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M. Sornarajah

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THE INTERNATIONAL LAW ON FOREIGN INVESTMENT

Given recent seismic upheavals in the world's money markets, an updated edition of an authoritative, reliable textbook on the international law of foreign investment has rarely been so timely. Sornarajah's classic text surveys how international law has developed to protect foreign investments by multinational actors and to control any misconduct on their part. It analyses treaty-based methods, examining the effectiveness of bilateral and regional investment treaties. It also considers the reverse flow of investments from emerging industrialising powers such as China and Brazil and explores the retreat from market-oriented economics to regulatory controls. By offering thought-provoking analysis of not only the law, but related developments in economics and political sciences, Sornarajah gives immediacy and relevance to the discipline. This book is required reading for all postgraduate and undergraduate international law students specialising in the law of foreign investments.

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Contents

<i>Preface to the third edition</i>	<i>page xv</i>
<i>Preface to the second edition</i>	xvii
<i>Preface to the first edition</i>	xviii
<i>Table of cases</i>	xix
<i>List of abbreviations</i>	xxx
1 Introduction	1
1. The definition of foreign investment	8
1.1 The distinction between portfolio investment and foreign direct investment	8
1.2 Definition of foreign investment in investment treaties	10
1.3 The evolution of the meaning of the term ‘investment’	11
2. The history of the international law on foreign investment	19
2.1 The colonial period	19
2.2 The post-colonial period	21
3. An outline of the book	29
2 The shaping factors	33
1. The historical setting	36
1.1 State responsibility for injuries to aliens	36
1.1.1 The natural resources sector	38
1.1.2 The plantation sector	41
1.1.3 The manufacturing sector	42
1.1.4 The financial sector	44
1.1.5 Intellectual property	44
2. Conflicting economic theories on foreign investment	47
2.1 The classical theory on foreign investment	48
2.2 The dependency theory	53
2.3 The middle path	55
3. Actors in the field of foreign investment	60
3.1 The multinational corporation	61
3.2 State corporations	63

3.3	International institutions	65
3.4	Non-governmental organisations	67
3.5	Other actors	68
3.6	Sovereign wealth funds	68
4.	Risks in foreign investment	69
4.1	Ideological hostility	71
4.2	Nationalism	71
4.3	Ethnicity as a factor	73
4.4	Changes in industry patterns	74
4.5	Contracts made by previous regimes	75
4.6	Onerous contracts	76
4.7	Regulation of the economy	77
4.8	Human rights and environmental concerns	77
4.9	The law-and-order situation	79
5.	Sources of the international law on foreign investment	79
5.1	Treaties	79
5.2	Custom	82
5.3	General principles of law	85
5.4	Judicial decisions	87
3	Controls by the host state	88
1.	Regulation of entry	97
1.1	Guarantees against expropriation	99
1.2	Guarantees relating to dispute settlement	102
1.3	Tax and non-tax incentives to foreign investors	103
1.4	Screening of foreign investment entry	104
1.5	Requirements of local collaboration	106
1.6	Capitalisation requirements	108
1.7	Requirements relating to environmental protection	109
1.8	Requirements relating to export targets	111
1.9	Requirements relating to local equity	112
1.10	Other requirements	115
1.11	Regulation and expropriation	115
2.	New forms of foreign investment	116
2.1	The joint venture	116
2.2	The production-sharing agreement	118
3.	Constraints on control: customary international law	119
3.1	State responsibility for injuries to aliens	120
3.2	The conflict between the United States and Latin American states	124
3.3	The content of the international minimum standard	128
3.4	State responsibility and developing states	130
3.5	The ‘noble synthesis’	131

Contents

ix

3.6	Damage to property in the course of civil disturbances	134
3.7	Validity of conditions on foreign investment	136
3.7.1	Regulations on screening of foreign investments	137
3.7.2	Local equity requirements	138
3.7.3	Export requirements	141
4.	Conclusion	142
4	The liability of multinational corporations and home state measures	144
1.	Obligations of multinational corporations	145
1.1	The obligation not to interfere in domestic politics	148
1.2	Obligations relating to human rights	149
1.3	Liability for violations of environmental norms	152
1.4	The obligation to promote economic development	154
2.	Extraterritorial control by home states	155
2.1	State responsibility of home states for failure to control multinational corporations	157
2.2	The existing rules on state responsibility	157
2.3	The duty to control nationals abroad	164
2.4	State responsibility and the duty to provide remedies to victims	169
3.	Conclusion	170
5	Bilateral investment treaties	172
1.	Introductory survey	175
2.	Treaties of friendship, commerce and navigation	180
3.	Reasons for making bilateral investment treaties	183
4.	Features of bilateral investment treaties	187
4.1	The statement of the purpose of the treaty	188
4.2	Definitions	190
4.2.1	Investments	190
4.2.2	Limitation on the definition of investment	194
4.2.3	Portfolio investments	196
4.2.4	Corporate nationality and the protection of shareholders	197
4.3	Standard of treatment	201
4.3.1	National standard of treatment	201
4.3.2	Fair and equitable standard	204
4.3.3	Most-favoured-nation treatment	204
4.3.4	Full protection and security	205
4.4	Performance requirements	205
4.5	Repatriation of profits	206
4.6	Nationalisation and compensation	207
4.6.1	Compensation for destruction during wars and national emergencies	213

4.7	Protection of commitments	215
4.8	Dispute resolution	216
4.9	Arbitration and the exhaustion of local remedies	219
4.9.1	Arbitration between states	221
4.9.2	Subrogation	222
4.10	Safeguard provisions and exceptions	222
4.11	Succession of governments and bilateral investment treaties	224
5.	New concerns in bilateral investment treaties	224
5.1	Environmental concerns	225
5.2	Human rights	227
5.3	Economic development	229
5.4	International concerns	230
5.5	Regulatory space and bilateral treaties	231
5.6	Bilateral investment treaties and customary international law	232
6.	Conclusion	234
6	Multilateral instruments on foreign investment	236
1.	The international norms on multinational corporations	238
2.	The Draft Codes on Multinational Corporations	242
2.1	Description of the UNCTC Draft Code	242
2.1.1	The preamble	243
2.1.2	Definition	243
2.1.3	Respect for national sovereignty	243
2.1.4	Renegotiation of contracts	244
2.1.5	Non-interference in domestic affairs	244
2.1.6	Abstention from corrupt practices	246
2.1.7	Economic and other controls	247
2.1.8	Disclosure of information	248
2.1.9	Treatment of transnational corporations	248
3.	The outstanding issues	249
3.1	The relevance of international law	249
3.2	Non-interference in domestic affairs	250
3.3	Permanent sovereignty and international obligations	252
4.	The regional agreements	253
4.1	NAFTA	253
4.2	The ASEAN agreements	254
5.	The Multilateral Agreement on Investment	257
6.	The WTO and foreign investment	262
6.1	Investment in the Uruguay Round	263
6.2	GATS	263
6.3	TRIPS	265
6.4	TRIMS	266

