

## The Future of Investment Treaties (Track 2)

The cost of inaction: arbitral practice in respect of earlier generation FET clauses and current approaches to FET clauses

Presentation by Professor Patrick Dumberry (University of Ottawa, Canada)  
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The present document summarises research by Professor Patrick Dumberry (University of Ottawa, Canada) which Prof. Dumberry presented at the meeting under Track 2 of the work programme on the Future of Investment Treaties on 7 November 2023. The document reflects Professor Dumberry's research and opinions, not necessarily the official views of the Organisation or of the governments participating in Track 2. The work was initially issued as DAF/INV/TR2/RD(2023)1/REV1. The process is documented at <https://oe.cd/foit>; the material is also available in French at <https://oe.cd/lati>.

Contact: [investment@oecd.org](mailto:investment@oecd.org)

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## Introduction and a few words on methodology

At the Track 2 (“Future of Investment Treaties”) meeting on 7 November 2023, I gave a presentation titled “The cost of inaction: arbitral practice in respect of earlier generation FET clauses and current approaches to FET clauses”. The presentation summarised my findings regarding a comprehensive empirical research project on how investment tribunals have assessed the status, scope and content of the “fair and equitable treatment standard” (FET) clause found in the vast majority of bilateral and multilateral investment treaties. I have examined all publicly available awards rendered by arbitral tribunals dealing with FET clauses. To the best of my knowledge, this is the first comprehensive survey on the issue since the 2012 UNCTAD Report.<sup>1</sup> I have found 279 relevant awards.<sup>2</sup> This document summarises my findings. The full report will be published by Kluwer in 2024.

I have focused my attention on the following three questions:

1. Based on the language of the FET clause contained in the treaty, what is the tribunal’s reasoning regarding the relationship between the standard of treatment it provides to foreign investors and the standard under “international law”, the “minimum standard of treatment” (MST) under custom, or, more generally, customary international law? In other words, do they constitute an equivalent treatment or does one offer a better level of protection than the other(s)?
2. In relation to how the tribunal analysed the first question, what did it say about the content of the FET standard? In other words, what are the different elements of treatment that the host State must accord to foreign investors? More specifically, does the tribunal consider that the standard includes the protection of the investor’s legitimate expectations, that it imposes an obligation of transparency and to provide a stable legal and business environment?
3. Does the answer to these two questions have any consequences or impact on a tribunal’s finding in terms of liability and awarding compensation?

In the following sections, I will examine the reasoning of tribunals for the following three different types of FET clauses:<sup>3</sup>

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<sup>1</sup> UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II, 2012.

<sup>2</sup> I have used the search engines of the web sites IAREporter and ITA Law and found about 500 results of awards (including more than 100 awards on jurisdiction containing the terms ‘fair and equitable’ in English, French and Spanish. My research only focused on those awards where tribunals have actually provided some analysis regarding the content and the scope of FET clauses contained in BITs or multilateral treaties. Cases involving FET clauses in contracts or in the host State’s domestic laws were excluded. Many awards/decisions were excluded from the scope of my research. For instance, when the FET clause was mentioned by the parties during the proceedings, but the tribunal did not provide any analysis on the issue because it focused instead on other provisions. Other awards were also excluded because the tribunal denied jurisdiction over the claim and therefore said nothing about the FET clause.

<sup>3</sup> A number of recent treaties contain FET clauses with a closed list of specific elements of the FET obligation. One example is the CETA between the EU, its member States and Canada. No award dealing with such clause has yet been rendered.

- Clauses containing an unqualified formulation of the FET obligation, i.e., a stand-alone obligation to provide FET without any reference to international law or any other standards (found in 174 awards, section 1);
- Clauses containing an explicit reference to the standard existing under “international law”. In this category, there are two distinct types of clauses:
  - those providing for treatment “in accordance with international law” and
  - those indicating that the treatment should be “no less than that required under international law” (found in 63 awards, section 2);
- Clauses where the FET obligation is expressly linked to the MST or custom (found in 42 awards, section 3).

## 1. Stand-alone FET clauses, not linked to international law

According to a recent OECD paper, these clauses represent almost 80% of FET provisions in treaties concluded between 1959 and 2023.<sup>4</sup> This is a typical example of this clause:

*Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. (Czechia-Bahrain BIT, 2007, Art. 2(2))*

I have found 120 awards that have examined this type of clause.

These awards can be divided in 3 different categories:

- Awards expressly stating that the clause must be interpreted as having an autonomous character (Section 1.1);
- Awards interpreting the clause as an implicit reference to the MST (Section 1.2);
- Awards not taking position on the status of the clause and its relation to the MST (Section 1.3);

To these 120 awards should be added 54 awards which will be examined separately because of the unique features of the FET clause contained in the Energy Chapter Treaty (Section 1.4).

### 1.1. Awards Expressly Stating that the Clause Must be Interpreted as Having an Autonomous Character

I have found 23 awards in this first category.<sup>5</sup>

These tribunals have explained that it is precisely because the FET clause is not qualified with any other standard that it should not be understood as limiting the protection to the MST under custom.

In practice, tribunals have considered that an “autonomous” FET clause provides an investor with a *better* level of protection than under a clause where the standard is linked to the MST.

- For instance, according to the *Saluka* tribunal, in the context of an autonomous FET clause, “in order to violate the standard, it may be sufficient that States’ conduct displays a relatively lower degree of inappropriateness”, while in contrast, under the MST, “in order to violate that standard, States’ conduct may have to display a relatively higher degree of inappropriateness” (*Saluka v. Czechia*, 2006, paras 292-293).
- In other words, it is easier for a claimant investor to prove that a breach of an “autonomous” FET clause has been committed.

An “autonomous” FET clause gives an arbitral tribunal “much latitude”, it “leaves the precise scope” of the standard “to the determination of the Arbitral Tribunal” and gives it “the possibility to articulate the range of principles necessary to achieve the treaty’s purpose in particular disputes” (*Biwater v Tanzania*, 2008, paras 593-595).

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<sup>4</sup> OECD, ‘Fair’ and ‘Equitable’ Treatment Provisions in Investment Treaties; A Large-Sample Survey of Treaty Provisions, 2023, accessible at <https://oe.cd/foit-fet>.

<sup>5</sup> See, Annex 1 for the list of awards.

The approach taken by these tribunals has some very practical consequences: All awards qualifying the FET clause as “autonomous” have concluded that the standard encompasses elements such as the so-called obligation of transparency and the protection of investors’ legitimate expectations (sometime defined broadly, often narrowly).

- As further discussed below, this situation contrasts with the approach adopted by many other tribunals that have examined FET clauses linked to the MST (see section 3).

The broad interpretations adopted by these tribunals has also had some direct impact on their findings in terms of liability and compensation.

- In 1/3 of awards (8 out of 23), tribunals found no breach of the FET standard.<sup>6</sup>
- For the other 2/3 of awards, tribunals concluded that the clause had been breached (yet, in 3 cases, they did not award any compensation).<sup>7</sup> As further explained below, this “success rate” of approximately 70% is much higher compared to other awards examining FET clauses linked to the MST (see section 3).
- It should be added that the amount of some damages awarded are very large:
  - Awards finding breaches of the FET clause and other provisions: *Tethyan Copper* (US\$ 4 billion), *Teinver* (US\$ 320 m.), *National Grid* (US\$ \$53,5 m.)
  - Awards finding a breach of the FET clause alone: *Deutsche Telekom* (US\$ 93.3 m.), *Cairn* (US\$ 1,2 billion), *Micula* (US\$ 116 m.), *Kuntur Wasi* (US\$ 42 m.).

## 1.2. Awards interpreting the clause as an implicit reference to the MST

I have found only 6 awards where the tribunal has not interpreted a stand-alone FET clause as having an autonomous character, but instead as an implicit reference to the MST.<sup>8</sup> This is a very small percentage (5%) of all awards which have examined stand-alone FET clauses.

