

# Contents

Acknowledgements	v
<b>CHAPTER 1</b>	
<b>FOREIGN INVESTMENT DISPUTES</b>	<b>1</b>
I. Introduction	1
II. A Brief History of Foreign Investment	2
III. The International Commitment to Encouraging and Protecting Foreign Investment	7
IV. What is a Foreign Investment Dispute?	9
V. Investment Treaties	10
VI. International Forums for Resolving Investment Disputes	11
VII. Political Risk Insurance	13
VIII. Applicable Law	13
IX. International Claims	14
X. Procedure and Proof	16
XI. Transparency and the Role of NGOs	16
XII. Sovereign Immunity and the Enforcement of State Awards	17
XIII. Format	17
<b>CHAPTER 2</b>	
<b>TREATY SCHEMES FOR BILATERAL INVESTMENT DISPUTES</b>	<b>19</b>
I. Introduction: Why Treaties have been Concluded with Respect to International Investment	19
A. Jeswald W. Salacuse, <i>BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries</i> , 24 Int'l Law 655, 659-60 (1990)	19
B. Comments and Questions	20
II. Precursors of Modern Investment Treaties	21
A. Kenneth J. Vandavelde, <i>The Bilateral Investment Treaty Program of the United States</i> , 21 Cornell Int'l L.J. 201, 203-08 (1988)	21
B. Comments and Questions	23
C. Treaty of Friendship, Commerce, and Consular Rights, June 15, 1931, U.S.-Pol., 11 Bevans 237	23



FOREIGN INVESTMENT DISPUTES

D. Comments and Questions	30
<b>III. History of Attempts to Create Bilateral Investment Treaties</b>	<b>31</b>
A. Jeswald W. Salacuse, <i>BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries</i> , 24 Int'l Law 655, 655-59 (1990)	31
B. Comments and Questions	33
C. F.A. Mann, <i>British Treaties for the Promotion and Protection of Investments</i> , 52 Br. Y.B. Int'l L. 241, 241-42 (1981)	33
<b>IV. What Should be Addressed in an Investment Treaty?</b>	<b>35</b>
A. Eli Lauterpacht, <i>The Drafting of Treaties for the Protection of Investment</i> , 1962 Int'l & Comp. L.Q. (Supp. Publ. No. 3) 18, 24-34	35
B. Comments and Questions	42
C. W. Michael Reisman & Mark Wiedman, <i>Contextual Imperatives of Dispute Resolution Mechanisms: Some Hypotheses and Their Applications in the Uruguay Round and NAFTA</i> , Journal of World Trade June 1995, at 5, 5-11	43
D. Comments and Questions	46
<b>V. Modern Investment Treaties</b>	<b>47</b>
A. Bilateral Treaties	47
1. Rudolf Dolzer & Margrete Stevens, <i>Bilateral Investment Treaties</i> 10-11 (1995)	47
2. Kenneth J. Vandavelde, <i>United States Investment Treaties: Policy and Practice</i> 19-20 (1992)	47
3. Treaty Between the Government of the United States of America and Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, 1-36 (2004), available at <a href="http://www.state.gov/documents/organization/38710.pdf">http://www.state.gov/documents/organization/38710.pdf</a>	48
4. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of [...] for the Promotion and Protection of Investments	73
5. Chapter on Dispute Resolution in US Singapore FTA Agreement, available at <a href="http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_File708_4036.pdf">http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_File708_4036.pdf</a>	79
6. Chapter on Dispute Resolution in US Chile FTA Agreement, available at <a href="http://www.ustr.gov/assets/Trade_agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload/File1_4004.pdf">http://www.ustr.gov/assets/Trade_agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload/File1_4004.pdf</a>	97
7. Comments and Questions	119
B. Multilateral Treaties	120
1. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605	120
2. Energy Charter Treaty, <a href="http://www.encharter.org/">http://www.encharter.org/</a>	127
3. Free Trade Agreement of the Americas, <a href="http://www.ftaa-alca.org/alca_e.asp">http://www.ftaa-alca.org/alca_e.asp</a>	127



## CONTENTS

4. Mercosur Agreement, <a href="http://www.sice.oas.org/trade/mrcsr/mrcsr10.asp">http://www.sice.oas.org/trade/mrcsr/mrcsr10.asp</a>	127
<b>VI. Structure of the Treaties and Obligations Undertaken by States</b>	<b>127</b>
A. Definitions	127
1. “Investments” Defined	127
2. “Investment Disputes” Defined	127
B. General Obligations (e.g., Minimum International Law Standards)	128
C. Expropriation Standards	128
D. Currency Transfer Standards	128
E. Dispute Resolution	128
1. Jurisdictional or Procedural Prerequisites to Invoking International Arbitration	128
2. Forums to which Consent is Given	128
3. <i>Compañia de Aguas del Aconquija S.A. v. Argentina Republic (The Vivendi Case)</i> , ICSID Case No. ARB/97/3, Decision on Annulment of 3 July 2002, 41 I.L.M. 1135, 1140 (2002)	129
4. <i>Compañia de Aguas del Aconquija S.A. v. Argentina</i> , ICSID Case No. ARB/97/3, Decision on Annulment of 3 July 2002, 41 I.L.M. 1135, 1144-45, 1157-58 (2002)	130
5. Application to Subdivisions	132
F. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Oct. 14, 1966)	204
G. Comments and Questions	209
<b>VII. Interpretation of Treaties</b>	<b>209</b>
A. Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679	209
B. Comments and Questions	211
 <b>CHAPTER 3</b>	
<b>INVESTMENT CONTRACTS AND KEY CLAUSES</b>	<b>213</b>
<b>I. Introduction</b>	<b>213</b>
<b>II. Types of Investment Contracts</b>	<b>215</b>
A. Oil and Gas	215
1. Concessions	215
a. Ernest E. Smith, et al., <i>Concessions, Production Sharing, and Participation Agreements for Developing a Country’s Resources</i> , in <i>International Petroleum Transactions</i> (2d ed. 2000 Rocky Mountain Mineral Law Foundation)	215
b. M. Sornarajah, <i>The Settlement of Foreign Investment Disputes</i> (Kluwer Law International 2000)	218
2. Production Sharing Agreements	219
a. E.E. Smith, et al., John S. Dzienkowski, <i>Concessions, Production Sharing, and Participation Agreements for Developing a Country’s Resources</i> , Chapter 6, in <i>International Petroleum Transactions</i> (2d ed. 2000 Rocky Mountain Mineral Law Foundation)	219



## FOREIGN INVESTMENT DISPUTES

b. M. Sornarajah, <i>The Settlement of Foreign Investment Disputes</i> (Kluwer Law International 2000)	219
3. Licenses	220
a. Ernest E. Smith, et al., <i>Concessions, Production Sharing, and Participation Agreements for Developing a Country's Resources</i> , Chapter 6 in <i>International Petroleum Transactions</i> (2d ed. 2000 Rocky Mountain Mineral Law Foundation)	220
4. Risk Service Contracts	222
a. Daniel Johnston, <i>International Petroleum Fiscal Systems and Production Sharing Contracts</i> (PennWell 1994)	222
B. Joint Ventures	222
1. M. Sornarajah, <i>The Settlement of Foreign Investment Disputes</i> (Kluwer Law International 2000)	222
C. Build, Operate and Transfer Agreements	223
1. M. Sornarajah, <i>The Settlement of Foreign Investment Disputes</i> (Kluwer Law International 2000)	223
<b>III. Key Investment Contract Clauses</b>	<b>225</b>
A. Choice of Forum	225
1. Arbitration and Expert Determination Clauses	225
a. Enforceability of an Arbitration Clause	225
i. Charles E. Stewart, <i>Commentary I.1</i> , in <i>1 Transnational Contracts</i> , (Charles E. Stewart et al. eds., Oceana Publications, Inc 1997)	225
ii. R. Doak Bishop, <i>A Practical Guide For Drafting International Arbitration Clauses</i> , 1 Int'l Energy L. & Tax'n Rev. 16 (2000)	225
iii. Gary B. Born, <i>International Arbitration and Forum Selection Agreements</i> (Kluwer Law International 1999)	227
b. Examples of Arbitration and Expert Determination Clauses	228
i. ICSID Model Clauses	228
ii. UNCITRAL Model Arbitration Clause	230
iii. ICC Model Clause	230
iv. Angola Model Production Sharing Agreement for Deep Water Blocks (February 1992), 156 Basic Oil Laws & Concession Contracts: South & Central Africa 1 (Supplement 141) (2004)	230
v. Trinidadian & Tobagon Model Production Sharing Contract for Deep Water Areas, IHS Energy, Petroleum Economics and Policy Solutions (PEPS) Database at <a href="http://www.ihsenergy.com">http://www.ihsenergy.com</a>	231
vi. UMC Production Sharing Contract Dated 29 June 1992 Between the Republic of Equatorial Guinea & United Meridian International Corp., 135 Basic Oil Laws & Concession Contracts: South & Central Africa 1(1998)	232
vii. AIPN Model Form International Operating Agreement art. 18.2 (D) (2002)	234
viii. AGIP/BP/ETAL Production Sharing Agreement Dated 18 November 1997 in respect of the North Caspian Sea (Kashagan) Among Agip Caspian Sea B.V., et al., 52 Basic Oil Laws & Concession Contracts: NIS 2 (Supplement 39) (2003)	237



## CONTENTS

ix. AIPN Model Form International Operating Agreement art. 18.3 (2002)	238
c. <i>Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614, 626, 628-31, 636-39 (1985)	239
d. <i>National Iranian Oil Company v. Ashland</i> , 817 F.2d 326 (5th Cir. 1987)	241
e. Comments and Questions	242
2. Forum Selection Clauses	243
a. AIPN Model Form International Operating Agreement, art. 18.2 (A), Alternative 1 (1995)	243
b. <i>M/S Bremen v. Zapata Off-Shore Company</i> , 407 U.S. 1 (1972)	243
c. Gary B. Born, <i>International Arbitration and Forum Selection Agreements</i> (Kluwer Law International 1999)	246
d. R. Doak Bishop & David B. Lee, <i>Enforceability of Forum – Selection Clauses in International Commercial Contracts</i> , <i>Currents: Int’l Trade L.J.</i> , Fall 1995 at 20	251
e. Comments and Questions	254
B. Choice-of-Law	255
1. Examples of Choice-of-Law Clauses	255
a. Trinidadian & Tobagon Model Production Sharing Contract for Deep Water Areas, IHS Energy, Petroleum Economics and Policy Solutions (PEPS) Database at <a href="http://www.ihsenergy.com">http://www.ihsenergy.com</a>	255
b. UMC Production Sharing Contract Dated 29 June 1992 Between the Republic of Equatorial Guinea & United Meridian International Corp., 135 <i>Basic Oil Laws &amp; Concession Contracts: South &amp; Central Africa</i> 1(1998)	255
c. Oil Concession Agreement Dated 13 October 1980 Between the Government of Abu Dhabi & Amerada Hess Petroleum Abu Dhabi Ltd., 75 <i>Basic Oil Laws &amp; Concession Contracts: Middle East</i> 2 (1982)	256
d. Pennzoil/Lukoil Group Agreement Dated 10 November 1995 on Production Sharing for the Karabakh and Area Adjacent in the Azerbaijan Sector of the Caspian Sea Between the State Oil Co. of the Azerbaijan Republic (Socar) and Lukoil International, et al., 52	256
e. Texaco Exploration Pakistan Petroleum Concession Agreement Dated 6 November 1990 Between the Islamic Republic of Pakistan, Oil & Gas Development Corp., & Texaco Exploration Pakistan Inc., 116 <i>Basic Oil &amp; Concession Contracts: Asia &amp; Australia</i> 1 (1993)	256
f. AIPN Model Form International Operating Agreement art. 18.1 (2002)	256
2. M. Sornarajah, <i>The Settlement of Foreign Investment Disputes</i> (Kluwer Law International 2000)	257
3. Charles E. Stewart, <i>Commentary I.1</i> , in 1 <i>Transnational Contracts</i> (Charles E. Stewart et al. eds., Oceana Publications, Inc. 1997)	259
4. R. Doak Bishop, <i>A Practical Guide For Drafting International Arbitration Clauses</i> , 1 <i>Int’l Energy L. &amp; Tax’n Rev.</i> 16 (2000)	261
5. Case Law on Choice-of-Law Clauses	263