Contents

xi

7.	An investment regime under the WTO	267
7.1	The definition of investment	267
7.2	Definition and preservation of regulatory control	268
7.3	Definition of investor	269
7.4	Treatment standards	269
7.4.1	Most-favoured-nation treatment	270
7.5	Performance requirements	271
7.6	Expropriation	271
7.7	Balance-of-payment safeguards	272
7.8	Dispute resolution	272
8.	The right to regulate foreign investment	273
9.	Conclusion	275
7	Settlement of investment disputes: contract-based arbitration	276
1.	Contractual devices for foreign investment protection	279
1.1	The essential clauses	281
1.1.1	The stabilisation clause	281
1.1.2	Choice-of-law clause	284
1.1.3	Arbitration clause	286
2.	The internationalisation of state contracts	289
2.1	The origin of the theory of internationalisation	289
2.2	The ICSID Convention and international law	299
2.3	The continued relevance of contract-based arbitration	300
2.4	Lex mercatoria and state contracts	302
2.5	Umbrella clauses and internationalisation	304
2.6	Arbitration based on investment legislation	304
3.	Conclusion	305
8	Treaty-based investment arbitration: jurisdictional issues	306
1.	Jurisdiction <i>ratione materiae</i>	308
1.1	The definition of investment	308
1.2	Economic development as a characteristic of investment	313
1.3	Does portfolio investment qualify as investment?	314
1.4	Pre-contractual expenses as investment	316
1.5	The qualification of investment as subject to local laws and regulations	317
1.6	Good faith limitations	318
1.7	Investments ‘approved in writing’	319
1.8	The time factor	319
1.9	Negotiations	320
1.10	The ‘fork in the road’ and waiver	320
1.11	Most-favoured-nation clause	322
1.12	Exhaustion of local remedies	322

2.	The investor as claimant	323
2.1	Natural persons	323
2.2	Juridical person: corporate nationality	323
2.3	Locally incorporated company	324
2.4	The wholly owned company	325
2.5	The migration of companies	325
2.6	Shopping for jurisdiction	327
2.7	Round-tripping and corporate nationality	328
2.8	Denial of benefits	329
2.9	Protection of minority shareholders	329
3.	Conclusion	330
9	Causes of action: breaches of treatment standards	332
1.	The customary international law standards	334
2.	The violation of national treatment standards	335
2.1	Performance requirements and national treatment	342
2.2	National treatment and infant industries	343
2.3	Subsidies, grants and national treatment	344
2.4	Ethnicity and national treatment	344
2.5	Conclusion	344
3.	International minimum standard treatment	345
4.	Fair and equitable standard of treatment	349
4.1	Violation of legitimate expectations	354
4.2	Denial of justice	357
4.3	Due process and administrative irregularity	358
5.	Full protection and security	359
6.	Conclusion	360
10	The taking of foreign property	363
1.	What constitutes taking?	364
1.1	New forms of taking	367
1.2	The ideas of property	369
1.2.1	Forced sales of property	376
1.2.2	Forced sales of shares	377
1.3	Privatisation and forced sales	380
1.3.1	Indigenisation measures	380
1.3.2	Interference with property rights	382
1.4	Evolving US and European notions of property	383
1.5	The impact on international law	386
1.6	Survey of authorities	389
2.	The exercise of management control over the investment	400
2.1	Cancellation of permits and licences	402
2.2	Takings by agents and mobs	404
2.3	Excessive taxation	405

<i>Contents</i>		xiii
2.4	Expulsion of the foreign investor	405
2.5	Freezing of bank accounts	406
2.6	Exchange controls	406
3.	Illegal takings	406
3.1	The taking must be for a public purpose	407
3.2	Discriminatory taking	409
3.3	Takings in violation of treaties	410
4.	Conclusion	410
11	Compensation for nationalisation of foreign investments	412
1.	The competing norms: the views of the capital-exporting states	413
1.1	The claim that 'prompt, adequate and effective' compensation must be paid	414
1.1.1	Treaties	415
1.1.2	Customary practice	417
1.1.3	General principles of law	418
1.1.4	Unjust enrichment	418
1.1.5	Acquired rights	419
1.1.6	Right to property	420
1.1.7	Foreign investment codes	424
1.1.8	Decisions of courts and tribunals	425
1.1.9	International courts	425
1.1.10	Awards of arbitral tribunals	429
1.1.11	National courts	440
1.1.12	Writings of publicists	441
2.	The competing norms	443
2.1	The claim that it is permissible to deduct past excess profits from compensation	443
2.2	The claim that the taking is a 'revindication' for which no compensation is necessary	444
2.3	The claim that appropriate compensation should be paid	445
2.3.1	Categories of takings for which damages rather than compensation must be paid	447
2.3.2	Categories of lawful takings for which full compensation must be paid	447
2.3.3	Full compensation must be paid where there is a one-off taking of a small business	448
2.3.4	Full compensation need not be paid as part of a full-scale nationalisation of a whole industry	448
2.3.5	Partial compensation	449
3.	Valuation of nationalised property	450
4.	Conclusion	451

12	Defences to responsibility	453
1.	Treaty-based defences	455
1.1	National security	457
1.2	Economic crises and national security	458
1.3	Necessity	461
1.4	Force majeure	465
2.	Violation of the fair and equitable standard by the foreign investor	466
3.	Ius cogens, competing obligations and liability	469
3.1	Transactions with undemocratic governments	470
3.2	Investments in areas of secessionist claims	471
3.3	Cultural property and foreign investment	471
3.4	Environmental obligations	472
3.5	Human rights considerations	472
4.	Conclusion	473
	<i>Bibliography</i>	474
	<i>Index</i>	494

Preface to the third edition

Since the second edition of this book, the international law on foreign investment has witnessed such enormous activity that a new edition is justified within five years. The number of arbitration awards based on investment treaties has increased, resulting in several books written solely on the subject of investment treaty arbitration. New works have appeared on several aspects of the law on foreign investment. This work has held the area of the law together without fragmenting it any further. The carving out of an international law on foreign investment itself may have furthered fragmentation in international law. Yet, the aim was to ensure that the base remained clearly in international law principles. That aim does not appear to have been preserved in many of the later works which sought to carve out further areas as free-standing ones. The original niche of this work remains unaffected. It seeks to establish the foundations of the law clearly in the international law rules on state responsibility and dispute resolution rather than approach it with the central focus on investment treaties and arbitration which seems to have attracted the practitioner more than the scholar.

