

ICSID Reports

Volume 20

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 into 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 and international commercial arbitration, whether advising foreign investors or States. Volume 20 of the *ICSID Reports* focuses on *Attribution of Conduct to the State*, including an opening piece by ICSID Secretary-General Meg Kinnear regarding the investor–State application of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts and an overview of the international law on attribution in investment disputes by Professor Jorge E. Viñuales, Harold Samuel Professor of Law and Environmental Policy at the University of Cambridge. Volume 20 of the *ICSID Reports* includes summaries, digests and excerpts of decisions rendered between 2009 and 2020 in 16 cases involving States from across Africa, Asia, Europe and the Americas, reflecting the breadth of contemporary practice on the attributable conduct of State organs, State-owned entities and non-State actors in international investment law: *Bayindir v. Pakistan*, *EDF v. Romania*, *Kardassopoulos v. Georgia*, *Hamester v. Ghana*, *Tulip Real Estate v. Turkey*, *Mesa Power v. Canada*, *Almås v. Poland*, *Flemingo DutyFree v. Poland*, *Saint-Gobain v. Venezuela*, *Ampal v. Egypt*, *Beijing Urban v. Yemen*, *Tethyan Copper v. Pakistan*, *Gavrilović v. Croatia*, *Unión Fenosa v. Egypt*, *Ortiz v. Algeria* and *Strabag v. Libya*. Case summaries and digests are written upon the invitation of the Editors by arbitration practitioners and international law researchers.

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Volume

20

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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
20

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INTRODUCTION

Volume 20 continues the direction of travel set since Volume 18. It reports excerpts – rather than the full text – of 16 decisions of particular relevance for the topical focus of the volume, *Attribution of Conduct to the State*. Each decision is introduced in an extended summary prepared by a network of law firms and colleagues, following a protocol that excludes conflicts of interests. ICSID Secretary-General Meg Kinnear has kindly accepted our invitation to contribute an opening piece on “ARSIWA, ISDS, and the process of developing an investor–State jurisprudence”. As in previous volumes, one of the editors has prepared a preliminary study on the topic of the volume.

This approach is intended to gather the most relevant decisions concerning a given topic of general interest in a single volume and provide authoritative analysis of the state of law on it. Our initial selection of topics, with Volume 18 devoted to defence arguments, Volume 19 to the meaning of investment, and Volume 20 to attribution of conduct to the State, hopes to cover a number of foundational aspects of investment law and arbitration before turning to more specialised issues. Over time, we plan to devote some more space within each volume to commentary and analysis, in the form of symposium contributions or elicited studies but also, possibly, of research articles submitted for peer-review and potential publication, as is the practice in academic and professional journals.

As in previous volumes, Volume 20 includes tables of cases reported in the volume and in the series, and a digest of issues arising from the 16 reported cases.

The year 2021 marks the twentieth anniversary of the adoption by the International Law Commission, in second reading, of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, on 9 August 2001. It is also the year in which the last Special Rapporteur on this topic, Professor James Crawford, sadly passed away. As the Whewell Professor of International Law at Cambridge, a member of the International Law Commission, an influential scholar, practitioner and arbitrator and a Judge of the International Court of Justice, Professor Crawford’s contribution to the field of international law is profound and enduring. Professor Crawford also served as Co-General Editor of the *ICSID Reports* from 2004 until 2012 (Volumes 6 to 16). This volume is dedicated to his memory.

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. Volume 19 contains decisions and awards for proceedings commenced between 1999 and 2013. Volume 20 contains decisions and awards for proceedings commenced between 2003 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.

After Volume 17, the *ICSID Reports* follow a different format. Each volume has a thematic focus and includes scholarly commentary from the Editors and invited authors. Excerpts from approximately 20 cases are reported, with case summaries and digests written by invited practitioners and researchers. 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. Volume 18 focused on defence arguments in investment arbitration. Volume 19 focused on the meaning of investment. Volume 20 focuses on attribution of conduct to the State.

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 Volumes 18–20 is indicated in each volume’s list of “Sources of reported decisions”, at p. xviii in Volume 20.

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.

Volumes 18–20 also include lists of abbreviations used in the volume and recommended short-form citations.

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 Reports* 453.

ACKNOWLEDGEMENTS

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Summaries were written by (in alphabetical order): Gabriela Alvarez-Avila, David L. Attanasio, Zeïneb Bouraoui, Damien Charlotin, Kyongwha Chung, Berk Demirkol, Colleen Devine, Alexander Ferguson, Jaime Gallego, José M. García Rebolledo, Oliver Hailes, Carlos Hernández Durán, Zachary Kady, Thomas F. Lane, Ofilio J. Mayorga, James McGlaughlin, Alice Osman, Robert Price, Devon Robertson, Felix Schaff, Eduardo Silva Romero, Vasuda Sinha, Anton A. Ware, Bart Wasiak and Rose Marie Wong.

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.

Thanks are due to ICSID Secretary-General Meg Kinnear for kindly accepting the invitation to write the opening piece of Volume 20.

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The excerpts reported in Volume 20 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 20 situates the excerpts in the overarching dispute. The full decisions might be of assistance to contextualise any cross-referencing. The Editors acknowledge the valuable work of *Italaw*. Please note that the reported excerpt of the Award in *Ortiz v. Algeria* has been translated from the original French.

Almås and Almås v. Republic of Poland, PCA Case No. 2015-13, Award (27 June 2016)

<https://www.italaw.com/sites/default/files/case-documents/italaw7531.pdf>

Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and Fischer v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017)

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- Ortiz Construcciones y Proyectos SA c. République Algérienne Démocratique et Populaire*, Affaire CIRDI ARB/17/1, Sentence (29 avril 2020)
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- Tulip Real Estate Investment and Development Netherlands BV v. Republic of Turkey*, ICSID Case No. ARB/11/28, Separate Opinion of Michael Evan Jaffe on the Question of Attribution Under Art. 8, ILC Articles (7 March 2014)
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- Tulip Real Estate Investment and Development Netherlands BV v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment (30 December 2015)
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RECOMMENDED SHORT-FORM CITATIONS

- Meg Kinnear, “ARSIWA, ISDS, and the process of developing an investor–State jurisprudence” 20 ICSID Rep 3
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ABBREVIATIONS IN VOLUME 20