FOREIGN INVESTMENT DISPUTES

a. <i>Wena Hotels Ltd. v. Arab Republic of Egypt</i> , ICSID Case No ARB/98/4, Annulment Decision of 28 January 2002, 41 ILM 933 (2002) <i>see</i> Chapter 6	263
b. <i>Mobil Oil Iran, Inc. v. Government of the Islamic Republic of Iran</i> , Award of 14 July 1987 16 Iran-U.S. Cl. Trib. Rep. 3 <i>see</i> Chapter 6	264
c. <i>AGIP Company v. Popular Republic of the Congo</i> , ICSID Case No. ARB/77/1, Award of 30 November 1979, 1 ICSID Rep. 306 (1993) <i>see</i> Chapter 6	264
d. <i>British Petroleum Co. (Libya) Ltd. v. Government of the Libyan Arab Republic</i> , Award of 10 October 1973, 5 Y.B. Comm. Arb. 143 (1980) <i>see</i> Chapter 6	264
e. <i>Texaco Overseas Petroleum Company/California Asiatic Oil Company v. Government of the Libyan Arab Republic</i> , Award on Merits of 19 January 1977, 17 I.L.M. 1 (1978) <i>see</i> Chapter 6	265
f. <i>Libyan American Oil Company v. Government of the Libyan Arab Republic</i> , Award of 12 April 1977, 20 I.L.M. 1 (1981) <i>see</i> Chapter 6	265
g. <i>Sapphire International Petroleum Ltd. v. National Iranian Oil Co.</i> , Award of 15 March 1963, 35 I.L.R. 136 (1967) <i>see</i> Chapter 6	265
h. <i>Case No. 3380</i> (ICC November 29, 1980) 108 J. du droit Int'l 928 (Clunet, No. 4, 1981) <i>see</i> Chapter 6	266
6. Comments and Questions	266
C. <i>Force Majeure</i>	267
1. Examples of <i>Force Majeure</i> Clauses	267
a. Angola Model Production Sharing Agreement For Deep Water Blocks (February 1992), 156 Basic Oil Laws & Concession Contracts: South & Central Africa 1 (Supplement 141) (2004)	267
b. Trinidadian & Tobagon Model Production Sharing Contract for Deep Water Areas, IHS Energy, Petroleum Economics and Policy Solutions (PEPS) Database at <a href="http://www.ihsenergy.com">http://www.ihsenergy.com</a>	267
c. UMC Production Sharing Contract Dated 29 June 1992 Between the Republic of Equatorial Guinea & United Meridian International Corp., 135 Basic Oil Laws & Concession Contracts: South & Central Africa 1(1998)	268
d. Agip/BP/Etal Production Sharing Agreement Dated 18 November 1997 in respect of the North Caspian Sea (Kashagan) Among Agip Caspian Sea V.B., et al., 52 Basic Oil Laws & Concession Contracts: Russia & NIS 1(Supplement 39) (2003)	269
e. Restated LNG Development & Production Sharing Agreement for the North Field Gas Dated 31 January 1993 Between the Government of the State of Qatar and (as Contractor) Qatar General Petroleum Corporation, et al., 58 World LNG Contracts: Qatar 1 (2003)	271
f. Concession Contract of 31 May 2001 Between the Republic of Cameroon & RSM Production Corp., 157 Basic Oil Laws & Concession Contracts: South & Central Africa 1 (2004)	271
g. AIPN Model Form International Operating Agreement art. 16 (2002)	272
2. <i>National Oil Corp. v. Libyan Sun Oil</i> , Award of 31 May 1985, 29 I.L.M. 565 (1990)	273



## CONTENTS

3. Charles E. Stewart (ed.), <i>Commentary I.1 in Transnational Contracts</i> , (Oceana Publications, Inc. 1997)	279
4. Karl Heinz Böckstiegel, <i>Arbitration and State Enterprises</i> (Kluwer Law International 1984)	280
5. Comments and Questions	285
D. Stabilization	286
1. General Considerations	286
a. Thomas W. Waelde & George Ndi, <i>Stabilizing International Investment Commitments: International Law Versus Contract Interpretation</i> , 31 <i>Tex. Int'l L.J.</i> 215 (1996)	286
b. M. Sornarajah, <i>The Settlement of Foreign Investment Disputes</i> (Kluwer Law International 2000)	289
2. Examples of Stabilization Clauses	290
a. Offshore (oil Winning License) Agreement Date 10 January 1978 between Government of Ghana & Offshore Hydrocarbons Corporation (Later Transferred to Agri-Petco), 58 <i>Basic Oil Laws &amp; Concession Contracts: South &amp; Central Africa</i> 22 (1980)	290
b. Amoco Group Agreement Dated 14 December 1996 on the Exploration, Development & Production Sharing for Prospective Structures Ashrafi, Dan Ulduzu & Area Adjacent in the Azerbaijan Sector of the Caspian Sea, 52 <i>Basic Oil Laws &amp; Concession Contracts: Russia &amp; NIS 1 (Supplement 24)</i> (2003)	291
c. Oman Model Exploration & Production Sharing Agreement of 2002, (2003), <a href="http://www.barrowscompany.com">www.barrowscompany.com</a> , <i>Basic Oil Laws &amp; Concession Contracts: Middle East</i>	291
d. Concession Contract of 31 May 2001 Between the Republic of Cameroon & RSM Production Corp., 157 <i>Basic Oil Laws &amp; Concession Contracts: South &amp; Central Africa</i> 1 (2004)	292
e. Charles E. Stewart (ed.), <i>Commentary I.1 in Transnational Contracts</i> (Oceana Publications, Inc. 1997)	293
3. Types of Stabilization Provisions	295
a. Christopher T. Curtis, <i>The Legal Security Of Economic Development Agreements</i> , 29 <i>Harv. Int'l L.J.</i> 317 (1988)	295
b. Thomas W. Waelde & George Ndi, <i>Stabilizing International Investment Commitments: International Law Versus Contract Interpretation</i> , 31 <i>Tex. Int'l L.J.</i> 215 (1996)	295
c. Bertrand Montembault-Heveline & Rebecca Major, <i>Stabilisation</i> , in 2 <i>AIPN Host Government Contract Handbook</i> (AIPN July 2002)	298
d. <i>Amoco International Finance Corp. v. Government of the Islamic Republic of Iran</i> , Award No. 310-56-3 of 14 July 1987, 15 <i>Iran-U.S. Cl. Trib. Rep.</i> 189	299
e. <i>Libyan American Oil Company v. Government of the Libyan Arab Republic</i> , Award of 12 April 1977, 20 <i>I.L.M.</i> 1 (1981)	301
4. Comments and Questions	302
E. Adaptation and Renegotiation	303
1. Examples of Adaptation and Renegotiation Clauses	303



## FOREIGN INVESTMENT DISPUTES

a. Restated LNG Development & Production Sharing Agreement for the North Field Gas Dated 31 January 1993 Between the Government of the State of Qatar and (as Contractor) Qatar General Petroleum Corporation, et al., 58 World LNG Contracts: Qatar 1 (2003)	303
b. Agip/BP/Etal Production Sharing Agreement Dated 18 November 1997 in respect of the North Caspian Sea (Kashagan) Among Agip Caspian Sea B.V., et al., 52 Basic Oil Laws & Concession Contracts: Russia & NIS 1 (Supplement 39) (2003)	303
2. Thomas W. Waelde & George Ndi, <i>Stabilizing International Investment Commitments: International Law Versus Contract Interpretation</i> , 31 Tex. Int'l L.J. 215 (1996)	304
3. Bertrand Montembault-Heveline & Rebecca Major, <i>Stabilisation</i> , in 2 AIPN Host Government Contract Handbook (AIPN July 2002)	304
4. M. Sornarajeh, <i>The Settlement of Foreign Investment Disputes</i> (Kluwer Law International 2000)	306
5. Comments and Questions	307
F. Waiver of Sovereign Immunity Clauses	308
1. Examples of Sovereign Immunity Waiver Clauses	308
a. Agip/BP/Etal Production Sharing Agreement Dated 18 November 1997 in respect of the North Caspian Sea (Kashagan) Among Agip Caspian Sea B.V., et al., 52 Basic Oil Laws & Concession Contracts: Russia & NIS 1 (Supplement 39) (2003)	308
b. 1997 Model Production Sharing Agreement between Sociedade Nacional de Combustiveis de Angola – Unidade Economica Estatal (Sonangol, U.E.E.) and Contractor, 137 Basic Oil Laws & Concession Contracts: South & Central 1 (1999)	308
c. Oman Model Exploration & Production Sharing Agreement of 2002, (2003), www.barrowscompany.com, Basic Oil Laws & Concession Contracts: Middle East	309
d. Production Sharing Contract for the Petroleum Exploration, Development and Production of _____ Suriname, Block [...] between Staatsolie Maatschappij Suriname N.V. and Contractor, 153 Basic Oil Laws & Concession Contracts: South America 18 (2003)	309
e. Concession Contract of 31 May 2001 Between the Republic of Cameroon & RSM Production Corp., 157 Basic Oil Laws & Concession Contracts: South & Central Africa 1 (2004)	309
f. AIPN Model Form International Operating Agreement art. 18.4 (2002)	310
2. Charles E. Stewart (ed.), <i>Comentary I.1 in Transnational Contracts</i> (Oceana Publications Inc. 1997)	310
3. Comments and Questions	311
G. Other Clauses	311
1. Charles E. Stewart (ed.), <i>Comentary I.1 in Transnational Contracts</i> (Oceana Publications Inc. 1997)	311
<b>IV. Implied Clauses from Civil Law Codes</b>	<b>314</b>
A. Good Faith	314



## CONTENTS

1. UNIDROIT Principles of International Commercial Contracts, art. 1.7 (2004)	314
2. El Salvadoran Civil Code, art. 1417	315
B. Doctrine of <i>Imprevisio</i> n or Changed Circumstances	315
1. Italian Civil Code, art. 1467	315
2. Argentina Code of Civil Procedure, art. 1198	315
3. El Salvadoran Commercial Code, art. 994	315
4. UNIDROIT Principles of International Commercial Contracts, art. 6.2 (2004)	316
C. Comments and Questions	316
<b>CHAPTER 4</b>	
<b>FORUMS FOR RESOLVING FOREIGN INVESTMENT DISPUTES</b>	<b>317</b>
<b>I. Introduction</b>	<b>317</b>
<b>II. Permanent Mixed Arbitration Tribunals</b>	<b>317</b>
A. ICSID	318
1. Advantages	318
a. W. Michael Reisman, <i>Systems of Control in International Adjudication and Arbitration: Breakdown and Repair</i> 46-47 (1992)	318
2. Jurisdiction	319
a. ICSID Convention Article 25(1)	319
3. Legal Dispute	319
a. Christoph H. Schreuer, <i>The ICSID Convention: A Commentary</i> 103-06 (2001)	319
b. <i>Kaiser Bauxite Co. v. Jamaica</i> , ICSID Case No. 74/3, Decision on Jurisdiction of 6 July 1975, 1 ICSID Repts. 296, 303 (1999)	321
c. Comments and Questions	322
d. <i>CSOB v. Slovakia</i> , ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, 14 ICSID Rev. – Foreign Inv. L.J. 251, 272 (1999)	323
4. “Arising directly out of an investment”	324
a. Treatises	324
i. Christoph H. Schreuer, <i>The ICSID Convention: A Commentary</i> 121-25 (2001)	324
ii. C.F. Amerasinghe, <i>The Jurisdiction of the International Centre for the Settlement of Investment Disputes</i> , 19 Indian J. Int’l L. 166, 177-81 (1979)	327
iii. Paul C. Szasz, <i>A Practical Guide to the Convention on Settlement of Investment Disputes</i> , 1 Cornell Int’l L.J. 1, 14-15 (1968)	330
iv. Comments and Questions	331
b. Definitions in U.S. Model BIT, ECT, NAFTA	331
c. Definitions in Local Foreign Investment Law	331
i. <i>Tradex Hellas S.A. v. Albania</i> , Case No. ARB/94/2, Decision on Jurisdiction of 24 December 1996, 14 ICSID Rev. – Foreign Inv. L.J. 197, 216-18 (1999)	331
d. Definitions in Parties’ Contract	333



FOREIGN INVESTMENT DISPUTES

i. Christoph H. Schreuer, <i>The ICSID Convention: A Commentary</i> 126-28 (2001)	333
e. Cases	335
i. <i>Olguin v. Paraguay</i> , ICSID Case No. ARB/98/5, Decision on Jurisdiction of 8 August 2000, available at <a href="http://www.worldbank.org/icsid/cases/paraguay-decision.pdf">http://www.worldbank.org/icsid/cases/paraguay-decision.pdf</a> (last visited 25 May 2005)	335
ii. <i>Fedax N.V. v. Venezuela</i> , ICSID Case No. ARB96/3, Decision on Jurisdiction of 11 July 1997, 37 I.L.M. 1378, 1383 (1998)	335
iii. <i>Tradex v. Albania Hellas S.A.</i> , Case No. ARB/94/2, Decision on Jurisdiction of 24 December 1996, 14 ICSID Rev. – Foreign Inv. L.J. 197, 225-26 (1999)	337
iv. <i>American Mfg. &amp; Trading, Inc. v. Zaire</i> , ICSID Case No. ARB/93/1, Award of 21 February 1997, 36 I.L.M. 1531, 1538-39, 1543-44, (1999)	338
v. <i>CSOB v. Slovakia</i> , ICSID Case No. ARB/97/4, Award of 24 May 1999, Decision on Jurisdiction, 24 May 1999, 14 ICSID Rev. – Foreign Inv. L.J. 251, 276-77 (1999)	340
vi. <i>Amco Asia Corp. v. Indonesia</i> , ICSID Case No. ARB/81/1, Decision on Jurisdiction of 25 September 1983, 1 ICSID Reports 377, 405, 565 (1993) (tax claim excluded)	341
f. Conclusion	344
i. Christoph H. Schreuer, <i>The ICSID Convention: A Commentary</i> 138-41 (2001)	344
ii. Comments and Questions	346
5. Parties	346
a. Contracting State or Constituent Subdivision or Agency	346
i. ICSID Convention Article 25 Criteria	346
ii. <i>Cable Television of Nevis Ltd. v. Federation of St. Kitts and Nevis</i> , Award of 13 January 1997, ICSID Case No. ARB/95/2, Award of 13 January 1997, 13 ICSID Review – Foreign Inv. L. J. 328, 334-52 (1998) (government agency not designated to ICSID)	346
iii. <i>Compañía de Aguas del Aconquija S.A. v. Argentine Republic (The         Vivendi Case)</i> , ICSID Case No. ARB/97/3, Decision on Annulment of 3 July 2002, 41 I.L.M. 1135, 1140 (2002)	352
<b>b.</b> National of another Contracting State	352
i. <i>Amco Asia Corp. v. Indonesia</i> , ICSID Case No. ARB/81/1, Decision on Jurisdiction of 25 September 1983, 1 ICSID Reports 389, 395-97	352
ii. <i>American Mfg. &amp; Trading, Inc. v. Zaire</i> , ICSID Case No. ARB93/1, Award of 21 February 1997, 36 I.L.M. 1531 (ICSID 1999) (case can be brought in name of direct foreign parent of local company)	355
iii. <i>Société Ouest Africaine des Bétons Industriels [SOABI] v. Senegal</i> , ICSID Case No. ARB82/1, Decision on Jurisdiction of 1 August 1984, 2 ICSID Rep. 175, 179-83	355
iv. <i>Vacuum Salt Prod., Ltd. v. Ghana</i> , ICSID Case No. ARB/92/1, Award of 16 February 1994, 4 ICSID Reports 329, 331-40, 344-51 (1997) (lack of jurisdiction because of lack of foreign control, in fact, over locally-incorporated company)	360