Some of these tribunals have interpreted the standard narrowly, others more broadly. But equalizing the FET with the MST does not seem to have had any significant impact on how tribunals have addressed matters of liability and compensation. In half of the cases (3 awards), the tribunals found that the clause had been breached and awarded compensation (some very large: *Unión Fenosa Gas* (US\$ 2 billion); *Siemens* (US\$ 217 m.)).

## 1.3. Awards not taking position on the status of a stand-alone FET clause and its relation to the MST

The third group consists of 91 awards that have not explicitly taken position on the status of stand-alone FET clauses and the issue of its relation to the MST. This is by far the largest group of awards.

The reasoning of these tribunals is, however, not uniform. Two patterns can be distinguished.

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<sup>6</sup> See, Annex 2 for the list of awards.

<sup>7</sup> See, Annex 3 for the list of awards.

<sup>8</sup> See, Annex 4 for the list of awards.

a) In a rather small number of awards (17), the tribunals do mention the issue but decided not to take position.

- In 7 cases, tribunals decided that the question could simply be left open.<sup>9</sup>
- A closer look at the reasoning of other tribunals (in some 10 awards<sup>10</sup>) suggests that they believe that the FET treaty standard offers better protection than under the MST.
- Some tribunals reasoning suggests that they believe that there is no real difference between the FET treaty standard and the MST. It should be added however that their analysis is based on a (controversial) assumption that the level of treatment under the MST has evolved rapidly in recent decades and now provides for basically the same protection as under the FET treaty standard.
- In the majority of these cases (7 out of 10)<sup>11</sup>, the tribunals have found that a breach of the FET clause had been committed. The 70% success rate is therefore similar to awards which have expressly stated that the clause must be interpreted as having an autonomous character (see, Section 1).
- In any event, what these 17 awards have in common is that tribunals have, in practice, all applied broad interpretations of the standard by including a protection for the legitimate expectations of investors (sometimes defined broadly, often narrowly) and an obligation of transparency.
- In other words, these tribunals have interpreted stand-alone FET clauses similarly as other tribunals (mentioned in Section 1) that have expressly stated that the clause has an autonomous character.

b) I have found numerous awards (74)<sup>12</sup> where the tribunals do not mention the issue at all. The awards contain no analysis or discussion on the question of the status of the FET clause and its relation to the MST.

- These tribunals have, in practice, also applied broad interpretations of the standard by including elements of protection for legitimate expectations (sometimes defined broadly, often narrowly) and transparency.
- A large number (more than 20) of awards rendered in the last 5 years have adopted narrow definitions of legitimate expectations.
  - These tribunals no longer find it necessary to examine the question of whether a stand-alone clause should be characterised as an autonomous clause or whether it is linked to international law or the MST. Instead, they are focusing on whether the elements contained in the FET standard have been breached.
  - It is noteworthy that in only about 30% of these recent awards, tribunals have found a breach of the FET clause.

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<sup>9</sup> See, Annex 5 for the list of awards.

<sup>10</sup> See, Annex 6 for the list of awards.

<sup>11</sup> See, Annex 7 for the list of awards.

<sup>12</sup> The awards are listed in Annexes 8 and 9.



Does the fact that a tribunal fails to (expressly) take position on the status of a stand-alone FET clause have any impact in terms of liability and compensation?

- At first, the impact seems to be rather “neutral”.
- In about half of cases (47 out of 91),<sup>13</sup> the FET claims were rejected.
- In the other half of cases (44 out of 91 awards),<sup>14</sup> tribunals found a breach of the FET clause and in some cases awarded large amounts of compensations:
  - Awards finding breaches of the FET clause and other provisions: *Devas* (USD 100 m.), *Quiborax* (USD 48 million), *PAO Tatneft* (USD 120 million), *Rumeli* (USD 125 million), *Kardassopoulos* (USD 45 million), *Mytilineos* (USD 40 million), *von Pezold* (USD 100 million), *Manolium* (USD 20 million), *Siag* (USD 74,5 m.), *ADC* (US\$ 76.2), *CME* (US\$ 269.8 m.).
  - Awards finding only FET clause breaches: *BG Group* (USD 185 million) *Dayyani* (USD 50 million).
- It is noteworthy that the overall success rate of 50% of awards which have not formally taken position on the status of a stand-alone FET clause is lower compared to other tribunals (mentioned in Section 1) which stated that the provision has an autonomous character. Yet, that success rate is still much higher than that of awards examining FET clauses linked to the MST (see, section 3).

#### 1.4. Awards interpreting the unique FET clause contained in the Energy Charter Treaty

Art. 10 of the Energy Charter Treaty contains a rather unique stand-alone FET clause where “international law” is mentioned, but is not directly linked to the FET standard:

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and *create stable, equitable, favourable and transparent conditions* for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties *fair and equitable treatment*. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment *less favourable than that required by international law*, including treaty obligations. (emphasis added)

I have found 54 awards examining this clause.

Most awards do not mention the status of the clause and its relation to international law or the MST.

The vast majority of tribunals that have taken position on this question (9 awards<sup>15</sup>) have considered that it was an “autonomous” FET clause not linked to the MST. I have also

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<sup>13</sup> See, Annex 8 for the list of awards.

<sup>14</sup> See, Annex 9 for the list of awards.

<sup>15</sup> See, Annex 10 for the list of awards.

found a few awards where the reasoning is rather ambiguous but could suggest that the tribunals believed that this is a reference to the MST.<sup>16</sup>

In any event, all tribunals have adopted a broad interpretation where an investor's legitimate expectations are considered to be part of the standard. They have, however, all defined the concept narrowly.

I have found 32 awards<sup>17</sup> (out of 54) which held that the FET clause (sometimes together with other clauses) had been breached. Two awards were later annulled and annulment proceedings are pending on some other cases. In 22 cases, the claims were rejected.<sup>18</sup> The 60% success rate is relatively high compared to that of other awards examined in section 3.

### 1.5. Conclusion on stand-alone FET clauses

Less than 25% of awards (29 out of 120) examining stand-alone FET clauses have addressed the question of its status and its relation to the MST.

The vast majority of awards where tribunals took a position on the issue have concluded that the clause should be interpreted as having an autonomous character (23 out of 29 awards, i.e. some 80% awards). The same is true for awards examining the Energy Charter Treaty: almost all tribunals which have taken position on the issue have adopted the same approach.

All these awards have concluded that the standard encompasses elements such as the protection of legitimate expectations (often defined narrowly) and an obligation of transparency.

The vast majority of tribunals (about 75%) did not formally take position on the status of FET clauses. In fact, a larger number of awards (74 out of 120) did not mention the issue at all. Yet, the approach they adopted is very similar to that of other tribunals which did take position on the status of the clause. They have all adopted broad interpretations when defining its content.

The success rate of FET claims is higher for tribunals which have expressly stated that a stand-alone FET clause has an "autonomous" character compared to others which did not take position on this question (2\3 versus 50%).

The difference is much more significant if one considers the awards rendered in the last 5 years which are characterised by tribunals not taking position at all on the issue and most of them (70%) not finding any breach. These findings suggest that when a tribunal discusses the status of the FET clause and takes position on the matter, it is more likely that it will conclude that a breach has been committed. On the contrary, if a tribunal does not take a position on this question, it is less likely to find a breach.

In any event, the overall success rate for all 120 awards where tribunals have examined stand-alone FET clauses is still high (63 awards out of 120). Claimants have a 50% chance of being successful. The success rate is even higher if one takes into account the 54 other awards rendered under the Energy Charter Treaty where claimants have been successful in 60% of cases. In any case, the most important finding is that this success rate is much higher

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<sup>16</sup> See, Annex 11 for the list of awards.