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| BIT | Bilateral investment treaty |
| ECT | 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 |
| ICSID | International Centre for Settlement of Investment Disputes |
| ICSID Additional Facility Rules | ICSID Additional Facility Rules (April 2006) Schedule C, Arbitration (Additional Facility) Rules |
| ICSID Arbitration Rules | ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) (April 2006) |
| ICSID Convention | 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 |
| ILC Articles on State Responsibility (also ARSIWA or ILC Articles) | International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83, UN Doc. A/RES/56/83, 12 December 2001 |
| NAFTA | North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 289 and 605 |
| PCA | Permanent Court of Arbitration |
| Salini test | <i>Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco</i> , Decision on Jurisdiction, ICSID Case No. ARB/00/4, 6 ICSID Rep 400, 23 July 2001, para. 52 |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCITRAL Rules | 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 (revised 2010 and 2013) |
| VCLT | 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 20

Admissibility

Abuse of process – Whether resorting to four parallel arbitrations with the same factual matrix, same witnesses and many identical claims was abusive – Whether the nature of those parallel claims was identical – Whether pursuit of the same claim before different investment tribunals should be allowed – Whether an investor should make an election to resolve overlapping claims in parallel proceedings

Ampal v. Egypt, ICSID Case No. ARB/12/11, 20 ICSID Rep 406 (Berk Demirkol)

Attribution – Contract – Whether alleged breaches of a contract entered into by an investor’s subsidiary and a State-owned entity were attributable to the State – Whether the alleged breaches of contract should be determined on the merits of the alleged breach of the standard of fair and equitable treatment

Saint-Gobain v. Venezuela, ICSID Case No. ARB/12/13, 20 ICSID Rep 360 (Ofilio J. Mayorga and José M. García Rebolledo)

Contract – Umbrella clause – Whether the tribunal could hear claims related to contractual breach under the BIT’s umbrella clause

Gavrilović v. Croatia, ICSID Case No. ARB/12/39, 20 ICSID Rep 512 (Zachary Kady and Colleen Devine)

Contract – Whether the existence of a contract under municipal law was a matter of admissibility or merits

Tethyan Copper v. Pakistan, ICSID Case No. ARB/12/1, 20 ICSID Rep 453 (Oliver Hailes)

Corruption – Causation – Whether improper conduct in the performance of the investment was proved – Whether proven acts of corruption were causally linked to any right or benefit obtained by the investor – Whether proven acts of corruption were attributable to the investor

Tethyan Copper v. Pakistan, ICSID Case No. ARB/12/1, 20 ICSID Rep 453 (Oliver Hailes)

Equitable prescription – Whether the claims should be time-barred due to the 10-year delay in filing the claims

Kardassopoulos v. Georgia, ICSID Case Nos. ARB/05/18 and ARB/07/15, 20 ICSID Rep 141 (Bart Wasiak, Alice Osman and Anton A. Ware)

Estoppel – Legality – Contract – Municipal law – Whether the State was estopped from objecting to the tribunal’s jurisdiction *ratione materiae* under the BIT and the ECT on the basis that the concession and agreement could be void *ab initio* under municipal law

Kardassopoulos v. Georgia, ICSID Case Nos. ARB/05/18 and ARB/07/15, 20 ICSID Rep 141 (Bart Wasiak, Alice Osman and Anton A. Ware)

Exhaustion of domestic remedies – Whether there was an obligation to exhaust domestic remedies in the absence of an alleged denial of justice

Gavrilović v. Croatia, ICSID Case No. ARB/12/39, 20 ICSID Rep 512 (Zachary Kady and Colleen Devine)

Forum shopping – Parallel proceeding – Municipal law – Whether the claims were inadmissible because the investor had engaged in forum shopping – Whether the claims were inadmissible because the impugned acts were still being litigated in the domestic courts

Flemingo DutyFree v. Poland, PCA Case No. 2014-11, 20 ICSID Rep 326 (Vasuda Sinha and Felix Schaff)

Parallel proceedings – *Res judicata* – Bad faith – Claim-splitting – Whether the claims were inadmissible because the investor’s subsidiary had pursued contractual claims in parallel arbitration proceedings

Unión Fenosa v. Egypt, ICSID Case No. ARB/14/4, 20 ICSID Rep 546 (Alexander Ferguson)

Procedure – Incidental or additional claim – Whether a claim was untimely if raised for the first time in the hearing on jurisdiction and merits – Whether there was sufficient opportunity for both parties to respond to the claim

Saint-Gobain v. Venezuela, ICSID Case No. ARB/12/13, 20 ICSID Rep 360 (Ofilio J. Mayorga and José M. García Rebolledo)

Representative claims – Whether claims may be asserted on behalf of a non-party to the proceeding

Tulip Real Estate v. Turkey, ICSID Case No. ARB/11/28, 20 ICSID Rep 220 (Carlos Hernández Durán)

Annulment

Applicable law – Whether a court considering the vacatur or confirmation of an award should apply the law of its jurisdiction or the law of the seat of the arbitration

Mesa Power v. Canada, PCA Case No. 2012-17, 20 ICSID Rep 267 (Eduardo Silva Romero, David L. Attanasio and Rose Marie Wong)

Failure to state reasons – ICSID Convention, Article 52(1)(e) – Attribution – ILC Articles on State Responsibility, Article 8 – Whether a tribunal failed to state reasons for concluding that a State-owned real estate developer was acting under the instruction or control of the State

Tulip Real Estate v. Turkey, ICSID Case No. ARB/11/28, 20 ICSID Rep 220 (Carlos Hernández Durán)

Manifest excess of powers – ICSID Convention, Article 52(1)(b) – Jurisdiction – Attribution – Whether a tribunal’s determination on the merits despite lack of jurisdiction for want of attribution was a manifest excess of powers

Tulip Real Estate v. Turkey, ICSID Case No. ARB/11/28, 20 ICSID Rep 220 (Carlos Hernández Durán)

Municipal law – Misconduct affecting parties’ rights – Exceeded arbitral power – Manifest disregard of the law – Interpretation – Deference – Whether a tribunal’s allegedly erroneous factual findings or legal conclusions serve as grounds for vacating its award – Whether an award should be vacated on the ground that the tribunal misinterpreted the meaning of procurement – Whether an award should be vacated on the ground that the tribunal deferred to the State’s decision-making in its renewable energy policy

Mesa Power v. Canada, PCA Case No. 2012-17, 20 ICSID Rep 267 (Eduardo Silva Romero, David L. Attanasio and Rose Marie Wong)