## CONTENTS

v. Christoph H. Schreuer, <i>The ICSID Convention: A Commentary</i> 310-11 (2001) (quoting and summarizing <i>LETCO v. Liberia</i> case) (causation for treating local company as foreign implied)	366
vi. Comments and Questions	366
6. Consent	367
a. <i>Société Ouest Africaine des Bétons Industriels [SOABI] v. Senegal</i> , ICSID Case No. ARB82/1, Decision on Jurisdiction of 1 August 1984, 2 ICSID Reports 165, 166, 179, 204-05, 219-20, 272	367
b. <i>American Mfg. &amp; Trading, Inc. v. Zaire</i> , ICSID Case No. ARB/93/1, Award of 21 February 1997, 36 I.L.M. 1531, 1544-46, 1548 (1997) (ICSID consent based on BIT)	370
c. <i>CSOB v. Slovakia</i> , ICSID Case No. ARB94/7, Decision on Jurisdiction of 24 May 1999, 14 ICSID Rev. – Foreign Inv. L.J. 251, 263-72 (1999)	371
d. <i>Southern Pacific Prop., Ltd. v. Egypt</i> , ICSID Case No. ARB84/3, Decision on Jurisdiction of 27 November 1985, 3 ICSID Reports 112, 137-45, 149-162 (1995), (ICSID consent based on foreign investment law)	377
e. Comments and Questions	384
7. Provisional measures	385
a. ICSID Convention Article 47	385
b. ICSID Arbitration Rules, Rule 39	385
c. Charles N. Brower & Ronald E.M. Goodman, <i>Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings</i> , 6 ICSID Rev. – Foreign Inv. L.J. 431, 440-46, 460-61 (1991)	386
d. Christoph H. Schreuer, <i>The ICSID Convention: A Commentary</i> 745-46 (2001)	391
e. Comments and Questions	391
8. Applicable Law	392
a. ICSID Convention Article 42(1)	392
b. Comments and Questions	392
9. Annulment Proceedings	392
a. Annulment Panel is Not an Appellate Court	392
i. W. Michael Reisman, <i>Systems of Control in International Adjudication and Arbitration: Breakdown and Repair</i> 48-50 (1992)	392
ii. Mark B. Feldman, <i>The Annulment Proceedings and the Finality of ICSID Arbitral Awards</i> , 2 ICSID Rev. – Foreign Inv. L.J. 85, 103-09 (1987)	393
b. Cases	397
i. <i>Klöckner Industrie – Anlagen GmbH v. Republic of Cameroon</i> , ICSID Case No. ARB81/2, Award of 21 October 1983, 2 ICSID Reports 3, 140-41 (1994)	397
ii. <i>Amco Asia v. Indonesia</i> , ICSID Case No. ARB81/1, Decision on Jurisdiction of 25 September 1983, 1 ICSID Reports 389, 524-40 (1993)	399



FOREIGN INVESTMENT DISPUTES

iii. <i>Wena Hotels Ltd. v. Arab Republic of Egypt</i> , ICSID Case No. ARB98/4, Decision on Application for Annulment of 8 December 2000, 41 I.L.M. 933, 938 (2002)	408
c. W. Michael Reisman, <i>Systems of Control in International Adjudication and Arbitration: Breakdown and Repair</i> 57-61, 69-71 (1992)	409
d. Comments and Questions	414
B. ICSID Additional Facility: ICSID, <i>Additional Facility Rules</i> , 5 (2003)	414
1. Review Permitted in Local Court	415
a. <i>United Mexican States v. Metalclad Corp.</i> , Case No. ARB(AF)/97/1, Reasons for Judgment of 2 May 2001, (2001) B.C.T.C. 664, available at <a href="http://www.economia-snci.gov/sphp_pages/importa/sol_control/consultoria/Casos_Mexico/Metalclad/BC-SCJ/Sentencia-BC.pdf">http://www.economia-snci.gov/sphp_pages/importa/sol_control/consultoria/Casos_Mexico/Metalclad/BC-SCJ/Sentencia-BC.pdf</a>	415
2. Enforcement under New York or Panama Conventions	417
a. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed 10 June 1958, entered into force 29 December 1970, 330 UNTS 3	417
b. The Inter-American Convention on International Commercial Arbitration, 30 January 1975, O.A.S.T.S. No. 42, O.A.S. Doc. OEA/Ser.A/20 (SEPF), reprinted in 14 I.L.M. 336 (1975)	418
C. Permanent Court of Arbitration	419
1. Manley O. Hudson, <i>The Permanent Court of International Justice 1920-1942: A Treatise</i> 4-6 (1943)	419
D. Iran-U.S. Claims Tribunal (Algiers Accords)	421
1. Conception	421
a. Charles N. Brower & Jason D. Brueschke, <i>The Iran-United States Claims Tribunal</i> 3-16 (1998)	421
2. Procedures – UNCITRAL Arbitration Rules	427
a. Charles N. Brower & Jason D. Brueschke, <i>The Iran-United States Claims Tribunal</i> 16-20 (1998)	427
3. Applicable Law – Claims Settlement Declaration, available at <a href="http://www.iusct.org/claims-settlement.pdf">http://www.iusct.org/claims-settlement.pdf</a>	428
4. Decisions – Iran-U.S. Claims Tribunal Reporter	428
<b>III. Other Arbitral Regimes</b>	<b>428</b>
A. ICC Arbitration Rules	428
1. R. Doak Bishop, Sashe D. Dimitroff, & Craig S. Miles, <i>Strategic Options Available When Catastrophe Strikes the Major International Energy Project</i> , 36 Tex. Int'l L. J. 635, 658 (2001)	430
2. <i>Nat'l Oil Corp. v. Libyan Sun Oil Co.</i> , ICC Case No. 4462/AS, Decision on Force Majeure of 31 May 1985, 29 I.L.M. 565 (1990)	430
3. <i>Deutsche Schachtbau- und Tiefbohrgesellschaft mbH (FR Germ.) v. State of R'as Al Khaimah (UAE)</i> , ICC Case No. 3572 of 1982, 1989 Y.B. Com. Arb. (Int'l Council for Com. Arb.) 111	431
B. London Court of International Arbitration	431
C. Stockholm Chamber of Commerce	433
D. American Arbitration Association	434



## CONTENTS

E. UNCITRAL Arbitration Rules (option provided in BIT's, ECT & NAFTA)	435
<b>IV. Ad hoc (non-UNCITRAL Arbitration Rules)</b>	<b>435</b>
A. <i>Lena Goldfields, Ltd. v. U.S.S.R.</i> , Award of 3 September 1930, reprinted in Arthur Nussbaum, <i>The Arbitration Between the Lena Goldfields, Ltd. and the Soviet Government</i> , 36 Cornell L.Q. 43 (1950-51)	435
B. <i>Petroleum Development, Ltd. v. Sheik of Abu Dhabi</i> , 18 I.L.R. 144, 144-46 (1951)	436
C. <i>Saudi Arabia v. Arabian Am. Oil Co. (ARAMCO)</i> , 27 I.L.R. 117, 130 (1958)	437
D. <i>Sapphire Int'l Petroleum v. Nat'l Iranian Oil Co.</i> , 35 I.L.R. 136 (1963)	438
E. <i>Kuwait v. American Independent Oil Co. (AMINOIL)</i> , Award of 24 March 1982, 21 I.L.M. 976, 998 (1982)	440
F. <i>Wintershall A.G. v. Qatar</i> , Partial Award of 5 February 1988 and Final Award of 31 May 1988, 28 I.L.M. 795 (1989)	442
G. Comments and Questions	442
<b>V. International Tribunals</b>	<b>443</b>
A. Permanent Court of International Justice	443
1. <i>Oscar Chinn Case</i> , 1934 P.C.I.J. (Ser. A/B) No. 63 (12 Dec.)	443
2. <i>Chorzów Factory Case</i> , ( <i>Ger. v. Pol.</i> ), 1928 P.C.I.J. (Ser. A) No. 17 (26 Jul.)	443
3. <i>Mavrommattis Palestine Concessions Case</i> , 1925 P.C.I.J. (Ser. A) No. 5 (26 March)	444
B. International Court of Justice (ICJ)	452
1. Espousal of Corporate Claims by Governments	452
a. <i>Anglo-Iranian Oil Co. Case</i> , 1952 I.C.J. 103, 103-14 (July 22) (jurisdiction denied)	452
b. <i>Barcelona Traction, Light &amp; Power Co. Ltd. (Belg. v. Spain)</i> , 1970 I.C.J. 3, 42, 42-50 (Feb. 5)	461
c. <i>Elettronica Sicula S.A. (ELSI) (U.S. v. Italy)</i> , Case of 20 July 1989, 1989 I.C.J. 15, available at <a href="http://www.icj-cij.org/icjwww/icses/ielsi/ielsi.ijudgments/icsli.ijudgment19890720.pdf">http://www.icj-cij.org/icjwww/icses/ielsi/ielsi.ijudgments/icsli.ijudgment19890720.pdf</a> (last visited 26 May 2005) (U.S. espoused claim of U.S. corporation	469
i. F.A. Mann, <i>Foreign Investment in the International Court of Justice: The ELSI Case</i> , 86 Am. J. Int'l L. 92, 99-101 (1992)	470
ii. Sean D. Murphy, <i>The ELSI Case: An Investment Dispute at the International Court of Justice</i> , 16 Yale J. Int'l L. 391, 444-48 (1991)	471
C. European Court of Human Rights	473
1. European Convention for the Protection of Human Rights and Fundamental Freedoms, available at <a href="http://www.echr.coe.int/Convention/webConvenENG.pdf">http://www.echr.coe.int/Convention/webConvenENG.pdf</a>	478
2. First Protocol to the European Convention	478



FOREIGN INVESTMENT DISPUTES

3. Expropriation Cases	478
a. <i>Wasa Liv Omsesidigt v. Sweden</i> , 58 Eur. Ct. H.R. 163 (1988)	478
b. <i>Agrotexim v. Greece</i> , 21 Eur. Ct. H.R. 250 (1995)	479
D. Inter-American Commission and Court on Human Rights	480
1. Introduction	480
a. W. Michael Reisman, <i>Practical Matters for Consideration in the Establishment of a Regional Human Rights Mechanism: Lessons from the Inter-American Experience</i> , 1995 St. Louis Warsaw Trans'1 89, 90-92 (1995)	480
2. American Convention on Human Rights, available at <a href="http://iachr.org/Basicos/basic3.htm">http://iachr.org/Basicos/basic3.htm</a>	481
3. Expropriation claims are limited to claims of individuals; corporate claims are prohibited	482
a. <i>Mevopal, S.A. v. Argentina</i> , Report No. 39/99, Inter-Am. C.H.R. OEA/Ser.L./V./II.95 doc. 7 rev. 297 (1998)	482
b. Comments and Questions	485
E. European Court of Justice	485
1. L. Neville Brown & Tom Kennedy, <i>The Court of Justice of the European Communities</i> 19-21 (2000)	485
2. <i>Francovich v. Italy</i> , Case C-6 & 9/90, 1993 E.C.R. I-5357 (1993) (government liable for damages)	486
<b>VI. National Claims Settlement Commissions and Tribunals</b>	<b>487</b>
A. U.S. Foreign Claims Settlement Commission	487
1. Richard B. Lillich, <i>International Claims: Their Adjudication by National Commissions</i> 5-15 (1962)	487
B. National Courts	490
C. Comments and Questions	490
<b>CHAPTER 5</b>	
<b>POLITICAL RISK INSURANCE</b>	<b>491</b>
<b>I. Introduction</b>	<b>491</b>
<b>II. Multilateral Investment Guarantee Agency (MIGA)</b>	<b>492</b>
A. Convention Establishing the Multilateral Investment Guarantee Agency, published in I <i>International Investment Instruments: A Compendium</i> 213 (UNCTAD 1996)	492
B. <i>Commentary on the Convention Establishing the Multilateral Investment Guarantee Agency</i> , 1 ICSID Rev. – FILJ 193 (1986)	496
C. Ibrahim F.I. Shihata, <i>MIGA and the Standards Applicable to Foreign Investments</i> , 1 ICSID Rev. – FILJ 327, 332 n. 26 (1986)	501
D. <i>Multilateral Investment Guarantee Agency (Standard) Contract of Guarantee</i> , 4 ICSID Rev. – FILJ 107 (Spring 1989)	502
E. <i>MIGA General Conditions of Guarantee for Equity Investments (January 25, 1989)</i> , 4 ICSID Rev. – FILJ 112 (Spring 1989)	504
F. Comments and Questions	509