<sup>17</sup> See, Annex 12 for the list of awards.

<sup>18</sup> See, Annex 13 for the list of awards.

compared to that of awards examining FET clauses where the standard is expressly linked to the MST (see, section 3).

At the end of the day, it is clear that the possibility that a tribunal will interpret a stand-alone FET clause as an implicit reference to the MST under custom is very low (about 5% of awards). A stand-alone FET clause therefore provides very limited protection for States against the possibility that a tribunal adopts a broad interpretation and concludes that a breach has been committed.

## 2. FET clauses referring to “international law”

According to the 2023 OECD paper, about 10% of treaties contain a FET clause where the treatment is associated with “international law” or “principles of international law”.

There are two variations of this clause, which will be examined separately:

- “in accordance with” clauses (Section 2.1);
- “no less” clauses (Section 2.2).

### 2.1. FET clauses where the treatment must be “in accordance with” international law

Two examples:

*Each Contracting Party shall accord investments or returns of investors of the other Contracting Party*

- fair and equitable treatment in accordance with principles of international law, and*
- full protection and security.* (Canada-Egypt BIT (1996), Art. II)

*Each Contracting Party shall in its Area accord to investments of investors of the other Contracting Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.* (Japan-Myanmar BIT (2013), Art. 4).

I have found 30 awards examining this type of clause. While some awards (11) did not take position on the status of the FET clause, the majority of tribunals did.<sup>19</sup>

The vast majority of awards (15) where the tribunals did take position have concluded that “in accordance with” international law is not a reference to the MST under custom.<sup>20</sup> I have found only 4 awards adopting a different position.<sup>21</sup> A good example illustrating the views of the majority of awards is the Vivendi tribunal, which saw no “basis for equating principles of international law” with the MST for the following three reasons:

“First, the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone. Second, the wording of Article 3 requires that the fair and equitable treatment conform to the principles of international law, but the requirement for conformity can just as readily set a floor as a ceiling on the Treaty’s fair and equitable treatment standard. Third, the language of the provision suggests that one should also look to contemporary principles of international law, not only to principles from almost a century ago” (*Vivendi v. Argentina*, 2007, para 7.4.7.)

For these tribunals, the requirement to conform with international law is just a floor. Therefore, the FET standard offers better protection than the MST, just like “autonomous” FET clauses. It should be added that a few of these awards seem to downplay the importance of this issue by qualifying it as “sterile” or “dogmatic”. They do so based on a (controversial) assumption that the level of treatment under the MST has evolved rapidly

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<sup>19</sup> See, Annex 14 for the list of awards.

<sup>20</sup> See, Annex 15 for the list of awards.

<sup>21</sup> See, Annex 16 for the list of awards.

in recent decades and now provides for basically the same protection as under a FET treaty standard.

Only a handful of tribunals have actually explained what the content of the FET standard under “international law” is. In fact, all tribunals have interpreted that clause in much the same way as a stand-alone FET clause having an autonomous character. They have all considered that the FET standard includes the protection of investors’ legitimate expectations (often defined narrowly), and many have also referred to an obligation of transparency.

The broad interpretations adopted by these tribunals has had a direct consequence in terms of liability and compensation.

- About 1/3 of awards (11 awards out of 30) found no breach of the FET clause.<sup>22</sup>
- In 2/3 of awards (19 out of 30), tribunals found that the clause had been breached and awarded compensation in most of them.<sup>23</sup> Some of the amounts awarded for damages are substantial:
  - Tribunals awarding compensation for breach of FET clause and other provisions: *Vivendi* (USD 105 million), *Valores* (USD 430 million), *Crystallex* (USD 1,2 billion), *EDF* (USD 136 million), *SAUR* (USD 40 million), *García Armas* (USD 213 million), *Perenco* (USD 449 million).
  - Tribunals awarding compensation for breach of the FET clause alone: *Total* (USD 300 million), *Suez* (USD 405 million), *Gold Reserve* (USD 713 million).

Whether or not a tribunal held that a breach had been committed seems to be closely related to the way it considered the status of the clause:

- The vast majority of tribunals (13 out of 15 awards<sup>24</sup>) which concluded that the clause “in accordance with international law” is *not* a reference to the MST under custom have found a breach of the FET clause.
- In contrast, 3 of the 4 awards where the tribunals held that “in accordance with” international law was a reference to the MST came to the conclusion that no FET violation had been committed (and the amount of compensation in the only award which came to a different conclusion is rather low: US\$ 10 m.).<sup>25</sup>

There is a correlation between the way a tribunal interprets an “in accordance with” international law FET clause and its finding in terms of liability. When a tribunal considers that the clause is not a reference to the MST, it is more likely to give it a broad interpretation and, in turn, to find that a violation has been committed.

## 2.2. FET clauses where the treatment must be “no less” than that required by international law

Example:

*Investment shall at all times be accorded fair and equitable treatment, shall enjoy*

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<sup>22</sup> See, Annex 17 for the list of awards.

<sup>23</sup> See, Annex 18 for the list of awards.

<sup>24</sup> See, Annex 19 for the list of awards.

<sup>25</sup> It should be added that about half of the 11 awards where the tribunals did not take position on the status of the clause have held that a breach had been committed.

*full protection and security and shall in no case be accorded treatment less than that required by international law (Argentina-United States BIT, Art. 2)*

I have found 33 awards examining this type of clause. In 11 cases, the tribunals did not address the status of the clause.<sup>26</sup> The claimants were successful in only 3 of these cases.

The reasoning of the tribunals which did take position on this issue (22 awards) can be divided in two groups.

a) Half of the awards (11) explicitly interpreted this clause to mean that the standard of treatment under the treaty is essentially the same as under an “autonomous” stand-alone FET clause.<sup>27</sup> A good example is the reasoning of the *Lemire* tribunal:

“The FET standard defined in the BIT is an autonomous treaty standard, whose precise meaning must be established on a case-by-case basis.”

“What the US and Ukraine agreed when they executed the BIT, was that the international customary minimum standard should not operate as a ceiling, but rather as a floor. Investments protected by the BIT should in any case be awarded the level of protection offered by customary international law. But this level of protection could and should be transcended if the FET standard provided the investor with a superior set of rights” (*Lemire v Ukraine*, 2010, para 284).

For these tribunals, the requirement to offer a level of treatment no less than that existing under international law sets a floor, a minimum, and does not operate as a ceiling. The level of treatment to be offered is therefore not the one existing under the MST, but a better protection than that. It should be added that some of the tribunals following this “not ceiling, but floor” approach have also mentioned that in their view, the level of protection was not that different than the one existing under the MST. Yet, this is because they have interpreted the MST very broadly.

Importantly, *all* awards adopting this “not ceiling, but floor” approach have concluded that the FET clause had been breached. They have all awarded compensation, including some large amounts:

- Compensation for breach of the FET and other clauses: *Occidental* (USD 71 million), *Enron* (USD 106 million), *Sempra* (USD 128 million), *Azurix* (USD 165 million), *CMS* (USD 133 million).
- Compensation only for breach of the FET clause: *Murphy* (USD 19 million).

b) About half of awards (11) have considered that the inclusion of the words “international law” in “no less” clauses is a reference to the MST under custom.<sup>28</sup>

Under this approach, the requirement to offer a level of treatment no less than that existing under international law sets a floor *and* a ceiling. In other words, the level of treatment to be offered is the same as the one existing under the MST, *not* better protection. It is noteworthy that some of these tribunals did not consider the concept of legitimate expectations, and that the ones that did, defined it rather narrowly.

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<sup>26</sup> See, Annex 20 for the list of awards.

<sup>27</sup> See, Annex 21 for the list of awards.

<sup>28</sup> See, Annex 22 for the list of awards.

