

*ICSID Reports*

*Volume 18*

The *ICSID Reports* provide an authoritative published collection of investor–State arbitral awards and decisions rendered under the auspices of the World Bank’s International Centre for Settlement of Investment Disputes (ICSID), pursuant to other bilateral or multilateral investment treaties such as the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT) or involving investment contracts entered by States. These decisions, which are fully indexed, make an important contribution to the growing body of jurisprudence on international investment law. The *ICSID Reports* are an invaluable tool for practitioners, scholars and government lawyers working in the field of public international law, investment treaty arbitration, international commercial arbitration, or advising foreign investors or States. Volume 18 of the *ICSID Reports* focuses on *Defence Arguments in Investment Arbitration*, including an opening piece from leading scholar and practitioner Professor Jan Paulsson, a founding partner of Three Crowns LLP, and a preliminary study by Professor Jorge E. Viñuales, Harold Samuel Chair of Law and Environmental Policy at the University of Cambridge. Volume 18 of the *ICSID Reports* includes summaries, digests and excerpts of decisions rendered between 2007 and 2018 in twenty cases involving States from across Africa, Asia, Europe and the Americas, reflecting the breadth of defence arguments in contemporary practice: *Sempra v. Argentina*, *Continental Casualty v. Argentina*, *Cargill v. Mexico*, *Mobil v. Canada*, *Bankswitch v. Ghana*, *Yukos v. Russia*, *Von Pezold v. Zimbabwe*, *Quiborax v. Bolivia*, *General Dynamics v. Libya*, *Philip Morris v. Uruguay*, *Devas v. India*, *Churchill v. Indonesia*, *Urbaser v. Argentina*, *Orascom v. Algeria*, *Karkey v. Pakistan*, *E energija v. Latvia*, *Mercer v. Canada*, *Antaris v. Czech Republic*, *ENKA v. Gabon* and *Cortec v. Kenya*.

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18

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# ICSID REPORTS

Reports of cases decided under the Convention on the Settlement of  
Investment Disputes between States and Nationals of Other States, 1965  
and related decisions on international protection of investments

Volume  
18

EDITED  
BY

JORGE E. VIÑUALES

*Harold Samuel Professor of Law and Environmental Policy  
University of Cambridge*

AND

MICHAEL WAIBEL

*Professor of International Law,  
University of Vienna*

ASSISTED  
BY

OLIVER HAILES

*Research Scholar, Trinity College  
University of Cambridge*

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## INTRODUCTION

Arbitral tribunals and *ad hoc* committees hearing disputes arising from foreign investment transactions have produced a large number of decisions. According to UNCTAD's ISDS Navigator, the number of known investment disputes as of 31 July 2019 is 983, with 647 of them concluded, 332 pending and 4 unknown. Most decisions are now publicly available through a range of online platforms. An adjustment of the initial approach of the *ICSID Reports* thus appeared necessary.

Volume 18 is both a continuation of the *ICSID Reports* and, in some ways, a new departure. To tackle the challenges of quantity and accessibility of decisions, the new format of the *ICSID Reports* includes four main changes. First, each volume will now focus on a specific theme or topic, and it will report excerpts of a selected number of relevant decisions. The topic of Volume 18 is *Defence Arguments in Investment Arbitration*. Secondly, although decisions rendered under the aegis of the International Centre for Settlement of Investment Disputes (ICSID) remain the main focus of the reports, certain decisions rendered under other rules and/or institutions are also covered. Thirdly, given that, for space reasons, only certain excerpts of each decision are reported, the summaries have been expanded to provide better coverage of the entire decision. This has been possible thanks to the collaboration of law firms and colleagues, who have generously taken the time to draft summaries, following a protocol that excludes conflicts of interests. Fourthly, volumes will now contain sections devoted to analysis of the case law and of other major developments in the form of a "By invitation" section and of a preliminary study by one of the General Editors. Over time, we hope to extend these sections to include additional authoritative analysis of certain topics and issues.

As in previous volumes, Volume 18 includes tables of cases reported in the volume and in the series, and a digest of issues arising from the twenty reported cases.

Jorge E. Viñuales and  
Michael Waibel

Lauterpacht Centre for International Law  
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## EDITORIAL NOTE

The *ICSID Reports* contain decisions rendered by arbitral tribunals and *ad hoc* committees under the aegis of the International Centre for Settlement of Investment Disputes (ICSID) or of other arbitration institutions and/or rules.

Volume 1 contains, in addition to the Basic Texts of the ICSID system, decisions in cases commenced during the period 1972 to 1981. Volume 2 contains material relating to proceedings commenced between 1981 and 1983, and Volume 3 contains the first three proceedings commenced in 1984. Volume 4 contains the texts of decisions and awards relating to ICSID cases commenced between 1984 and 1992. Volume 5 contains available texts of decisions and awards for proceedings commenced between 1992 and 2000, and Volume 6 contains those commenced between 1995 and 2001. Volume 7 contains decisions and awards for arbitration proceedings commenced between 1997 and 2002. Volume 8 contains decisions and awards for arbitration proceedings commenced between 1996 and 2002. Volume 9 contains decisions and awards for proceedings commenced between 1990 and 2003. Volume 10 contains decisions and awards for proceedings commenced between 1998 and 2004. Volume 11 contains those for proceedings commenced between 2000 and 2002. Volume 12 contains decisions and awards for proceedings commenced between 2001 and 2003. Volume 13 contains decisions and awards for proceedings commenced between 1997 and 2004. Volume 14 contains decisions and awards for proceedings commenced between 1985 and 2004. Volumes 15, 16 and 17 contain decisions and awards for proceedings commenced between 2000 and 2005. Volume 18 contains decisions and awards for proceedings commenced between 2002 and 2017.

The awards and decisions in volumes 1–17 are reproduced, to the greatest extent possible, in the form in which they were handed down. Editorial intervention is limited to the introduction of a summary and of a bold-letter rubric at the head of each case. These are followed by the full text of the original decision, if available, or its translation. No attempt has been made to tamper with the texts by purporting to correct any errors or to clarify obscurities of expression. Where only excerpts are available these have been reproduced. Any omission of material is indicated either by a series of dots or by the insertion of a sentence in square brackets stating the nature of the passage which has been omitted.

Volume 18 follows a different format and reports excerpts from twenty selected decisions focused on defence arguments. Each author has presented the broader context to the reported excerpt by summarising relevant decisions and by recording subsequent developments such as settlement or annulment. Minor or procedural decisions are in footnotes, whereas substantive decisions tend to be listed in the intituling and presented in a standalone digest.

Bold-letter headings preceding each case indicate the main points of law involved in the decision. These entries are also collected in a digest at the beginning of the volume.

The source of the material in volumes 1-17 is indicated at the end of each case. Where the material has been published in more than one language, one publication in each language is listed. The language of the original decision is also mentioned. The source of the material in this volume is indicated in the list of “Sources of Reported Decisions” at p. xxi.

Three tables are printed at the beginning of each volume: an alphabetical table of cases reported in the volume, a consolidated alphabetical table of all the cases so far reported and a digest of the cases reported in the volume.

This volume also includes lists of “Abbreviations in Volume 18” at p. xlix and “Recommended Short-Form Citations” at p. xxiv.

Earlier volumes contained a consolidated index. This has become impossible due to space considerations and thus, from volume 11, the index is confined to the volume in question. The consolidated index for volumes 1–10 is to be found at 10 ICSID Rep 453.



## ACKNOWLEDGEMENTS

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Summaries were written by (in alphabetical order): Ece Akıncıbay, Gabriela Álvarez Ávila, David L. Attanasio, Andrew Cannon, Guillaume Croisant, Michail Dekastros, Berk Demirkol, Javier Echeverri Díaz, Ruxandra Esanu, Alexander Ferguson, Jaime Gallego, Bruno Gélinas-Faucher, Oliver Hailes, Zachary Kady, Joseph Klingler, Tamara Korešová, Jana Lamas de Mesa, Yuri Mantilla, Samy Markbaoui, Oliver Marsden, Camille Martini, Iain Maxwell, Ricardo Mier y Teran Ruesga, Robert Price, David Roney, Constantinos Salonidis, Bhushan Satish, Christina Cathey Schuetz, Eleanor Scogings, David Seidl and Eduardo Silva Romero.

Mr Oliver Hailes reviewed all summaries and prepared the Tables and Digest. Responsibility for the selection and content of the materials reported in this volume remains with the Editors. The Index was prepared by Miss Maureen MacGlashan, CMG.

Thanks are due to Professor Jan Paulsson for kindly accepting the invitation to write the opening piece of Volume 18.

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## SOURCES OF REPORTED DECISIONS

The excerpts reported in Volume 18 were obtained from the online sources below (listed in alphabetical order by case) from which the reader may locate the full decisions. Each summary in Volume 18 situates the excerpts in the overarching dispute. Because the non-translated excerpts have been reported without amendment, however, the full decisions might be of assistance to contextualise any cross-referencing. The Editors acknowledge the valuable work of *Italaw* and *Jus Mundi* as online hosts of publicly available decisions. The Editors are grateful to *Investment Arbitration Reporter* and Luke Eric Peterson for permission to reproduce the excerpt from *Bankswitch v. Ghana*, which may be accessed by subscription.