## CONTENTS

<b>III. National Programs – U.S. Overseas Private Investment Corporation (OPIC)</b>	<b>510</b>
A. OPIC Program Handbook (2001)	510
B. OPIC Enabling Statute – 22 U.S.C. § 2191	514
C. OPIC Contract of Insurance Against Inconvertibility, Expropriation, Political Violence (Form 234 KGT 12-85, Second Revised)	517
D. OPIC Contract of Insurance Against Business Income Loss (Form 234 KGT 5-87)	522
E. OPIC Contract of Institutional Lenders Insurance	523
F. OPIC Policy of Bid Guaranty Insurance	525
G. Merlin Liu, <i>Mitigating the Political Risk of Infrastructure Projects with OPIC Political Risk Insurance</i> , 822 PLI/Comm. 441 (2001)	526
H. OPIC Claims Procedures	530
1. Expropriation	530
2. Inconvertibility	531
3. Political Violence	533
I. OPIC Agreements with Foreign Governments	534
1. <i>Model OPIC Investment Incentive Agreement</i> , 1 B.D.I.E.L. 669 (1994)	534
2. Robert C. O’Sullivan, <i>Model OPIC Investment Incentive Agreement</i> , 1 B.D.I.E.L. 665 (1994)	536
3. OPIC Agreement with the Republic of Palau (15 March 2002)	538
J. Comments and Questions	539
<b>IV. OPIC Claims</b>	<b>540</b>
A. Expropriation Claims	540
1. Governmental Nexus	540
a. Pablo M. Zylberglait, <i>OPIC’s Investment Insurance: The Platypus of Governmental Programs and its Jurisprudence</i> , 25 Law & Pol’y in Int’l Bus. 359 (1993)	540
b. Otis Elevator Co.	540
c. Indian Head Mills, Inc.	545
2. Causation	546
a. Pablo M. Zylberglait, <i>OPIC’s Investment Insurance: The Platypus of Governmental Programs and its Jurisprudence</i> , 25 Law & Pol’y in Int’l Bus. 359 (1993)	546
3. Creeping Expropriation	546
a. Pablo M. Zylberglait, <i>OPIC’s Investment Insurance: The Platypus of Governmental Programs and its Jurisprudence</i> , 25 Law & Pol’y in Int’l Bus. 359 (1993)	546
b. Fearn International, Inc.	547
c. Northern Indiana Brass Co.	550
d. Webster Publishing Co.	552
e. <i>International Bank v. OPIC</i> , 11 I.L.M. 1216 (1972)	552
f. <i>Revere Copper &amp; Brass, Inc. v. OPIC</i> , AAA Award of August 24, 1978, 17 I.L.M. 1321 (1978)	555



## FOREIGN INVESTMENT DISPUTES

g. Reynolds-Guyana Mines, Ltd.	562
h. MidAmerican Energy Holdings Company (formerly CalEnergy Company, Inc.)	563
4. Defenses	571
a. Pablo M. Zylberglait, <i>OPIC's Investment Insurance: The Platypus of Governmental Programs and its Jurisprudence</i> , 25 Law & Pol'y in Int'l Bus. 359 (1993)	571
b. Otis Elevator Co.	571
c. W.E. Belcher Lumber Co., Inc.	572
d. Central Soya Company, Inc.	573
e. <i>The Anaconda Company &amp; Chile Copper Company v. Overseas Private Investment Corporation</i> , AAA Award of 17 July 1975, 14 I.L.M. 1210 (1975)	574
f. <i>International Telephone &amp; Telegraph Corp. Sud America v. OPIC</i> , 13 I.L.M. 1307 (1974)	580
5. Comments and Questions	587
<b>B. Currency Inconvertibility Claims</b>	<b>588</b>
1. Pablo M. Zylberglait, <i>OPIC's Investment Insurance: The Platypus of Governmental Programs and its Jurisprudence</i> , 25 Law & Pol'y in Int'l Bus. 359 (1993)	588
2. Reasonable Steps to Convert Local Currency	589
a. Philippine Geothermal, Inc.	589
3. Lack of Pre-existing Law or Regulation	592
a. Active Inconvertibility	592
i. Kimberly Clark Corp.	592
b. Passive Inconvertibility	595
i. Phelps Dodge Corp.	595
4. Comments and Questions	597
<b>C. Political Violence Claims</b>	<b>597</b>
1. Pablo M. Zylberglait, <i>OPIC's Investment Insurance: The Platypus of Governmental Programs and its Jurisprudence</i> , 25 Law & Pol'y in Int'l Bus. 359 (1993)	597
2. Direct Causation	599
a. Nord Resources Corporation	599
b. Philippine Geothermal, Inc.	603
c. Haitian Tropical Management, S.A	605
d. F.C. Schaffer & Associates	605
e. Isaac Schwartz, Murray Jacobowitz, Good Fortune Gold, Inc., and Eldeen Import and Export, Inc.	607
f. Agronom International, Inc.	608
3. Political Motivation	609
a. Freeport Minerals Corp.	609
b. Beckman Instruments, Inc.	612
4. Notice	614
a. Kimberly Clark Corp.	614
5. Comments and Questions	615
<b>V. Private Political Risk Insurance</b>	<b>616</b>



## CONTENTS

A. Elizabeth A. Kessler, <i>Political Risk Insurance and the Overseas Private Investment Corporation: What Happened to the Private Sector</i> , 13 N.Y.L. Sch. J. Int'l & Comp. L. 203 (1992)	616
B. Paul E. Comeaux & Stephen Kinsella, <i>Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA &amp; OPIC Investment Insurance</i> , 15 N.Y.L. Sch. J. Int'l & Comp. L. 1 (1994)	621
C. Comments and Questions	622
<b>CHAPTER 6</b>	
<b>APPLICABLE SUBSTANTIVE LAW</b>	<b>623</b>
<b>I. Introduction</b>	<b>623</b>
A. J.G. Collier, <i>Conflict of Laws</i> , Chapter 11, Arbitration (3d. ed., Cambridge 2001)	623
B. Comments and Questions	624
C. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, <i>signed</i> 10 June 1958), <i>entered into force</i> 29 December 1970, 330 U.N.T.S. 3 (1959)	625
D. Comments and Questions	626
<b>II. The Choice of Law Process in International Commercial Arbitration</b>	<b>626</b>
A. Rules of Arbitration of the International Chamber of Commerce (as in force from 1 January 1998)	626
B. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)	627
C. UNCITRAL Model Law on International Commercial Arbitration (1985) (as adopted by the United Nations Commission on International Trade Law on 21 June 1985)	627
D. UNCITRAL Arbitration Rules (1976) (Adopted by the General Assembly on December 15, 1976)	627
E. EC Convention on the Law Applicable to Contractual Obligations (Rome 1980)	628
F. Comments and Questions	629
<b>III. Options for the Applicable Law</b>	<b>630</b>
A. National Law	630
1. F.V. García Amador, <i>State Responsibility: Fourth Report by the Special Rapporteur in International Responsibility</i> , [1959] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/119	630
2. Comments and Questions	632
B. National Law with International Guarantees	632
1. <i>AGIP Spa v. The Government of the Popular Republic of the Congo</i> , ICSID Case No. ARB/77/1, Award of 30 November 1979, 1 ICSID Rep. 306, 67 I.L.R. 318 (1979)	632



FOREIGN INVESTMENT DISPUTES

2. <i>Benvenuti and Bonfant Srl v. The Government of the People's Republic of the Congo</i> , ICSID Case No. ARB/77/2, Award of 15 August 1980, 1 ICSID Rep. 330	634
3. <i>Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt</i> , ICSID Case No. ARB/84/3, Award of 20 May 1992, 3 ICSID Rep. 189, 249 (Dissenting Opinion of Dr El Mahdi)	634
4. <i>Klöckner Industrie-Anlagen GmbH v. Republic of Cameroon</i> , ICSID Case No. ARB/81/2, Decision on Annulment of 3 May 1985, 2 ICSID Rep. 95 (1994)	641
5. <i>Amco Asia v. Indonesia</i> , ICSID Case No. ARB/81/1, Decision on the Application for Annulment of 16 May 1986, 1 ICSID Reports 509 (1993)	642
6. W. Michael Reisman, <i>The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold</i> , 15 ICSID Rev. – Foreign Inv. L.J. 362 (2000)	645
7. <i>Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica</i> , ICSID Case No. ARB/96/1, Award of 17 February 2000, 15 ICSID Rev. – Foreign Inv. L.J. 167 (2000)	650
8. <i>Wena Hotels Limited v. Arab Republic of Egypt</i> , ICSID Case No. ARB/98/4, Decision on Annulment of 5 February 2002, 41 I.L.M. 933 (2002)	652
9. Prosper Weil, <i>The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage À Trois</i> , 15 ICSID Rev. – Foreign Inv. L.J. 401 (2000)	655
10. Comments and Questions	661
C. Internationalization	662
1. <i>Petroleum Development Ltd. v. Sheikh of Abu Dhabi</i> , 18 I.L.R. 144 (1951)	662
2. Comments and Questions	663
3. F.V. García Amador, <i>State Responsibility: Fourth Report by the Special Rapporteur in International Responsibility</i> , [1959] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/119	664
4. <i>Sapphire International Petroleum v. NIOC</i> , 35 I.L.R. 136 (1963)	666
5. Comments and Questions	670
6. <i>Texaco Overseas Petroleum Company &amp; Californian Asiatic Oil Company v. The Government of the Libyan Arab Republic</i> , Award on the Merits, 53 I.L.R. 420 (1977)	670
7. Comments and Questions	674
8. <i>International Chamber of Commerce, Case No. 3380</i> , Award of 29 November 1980 (also reported in 108 Journal du droit int'l 928 (Clunet, No. 4) (1981))	674
9. Comments and Questions	675
10. <i>Government of Kuwait v. American Independent Oil Co. (AMINOIL)</i> , 66 I.L.R. 518 (1982)	675
11. Comments and Questions	678
12. <i>Mobil Oil Iran Inc., et al v. Government of the Islamic Republic of Iran and National Iranian Co.</i> , Case No. 74, Award No. 311-74/76/81/150-3, 14 July 1987, 16 Iran-US Cl. Trib. Rep. 3 (1987)	678



## CONTENTS

13. Comments and Questions	681
14. <i>United States v. Iran (Case No. B36)</i> , Case No. B 36, Award of 23 March 1997, 32 Iran-U.S. Cl. Trib. Rep. 162 (1996)	681
15. Georges R. Delaume, <i>The Proper Law of State Contracts Revisited</i> , 12(1) ICSID Rev. – Foreign Inv. L.J. 1 (1997)	682
16. <i>Wintershall A.G., et al. v. Government of Qatar</i> , Partial Award on Liability of 5 February 1988, 28 ILM 795 (1989)	689
17. Comments and Questions	689
<b>D. Direct Investor Claims Under Treaties</b>	<b>689</b>
1. Jan Paulsson, <i>Arbitration Without Privity</i> , 10(2) ICSID Rev. – Foreign Inv. L.J. 232 (1995)	690
2. Comments and Questions	694
3. Antonio R. Parra, <i>Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties</i> , 16(1) ICSID Rev. – Foreign Inv. L.J. 20 (2001)	694
4. Comments and Questions	697
5. <i>Asian Agricultural Products Ltd. v. Republic of Sri Lanka</i> , Case No. ARB/87/3, Award of 27 June 1990, 4 ICSID Rep. 245 (1997)	697
6. Comments and Questions	699
7. <i>Compañía de Aguas del Aconquija S.A. &amp; Vivendi Universal v. Argentine Republic</i> , Case No. ARB/97/3, Decision on Annulment of 3 July 2002, 17 ICSID Rev. – Foreign Inv. L.J. (2004)	699
8. Comments and Questions	703
<b>IV. Applicable International Law</b>	<b>704</b>
<b>A. The Sources of International Law</b>	<b>704</b>
1. Article 38 of the Statute of the International Court of Justice (1945)	704
2. Comments and Questions	704
<b>B. Standards Under Bilateral and Multilateral Investment Treaties</b>	<b>705</b>
1. North American Free Trade Agreement, Chapter 11, Investment (1994)	705
2. Treaty Concerning the Treatment and Protection of Investment, 15 December 1987, Brunei – Indon. – Malay. – Phil. – Sing. – Thail., available at <a href="http://aseansec.org/6464.htm">http://aseansec.org/6464.htm</a> (last visited 26 May 2005)	708
3. Treaty Concerning the Treatment and Protection of Investments, 3 July 1991, FR. – AR., 1728 U.N.T.S. 298	712
<b>C. Other Sources of International Law</b>	<b>717</b>
1. <i>Texaco Overseas Petroleum Company &amp; Californian Asiatic Oil Co. v. Government of the Libyan Arab Republic</i> , Award on the Merits of 19 January 1977, 53 I.L.R. 420 (1977)	718
2. Comments and Questions	722
3. <i>Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic</i> , Award of 12 April 1977, 62 I.L.R. 140 (1977)	722
4. <i>SEDCO Inc v. National Iranian Oil Co. &amp; Islamic Republic of Iran</i> , Case No. 129, Award No. ITL 59-129-3 of 27 March 1986, 84 I.L.R. 521 (1986)	724
5. Comments and Questions	726



FOREIGN INVESTMENT DISPUTES

D. Projected Codification and Progressive Development of International Law	727
1. UN International Law Commission Articles on State Responsibility (2001)	727
2. Comments and Questions	727
3. Louis B. Sohn and R. R. Baxter, <i>Responsibility of States for Injuries to the Economic Interests of Aliens</i> , 55 Am. J. Int'l L. 545 (1961)	728
4. Draft Convention on the International Responsibility of States for Injuries to Aliens	728
5. Restatement (Third) of Foreign Relations Law of the United States	729
6. Multilateral Agreement on Investment (MAI), Draft Consolidated Text of 22 April 1998, OECD Doc. No. DAF/MAI(98)7/REV1	730
7. Comments and Questions	733
<b>V. Sources of "Non-National" Law: The <i>Lex Mercatoria</i></b>	<b>733</b>
A. M. Mustill, <i>The New Lex Mercatoria: The First Twenty-five Years</i> , in M. Bos & I. Brownlie, <i>Liber Amicorum for the Rt. Hon. Lord Wilberforce</i> 149 (Oxford, Clarendon Press, 1987)	734
B. Georges R. Delaume, <i>Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria</i> , 63 Tul. L. Rev. 575-611 (1989)	737
C. Keith Highet, <i>The Enigma of the Lex Mercatoria</i> , 63 Tul. L. Rev. 613-628 (1989)	741
D. Emmanuel Gaillard, <i>Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules</i> , 10(2) ICSID Rev. – Foreign Inv. L.J. 208 (1995)	744
E. Comments and Questions	748
F. L. Yves Fortier, <i>New Trends in Governing Law: The New, New Lex Mercatoria, or, Back to the Future</i> , 16(1) ICSID Rev. – Foreign Inv. L.J. 10 (2001)	748
G. <i>ICC Case No. 7110</i> , First Partial Award of June 1995, 10(2) ICC Bulletin 39 (1999)	750
H. <i>Watkins-Johnson Company and Watkins-Johnson Limited v. Islamic Republic of Iran and Bank Saderat Iran</i> , Case No. 370, Award of 28 July 1989, 22 Iran-US Cl. Trib. Rep. 218 (1989)	751
I. <i>ICC Case No. 5713</i> , Final Award of 1989, 15 Y.B. Comm'l Arb. 206 (1990)	753
J. Comments and Questions	754
K. James Crawford & Anthony Sinclair, <i>The Unidroit Principles of International Commercial Contracts and their Application to State Contracts</i> , I.C.C. Bulletin – Supplement 57-75 (2002)	754
L. Comments and Questions	757



