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INVESTOR–STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2016

HIGHLIGHTS

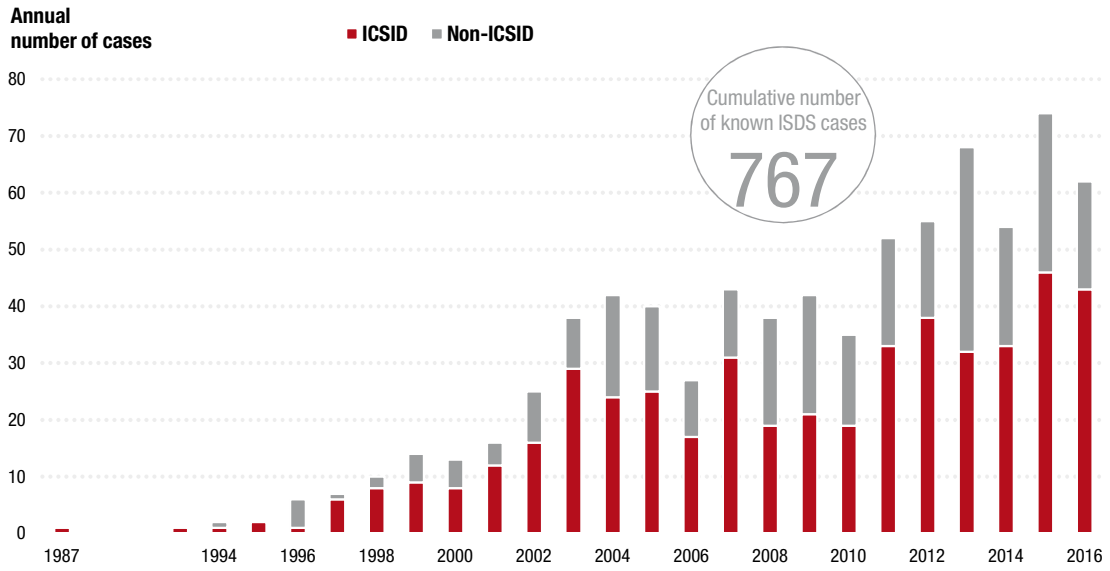
- The rate of new treaty-based investor–State dispute settlement (ISDS) cases continued unabated. In 2016, 62 new cases were initiated pursuant to international investment agreements (IIAs), bringing the total number of known cases to 767. Looking at the totality of decisions on the merits by the end of 2016, about 60 per cent were decided in favour of the investor and 40 per cent in favour of the State.
- The new ISDS cases in 2016 were commenced against 41 countries. With four cases each, Colombia, India and Spain were the most frequent respondents. Developed-country investors brought most of the 62 known cases in 2016. Investors from the Netherlands and the United States initiated the most cases with 10 each, followed by investors from the United Kingdom with 7.
- About two thirds of ISDS cases in 2016 were brought under bilateral investment treaties (BITs), most of them dating back to the 1980s and 1990s. The remaining arbitrations were based on treaties with investment provisions (TIPs). The IIAs most frequently invoked in 2016 were the Energy Charter Treaty (ECT) (with 10 cases), the North American Free Trade Agreement (NAFTA) and the Russian Federation–Ukraine BIT (3 each).
- In 2016, ISDS tribunals rendered at least 57 substantive decisions, 41 of which are in the public domain (at the time of writing). Of these public decisions, 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 topics identified in UNCTAD's Road Map for IIA Reform (*WIR15*) and its Investment Policy Framework for Sustainable Development (UNCTAD, 2015). For instance, tribunals addressed the right to regulate to protect public health under the fair and equitable treatment (FET) and indirect expropriation clauses (*Philip Morris v. Uruguay),* the limitation period for bringing ISDS claims (*Berkowitz and others v. Costa Rica),* a State counterclaim concerning the investors' alleged violation of human rights (*Urbaser and CABB v. Argentina*), and the interpretation of the most-favoured-nation (MFN) clause in IIAs (*Içkale v. Turkmenistan)* as well as in the WTO General Agreement on Trade in Services (GATS) (*MMEA and AHSI v. Senegal).*
- The wording of specific treaty provisions is a key factor in case outcomes, underlining the importance of balanced and careful treaty drafting. This not only applies to future treaties, but also calls for modernizing the existing stock of old-generation treaties. UNCTAD's World Investment Report 2017 presents and analyses the pros and cons of 10 policy options that countries can take to reform their old-generation treaties (chapter III, *WIR17*).