*Antaris Solar GmbH and Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018

<https://www.italaw.com/sites/default/files/case-documents/italaw9809.pdf>

*Antaris Solar GmbH and Göde v. Czech Republic*, PCA Case No. 2014-01, Declaration of Judge Tomka, 2 May 2018

<https://www.italaw.com/sites/default/files/case-documents/italaw9811.pdf>

*Antaris Solar GmbH and Göde v. Czech Republic*, PCA Case No. 2014-01, Dissenting Opinion of Mr Gary Born, 2 May 2018

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*Bankswitch Ghana Ltd (Ghana) v. Republic of Ghana Acting as the Government of Ghana*, PCA Case No. 2011-10, Award Save as to Costs, 11 April 2014

[https://www.iareporter.com/wp-content/themes/iareporter/download.php?post\\_id=28464](https://www.iareporter.com/wp-content/themes/iareporter/download.php?post_id=28464)

*Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009

[https://www.italaw.com/sites/default/files/case-documents/ita0133\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/ita0133_0.pdf)

*CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016

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*Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016

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<https://www.italaw.com/sites/default/files/case-documents/italaw10051.pdf>

*ENKA İnşaat ve Sanayi A.Ş. (Turkey) v. The Gabonese Republic and L'Agence Nationale des Grands Travaux*, ICC Case No. 22841/DDA, Award, 14 September 2018

<https://jsumundi.com/en/document/pdf/Decision/IDS-22841-14092018-001/en/en-enka-insaat-ve-sanayi-a-s-v-1-the-gabonese-republic-2-lagence-nationale-des-grands-travaux-final-award-friday-14th-september-2018>

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## ABBREVIATIONS IN VOLUME 18

<b>BIT</b>	Bilateral investment treaty
<b>ECT</b>	Energy Charter Treaty, Annex 1 to the Final Act of the European Energy Charter Conference (adopted 17 December 1994, entered into force 18 April 1998) 2080 UNTS 95
<b>ICC</b>	International Chamber of Commerce
<b>ICC Rules</b>	Rules of Arbitration of the International Chamber of Commerce (entered into force 1 January 2012)
<b>ICSID</b>	International Centre for the Settlement of Investment Disputes
<b>ICSID Additional Facility Rules</b>	ICSID Additional Facility Rules (April 2006), Schedule C, Arbitration (Additional Facility) Rules
<b>ICSID Arbitration Rules</b>	ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) (April 2006)
<b>ICSID Convention</b>	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159
<b>ILC Articles on State Responsibility</b>	International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (adopted 12 December 2001), UNGA Res 56/83, UN Doc. A/RES/56/83, Annex
<b>NAFTA</b>	North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 289 and 605
<b>PCA</b>	Permanent Court of Arbitration
<b>Salini test</b>	<i>Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco</i> , ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, 6 ICSID Rep 400, para. 52
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNCITRAL Rules</b>	United Nations Commission on International Trade Law Arbitration Rules (adopted 28 April 1976) UNGA Res 31/98, UN GAOR, 31st Sess, Supp No. 17, UN Doc. A/31/17
<b>VCLT</b>	Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

## DIGEST OF CASES REPORTED IN VOLUME 18

### Admissibility

Abuse of rights – Whether successive claims brought by entities within the same vertically integrated chain of companies under different BITs amounted to an abuse of process – Whether the principles of abuse of rights had evolved since earlier investment treaty jurisprudence

*Orascom v. Algeria*, ICSID Case No. ARB/12/35, 18 ICSID Rep 584  
(Christina Cathey Schuetz)

Dispute – ICSID Convention, Article 25(1) – Estoppel – Acquiescence – Prescriptive extinction – Bad faith – Whether the doctrine of estoppel precluded the existence of a dispute – Whether the claimant had acquiesced to the extinguishment of the dispute – Whether the doctrine of prescriptive extinction applied in the absence of express time limits – Whether the arbitration was initiated in bad faith to put pressure on the claimant’s home State

*E energija v. Latvia*, ICSID Case No. ARB/12/33, 18 ICSID Rep 631  
(Bhushan Satish)

Foreign investor – Good faith – Whether a shareholder must advise the host State of its foreign nationality

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393  
(Oliver Marsden and Yuri Mantilla)

Fraud – Good faith – Abuse of rights – Third-party misconduct – Wilful blindness – International public policy – Whether an investor may bring a claim based on rights arising from fraud or forgery which the investor deliberately or unreasonably ignored – Whether the fraud was serious – Whether the investor exercised a reasonable level of due diligence – Whether the underlying fraud affected the validity of later instruments

*Churchill v. Indonesia*, ICSID Case No. ARB/12/14 and 12/40, 18 ICSID Rep 527 (Eduardo Silva Romero, David L. Attanasio, Javier Echeverri Díaz and Ruxandra Esanu)

ICSID Arbitration Rule 34(1) – Whether evidence from criminal proceedings was admissible

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393  
(Oliver Marsden and Yuri Mantilla)

Settlement – Claim preclusion – Whether the claims of a parent company were precluded by the settlement of an earlier claim on the same facts by a

subsidiary company against the State under a different BIT – Whether the claim requested any distinct relief from the settled dispute – Whether the related settlement agreement had terminated the underlying dispute

*Orascom v. Algeria*, ICSID Case No. ARB/12/35, 18 ICSID Rep 584  
 (Christina Cathey Schuetz)

Standing – Divestment – Whether the sale of shares in the company holding the investment prior to the notice of arbitration impacted on admissibility

*Orascom v. Algeria*, ICSID Case No. ARB/12/35, 18 ICSID Rep 584  
 (Christina Cathey Schuetz)

## Annulment

Costs – Whether the rule that costs follow the event was in line with equitable principles

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111  
 (Bruno Gélinas-Faucher)

Failure to state reasons – ICSID Convention, Article 52(1) – Whether the tribunal failed to state the reasons for its decision on quantum

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393  
 (Oliver Marsden and Yuri Mantilla)

Failure to state reasons – ICSID Convention, Article 52(1) – Whether the tribunal failed to state the reasons on which the award was based

*Churchill v. Indonesia*, ICSID Case No. ARB/12/14 and 12/40, 18 ICSID Rep 527 (Eduardo Silva Romero, David L. Attanasio, Javier Echeverri Díaz and Ruxandra Esanu)

Manifest excess of powers – Failure to state reasons – ICSID Convention, Article 52(1) – Jurisdiction – Investment – Minority or indirect shareholding – Whether the tribunal's conclusions on standing constituted grounds for annulment

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111  
 (Bruno Gélinas-Faucher)

Manifest excess of powers – Failure to state reasons – Serious departure from a fundamental rule of procedure – ICSID Convention, Article 52(1) – Whether the tribunal failed to decide the investor's claim for loss after the state of necessity was over – Whether the tribunal failed to determine the investor's expropriation claim in relation to unilateral restructuring of governmental financial instruments – Whether the tribunal failed in its construction of the scope of freedom of transfer – Whether the tribunal failed to explain why the State could no longer rely on the necessity

defence – Whether the tribunal had awarded damages on a ground not invoked by the investor

*Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, 18 ICSID Rep 155 (Jaime Gallego)

Manifest excess of powers – ICSID Convention, Article 52(1) – Defence – Exclusions and reservations – Whether equating a treaty provision with the standard under customary international law constituted a failure to apply the applicable law – Whether excess of power was manifest

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111 (Bruno Gélinas-Faucher)

Manifest excess of powers – ICSID Convention, Article 52(1) – Whether the tribunal failed to apply the proper law for the defence of necessity and legality of investments

*Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, 18 ICSID Rep 360 (Berk Demirkol)

Manifest excess of powers – ICSID Convention, Article 52(1) – Whether the tribunal had failed to apply the applicable law in determining the issue of admissibility

*Churchill v. Indonesia*, ICSID Case No. ARB/12/14 and 12/40, 18 ICSID Rep 527 (Eduardo Silva Romero, David L. Attanasio, Javier Echeverri Díaz and Ruxandra Esanu)

Manifest excess of powers – ICSID Convention, Article 52(1) – Whether the tribunal's findings on municipal law were in manifest excess of powers – Whether the tribunal acted in manifest excess of powers in determining the existence of protected investments – Whether the tribunal acted in manifest excess of powers by failing to apply the applicable law for quantum

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393 (Oliver Marsden and Yuri Mantilla)

Procedure – Whether an annulment committee may consider an additional ground on its own motion

*Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, 18 ICSID Rep 155 (Jaime Gallego)

Provisional measures – ICSID Convention, Article 52 – Whether the committee had jurisdiction to annul provisional measures

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393 (Oliver Marsden and Yuri Mantilla)

Serious departure from a fundamental rule of procedure – Composition of tribunal – Corruption of tribunal member – ICSID Convention, Article 52(1) – Waiver – Whether the late disclosure of the tribunal president's role with

another World Bank body formed a basis for annulment – Whether the State waived its right to challenge the arbitrator

*Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, 18 ICSID Rep 360 (Berk Demirkol)

Serious departure from a fundamental rule of procedure – ICSID Convention, Article 52(1) – Right to be heard – Whether the tribunal's refusal to allow further evidence constituted a breach of the right to be heard – Whether the tribunal had considered evidence that had been excluded – Whether there was unequal treatment in the tribunal's decision to allow the State not to produce police files – Whether the tribunal failed to draw adverse inferences from the non-production of police files – Whether the investors were denied the right to be heard on the validity of licences under municipal law and denial of justice in local courts – Whether the tribunal denied the right to present arguments on the law of State responsibility

*Churchill v. Indonesia*, ICSID Case No. ARB/12/14 and 12/40, 18 ICSID Rep 527 (Eduardo Silva Romero, David L. Atanasio, Javier Echeverri Díaz and Ruxandra Esanu)

Serious departure from a fundamental rule of procedure – ICSID Convention, Article 52(1) – Whether the State had been denied an opportunity to present a case on illegality due to procedural orders on admissibility

*Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, 18 ICSID Rep 360 (Berk Demirkol)

Serious departure from a fundamental rule of procedure – ICSID Convention, Article 52(1) – Whether the State was denied the right to be heard on the valuation methodology

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393 (Oliver Marsden and Yuri Mantilla)

### **Applicable law**

Contract – Whether remedies in case of default stipulated in a contract precluded the application of other remedies under the applicable law – Whether obligations under the contract were reciprocal

*General Dynamics v. Libya*, ICC Case No. 19222/EMT, 18 ICSID Rep 421 (Camille Martini)

Counterclaim – VCLT, Article 31(3)(c) – Whether applicable law included international human rights law

*Urbaser v. Argentina*, ICSID Case No. ARB/07/26, 18 ICSID Rep 554 (Gabriela Álvarez Ávila and Ricardo Mier y Teran Ruesga)

Fraud – ICSID Convention, Article 42(1) – Whether international or municipal law governed allegations of forgery and deception

*Churchill v. Indonesia*, ICSID Case No. ARB/12/14 and 12/40, 18 ICSID Rep 527 (Eduardo Silva Romero, David L. Attanasio, Javier Echeverri Díaz and Ruxandra Esanu)

ICSID Convention, Article 42(1) – Whether the BIT contained an implicit agreement as to applicable law

*E energija v. Latvia*, ICSID Case No. ARB/12/33, 18 ICSID Rep 631 (Bhushan Satish)

### **Arbitrary or discriminatory measures**

Economic crisis – Whether measures adopted were arbitrary or discriminated against the investor

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111 (Bruno Gélinas-Faucher)

Emergency measures – Whether the investors were subjected to measures that had no justification – Whether justification was linked to investor expectations – Whether the State could have adopted less harmful emergency measures during the financial crisis – Whether the claims related to purely contractual disputes