## CONTENTS

### CHAPTER 7

<b>INTERNATIONAL RESPONSIBILITY: GENERAL PRINCIPLES</b>	<b>759</b>
<b>I. Development of the Law of State Responsibility</b>	<b>759</b>
A. The Concept of Diplomatic Protection	759
1. <i>Case of the Mavrommatis Palestine Concessions (Greece v. United Kingdom)</i> , Decision on Jurisdiction of 30 August 1924, P.C.I.J., Series A, No. 2 (1924)	759
2. <i>Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)</i> , Judgment of 28 February 1939, P.C.I.J., Series A/B, No. 76 (1939)	760
3. <i>Nottebohm Case (Liechtenstein v. Guatemala)</i> , Second Phase, Judgment of 6 April 1955, 1955 I.C.J. p. 4.	761
4. Comments and Questions	765
5. <i>Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain)</i> Judgment of 5 February 1970, 1970 I.C.J. 3	765
6. <i>Case Concerning Elettronica Sicula SpA (ELSI) (United States of America v. Italy)</i> , Judgment of 20 July 1989, 1989 I.C.J. p. 15	773
7. <i>LaGrand Case (Germany v. United States of America)</i> , Judgment of 27 June 2001, 2001 I.C.J. 466	776
8. Comments and Questions	780
9. <i>The Loewen Group Inc. and Raymond L. Loewen v. United States of America</i> , ICSID Case No. ARB(AF)/98/3, Award of 26 June 2003, 7 ICSID Reports	780
10. Comments and Questions	786
B. Framework Principles of State Responsibility: The Work of the ILC	786
1. James Crawford, <i>The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries</i> (Cambridge, 2002), Introduction	787
2. <i>Responsibility of States for Internationally Wrongful Acts</i> , General Assembly Resolution A/RES/56/83 of 12 December 2001	789
C. The General Character of State Responsibility Principles	790
1. International Law Commission, Commentaries on Articles on Responsibility of States for Internationally Wrongful Acts	790
D. Delictual and Treaty Responsibility	793
1. <i>Rainbow Warrior (New Zealand v. France)</i> , Award of 30 April 1990, 20 R.I.A.A. 217 (1990)	793
2. Comments and Questions	794
3. Articles on Responsibility of States for Internationally Wrongful Acts	794
4. International Law Commission, Commentaries on Articles on Responsibility of States for Internationally Wrongful Acts	794
E. Responsibility under International and Internal Law	796
1. <i>Case Concerning Elettronica Sicula SpA (ELSI) (United States of America v. Italy)</i> , Judgment of 20 July 1989, 1989 I.C.J. 15	796
F. The <i>Lex Specialis</i> Issue	797
1. Articles on Responsibility of States for Internationally Wrongful Acts	797



FOREIGN INVESTMENT DISPUTES

2. International Law Commission, Commentaries on Articles on Responsibility of States for Internationally Wrongful Acts	797
<b>II. Attribution of Conduct to the State</b>	<b>799</b>
<b>A. Organs of the State or of Political Subdivisions</b>	<b>799</b>
1. Articles on Responsibility of States for Internationally Wrongful Acts	799
2. International Law Commission, Commentaries on Articles on Responsibility of States for Internationally Wrongful Acts	800
3. American Law Institute, <i>Restatement of the Law (Third): The Foreign Relations Law of the United States</i> (St. Paul, American Law Institute Publishers, 1987)	806
4. <i>Metalclad Corporation v. The United Mexican States</i> (2000), ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000, 40 ILM 36	807
5. <i>Texaco Overseas Petroleum Company and Californian Asiatic Oil Company v. The Government of the Libyan Arab Republic</i> (1977), Preliminary Award of 27 November 1975, 53 I.L.R. 392 (1977)	808
6. <i>Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic</i> (2000) ICSID Case No. ARB/97/3, Award of 21 November 2000	809
7. Comments and Questions	811
<b>B. State Enterprises</b>	<b>811</b>
1. <i>Wintershall A.G., et al. v. Government of Qatar</i> (1989), Partial Award on Liability of 5 February 1988, 28 ILM 795 (1989)	811
2. Articles on Responsibility of States for Internationally Wrongful Acts	812
3. International Law Commission, Commentaries on Articles on Responsibility of States for Internationally Wrongful Acts	812
<b>C. Conduct of Private Parties</b>	<b>814</b>
1. <i>Amco Asia Corporation and Others v. The Republic of Indonesia</i> , ICSID Case No. ARB/81/1, Award on the Merits of 20 November 1984, 1 ICSID Reports 413	814
2. <i>Tradex Hellas S.A. (Greece) v. Republic of Albania</i> , ICSID Case No. ARB 94/2, Award of 29 April 1999, 14 (1) ICSID Rev. – FILJ 197 (1999)	817
3. Articles on Responsibility of States for Internationally Wrongful Acts	821
4. International Law Commission, Commentaries on Articles on Responsibility of States for Internationally Wrongful Acts	821
5. Articles on Responsibility of States for Internationally Wrongful Acts	823
6. International Law Commission, Commentaries on Articles on Responsibility of States for Internationally Wrongful Acts	823
7. Comments and Questions	824
<b>D. Succession to Responsibility</b>	<b>824</b>
1. <i>Tinoco Case (Great Britain v. Costa Rica)</i> , Award of 18 October 1923, I R.I.A.A. 375 (1923)	824



## CONTENTS

2. <i>Lighthouses Arbitration Between France and Greece</i> , Claims No. II and 4 (1956), Permanent Court of Arbitration, 24 July 1956, 23 I.L.R. 81 (1956)	827
3. Comments and Questions	831
<b>III. Breach of an International Obligation</b>	<b>831</b>
A. The Concept of Due Diligence and the Role of Fault	832
1. Alabama Arbitration, Award of 14 September 1872; J.B. Moore, <i>History and Digest of the International Arbitrations to which the United States has been a Party</i> (Washington, US Government Printing Office, 1898), vol. I, p. 495	832
2. James Crawford, <i>The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries</i> (Cambridge, 2002), Introduction	833
B. Obligations of Conduct and Result	833
1. International Law Commission, Commentaries on Articles on Responsibility of States for Internationally Wrongful Acts	834
C. Irrelevance of Sovereign/Commercial Act Distinction	834
1. <i>Swedish Engine Drivers' Union Case</i> (1976), E.C.H.R., Series A, No. 20 (1976)	835
2. Comments and Questions	836
 <b>CHAPTER 8</b>	
<b>VIOLATIONS OF INVESTOR RIGHTS UNDER CUSTOMARY INTERNATIONAL LAW</b>	<b>837</b>
<b>I. Expropriation</b>	<b>837</b>
A. Introduction	837
1. F.V. Garcia Amador, Special Rapporteur's Report, International Law Commission (1959)	837
B. General Distinction	842
1. Direct – <i>De Jure</i>	842
a. <i>Compania del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica</i> , ICSID Case No. ARB/96/1, Award of 17 February 2000, 39 I.L.M. 1317, 1329 (2000)	842
b. Martin Domke, <i>Foreign Nationalizations: Some Aspects of Contemporary International Law</i> , 55 Am. J. Int'l L. 585 (1961)	843
2. Indirect – <i>De Facto</i> – Creeping	844
a. Errol P. Mendes, <i>The Canadian National Energy Program: An Example of Assertion of Economic Sovereignty or Creeping Expropriation in International Law</i> , 14 Vand. J. Transnat'l L. 475, 498-501 (1981)	844
b. <i>Waste Mgmt. Inc. v. United Mexican States</i> , ICSID Case No. ARB(AF)/98/2, Award of 2 June 2000, 40 I.L.M. 56, 73 (2001)	847
c. UNCTAD, <i>Bilateral Investments Treaties in the Mid-1990s</i> , 65-66, U.N. Doc. No. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8 (1998)	847
d. Comments and Questions	848



FOREIGN INVESTMENT DISPUTES

C. Initial Precepts – Government is not a Guarantor or Insurer of the Investment	849
1. <i>Oscar Chinn Case</i> , 1934 P.C.I.J. (Ser. A./B.) No. 63, 416, 436, 439 (12th December)	849
D. Objective of Expropriation (Property, Rights and Interests)	849
1. Tangible Property	849
a. <i>SEDCO, Inc. v. National Iranian Oil Co.</i> , Award No. 309-129-3 of 2 July 1987, 15 Iran-U.S. Cl. Trib. Rep. 23 (equipment)	849
b. <i>Oil Field of Texas, Inc. v. Iran</i> , Award No. 258-43-1 of 8 October 1986, 12 Iran-U.S. Cl. Trib. Rep. 308, 318-19 (1986)	850
2. Real Property	851
a. <i>Metalclad Corp. v. Mexico</i> , ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000, 16 ICSID Rev. – Foreign Investment L. J. 168, 179-87, 195-97 (2001)	851
b. <i>Compania del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica</i> , ICSID Case No. ARB/96/1, Award of 17 February 2000, 39 I.L.M. 1317 (2000)	853
3. Stocks and Shares	854
a. <i>Reineccius v. Bank of International Settlements</i> , Arbitral Tribunal of the Bank of International Settlements (January 8, 2001)	854
4. Bank Accounts	858
a. <i>American Bell Int’l, Inc. v. Iran</i> , Award No. 255-48-3 of 19 September 1986, 12 Iran-U.S. Cl. Trib. Rep. 170, 213-15 (1987)	858
5. Dividends	859
a. <i>Foremost Tehran, Inc. v. Iran</i> , Award No. 220-37/231-1 of 11 April 1986, 10 Iran-U.S. Cl. Trib. Rep. 228, 246, 250-53 (1987)	859
6. Bonds	862
a. Edwin Borchard, <i>State Insolvency and Foreign Bondholders</i> , Vol. I, <i>General Principles</i> , 193, 197-98, 200-02 (1951)	862
7. Management of business	863
a. <i>SEDCO, Inc. v. National Iranian Oil Co.</i> , Award No. 55-129-3 of 28 October 1985, 15 Iran-U.S. Cl. Trib. Rep. 248	863
b. <i>Tippetts, Abbott, McCarthy, Stratton v. Iran</i> , Award No. 141-7-2 of 19 June 1984, 6 Iran-U.S. Cl. Trib. Rep. 219 (1985)	863
c. <i>Starrett Housing Corp v. Iran</i> , Award No. 314-24-1 of 14 August 1987, 6 Iran-U.S. Cl. Trib. Rep. 122, 154-57	864
8. Contractual rights	866
a. <i>Phillips Petroleum Co. Iran v. Iran</i> , Award No. 425-39-2 of 29 June 1989, 21 Iran-U.S. Cl. Trib. Rep. 106-07, 118-19	866
b. <i>Amoco Int’l Finance Corp. v. Iran</i> , Award No. 310-56-3 of 14 July 1987, 15 Iran-U.S. Cl. Trib. Rep. 189, 205, 241-44	867
c. <i>Mobil Oil v. Iran</i> , Award No. 492-74-3 of 8 November 1980, 16 Iran-U.S. Cl. Trib. Rep. 3, 37, 42-43, 60, 62-63	870
d. <i>Waste Mgmt. Inc. v. United Mexican States</i> , Case No. ARB(AF)00/3, Award of 30 April 2004, 43 I.L.M. 967 (2004)	872
e. Comments and Questions	874
9. Intangible Property (e.g. intellectual property, goodwill)	875



## CONTENTS

a. <i>Case Concerning the Factory at Chorzów (Claim for Indemnity) (The Merits)</i> , Judgment No. 13, 1928 P.C.I.J. (Ser. A) No. 17	875
b. <i>Amoco Int'l Finance Corp. v. Iran</i> , Award No. 310-56-3 of 14 July 1987, 15 Iran-U.S. Cl. Trib. Rep. 189, 249, 258, 267	876
c. Comments and Questions	877
10. Shares	877
a. <i>Reineccius v. Bank of International Settlements</i> , Arbitral Tribunal of the Bank of International Settlements (January 8, 2001)	877
11. Use of Property	877
a. Thomas Waelde & Abba Kolo, <i>Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law</i> , 50 Int'l & Comp. L.Q. 811, 839-40, 846-47 (2001)	877
b. <i>Pine Valley Developments Ltd. Ors v. Ireland</i> , 14 Eur. H.R. Rep. 319 (1992)	878
c. <i>Katte v. Italy</i> , 19 Eur. H.R. Rep. 368 (1995)	881
d. <i>Trustees of the Late Duke of Westminster's Estate v. U.K.</i> , 5 Eur. H.R. Rep. 440, 456, 546 (1983)	881
E. Expropriatory Intent	883
1. Question of the Necessity of Expropriatory Intent	883
a. <i>Tippetts, Abbet, McCarthy, Stratton (TAMS) v. Iran</i> , 6 Iran-U.S. Cl. Trib. Rep. 219, 225-26	883
b. <i>Phillips Petroleum Company Iran v. Iran</i> , Award No. 425-39-2 of 29 June 1989) 21 Iran-U.S. Cl. Trib. Rep. 79, 115	883
c. Comments and Questions	884
2. Effect of Act on Interests	884
a. <i>TAMS v. Iran</i> , Award No. 141-7-2 of 29 June 1984, 6 Iran-U.S. Cl. Trib. Rep. 219, 225	884
F. Standard	884
1. Direct Expropriation: The Government Acquires Title and Benefits From It	884
a. <i>Olguin v. Paraguay</i> , ICSID Case No. ARB/98/5, Award of 8 August 2000, available at <a href="http://www.worldbank.org/icsid/cases/paraguay-decision.pdf">http://www.worldbank.org/icsid/cases/paraguay-decision.pdf</a> (last visited 25 May 2005)	884
b. <i>CME Czech Republic B.V. (The Netherlands) v. The Czech Republic</i> (2001)	885
2. Indirect Expropriation	888
a. G.C. Christie, <i>What Constitutes a Taking of Property Under International Law?</i> , 38 Brit. Y.B. Int'l L. 307, 322-24, 330-38 (1962)	888
b. <i>Biloune v. Ghana Investments Centre</i> , Award on Jurisdiction and Liability of 27 October 1989, 95 I.L.R. 183, 209-10	895
c. <i>Wena Hotels Limited v. Arab Republic of Egypt</i> , ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 I.L.M. 881, 884, 896, 911, 914-15 (2002)	896
d. Comments and Questions	898
3. Legitimate Expectations of Investor	899
a. <i>Opel Austria GmbH v. Council of the European Union</i> , T-115/94 (1997)	899