Procedure – Seat – ICSID Convention, Article 62 – Whether annulment proceedings may be conducted in a place different from the seat of ICSID absent agreement of parties

Saint-Gobain v. Venezuela, ICSID Case No. ARB/12/13, 20 ICSID Rep 360 (Ofilio J. Mayorga and José M. García Rebolledo)

Procedure – Stay of enforcement – Whether a stay of enforcement of the award should be lifted because the applicant for annulment failed to pay an advance on costs

Saint-Gobain v. Venezuela, ICSID Case No. ARB/12/13, 20 ICSID Rep 360 (Ofilio J. Mayorga and José M. García Rebolledo)

Procedure – Suspension of proceedings – Whether annulment proceedings should be suspended because the applicant for annulment failed to pay an advance on costs

Saint-Gobain v. Venezuela, ICSID Case No. ARB/12/13, 20 ICSID Rep 360 (Ofilio J. Mayorga and José M. García Rebolledo)

Procedure – Whether annulment proceedings should be suspended pending resolution of the application for revision of an award

Kardassopoulos v. Georgia, ICSID Case Nos. ARB/05/18 and ARB/07/15, 20 ICSID Rep 141 (Bart Wasiak, Alice Osman and Anton A. Ware)

Serious departure from a fundamental rule of procedure – ICSID Convention, Article 52(1)(d) – Attribution – Evidence – Whether a tribunal disregarded critical evidence relevant to attribution

Tulip Real Estate v. Turkey, ICSID Case No. ARB/11/28, 20 ICSID Rep 220 (Carlos Hernández Durán)

Serious departure from a fundamental rule of procedure – ICSID Convention, Article 52(1)(d) – Interpretation – Right to a fair trial – VCLT, Article 31(3)(c) – Human rights – Whether human rights instruments were relevant to the interpretation of the concept of a fundamental rule of procedure

Tulip Real Estate v. Turkey, ICSID Case No. ARB/11/28, 20 ICSID Rep 220 (Carlos Hernández Durán)

Applicable law

Property – Municipal law – Whether issues related to property rights would be decided solely under municipal law or under both municipal and international law

Gavrilović v. Croatia, ICSID Case No. ARB/12/39, 20 ICSID Rep 512 (Zachary Kady and Colleen Devine)

Arbitrary or discriminatory measures

Whether the State applied the measures without a legitimate purpose

EDF v. Romania, ICSID Case No. ARB/05/13, 20 ICSID Rep 118 (Jaime Gallego)

Contract

Defence – Municipal law – Scope of rights – Unconscionability – Misrepresentation – Whether the concession and agreement through which the investment was made conferred rights to future pipelines – Whether the investors' rights were vitiated by virtue of contractual defences raised by the State – Whether the contractual defences of unconscionability, misrepresentation and lack of performance were supported by the evidence

Kardassopoulos v. Georgia, ICSID Case Nos. ARB/05/18 and ARB/07/15, 20 ICSID Rep 141 (Bart Wasiak, Alice Osman and Anton A. Ware)

Privity – Whether the State was bound by a contract entered into by a State-appointed liquidator

Gavrilović v. Croatia, ICSID Case No. ARB/12/39, 20 ICSID Rep 512 (Zachary Kady and Colleen Devine)

Puissance publique – Fair and equitable treatment – Expropriation – Umbrella clause – Whether treaty claims arising from contractual termination required acts performed in the exercise of *puissance publique* to constitute breach

Almås v. Poland, PCA Case No. 2015-13, 20 ICSID Rep 294 (Thomas F. Lane and Robert Price)

Costs

Costs follow the event – Legal fees – Arbitration costs – Whether the unsuccessful party was to pay the legal fees of the successful party – Whether the unsuccessful party was to pay the arbitration costs of the successful party

Unión Fenosa v. Egypt, ICSID Case No. ARB/14/4, 20 ICSID Rep 546 (Alexander Ferguson)

Costs follow the event – Whether the unsuccessful party should bear the arbitration costs

Tulip Real Estate v. Turkey, ICSID Case No. ARB/11/28, 20 ICSID Rep 220 (Carlos Hernández Durán)

Good faith – Whether the unsuccessful party should not be ordered to pay the successful party's costs because the former brought the proceeding in good faith

Ortiz v. Algeria, ICSID Case No. ARB/17/1, 20 ICSID Rep 571 (Damien Charlotin)

ICSID Additional Facility – Whether the losing party should bear the winning party's costs even where the winning party was only partly successful

Strabag v. Libya, ICSID Case No. ARB(AF)/15/1, 20 ICSID Rep 611 (Zeïneb Bouraoui)

Legal costs – Whether a party should be held responsible for its opponent's legal costs when their good faith claims were dismissed by the tribunal

Mesa Power v. Canada, PCA Case No. 2012-17, 20 ICSID Rep 267 (Eduardo Silva Romero, David L. Attanasio and Rose Marie Wong)

Loser pays – Good faith – Whether the loser-pays principle is accepted in investment arbitration – Whether the dispute had been brought by the investor in good faith

EDF v. Romania, ICSID Case No. ARB/05/13, 20 ICSID Rep 118 (Jaime Gallego)

Loser pays – ICSID Convention, Article 61(2) – Discretion – Whether the State’s share of costs should be reduced when the investors only recovered 2% of the compensation claimed

Gavrilović v. Croatia, ICSID Case No. ARB/12/39, 20 ICSID Rep 512
 (Zachary Kady and Colleen Devine)

Third-party funding – Whether third-party funding should be taken into account in the award of costs

Kardassopoulos v. Georgia, ICSID Case Nos. ARB/05/18 and ARB/07/15, 20 ICSID Rep 141 (Bart Wasiak, Alice Osman and Anton A. Ware)

UNCITRAL Rules – Agreement – Costs follow the event – Reasonable conduct – Whether a tribunal should order the successful party to pay certain costs of the arbitration because of unreasonable conduct despite prior agreement that costs follow the event – Whether each party should bear its own costs – Whether the unsuccessful party should reimburse the successful party for its advance on costs

Almås v. Poland, PCA Case No. 2015-13, 20 ICSID Rep 294 (Thomas F. Lane and Robert Price)

UNCITRAL Rules, Article 40(1) – Costs follow the event – Circumstances of the case – Whether the circumstances allowed the tribunal to depart from the principle that costs should follow the event