*Urbaser v. Argentina*, ICSID Case No. ARB/07/26, 18 ICSID Rep 554 (Gabriela Álvarez Ávila and Ricardo Mier y Teran Ruesga)

Like circumstances – Applicable law – Whether the standard had an autonomous meaning from fair and equitable treatment – Whether any State measures were clearly less favourable to the foreign investors – Whether unfavourable treatment was intended to harm the foreign investor and was not justified by sufficient reasons – Whether discrimination obstructed investments and their management, maintenance, use and enjoyment – Whether the investors had identified comparator businesses in identical or similar circumstances

*Urbaser v. Argentina*, ICSID Case No. ARB/07/26, 18 ICSID Rep 554 (Gabriela Álvarez Ávila and Ricardo Mier y Teran Ruesga)

Whether the State acted unreasonably in its policy decision or discriminated against foreign ownership

*Devas v. India*, PCA Case No. 2013-09, 18 ICSID Rep 487 (Alexander Ferguson)

Windfall profits – Consumer welfare – Whether the solar levy was advanced as part of a rational package of measures to limit consumer prices and to raise revenue – Whether it was reasonable to regulate windfall profits

*Antaris v. Czech Republic*, PCA Case No. 2014-01, 18 ICSID Rep 681  
 (Eleanor Scogings and Robert Price)

## Contract

Applicable law – Whether the governing law of the contract incorporated principles of customary international law

*Bankswitch v. Ghana*, PCA Case No. 2011-10, 18 ICSID Rep 303  
 (Constantinos Salonidis and Joseph Klingler)

Breach of contract – Interpretation – Whether the requirement of the issuance of a Certificate of Satisfaction had been fulfilled

*Bankswitch v. Ghana*, PCA Case No. 2011-10, (Constantinos Salonidis and Joseph Klingler)

Breach of contract – Whether alleged breaches were of a purely contractual nature or amounted to breaches of the BIT – Whether the failure of the concession was due to the local subsidiary's performance – Whether delays by the provincial government or the financial crisis justified the local subsidiary's failure to meet targets – Whether renegotiation of a concession would have occurred even without the financial crisis and emergency measures

*Urbaser v. Argentina*, ICSID Case No. ARB/07/26, 18 ICSID Rep 554  
 (Gabriela Álvarez Ávila and Ricardo Mier y Teran Ruesga)

Breach of contract – Whether Article 107 of the Swiss Code of Obligations was applicable – Whether the claimant's notice of default was valid – Whether the State validly exercised a drawdown against the advance payment guarantee – Whether the claimant was required to grant an extension of the advance payment guarantee

*General Dynamics v. Libya*, ICC Case No. 19222/EMT, 18 ICSID Rep 421 (Camille Martini)

Breach of contract – Whether the State failed to honour its debts in accordance with a settlement agreement

*ENKA v. Gabon*, ICC Case No. 22841/DDA, 18 ICSID Rep 716 (David Roney and Michail Dekastros)

Interpretation – Indemnity – Taxation – Whether the State was obliged to indemnify for taxes claimed by municipal authorities – Whether the obligation extended to future hypothetical taxes – Whether the obligation extended to social security obligations

*ENKA v. Gabon*, ICC Case No. 22841/DDA, 18 ICSID Rep 716 (David Roney and Michail Dekastros)

Settlement – Award on agreed terms – Whether an award on agreed terms could be issued in the absence of party signatures

*Bankswitch v. Ghana*, PCA Case No. 2011-10, 18 ICSID Rep 303  
(Constantinos Salonidis and Joseph Klingler)

### Costs

Conditional legal costs – Whether the parties should split the costs – Whether the claimant was entitled to recover a success fee payable to counsel

*E energija v. Latvia*, ICSID Case No. ARB/12/33, 18 ICSID Rep 631  
(Bhushan Satish)

Costs follow the event – Reduction – Whether the claim for costs was manifestly excessive – Whether the conduct of the party seeking costs warranted a reduction due to unproven claims of corruption

*Cortec v. Kenya*, ICSID Case No. ARB/15/29, 18 ICSID Rep 741  
(Andrew Cannon and Iain Maxwell)

ICC Rules, Article 37 – Whether costs should reflect the relative success and failure in the arbitration

*General Dynamics v. Libya*, ICC Case No. 19222/EMT, 18 ICSID Rep 421 (Camille Martini)

ICSID Convention, Article 61(2) – Costs follow the event – Party conduct – Reasonableness of costs claimed – Whether party conduct or the reasonableness of the costs claimed weighed on the principle that costs follow the event – Whether the State failed to cooperate in good faith in the proceedings – Whether the legal expenses claimed by the investor were reasonable

*Karkey v. Pakistan*, ICSID Case No. ARB/13/1, 18 ICSID Rep 600  
(Samy Markbaoui and Ece Akincibay)

ICSID Convention, Article 61(2) – Whether the success on jurisdiction and failure on admissibility affected the allocation of costs

*Orascom v. Algeria*, ICSID Case No. ARB/12/35, 18 ICSID Rep 584  
(Christina Cathey Schuetz)

Whether it was appropriate for the State to pay a substantial portion of the costs and legal fees during the jurisdictional phase

*Urbaser v. Argentina*, ICSID Case No. ARB/07/26, 18 ICSID Rep 554  
(Gabriela Álvarez Ávila and Ricardo Mier y Teran Ruesga)



Whether it was fair in the circumstances for the State to bear the costs of arbitration

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393  
 (Oliver Marsden and Yuri Mantilla)

### Counterclaim

Contract – Abuse of rights – Bad faith – Whether the claimant acted in bad faith or abused its rights during its contractual relationship with the State – Whether the State may recover for alleged waste of time, labour and resources

*General Dynamics v. Libya*, ICC Case No. 19222/EMT, 18 ICSID Rep 421 (Camille Martini)

Human rights – Constitutional law – Human right to water – Whether the State had identified any obligation of the investors under the concession contract to actively participate in complying with the human right to water – Whether there existed any ground for damages for breach of human rights

*Urbaser v. Argentina*, ICSID Case No. ARB/07/26, 18 ICSID Rep 554  
 (Gabriela Álvarez Ávila and Ricardo Mier y Teran Ruesga)

### Defence

Constitutional law – Whether the contract was an international business or economic transaction requiring parliamentary approval

*Bankswitch v. Ghana*, PCA Case No. 2011-10, 18 ICSID Rep 303  
 (Constantinos Salonidis and Joseph Klingler)

Contract – French law – *Délai de grâce* – Grace period – Good faith – Impecuniosity – Whether the doctrine of grace period under French civil law applied where a State faced cash flow difficulties – Whether the State had demonstrated circumstances under French law warranting a grace period in the payment of the award – Whether the State was an unfortunate debtor in good faith

*ENKA v. Gabon*, ICC Case No. 22841/DDA, 18 ICSID Rep 716 (David Roney and Michail Dekastros)

Contract – French law – *Théorie de l'imprévision* – Unforeseeability – Good faith – Settlement – Whether the doctrine of unforeseeability under French administrative law applied to foreign public entities – Whether the doctrine of unforeseeability under French civil law applied where a State faced cash flow difficulties – Whether the contractual duty to cooperate in good faith required the application of the doctrine of unforeseeability – Whether the conditions for the application of the doctrine were satisfied in the context of a settlement agreement

*ENKA v. Gabon*, ICC Case No. 22841/DDA, 18 ICSID Rep 716 (David Roney and Michail Dekastros)

Contract – Non-performance – Whether the claimant’s delay entitled the State to withhold payment

*General Dynamics v. Libya*, ICC Case No. 19222/EMT, 18 ICSID Rep 421 (Camille Martini)

Corruption – Evidence – Standard of proof – Burden of proof – Whether an allegation of corruption must be supported by clear and convincing evidence or on the ordinary balance of probabilities – Whether the burden shifted once the allegation was supported by prima facie evidence – Whether circumstantial evidence could be explained or instead shifted the burden of proof

*Karkey v. Pakistan*, ICSID Case No. ARB/13/1, 18 ICSID Rep 600 (Samy Markbaoui and Ece Akincibay)

Countermeasures – ILC Articles on State Responsibility, Article 22 – Customary international law – NAFTA – Whether countermeasures between States may be invoked as a circumstance precluding the wrongfulness of measures otherwise in breach of investor rights – Whether investor rights were of a substantive or procedural nature

*Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, 18 ICSID Rep 199 (Jana Lamas de Mesa)

Emergency measures – Municipal law – Whether national emergency measures were legally justified under municipal law

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111 (Bruno Gélinas-Faucher)

Estoppel – Whether the State’s reliance on its own failure to follow constitutional requirements was estopped under international law and public policy

*Bankswitch v. Ghana*, PCA Case No. 2011-10, 18 ICSID Rep 303 (Constantinos Salonidis and Joseph Klingler)

Exclusions and reservations – ECT, Article 21 – Taxation measures – Expropriation – Good faith – Whether the carve-out applied only to bona fide taxation measures – Whether the measures could be clawed back as expropriative taxes

*Yukos v. Russia*, PCA Case No. AA 227, 18 ICSID Rep 331 (Guillaume Croisant)

Exclusions and reservations – ECT, Article 21 – Taxation measures – Interpretation – Municipal law – Whether the carve-out depended on municipal tax law – Whether the solar levy was paid for a specific purpose of reducing the incentive regime or for general State revenue – Whether the solar levy was a tax in nature and substance – Whether the solar levy had

been characterised as a tax by the municipal courts – Whether the measure was rendered as a tax to avoid international arbitration proceedings

*Antaris v. Czech Republic*, PCA Case No. 2014-01, 18 ICSID Rep 681  
(Eleanor Scogings and Robert Price)

Exclusions and reservations – Essential security interests – Interpretation – Whether an economic emergency qualified as an essential security interest – Whether the provision was self-judging – Whether the provision should be interpreted in light of customary international law

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111  
(Bruno Gélinas-Faucher)

Exclusions and reservations – Essential security interests – Whether the security interests were essential – Whether the contract was annulled for non-security political factors – Whether essential security interests precluded the tribunal from exercising jurisdiction – Whether jurisdiction could be excluded only for part of an expropriation based on a reasonable allocation for essential security interests – Whether the State had to meet the standard of necessity under customary international law – Whether the State had undertaken an obligation not to invoke its essential security interests

*Devas v. India*, PCA Case No. 2013-09, 18 ICSID Rep 487 (Alexander Ferguson)