FOREIGN INVESTMENT DISPUTES

G. Governmental Acts	900
1. Laws and Decrees Explicitly Expropriating	900
2. Appointment of Managers	900
3. Seizure of Premises and Impoundment of Property	900
4. Announcement of Intended Expropriation Without Further Acts	901
a. <i>Sola Tiles, Inc. v. Iran</i> , Award No. 298-317-1, reprinted in 14 Iran-U.S. Cl. Trib. Rep. 223, 230-34	901
b. Comments and Questions	903
c. <i>Agrotexim v. Greece</i> , 21 Eur. H.R. Rep. 250 (1995)	903
d. <i>Compania del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica</i> , ICSID Case No. ARB/96/1, Award of 17 February 2000, 39 I.L.M. 1317 (2000)	903
5. Unilateral Reduction of Concession Area	903
a. <i>LETCO v. Liberia</i> , Award of 31 March 1986, 26 I.L.M. 647, 664-67 (1986)	903
6. Use Restrictions	906
7. Forced Sales	907
a. G.C. Christie, <i>What Constitutes a Taking of Property Under International Law?</i> , 38 Brit. Y.B. Int'l L. 307, 324-26, 328-29 (1962)	907
b. Comments and Questions	909
8. Cessation of Project Work due to Governmental Interference	910
a. <i>Biloune v. Ghana Investments Centre</i> , 95 I.L.R. 183, 209-210 (1990)	910
9. Setting Product Price at Loss by Governmental Decree	911
a. <i>Benvenuti et Bonfant v. Congo</i> , ICSID Case No. ARB/77/2, Award of 8 August 1980, 21 I.L.M. 740, 757-58 (1980)	911
b. <i>Pope &amp; Talbott v. Canada</i> , Award on the Merits of Phase 2 by Arbitral Tribunal (April 10, 2001)	911
H. Legality	911
1. Form of expropriation (e.g., due process)	911
a. F.V. Garcia Amador, Special Rapporteur Report, International Law Commission (1959)	911
b. <i>SEDCO, Inc. v. Iran</i> , Award No. 59-123-3 of 27 March 1986, reprinted in 10 Iran-U.S. Cl. Trib. Rep. 180	911
2. Purpose	912
a. Not for a Public Purpose	912
i. <i>Amoco Int'l Finance Corp. v. Iran</i> , Award No. 310-56-3 of 14 July 1987, 15 Iran-U.S. Cl. Trib. Rep. 189	912
b. Discrimination	913
i. <i>Sociedad Minera el Teniente S.A. v. Aktiengesellschaft Norddeutsche Attinerie (Chilean Copper Case)</i> , 12 I.L.M. 251, 276-81 (Hamburg Superior Court 1973)	913
ii. <i>LETCO v. Liberia</i> , Award of 31 March 1986, 26 I.L.M. 647, 665 (1986)	914
c. Violation of Stabilization Clause	914
i. <i>TOPCO v. Libya</i> , Award of 19 January 1977, 17 I.L.M. 3, 24-27 (1978)	914
ii. <i>AGIP SPA v. Congo</i> , Award of November 30, 1979, 67 I.L.R. 318 (1984)	918



## CONTENTS

iii. <i>Kuwait v. AMINOIL</i> , 66 I.L.R. 518, 585-91 (1982)	918
iv. <i>Mobil Oil v. Iran</i> , 16 Iran-U.S. Cl. Trib. Rep. 3	923
I. Date of Expropriation	923
1. Vance R. Koven, <i>Expropriation and the “Jurisprudence” of OPIC</i> , 22 Harv. Int’l L.J. 269, 277, 311-20 (1981)	923
2. Cases	928
a. <i>Amoco Int’l Finance Corp. v. Iran</i> , Award No. 310-56-3 of 14 July 1987, 15 Iran-U.S. Cl. Trib. Rep. 189, 226-29	928
b. <i>Phillips Petroleum Co. v. Iran</i> , Award No. 425-9-2 of 29 June 1989, 21 Iran-U.S. Cl. Trib. Rep. 79	930
c. <i>Compania del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica</i> , ICSID Case No. ARB/96/1, Award of 17 February 2000, 39 I.L.M. 1317 (2000)	930
d. W. Michael Reisman & Robert D. Sloane, <i>Indirect Expropriation and Its Valuation in the BIT Generation</i> , 74 Brit. Y.B. Int’l L. 115 (2004)	930
e. Comments and Questions	931
J. Defenses Argued by Governments	931
1. U.N. Resolutions	931
a. “Permanent Sovereignty over Natural Resources”, General Assembly Resolution 1803 (XVII) of 14 December 1962	931
b. Declaration on the Establishment of a New International Economic Order (1 May 1974), A/RES/3201 (S-VI)	932
c. Charter of Economic Rights and Duties of States (12 Dec. 1974), A/RES/3281 (XXIX)	932
2. Cases	933
a. <i>TOPCO v. Libya</i> , Award of 19 January 1977, 17 I.L.M. 3, 27-31 (1978)	933
b. Comments and Questions	940
c. <i>Libyan American Oil Co. (LIAMCO) v. Libyan Arab Republic</i> , Award of the Tribunal of 12 April 1977, 6 Y.B. Com. Arb. 89, 99-101 (1981)	940
d. <i>Kuwait v. Aminoil</i> , Award of 24 March 1982, 21 I.L.M. 976, para. 90(2) (1982)	942
3. Administrative Contracts	943
a. <i>Kuwait v. AMINOIL</i> , Award of 24 March 1982, 21 I.L.M. 976, 1022 (1982)	943
4. <i>Force Majeure/Impossibility/Frustration</i>	944
a. <i>Mobil Oil v. Iran</i> , Award No. 492-74-3 of 8 November 1980, 16 Iran-U.S. Cl. Trib. Rep. 3, 38-39	944
5. Implied Termination or Waiver	945
a. <i>Mobil Oil v. Iran</i> , Award No. 492-74-3 of 8 November 1980, 16 Iran-U.S. Cl. Trib. Rep. 3	945
6. Changed Circumstances	945
a. <i>Mobil Oil v. Iran</i> , Award No. 492-74-3 of 8 November 1980, 16 Iran-U.S. Cl. Trib. Rep. 3, 39-40	946
b. <i>Phillips Petroleum Co v. Iran</i> , Award No. 425-39-2 of 29 June 1989, 21 Iran-U.S. Cl. Trib. Rep. 79	946



<b>II. Discriminatory Conduct</b>	<b>946</b>
A. What is the Customary International Law Standard?	946
1. <i>British Petroleum v. Libyan Arab Republic</i> , 53 I.L.R. 297, 329, 346-48, 353 (1973)	946
B. A.F.M. Maniruzzaman, <i>Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview</i> , 8 J. Transnat'l L. & Pol'y 57-59, 67-70 (1998)	948
<b>III. Arbitrary Conduct</b>	<b>951</b>
A. F.V. Garcia Amador, Special Rapporteur Report, International Law Commission (1959)	951
<b>IV. Denial of Justice</b>	<b>953</b>
A. <i>Loewen v. United States</i> , ICSID Case No. ARB(AF)/98/3, Award of 26 June 2003, 33-39, 70-71, available at < <a href="http://www.state.gov/documents/organization/22094.pdf">http://www.state.gov/documents/organization/22094.pdf</a> >	953
B. <i>Mondev Int'l Ltd. v. United States</i> , ICSID Case No. ARB(AF)/99/2, Award of 11 October 1999, 1-2, 44-45, 49-52, 54-56, available at < <a href="http://www.state.gov/documents/organization/14442.pdf">http://www.state.gov/documents/organization/14442.pdf</a> >	958
C. Francisco Orrego Vicuña, <i>Some International Law Problems Posed by the Nationalization of the Copper Industry by Chile</i> , 67 Am. J. Int'l L. 711, 711-12, 715-717 (1973)	963
D. <i>Amco Asia Corp. v. Republic of Indonesia</i> , ICSID Case No. ARB/81/1, Award of 5 June 1990, 1 ICSID Rep. 569, 599-605	966
E. <i>Athanassoglou v. Switzerland</i> (Eur. Ct. Human Rts. 1999)	969
F. <i>Azinian v. United Mexican States</i> , ICSID Case No. ARB(AF)/97/2, Award of 1 November 1999, 39 I.L.M. 537, 552-55 (2000)	972
G. Comments and Questions	976
<b>V. Abuse of Rights</b>	<b>977</b>
A. F.V. Garcia Amador, Special Rapporteur Report, International Law Commission (1959)	977
B. Karl-Heinz Böckstiegel, <i>Arbitration and State Enterprises</i> , 45-46 (Kluwer 1984)	977
C. International Law Commission, <i>Draft Articles on State Responsibility</i> (2001)	978
<b>VI. Unjust Enrichment</b>	<b>978</b>
A. Christoph H. Schreuer, <i>Unjustified Enrichment in International Law</i> , 22 Am. J. Comp. L. 281, 281, 284-84, 289, 300-01 (1974)	978
B. International Law Commission, <i>Draft Articles on State Responsibility</i> (2001)	980
C. <i>Factory at Chorzów Case</i> , 1928 P.C.I.J. No. 13	980
D. Arthur Nussbaum, <i>The Arbitration Between the Lena Goldfields, Ltd. and the Soviet Government</i> , 36 Cornell L.Q. 31, 50-51 (1950)	980



## CONTENTS

E. <i>Sea-Land Services Case</i> , Award No. 135-33-1 of 22 June 1984, 6 Iran-U.S. Cl. Trib. Rep. 149, 164-72	981
F. <i>Isaiah v. Bank Mellat</i> , Award No. 35-219-2 of 30 March 1983 2 Iran-U.S. Cl. Trib. Rep. 232, 236-39	983
G. <i>Flexi-Van Leasing, Inc. v. Iran</i> , 12 Iran-U.S. Cl. Trib. Rep. 335, 352-56 (1986)	986
H. <i>Schlegel Corp. v. National Copper Industries Co.</i> , Award No. 295-834-2 of 27 March 1987, 14 Iran-U.S. Cl. Trib. Rep. 176, 177-83	988
I. <i>T.C.S.B., Inc. v. Iran</i> , Award No. 114-140-2 of 16 March 1984, 5 Iran-U.S. Cl. Trib. Rep. 160, 161, 171-72, 174 (1984)	991
J. <i>Lockheed Corp. v. Iran</i> , Award No. 367-829-2 of 9 June 1998, 18 Iran-U.S. Cl. Trib. Rep. 292, 293-295, 308-10	993
K. <i>Beyeler v. Italy</i> , Eur. Ct. H.R. (application no. 33202/96) (2000)	994
L. <i>Mobil Oil Iran, Inc. v. Iran</i> , Partial Award No. 311-74/76/81/150-3 of 14 July 1987, 16 Iran-U.S. Cl. Trib. Rep. 3	999
M. <i>Amco Asia v. Republic of Indonesia</i> , ICSID Case No. ARB/81/1, Award of 5 June 1990, 1 ICSID Reports, 569, 607-08 (1993)	999
N. Charles N. Brower & Jason D. Brueschke, <i>The Iran-U.S. Claims Tribunal</i> 427-29 (1998)	1000
<b>VII. Unlawful Interference</b>	<b>1001</b>
A. <i>Eastman Kodak Co. v. Iran</i> , Award No. 329-227-3 of 11 November 1987, 17 Iran-U.S. Cl. Trib. Rep. 153, 156-60, 168-69	1001
B. Comments and Questions	1005
<b>CHAPTER 9</b>	
<b>VIOLATION OF INVESTOR RIGHTS UNDER INVESTMENT TREATIES</b>	<b>1007</b>
<b>I. Introduction</b>	<b>1007</b>
<b>II. Absolute Standards</b>	<b>1010</b>
A. Fair and Equitable Treatment	1010
1. U.S. Model BIT Art. II (2)(a) (1992)	1010
2. NAFTA Art. 1105(1)	1011
3. Energy Charter Treaty Art. 10(1)	1011
4. UNCTAD [United Nations Conference on Trade and Development], <i>Fair and Equitable Treatment</i> (1999)	1011
5. Rodolf Dolzer and Margrete Stevens, <i>Bilateral Investment Treaties</i> (Kluwer 1995)	1013
6. F.A. Mann, <i>British Treaties for the Promotion and Protection of Investments</i> , 52 Brit. Y.B. Int'l L. 241 (1981)(1985)	1014
7. Stephen Vascianne, <i>Fair and Equitable Treatment</i> , 70 Brit. Y.B. Int'l Law 99 (2000) edited by I. Brownlie	1015
8. BIT Cases	1015