1. Trends in investor–State dispute settlement

a. New cases initiated in 2016

In 2016, investors initiated 62 known ISDS cases pursuant to IIAs (figure 1). This number is lower than the 74 initiated in the preceding year, but higher than the 10-year average of 49 cases per year (2006–2015). As of 1 January 2017, the total number of publicly known ISDS claims had reached 767. So far, 109 countries have been respondents to one or more known ISDS claims. As arbitrations can be kept confidential under certain circumstances, the actual number of disputes filed for this and previous years is likely to be higher.

Figure 1. Trends in known treaty-based ISDS cases, 1987–2016



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 and may not match case numbers reported in previous years.

Respondent States

The new ISDS cases in 2016 were commenced against 41 countries. With four cases each, Colombia, India and Spain were the most frequent respondents (figure 2). The cases against Colombia are the first known in the country's history. At 29 per cent, the relative share of cases against developed countries was lower than in 2015 (45 per cent).

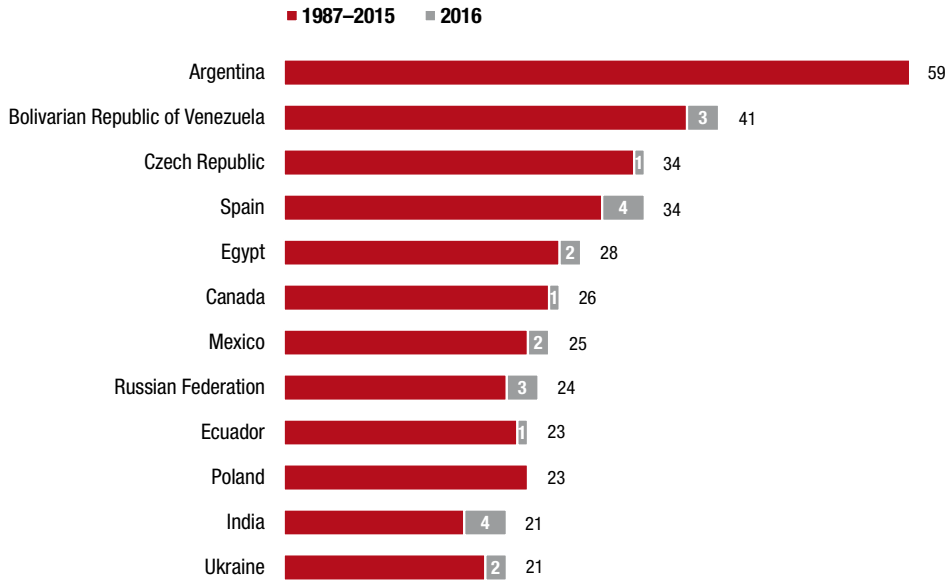
Home States of claimants

Developed-country investors brought most of the 62 known cases in 2016. Investors from the Netherlands and the United States initiated the most cases with 10 each, followed by investors from the United Kingdom with 7 (figure 3). Investors from the Russian Federation, Turkey, Ukraine and the United Arab Emirates were the most active claimants from developing countries and transition economies, with two cases each filed in 2016.