Exclusions and reservations – NAFTA, Article 1108 – Subordinate measures – Whether a subordinate measure was adopted under the authority of and consistent with the reserved measure – Whether new subordinate measures should be assessed for consistency with existing subordinate measures

*Mobil v. Canada*, ICSID Case No. ARB(AF)/07/4, 18 ICSID Rep 226  
(David Seidl and Tamara Korešová)

Exclusions and reservations – Procurement – NAFTA, Article 1108(7)(a) – Whether regulatory determinations related to commercial activity were procurement functions excluded from most-favoured-nation and national treatment

*Mercer v. Canada*, ICSID Case No. ARB(AF)/12/3, 18 ICSID Rep 657  
(Zachary Kady)

Exhaustion of remedies – Fork-in-the road clause – Whether the claims were premature

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393  
(Oliver Marsden and Yuri Mantilla)

*Force majeure* – Armed conflict – Whether one party's *force majeure* notice relieved the other party of its contractual obligations – Whether civil war or foreign military intervention in the host State amounted to a *force majeure* event – Whether the defence was precluded by prior default – Whether the

failure to give notice of a *force majeure* impediment precluded the State from relying upon *force majeure* events to excuse its non-performance – Whether non-compliance with the obligation to consult on the continuation of the contract after six months of *force majeure* impediments was of any legal consequence

*General Dynamics v. Libya*, ICC Case No. 19222/EMT, 18 ICSID Rep 421 (Camille Martini)

Legality – Municipal law – Whether the defence was admissible – Whether the investment was obtained through an irregular process that benefited former public officials – Whether the investment was null and void *ab initio* under municipal law

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393 (Oliver Marsden and Yuri Mantilla)

Necessity – Exclusions and reservations – Public order – Essential security interests – Margin of appreciation – Customary international law – World Trade Organization – Whether the strict conditions of application for the plea of necessity under customary international law applied to the safeguard clause – Whether the economic crisis required the maintenance of public order or the protection of essential security interests – Whether the law of the World Trade Organization assisted in the interpretation of the defence – Whether the State had any reasonably available alternatives that were more compliant with its international obligations – Whether the State was barred by its own conduct from relying on the defence

*Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, 18 ICSID Rep 155 (Jaime Gallego)

Necessity – ILC Articles on State Responsibility, Article 25 – Customary international law – Whether measures were adopted to safeguard an essential interest – Whether there existed a grave and imminent peril – Whether the measures adopted were the only way to offset the economic crisis – Whether the State contributed to the situation giving rise to necessity

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111 (Bruno Gélinas-Faucher)

Necessity – ILC Articles on State Responsibility, Article 25 – Customary international law – Whether property invasions should be considered a threat to an essential interest of the State – Whether there was an essential interest of the State at stake – Whether there was a grave and imminent peril to the existence of the State or merely the incumbent political party – Whether the acts of State were the only way to stop the occupations – Whether the measures were in violation of obligations *erga omnes* not to discriminate based on race – Whether the State contributed to the situation

*Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, 18 ICSID Rep 360 (Berk Demirkol)

Necessity – ILC Articles on State Responsibility, Article 25 – Customary international law – Whether the defence under general international law was available in the alternative

*Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, 18 ICSID Rep 155 (Jaime Gallego)

Necessity – ILC Articles on State Responsibility, Article 27 – Customary international law – Temporality – Whether the state of necessity was still justified – Whether compensation might be owed for measures adopted during the state of necessity

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111 (Bruno Gélinas-Faucher)

Police powers – Customary international law – Public welfare – Public health – Tobacco control measures – Good faith – Whether the doctrine of police powers was recognised by the BIT or customary international law – Whether the customary defence was excluded by the public purpose condition for lawful expropriation – Whether the measures were adopted in accordance with municipal and international legal obligations – Whether the measures were implemented in good faith for the protection of public welfare – Whether the measures were discriminatory or disproportionate – Whether the measures were directed to and capable of achieving the stated goal

*Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, 18 ICSID Rep 450 (Oliver Hailes)

Police powers – Customary international law – Whether an executive decree constituted a legitimate revocation of concessions based on actual violations of municipal law – Whether the revocation was carried out in accordance with due process

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393 (Oliver Marsden and Yuri Mantilla)

Police powers – Whether the lawful revocation of licences by the State in good faith and to protect the public interest was an expropriation – Whether subsequent enforcement of the revocation was within the State's regulatory police powers

*E energija v. Latvia*, ICSID Case No. ARB/12/33, 18 ICSID Rep 631 (Bhushan Satish)

Proportionality – Margin of appreciation – Whether land expropriations could be justified as a proportionate exercise of State regulatory powers – Whether a margin of appreciation may be applied in the context of investment treaty disputes

*Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, 18 ICSID Rep 360 (Berk Demirkol)

Unclean hands – Whether the doctrine of unclean hands constituted a general principle of law – Whether the doctrine applied to how the investor obtained an investment – Whether the doctrine applied to the investors' performance of the investment

*Yukos v. Russia*, PCA Case No. AA 227, 18 ICSID Rep 331 (Guillaume Croisant)

## Evidence

Adverse inferences – Whether the tribunal was required to draw adverse inferences from a failure to produce documents

*Churchill v. Indonesia*, ICSID Case No. ARB/12/14 and 12/40, 18 ICSID Rep 527 (Eduardo Silva Romero, David L. Attanasio, Javier Echeverri Díaz and Ruxandra Esanu)

Corruption – Bad faith – Bribery – Whether the State may prove allegations of bad faith or corruption without putting the allegations to witnesses – Whether the review of mining licences was a response to the refusal to pay a bribe

*Cortec v. Kenya*, ICSID Case No. ARB/15/29, 18 ICSID Rep 741 (Andrew Cannon and Iain Maxwell)

Fraud – Burden of proof – Standard of proof – Whether the State bore the burden of proof under international law – Whether the standard was balance of probabilities – Whether the State was required to prove motive or intent

*Churchill v. Indonesia*, ICSID Case No. ARB/12/14 and 12/40, 18 ICSID Rep 527 (Eduardo Silva Romero, David L. Attanasio, Javier Echeverri Díaz and Ruxandra Esanu)

Fraud – Whether signatures on official documents were authentic and authorised – Whether there was sufficient evidence to support a finding of corruption – Whether there was sufficient evidence to find that the investors were authors of fraud

*Churchill v. Indonesia*, ICSID Case No. ARB/12/14 and 12/40, 18 ICSID Rep 527 (Eduardo Silva Romero, David L. Attanasio, Javier Echeverri Díaz and Ruxandra Esanu)

Parallel proceedings – Confidential information – Whether materials from confidential parallel proceedings should be allowed into the arbitral record

*Orascom v. Algeria*, ICSID Case No. ARB/12/35, 18 ICSID Rep 584 (Christina Cathey Schuetz)

## Expropriation

Contract termination – Whether the State expropriated an investment by instructing a State-owned entity to annul its contract with a foreign

investor – Whether the taking was for a public purpose – Whether the taking followed due process – Whether the State paid compensation – Whether the arbitral award of compensation for breach of contract to be paid by the State-owned entity to the investor's local subsidiary was relevant to the expropriation standard – Whether the State discriminated against the foreign investor

*Devas v. India*, PCA Case No. 2013-09, 18 ICSID Rep 487 (Alexander Ferguson)

Direct expropriation – Compensation – Non-discrimination – Due process – Public purpose – Whether the taking of land complied with the conditions of a lawful expropriation – Whether direct debit from bank accounts and seizure of grain at less than market price constituted unlawful expropriations

*Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, 18 ICSID Rep 360 (Berk Demirkol)

Direct expropriation – Contract termination – Whether the termination of a concession contract for just cause constituted an expropriation

*Urbaser v. Argentina*, ICSID Case No. ARB/07/26, 18 ICSID Rep 554 (Gabriela Álvarez Ávila and Ricardo Mier y Teran Ruesga)

Direct expropriation – Lawfulness – Discrimination – Whether the revocation of concessions directly expropriated the investment of the foreign-controlled local company – Whether the expropriation complied with conditions for lawful expropriation

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393 (Oliver Marsden and Yuri Mantilla)

Direct expropriation – Whether transfer of property rights to the State was an essential requirement of direct expropriation

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111 (Bruno Gélinas-Faucher)

Energy Charter Treaty, Article 13 – Whether the State's actions had an effect equivalent to nationalisation or expropriation – Whether the expropriation was lawful

*Yukos v. Russia*, PCA Case No. AA 227, 18 ICSID Rep 331 (Guillaume Croisant)

Indirect expropriation – Contract – Judicial act – Substantial deprivation – Whether contractual rights were capable of expropriation – Whether the municipal judgment of a superior court deprived the investor of the use and enjoyment of its contractual rights

*Karkey v. Pakistan*, ICSID Case No. ARB/13/1, 18 ICSID Rep 600 (Samy Markbaoui and Ece Akıncıbay)



Indirect expropriation – Emergency measures – Whether emergency measures or concession renegotiation deprived the local subsidiary of its rights

*Urbaser v. Argentina*, ICSID Case No. ARB/07/26, 18 ICSID Rep 554  
(Gabriela Álvarez Ávila and Ricardo Mier y Teran Ruesga)

Indirect expropriation – Intellectual property – Trademark – Right to use – Regulation – Harmful products – Whether intellectual property rights were protected against any regulation restricting the right to use – Whether the investor should have expected the regulation of harmful products

*Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, 18 ICSID Rep 450  
(Oliver Hailes)

Indirect expropriation – Monetary sovereignty – Municipal law – Constitutional law – Taxation – Whether sovereign management of the exchange rate could result in an indirect expropriation – Whether compulsory currency conversion was protected from expropriation under constitutional law – Whether constitutional court decisions were relevant – Whether a breach of constitutional law amounted to an expropriation under international investment law – Whether losses for payment delays could be considered an expropriation – Whether unilateral restructuring of governmental financial instruments was an expropriation – Whether imposition of a capital tax on a nominal gain resulting from currency devaluation was an expropriation

*Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, 18 ICSID Rep 155 (Jaime Gallego)

Indirect expropriation – Substantial deprivation – Whether direct expropriation of the foreign-controlled local company substantially deprived its shareholders of value

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393  
(Oliver Marsden and Yuri Mantilla)

Indirect expropriation – Substantial deprivation – Whether the extent of deprivation should be assessed by the overall business value or the value of each business asset – Whether the business remained profitable after the deprivation of value

*Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, 18 ICSID Rep 450  
(Oliver Hailes)