FOREIGN INVESTMENT DISPUTES

a. <i>Tecnicas Medioambientales Tecmed S.A. v. Estados Unidos Mexicanos</i> , ICSID Case No. ARB (AF)/00/2 (2003), Award dated May 29, 2003, available at <a href="http://www.worldbank.org/icsid/cases/tecmed-award.pdf">www.worldbank.org/icsid/cases/tecmed-award.pdf</a>	1015
b. <i>CME Czech Republic B.V. (The Netherlands) v. The Czech Republic</i> , UNCITRAL Partial Award of 13 September 2001	1024
c. <i>Occidental Exploration and Production Company v. Republic of Ecuador</i> ; Final Award of July 1, 2004, in Case No. UN 3467	1025
9. NAFTA Cases	1027
a. <i>S.D. Myers, Inc. v. Government of Canada</i> , UNCITRAL Partial Award of 13 November 2000	1027
b. <i>Pope &amp; Talbot, Inc. v. The Government of Canada</i> , UNCITRAL (NAFTA) Award on the Merits of Phase 2 of 10 April 2001	1029
c. NAFTA Free Trade Commission Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001)	1035
d. <i>Pope &amp; Talbot Inc. v. Government of Canada</i> , UNCITRAL (NAFTA) Award in Respect of Damages (31 May 2002)	1035
e. <i>Loewen Group, Inc. and Raymond L. Loewen v. United States of America</i> , ICSID Case No. AR.B(AF)/98/3, Award of 26 June 2003, 7 ICSID Rep.	1037
f. <i>Waste Management, Inc. v. United Mexican States</i> , ICSID Case No. ARB(AF) 00/00/3; (NAFTA) Award of 25 June 2003	1041
g. <i>Gami Investments, Inc. v. The Government of the United Mexican States</i> , UNCITRAL, Final Award 12 November 2004	1044
10. Comments and Questions	1046
B. Full Protection and Security	1049
1. <i>Case Concerning Elettronica Sicula, SpA (ELSI) case (U.S. v. Italy)</i> , Judgment of 20 July 1989), 1989 I.C.J. 15	1049
2. <i>Asian Agricultural Products Ltd. v. Republic of Sri Lanka</i> , Award of 27 June 1990, 4 ICSID Reports 246	1050
3. <i>American Manufacturing &amp; Trading, Inc. v. Republic of Zaire</i> , ICSID Case No. ARB/93/1 Award of 21 February 1997, 36 I.L.M. 1531(1997)	1057
4. <i>Wena Hotels Ltd. v. Arab Republic of Egypt</i> , ICSID Case No. ARB/98/4, Decision of 2000, 41 I.L.M. 896 (2002)	1060
5. <i>Ronald S. Lauder v. The Czech Republic</i> , UNCITRAL Final Award of 3 September 2001	1060
6. <i>CME Czech Republic B. V. (The Netherlands) v. The Czech Republic</i> , UNCITRAL Partial Award of 13 September 2001	1061
7. Rodolf Dolzer and Margrete Stevens, <i>Bilateral Investment Treaties</i> (Kluwer Law International 1995)	1061
8. United Nations Conference on Trade and Development (UNCTAD), <i>Bilateral Investment Treaties in the Mid-1990s</i> (1998)	1062
9. Comments and Questions	1062
C. Treatment No Less Favorable Than That Required by International Law	1063



## CONTENTS

1. <i>L.F.H. Neer and Pauline E. Neer v. Mexico</i> (General Claims Commission – United States and Mexico 1926), 21 Am. J. Int'l L. 555 (1927)	1063
2. <i>Mondev International Ltd. v. United States of America</i> , ICSID Case No. ARB (AF)/99/2, Award of October 11, 2002	1064
3. <i>CME Czech Republic B.V. (The Netherlands) v. The Czech Republic</i> , UNCITRAL Partial Award of 13 September 2001	1069
4. <i>Ronald S. Lauder v. The Czech Republic</i> , UNCITRAL Final Award of 3 September 2001	1069
5. <i>American Manufacturing &amp; Trading, Inc. v. Zaire</i> , ICSID Case No. ARB/93/1 Final Award of 21 February 1997, 36 I.L.M. 1531 (1997)	1070
6. Kenneth J. Vandavelde, <i>United States Investment Treaties: Policy and Practice</i> at 77-78 (Kluwer 1992)	1070
7. UNCTAD, <i>Bilateral Investment Treaties in the Mid-1990s</i> (1998)	1071
8. Comments and Questions	1071
D. Arbitrary Treatment	1071
1. U.S. Model BIT Art. II (2)(b) (1992)	1071
2. <i>Elettronica Sicula, SA (ELSI) Case (U.S. v. Italy)</i> (ICJ), Judgement of 20 July 1989	1071
3. Sean D. Murphy, <i>The ELSI Case: An Investment Dispute at the International Court of Justice</i> , 16 Yale J. Int'l L. 391 (1991)	1078
4. <i>Ronald S. Lauder v. The Czech Republic</i> , UNCITRAL Final Award of 3 September 2001	1080
5. UNCTAD, <i>Bilateral Investment Treaties in the Mid-1990s</i> (1998)	1084
6. Kurt Hamrock, <i>The ELSI Case: Toward an International Definition of "Arbitrary" Conduct</i> , 27 Tex. Int'l L.J. 837 (1992)	1084
7. Comments and Questions	1086
E. Discrimination	1087
1. NAFTA Art. 1104	1087
2. <i>Amoco International Finance Corp. v. Islamic Republic of Iran</i> , Award No. 310-56-3 (Chamber 3) of 14 July 1987	1087
3. <i>Ronald S. Lauder v. The Czech Republic</i> , UNCITRAL Final Award of 3 September 2001	1088
4. A.F.M. Maniruzzaman, <i>Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview</i> , 8 J. Transnat'l L. & Pol'y 57 (1998)	1089
5. Rodolf Dolzer and Margrete Stevens, <i>Bilateral Investment Treaties</i> (Kluwer Law International 1995)	1094
6. Comments and Questions	1094
F. Comply with All Obligations Undertaken Towards Investments	1095
1. U.S. Model BIT Art. II (2)(c) (1992)	1095
2. F.A. Mann, <i>British Treaties for the Promotion and Protection of Investments</i> , 52 Brit. Y.B. Int'l L. 241 (1981)(1985)	1095
3. Kenneth J. Vandavelde, <i>United States Investment Treaties: Policy and Practice</i> at 78 (Kluwer Law International 1992)	1096
4. United Nations Conference on Trade and Development (UNCTAD), <i>Bilateral Investment Treaties in the Mid-1990s</i> (1998)	1096



FOREIGN INVESTMENT DISPUTES

5. <i>SGS Société Générale de Surveillance v. Republic of the Philippines</i> , ICSID Case No. ARB/02/6, Award of 29 September 2004	1096
6. Comments and Questions	1103
G. Currency Transfer	1104
1. U.S. Model BIT Art. IV (1992)	1104
2. NAFTA Art. 1109	1105
3. ECT Art. 14	1106
4. Rodolf Dolzer and Margrete Stevens, <i>Bilateral Investment Treaties</i> (Kluwer 1995)	1107
5. UNCTAD, <i>Bilateral Investment Treaties in the Mid-1990s</i> (1998)	1109
6. Comments and Questions	1109
H. Expropriation	1109
1. U.S. Model BIT Art. III	1109
2. NAFTA Art. 1110	1110
3. ECT Art. 13	1111
4. <i>Metalclad Corp. v. United Mexican States</i> , ICSID Case No. ARB(AF)/97/1 NAFTA Award of 30 August 2000 16 ICISD Rev. – FILJ 168 (2001)	1111
5. <i>Azinian, Davitian &amp; Baca v. United Mexican States</i> , ICSID Case No. ARB(AF)/97/2, NAFTA Award of 1 November 1999, 39 I.L.M. 537 (2000)	1114
6. <i>S.D. Myers v. Government of Canada</i> , UNCITRAL Partial Award of 13 November 2000	1116
7. <i>Waste Management, Inc. v. United Mexican States</i> , Case No. ARB(AF) 00/00/3; (NAFTA) Award of 25 June 2003	1117
8. <i>CME Czech Republic B.V. v. The Czech Republic</i> , UNCITRAL Partial Award of 13 September 2001	1119
9. <i>Phillips Petroleum v. Iran</i> , Case No. 39, Chamber No. Two, Award No. 425-39-2, Iran-U.S., Cl. Trib. (June 1989)	1122
10. <i>Case Concerning Elettronica Sicula, S.A. (ELSI) case (U.S. v. Italy)</i> , Judgment of 20 July 1989, 1989 I.C.J. 15	1127
11. <i>Gami Investments, Inc. v. The Government of the United Mexican States</i> , UNCITRAL (NAFTA), Final Award of 12 November 2004	1128
12. UNCTAD, <i>Taking of Property</i> (2000)	1130
13. UNCTAD, <i>Bilateral Investment Treaties in the Mid-1990s</i> (1998)	1131
14. Comments and Questions	1132
<b>III. Relative Standards</b>	<b>1133</b>
A. National Treatment	1133
1. U.S. Model BIT Art. II (1) and (8) (1992)	1133
2. NAFTA Art. 1102	1134
3. The Energy Charter Treaty Art. 10(2) (3) (7) and (10)	1134
4. <i>S.D. Myers, Inc. v. Canada</i> , Partial Award of 13 November 2000 (NAFTA)	1135
5. <i>Pope &amp; Talbot, Inc. v. Canada</i> , UNCITRAL (NAFTA) Award of 10 April 2001	1138
6. <i>Marvin Feldman v. Mexico</i> , ICSID Case No. ARB(AF)/99/1, NAFTA Award of 16 December 2002	1146



## CONTENTS

7. <i>Loewen Group, Inc. and Raymond L. Loewen v. United States of America</i> , ICSID Case No. ARB(AF)/98/3, Award of 25 June 2003, 7 ICSID Rep.	1151
8. Rodolf Dolzer and Margrete Stevens, <i>Bilateral Investment Treaties</i> (Kluwer Law International 1995)	1152
9. United Nations Conference on Trade and Development (UNCTAD), <i>National Treatment</i> (1999)	1152
10. Comments and Questions	1154
B. Most-Favored-Nation Treatment	1156
1. U.S. Model BIT Art. II(9) (1992)	1156
2. NAFTA Art. 1103	1156
3. <i>Maffezini v. Spain</i> , ICSID Case No. ARB/97/7, Decision on Jurisdiction of 25 January 2000, 16 ICSID Rev. – FILJ 212 (2001)	1156
4. UNCTAD, <i>Most-Favoured-Nation Treatment</i> (1999)	1162
5. UNCTAD, <i>Bilateral Investment Treaties in the Mid-1990s</i> (1998)	1163
6. Rodolf Dolzer and Margrete Stevens, <i>Bilateral Investment Treaties</i> (Kluwer 1995)	1164
7. Comments and Questions	1165
<b>IV. Transparency</b>	<b>1166</b>
A. U.S. Model BIT, Art. II (7)	1166
B. NAFTA Article 102: Objectives	1166
C. ECT Art. 20	1166
D. UNCTAD, <i>Bilateral Investment Treaties in the Mid-1990s</i> (1998)	1166
E. <i>Metalclad Corp. v. United Mexican States</i> , ICSID (NAFTA) Case No. ARB(AF)/97/1, 16 ICSID Rev. – FILJ 168 (2001)	1167
F. Comments and Questions	1169
<b>CHAPTER 10</b>	
<b>DEFENCES</b>	<b>1171</b>
I. Introduction	1171
II. <i>Force Majeure</i>	1172
A. <i>National Oil Corporation (Libya) v. Libyan Sun Oil Company (USA)</i> , Case No. 4462/A5, First Award of 31 May 1985, 29 I.L.M. 565	1172
B. Comments and Questions	1174
C. <i>Gould Marketing, Inc. v. Ministry of National Defense of Iran</i> , Interlocutory Award No. 24-49-2 of 27 July 1983, 3 Iran-US Cl. Trib. Rep. 147	1175
D. <i>Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran</i> , Award of 14 July 1987, 15 Iran-US CTR 189 (1987-II)	1176
E. Comments and Questions	1178



FOREIGN INVESTMENT DISPUTES

F. <i>Phillips Petroleum Company Iran v. The Islamic Republic of Iran &amp; the National Iranian Oil Company</i> , Award of 29 June 1989, 21 Iran-US CTR 79 (1989-I)	1178
G. Comments and Questions	1180
H. <i>UNIDROIT Principles of International Commercial Contracts</i> (2004), Articles 6.2.1, 6.2.2, 6.2.3, 7.1.7	1181
I. Comments and Questions	1182
J. International Law Commission, <i>Articles on Responsibility of States for Internationally Wrongful Acts</i> , November 2001, Article 23 and Commentary	1182
K. Comments and Questions	1187
L. James Crawford & Anthony Sinclair, <i>The Unidroit Principles of International Commercial Contracts and their Application to State Contracts</i> , ICC Court of Arbitration Bulletin, Special Supplement 57-75 (Paris, 2002)	1187
M. Comments and Questions	1195
<b>III. Coercion and Duress</b>	<b>1195</b>
A. Detlev Vagts, <i>Coercion and Foreign Investment Rearrangements</i> , 72 Am. J. Int'l L. 17 (1978)	1195
B. Comments and Questions	1198
C. <i>UNIDROIT Principles of International Commercial Contracts</i> , article 3.9 (2004)	1198
D. International Law Commission, <i>Articles on Responsibility of States for Internationally Wrongful Acts</i> , November 2001, Article 18 and Commentary	1199
E. Comments and Questions	1201
F. <i>Government of Kuwait v. American Independent Oil Company (AMINOIL)</i> , Award of 24 March 1982, 66 I.L.R. 519	1201
G. Comments and Questions	1203
<b>IV. Necessity</b>	<b>1203</b>
A. <i>Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)</i> , Judgment of 25 September 1997, 1997 I.C.J. 7	1203
B. International Law Commission, <i>Articles on Responsibility of States for Internationally Wrongful Acts</i> , November 2001, Article 25 and Commentary	1209
C. Comments and Questions	1213
D. <i>Himpurna California Energy Ltd. v. Indonesia</i> (1999), Final Award of 4 May 1999, 25 Y.B. Com. Arb. 11-432 (2000)	1213
E. Comments and Questions	1216
<b>V. Corruption</b>	<b>1217</b>
A. Anti-Bribery Provisions of The Foreign Corrupt Practices Act	1217