The narrow interpretations adopted by these tribunals has had a direct impact in terms of liability and compensation.<sup>29</sup> Out of the remaining 8 relevant cases, the vast majority of awards (6 awards, i.e., 75%)<sup>30</sup> have held that no violation had been committed and no compensation was awarded. In only two awards, both decided under the Argentina-US BIT (*Mobil Exploration*, US\$ 196 m.; *El Paso*, US\$ 43 m.) compensation was awarded by the tribunal.

### 2.3. Conclusion on FET clauses referring to “international law”

The question of how a tribunal analyses the status of an FET clause containing a reference to “international law” seems to have a direct impact on the interpretation (broad or narrow) it gives to the content of the standard and, in turn, on how it addresses matters of liability and compensation.

The vast majority of awards where tribunals have taken position on the status of an “in accordance with” international law FET clause have concluded that this is *not* a reference to the MST under custom.

- They have considered that under this clause the FET standard offers better protection than under the MST and have, in practice, interpreted the clause in very much the same way that other tribunals have done regarding stand-alone FET clauses having an autonomous character.
- These broad interpretations led the majority of tribunals (2/3 of awards) to find a breach of FET and to award compensation. It is noteworthy that this 70% success rate is the same for tribunals which have expressly stated that a stand-alone FET clause must be interpreted as having an “autonomous” character (see, section 1.1).

Tribunals assessing “no less” FET clauses have been evenly divided on the interpretation to be given to this clause and its relation to the MST. Yet, there is also a clear link between the approach adopted by a tribunal regarding the status of a “no less” FET clause and how it assesses matters of liability and compensation.

- Those tribunals which have considered “no less” clauses in the same way as autonomous stand-alone FET clauses have all given broad interpretations which led *all of them* to conclude that a breach had been committed.
- On the contrary, tribunals which have interpreted “no less” clauses as meaning that the level of treatment is the same as the one existing under MST, have adopted narrower approaches which led the vast majority of them to find no breach.

Ultimately, what is clear is that a BIT that contains a FET clause with a reference to “international law” (whether “in accordance” or “no less”) does *not* provide any guarantee that a tribunal will interpret this wording as being synonymous with the MST under custom. Only a minority of tribunals have adopted this approach (15 out of 63 awards, i.e. 25%). In fact, it is more likely that a tribunal will interpret such language similarly to any other stand-alone FET clause containing no reference to “international law” whatsoever (see, section 1.1). In practical terms, the vast majority of tribunals that adopted this approach came to the conclusion that the FET clause had been breached and awarded compensation.

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<sup>29</sup> It should be mentioned that three cases should be excluded from the analysis on liability. In two awards, the tribunals found a violation of the clause, but awarded compensation to cover breaches of other provisions or other elements of protection. Another case is pending.

<sup>30</sup> See, Annex 23 for the list of awards.

In sum, a reference to “international law” in a FET clause offers limited protection for States against the possibility of tribunals adopting broad interpretations and finding liability.



### 3. FET clauses linked to MST or custom

According to the 2023 OECD paper, some 200 treaties contain a FET clause where the standard of treatment is explicitly linked to the MST (they represent less than 10% of all treaties).

This is one example of a rather simple clause:

*Investments or returns of investors of either Contracting Party shall at all times be accorded treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. (Canada-Czechia BIT, 2009, Art. 3).*

Many recent treaties (some 55) have adopted a very detailed FET clause based on the United States Model BIT (2005), where the standard is explicitly linked to the MST under custom, with some additional clarifications:

*Art. 5 Minimum Standard of Treatment<sup>31</sup>*

*1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*

*2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:*

*(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and*

*(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law. (...)*

This group consists of 42 awards. I will first examine awards rendered in the context of one treaty, NAFTA, (section 3.1) and then under other treaties (section 3.2).

#### 3.1. NAFTA

I have found 27 awards dealing with NAFTA Article 1105(1), entitled “Minimum Standard of Treatment”:<sup>32</sup>

*Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.*

The Free Trade Commission issued its Note of Interpretation in 2001, which contains, inter alia, the following classifications:

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<sup>31</sup> A footnote is attached to the title of the provision, which indicates that “Article 5 shall be interpreted in accordance with Annex A” (entitled “Customary International Law”), which reads as follows: “The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 5 and Annex B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.”

<sup>32</sup> See, Annex 24 for the list of awards.

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

Since the 2001 Note, all NAFTA tribunals have concluded that the FET clause under Article 1105 is a reference to the MST under custom. Yet, it should be added that some tribunals have interpreted customary international law as an evolving and rather flexible concept.

In contrast to other awards dealing with differently worded FET clauses (examined in sections 1 and 2 above), NAFTA tribunals have recognized that the FET standard contains only a *limited number* of specific elements of protection that must be accorded to investors, such as denial of justice, due process and arbitrariness.

- With one exception, NAFTA tribunals have consistently denied the existence (as a stand-alone obligation) of a broader obligation to maintain a stable legal and business environment for investments.
- The vast majority of tribunals have not considered the concept of legitimate expectations as a stand-alone element of the FET standard under Article 1105; it is rather a “factor” to be taken into account when assessing whether or not *other well-established* elements of the standard have been breached (for instance, due process, arbitrary conduct, etc.). They have also repeatedly narrowly qualified the concept of legitimate expectations in order to significantly reduce its scope of application.
- All awards (except for one, which was later set aside) concluded that transparency is *not* a stand-alone element of the FET standard and that it does not impose any obligation on host States under Article 1105.

NAFTA tribunals have consistently required proof of a high threshold of severity and gravity (using qualifiers such as “manifest”, “gross”, “evident”, “blatant”, and “complete”) to conclude that the host State has breached any of the elements contained within the FET standard under Article 1105.

The narrow interpretation adopted by (almost) all NAFTA tribunals has had some direct consequences in terms of liability and compensation. Tribunals have found a breach in only 25% of claims (6 out of 27 awards<sup>33</sup>). The amount of compensation awarded has also been relatively modest, with the exception of a few awards where the FET clause was breached alone (*Windstream*: CN\$ 25 m.; *Lion Mexico*: US\$ 47 m.) or together with other provisions (*Cargill*: US\$ 77 m.).

### 3.2. Other treaties

The FET clause in CAFTA contains the same text as the one in the US Model BIT. All CAFTA awards (5) have applied the MST.<sup>34</sup> None have considered it as an autonomous FET clause.

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<sup>33</sup> See, Annex 25 for the list of awards.

<sup>34</sup> See, Annex 26 for the list of awards. In one case, the proceedings were later discontinued.

- They have also defined the standard in the same way as NAFTA awards did. They have (except for one) adopted the same position on transparency and on the application of legitimate expectations (i.e., not a stand-alone element, but only a factor to be taken into account). They have also referred to the high threshold of gravity required to find a breach.
- In 2 claims, the tribunals found no breach. In the other 2 cases where the tribunals did find the State responsible, the compensations awarded were relatively modest (less than US\$ 21 m).

I have also found 10 awards where tribunals have examined provisions contained in investment treaties with wording similar, or identical, to the FET clause found in the US Model BIT.<sup>35</sup> They have also followed the reasoning of NAFTA tribunals.

- All awards have applied the MST.
- They have not given a broad interpretation to the standard (with one exception, dealing with a rather unique clause). All have interpreted the concept of legitimate expectations narrowly and some awards have adopted the same position as NAFTA tribunals on its application (i.e., not a stand-alone element, but only a factor to be taken into account). They have also applied a high threshold to find a breach.
- Interestingly, this NAFTA-style approach did not seemingly have a direct impact in terms of liability. Thus, the majority of awards found that a breach of the FET clause had been committed and awarded compensation (some include significant amounts: *Elliott*: US\$ 54 m.; *Kenon*: US\$ 110 m.; *Gramercy*: US\$ 33 m.; *Abengoa*: approx. US\$ 25 m.). Importantly, they did so based on the application of a threshold of gravity higher than under an autonomous stand-alone FET clause. The only award which did not follow this approach, ended up awarding the largest amount in damages (*OI European Group*: US\$ 372 m.).