Intra-EU disputes

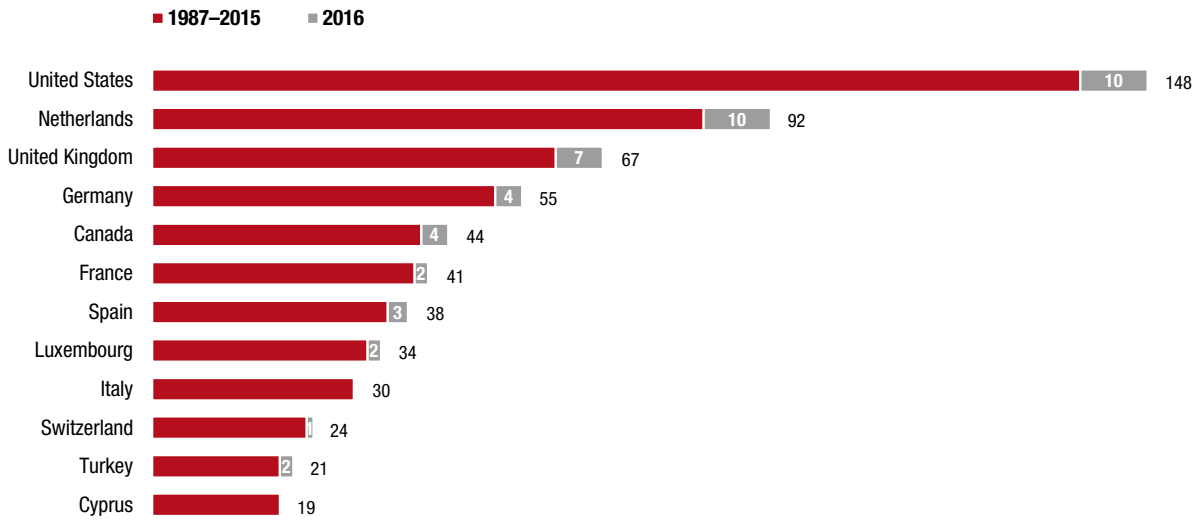
Intra-EU disputes accounted for about one quarter of investment arbitrations initiated in 2016, down from one third in the three preceding years. The overall number of known intra-EU investment arbitrations initiated by an investor from one EU member State against another member State, totalled 147 by the end of 2016, i.e. approximately 19 per cent of all known cases globally.

Figure 2. Most frequent respondent States, 1987–2016 (Number of known cases)



Source: ©UNCTAD, ISDS Navigator.

Figure 3. Most frequent home States of claimants, 1987–2016 (Number of known cases)



Source: ©UNCTAD, ISDS Navigator.

Applicable investment treaties

About two thirds of investment arbitrations in 2016 were brought under BITs, most of them dating back to the 1980s and 1990s. The remaining arbitrations were based on treaties with investment provisions (TIPs). The IIAs most frequently invoked in 2016 were the ECT (with 10 cases), NAFTA and the Russian Federation–Ukraine BIT (3 cases each). Looking at the overall trend, virtually all of today's known ISDS cases are based on treaties concluded before the year 2010; about 20 per cent of all known cases invoked the ECT (99 cases) or NAFTA (59 cases).

Economic sectors involved

About 60 per cent of the cases filed in 2016 related to activities in the services sector, including the following:

- Supply of electricity and gas (11 cases)
- Construction (6 cases)

- Information and communication (6 cases)
- Financial and insurance services (4 cases)
- Real estate (3 cases)
- Transportation and storage; and arts, entertainment and recreation (2 cases each)
- Accommodation and food service, and administrative and support service (1 case each)

Primary industries accounted for 24 per cent of new cases, and manufacturing for the remaining 16 per cent. This is broadly in line with the overall distribution of the 767 known ISDS cases filed to date.