Indirect expropriation – Whether assets that were not directly expropriated but were no longer commercially viable were unlawfully expropriated – Whether changes to water permits were so significant as to constitute expropriation – Whether refusal to release foreign currency led to expropriation of an unpaid loan

*Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, 18 ICSID Rep 360 (Berk Demirkol)



Indirect expropriation – Whether the cumulative acts of the State amounted to expropriation

*E energija v. Latvia*, ICSID Case No. ARB/12/33, 18 ICSID Rep 631  
 (Bhushan Satish)

Indirect expropriation – Whether there was substantial deprivation of property rights

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111  
 (Bruno Gélinas-Faucher)

NAFTA, Article 1110 – Customary international law – Whether measures resulted in radical deprivation of the investment – Whether temporary loss of business income was an expropriation

*Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, 18 ICSID Rep 199  
 (Jana Lamas de Mesa)

### **Fair and equitable treatment**

Arbitrariness – Public health – Tobacco control measures – Scientific evidence – Margin of appreciation – Proportionality – Good faith – Whether a margin of appreciation may be applied to policy decisions on public health – Whether the reasonableness of a tobacco control measure was determined by scientific evidence of actual effects or the good faith of the State in addressing public health

*Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, 18 ICSID Rep 450  
 (Oliver Hailes)

Arbitrary and discriminatory measures – Legitimate expectation – Due process – Bad faith – Due diligence – Whether fair and equitable treatment and the protection against arbitrary and discriminatory measures constituted the same standard of treatment – Whether delayed implementation of statutory and contractual duties by the State was in breach – Whether a revocation of licences in the public interest was in breach – Whether reversal of a previous decision taken on incorrect information was in breach – Whether consequential actions following impugned measures were likewise in breach – Whether declaring an energy crisis whilst taking steps to stop the claimant from providing services and forming a replacement provider was in bad faith – Whether the existence of only one legitimate reason supporting an impugned measure justified the decision – Whether the State made any specific assurance in relation to risks inherent to the claimant's business – Whether the claimant failed to exercise due diligence

*E energija v. Latvia*, ICSID Case No. ARB/12/33, 18 ICSID Rep 631  
 (Bhushan Satish)

Denial of justice – Whether contradictory decisions of different courts on the same issue led to denial of justice – Whether the rejection of an investor’s administrative challenge due to a competitor’s earlier and unsuccessful challenge on similar but not identical evidence led to denial of justice – Whether procedural irregularities were sufficiently grave to result in denial of justice – Whether the claims were decided in substance

*Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, 18 ICSID Rep 450  
 (Oliver Hailes)

Due process – Municipal law – Whether the State’s failure to hear the claimant before taking the impugned measures was in breach despite the claimant’s unsuccessful appeals in municipal courts – Whether measures found to be lawful in municipal courts should be examined by the tribunal

*E energija v. Latvia*, ICSID Case No. ARB/12/33, 18 ICSID Rep 631  
 (Bhushan Satish)

Full protection and security – Arbitrary or unreasonable measures – Legitimate expectation – Legal stability – Whether the standards of protection were overlapping – Whether guarantees of stability in general legislation may ground a legitimate expectation that the regulatory framework would not be modified

*Antaris v. Czech Republic*, PCA Case No. 2014-01, 18 ICSID Rep 681  
 (Eleanor Scogings and Robert Price)

Legal stability – Legitimate expectation – Taxation – Whether the expectation of stability in the exchange and currency regime was legitimate and protected by the BIT – Whether unilateral restructuring of governmental financial instruments was reasonable once the economic crisis had ended – Whether imposition of a capital tax on a nominal gain resulting from currency devaluation was in breach of fair and equitable treatment

*Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, 18 ICSID Rep 155 (Jaime Gallego)

Legitimate expectation – Contract – Applicable law – Human rights – Whether contractual performance constituted a legitimate expectation protected by the standard – Whether the standard was the customary minimum standard of treatment or should be extended by principles and rules of international law – Whether the investors’ expectations were legitimate in the light of the legal framework, social and economic environment, constitutional law and core interests of the host State such as the human right to water – Whether the investors had waived or lost their expectations due to negligence

*Urbaser v. Argentina*, ICSID Case No. ARB/07/26, 18 ICSID Rep 554  
 (Gabriela Álvarez Ávila and Ricardo Mier y Teran Ruesga)

Legitimate expectation – Good faith – Whether the investors had a legitimate expectation that the State would not invoke its essential security interests – Whether the State acted in good faith during the annulment of the

contract – Whether unjust enrichment grounded a distinct claim – Whether the State harassed the investors

*Devas v. India*, PCA Case No. 2013-09, 18 ICSID Rep 487 (Alexander Ferguson)

Legitimate expectation – Legal stability – Defence – Margin of appreciation – Due diligence – Whether investor awareness of possible changes to the legal framework may amount to a defence – Whether the claimants should have been aware of political and economic unrest and therefore impending reform – Whether the State should be accorded a margin of appreciation to make changes to the legal framework

*Antaris v. Czech Republic*, PCA Case No. 2014-01, 18 ICSID Rep 681 (Eleanor Scogings and Robert Price)

Legitimate expectation – Legal stability – Harmful products – Public concern – International practice – Whether the State made any commitment not to modify the legal framework – Whether investors should expect harmful products to be regulated – Whether investors should expect progressively more onerous regulation of harmful products due to public concern – Whether the State was precluded from adopting novel measures in advance of international practice

*Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, 18 ICSID Rep 450 (Oliver Hailes)

Legitimate expectation – Legal stability – Municipal law – Retroactivity – Whether expectations of stability may arise in the absence of an express stabilisation commitment – Whether there was a free-standing obligation to provide a stable and predictable investment framework – Whether State officials had made a promise of stability – Whether the State was entitled to amend legislation to correct price distortion – Whether a five-year tax exemption was a guarantee that the legal framework would not be amended during that period – Whether the measures were retroactive or in breach of legitimate expectations according to the municipal courts

*Antaris v. Czech Republic*, PCA Case No. 2014-01, 18 ICSID Rep 681 (Eleanor Scogings and Robert Price)

Legitimate expectation – Whether State measures substantially changed the legal and business framework under which the investment was made

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111 (Bruno Gélinas-Faucher)

Legitimate expectation – Whether the State provided specific assurances that the investors would not be expropriated – Whether changes to water permitting without compensation violated legitimate expectations – Whether restrictions on foreign currency and exchange were in breach of fair and equitable treatment

*Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, 18 ICSID Rep 360 (Berk Demirkol)

Minimum standard of treatment – Impairment – Whether revocation of the concessions violated the minimum standard of treatment – Whether subsequent annulment of the concessions was a bona fide exercise of police powers or an *ex post* attempt to improve an arbitral defence

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393  
(Oliver Marsden and Yuri Mantilla)

Minimum standard of treatment – NAFTA, Article 1105 – Customary international law – Legal stability – Legitimate expectation – Transparency – Arbitrariness – Whether the minimum standard of treatment had evolved through State practice – Whether the standard required the host State to provide a stable and predictable environment in which reasonable expectations were upheld – Whether the standard required transparency – Whether arbitrariness may constitute a breach of the standard – Whether an import measure targeting an investor for the purpose of resolving a trade dispute with its home State breached the minimum standard – Whether circumstances of the host State were relevant – Whether an exempted tax measure may nevertheless assist in understanding the context to challenged measures

*Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, 18 ICSID Rep 199  
(Jana Lamas de Mesa)

Minimum standard of treatment – NAFTA, Article 1105 – Customary international law – Legitimate expectation – Legal stability – Whether the minimum standard protected an investor's legitimate expectations – Whether the minimum standard protects an investor from changes in the legal and business framework – Whether the State made any promise or representation of a contractual nature – Whether the measures constituted egregious behaviour

*Mobil v. Canada*, ICSID Case No. ARB(AF)/07/4, 18 ICSID Rep 226  
(David Seidl and Tamara Korešová)

Minimum standard of treatment – NAFTA, Article 1105 – Discrimination – Due process – Transparency – Whether discriminatory treatment under the minimum standard of treatment provided protections beyond that afforded by the standards of most-favoured-nation and national treatment – Whether the State had shown wilful disregard of due process – Whether transparency in regulatory decision-making was required under the customary minimum standard

*Mercer v. Canada*, ICSID Case No. ARB(AF)/12/3, 18 ICSID Rep 657  
(Zachary Kady)

Transparency – Policy change – Whether the State breached the standard of treatment by not disclosing an abrupt policy change during renegotiations

*Urbaser v. Argentina*, ICSID Case No. ARB/07/26, 18 ICSID Rep 554  
 (Gabriela Álvarez Ávila and Ricardo Mier y Teran Ruesga)

### Foreign investor

Investment – Minority or indirect shareholding – Whether a minority shareholding qualified as an investment

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111  
 (Bruno Gélinas-Faucher)

### Free transfer

Interpretation – International Monetary Fund – Whether a currency transfer impeded by a bank freeze was related to an investment – Whether the provisions and principles of the International Monetary Fund assisted in interpretation of the investment treaty standard

*Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, 18 ICSID Rep 155 (Jaime Gallego)

Physical assets – Whether the guarantee of free transfer extended from funds to include physical assets – Whether the detention of vessels fell within the scope of the State's obligation – Whether the detention prevented the investor from selling and transferring proceeds

*Karkey v. Pakistan*, ICSID Case No. ARB/13/1, 18 ICSID Rep 600  
 (Samy Markbaoui and Ece Akincibay)

Whether refusal to release foreign currency and imposition of local currency constituted an investment treaty breach

*Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, 18 ICSID Rep 360 (Berk Demirkol)

### Full protection and security

Law enforcement – Whether the State took all reasonable measures to remove occupiers from the investors' land – Whether the police were overwhelmed or would have needed to use disproportionate force – Whether responsibility was excepted by a situation of war or revolution

*Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, 18 ICSID Rep 360 (Berk Demirkol)

Law enforcement – Whether use of the police to enforce a lawful order against the claimant's business assets was in breach of full protection and security

*E energija v. Latvia*, ICSID Case No. ARB/12/33, 18 ICSID Rep 631  
 (Bhushan Satish)

Legal protection – Whether the standard of full protection and security expanded beyond physical protection

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111  
 (Bruno Gélinas-Faucher)

Legal protection – Whether the State failed to afford full legal protection and security against third parties – Whether the State-owned entity was a third party

*Devas v. India*, PCA Case No. 2013-09, 18 ICSID Rep 487 (Alexander Ferguson)