### 3.3. Conclusion on FET clauses linked to the MST or custom

All tribunals examining FET clauses expressly linked to the MST (or custom) have followed the intention of the contracting parties and have applied a strict standard. I have found no award interpreting this type of clause as a stand-alone “autonomous” FET clause.

Interpreting the clause in accordance with the MST leads tribunals to define the content of the FET standard narrowly. For instance, the vast majority have not considered legitimate expectations to be a stand-alone element, but rather as a factor to be taken into account when assessing other elements. They have also systematically applied a high threshold of severity to find a breach.

As a result of this narrow interpretation, NAFTA tribunals have come to the conclusion that the host State had violated the FET clause in a limited number of cases. The success rate of NAFTA claims is significantly lower when compared with awards interpreting other types of FET clauses (examined in sections 1 and 2). It should be added that for non-NAFTA tribunals interpreting treaties containing similar wording, the success rate is similar to that of awards assessing stand-alone FET clauses.

At the end of the day, an explicit reference to the MST (or custom) in a FET clause offers much better protection compared to other types of clauses examined in sections 1 and 2. A

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<sup>35</sup>

See, Annex 27 for the list of awards.

tribunal interpreting this type of clause is significantly less likely to adopt a broad interpretation and to find liability.

## 4. General conclusion

In a 2012 Report, UNCTAD noted a significant statistical difference between the lower success rates of FET claims under NAFTA when compared to the much higher one under BITs (which at the time included essentially stand-alone FET clauses and provisions containing a reference to “international law”). In NAFTA cases, only 22% of those claims were successful (4 out of 18), while in other BIT cases, 62% were accepted by tribunals (41 out of 66).<sup>36</sup> The Report concluded that the NAFTA “claimants’ success rate is much lower than in cases under traditional BITs, where the FET provision is most often analysed as setting an autonomous standard not linked to the MST.”<sup>37</sup>

My findings confirm the same patterns and trends than those mentioned in the UNCTAD Report some 10 years ago.

A stand-alone FET clause provides very limited protection for States against the possibility that a tribunal adopts a broad interpretation and concludes that a breach has been committed. The same is true for clauses containing a reference to “international law”. In most cases, tribunals have interpreted them in pretty much the same way as stand-alone “autonomous” FET clauses.

A FET clause explicitly linked to the MST is the only type of provision which can significantly reduce the possibility of a tribunal giving a broad interpretation to the FET standard and awarding a large compensation. Whether a CETA-style closed list clause offers the same protection remains to be seen.

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<sup>36</sup> *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II, 2012, p. 61.

<sup>37</sup> *Ibid.*, p. 60.

*Annex 1: List of awards mentioned in footnote no. 5*

*Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006.

*Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia*, PCA Case No. 2015-40, Award, 29 March 2019.

*Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia*, ICSID Case No. ARB/17/29, Award, 27 October 2022.

*Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, 13 December 2017.

*Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017.

*Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Award, 21 December 2020.

*Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008.

*Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Award, 1 March 2012.

*Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35, Award, 24 November 2021.

*Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017.

*Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/01, Award, 21 July 2017.

*Mobile Telesystems (MTS) V. Turkmenistan (2)*, ARB(AF)/18/4, Award, 14 June 2023 (reported in IAREporter, 19 June 2023).

*Spoldzielnia Pracy Muszynianka v. Slovak Republic*, UNCITRAL, PCA Case No. 2017-08, 7 Oct. 2020.

*Veolia Propreté v. Arab Republic of Egypt*, ICSID Case No. ARB/12/15, Award, 25 May 2018.

*Sociedad Aeroportuaria Kuntur Wasi S.A. and Corporación América S.A. v Republic of Peru*, ICSID Case No. ARB/18/27, Decision on Jurisdiction Liability Certain Aspects of Quantum and Further Directions on Quantum, 11 August 2023.

*GPF GP S.à.r.l v. Republic of Poland*, SCC Case No. V 2014/168, Award, 29 April 2020.

*Abed El Jaouni and Imperial Holding SAL v. Lebanese Republic*, ICSID Case No. ARB/15/3, Decision on jurisdiction and liability, 25 June 2018; Award, 14 January 2021.

*Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt I*, PCA Case No. 2012-07, Final Award, 23 December 2019.

*Albacora S.A. v. Republic of Ecuador*, PCA Case No. 2016-11, Award, 18 July 2019 (reported in IAREporter, 26 July 2019).

*Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013.

*National Grid plc v. The Argentine Republic*, UNCITRAL, Award, 3 Nov. 2008.

*Bayindir Insaat Turizm Ticaret ve Sanayi AS v. Pakistan*, ICSID Case No. ARB/03/29 Award, 27 August 2009.

*Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012.

*Annex 2: List of awards mentioned in footnote no. 6*

*Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia*, PCA Case No. 2015-40, Award, 29 March 2019.

*Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia*, ICSID Case No. ARB/17/29, Award, 27 October 2022.

*Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35, Award, 24 November 2021.

*Mobile Telesystems (MTS) V. Turkmenistan (2)*, ARB(AF)/18/4, Award, 14 June 2023 (reported in IARepporter, 19 June 2023).

*Veolia Propreté v. Arab Republic of Egypt*, ICSID Case No. ARB/12/15, Award, 25 May 2018.

*GPF GP S.à.r.l v. Republic of Poland*, SCC Case No. V 2014/168, Award, 29 April 2020.

*Albacora S.A. v. Republic of Ecuador*, PCA Case No. 2016-11, Award, July 18, 2019, (reported in IARepporter, 26 July 2019).

*Bayindir Insaat Turizm Ticaret ve Sanayi AS v. Pakistan*, ICSID Case No. ARB/03/29 Award, 27 August 2009.

*Annex 3: List of awards mentioned in footnote no. 7*

*Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017.

*Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008.

*Spoldzielnia Pracy Muszynianka v. Slovak Republic*, UNCITRAL, PCA Case No. 2017-08, 7 Oct. 2020.

*Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019.

*Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/01, Award, 21 July 2017.

*Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt I*, PCA Case No. 2012-07, Final Award, 23 December 2019.

*Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012.

*Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Award, 1 March 2012.

*National Grid plc v. The Argentine Republic*, UNCITRAL, Award, 3 Nov. 2008.

*Abed El Jaouni and Imperial Holding SAL v. Lebanese Republic*, ICSID Case No. ARB/15/3, Decision on jurisdiction and liability, 25 June 2018; Award 14 January 2021.

*Deutsche Telekom v. India*, PCA Case No. 2014-10, Final Award, 27 May 2020.

*Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Award, 21 December 2020.

*Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013.

*Sociedad Aeroportuaria Kuntur Wasi S.A. and Corporación América S.A. v Republic of Peru*, ICSID Case No. ARB/18/27, Decision on Jurisdiction Liability Certain Aspects of Quantum and Further Directions on Quantum, 11 Aug. 2023.

NB: In *Saluka Investments BV v. Czech Republic*, PCA Case No. 2001-04, Partial Award, March 17, 2006, no final award was rendered because a settlement was reached between the parties.



*Annex 4: List of awards mentioned in footnote no. 8*

*William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Award, 9 Sept. 2003.

*Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018.

*Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016.

*Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016.

*Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007.

*Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (II)*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010.

*Annex 5: List of awards mentioned in footnote no. 9*

*Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007.

*Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7, Award, 12 January 2016.

*Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Award, 22 Dec. 2003.

*ECE Projektmanagement v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013.

*Rupert Joseph Binder v. Czech Republic*, UNCITRAL, Final Award, 15 July 2011.

*MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004.

*Oxus Gold plc v. Republic of Uzbekistan, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat*, UNCITRAL, Final Award, 17 December 2015

*Annex 6: List of awards mentioned in footnote no. 10*

*Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015.

*BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, 24 December 2007.

*The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013.

*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.

*Valeri Belokon v. Kyrgyz Republic*, PCA Case No. AA518, Award, 24 October 2014.

*PAO Tatneft (formerly OAO Tatneft) v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014.

*Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008.

*MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro* (ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016.

*Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, 18 February 2020.

*Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award on 29 April 2014.

*Annex 7: List of awards mentioned in footnote no. 11*

*Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015.

*BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, 24 December 2007.

*The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013.

*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.

*Valeri Belokon v. Kyrgyz Republic*, PCA Case No. AA518, Award, 24 October 2014.

*PAO Tatneft (formerly OAO Tatneft) v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014.

*Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008.

## *Annex 8: List of awards mentioned in footnote no. 13*

*South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 30 August 2018.

*Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Award, 22 Dec. 2003.

*L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Award, 12 Nov. 2008.

*Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic*, Award on the Merits, 6 June 2008.

*EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009.

*Invesmart v. Czech Republic*, UNCITRAL, Ad hoc, Award, 26 June 2009.

*Peter Franz Vocklinghaus v. Czech Republic*, Ad Hoc, Final Award, 19 Sept. 2011.

*Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011.

*GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011.

*White Industries Australia Limited v. Republic of India*, UNCITRAL, Award, 30 Nov. 2011.

*Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Ad Hoc, Award, 25 October 2012.

*Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Award, 21 May 2013.

*Yuri Bogdanov and Yulia Bogdanova v. Republic of Moldova*, SCC Case No. V091/2012, Award, 16 April 2013.

*Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014.

*Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 29 April 2014.

*Tulip Real Estate and Development Netherlands B.V. v Republic of Turkey*, ICSID Case No. ARB/11/28, 10 March 2014.

*ECE Projektmanagement v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013.

*MNSS B.V. and Recuperero Credito Acciaio N.V v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016.

*CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., CMC Muratori Cementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa, and CMC Africa Austral, LDA v. Republic of Mozambique*, ICSID Case No. ARB/17/23, Award, 24 Oct. 2019.

*Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Mr. Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Award, 14 December 2017.

*Lidercón, S.L. v. Republic of Peru*, ICSID Case No. ARB/17/9, Award, 6 March 2020.

*IC Power Asia Development Ltd. v. Republic of Guatemala*, PCA Case No. 2019-43, Award, 7 October 2020.

*Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007.

*Rupert Joseph Binder v. Czech Republic*, UNCITRAL, Final Award, 15 July 2011.

*WCV World Capital Ventures Cyprus Ltd. & Channel Crossings Ltd. v. Czech Republic*, PCA Case No. 2016-1, Award, 26 July 2023.

*Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012.

*Toto Costruzioni Generali S.p.A v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012.

*Naturgy Energy Group, S.A. and Naturgy Electricidad Colombia, S.L. (formerly Gas Natural SDG, S.A.*

*and Gas Natural Fenosa Electricidad Colombia, S.L.) v. Republic of Colombia*, ICSID Case No. UNCT/18/1, Award, 12 March 2021.

*Ortiz Construcciones y Proyectos S.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/17/1, Award, 29 April 2020.

*Ioan Micula, Viorel Micula and others v. Romania II*, ICSID Case No. ARB/14/29, Award, 5 March 2020, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009.

*Bayindir Insaat Turizm Ticaret ve Sanayi AS v. Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009.

*Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020.

*Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, 18 February 2020.

*Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya*, ICC Case No. 21537/ZF/AYZ, Award, 7 November 2018.

*Agility Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Award, 22 February 2021.

*Consutel Group S.p.A. in liquidazione v. People's Democratic Republic of Algeria*, PCA No. 2017-33, Award, 3 February 2020.

*United Utilities (Tallinn) B.V. and Aktiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019.

*Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018.

*Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018.

*Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018.

*JSW Solar (zwei) GmbH & Co. KG, Gisela Wirtgen, Jürgen Wirtgen, and Stefan Wirtgen v. Czech Republic*, PCA Case No. 2014-03, Final Award, 11 October 2017.

*JKX Oil & Gas plc, Poltava Gas B.V. and Poltava Petroleum Company v. Ukraine*, PCA Case No. 2015-11, Award, 6 February 2017 (reported in IARepporter, 29 June 2020).

*Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7, Award, 12 January 2016.

*G.I.H.G. Limited, Natland Group Limited, Natland Investment Group NV, and Radiance Energy Holding S.A.R.L. v. The Czech Republic*, PCA Case No. 2013-35, Partial Award, 20 December 2017 (reported in IARepporter, 26 July 2018).

*A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15, Award, 11 May 2020.

*Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011.

### *Annex 9: List of awards mentioned in footnote no. 14*

*The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013.

*Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 Nov. 2021.

*B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia*, ICSID Case No. ARB/15/5, Award, 5 April 2019.

*Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL Ad hoc, Final Award, 15 Dec. 2014.

*Luigiterzo Bosca v. Lithuania*, UNCITRAL, Award, 17 May 2013.

*Nordzucker v. Poland*, UNCITRAL, Second Partial Award (Merits), 23 Nov. 2009.

*Eureko B.V. v. Republic of Poland*, ad hoc arbitration, Partial Award, 19 Aug. 2005.

*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 Quantum, 13 October 2020.

*Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015.

*Valeri Belokon v. Kyrgyz Republic*, PCA Case No. AA518, Award, 24 October 2014.

*PAO Tatneft (formerly OAO Tatneft) v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014.

*Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008.

*Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Award, 15 April 2021 (reported in IAREporter, 8 June 2023).

*Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 Nov. 2010.

*Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010.

*Glencore International A.G. y C.I. Prodeco S.A. c. Colombia*, ICSID Case No. ARB/16/6, Award, 27 Aug. 2019.

*Olin Holdings Limited v. State of Libya*, ICC Case No. 20355/MCP, Final Award, 25 May 2018.

*Mytilineos Holdings v. Serbia (II)*, PCA Case No. 2014-30, Award, August 2017 (reported in IAREporter, 30 Sept. 2019).

*Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016.

*Flemingo Duty Free Shop Private Limited v. Republic of Poland*, PCA Case No. 2014-11, Award, 12 August 2016.

*Bernhard von Pezold and Others v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015.

*Manolium Processing v. Republic of Belarus*, PCA Case No. 2018-06, Final Award, 22 June 2021.

*Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014 (the award was later annulled: [Decision on Annulment, 9 March 2017](#)).

*Yury Bogdanov v. Republic of Moldova*, SCC Arbitration No. V (114/2009), Award, 30 March 2010.

*Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010.

*Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009.

*ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 Oct. 2006.

*CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Award, 14 March 2003.

*Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000.

*Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 Nov. 2000.

*Parkerings-Compagniet AS v. Lithuania*, ICSID No. ARB/05/8, Award, 7 September 2011.

*Horthel Systems BV, Poland Gaming Holding BV and Tesa Beheer BV v. Poland*, PCA Case No. 2014-31, Award, 2 Feb. 2017.

*MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004.

*BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, 24 December 2007.

*Impregilo S.p.A. v. Argentine Republic I*, ICSID Case No. ARB/07/17, Award, 21 June 2011.

*Etrak İnşaat Taahut ve Ticaret Anonim Sirketi v. State of Libya*, ICC Case No. 22236/ZF/AYZ, Final Award, 22 July 2019.

*Mohammad Reza Dayyani and others v. Republic of Korea*, PCA Case No. 2015-38, June 2018 (reported in: in IAREporter, 22 Jan. 2019).

*UAB E Enerģija v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017.

*HOCHTIEF Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014.

*Oxus Gold plc v. Republic of Uzbekistan, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat*, UNCITRAL, Final Award, 17 December 2015.

*British Caribbean Bank Limited v. The Government of Belize*, PCA Case No. 2010-18, Award, 19 Dec. 2014.

*Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012.

*Walter Bau Ag (In Liquidation) v. Kingdom of Thailand*, UNCITRAL (formerly Walter Bau AG (in liquidation) v. Kingdom of Thailand), Award, 1 July 2009.

*Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 Feb. 2008.

*Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007.

*Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC, Award, 22 Sept. 2005.



*Annex 10: List of awards mentioned in footnote no. 15*

*Liman Caspian Oil B.V. & NCL Dutch Investment B.V. v The Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010.

*Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB /15/37, Award, 26 Feb. 2021.

*Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019.

*SunReserve Luxco Holdings S.à.r.l. (Luxembourg) et al. v. Italian Republic*, SCC Case No. 2016/32, Final Award, 25 March 2020.

*LSG Building Solutions GmbH and others v. Romania*, ICSID Case No. ARB/18/19, Decision on Jurisdiction, Liability and Principles of Reparation, 11 July 2022.

*SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019.

*OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019.

*Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020.

*InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019.

*Annex 11: List of awards mentioned in footnote no. 16*

*Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016.

*RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019.

*Electrabel v. Hungary*, ICSID ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012.

*RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018.

*Limited Liability Company Amtov v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008.

## *Annex 12: List of awards mentioned in footnote no. 17*

*Luxembourg Solar 1 S.Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy II S.P.A v. Kingdom of Spain*, SCC Case No. 2015/150, Award, 14 November 2018.

*RENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022.

*RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019.

*Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019.

*SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019.

*RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Award, 11 Dec. 2019.

*Opera Fund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019.

*Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020.

*InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019.

*Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Trading Ltd. v. Republic of Kazakhstan*, SCC Case No. 116/2010, Award, 19 December 2013.

*Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018.

*Masdar Solar & Wind Cooperatief v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2008.

*NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019.

*Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability, and Directions on Quantum, 13 September 2021.

*MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia*, ICSID Case No. ARB/13/32, Award, 5 July 2022.

*Mathias Kruck and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction, Liability and Principles of Quantum, 14 September 2022; Award, 6 October 2023.

*STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Principles of Quantum, 8 Sept. 2020.

*Petrobart Ltd. v. The Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 March 2005.

*Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003.

*Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020; Award, 29 September 2022.

*Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021.

*ESPF Beteiligungs GmbH et al. v. Italian Republic*, ICSID Case No. ARB/16/5, Award, 14 September 2020.

*BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019.

*AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013.

*LSG Building Solutions GmbH and others v. Romania*, ICSID Case No. ARB/18/19, Decision on Jurisdiction, Liability and Principles of Reparation, 11 July 2022.

*Hydro Energy 1 S.à.r.l and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020.

*Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/2, Decision on Jurisdiction, Liability, and Principles of Quantum, 11 February 2022.

*Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg) v. Kingdom of Spain*, SCC Case No. 2015/063, Final Arbitral Award, 15 February 2018 (set aside by Swedish appellate court, Svea Court of Appeal Case No. T 4658-18, Dec. 2022).

*Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017 (annulled by decision of Committee, 11 June 2020).

*PV Investors v. Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020.

*AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013.

*9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019.

### *Annex 13: List of awards mentioned in footnote no. 18*

- Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008.
- Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020.
- Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016.
- Electrabel v. Hungary*, ICSID ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, Final Award, 25 November 2015.
- Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019.
- Mamidoil Jetoil v. Albania*, ICSID ARB/11/24, Award, 30 March 2015.
- FREIF Eurowind Holdings Ltd. v. Kingdom of Spain*, SCC Case No. 2017/060, Final Award, 8 March 2021.
- Photovoltaic Knopf Betriebs GMBH v. Czech Republic*, PCA Case No.2014-21, Award, 15 May 2019.
- Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, 15 May 2019.
- Mercuria Energy Group Limited v. Republic of Poland*, SCC Case No. 096/2008, Award, 29 December 2022.
- Charanne B.V. and Construction Investments S.a.r.l. v. Spain*, SCC Case No. 062/2012, Final Award, 21 January 2016.
- Isolux Infrastructure Netherlands, B.V. v. the Kingdom of Spain*, SCC V2013/153, Award, 12 July 2016.
- Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008.
- SunReserve Luxco Holdings S.à.r.l. (Luxembourg) et al. v. Italian Republic*, SCC Case No. 2016/32, Final Award, 25 March 2020.
- WA Investments Europa Nova Ltd v. Czech Republic*, PCA Case No. 2014-19, 15 May 2019.
- Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB /15/37, Award, 26 Feb. 2021.
- I.C.W Europe Investments Limited v. Czech Republic*, PCA Case No. 2014-22, Award, 15 May 2019.
- Festorino Invest Limited and others v Poland*, SCC Case No. V2018/098, Award, 30 June 2021.
- Antaris GmbH and Göde v. Czech Republic*, PCA Case No. 2014-01, UNCITRAL, Award, 2 May 2018.
- AES Summit Generation Limited and AES-Tisza Erömi Kft. v. Republic of Hungary (II)*, ICSID Case No. ARB/07/22, Award, 23 September 2010.
- Liman Caspian Oil B.V. & NCL Dutch Investment B.V. v The Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010.
- Stadtwerke München GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019.

*Annex 14: List of awards mentioned in footnote no. 19*

*Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Ad Hoc, Award, 12 Nov. 2010.

*Eutelsat S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/17/2, Award, 15 Sept. 2021.

*PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007.

*Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award, 15 March 2016.

*Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 Aug. 2015.

*Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela*, PCA Case No. 2013-3, Award, 26 April 2019.

*Gold Reserve Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014.

*Peter A. Allard v. Barbados*, PCA Case No. 2012-06, Award, 27 June 2017.

*Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016.

*Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, 29 Jan. 2016.

*Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, 11 September 2018.

*Annex 15: List of awards mentioned in footnote no. 20*

- Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID No. ARB(AF)/00/2, Award, 29 May 2003.
- Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016.
- Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013.
- Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/17/1, Award, 13 September 2021.
- Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/97/3, Second Presentation of the Case, Award, 20 August 2007.
- Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic (II)*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010.
- Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010.
- Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017.
- Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019.
- SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012.
- EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012.
- Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 Sept. 2014.
- Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award, 27 March 2020.
- Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021.
- OKO Pankki Oyj and others v. Republic of Estonia*, ICSID Case No. ARB/04/6, Award, 19 November 2007.

*Annex 16: List of awards mentioned in footnote no. 21*

*Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017.

*Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 12 Nov. 2014.

*Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016.

*Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, 16 Jan. 2013.



*Annex 17: List of awards mentioned in footnote no. 22*

*Peter A. Allard v. Barbados*, PCA Case No. 2012-06, Award, 27 June 2017.

*Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016.

*Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017.

*Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016.

*Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, 16 Jan. 2013.

*Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Ad Hoc, Award, 12 Nov. 2010.

*Eutelsat S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/17/2, Award, 15 Sept. 2021.

*Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, 11 Sept. 2018.

*Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, 29 Jan. 2016.

*Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019.

*Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award, 27 March 2020.

*Annex 18: List of awards mentioned in footnote no. 23*

- Infito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021.
- PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 Jan. 2007.
- Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 Aug. 2015.
- Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/97/3, Second Presentation of the Case, Award, 20 August 2007.
- Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017.
- Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016.
- International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012.
- Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID No. ARB(AF)/00/2, Award, 29 May 2003.
- SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Award, 22 May 2014.
- Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/17/1, Award, 13 September 2021.
- Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela*, PCA Case No. 2013-3, Award, 26 April 2019.
- Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award, 15 March 2016.
- Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 Sept. 2014.
- Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Award, 27 November 2013.
- OKO Pankki Oyj and others v. Republic of Estonia*, ICSID Case No. ARB/04/6, Award, 19 November 2007.
- Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (II)*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010.
- Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 12 Nov. 2014.
- Gold Reserve Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014.
- Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013.