Measures challenged

Investors in 2016 most frequently challenged the following types of State conduct:

- Alleged direct expropriations of investments (at least 7 cases)
- Legislative reforms in the renewable energy sector (at least 6 cases)
- Tax-related measures such as allegedly unlawful tax assessments or the denial of tax exemptions (at least 5 cases)
- Termination, non-renewal or alleged interference with contracts or concessions (at least 5 cases)
- Revocation or denial of licences or permits (at least 5 cases)

Other measures that were challenged included the designation of national heritage sites, environmental conservation zones, indigenous protected areas and national parks; and money laundering and anti–corruption investigations.[1]

Amounts claimed

The amounts claimed ranged from $10 million (*Grot and others v. Moldova* and *Görkem Insaat v. Turkmenistan)* to $16.5 billion (*Cosigo Resources and others v. Colombia*).[2] Information regarding the amounts sought by investors has been reported for about half of the new cases.

b. ISDS outcomes

Decisions and outcomes in 2016

In 2016, ISDS tribunals rendered at least 57 substantive decisions in investor–State disputes, 41 of which are in the public domain (at the time of writing).[3] Of these public decisions, 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:

- Twelve decisions (including rulings on preliminary objections) principally addressed jurisdictional issues, with six upholding the tribunal's jurisdiction[4] and six denying jurisdiction over the investors' claims.
- Twenty decisions on the merits were rendered in 2016, with 14 accepting at least some investor claims and 6 dismissing all the claims. In the decisions holding the State liable, tribunals most frequently found breaches of the FET provision and the expropriation provision. In two decisions, tribunals found that the State breached the IIA but decided that no compensation was due.
- One decision in an ICSID resubmitted case confirmed the breaches found by the original tribunal but held that no monetary compensation was due.
- Eight publicly known decisions were rendered in ICSID annulment proceedings. ICSID *ad hoc* committees rejected six applications for annulment and partially annulled two awards.

[1] Information about several cases is lacking.
[2] Reference to "dollars" ($) means United States dollars, unless otherwise indicated.
[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] Four out of the six decisions upholding the tribunal's jurisdiction were rendered in the course of proceedings concerning preliminary objections to jurisdiction raised by the respondent State.

Overall outcomes

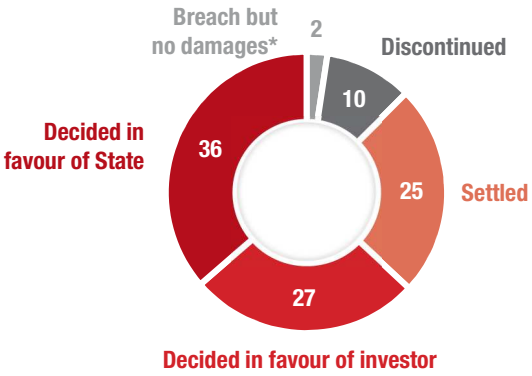
By the end of 2016, some 495 ISDS proceedings had been concluded. The relative shares of case outcomes changed only slightly from those of 2015. About one third of concluded cases were decided in favour of the State (claims were dismissed either on jurisdictional grounds or on the merits), and about one quarter were decided in favour of the investor, with monetary compensation awarded (figure 4). A quarter of cases were settled; in most, the specific terms of settlements remain confidential.[5] In the remaining proceedings, either cases were discontinued or the tribunal found a treaty breach but did not award monetary compensation.

Of the cases that ended in favour of the State, about half were dismissed for lack of jurisdiction.[6] 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).

Average 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 $1.4 billion and the median $100 million. The average amount awarded was $545 million and the median $20 million.[7]

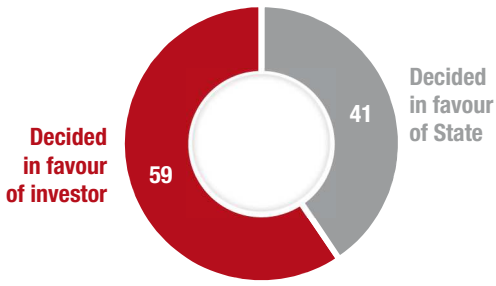
Figure 4. Results of concluded cases, 1987–2016 (Per cent)



Source: ©UNCTAD, ISDS Navigator.