Flemingo DutyFree v. Poland, PCA Case No. 2014-11, 20 ICSID Rep 326 (Vasuda Sinha and Felix Schaff)

Counterclaim

Jurisdiction – Consent – Municipal law – Standing – Whether the tribunal had jurisdiction to hear counterclaims – Whether consent to counterclaims was limited to treaty law or extended to contract and public law – Whether the State had standing to arbitrate the rights and obligations entered into by a territorial unit and its agencies under municipal law

Tethyan Copper v. Pakistan, ICSID Case No. ARB/12/1, 20 ICSID Rep 453 (Oliver Hailes)

Legality – Interpretation – Whether a legality requirement in a treaty definition gave rise to any obligation of the investor with corresponding liability

Tethyan Copper v. Pakistan, ICSID Case No. ARB/12/1, 20 ICSID Rep 453 (Oliver Hailes)

Umbrella clause – Set-off – Additional claim – Incidental claim – Whether a respondent State can assert an additional or incidental contractual claim brought under the tribunal’s jurisdiction by operation of an umbrella

clause – Whether the circumstances of the domestic courts were relevant to whether a tribunal should resolve the contractual counterclaim

Strabag v. Libya, ICSID Case No. ARB(AF)/15/1, 20 ICSID Rep 611 (Zeineb Bouraoui)

Evidence

Adverse inferences – Document production – Attribution – Whether adverse inferences on the attribution of conduct should be drawn from the State's refusal to comply with the tribunal's document production orders

Flemingo DutyFree v. Poland, PCA Case No. 2014-11, 20 ICSID Rep 326 (Vasuda Sinha and Felix Schaff)

Authenticity – Adverse inference – Whether a party's refusal to allow the testing of a document's authenticity invited an adverse inference of fabrication

Tethyan Copper v. Pakistan, ICSID Case No. ARB/12/1, 20 ICSID Rep 453 (Oliver Hailes)

Bad faith – Contract – Whether procedural mistakes in the termination of a contract amounted to bad faith

Almás v. Poland, PCA Case No. 2015-13, 20 ICSID Rep 294 (Thomas F. Lane and Robert Price)

Contract – Standard of review – Whether the tribunal needed to determine that there was a breach of the contract to decide claims under the BIT

Bayindir v. Pakistan, ICSID Case No. ARB/03/29, 20 ICSID Rep 99 (Devon Robertson)

Corruption – Burden of proof – Whether the burden of proof shifted once prima facie evidence of corruption had been established

Tethyan Copper v. Pakistan, ICSID Case No. ARB/12/1, 20 ICSID Rep 453 (Oliver Hailes)

Corruption – Causation – Whether a party alleging corruption had to show that a benefit would not have been obtained but for the corrupt act – Whether an alleged act of corruption must concern foundational rights to impact upon a tribunal's jurisdiction

Tethyan Copper v. Pakistan, ICSID Case No. ARB/12/1, 20 ICSID Rep 453 (Oliver Hailes)

Corruption – Standard of proof – Indirect evidence – Circumstantial evidence – Whether the standard of proof for alleged corruption allowed for a tribunal to consider indirect or circumstantial evidence

Tethyan Copper v. Pakistan, ICSID Case No. ARB/12/1, 20 ICSID Rep 453 (Oliver Hailes)

Expropriation

Attribution – Non-State actors – ILC Articles on State Responsibility, Article 8 – ILC Articles on State Responsibility, Article 11 – Whether the physical takeover of a plant by former workers, union officials and sympathetic politicians was under the instructions of, or under the direction or control of, the State – Whether causality between a presidential announcement and the physical takeover was sufficient to attribute the conduct of non-State actors – Whether the subsequent adoption of the conduct of non-State actors by a State-owned entity vested with governmental authority was attributable to the State

Saint-Gobain v. Venezuela, ICSID Case No. ARB/12/13, 20 ICSID Rep 360 (Ofilio J. Mayorga and José M. García Rebolledo)

Attribution – State-owned entity – ILC Articles on State Responsibility, Article 5 – Whether the presence of a State-owned entity in the investor's abandoned plant was merely in a caretaker capacity for reasons of public safety – Whether the State-owned entity was vested with governmental authority to nationalise the plant

Saint-Gobain v. Venezuela, ICSID Case No. ARB/12/13, 20 ICSID Rep 360 (Ofilio J. Mayorga and José M. García Rebolledo)

Compensation – Legal stability – Tax exemption – Whether a licence granting taxation privileges constituted a protected investment – Whether the revocation of a licence constituted an expropriation – Whether the investors had the right to retain the taxation privileges beyond the initial period of the licence

Ampal v. Egypt, ICSID Case No. ARB/12/11, 20 ICSID Rep 406 (Berk Demirkol)

Contract – Whether a recommendation by a State organ entity to terminate a contract meant that the termination was an improper exercise of sovereign power

Tulip Real Estate v. Turkey, ICSID Case No. ARB/11/28, 20 ICSID Rep 220 (Carlos Hernández Durán)

Contract – Whether the termination of lease agreements expropriated the investment without compensation

Flemingo DutyFree v. Poland, PCA Case No. 2014-11, 20 ICSID Rep 326 (Vasuda Sinha and Felix Schaff)

Creeping expropriation – Whether the State's measures, either individually or in aggregate, constituted creeping expropriation

EDF v. Romania, ICSID Case No. ARB/05/13, 20 ICSID Rep 118 (Jaime Gallego)

De facto expropriation – Whether acquiring *de facto* control of an investment with the aim of ultimately carrying out an expropriation could amount to an expropriation

Saint-Gobain v. Venezuela, ICSID Case No. ARB/12/13, 20 ICSID Rep 360 (Ofilio J. Mayorga and José M. García Rebolledo)

Direct expropriation – Whether registering State ownership of land without providing compensation constituted a direct expropriation

Gavrilović v. Croatia, ICSID Case No. ARB/12/39, 20 ICSID Rep 512 (Zachary Kady and Colleen Devine)

Direct expropriation – Whether the State expropriated the investor's investment through a governmental decree that deprived its joint venture vehicle of rights in an oil pipeline

Kardassopoulos v. Georgia, ICSID Case Nos. ARB/05/18 and ARB/07/15, 20 ICSID Rep 141 (Bart Wasiak, Alice Osman and Anton A. Ware)

Export ban – Joint venture – Government interference – Evidence – Whether there was evidence that the imposition of an export ban was controlled by the State – Whether the imposition of an export ban was motivated by the legitimate commercial fears of a joint venture partner

