTAD.

Notes:

[a] ECJ, *Slovak Republic v Achmea BV* (Case C-284/16), Judgment, 6 March 2018.

[b] *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic (I) (PCA Case No. 2008-13)*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010; Award, 7 December 2012.

Economic sectors involved

About 70 per cent of the cases filed in 2017 related to activities in the services sector, including these:

- Financial and insurance services (11 cases)
- Construction (9 cases)
- Supply of electricity, gas, steam and air (7 cases)
- Information and communication (6 cases)
- Transportation and storage (4 cases)

Primary industries and manufacturing each accounted for 15 per cent of new cases. This is broadly in line with the overall distribution of the 855 known ISDS cases filed to date.

Measures challenged

Investors in 2017 most frequently challenged the following types of State conduct:

- Domestic legal proceedings and decisions (at least 7 cases)
- Termination of contracts or concessions, and revocation or non-renewal of licenses (at least 7 cases)
- Placement under administration and other actions allegedly resulting in bankruptcy or liquidation (at least 6 cases)
- Alleged takeover, seizure or nationalization of investments (at least 5 cases)
- Legislation prescribing changes in the currency of loans and mortgages (at least 4 cases)
- Tax-related measures such as allegedly unlawful tax assessments or the denial of tax exemptions (at least 4 cases)
- Legislative reforms in the renewable energy sector (at least 2 cases)

Other conduct that was challenged included alleged harassment by State authorities, unfair or discriminatory treatment, fraudulent misrepresentation and anti-money laundering regulations.

Amounts claimed

Where information regarding the amounts sought by investors has been disclosed (in about one-quarter of the new cases), the amounts claimed range from $15 million (*Arin Capital and Khudyan v. Armenia*) to $1.5 billion (*MAKAE v. Saudi Arabia*).[2]

[2] Reference to "dollars" ($) means United States dollars, unless otherwise indicated.

b. ISDS outcomes

Decisions and outcomes in 2017

In 2017, ISDS tribunals rendered at least 62 substantive decisions, 34 of which are in the public domain (at the time of writing).[3] Of these public decisions, more than half of the decisions on jurisdictional issues were decided in favour of the State, whereas those on the merits were mostly decided in favour of the investor. More specifically:

- Thirteen decisions (including rulings on preliminary objections) principally addressed jurisdictional issues, with five upholding the tribunal's jurisdiction and eight denying jurisdiction.
- Eighteen decisions on the merits were rendered in 2017, with 12 accepting at least some investor claims and 6 dismissing all of the claims. In the decisions holding the State liable, tribunals most frequently found breaches of the expropriation and the fair and equitable treatment (FET) provisions. In one decision, the tribunal found that the State had breached the IIA but decided that no compensation was due.
- Three publicly known decisions were rendered in ICSID annulment proceedings. ICSID ad hoc committees rejected two applications for annulment and partially annulled one award.

Overall outcomes

By the end of 2017, some 548 ISDS proceedings had been concluded. The relative shares of case outcomes changed only slightly from that in 2016. About one-third of all concluded cases were decided in favour of the State (claims were dismissed either on jurisdictional grounds or on the merits), and about one-quarter were decided in favour of the investor, with monetary compensation awarded. A quarter of cases were settled; in most cases, the specific terms of settlements remain confidential. In the remaining proceedings, cases were either discontinued or the tribunal found a treaty breach but did not award monetary compensation (figure 4).

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 40 per cent in favour of the State (figure 5).

Overall amounts claimed and awarded

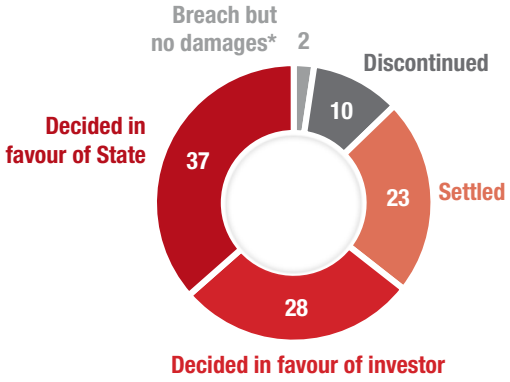
On average, successful claimants were awarded about 40 per cent of the amounts they claimed. In cases decided in favour of the investor, the average amount claimed was $1.3 billion and the median $118 million. The average amount awarded was $504 million and the median $20 million.[4] These amounts do not include interest or legal costs, and some of the awarded sums may have been subject to set-aside or annulment proceedings.

The combined $114 billion claimed and $50 billion awarded in three cases related to the Yukos company (brought by Hulley Enterprises, Veteran Petroleum and Yukos Universal against the Russian Federation) were the highest in the history of investment treaty arbitration. These arbitration awards have been set aside by The Hague District Court; its judgment was appealed and the appeal is currently pending. Excluding these values from the calculations above, the average amount claimed falls to $454 million and the amount awarded to $125 million, i.e. about 28 per cent of the amount claimed.