It also has a focus that is different from that of the other works in the field. It is written from the perspective of development. The claim to neutrality of the works in the field cloaks the fact that they deal with an asymmetrical system of the law created largely to ensure investment protection. The fact that it does not follow this routine does not by itself make it a partial work. As before, the criticisms of this work have been made best by my students who have come from all over the world. I have taught courses based on this book in London, at the Centre for Transnational Legal Studies, in Toronto, at Osgoode Hall Law School, at Dundee at the Centre for Petroleum and Natural Resources Law and at my own home institution, the National University of Singapore, which, through its joint programme with the New York University Law School, attracts a global body of students. All possible criticisms that could be made of its central approach are reflected in the work. No criticism can be more valuable to an academic than those made by young minds coming fresh to the subject. In many ways, the stances that were taken in the first two editions seem to be justified in light of the global economic crisis and the retreat of some of the tenets of free market liberalisation that it is alleged to have brought about.

That the subject will continue to undergo rapid changes is very clear. Even as the preface is written, new developments are taking place. As I sat to write it, the Lisbon Treaty of the European Union came into effect giving the EU competence over investment policy and investment treaties. It is not possible in this edition to speculate what the effects of the Treaty

might be. States, particularly in Latin America, are pulling out of investment treaties and the ICSID Convention. The United States and South Africa have announced major reviews of their investment treaties. Some treaties are being made without an investor–state dispute-resolution provision. There is an evident retreat from the perception that investment protection is the only purpose of the investment treaty by the recognition of defences often on the basis of the relevance of the international law generally and of the international law on human rights and the environment in particular. In any event, the newer treaties are beginning to include concerns relating to labour rights, human rights and the environment. The impact of sovereign wealth funds as foreign investors has to be assessed. These changes are captured in this edition, but the manner in which they will take hold is still unclear.

As indicated in the previous editions, this area of the law is in constant change simply because different interests clash and outcomes differ based on constantly changing power balances. As a consequence, it is not an area to be studied by looking at only the language of the treaties and the awards interpreting them (the approach taken in the conventional texts on the subject), but in light of a variety of factors, among them the movement of power balances among states, the dominance and retreat of particular economic theories at given periods and the prevailing viewpoints within the arbitral community. This edition seeks to capture these changing factors which are responsible for the rapid developments that have taken place in the law.

As in the case of the previous editions, I thank those who have travelled the same path with me in the study of this exciting branch of international law. Working with those at the Division on Investment and Enterprise at UNCTAD, particularly with James Chan and Anna Joubin-Brett, has enabled me to keep abreast of the new developments that have taken place, especially in the economic aspects of the field. My academic friends, Peter Muchlinski, Frederico Ortino, Gus van Harten, Kerry Rittich, Karl Sauvant, Wenhua Shan, David Schneiderman, Kenneth Vandeveld, Jiangyu Wang and Jean Ho, have always been good sources of information, criticism and commentary, for which I am grateful. The work was first written at the Lauterpacht Centre for International Law at Cambridge. Its Directors, Sir Eli Lauterpacht and Professor James Crawford, have remained supportive. I thank also my graduate students, Huala Adolf, George Akpan, Lu Haitian and Adefolake Oyewande Adeyeye, who worked with me in aspects of this field.

I thank Finola O’Sullivan, Sinéad Moloney, Richard Woodham, Daniel Dunlavy and Martin Gleeson for the care taken over the production of my book.

The National University of Singapore has facilitated my research in every way I wished for. It has been a pleasure to be an academic at the NUS.

I commend to the readers of this work the excellent website run by Professor Andrew Newcombe of the University of Victoria, Canada, at <http://ita.law.uvic.ca>, which provides the texts of and other documents concerning investment treaty awards, and the equally excellent website run by Luke Peterson, www.iareporter.com, which reports on developments in the field. Both are free services of immense help to students of this field. Most of the arbitral awards cited in this work are to be found on these websites.

Thanga was there, as always. Ahila has now studied this area of the law. Ramanan and Vaishnavi have careers of their own. The book has grown up with them.

Preface to the second edition

The international law on foreign investment has witnessed an explosive growth since the last edition. The decade had witnessed a proliferation of bilateral and regional investment treaties, and a dramatic rise in litigation under such treaties. The attempt to fashion a multilateral instrument on investment within the World Trade Organization has given the debate on issues in the area a wider focus. This edition seeks to capture such developments.

In the course of the decade, I have had the good fortune of being involved actively in many facets of the operation of this area of the law. During such activity, I have acquired many friends who work in the area. My association with UNCTAD has brought me in contact with Karl Sauvant, Anna Joubin-Brett, Victoria Aranda and James Chan. It has also given me the opportunity to work with Arghyrios Fatouros, Peter Muchlinksi and Kenneth Vandavelde, the academic leaders of this field. They have added much to my understanding of the law. The many hours of arguments with them, in various parts of the world, have added to the pleasure of studying this area of the law.

The first edition was written while I was a visiting fellow at the Lauterpacht Centre for International Law, University of Cambridge. The successive Directors of the Centre, Professor Sir Eli Lauterpacht and Professor James Crawford, have continued to encourage my efforts in this and other areas of international law.

My many students in Singapore and Dundee have always challenged me so that I was taught by them to know and remember that there are other ways in which the law could be looked at. To my critics, my answer would be that I am constantly made aware of their criticisms in the classroom. I have accommodated those criticisms in the text.

I thank Finola O'Sullivan, Alison Powell and Martin Gleeson for the care taken over the production of my book.

My research student, Lu Haitian, prepared the bibliography.

Thanga was there, as always. Ahila, Ramanan and Vaishnavi happily are now old enough to let their father alone.

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Preface to the first edition

This book was written while I was on sabbatical leave from the National University of Singapore. I thank the Vice-Chancellor, the Council and Dean of the Faculty of Law for the generous terms on which I was granted the leave.

I spent the sabbatical year as a Visiting Fellow at the Research Centre for International Law of the University of Cambridge. I thank Eli Lauterpacht, the Director of the Centre, for many acts of kindness in making this year a happy and productive one.