Hamester v. Ghana, ICSID Case No. ARB/07/24, 20 ICSID Rep 164 (Gabriela Alvarez-Avila and James McGlaughlin)

Harassment – Criminal investigation – Evidence – Whether there was sufficient evidence of alleged harassment by police officers – Whether a criminal investigation into an employee of the investor contributed to an alleged expropriation

Hamester v. Ghana, ICSID Case No. ARB/07/24, 20 ICSID Rep 164 (Gabriela Alvarez-Avila and James McGlaughlin)

Indirect expropriation – Assets capable of being expropriated – Whether interference with contractual rights could lead to expropriation under the BIT

Bayindir v. Pakistan, ICSID Case No. ARB/03/29, 20 ICSID Rep 99 (Devon Robertson)

Indirect expropriation – Contract – Whether contractual rights specific to certain properties were indirectly expropriated

Gavrilović v. Croatia, ICSID Case No. ARB/12/39, 20 ICSID Rep 512 (Zachary Kady and Colleen Devine)

Indirect expropriation – Real estate – Whether failure to facilitate registration of land led to an indirect expropriation

Gavrilović v. Croatia, ICSID Case No. ARB/12/39, 20 ICSID Rep 512 (Zachary Kady and Colleen Devine)

Indirect expropriation – Substantial deprivation – Regulatory power – Whether the measure resulted in substantial deprivation of value or rendered useless an investor’s rights – Whether the measure was a legitimate exercise of regulatory power – Whether the State complied with the criteria for lawful expropriation

Tethyan Copper v. Pakistan, ICSID Case No. ARB/12/1, 20 ICSID Rep 453 (Oliver Hailes)

Indirect expropriation – Substantial deprivation – Whether there could be substantial deprivation when the scope of the rights alleged to be expropriated was limited by the counterparty’s rights under the contract

Bayindir v. Pakistan, ICSID Case No. ARB/03/29, 20 ICSID Rep 99 (Devon Robertson)

Interpretation – Measures – Particular undertaking – Whether the term “measures” required an expropriation to consist of a formal exercise of government powers – Whether notion of a particular undertaking included other provisions of a BIT or was limited to external agreements entered into by the State

Saint-Gobain v. Venezuela, ICSID Case No. ARB/12/13, 20 ICSID Rep 360 (Ofilio J. Mayorga and José M. García Rebolledo)

Management rights – Joint venture – Government interference – Evidence – Whether there was evidence of instructions from the State to the investor’s joint venture partner that resulted in the expropriation of the investor’s management rights

Hamester v. Ghana, ICSID Case No. ARB/07/24, 20 ICSID Rep 164 (Gabriela Alvarez-Avila and James McGlaughlin)

Prompt compensation – Interpretation – Good faith – VCLT, Article 31(1) – Manifestly absurd or unreasonable – VCLT, Article 32(b) – Municipal law – Whether the payment of prompt compensation required the State to specify a certain figure constituting the amount of compensation on the date of expropriation – Whether that interpretation contravened the principle of good faith interpretation – Whether that interpretation led to a manifestly absurd or unreasonable result – Whether a tribunal had to examine whether municipal law implemented an expropriation procedure in accordance with the BIT

Saint-Gobain v. Venezuela, ICSID Case No. ARB/12/13, 20 ICSID Rep 360 (Ofilio J. Mayorga and José M. García Rebolledo)

Unlawful expropriation – Contract – Whether State entities wrongfully terminated a contract under the proper law – Whether unlawful termination of a contract was tantamount to an unlawful expropriation

Ampal v. Egypt, ICSID Case No. ARB/12/11, 20 ICSID Rep 406 (Berk Demirkol)

Unlawful expropriation – ECT, Article 13(1) – Public interest – Discrimination – Due process – Compensation – Whether the expropriation was in the public interest – Whether the expropriation was carried out in a discriminatory manner – Whether the expropriation was carried out in accordance with due process – Whether the investor was paid prompt, adequate and effective compensation

Kardassopoulos v. Georgia, ICSID Case Nos. ARB/05/18 and ARB/07/15, 20 ICSID Rep 141 (Bart Wasiak, Alice Osman and Anton A. Ware)

Fair and equitable treatment

Coercion – Evidence – Whether the investor had adduced sufficient evidence that it had been subjected to coercion or threats by military personnel

Bayindir v. Pakistan, ICSID Case No. ARB/03/29, 20 ICSID Rep 99 (Devon Robertson)

Conspiracy – Evidence – Standard of proof – Whether a conspiracy would breach the standard of fair and equitable treatment – Whether the investor had adduced sufficient evidence to meet the high standard for establishing a conspiracy

Bayindir v. Pakistan, ICSID Case No. ARB/03/29, 20 ICSID Rep 99 (Devon Robertson)

Contract – Bad faith – Evidence – Municipal law – Whether lease agreements were terminated in bad faith – Whether judicial findings of abuse of right under municipal law were relevant to the standard of fair and equitable treatment

Flemingo DutyFree v. Poland, PCA Case No. 2014-11, 20 ICSID Rep 326 (Vasuda Sinha and Felix Schaff)

Contract – Sovereign powers – Whether actions carried out by a contractual party were an exercise of sovereign powers in breach of fair and equitable treatment

Bayindir v. Pakistan, ICSID Case No. ARB/03/29, 20 ICSID Rep 99 (Devon Robertson)

Customary international law – Legitimate expectation – Contract – Taxation – Specific assurance – Whether the standard of fair and equitable treatment was equivalent to the customary minimum standard – Whether legitimate expectations were protected by the customary minimum standard – Whether a contract between the investor and the subsidiary of a national oil company created a legitimate expectation – Whether a letter from a State official created a legitimate expectation – Whether the expectation was relied upon – Whether the expectation was defeated –

Whether non-payment under a contract defeated a legitimate expectation –
Whether revocation of tax-free status defeated a legitimate expectation

Unión Fenosa v. Egypt, ICSID Case No. ARB/14/4, 20 ICSID Rep 546
(Alexander Ferguson)

Due process – Procedural fairness – Transparency – Whether relevant
procedural requirements applied to internal decision-making processes of a
party to a contract

Bayindir v. Pakistan, ICSID Case No. ARB/03/29, 20 ICSID Rep 99
(Devon Robertson)