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

Figure 5. Results of decisions on the merits, 1987–2016 (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).

[5] One of the important cases settled in 2016 is *Abaclat and others v. Argentina*, the largest mass claims dispute brought to investment arbitration to date (over 60,000 claimants). The case was settled for $1.35 billion. See *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic* (ICSID Case No. ARB/07/5), Consent Award under ICSID Arbitration Rule 43(2), 29 December 2016. This settlement follows the discontinuance of two other (smaller) sovereign debt-related claims against Argentina (*Ambiente Ufficio and others v. Argentina* and *Alemanni and others v. Argentina*).

[6] These are cases in which a tribunal found, for example, that the asset or transaction did not constitute a "covered investment", that the claimant was not a "covered investor", that the dispute arose before the treaty entered into force or fell outside the scope of the ISDS clause, that the investor had failed to comply with certain IIA-imposed conditions (e.g. the mandatory local litigation requirement) or other reasons that deprived the tribunal of the competence to decide the case on the merits.

[7] 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.

2. Decisions in 2016: an overview

a. Jurisdictional and admissibility issues

The meaning of "investment" and extra-textual criteria (characteristics of investment)

In *RREEF v. Spain*,[8] the respondent State argued that the claimants had not made an investment in Spain within the meaning of the ECT (1994) or the ICSID Convention. In particular, the respondent State contended that the claimants had not contributed economic resources into Spain or assumed any risk in the projects; the funds had been contributed by other entities.[9] According to the respondent State, the claimants were simply shell companies without any real business or economic object.[10]

The tribunal found that the claimants' assets fell within the ECT's open asset-based definition of "investment".[11] The tribunal rejected the attempt to add extra-textual elements to that definition: "There is no test, set of criteria or guidelines that can or should be relied upon in international law to restrict or replace the definition that exists in the ECT. There is no reason to place any such test, set of criteria or guidelines on the language of Article 25 of the ICSID Convention."[12] Turning to the respondent State's argument that the assumption of risk was an intrinsic characteristic of "investment", the tribunal decided that it would be "improper" to read this or criteria such as the contribution of economic resources and duration into the ECT or the ICSID Convention.[13]

The meaning of corporate "seat" for purposes of coverage under a BIT

In *CEAC v. Montenegro*,[14] the claimant sought protection under the Cyprus–Montenegro BIT (2005), alleging that – as required by the BIT – its "seat" of business was in Cyprus. The claimant relied on a certificate of registered office issued by the Cypriot authorities. The tribunal ruled that it was "not bound by the nationality determinations and the certificates issued by domestic authorities, but must make its own determination under international law".[15] Having examined the available evidence, the tribunal concluded that the "Claimant has not proven […] that the [office building] is accessible to the public for purposes of inspecting the company's registers, that CEAC is amenable to service at that address, that the company's records are kept there or that the address bears a plate with CEAC's name".[16] On this basis, the tribunal's majority held that the claimant had failed to establish that it had its seat, in the meaning of a registered office, in Cyprus.[17]

The tribunal in *Tenaris and Talta v. Venezuela* (II)[18] found that the concept of "seat" could not be understood as statutory seat, but rather as *effective* seat, i.e. the place where the company's management activities took place.[19] To this effect, it tested three criteria to determine whether the seat was effective, namely (i) where shareholder and board administration meetings took place, (ii) where the management activities (establishing contacts with clients, conclusion of the principal contracts, main financial activities) took place, and finally (iii)