I am grateful to Professor James Crawford, Whewell Professor of International Law at Cambridge, who read and commented on an early draft of this work, to Professor Detlev Vagts, Bemis Professor of International Law at Harvard, who enabled me to spend a month of research at the Harvard Law School and to Robin Pirrie, Fellow of Hughes Hall, Cambridge, who was helpful with his advice. I remain responsible for any errors and omissions.

As always, Thanga has been an unfailing source of strength. Ahila, Ramanan and Vaishnavi have given up time that should have been theirs.

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- AAPL *see* Asian Agricultural Products Ltd
 Abu Dhabi Arbitration (1951) 18 *ILR* 144 290
 ADF Group Inc. v. United States, ICSID Case No. ARB(AF)/00/1 (9 January 2003) 202, 338, 339–340, 342, 344, 345, 346, 347, 358, 359, 403
 AGIP v. Congo (1982) 21 *ILM* 726 431
 Aguas del Tunari v. Republic of Bolivia, ICSID Case No. ARB/02/3 (Jurisdiction Award, 21 October 2005) 318, 325–7, 455
 Aguaytia Energy v. Republic of Peru, ICSID Case No. ARB/06/13 337
 Alabama Claim (1872) 1 Moore 495 159
 Al-Adsani v. Kuwait (1996) 106 *ILR* 536 164, 165
 Alcoa *see* United States v. Aluminium Company of America (Alcoa)
 Amco Asia Corporation v. Republic of Indonesia, ICSID Case No. ARB/81/1 (Award, 20 November 1984); (1984) 23 *ILM* 351; (1988) 27 *ILM* 1281; 1 *ICSID Reports* 589 43, 51, 70, 93, 96, 104, 105, 108–9, 139, 140–1, 187, 192, 198, 318, 324, 329, 330, 358, 376, 392–3, 394, 396, 403, 405, 419
 American International Group Inc. v. Iran (1983) 4 *Iran–US CTR* 96 433
 American Machine Tools v. Zaire (1997) 36 *ILM* 1531 122, 124, 205, 218, 359, 404
 Aminoil v. Kuwait (1982) 21 *ILM* 976 38, 39, 75, 277, 282, 283, 293, 392, 405, 420, 431, 444, 448
 Amoco International Finance Corporation v. Iran (1987) 15 *Iran–US CTR* 189 291, 417, 437–8
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 Argentine Bribery Case, ICC Case No. 1110 (1963) 434
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- Atlantic Triton v. Guinea (1986) 3 *ICSID Reports* 13 309
- Attorney-General for Canada v. Cain [1906] AC 542 89
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- Bayview Irrigation District No. 11 v. United Mexican States, ICSID Case No. ARB(AF)/05/1 (19 January 2005) 228
- Baywater Irrigation District v. Mexico (NAFTA/ICSID), ICSID Case No. ARB(AF)/05/1 (Award, 19 June 2007) 400
- Beanal v. Freeport-McMoran, 969 F Supp 362 (ED La, 1997) 147, 150, 165
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- BP v. Libya (1977) 53 *ILR* 296 293, 430, 434
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- Carl Zeiss Stiftung Case [1967] 1 AC 853 191
- CEMSA *see* Karpa (Marvin Roy Feldman) (CEMSA) v. United Mexican States
- Centros Ltd v. Erhverves-og Selskabsstyrelsen [2000] Ch 446; [2000] 2 WLR 1048; [1999] 2 CMLR 551 198
- Ceskoslovenská Obchodní Banka v. Slovakia (1999) 14 *ICSID Rev* 251 16–17, 218, 308
- Champion Trading Company and Ameritrade International Inc. v. Egypt, ICSID Case No. ARB/02/9 (Award, 27 October 2006); (2006) IIC 57 323

Table of cases

xxi

- Chevreau Case (1931) 27 *AJIL* 153 347
 Chevreau Case (1933) 27 *AJIL* 160 124
 Chinn (Oscar) Case (1934) PCIJ Series A/B No. 64 132, 356, 407
 Chorzow Factory Case (1928) PCIJ Series A No. 17 44, 85, 87, 122, 191, 410, 425, 433, 435, 438, 439, 450
 CME v. Czech Republic, UNCITRAL Arbitration Proceedings (Award, 14 March 2003) 353, 359, 373, 393, 396, 403
 CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/8 (Jurisdiction Award, 17 July 2003); (2003) 30/42 *ILM* 778; (2005) 44 *ILM* 1205 321, 330, 354, 355, 396, 406, 457, 460, 461, 462–3, 465, 469
 Commonwealth Aluminium Corporation v. Attorney-General [1976] Qd 231 100
 Compagnie Européenne de Pétroles v. Sensor Nederland BV (1983) 22 *ILM* 320 198
 Compania de Aguas del Aconquijia and Vivendi Universal SA v. Argentine Republic, ICSID Case No. ARB/97/3 (Annulment Decision, 3 July 2003) 300, 321
 Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9 (Award, 5 September 2008) 464
 Corfu Channel Case [1949] *ICJ Reports* 4 163
 Corn Products International Inc. v. Mexico, ICSID Case No. ARB/04/01 (Decision, 15 January 2008) 473
 Crude Oil Windfall Tax Case *see* United States v. Ptasynski
 CSOB *see* Československá Obchodní Banka v. Slovakia
 Czarnikow Ltd v. Rolimpex [1979] AC 351 284
- Dagi v. BHP [1997] 1 VR 428 151
 De Jaeger v. Attorney-General of Natal [1907] AC 326 97
 De Sabla v. Republic of Panama (1934) 28 *AJIL* 602 366, 389
 Delgoa Bay Railway Company Case (1900) Whiteman, *Digest*, vol. 3, p. 1694 289, 429–30, 448
 Desert Line Projects LLC v. Yemen, ICSID Case No. ARB/05/17 (Award, 6 February 2008) 359
 Deutsche Schactbau- und Tiefbohrgesellschaft mbH v. Ras Al-Khaimah National Oil Company [1988] 3 WLR 230; [1988] 2 All ER 833 285
 Diallo v. Congo, ICJ (Judgment, 24 May 2007) 28, 37, 87, 198, 324, 329, 378
 Dillingham-Moore v. Murphyores (1979) 136 CLR 1 109–10
 Doe (John) et al. v. Exxon Mobil et al. ('Doe I'), Civ No. 01-1357 (DDC) 245
 Doe (John) v. Unocal ('Doe I'), 963 F Supp 880 (CD Cal., 1997) 147, 150, 165, 166, 167
 Doe v. Unocal, 27 F Supp 2d 1174 (1998) (CD Cal., 1997) 165
- East Timor Case [1995] *ICJ Reports* 139 470
 Eastern Greenland Case (1933) PCIJ Series A/B No. 5 101
 Elf Aquitaine v. NIOC (1982) 11 *YCA* 112 294
 Elkin v. United States, 142 US 65 (1892) 89