[3] This number includes decisions (awards) on jurisdiction and awards on liability and damages (partial and final) as well as follow-on decisions such as decisions rendered in ICSID annulment proceedings and ICSID resubmission proceedings. It does not include decisions on provisional measures, disqualification of arbitrators, procedural orders, discontinuance orders, settlement agreements or decisions of domestic courts.

[4] The amount claimed or awarded refers to the amount of monetary compensation awarded by the arbitral tribunal to the claimant, not including interest, legal costs or costs of arbitration.

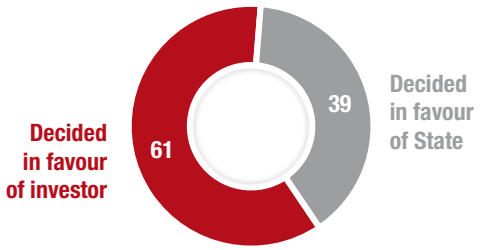
Figure 4. Results of concluded cases, 1987–2017 (Per cent)



Source: UNCTAD, ISDS Navigator.

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

Figure 5. Results of decisions on the merits, 1987–2017 (Per cent)



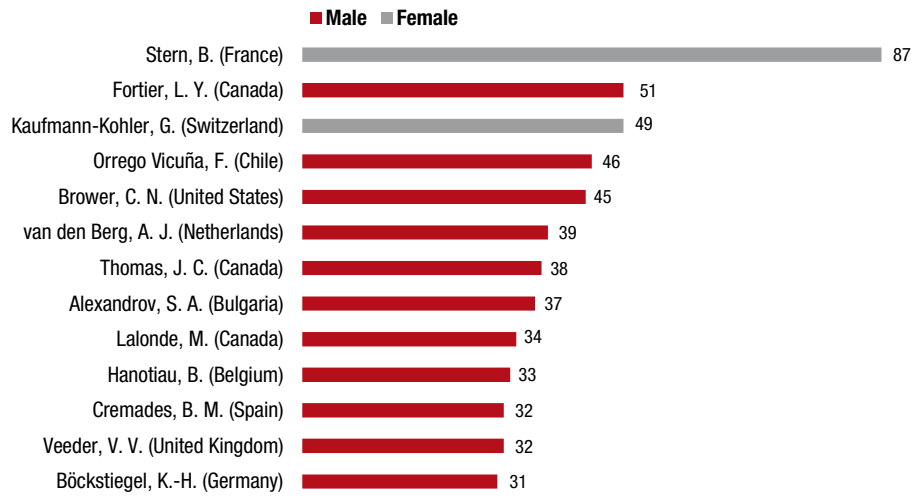
Source: UNCTAD, ISDS Navigator.

Note: Excluding 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

About 500 people have been appointed as arbitrators in known ISDS cases (original proceedings). About half have served on more than one known case. A small number of people have been appointed to more than 30 cases each (figure 6), with three having received the most appointments. All but one are citizens of European or North American countries. Interesting from a gender perspective is that 11 of the 13 are men, and that the two women are among the three people having received the most appointments.

Figure 6. Most frequently appointed ICSID arbitrators, 1987–2017 (Number of appointments)



Source: UNCTAD, ISDS Navigator.

Note: Information on nationality and gender compiled on the basis of ICSID's database of arbitrators, conciliators and ad hoc Committee members.

2. Decisions in 2017: an overview

a. Jurisdictional and admissibility issues

The standing of State-owned enterprises

In *Beijing Urban Construction v. Yemen*, the respondent State argued that the claimant, a State-owned entity, did not qualify as "a national of another Contracting State" under ICSID Convention Article 25(1) because it was allegedly an agent of the Chinese Government and discharged governmental functions even in its ostensibly commercial undertakings.[5] The tribunal accepted that the ICSID dispute resolution mechanism "is not open to State-owned companies as claimants when acting as agents of the State or when engaged in activities where they exercise governmental functions".[6] It concluded, however, that the claimant in the case before it was neither acting as an agent nor fulfilling Chinese governmental functions within the territory of the respondent State.[7] In the tribunal's view, the respondent State's assertion that the Chinese Government was the ultimate decision maker for the claimant, a contractor for an international airport project in Yemen, was "too remote from the facts of the [claimant's] project to be relevant".[8]

In *China Heilongjiang and others v. Mongolia*, the respondent State argued that the claimants did not qualify as "investors" under the China–Mongolia BIT (1991) on the ground that they were "not motivated to make a profit"; did not function with "sufficient independence" from their owner, the Chinese State; and were in fact "quasi-instrumentalities of the Chinese government", "under the direct control of the Chinese government, and […] under express instruction to invest abroad in order to serve China's foreign policy goals".[9]

The UNCITRAL tribunal rejected the argument. It found "no basis" in the BIT to impose restrictions on investors based upon their organization, business purpose, ownership, or control.[10] Instead, it considered that the treaty simply required that an investor be "any kind of legal entity engaging in economic or business activities".[11] Accordingly, the tribunal determined that "the fact that the Chinese State directly or indirectly own[ed] Beijing Shougang and China Heilongjiang ha[d] no relevance for the purpose of their qualification as 'economic entities' under Article 1(2) of the Treaty".[12] The tribunal found no evidence in support of the respondent State's assertion that the claimants had acted as "quasi-instrumentalities of the Chinese government" or otherwise acted under the express instructions of the Chinese Government.[13] It concluded that, in the circumstances of the case, all three claimants qualified as investors under the applicable treaty.