[8] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/30), Decision on Jurisdiction, 6 June 2016.
[9] Ibid., paras. 149-150.
[10] Ibid., para. 134.
[11] Ibid., paras. 156, 160.
[12] Ibid., para. 157.
[13] Ibid., para. 158. In *Garanti Koza LLP v. Turkmenistan*, the tribunal similarly refused to graft extra-textual elements onto the definition of "investment" in the Turkmenistan–United Kingdom BIT (1995) or Article 25 of the ICSID Convention (see *Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20), Award, 19 December 2016, paras. 231-234; 239-242). However, the opposite conclusion was reached in *Vestey Group Ltd v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/06/4), Award, 15 April 2016, para. 187 ("[T]he term 'investment' in Article 25 of the ICSID Convention has an independent meaning [and] comprises three components: a commitment or allocation of resources, risk, and duration").
[14] *CEAC Holdings Limited v. Montenegro* (ICSID Case No. ARB/14/8), Award, 26 July 2016.
[15] Ibid., para. 155.
[16] Ibid., para. 199.
[17] Ibid., paras. 200-201. The tribunal additionally rejected the claimant's alternative arguments that it was managed and controlled from Cyprus at the relevant time (ibid., para. 207), and that the term "seat" under the BIT should be equated to tax residency (ibid., paras. 210-211).
[18] *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (II) (ICSID Case No. ARB/12/23), Award, 12 December 2016.
[19] Ibid., paras. 189-190.

where the books and accounts were located.[20] The tribunal concluded that the claimants had fulfilled these criteria.[21]

In another ICSID case between the same disputing parties, *Tenaris and Talta v. Venezuela* (I),[22] the tribunal – consisting of three different arbitrators – similarly interpreted the notion of "seat" to mean "the place of actual or effective management".[23] The tribunal emphasized that it must take into account the precise nature of the company in question. In this case, it found that either of the claimants was a "holding company" whose "day-to-day 'management' will necessarily be very limited, and so will its physical links with its corporate seat".[24] The tribunal explained that "it would be entirely unreasonable to expect a mere holding company […] to maintain extensive offices or workforce, or to be able to provide evidence of extensive activities, at its corporate location".[25] To the tribunal, the claimants met the legal test of "actual or effective management" as they had premises in the respective home States, held annual general meetings and/or board meetings there, and had certain other documented ties.[26]

Illegality in the operation of the investment

In *Copper Mesa v. Ecuador*,[27] the host State alleged that the investor had operated its investment in violation of the host State's law and that, as a result, the claims were jurisdictionally barred.[28] Relying on the definition of "investment" in the IIA, which required that investments be "owned or controlled […] in accordance with the [host State's] laws", the host State alleged that the investor was under an obligation to operate its investment in accordance with the host State's law throughout the lifetime of the investment.[29]

Disagreeing with the host State's interpretation, the tribunal considered that the cited article "does not extend to the subsequent operation, management or conduct of an investment" and "it would take clear wording to produce such an important jurisdictional bar".[30] Moreover, the tribunal reasoned, that even if the language of the IIA was read in the way suggested by the respondent, it would be difficult to determine "the exact dividing-line between minor and non-minor violations of the local law" which might (or might not) justify imposing the jurisdictional bar.[31]

Document forgery and admissibility

In *Churchill Mining and Planet Mining v. Indonesia*,[32] the tribunal concluded on the balance of probabilities that some 34 documents in the arbitration – 30 of which had been submitted by the claimants – were forgeries.[33] Included in these documents were the mining licences, held by the investors' local partner (an Indonesian group of companies called Ridlatama), which were at the centre of the investors' claims. The tribunal concluded that Ridlatama was most likely responsible for the forgeries.[34]

In assessing the legal consequences of the forgeries, the tribunal held that an investor's "deliberate closing of eyes to evidence of serious misconduct or crime, or an unreasonable failure to perceive such evidence" would vitiate its claim.[35] Looking to the facts before it, the tribunal focused on "the level of institutional control and oversight deployed by the Claimants in relation to the licensing process, whether the claimants were put on notice by evidence of fraud that a reasonable investor in the Indonesian mining sector should have investigated, and