- ELSI Case [1989] *ICJ Reports* 15 37, 87, 129, 139–40, 141, 167, 180, 190, 197, 201, 219–20, 347, 357, 377, 379, 391, 400, 401, 404
- Empresa Luchetti SA v. Peru (2005) 20 *ICSID Rev* 319
- EnCana Corporation v. Ecuador, London Court of International Arbitration Case No. UN3481 (UNCITRAL) (27 February 2004) 399
- Enron Corporation and Ponderosa Assets LP v. Argentine Republic, ICSID Case No. ARB/01/3 354, 457, 460, 461, 462
- Ethyl Corporation v. Canada (Ethyl Case) (1999) 38 *ILM* 708 25, 93, 356, 373, 388, 395
- Eureko BV v. Republic of Poland (Netherlands–Poland BIT Ad Hoc Award, 23 November 2006) 360
- Fedax NV v. Venezuela (1998) 37 *ILM* 1378 9, 17, 196–7, 309, 315, 327
- Feldman v. Mexico *see* Karpa (Marvin Roy Feldman) (CEMSA) v. United Mexican States Foreign Investment Review Act (FIRA) Case, GATT BISD (30th Supp) (7 February 1984) 137
- Foresti (Piero), de Carli (Laura) and others v. Republic of South Africa, ICSID Case No. ARB(AF)/07/01 73, 382
- Fortino v. Quasar Company, 950 F 2d 389 (1991) 181
- Framatome and others v. Atomic Energy Organization of Iran (30 April 1982), (1983) 6 *YCA* 94; (1984) 111 *Journal du Droit International* 58 284
- Fraport AF Frankfurt Airport Services v. Republic of the Philippines, ICSID Case No. ARB/03/25 (Award, 16 August 2007) 43, 76, 93, 114, 190–201, 295, 300, 318, 390
- Fraser Island sandmining dispute *see* Dillingham-Moore v. Murphyores
- French Nuclear Test Case [1974] *ICJ Reports* 253 101
- Fuji v. Kodak, WTO (Decision, 5 December 1997) 273
- Funnekotter (Bernardus Henricus) v. Republic of Zimbabwe, ICSID Case No. ARB/05/6 (Award, 22 April 2009) 215, 364, 365
- Gabcikovo–Nagymaros Case [1997] *ICJ Reports* 7 399, 462
- Gami Investments v. Mexico, NAFTA (Final Award, 15 November 2004); (2004) 44 *ILM* 811 316, 341, 355
- Gelbtrunk (Rosa) v. Salvador (1902) *Foreign Relations of 1902* 877 124–5
- Generation Ukraine v. Ukraine (Award, 16 September 2003); (2005) 44 *ILM* 404 329, 468
- Genin (Alex) v. Estonia, ICSID Case No. ARB/99/2 (2001); (2002) 17 *ICSID Rev* 395 321, 333, 353, 356, 358, 376, 468
- Glamis Gold Ltd v. United States, NAFTA/UNCITRAL (Award, 8 June 2009) 357
- Goetz (Antoine) v. Burundi, ICSID Case No. ARB/95/3; (1999) 15 *ICSID Rev* 457; (2001) 26 *YCA* 24 393, 402, 403, 467
- Goldberg (David) Case (1930) 2 *UNRIAA* 901 407
- Goldenberg and Sons v. Germany (1928) *AD* 452 126, 430
- Grand River Enterprises Six Nations v. United States, UNCITRAL Arbitration Proceedings (Decision on Objections to Jurisdiction, 20 July 2006) 400

Table of cases

xxiii

- Grueslin (Philip) v. Malaysia (2000) 5 *ICSID Reports* 483 194, 319, 459
 Gudmundson v. Iceland (1960) 30 *ILR* 253 392
 Guinea v. Republic of Congo, ICJ (Judgment, 24 May 2007) 324
- Hartford Fire Insurance Company v. California, 509 US 764 (1993) 156
 Hawaii Housing Authority v. Midkiff, 467 US 229 (1984) 423
 Himpurna v. Indonesia (2000) 25 *YCA* 13 228, 301, 302, 465, 466
 Hoffman-La Roche v. Empagram SA (2004) 542 US 155 156
 Holiday Inns v. Morocco (1980) 51 *BYIL* 123 198, 324
 Holy Monasteries v. Greece (1995) 20 *EHRR* 1 385
 Home Missionary Society Case (1920) 6 *UNRIAA* 42 126, 135, 167
 Hubco v. WAPDA (Pakistan Civil Appeal Nos. 1398 and 1399 of 1999), 16 *Arb Intl* (No. 4, 2000) 439 228, 302
- INA Corporation v. Iran (1985) 8 *Iran-US CTR* 373 434–5
 Inceysa Vallisoletana v. El Salvador, ICSID Case No. ARB/03/26 (Jurisdiction Award, 2 August 2006) 317, 318
 Indonesia (Republic of) v. Newmont (unreported *ad hoc* award under UNCITRAL Rules, 2009) 225
 International Bank of Washington v. OPIC (1972) 11 *ILM* 1216 110, 230
 International Thunderbird Gaming Corporation v. United Mexican States, NAFTA/UNCITRAL (Award, 26 January 2006) 348, 354, 468
 Ioannis Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18 (Jurisdiction Award, 6 July 2007) 318
 Iran (Islamic Republic of) v. United States (1988) 13 *Iran-US CTR* 173 387
- James v. United Kingdom (1986) 8 *EHRR* 123 385, 408, 422, 423
 Jan de Nul Dredging International NV v. Arab Republic of Egypt, ICSID Case No. ARB/04/13 (Jurisdiction Award, 16 June 2006) 313, 319
 Janes Claim (1926) 4 *UNRIAA* 82 130
 John Doe v. Mobil *see* Doe (John) et al. v. Exxon Mobil et al. ('Doe I')
 John Doe v. Unocal *see* Doe (John) v. Unocal ('Doe I')
 Jota v. Texaco Inc., 157 F 3d 153 (2nd Cir., 1998) 248
 Joy Mining Machinery v. Egypt, ICSID Case No. ARB/03/11 (2004) 309
- Kahler v. Midland Bank [1950] AC 24 286
 Karaha Bodas Company LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), 364 F 3d 274 (2004) (USCA 5th Cir.); [2003] 380 HKCU 1 301, 302, 465, 466
 Karpa (Marvin Roy Feldman) (CEMSA) v. United Mexican States, ICSID Case No. ARB (AF)/99/1 (Award, 16 December 2002), (2003) 42 *ILM* 625 202, 208, 317, 323, 338, 341, 372, 387, 394–5, 396, 398, 401, 405