Good faith – Evidence – Whether a breach of good faith required a proof of
bad faith conduct – Whether an uncorroborated witness statement can
evidence threats by the State

Ortiz v. Algeria, ICSID Case No. ARB/17/1, 20 ICSID Rep 571 (Damien
Charlotin)

Interpretation – Autonomous standard – Legitimate expectation – Whether
the BIT referenced the minimum standard under customary international law
or created an autonomous standard of treatment – Whether the standard
protected the legitimate expectation of an investor

Tethyan Copper v. Pakistan, ICSID Case No. ARB/12/1, 20 ICSID Rep
453 (Oliver Hailes)

Interpretation – Legitimate expectation – Legal stability – Contract –
Whether standard required proactive protection of legal stability and
predictability – Whether any precontractual representations provided the
basis for legitimate expectations regarding zoning – Whether the decisions
of a State-owned real estate developer not to grant further extensions and
ultimately to terminate a contract were a breach of fair and
equitable treatment

Tulip Real Estate v. Turkey, ICSID Case No. ARB/11/28, 20 ICSID Rep
220 (Carlos Hernández Durán)

Legitimate expectation – Contract – Joint venture – Whether contractual
rights were sufficient to ground a legitimate expectation under
international law

Hamester v. Ghana, ICSID Case No. ARB/07/24, 20 ICSID Rep 164
(Gabriela Alvarez-Avila and James McGlaughlin)

Legitimate expectation – Contract – Regulatory framework – Specific
assurance – Whether a contract gave rise to a legitimate expectation –
Whether the regulatory framework gave rise to a legitimate expectation –
Whether specific assurances of government officials gave rise to a legitimate
expectation – Whether the investor's legitimate expectation was breached by
denying its application for a mining lease – Whether the State had executed a

plan to take over the investment – Whether there were nevertheless legitimate reasons for the State to deny the application for a mining lease – Whether the application for a mining lease was denied on the basis of routine regulatory requirements

Tethyan Copper v. Pakistan, ICSID Case No. ARB/12/1, 20 ICSID Rep 453 (Oliver Hailes)

Legitimate expectation – Corruption – Evidence – Contract – Investigation – Whether there was sufficient proof of the solicitation of a bribe by the State's officials – Whether the investor had a right to legitimately expect that the duration of the investments would be extended – Whether the State's challenge of the registration of the share transfer in the joint venture to the investor was in bad faith – Whether the State's refusal to conclude further lease agreements with the joint venture was justified – Whether the organisation and conduct of auctions for leasing commercial spaces at the airport was justified – Whether the investigation by the State's financial regulator and confiscation of revenues was proportionate, transparent and in good faith – Whether the enactment of an ordinance reorganising the duty-free regime violated the State's obligation to accord fair and equitable treatment

EDF v. Romania, ICSID Case No. ARB/05/13, 20 ICSID Rep 118 (Jaime Gallego)

Legitimate expectation – Legal stability – Contract – Attribution – State-owned entity – Whether a legitimate expectation of the contractual performance of a State-owned entity at a certain price can be formed in the absence of a specific commitment from the State guaranteeing such performance or price – Whether any breach of contract had been established – Whether it was necessary to address the issue of attribution in the absence of contractual breach

Saint-Gobain v. Venezuela, ICSID Case No. ARB/12/13, 20 ICSID Rep 360 (Ofilio J. Mayorga and José M. García Rebolledo)

Legitimate expectation – Legal stability – Whether the investor's legitimate expectations were frustrated as a result of political volatility

Bayindir v. Pakistan, ICSID Case No. ARB/03/29, 20 ICSID Rep 99 (Devon Robertson)

Legitimate expectation – Specific promise – Material advantage – Whether an investment should have been made on the basis of the alleged expectation – Whether an expectation can be based on vague promises to grant work

Ortiz v. Algeria, ICSID Case No. ARB/17/1, 20 ICSID Rep 571 (Damien Charlotin)

Legitimate expectation – Transparency – Discrimination – Whether the standard required the investor's expectations to be based on conditions offered by or prevailing in the State at the time the investment was made –

Whether the State's compensation process violated basic requirements of consistency, transparency, even-handedness and non-discrimination

Kardassopoulos v. Georgia, ICSID Case Nos. ARB/05/18 and ARB/07/15, 20 ICSID Rep 141 (Bart Wasiak, Alice Osman and Anton A. Ware)

Legitimate expectation – Whether there could be a legitimate expectation with respect to properties in which the investors had no property or contractual right – Whether there was a legitimate expectation that the investor would be able to register certain properties – Whether the investors established that the State interfered with their attempt to register ownership contrary to a legitimate expectation

Gavrilović v. Croatia, ICSID Case No. ARB/12/39, 20 ICSID Rep 512 (Zachary Kady and Colleen Devine)

Unjustified, incoherent or arbitrary conduct – Whether the terms “unjustified” and “arbitrary” were equivalent – Whether a failure to succeed in contractual negotiations can evidence an unjustified or incoherent conduct

Ortiz v. Algeria, ICSID Case No. ARB/17/1, 20 ICSID Rep 571 (Damien Charlotin)

Full protection and security

Circumstances of the host State – Interpretation – Whether the standard of full and constant protection and security prescribes the reasonable measures of prevention that any well-administered government would exercise under similar circumstances – Whether the standard of full and constant protection and security considerations required a tribunal to take into account the conditions prevailing in the host State

Strabag v. Libya, ICSID Case No. ARB(AF)/15/1, 20 ICSID Rep 611 (Zeïneb Bouraoui)

Due diligence – Civil unrest – Whether the State took reasonable precautionary, preventive and remedial measures to protect the physical security of a pipeline network from sabotage

Ampal v. Egypt, ICSID Case No. ARB/12/11, 20 ICSID Rep 406 (Berk Demirkol)

Interpretation – Contract – Police – Whether the standard of full protection and security imposed an obligation of strict liability – Whether the involvement of police forces in the termination of a contract implied a breach of full protection and security

Tulip Real Estate v. Turkey, ICSID Case No. ARB/11/28, 20 ICSID Rep 220 (Carlos Hernández Durán)

Legal stability – Contract – State-owned entity – Whether the State had an obligation to protect an investor from alleged contractual breaches by a State-owned entity

Saint-Gobain v. Venezuela, ICSID Case No. ARB/12/13, 20 ICSID Rep 360 (Ofilio J. Mayorga and José M. García Rebolledo)