[20] Ibid., para. 193.
[21] Ibid., para. 230.
[22] *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda v. Bolivarian Republic of Venezuela* (I) (ICSID Case No. ARB/11/26), Award, 29 January 2016.
[23] Ibid., para. 154.
[24] Ibid., para. 199.
[25] Ibid.
[26] Ibid., paras. 201-226.
[27] *Copper Mesa Mining Corporation v. Republic of Ecuador* (PCA No. 2012-2), Award, 15 March 2016.
[28] Ibid., para. 5.29.
[29] Ibid., paras. 5.30, 5.55.
[30] Ibid., paras. 5.54-5.55.
[31] Ibid., para. 5.56.
[32] *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/40 and 12/14), Award, 6 December 2016.
[33] Ibid., para. 510.
[34] Ibid., para. 476.
[35] Ibid., para. 502 (quoting *David Minnotte and Robert Lewis v. Republic of Poland* (ICSID Case No. ARB(AF)/10/1), Award, 16 May 2014, para. 131).

whether or not they took appropriate corrective steps".[36] In the tribunal's view, the claimants failed to act with reasonable diligence in the circumstances, especially given the seriousness of the fraud. Accordingly, it held the claims to be inadmissible.[37]

Limitation period for claims

In *Berkowitz and others v. Costa Rica*,[38] the claimants brought a variety of claims under the Central America–Dominican Republic–United States Free Trade Agreement (CAFTA) (2004) in connection with the expropriations of numerous plots of land for inclusion in an ecological park. In relation to many of the plots of land at issue, the respondent State acknowledged that the expropriations had occurred, but argued that compensation had already been awarded to the claimants in domestic proceedings. In response, the claimants argued that the domestic proceedings had been tainted by delays and unfairness and that the levels of compensation awarded were insufficient under the standards imposed by the CAFTA.

The tribunal examined whether the claims were precluded by the three-year time-bar (CAFTA Article 10.18.1). Under the facts of the case, this meant that the claimants acquired (or should have acquired) knowledge of Costa Rica's alleged CAFTA breaches no earlier than 10 June 2010.[39] The tribunal concluded that it would have jurisdiction to hear claims regarding those local-court rulings that had been made after 10 June 2010; they could constitute actionable state measures under the CAFTA if found to be manifestly arbitrary or blatantly unfair.[40] Moreover, the tribunal held that the claims could be assessed without examining conduct that occurred before the CAFTA's entry into force (1 January 2009).[41]

In *Rusoro Mining v. Venezuela*,[42] the tribunal applied a similar time-bar found in the Canada–Venezuela BIT (1996). Under the provision, the cut-off date for claims was three years before the claimant's July 2012 request for arbitration.[43] The tribunal's task was therefore to determine which claims met this cut-off date by identifying the dates when the alleged breaches to the BIT occurred.[44] Reviewing the measures on which the claims were based, the tribunal found that the claimant was aware of certain measures taking place before the cut-off date and that, accordingly, claims based upon those measured were barred.[45] The tribunal rejected the claimant's argument that these earlier measures should be treated as intrinsically linked to later measures, and instead decided to "[break] down each alleged composite claim into individual breaches, each referring to a certain governmental measure, and to apply the time bar to each of such breaches separately".[46]

"Treaty shopping" and abuse of rights – transfer of investment interests[47]

In *Transglobal v. Panama*,[48] the tribunal considered whether a transfer of interests in a concession by a Panamanian national to a United States corporation was an abuse of rights designed to establish jurisdiction under the Panama–United States BIT (1982). At the time of the transfer, there was an ongoing dispute between the Panamanian concessionaire and the Government of Panama, which had resulted in litigation in the Panamanian courts. In considering whether the transfer amounted to an abuse of rights, the tribunal identified elements relied upon in the analyses of previous tribunals, including "the timing of the purported investment, the

[36] Ibid., para. 504.