- Klockner v. Cameroon (1983) 2 *ICSID Reports* 16 324
- Kozacioglu v. Turkey (European Court of Human Rights, Application No. 2334/03, Judgment of 19 February 2009) 187–224
- Kugele v. Polish State [1931–2] *AD* 69 402
- La Brea y Parinas (1968) 7 *ILM* 1201 444
- Land Sale to Aliens Case (1973) 77 *ILR* 433 106
- Lauder v. Czech Republic, UNCITRAL Arbitration Proceedings (Final Award, 3 September 2001) 353, 359, 368, 382, 393, 403
- Le Courturier v. Rey [1910] AC 262 191
- Lemenda Trading Co. Ltd v. African Middle East Petroleum Co. Ltd [1988] 1 All ER 513 247
- Lena Goldfields v. USSR (1930) *The Times*, 3 September; (1930) Whiteman, *Damages*, vol. 3, p. 1652 289, 430
- LESI SpA and Astaldi SpA v. Algeria, ICSID Case No. ARB/05/3 313
- Letelier v. Chile, 488 F Supp 665 (1980) 164
- LG&E v. Argentina, ICSID Case No. ARB/02/1 (Award, 3 October 2006) 354, 458, 460, 462, 463, 464
- Libyan American Oil Company (Liamco) v. Libya (1981) 20 *ILM* 1 288, 408, 430–1
- Link-Trading Joint Stock Company v. Republic of Moldova, UNCITRAL (Final Award, 18 April 2002); (2002) IIC 154 399
- Lithgow v. United Kingdom (1986) 8 *EHRR* 329 422–3, 440–1
- Lockerbie Case *see* Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK and Libya v. US) (Judgment, 27 February 1998)
- Loewen v. United States (2003) 42 *ILM* 811 102, 341, 357, 394
- Loizidou v. Turkey (1996) 108 *ILR* 443 161
- Maffezini v. Kingdom of Spain (2000) 5 *ICSID Reports* 396 205, 319, 322, 333
- Malaysian Historical Salvors SDN BHD v. Malaysia, ICSID Case No. ARB/05/10 (Award, 17 May 2007) 155, 309, 311–14, 317
- Mavrommatis Palestine Concessions Case (1929) PCIJ Series A No. 2 122, 158
- Metalclad v. Mexico (2001) 5 *ICSID Reports* 209 25, 110, 111, 182, 297, 348, 349, 350, 354, 369, 372, 373, 374, 390, 393, 396, 403
- Methanex v. United States (2005) 44 *ILM* 1345 25, 34, 78, 110, 111, 341, 373, 374, 387, 388, 390, 395, 456, 458, 472
- Middle East Cement Shipping and Handling Co. v. Egypt, ICSID Case No. ARB/99/6 (12 April 2002); (2002) 7 *ICSID Reports* 2 317, 334, 359, 368, 373, 393, 403
- Mihaly v. Sri Lanka (2002) 17 *ICSID Rev* 21 16, 316–17
- Military and Paramilitary Activities In and Against Nicaragua *see* Nicaragua v. United States
- Mitchell (Patrick) v. Congo, ICSID Case No. ARB/99/7 (Award, 1 November 2006) 106, 155, 189, 309, 313

Table of cases

xxv

- Mobil Oil Case *see* Doe (John) et al. v. Exxon Mobil et al. ('Doe I')
- Mondev International v. United States, ICSID Case No. ARB(AF)/99/2 (1999), (2003)
42 *ILM* 85 219, 333, 334, 336, 345, 347, 348
- MTD Equity v. Republic of Chile (2007) 12 *ICSID Reports* 6 354, 356
- Murphyores Ltd v. Commonwealth (1976) 136 *CLR* 1 402, 403
- Mutasa v. Attorney-General [1979] 3 *All ER* 257 441
- Myers (S. D.) v. Canada (NAFTA/UNCITRAL Tribunal (21 October 2002)); (2002) 121
ILR 1 78, 111, 202, 226, 231, 339, 340, 350–1, 361, 367, 388, 396, 456
- National Grid v. Argentina (unreported) 464
- Nationalization of Gulf Oil in Bolivia (1969) 8 *ILM* 264 444
- Neer Claim (1926) 4 *UNRIAA* 60 122, 124, 130, 347, 348, 352, 354, 468
- Nicaragua v. United States [1986] *ICJ Reports* 14 82, 83, 161, 164, 166, 180, 184, 221, 457
- NIS v. Ukraine *see* Western NIS Enterprise Fund v. Ukraine; ICSID Case No. ARB/04/2
(Order, 16 March 2006)
- North American Dredging Company of Texas v. United Mexican States (Mexico/USA
General Claims Commission Award, 31 March 1926); (1926) 4 *UNRIAA* 26 321
- Norwegian Ship Owners' Claims (1922) 1 *UNRIAA* 307 433
- Nottebohm Case [1955] *ICJ Reports* 4 323
- Occidental v. Ecuador, London Court of International Arbitration (Award, 1 July 2004) 320,
338, 340, 354, 355, 360
- Oil Fields of Texas v. Iran (1982) 1 *Iran-US CTR* 347 101
- Oil Platforms Case [1996] *ICJ Reports* 8 181, 457
- Ok Tedi Mining Case (unreported) 147
- Olguin v. Paraguay, ICSID Case No. ARB/98/5 (Final Award, 26 July 2001) 468
- Oppenheimer v. Cattermole (Inland Revenue Commissioner) [1975] 1 *All ER* 538
106, 409
- Osthoff v. Hofele, 1 *US Ct Rest App* 111 (1950) 377
- Palazzolo v. Rhode Island, 533 *US* 606 (2001) 371
- Panevezys–Saldutiskis Railway Case (1939) *PCIJ Series A/B No.* 76 121, 122, 124
- Pantechniki SA Contractors & Engineers v. Republic of Albania, ICSID Case No.
ARB/07/21 (Award, 30 July 2009) 309, 359
- Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8 (Award,
11 September 2007) 354
- Patrick Mitchell *see* Mitchell (Patrick) v. Congo
- Payne (Thomas Earl) v. Iran (1987) 12 *Iran-US CTR* 3, 437
- Pelletier Claim, in C. C. Hyde, *International Law* (1945), p. 1640 159
- Peña-Irala v. Filartiga, 630 *F 2d* 876 (2nd Cir., 1980) 151
- Penn Central v. New York City, 438 *US* 104 (1978) 385
- Petrobart v. Kyrgyz Republic (Energy Charter Treaty Case, 2005) (unreported) 317