### Interpretation

*Effet utile* – Whether it would be inconsistent with the effectiveness of the procurement exception to find that the standard of fair and equitable treatment permitted a discrimination claim beyond the standards of most-favoured-nation and national treatment

*Mercer v. Canada*, ICSID Case No. ARB(AF)/12/3, 18 ICSID Rep 657  
 (Zachary Kady)

VCLT, Article 31 – VCLT, Article 32 – Customary international law – Whether the rules of treaty interpretation supported a particular meaning of *siège social* – Whether supplementary means of interpretation confirmed the meaning of *siège social* – Whether the customary rules on diplomatic protection were relevant to treaty interpretation – Whether the contracting States intended to give the term “investment” an ordinary meaning or special meaning

*Orascom v. Algeria*, ICSID Case No. ARB/12/35, 18 ICSID Rep 584  
 (Christina Cathey Schuetz)

World Trade Organization – International Monetary Fund – Whether the norms of multilateral economic institutions assisted in investment treaty interpretation

*Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, 18 ICSID Rep 155 (Jaime Gallego)

### Investment

NAFTA, Article 1139 – Whether actual or potential market share was an investment – Whether business income of a subsidiary qualified as an investment

*Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, 18 ICSID Rep 199  
 (Jana Lamas de Mesa)

### Jurisdiction

Applicable law – ICSID Convention, Article 42(1) – ICSID Convention, Article 25 – Whether the choice of applicable law on the merits applied also to the jurisdictional phase

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111  
(Bruno Gélinas-Faucher)

Consent – ICSID Convention, Article 25(1) – Cooling-off period – Whether each party had consented to arbitration – Whether the investors had satisfied the three-month cooling-off period required under the BIT through negotiations and municipal legal proceedings

*Cortec v. Kenya*, ICSID Case No. ARB/15/29, 18 ICSID Rep 741  
(Andrew Cannon and Iain Maxwell)

Consent – ICSID Convention, Article 25(1) – Meaning of “shall assent” – Whether the State consented in writing to ICSID arbitration – Whether the BITs contained standing offers to arbitrate – Whether the State subsequently consented to arbitrate in approving the local investment vehicle – Whether the subsequent act of consent extended to foreign shareholders

*Churchill v. Indonesia*, ICSID Case No. ARB/12/14 and 12/40, 18 ICSID Rep 527 (Eduardo Silva Romero, David L. Atanasio, Javier Echeverri Díaz and Ruxandra Esanu)

Consent – ICSID Convention, Article 36(2) – ICSID Convention Institution Rule 2(1)(f) and 2(2) – Whether there was a lack of internal authorisation to initiate arbitration in the claimant’s board minutes – Whether a lack of internal authorisation could taint the consent requirement

*E energija v. Latvia*, ICSID Case No. ARB/12/33, 18 ICSID Rep 631  
(Bhushan Satish)

Counterclaim – Consent – Whether the investor consented *ipso facto* to counterclaims in exercising its right to arbitrate – Whether the BIT contemplated the possibility of counterclaims

*Karkey v. Pakistan*, ICSID Case No. ARB/13/1, 18 ICSID Rep 600  
(Samy Markbaoui and Ece Akincibay)

Counterclaim – ICSID Convention, Article 46 – Whether the tribunal had *prima facie* jurisdiction to hear a counterclaim brought by the host State

*Urbaser v. Argentina*, ICSID Case No. ARB/07/26, 18 ICSID Rep 554  
(Gabriela Álvarez Ávila and Ricardo Mier y Teran Ruesga)

Countermeasures – Whether an investment tribunal had jurisdiction to determine the validity of countermeasures

*Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, 18 ICSID Rep 199  
(Jana Lamas de Mesa)

Denial of benefits – ECT, Article 17 – Whether the State exercised its right to deny the treaty’s benefits – Whether the investors were owned or controlled by citizens of a third State



*Yukos v. Russia*, PCA Case No. AA 227, 18 ICSID Rep 331 (Guillaume Croisant)

Dispute – ICSID Convention, Article 25 – Whether there was no dispute because the State had merely suspended rather than revoked the mining licence

*Cortec v. Kenya*, ICSID Case No. ARB/15/29, 18 ICSID Rep 741 (Andrew Cannon and Iain Maxwell)

Dispute – ICSID Convention, Article 25(1) – Whether dispute was of a legal nature – Whether the dispute arose out of an investment – Whether the claim was premature

*Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, 18 ICSID Rep 155 (Jaime Gallego)

Dispute – ICSID Convention, Article 25(1) – Whether the dispute was of a legal nature – Whether dispute arose directly from an investment

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111 (Bruno Gélinas-Faucher)

Exclusions and reservations – Public health – Interpretation – Whether the State's right not to allow economic activities for reasons of public health excluded the impugned measures from the scope of the BIT – Whether the exclusion applied only to the admission of investments rather than the protection of investments already admitted

*Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, 18 ICSID Rep 450 (Oliver Hailes)

Exhaustion of remedies – Domestic litigation requirement – Whether one investor's compliance with the domestic litigation requirement extended to other investors – Whether the purpose of the domestic litigation requirement was met

*Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, 18 ICSID Rep 450 (Oliver Hailes)

Exhaustion of remedies – Whether the requirement for domestic litigation prior to arbitration was one of jurisdiction – Whether the State was deprived of a fair opportunity to address the dispute within its own legal system – Whether the requirement also imposed obligations on the State to ensure its courts were capable of adjudicating the substance of the dispute within 18 months – Whether the State was precluded from relying on the investors' failure to comply with the domestic litigation requirement

*Urbaser v. Argentina*, ICSID Case No. ARB/07/26, 18 ICSID Rep 554 (Gabriela Álvarez Ávila and Ricardo Mier y Teran Ruesga)



Foreign investor – Consent of host State – ICSID Convention, Article 25(3) – Whether the public nature of an investor meant that the consent of the other ICSID contracting party was required

*Urbaser v. Argentina*, ICSID Case No. ARB/07/26, 18 ICSID Rep 554  
(Gabriela Álvarez Ávila and Ricardo Mier y Teran Ruesga)

Foreign investor – ECT, Article 1(7) – Origin of capital – Whether an investor must have an effective link with the home State

*Yukos v. Russia*, PCA Case No. AA 227, 18 ICSID Rep 331 (Guillaume Croisant)

Foreign investor – ICSID Convention, Article 25 – Corporate nationality – Meaning of *siège social* – Whether the nationality criteria in the BIT were reasonable and of objective significance – Whether pursuant to international law an ambiguous term in a definition of nationality should be interpreted by reference to criteria under the applicable national law or an autonomous notion of nationality – Whether *siège social* meant the registered office of the investor

*Orascom v. Algeria*, ICSID Case No. ARB/12/35, 18 ICSID Rep 584  
(Christina Cathey Schuetz)

Foreign investor – ICSID Convention, Article 25 – Whether investors had acquired shares in a local company – Whether the shareholders engaged in fraud or fabricated evidence to gain access to arbitration – Whether a local company may be treated as the national of another State due to foreign control

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393  
(Oliver Marsden and Yuri Mantilla)

Foreign investor – ICSID Convention, Article 25(2) – Whether the requirements of foreign nationality or control were satisfied

*Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, 18 ICSID Rep 360 (Berk Demirkol)

Foreign investor – ICSID Convention, Article 25(2)(b) – Whether the claimant had standing to bring a claim as a protected investor

*E energija v. Latvia*, ICSID Case No. ARB/12/33, 18 ICSID Rep 631  
(Bhushan Satish)

Fork-in-the-road clause – ECT, Article 26(3)(b)(i) – Whether domestic and international human rights proceedings covered the same parties, facts and cause of action as the investment treaty claims

*Yukos v. Russia*, PCA Case No. AA 227, 18 ICSID Rep 331 (Guillaume Croisant)

Forum selection – Submission to local jurisdiction – Whether contract-related disputes may be submitted to ICSID tribunal

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111  
(Bruno Gélinas-Faucher)

Investment – Contract – ICSID Convention, Article 25(1) – *Salini* test – Whether the contract was akin to a sale of goods or qualified as an investment – Whether the investor contributed significant capital with substantial duration, took a reasonable risk on the transaction, and contributed to the economic development of the State

*Karkey v. Pakistan*, ICSID Case No. ARB/13/1, 18 ICSID Rep 600  
(Samy Markbaoui and Ece Akincibay)

Investment – ECT, Article 1(6) – Definition of protected investment – Whether the ultimate source of investment must be foreign

*Yukos v. Russia*, PCA Case No. AA 227, 18 ICSID Rep 331 (Guillaume Croisant)

Investment – Foreign investor – ICSID Convention, Article 25 – Origin of capital – *Salini* test – Bad faith – Whether there was no protected investment because the investors were shell companies for investment from a third State – Whether the investment satisfied the criteria of risk, duration and contribution to the economic development of the host State – Whether jurisdiction should be declined due to allegations of bad faith

*Cortec v. Kenya*, ICSID Case No. ARB/15/29, 18 ICSID Rep 741  
(Andrew Cannon and Iain Maxwell)

Investment – Foreign investor – NAFTA, Article 1101 – Whether measures relating to trade in goods may also be related to investors or investments

*Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, 18 ICSID Rep 199  
(Jana Lamas de Mesa)

Investment – ICSID Convention, Article 25 – Interpretation – *Salini* test – Whether the four elements of the *Salini* test were mandatory legal requirements – Whether the BIT contained further limits on the scope of protected investments

*Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, 18 ICSID Rep 450  
(Oliver Hailes)

Investment – ICSID Convention, Article 25 – *Salini* test – Origin of capital – Whether the claims related to foreign investments fulfilling the applicable test

*Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, 18 ICSID Rep 360 (Berk Demirkol)

Investment – ICSID Convention, Article 25 – Whether each investor satisfied the objective elements of an investment

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393  
 (Oliver Marsden and Yuri Mantilla)

Investment – ICSID Convention, Article 25(1) – Whether the claimant's shares and statutory capital in the local subsidiary were a covered investment

*E energija v. Latvia*, ICSID Case No. ARB/12/33, 18 ICSID Rep 631  
 (Bhushan Satish)

Investment – Legality – Fraud – Contract – Municipal law – Whether the investor procured the investment through contractual promises it knew it could not perform – Whether changes made to the contract contrary to municipal law precluded jurisdiction

*Karkey v. Pakistan*, ICSID Case No. ARB/13/1, 18 ICSID Rep 600  
 (Samy Markbaoui and Ece Akincibay)