*Annex 19: List of awards mentioned in footnote no. 24*

- Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID No. ARB(AF)/00/2, Award, 29 May 2003.
- Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016.
- Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013.
- Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/17/1), Award 13 September 2021.
- Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/97/3, Second Presentation of the Case, Award, 20 August 2007.
- Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (II)*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010.
- Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010.
- Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017.
- SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012.
- EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012.
- Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 Sept. 2014.
- Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021.
- OKO Pankki Oyj and others v. Republic of Estonia*, ICSID Case No. ARB/04/6, Award, 19 November 2007.

*Annex 20: List of awards mentioned in footnote no. 26*

*Mr. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, 2 March 2015.

*Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012.

*Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*, UNCITRAL, Award, 18 April 2002.

*Big Sky Energy Corporation v. Republic of Kazakhstan*, ICSID Case No. ARB/17/22, Award, 1 Nov. 2012.

*Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008.

*Rasia FZE and Joseph K. Borkowski v. Republic of Armenia*, ICSID Case No. ARB/18/28, Award, 20 Jan. 2023.

*David Minnotte & Robert Lewis v. Republic of Poland*, ICSID Case No. ARB (AF)/10/1, Award, 16 May 2014.

*Manchester Securities Corporation v. Republic of Poland*, PCA Case No. 2015-18, Award, 7 December 2018.

*LSF-KEB Holdings SCA and others v. Republic of Korea*, ICSID Case N no. ARB/12/37, Award, 30 Aug. 2022.

*LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006.

*Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 19 May 2006.

*Annex 21: List of awards mentioned in footnote no. 27*

*Banco Bilbao Vizcaya Argentaria S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB(AF)/18/5, Award, 12 July 2022.

*Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 Sept. 2008.

*Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010.

*Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007.

*Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007.

*Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006.

*Cargill, Incorporated v. Poland*, ICSID Case No. ARB(AF)/04/2, Award, 5 March 2008.

*Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008.

*Occidental Exploration and Production Co v. Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004.

*CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005.

*Murphy Exploration and Production Company International v. Republic of Ecuador II*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, 6 May 2016.

*Annex 22: List of awards mentioned in footnote no. 28*

*M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador*, ICSID No. ARB/03/6, Award, 31 July 2007.

*Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Estonia*, Award, 25 June 2001.

*Ulysseas, Inc v Ecuador*, UNCITRAL, Final Award, 12 June 2012.

*Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001.

*Alejandro Diego Díaz Gaspar v. Republic of Costa Rica*, ICSID Case No. ARB/19/13, Award, 29 June 2022.

*Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador), Decision on Reconsideration and Award, 7 February 2017.

*Iberdrola Energia, S.A. v. Republic of Guatemala*, ICSID ARB/09/5, Award, 17 Aug. 2012.

*Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018.

*American Manufacturing & Trading v Republic of Zaire (AMT)*, ICSID Case No. ARB/93/1, Award, 21 February 1997.

*El Paso Energy International Company v Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011.

*Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013.

*Annex 23: List of awards mentioned in footnote no. 30*

*M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador*, ICSID No. ARB/03/6, Award, 31 July 2007.

*Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001.

*Ulysseas, Inc v Ecuador*, UNCITRAL, Final Award, 12 June 2012.

*Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001.

*Alejandro Diego Díaz Gaspar v. Republic of Costa Rica*, ICSID Case No. ARB/19/13, Award, 29 June 2022.

*Iberdrola Energia, S.A. v. Republic of Guatemala*, ICSID ARB/09/5, Award, 17 Aug. 2012.

*Annex 24: List of awards mentioned in footnote no. 32*

- Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.
- S.D. Myers v. Canada*, UNCITRAL, First Partial Award, 13 November 2000.
- Pope & Talbot Inc. v. Canada*, UNCITRAL, Award on the Merits of Phase II, 10 April 2001.
- Pope & Talbot Inc. v. Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002.
- Mesa Power Group, LLC v. Canada*, UNCITRAL PCA Case No. 2012-17, Award, 24 March 2016.
- Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, 21 Nov. 2022.
- Windstream Energy LLC v. Canada*, [UNCITRAL](#), Award, 27 September 2016.
- Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 2 October 2012.
- Waste Management, Inc. v. Mexico* (“Number 2”), ICSID Case No. ARB(AF)/00/3, [Award, 30 April 2004](#).
- Glamis Gold Ltd v. United States*, UNCITRAL, Award, 14 May 2009.
- Apotex Holdings Inc & Apotex Inc. v. United States*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014.
- ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award, 6 January 2003.
- Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/02, Award, 18 September 2009.
- Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL, Award, 31 March 2010.
- William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc v. Canada*, UNCITRAL PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015.
- Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012.
- Eli Lilly and Company v. Canada*, UNCITRAL Case No. UNCT/14/2, Final Award, 16 March 2017.
- Robert Azinian, Kenneth Davitian, & Ellen Baca v. Mexico*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999.
- Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID No. ARB(AF)/98/3, Award, 26 June 2003.
- Methanex Corporation v. United States*, UNCITRAL, Award, 3 August 2005.
- International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL, Award, 26 January 2006.
- Chemtura Corporation v. Canada*, UNCITRAL, Award, 2 August 2010.
- Vento Motorcycles, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, 6 July 2020.
- Jorge Luis Blanco, Joshua Dean Nelson and Tele Fácil México, S.A. de C.V. v. Mexico*, ICSID Case No. UNCT/17/1, Final Award, 5 June 2020.
- Grand River Enterprises Six Nations, Ltd., et al. v. United States*, UNCITRAL, Award, 12 January 2011.
- Gami v. Mexico*, UNCITRAL, Award, 15 November 2004.
- Lion Mexico Consolidated v. Mexico*, ICSID, ARB(AF)/15/2, Award, 20 September 2021.



*Annex 25: List of awards mentioned in footnote no. 33*

*S.D. Myers v. Canada*, UNCITRAL, First Partial Award, 13 November 2000.

*Pope & Talbot Inc. v Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002.

*Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/02, Award, 18 September 2009.

*William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v Canada*, UNCITRAL PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015.

*Windstream Energy Llc v Canada*, UNCITRAL, Award, 27 September 2016.

*Lion Mexico Consolidated V. Mexico*, ICSID, ARB(AF)/15/2, Award, 20 September 2021.

*Annex 26: List of awards mentioned in footnote no. 34*

*Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012.

*The Lopez-Goyne Family Trust and Others V. The Republic of Nicaragua*, ICSID, Case No. ARB/17/44, Award, 1 March 2023.

*TECO Guatemala Holdings LLC v. Guatemala*, ICSID Case No. ARB/10/23, Award, 19 Dec. 2013.

*Spence International Investments, Llc, Berkowitz, et al, v. Costa Rica*, ICSID case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017.

*David R. Aven and Others v. Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018.

*Annex 27: List of awards mentioned in footnote no. 35*

*Adel A Hamadi Al Tamimi v Oman*, ICSID Case No ARB/11/33, Award, 27 October 2015.

*Eco Oro Minerals Corp. v Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 Sept. 2021.

*Elliott Associates L.P. v. Republic of Korea*, PCA Case No. 2018-51, Award, 20 June 2023.

*Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, 6 December 2022.

*PACC Offshore Services Holdings v United Mexican States*, ICSID Case No. UNCT/18/5, 11 January 2022.

*Kenon Holdings Ltd and IC Power Ltd v. Republic of Peru*, ICSID Case No. ARB/19/19, Award, 3 October 2023 (reported in: IAREP, 11 Oct 2023).

*Abengoa S.A. y COFIDES S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013.

*Antonio Del Valle Ruiz and others v. Kingdom of Spain*, PCA Case No. 2019-17, Final Award, 13 March 2023.

*Rand investments ltd., William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand, Robert Harry Leander Rand and Sembi Investment Limited vs. Republic of Serbia*, ICSID case no. Arb/18/8, Award, 29 June 2023.

*OI European Group B.V. v. Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015.

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