- Phaiton Energy Company v. Pertamina Perusahaan Tambang Minyak Negara (unreported) 301, 302, 465
- Phelps Dodge Corporation v. Iran (1986) 10 *Iran-US CTR* 157 436, 437
- Phillips Petroleum (1989) 21 *Iran-US CTR* 79 420
- Phoenix Action Ltd v. The Czech Republic (Award, 19 April 2009) ICSID Case No. ARB/06/5 307, 308, 313, 318, 319, 327, 328, 361, 399, 469
- Pinochet Case *see* R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)
- Plama Consortium Ltd v. Republic of Bulgaria, ICSID Case No. ARB/03/24 (Award, 27 August 2008) 318, 322, 329
- Poemann v. Kulmbache Spinneri AG, US Ct Rest App 701 (1952) 377
- Poggioli Case (1903), in J. Ralston, *The Law and Procedure of International Tribunals* (1926), p. 847 160
- Pope and Talbot v. Canada, NAFTA/UNCITRAL Tribunal (26 January 2000) (2002) 41 *ILM* 1347 348, 351–3, 373, 374, 388, 396
- Presbyterian Church of the Sudan v. Talisman Energy Inc., 453 F Supp 2d 633 (USDC SDNY, 2006) 149
- PSEG Global Inc. v. Republic of Turkey (2005) 44 *ILM* 465 317, 321
- Qatar Arbitration (1953) 20 *ILR* 534 290
- Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK and Libya v. US) (Judgment, 27 February 1998) 161
- R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3) (unreported) 148, 151, 164
- R. v. North and East Devon Health Authority, ex parte Coughlan [2001] QB 203 355
- R. v. Secretary of State for Foreign Affairs, ex parte Pirbhai (1984) 129 SJ 56 441
- Rainbow Warrior Arbitration (France v. New Zealand) (1987) 26 *ILM* 1346; (1990) 82 *ILR* 499 161, 164, 168, 169
- Revere Copper and Brass Inc. v. Overseas Private Investment Corporation (OPIC) (1978) 56 *ILR* 258 52, 201, 294, 391–2
- RFCC Consortium v. Kingdom of Morocco, ICSID Case No. ARB/00/6 (Award, 22 December 2003) 337
- Roberts Claim (1926) 4 *UNRIAA* 77 122, 130, 347
- ‘Rose Mary’, *The see* Anglo-Iranian Oil Company Ltd v. Jaffrate
- RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14 (Award, 13 March 2009) 309, 317, 465
- Sabbatino v. Banco Nacional de Cuba, 193 F Supp 375 (1961) 407, 440
- Saipem v. Bangladesh, ICSID Case No. ARB/06/07 (Decision, 30 June 2009) 302, 309

Table of cases

xxvii

- Salini Costruttori SpA v. Kingdom of Morocco, ICSID Case No. ARB/00/4 (Jurisdiction Award, 23 July 2001); (2001) 42 *ILM* 577 309, 310, 313
- Saluka Investments BV v. Czech Republic (UNCITRAL Partial Award, 17 March 2006) 347, 354, 359, 375, 398
- Sambaggio Case, 10 *UNRIAA* 534 125, 135, 167
- Sancheti v. Mayor and Commonalty and Citizens of the City of London [2008] EWCA Civ 1283 28, 182
- Santa Elena v. Costa Rica (2002) 5 *ICSID Reports* 153 3, 25, 78, 110, 111, 178, 225, 231, 297, 361, 374, 387, 388, 389, 390, 395, 396, 397, 399, 410, 472
- Sapphire International Petroleum v. National Iranian Oil Company (NIOC) (1963) 35 *ILR* 136 283, 294, 295, 387, 390
- Sarei v. Rio Tinto, 221 F Supp 2d 1116 (CD Cal., 2002) 151
- Saro-Wiwa v. Shell, 226 F 3d 88 (2nd Cir., 2000) 149, 151
- Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch 149 89
- Schufeldt Claim (1930) 5 *AD* 179; (1930) *UNRIAA* 1079; (1930) 24 *AJIL* 799 126, 158, 289, 407, 430
- S. D. Myers v. Canada *see* Myers (S. D.) v. Canada
- Sedco Inc. v. NIOC (1987) 23 *Iran-US CTR* 23 386, 435–6
- Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16 354, 457, 460, 461, 462–3
- Serbian Loans Case (1929) PCIJ Series A No. 20 286, 290
- Settebello v. Banco Totta e Acores [1985] 2 All ER 1025; [1985] 1 WLR 1050 76–7, 284
- SGS Société Générale de Surveillance SA v. Pakistan (unreported, 2004) 177, 304, 309, 465
- SGS Société Générale de Surveillance SA v. Republic of the Philippines, ICSID Case No. ARB/02/06 (Award, 29 June 2004) 216, 300, 304, 309
- Shaffer v. Heitner, 433 US 188 (1977) 89
- Shott v. Iran (1987) 16 *Iran-US CTR* 76 160, 168–9
- Shott v. Iran (1989) 23 *Iran-US CTR* 351 114
- Shott v. Iran (1990) 24 *Iran-US CTR* 203 43
- Siderman de Blake v. Republic of Argentina, 965 F 2d 699 (1992) 364, 409
- Siemens v. Argentine Republic, ICSID Case No. ARB/02/8 (Award, 6 February 2007) 322, 339, 355, 464
- Smith (Walter Fletcher) Case (1930) 24 *AJIL* 384 407
- Sociedad Minera el Teniente SA v. Aktiengesellschaft Nordeutsche Affinerie (1973) 12 *ILM* 251 440
- Société de Grands Travaux de Marseille v. People's Republic of Bangladesh (1980) 5 *YCA* 177 75, 230
- Sola Tiles v. Iran (1987) 14 *Iran-US CTR* 223 419, 436, 437
- Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/07 (Award, 7 July 2004) 323
- Southern Pacific Properties (Middle East) Ltd (SPP) v. Egypt (1992) 8 *ICSID Rev* 328; (1983) 22 *ILM* 752 72, 99, 100–1, 102, 231, 283, 287, 300, 304, 361, 390, 396, 471