Whether a trustee qualifies as investor

In *Blue Bank v. Venezuela*, the claimant brought the action as the trustee for a trust whose assets included shareholdings in companies that had indirectly made investments in Venezuela.[14] The tribunal concluded that the trustee was not an "investor" as it had not "made an 'investment'" pursuant to the terms of the Barbados–Venezuela BIT (1994).[15] Looking to the law of Barbados – the law under which the trust had been established – the tribunal observed that "by acting in its capacity as trustee, the Claimant cannot be considered as having committed any assets in its own right, as having incurred any risk, or as sharing the loss or profit resulting from the investment".[16] As a result, the tribunal concluded that the trustee had "no ownership rights in respect of the assets of the [trust],

[5] *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (ICSID Case No. ARB/14/30), Decision on Jurisdiction, 31 May 2017, para. 147.
[6] Ibid., para. 31.
[7] Ibid., paras. 41 and 44.
[8] Ibid., para. 43.
[9] *Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia* (PCA Case No. 2010-20), Award, 30 June 2017, para. 408.
[10] Ibid., para. 412.
[11] Ibid., para. 415.
[12] Ibid., para. 417.
[13] Ibid., para. 418.
[14] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20), Award, 26 April 2017, para. 135.
[15] Ibid., para. 172.
[16] Ibid., para. 163.

that it ha[d] not brought a claim on its own behalf – whether as a nominal or beneficial owner – and that, accordingly, [it] ha[d] not invested the relevant assets under the terms of the BIT".[17]

Trademark as investment

In *Bridgestone v. Panama*, the tribunal considered whether a trademark could qualify as an investment under the Panama–United States Trade Promotion Agreement (2007), which lists intellectual property rights among the assets covered and requires such assets to have the characteristics of an investment (e.g. commitment of capital or other resources, expectation of gain or profit, assumption of risk).[18]

Considering the characteristics of investment an "overriding" but not "inflexible" requirement,[19] the tribunal drew a distinction between "the mere registration of a trademark", which it concluded would "manifestly […] not amount to, or have the characteristics of, an investment", and the situation presented "if the trademark is exploited".[20] Exploitation, the tribunal observed, could take a variety of forms, including "the manufacture, promotion and sale of goods that bear the mark", or the grant of a license to exploit the trademark under a franchise agreement.[21] For the tribunal, the key was to determine whether the trademark was being "exploited by its owner by activities that, together with the trademark itself, have the normal characteristics of an investment".[22] The tribunal determined that one of the claimants, Bridgestone Americas, carried out the activities involved in exploiting the two trademarks at issue and that they constituted investments in Panama owned or controlled by the claimant.[23]

Contractual rights as an investment

In *Koch Minerals v. Venezuela*, the tribunal considered whether the claimants' rights under an off-take agreement (which granted the claimants the right to purchase a guaranteed quantity of fertilizers at a discounted price for a 20-year term) constituted an "investment" under the relevant BIT and under Article 25 of the ICSID Convention. With respect to the meaning of "investment" under the BIT, the tribunal observed that the treaty defined "investment" broadly, as including "every kind of asset", and identified claims to performance under a contract as an asset meeting the definition of "investment".[24]

For the purposes of Article 25 of the ICSID Convention, the tribunal looked at the "unity of investment".[25] While it accepted that a "pure sales contract" could not, by itself, constitute an investment under Article 25,[26] the tribunal established that the off-take agreement was part of a much larger investment operation – "by any standards, a legal and economic behemoth".[27] On this basis, looking at the unity of the investment, the tribunal concluded that the off-take agreement satisfied the requirements of an investment under both the BIT and the ICSID Convention.[28]

Tribunal's duty to assess legality of investment

In *Infinito Gold v. Costa Rica*, a non-disputing party, in its submission under ICSID Rule 37, urged the tribunal to decline jurisdiction asserting that the claimant's investment had not been made in accordance with Costa Rican law.[29] In particular, the non-disputing party alleged that the public officials involved in the granting of the claimant's concession had intentionally violated the law, leading to criminal proceedings for malfeasance in office that were pending in Costa Rica. Both the claimant and the respondent State disagreed with the non-disputing