Investment – Legality – Municipal law – Intangible assets – Environmental impact assessment – Proportionality – Bad faith – Whether there was an implied requirement that investments be in accordance with the laws of the host State – Whether a prospecting licence and data generated thereunder qualified for protection if the licence did not legally permit the investor to generate revenue in the host State – Whether licences acquired contrary to the requirement of an environmental impact statement and other municipal protections were void *ab initio* under municipal law – Whether the tribunal should accept rulings of the municipal courts – Whether it was proportionate to decline jurisdiction in the light of the significance of the legal obligations, the seriousness of the investor's conduct and whether those factors resulted in a sufficiently significant violation of the interests of the host State – Whether protection of a mining licence would have been denied on the merits for want of legality and good faith in the exercise of a State official's discretion even if it was not void *ab initio* under municipal law

*Cortec v. Kenya*, ICSID Case No. ARB/15/29, 18 ICSID Rep 741  
 (Andrew Cannon and Iain Maxwell)

Investment – Legality – Whether an admission requirement was restricted to the time when the investment was made or extended to subsequent performance – Whether local consent satisfied the admission requirement – Whether a government body was authorised to grant consent

*Churchill v. Indonesia*, ICSID Case No. ARB/12/14 and 12/40, 18 ICSID Rep 527 (Eduardo Silva Romero, David L. Atanasio, Javier Echeverri Díaz and Ruxandra Esanu)

Investment – Minority or indirect shareholding – Whether the investor made a contribution or allocation of resources for a duration with an expectation of commercial return – Whether the investment was located in the host State

*Orascom v. Algeria*, ICSID Case No. ARB/12/35, 18 ICSID Rep 584  
(Christina Cathey Schuetz)

Investment – Whether a foreign investor had standing to bring claims for damages suffered by the assets, investments and activities of its local subsidiary

*Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, 18 ICSID Rep 155 (Jaime Gallego)

Investment – Whether an investment had been made by the acquisition of shares, debentures and indirect interests over business assets – Whether it was relevant that the project required further regulatory approval

*Devas v. India*, PCA Case No. 2013-09, 18 ICSID Rep 487 (Alexander Ferguson)

Investment – Whether the investors' shareholding in a local company extended to protection of concession rights under the BIT – Whether the investors had transferred their shareholding interests in breach of a concession contract

*Urbaser v. Argentina*, ICSID Case No. ARB/07/26, 18 ICSID Rep 554  
(Gabriela Álvarez Ávila and Ricardo Mier y Teran Ruesga)

Legality – Estoppel – Whether the State was estopped from contesting the legality of the investments – Whether there was any fraud or non-trivial violation of the host State's legal order or foreign investment regime at the time when the investment was established

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393  
(Oliver Marsden and Yuri Mantilla)

Legality – Municipal law – Judicial act – Arbitrariness – Whether the investment was made in conformity with municipal law – Whether issues of municipal law decided in the judgment of a superior court were binding upon an international tribunal – Whether violations of municipal law by officials precluded the State relying on the judgment – Whether the judgment was arbitrary under international law – Whether the State could in an international tribunal rely on judicial findings which it was seeking to overturn

*Karkey v. Pakistan*, ICSID Case No. ARB/13/1, 18 ICSID Rep 600  
(Samy Markbaoui and Ece Akincibay)

Nationality – ICSID Convention, Article 25(2)(b) – Whether nationality requirements were cumulative or alternative – Whether an investor not exercising control may bring a claim – Whether the interests of foreign investors may be combined

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111  
(Bruno Gélinas-Faucher)

Negotiation – Whether an ongoing renegotiation of licences with the State was a ground to decline jurisdiction

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111  
 (Bruno Gélinas-Faucher)

Provisional application – ECT, Article 45 – Whether the State was required to make prior declarations to benefit from limitations on the treaty’s provisional application – Whether the limitation clause required analysis of the treaty’s overall consistency with domestic law or of the consistency of each treaty provision

*Yukos v. Russia*, PCA Case No. AA 227, 18 ICSID Rep 331 (Guillaume Croisant)

Provisional application – VCLT, Article 25 – Whether the parties to the BIT agreed to provisional application prior to the date of its ratification

*Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, 18 ICSID Rep 360 (Berk Demirkol)

Standing – Whether the claimants had standing to bring a claim for loss in respect of assets held by local companies

*Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, 18 ICSID Rep 360 (Berk Demirkol)

Time bar – NAFTA, Article 1116(2) – NAFTA, Article 1117(2) – Actual or constructive knowledge – Whether the claimant acquired or should reasonably have acquired sufficient knowledge of any alleged breach of NAFTA at the time three years prior to its request for arbitration

*Mercer v. Canada*, ICSID Case No. ARB(AF)/12/3, 18 ICSID Rep 657  
 (Zachary Kady)

UNCITRAL Rules, Article 21(3) – Whether a jurisdictional objection was untimely and had been waived

*Bankswitch v. Ghana*, PCA Case No. 2011-10, 18 ICSID Rep 303  
 (Constantinos Salonidis and Joseph Klingler)

### Most-favoured-nation treatment

NAFTA, Article 1103 – Whether the investor had identified a comparable investor or investment of a NAFTA party or non-party in the territory of the host State

*Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, 18 ICSID Rep 199  
 (Jana Lamas de Mesa)

National treatment – NAFTA, Article 1102 – NAFTA, Article 1103 – Like circumstances – De facto discrimination – Whether application of the same

regulatory principles or methodology to different investors and investments constituted discrimination where the treatment resulted in disparate effects

*Mercer v. Canada*, ICSID Case No. ARB(AF)/12/3, 18 ICSID Rep 657 (Zachary Kady)

Substantive provision – Whether the standard of full protection and security could be imported from another bilateral investment treaty

*Devas v. India*, PCA Case No. 2013-09, 18 ICSID Rep 487 (Alexander Ferguson)

Whether the duty to grant the necessary permits under municipal law could be imported from another BIT – Whether the most-favoured-nation clause could import treaty standards or related only to de facto treatment

*E energija v. Latvia*, ICSID Case No. ARB/12/33, 18 ICSID Rep 631 (Bhushan Satish)

### National treatment

NAFTA, Article 1102 – Like circumstances – Whether nationals were in like circumstances to the investor – Whether the range of products, level of regulation or economic circumstances of nationals relevantly distinguished their circumstances – Whether treatment of the investor was less favourable on the basis of nationality

*Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, 18 ICSID Rep 199 (Jana Lamas de Mesa)

### Performance requirements

NAFTA, Article 1106 – Interpretation – Meaning of “services” – Whether research and development qualified as services – Whether the measure required the investor to prefer local goods and services

*Mobil v. Canada*, ICSID Case No. ARB(AF)/07/4, 18 ICSID Rep 226 (David Seidl and Tamara Korešová)

NAFTA, Article 1106 – Whether a tax advantage conditional on domestic production was connected to an investment

*Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, 18 ICSID Rep 199 (Jana Lamas de Mesa)

### Procedure

Addition of a party – ICSID Convention, Article 25(2)(b) – ICSID Convention, Article 46 – Whether the local subsidiary of the claimant could be added as a party to the dispute – Whether the request for addition could be made by the claimant – Whether the claims of the local subsidiary needed to be different from those of the foreign parent

*Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, 18 ICSID Rep 155 (Jaime Gallego)

Admissibility – Incidental or additional claim – ICSID Convention, Article 46 – ICSID Arbitration Rule 40 – Whether the claim was presented not later than in the reply – Whether the claim arose directly out of the subject matter of the dispute – Whether the claim was in the scope of the consent of the parties and the tribunal’s jurisdiction – Whether the claim was subject to any further requirement of domestic litigation

*Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, 18 ICSID Rep 450 (Oliver Hailes)

*Amicus curiae* – ICSID Arbitration Rule 37(2) – Public interest – Whether a non-disputing party possessed perspective, particular knowledge or insight on the issues in dispute that was different from that of the disputing parties – Whether the proposed submission was within the scope of the dispute – Whether the non-disputing parties had an interest in the proceeding – Whether granting the request would support transparency and the public interest – Whether the submission would disrupt the proceeding or unfairly burden either party – Whether the applicants had sufficient independence from the disputing parties – Whether the application was timely

*Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, 18 ICSID Rep 450 (Oliver Hailes)

Challenge to arbitrator – Impartiality – Issue conflict – Whether the challenge was brought within time – Whether previous statements about the law gave rise to issue conflict

*Devas v. India*, PCA Case No. 2013-09, 18 ICSID Rep 487 (Alexander Ferguson)

Evidence – Document production – Whether negative inferences must be drawn from a party’s failure to produce documents as ordered by the tribunal

*General Dynamics v. Libya*, ICC Case No. 19222/EMT, 18 ICSID Rep 421 (Camille Martini)

Exclusivity – ICSID Convention, Article 26 – Whether the exclusivity of the arbitral proceedings was threatened by the continuation of local criminal proceedings

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393 (Oliver Marsden and Yuri Mantilla)

Fraud – Whether an allegation of forgery should be addressed as a matter of jurisdiction, admissibility or merits

*Churchill v. Indonesia*, ICSID Case No. ARB/12/14 and 12/40, 18 ICSID Rep 527 (Eduardo Silva Romero, David L. Atanasio, Javier Echeverri Díaz and Ruxandra Esanu)



ICSID Arbitration Rule 27 – Whether the parties needed to agree on a procedural language

*Orascom v. Algeria*, ICSID Case No. ARB/12/35, 18 ICSID Rep 584  
 (Christina Cathey Schuetz)

Provisional measures – ICSID Convention, Article 47 – ICSID Arbitration Rule 39 – Whether criminal proceedings and corporate audits affected the claimants’ right to the preservation of the status quo and to non-aggravation of the dispute – Whether the criminal proceedings impaired the claimants’ right to present their case – Whether the claimants satisfied the criteria of urgency, necessity and proportionality – Whether a stay of criminal proceedings would affect sovereignty or be contrary to municipal law

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393  
 (Oliver Marsden and Yuri Mantilla)

Stay of enforcement – ICSID Convention, Article 52(4) – Whether there was a presumption in favour of granting a stay – Whether an annulment committee was empowered to impose conditions on the granting of stay

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111  
 (Bruno Gélinas-Faucher)

Stay of enforcement – ICSID Convention, Article 53 – ICSID Convention, Article 54 – Whether the creditor must have recourse to domestic enforcement procedure – Whether circumstances and history of non-compliance called for assurances