- Spielberg (Erna) Claim (1958) Whiteman, *Digest*, vol. 8, p. 988 402
- Sporrong and Lönnroth v. Sweden (1983) 5 *EHRR* 35 385
- SPP v. Egypt *see* Southern Pacific Properties (Middle East) Ltd (SPP) v. Egypt
- Sramek [1984] *Yearbook of the European Commission on Human Rights* 294 106
- Starret Housing Corporation v. Iran (1987) 16 *Iran-US CTR* 112 386, 448
- Sultana Begum v. Returning Officer for the London Borough of Tower Hamlets [2006] EWCA Civ 733 355
- Sumitomo Shoji America Inc. v. Avagliano, 457 US 176 (1982) 180, 181, 198
- Tadic Case (1997) 36 *ILM* 908 161
- Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency, 535 US 302 (2002); 122 S Ct 1465 (2002) 371, 385
- Tams v. Tams-AFFA (1984) 6 *Iran-US CTR* 219 436, 437
- Tecmed v. Mexico, ICSID Case No. ARB(AF)/00/2; (2006) 10 *ICSID Reports* 54 356, 368, 374, 388, 396, 398, 403
- Telenor Mobile Communications AS v. Republic of Hungary, ICSID Case No. ARB/04/15 (Jurisdiction Award, 13 September 2006) 322
- Temple of Preah Vihear Case [1982] *ICJ Reports* 1 298
- Texaco v. Libya (1977) 53 *ILR* 389 83, 86, 277, 282–3, 293, 294, 430, 435, 470
- Thai Tobacco Case (1991) 37 *GATT BISD* 200 227
- Thunderbird v. Mexico *see* International Thunderbird Gaming Corporation v. United Mexican States
- Tokios Tokelës v. Ukraine, ICSID Case No. ARB/02/18 (Jurisdiction Award, 29 April 2004) 318, 327, 328
- Tokyo Suikosha v. Tokyo Masonic Lodge Association (1966) 53 *ILR* 1 385
- Too (Emmanuel) v. United States (1989) 23 *Iran-US CTR* 378 393
- Trade SA v. Republic of Turkey, ICSID Case No. ARB(AF)/07/2 (ECT) (Award, 13 August 2009) 318
- Tradex v. Albania (1996) 5 *ICSID Reports* 43; (1999) 14 *ICSID Rev* 161 218, 318
- Trail Smelter Case (1941) 35 *AJIL* 684 159
- Tza Yap Shum v. Peru, ICSID Case No. ARB/07/6 (Decision on Jurisdiction and Competence, 19 June 2009) 28, 205, 322
- United Painting Company Inc. v. Iran (1989) 23 *Iran-US CTR* 351 376, 386
- United Parcel Services of America Inc. (UPS) v. Canada *see* UPS v. Canada
- United Postal Workers Union v. Canada *see* United Union of Postal Workers v. Canada Post Corporation
- United States v. Aluminium Company of America (Alcoa), 148 F 2d 416 (2nd Cir., 1945) 155–6
- United States v. Ptasynski, 462 US 74 (1983) 405
- United States v. Sabbatino, 374 US 398 (1964) 1
- United States v. Venezuela (Upton Case), 9 *UNRIAA* 234 (1903) 134

Table of cases

xxix

- United Union of Postal Workers v. Canada Post Corporation [2001] BCJ No. 680 (CA) 102–3
- Unocal Case *see* Doe (John) v. Unocal ('Doe I')
- UPS v. Canada, UNCITRAL Arbitration Proceedings (NAFTA) (Award on the Merits, 24 May 2007) 25, 202, 307, 334, 337, 338, 339, 340, 353, 376, 415
- Upton case *see* United States v. Venezuela (Upton Case)
- Urenco Case (unreported) 75, 470
- Vacuum Salts v. Ghana (1994) 4 *ICSID Reports* 329; (1997) 4 *ICSID Reports* 323 324
- Vattenfall AB v. Federal Republic of Germany, ICSID Case No. ARB/09/6 (Request filed, 30 March 2009) 28, 182, 185
- Velasquez Rodriguez (1988) 9 *HRLJ* 212 170
- Vivendi Universal SA *see* Compania de Aguas del Aconquijia and Vivendi Universal SA v. Argentine Republic
- Waste Management Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2 (Final Award, 30 April 2004) 354, 358
- Wena Hotels v. Republic of Egypt (2002) 41 *ILM* 896 205, 309, 359, 405
- Western NIS Enterprise Fund v. Ukraine, ICSID Case No. ARB/04/2 (Order, 16 March 2006) 320
- Westinghouse v. Philippines (unreported) 76
- Williams and Humbert v. W. and H. Trademarks [1986] AC 368 440
- World Duty Free Ltd v. Kenya, ICSID Case No. ARB/00/7 (Award, 4 October 2006) 147, 300, 455
- Yaung Chi Oo Ltd v. Myanmar (2003) 8 *ICSID Reports* 463; (2003) 42 *ILM* 430 76, 194, 195, 198, 199, 219, 288, 319, 322, 324, 329, 336, 365, 377, 394, 405
- Yeager v. Iran (1987) 17 *Iran–US CTR* 92 404
- Youmans Claim (1926) 4 *UNRIAA* 110 168
- Yukon Lumber Case (1913) 6 *UNRIAA* 17 126
- Zafiro Claim (1925) 6 *UNRIAA* 160 124, 168
- Zhinvali Development Ltd v. Republic of Georgia, ICSID Case No. ARB/00/1 317
- Zwach v. Kraus Brothers, 237 F 2d 255 (2nd Cir., 1956) 377

Abbreviations

AC	Appeal Cases
AD	Annual Digest of Public International Law Cases
AJIL	American Journal of International Law
All ER	All England Reports
ALR	Australian Law Reports
ASIL Proceedings	American Society of International Law Proceedings
BYIL	British Yearbook of International Law
CLR	Commonwealth Law Reports
CMLR	Common Market Law Review
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
F Supp	Federal Supplement
Hague Recueil	Hague Recueil des Cours
ICLQ	International and Comparative Law Quarterly
ICSID Rev	ICSID Review – Foreign Investment Law Journal
ILJ	International Law Journal
ILM	International Legal Materials
Iran–US CTR	Iran–United States Claims Tribunal Reports
JIA	Journal of International Arbitration
JIL	Journal of International Law
JWTL	Journal of World Trade Law
KB	King’s Bench Reports
LJ	Law Journal
LQR	Law Quarterly Review
LR	Law Review
MLR	Modern Law Review
PCIJ	Permanent Court of International Justice
SJ	Solicitors Journal
UNRIAA	United Nations Reports of International Arbitral Awards
WLR	Weekly Law Reports
YCA	Yearbook of Commercial Arbitration