Investment promotion

Interpretation – Whether a failure to promote and protect investments constituted a discrete breach of the BIT

Tulip Real Estate v. Turkey, ICSID Case No. ARB/11/28, 20 ICSID Rep 220 (Carlos Hernández Durán)

Jurisdiction

Consent – Contract claims – Whether the claim was purely contractual – Whether the investors submitted a treaty claim

Ampal v. Egypt, ICSID Case No. ARB/12/11, 20 ICSID Rep 406 (Berk Demirkol)

Consent – Exclusions and reservations – Taxation measures – Whether a carve-out clause for taxation barred the investors' claims of expropriation

Ampal v. Egypt, ICSID Case No. ARB/12/11, 20 ICSID Rep 406 (Berk Demirkol)

Consultation – NAFTA, Article 1118 – Whether a foreign investor could comply with NAFTA Article 1118's consultation requirement without substantively engaging with the State – Whether the fact that a foreign investor sought consultations with a State was sufficient to meet NAFTA Article 1118's consultation requirement

Mesa Power v. Canada, PCA Case No. 2012-17, 20 ICSID Rep 267 (Eduardo Silva Romero, David L. Attanasio and Rose Marie Wong)

Contract – Expropriation – Whether the involvement of military forces distinguished the alleged expropriation from a purely contractual claim

Beijing Urban v. Yemen, ICSID Case No. ARB/14/30, 20 ICSID Rep 439 (Kyongwha Chung)

Contract – Relationship between treaty claims and contract claims – Whether the essential basis of the investor's claims was purely contractual such that the tribunal did not have jurisdiction over such claims

Bayindir v. Pakistan, ICSID Case No. ARB/03/29, 20 ICSID Rep 99 (Devon Robertson)

Contract – Whether claims arising out of a contractual termination may constitute treaty claims

Tulip Real Estate v. Turkey, ICSID Case No. ARB/11/28, 20 ICSID Rep 220 (Carlos Hernández Durán)

Cooling-off period – NAFTA, Article 1120 – Whether an investor was required to observe NAFTA Article 1120's cooling-off period – Whether every event that gave rise to a claim must have occurred before the cooling-off period – Whether the investor must have suffered damage prior to the cooling-off period

Mesa Power v. Canada, PCA Case No. 2012-17, 20 ICSID Rep 267 (Eduardo Silva Romero, David L. Attanasio and Rose Marie Wong)

Expropriation – Interpretation – Dispute – Consent – Whether the State had consented to ICSID arbitration in respect not only of the quantum of expropriation claims but also liability for expropriation

Beijing Urban v. Yemen, ICSID Case No. ARB/14/30, 20 ICSID Rep 439 (Kyongwha Chung)

Foreign investor – Contribution – Indirect ownership – Whether a foreign investor's investment indirectly made through layers of wholly owned subsidiaries qualified as a protected investor

Strabag v. Libya, ICSID Case No. ARB(AF)/15/1, 20 ICSID Rep 611 (Zeineb Bouraoui)

Foreign investor – Denial of benefits – Requirement to consult – Whether the host State promptly consulted the home State to seek a mutually satisfactory resolution of the matter – Whether exercising a denial-of-benefits clause amounted to withdrawing unilaterally a previously given consent – Whether the denial-of-benefits clause could be exercised after the investment claim had been filed

Ampal v. Egypt, ICSID Case No. ARB/12/11, 20 ICSID Rep 406 (Berk Demirkol)

Foreign investor – Foreign control – Substantial interest – Whether the investors satisfied the conditions of nationality under the BIT – Whether nationals of the home State had a substantial interest in the investors – Whether a substantial interest needed to be a controlling or a majority interest

Ampal v. Egypt, ICSID Case No. ARB/12/11, 20 ICSID Rep 406 (Berk Demirkol)

Foreign investor – Indirect investment – Made in the territory – Remoteness – Whether the investor made an investment in the State's territory by acquiring shares in an investment that had previously been made – Whether the investor was not protected because it was not the

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Flemingo DutyFree v. Poland, PCA Case No. 2014-11, 20 ICSID Rep 326 (Vasuda Sinha and Felix Schaff)

Foreign investor – Investment – Contractual rights – Whether shareholders had standing to protect the contractual rights of the corporate vehicle for their investment

Almás v. Poland, PCA Case No. 2015-13, 20 ICSID Rep 294 (Thomas F. Lane and Robert Price)

Foreign investor – Investment – ICSID Convention, Article 25 – Whether the claimants were investors making an investment under the BIT and the ICSID Convention

Gavrilović v. Croatia, ICSID Case No. ARB/12/39, 20 ICSID Rep 512 (Zachary Kady and Colleen Devine)

Foreign investor – Investment – NAFTA, Article 1116 – Whether a foreign investor met the jurisdiction requirements set forth in NAFTA – Whether claims based on a causal link between the challenged measures and the investment were sufficient for a tribunal to have jurisdiction under NAFTA Article 1116

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Foreign investor – Legality – Interpretation – Municipal law – Whether an investor needed to register its investment under municipal law as a condition precedent for treaty protection

Beijing Urban v. Yemen, ICSID Case No. ARB/14/30, 20 ICSID Rep 439 (Kyongwha Chung)

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Strabag v. Libya, ICSID Case No. ARB(AF)/15/1, 20 ICSID Rep 611 (Zeineb Bouraoui)

Foreign investor – State-owned entity – ICSID Convention, Article 25(1) – Interpretation – Broches test – ILC Articles on State Responsibility – Whether a State-owned entity operating as an ordinary commercial entity was “a national of another Contracting State” under Article 25(1) of the ICSID Convention – Whether the application of the Broches test requires a context-specific analysis of the commercial functions of the investment

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Investment – Contract – Shares – ICSID Convention, Article 25(1) – *Salini* test – Whether contract, execution, amendment and performance were an investment under a BIT – Whether shares in a local company were an investment under a BIT – Whether the investments met the guidance provided by the *Salini* test

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Investment – Corruption – Attribution – Whether allegedly corrupt acts prior to the establishment of the investment were proved – Whether proven acts of corruption were attributable to the investor

Tethyan Copper v. Pakistan, ICSID Case No. ARB/12/1, 20 ICSID Rep 453 (Oliver Hailes)

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(Zeineb Bouraoui)

Investment – ICSID Additional Facility – Interpretation – Whether the meaning of investment under the ICSID Convention applied in ICSID Additional Facility arbitration