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111  
 (Bruno Gélinas-Faucher)

Stay of enforcement – Whether the State demonstrated economic hardship – Whether escrow eliminated risk of non-recoupment

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111  
 (Bruno Gélinas-Faucher)

Stay of proceeding – Termination of proceeding – Municipal law – Parallel proceeding – Whether the arbitration should be stayed pending the outcome of municipal proceedings – Whether the arbitration should be terminated due to ongoing municipal proceedings

*E energija v. Latvia*, ICSID Case No. ARB/12/33, 18 ICSID Rep 631  
 (Bhushan Satish)

Termination of stay – Whether the risk of third-party creditors seizing escrow funds justified non-compliance with conditions on the granting of stay

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111  
 (Bruno Gélinas-Faucher)



## Remedies

Contributory fault – Mitigation – ILC Articles on State Responsibility, Article 31 – ILC Articles on State Responsibility, Article 39 – Whether the investors' use of tax avoidance arrangements contributed in a material and significant way to their loss – Whether the investors could have mitigated their loss

*Yukos v. Russia*, PCA Case No. AA 227, 18 ICSID Rep 331 (Guillaume Croisant)

Damages – Contributory fault – Whether damages should not be awarded because the concession had no future due to failures of the investors

*Urbaser v. Argentina*, ICSID Case No. ARB/07/26, 18 ICSID Rep 554 (Gabriela Álvarez Ávila and Ricardo Mier y Teran Ruesga)

Damages – Customary international law – Causation – Contributory fault – Whether damages for breach of fair and equitable treatment were the same as for expropriation – Whether the claimant contributed to its own loss – Whether to reduce the award of damages

*E energija v. Latvia*, ICSID Case No. ARB/12/33, 18 ICSID Rep 631 (Bhushan Satish)

Damages – Customary international law – Whether assessment of full reparation allowed for use of *ex post* data up to the date of the award

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393 (Oliver Marsden and Yuri Mantilla)

Damages – Mitigation – Whether the damages claim was mitigated by the investor's share of import quotas – Whether the damages claim was mitigated by the treatment and profitability of a distinct investment of the investor

*Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, 18 ICSID Rep 199 (Jana Lamas de Mesa)

Damages – Standard of compensation – Expropriation – Standard of proof – Valuation date – Valuation of contractual rights – Repairs costs – Replacement costs – Lost profits – Increased costs – Wasted costs – Whether the investor was entitled not only to losses suffered but also lost profits – Whether damages had to be proven with certainty or merely with a sufficient degree of probability – Whether *ex ante* or *ex post* valuation was the appropriate starting point – Whether the investor was entitled to recover the lost earning capacity of detained vessels – Whether the investor was entitled to recover the cost of delays to its operations in other States

*Karkey v. Pakistan*, ICSID Case No. ARB/13/1, 18 ICSID Rep 600 (Samy Markbaoui and Ece Akincibay)

Damages – Whether an investor may claim damages for losses incurred from measures determined to be illegal by another international tribunal – Whether an investor may claim for loss of profits due to the inability to sell goods to its local subsidiary

*Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, 18 ICSID Rep 199 (Jana Lamas de Mesa)

Damages – Whether crisis had incidence on the amount of compensation – Whether a renegotiated agreement had incidence on amount of compensation

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111 (Bruno Gélinas-Faucher)

Damages – Whether the claimant should be awarded lost profits for substantial loss caused by the breach of contract

*Bankswitch v. Ghana*, PCA Case No. 2011-10, 18 ICSID Rep 303 (Constantinos Salonidis and Joseph Klingler)

Damages – Whether the claimant would have retained the drawn amount but for the State's breach of contract

*General Dynamics v. Libya*, ICC Case No. 19222/EMT, 18 ICSID Rep 421 (Camille Martini)

Damages – Whether there was a compensable difference between the value of land as is and but for the unlawful measures due to damage and loss of productivity

*Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, 18 ICSID Rep 360 (Berk Demirkol)

Expropriation – Compensation – Whether compensation for expropriation could be apportioned based on partial defence of essential security interests

*Devas v. India*, PCA Case No. 2013-09, 18 ICSID Rep 487 (Alexander Ferguson)

Future damages – NAFTA, Article 1116 – Whether a tribunal may award compensation for future damages

*Mobil v. Canada*, ICSID Case No. ARB(AF)/07/4, 18 ICSID Rep 226 (David Seidl and Tamara Korešová)

Interest – Applicable law – Whether international law or municipal law applied to whether interest should be compounded

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393 (Oliver Marsden and Yuri Mantilla)

Interest – Compound interest – Whether simple or compound interest should be awarded in the circumstances

*Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, 18 ICSID Rep 155 (Jaime Gallego)

Interest – Contract – Whether interest should be charged at the contractual rate on delayed payments or borrowing costs

*Karkey v. Pakistan*, ICSID Case No. ARB/13/1, 18 ICSID Rep 600 (Samy Markbaoui and Ece Akıncıbay)

Interest – Whether post-award interest must be expressly requested in the petition for relief

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111 (Bruno Gélinas-Faucher)

Moral damages – Whether any specific moral injury satisfied the threshold of exceptional circumstances

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393 (Oliver Marsden and Yuri Mantilla)

Moral damages – Whether exceptional circumstances existed to award moral damages – Whether corporate claimants may be awarded moral damages

*Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, 18 ICSID Rep 360 (Berk Demirkol)

Quantum – Customary international law – Whether a tribunal may increase compensation to offset an investor's future tax liability

*Mobil v. Canada*, ICSID Case No. ARB(AF)/07/4, 18 ICSID Rep 226 (David Seidl and Tamara Korešová)

Quantum – Whether losses represented expenditure undertaken pursuant to the measure or would have been made in the ordinary course of business – Whether compensation should be decreased to reflect tax benefits and royalty payment deductions enjoyed by an investor

*Mobil v. Canada*, ICSID Case No. ARB(AF)/07/4, 18 ICSID Rep 226 (David Seidl and Tamara Korešová)

Quantum – Whether the award of expectation damages for lost profits should be discounted for risks and the time value of money

*Bankswitch v. Ghana*, PCA Case No. 2011-10, 18 ICSID Rep 303 (Constantinos Salonidis and Joseph Klingler)

Quantum – Whether the investors' loss should be valued at the date of expropriation or the date of award – Whether there was any risk of double recovery

*Yukos v. Russia*, PCA Case No. AA 227, 18 ICSID Rep 331 (Guillaume Croisant)

Restitution – Whether it was possible to reinstate title to expropriated land

*Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, 18 ICSID Rep 360 (Berk Demirkol)

Satisfaction – ILC Articles on State Responsibility, Article 37 – Customary international law – Whether the tribunal had jurisdiction to make a declaration – Whether the State’s conduct during the arbitral proceeding, including alleged harassment through criminal proceedings and failure to comply with provisional measures, warranted declaratory relief

*Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, 18 ICSID Rep 393 (Oliver Marsden and Yuri Mantilla)

Settlement – State-owned entity – Whether an agreement between the claimant and a State-owned company settled treaty-based claims in the absence of express language

*E energija v. Latvia*, ICSID Case No. ARB/12/33, 18 ICSID Rep 631 (Bhushan Satish)

Standard of proof – Customary international law – Whether compensation could be made for obligations incurred but not yet paid – Whether uncertainty was to be construed against the wrongdoer

*Mobil v. Canada*, ICSID Case No. ARB(AF)/07/4, 18 ICSID Rep 226 (David Seidl and Tamara Korešová)

## State responsibility

Attribution – ILC Articles on State Responsibility, Article 4 – ILC Articles on State Responsibility, Article 8 – ILC Articles on State Responsibility, Article 11 – Customary international law – Whether the State could be held responsible for police inaction in the face of the unlawful occupation movement – Whether the occupation movement was under the direct order or control of the State

*Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, 18 ICSID Rep 360 (Berk Demirkol)

Attribution – Most-favoured-nation treatment – State-owned entity – Whether the impugned conduct of companies owned by the municipal authority was attributable based on rules in another BIT

*E energija v. Latvia*, ICSID Case No. ARB/12/33, 18 ICSID Rep 631 (Bhushan Satish)

Attribution – State-owned entity – Contract – Whether the contractual conclusion and performance of a State-owned energy company was

attributable to the State – Whether contractual disclaimers were relevant to attribution

*Karkey v. Pakistan*, ICSID Case No. ARB/13/1, 18 ICSID Rep 600  
 (Samy Markbaoui and Ece Akıncıbay)

Attribution – State-owned entity – ILC Articles on State Responsibility – Whether the State can be held liable for the actions of a State-owned entity – Whether the State can be held liable for the actions of a bankruptcy administrator

*Yukos v. Russia*, PCA Case No. AA 227, 18 ICSID Rep 331 (Guillaume Croisant)

Attribution – State-owned entity – ILC Articles on State Responsibility, Article 4 – ILC Articles on State Responsibility, Article 5 – Customary international law – Whether municipal and regulatory authorities were State organs acting in an official capacity – Whether the conduct of the regulatory authority and companies owned by the municipal authority could be attributed to the State for having exercised elements of governmental authority – Whether the State-owned companies were being directed and controlled by the State

*E energija v. Latvia*, ICSID Case No. ARB/12/33, 18 ICSID Rep 631  
 (Bhushan Satish)

Attribution – State-owned entity – ILC Articles on State Responsibility, Article 4 – ILC Articles on State Responsibility, Article 5 – Whether actions of a State-owned entity could be attributed to the State under customary international law – Whether the State-owned entity was a governmental entity under municipal law – Whether the concept of agency could establish State responsibility

*Devas v. India*, PCA Case No. 2013-09, 18 ICSID Rep 487 (Alexander Ferguson)

### **Umbrella clause**

Intellectual property – Trademark – Whether granting a trademark under the general law on intellectual property was a unique commitment to encourage or permit a specific investment

*Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, 18 ICSID Rep 450  
 (Oliver Hailes)

Whether breach arose from conduct of an ordinary contract party or involved sovereign State function – Whether the obligation was related to a specific investment agreement

*Sempra v. Argentina*, ICSID Case No. ARB/02/16, 18 ICSID Rep 111  
 (Bruno Gélinas-Faucher)

Whether the State entered into any commitments with regard to investments – Whether the standard applied to contractual undertakings made to a local subsidiary – Whether domestic laws addressed to the general public created obligations specific to a foreign investor

*Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, 18 ICSID Rep 155 (Jaime Gallego)