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Investment – ICSID Convention, Article 25 – Whether an investment can be composed of interrelated transactions

Tulip Real Estate v. Turkey, ICSID Case No. ARB/11/28, 20 ICSID Rep 220 (Carlos Hernández Durán)

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Bayindir v. Pakistan, ICSID Case No. ARB/03/29, 20 ICSID Rep 99
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Ampal v. Egypt, ICSID Case No. ARB/12/11, 20 ICSID Rep 406 (Berk Demirkol)

Investment – Indirect investment – Shares – Contract – Concession – Whether an indirect investment in shares constituted a protected investment – Whether lease agreements entered into by a local subsidiary qualified as protected contractual rights or concessions

Flemingo DutyFree v. Poland, PCA Case No. 2014-11, 20 ICSID Rep 326 (Vasuda Sinha and Felix Schaff)

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Beijing Urban v. Yemen, ICSID Case No. ARB/14/30, 20 ICSID Rep 439 (Kyongwha Chung)

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Bayindir v. Pakistan, ICSID Case No. ARB/03/29, 20 ICSID Rep 99 (Devon Robertson)

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Investment – Legality – Corruption – Lobbying – Evidence – Whether bribe by a subcontractor to officials affected the legality of the investment – Whether using personal connections for the benefit of the investor was corrupt – Whether paying generous fees to a local representative was evidence of corruption or legitimate lobbying

Unión Fenosa v. Egypt, ICSID Case No. ARB/14/4, 20 ICSID Rep 546 (Alexander Ferguson)

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Ampal v. Egypt, ICSID Case No. ARB/12/11, 20 ICSID Rep 406 (Berk Demirkol)

Investment – Legality – Fraud – Whether the investment had been procured on the basis of the investor’s fraudulent activity

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 (Gabriela Alvarez-Avila and James McGlaughlin)

Investment – Legality – Interpretation – Whether the BIT imposed a strict legality or formal admission requirement – Whether the retroactive invalidation of a contract was relevant to the legality of the investment

Tethyan Copper v. Pakistan, ICSID Case No. ARB/12/1, 20 ICSID Rep 453 (Oliver Hailes)

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Kardassopoulos v. Georgia, ICSID Case Nos. ARB/05/18 and ARB/07/15, 20 ICSID Rep 141 (Bart Wasiak, Alice Osman and Anton A. Ware)

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Investment – Shares – Indirect ownership – Whether the indirect ownership of shares in a locally incorporated company could qualify as a protected investment

Strabag v. Libya, ICSID Case No. ARB(AF)/15/1, 20 ICSID Rep 611
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National treatment

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EDF v. Romania, ICSID Case No. ARB/05/13, 20 ICSID Rep 118 (Jaime Gallego)

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Saint-Gobain v. Venezuela, ICSID Case No. ARB/12/13, 20 ICSID Rep 360 (Ofilio J. Mayorga and José M. García Rebolledo)

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Tethyan Copper v. Pakistan, ICSID Case No. ARB/12/1, 20 ICSID Rep 453 (Oliver Hailes)

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 (Zachary Kady and Colleen Devine)

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Ampal v. Egypt, ICSID Case No. ARB/12/11, 20 ICSID Rep 406 (Berk Demirkol)

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Unión Fenosa v. Egypt, ICSID Case No. ARB/14/4, 20 ICSID Rep 546
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Saint-Gobain v. Venezuela, ICSID Case No. ARB/12/13, 20 ICSID Rep 360 (Ofilio J. Mayorga and José M. García Rebolledo)

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Unión Fenosa v. Egypt, ICSID Case No. ARB/14/4, 20 ICSID Rep 546 (Alexander Ferguson)

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Hamester v. Ghana, ICSID Case No. ARB/07/24, 20 ICSID Rep 164 (Gabriela Alvarez-Avila and James McGlaughlin)

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Gavrilović v. Croatia, ICSID Case No. ARB/12/39, 20 ICSID Rep 512 (Zachary Kady and Colleen Devine)

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Almås v. Poland, PCA Case No. 2015-13, 20 ICSID Rep 294 (Thomas F. Lane and Robert Price)

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Unión Fenosa v. Egypt, ICSID Case No. ARB/14/4, 20 ICSID Rep 546 (Alexander Ferguson)

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Tulip Real Estate v. Turkey, ICSID Case No. ARB/11/28, 20 ICSID Rep 220 (Carlos Hernández Durán)

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Ortiz v. Algeria, ICSID Case No. ARB/17/1, 20 ICSID Rep 571 (Damien Charlotin)

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EDF v. Romania, ICSID Case No. ARB/05/13, 20 ICSID Rep 118 (Jaime Gallego)

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Almås v. Poland, PCA Case No. 2015-13, 20 ICSID Rep 294 (Thomas F. Lane and Robert Price)

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Tulip Real Estate v. Turkey, ICSID Case No. ARB/11/28, 20 ICSID Rep 220 (Carlos Hernández Durán)

Attribution – ILC Articles on State Responsibility, Article 5 – Governmental authority – State-owned entity – Whether a national oil company or its subsidiary were empowered to exercise governmental authority

Unión Fenosa v. Egypt, ICSID Case No. ARB/14/4, 20 ICSID Rep 546 (Alexander Ferguson)

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Gavrilović v. Croatia, ICSID Case No. ARB/12/39, 20 ICSID Rep 512 (Zachary Kady and Colleen Devine)

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Ortiz v. Algeria, ICSID Case No. ARB/17/1, 20 ICSID Rep 571 (Damien Charlotin)

Attribution – ILC Articles on State Responsibility, Article 5 – *Puissance publique* – Joint venture – Contract – Shareholder dispute – Whether a corporate body was empowered with governmental authority – Whether impugned acts of a corporate body were performed through the exercise of governmental authority – Whether contractual negotiations evidenced the exercise of governmental authority – Whether a contractual dispute over the failure to supply goods evidenced the exercise of governmental authority – Whether a dispute between shareholders of a joint venture vehicle evidenced the exercise of governmental authority

Hamester v. Ghana, ICSID Case No. ARB/07/24, 20 ICSID Rep 164 (Gabriela Alvarez-Avila and James McLaughlin)

Attribution – ILC Articles on State Responsibility, Article 5 – State-owned entity – Governmental authority – Control – Whether the State-owned commercial entities were acting as agents of the State and exercising governmental authority

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