## CONTENTS

B. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997	1221
C. International Chamber of Commerce, Award in Case no. 1110 of 1963, 21 Y.B. Com. Arb. 47 (1996)	1225
D. J. Gillis Wetter, <i>Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No. 1110</i> , 10 Arb. Int'l 277 (1994)	1226
E. Comments and Questions	1229
F. International Chamber of Commerce, Second Interim Award in Case 4145 of 1984, 12 Y.B. Com. Arb. 97 (1987)	1229
G. Comments and Questions	1232
H. International Chamber of Commerce, Final Award in Case no. 5622 of 1988, 19 Y.B. Com. Arb. 105 (1994)	1232
I. Comments and Questions	1235
J. International Chamber of Commerce, Partial Award in Case no. 6286 of 28 August 1991, 19 Y.B. Com. Arb. 141 (1994)	1235
K. Comments and Questions	1236
L. ICSID, <i>Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited</i> , Case No. ARB/98/8, Decision on Tariff and Other Remaining Issues of 9 February 2001, 8 ICSID Reports 272	1236
M. Comments and Questions	1237
N. Phillippe Fouchard et al., <i>Fouchard Gaillard Goldman on International Commercial Arbitration</i> (Emmanuel Gaillard & John Savage eds., Kluwer Law International, 1999)	1237
O. Comments and Questions	1238
<b>VI. Fundamental Change of Circumstances (<i>Rebus Sic Stantibus</i> / <i>Imprévision</i>)</b>	<b>1239</b>
A. <i>UNIDROIT Principles of International Commercial Contracts</i> (2004), Articles 6.2.1, 6.2.2, 6.2.3	1239
B. <i>Questech, Inc. v. The Ministry of National Defence of the Islamic Republic of Iran</i> , Award of 20 September 1985, 9 Iran-US CTR 107 (1985)	1240
C. Comments and Questions	1244
<b>CHAPTER 11</b>	
<b>REPARATIONS RECOVERABLE BY FOREIGN INVESTORS IN INTERNATIONAL LAW</b>	<b>1245</b>
I. Introduction	1245
II. Reparations Generally	1246
A. General types of reparations	1246



## FOREIGN INVESTMENT DISPUTES

1. International Law Commission (ILC) Articles on State Responsibility, Fifty-third session (2001), Articles 31 & 34	1246
2. <i>Draft Convention on State Responsibility</i> , 55 Am. J. Int'l L. 545, 581 (1961)	1246
B. General Principle of Reparations – <i>Factory at Chorzow Case</i> , 1928 P.C.I.J. No. 13	1247
C. Causation and limits on reparations	1247
1. James Crawford, Special Rapporteur, <i>Third Report on State Responsibility</i> , International Law Commission 52nd Sess., at 22, U.N. Doc. A/CN.4/507 (2000)	1247
2. United Nations Compensation Commission, <i>Report and Recommendations Made by the Panel of Commissioners Concerning Part Two of the Third Installment of “F3” Claims</i> , S/AC.26/2002/19 (2002)	1248
3. 2 F. V. Garcia-Amador, <i>The Changing Law of International Claims</i> , 599-601 (Oceana Publications 1984)	1249
4. ILC Articles on State Responsibility article 39	1250
5. <i>Draft Convention on State Responsibility</i> , 55 Am. J. Int'l L. 545, 581 (1961)	1250
6. <i>Bridas S.A.P.I.C. (Argentina) et al. v. Government of Turkmenistan</i> , ICC Case No. 9058/FMS/KGA, Third Partial Award of 2 September 2000	1251
7. Comments and Questions	1252
<b>III. Declaratory and Injunctive Relief</b>	<b>1252</b>
A. ILC Articles on State Responsibility, articles 29, 30 and 35	1252
B. James Crawford, Special Rapporteur, <i>Third Report on State Responsibility</i> , International Law Commission 52nd Sess., at 22, U.N. Doc. A/CN.4/507 (2000)	1253
C. Christoph Schreuer, <i>The ICSID Convention: A Commentary</i> , Art. 54(c) 1124-1126 (Cambridge U. Press 2001)	1253
D. Ian Brownlie, <i>Principles of Public International Law</i> 462 (Oxford, Clarendon Press 1998)	1255
E. 2 F. V. Garcia-Amador, <i>The Changing Law of International Claims</i> , 576-78, 581-83 (1984)	1255
F. <i>Arbitral Award in the Martini Case</i> , 25 Am. J. Int'l Law 554 (1931)	1257
G. <i>Enron Corp. v. Argentina</i> , ICSID Case No. ARB/01/3, Decision on Jurisdiction of 14 January 2004, available at <a href="http://www.asil.org/ilib/Enron.pdf">http://www.asil.org/ilib/Enron.pdf</a> (last visited 24 May 2005)	1260
H. Comments and Questions	1262
<b>IV. Compensation for Breach of Contract</b>	<b>1267</b>
A. <i>Sapphire International Petroleum Ltd. v. National Iranian Oil Co.</i> , 35 I.L.R. 136 (1967); 13 Int'l & Comp. LQ 1011 (1964)	1267
B. <i>P. W. Shufeldt v. Guatemala</i> , 2 R.I.A.A. 1080, Award of 24 July 1930	1269



## CONTENTS

C. <i>Bridas S.A.P. I.C. v. Government of Turkmenistan</i> , Partial Award of 25 June 1999	1270
D. <i>Karaha Bodas Co., LLC v. Pertamina &amp; Others</i> , Final Award of 18 December 2000, 16 Int'l Arb. Rep. C-2	1273
E. ILC Articles on State Responsibility, Fifty-third session, article 36 (2001)	1275
F. <i>Draft Convention on State Responsibility</i> , 55 Am. J. Int'l L. 545, 581 (1961)	1275
G. UNIDROIT Principles of International Commercial Contracts	1276
H. Comments and Questions	1277
<b>V. Restitution and Compensation for Unlawful, Tortious or Delictual Conduct</b>	<b>1278</b>
A. <i>Chorzow Factory Case</i> , 1928 P.C.I.J. No. 13	1278
B. ILC Articles on State Responsibility, Fifty-third session, article 35 (2001)	1283
C. <i>Draft Convention on State Responsibility</i> , 55 Am. J. Int'l L. 545, 581 (1961)	1284
D. <i>Kuwait Petroleum Corporation v. Iraq</i> ; United Nations Compensation Commission	1284
E. <i>Asian Agricultural Products Ltd. v. Democratic Socialist Republic of Sri Lanka</i> , ICSID Case No. ARB/87/3, Award of 27 June 1990, 4 ICSID Rep. 245	1291
F. <i>American Manufacturing &amp; Trading, Inc. v. Republic of Zaire</i> , ICSID Case No. ABR/93/1, Award of 21 February 1997, 36 I.L.M. 1531 (1992)	1295
G. Comments and Questions	1298
<b>VI. Restitution and Compensation for Expropriations</b>	<b>1298</b>
A. Introduction	1298
B. Specific Performance ( <i>restitutio in integrum</i> )	1299
1. <i>Texaco Overseas Petroleum Company/California Asiatic Oil Company v. The Government of the Libyan Arab Republic</i> , Award of 19 January 1977, 17 I.L.M. 3 (1978)	1299
2. <i>Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic</i> , Award of 12 April 1977, 20 I.L.M. 1 (1981)	1302
3. Dr. J. Gillis Wetter & Stephen M. Schwebel, <i>Some Little-Known Cases on Concessions</i> , 40 Brit. Y.B. Int'l L. 183, 220-22 (1964)	1303
4. Comments and Questions	1305
C. What is the Standard of Compensation for an Expropriation?	1305
1. Treaty Standard – <i>Lex Specialis</i>	1305
a. U.S. Model BIT (1992)	1305
b. <i>Phillips Petroleum Company Iran v. The Islamic Republic of Iran</i> , Award No. 425-39-2 (Chamber Two) of 29 June 1989, 21 Iran-U.S. Cl. Trib. Rep. 79	1306



FOREIGN INVESTMENT DISPUTES

c. <i>CME Czech Republic B.V. (The Netherlands) v. The Czech Republic</i> , UNCITRAL Final Award of 14 March 2003	1308
d. Comments and Questions	1310
2. Customary International Law	1311
a. United Nations Resolutions	1311
i. Resolution 1803 (XVII) entitled “Permanent Sovereignty over Natural Resources”, adopted by the General Assembly of the United Nations on 14 December 1962	1311
ii. Resolution 3201 (S-VI) adopted by the United Nations General Assembly on 1 May 1974, entitled “Declaration on the Establishment of a New International Economic Order”, Article 4, paragraph (e)	1311
iii. Resolution 3281 (XXIX), Article 2, adopted by the General Assembly of the United Nations, on 12 December 1974, entitled “Charter of Economic Rights and Duties of the States”	1311
b. <i>Shahin Shaine Ebrahimi v. Iran</i> , Iran-U.S. Claims Tribunal Award 560-44/46/47-3 of 12 October 1994	1311
c. <i>Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic</i> , Award of 12 April 1977, 20 I.L.M. 1 (1981)	1312
d. <i>Government of the State of Kuwait v. American Independent Oil Co. (AMINOIL)</i> , Award of 24 May 1982, 21 I.L.M. 976 (1982)	1313
e. <i>Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran</i> , Award No. 310-56-3 (Chamber Three) of 14 July 1987, 15 Iran-US Cl. Trib. Rep. 189	1316
f. <i>Phillips Petroleum Company Iran v. The Islamic Republic of Iran</i> , Award No. 425-39-2 (Chamber Two) of 29 June 1989, 21 Iran-US Cl. Trib. Rep. 79	1321
g. Brice Clagett, <i>Just Compensation in International Law: The Issues Before the Iran-United States Claims Tribunal, in The Valuation of Nationalized Property in International Law</i> , Vol. IV (Lillich ed. 1987)	1321
h. <i>World Bank Guidelines on the Treatment of Foreign Direct Investment</i> , 31 I.L.M. 1363, 1379, 1382-84 (1992)	1322
i. Comments and Questions	1324
D. Date of Expropriation as Affecting Valuation	1326
1. <i>Compania del Desarrollo de Santa Elena S.A. v. Costa Rica</i> , ICSID Case No. ARB/96/1, Award of 17 February 2000, 15 ICSID Rev. – Foreign Inv. L.J. 169 (2000), 39 I.L.M. 1317 (2000)	1326
2. <i>Phillips Petroleum Co. Iran v. Islamic Republic of Iran</i> , Award No. 425-39-2 of 29 June 1989, 21 Iran-U.S. Cl. Trib. Rep. 79	1329
3. Comments and Questions	1331
<b>VII. Methods for valuing losses</b>	<b>1331</b>
A. Generally	1331
1. Corporeal property	1331
a. <i>Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic</i> , Award of 12 April 1977, 20 I.L.M. 1 (1981)	1331



## CONTENTS

b. <i>SEDCO, Inc. v. National Iranian Oil Company</i> , Award No. 309-129-3 (Chamber Three ) of 7 July 1987, 15 Iran-U.S. Cl. Trib. Rep. 23 1333	1333
2. Lost profits	1336
a. Delagoa Bay Arbitration, described in M. Whiteman, <i>Damages in International Law</i> 1694, 1697-99 (1943)	1336
b. Dr. J. Gillis Wetter & Stephen M. Schwebel, <i>Some Little-Known Cases on Concessions</i> , 40 Brit. Y. B. Int'l L. 183 (1964)	1339
c. The Claim of the Salvador Commercial Company and other citizens of the United States, stockholders in the corporation styled " <i>El Triunfo Company, Limited</i> " v. <i>El Salvador</i> , Award of 8 May 1902, 15 R.I.A.A. 457	1340
d. <i>Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic</i> , Award of 12 April 1977, 20 I.L.M. 1 (1981)	1341
e. Comments and Questions	1343
B. Income-Producing Assets	1344
1. Paul D. Friedland & Eleanor Wong, <i>Measuring Damages for the Deprivation of Income-Producing Assets: ICSID Case Studies</i> , 6 ICSID Rev. – Foreign Inv. L.J. 400, 405-407 (1991)	1344
2. Asset Values	1346
a. Actual Investment	1346
i. <i>Metalclad Corp. v. The United Mexican States</i> , ICSID Case No. ARB (AF)/97/1, Award of 30 August 2000, 16 (1) ICSID Rev. – Foreign Inv. L.J. 168, 197-99	1346
b. Net Book Value Method	1348
i. <i>Finance Corp. v. Government of the Islamic Republic of Iran</i> , Award No. 310-56-3 of 14 July 1987, 15 Iran-US Cl. Trib. Rep. 189	1348
c. Liquidation Value	1351
i. <i>SEDCO, Inc. v. Iran Marine Industrial Company</i> , Award No. 419-128/129-2 of 30 March 1989, 21 Iran-U.S. Cl. Trib. Rep. 31	1351
d. Depreciated Replacement Value	1353
i. <i>Government of the State of Kuwait v. American Independent Oil Co. (AMINOIL)</i> , Award of 24 May 1982, 21 I.L.M. (1982)	1353
e. Comments and Questions	1354
3. Going Concern Value	1355
a. Brice M. Clagett, <i>Just Compensation in International Law: The Issues Before the Iran-United States Claims Tribunal</i> , in <i>The Valuation of Nationalized Property</i> (1987)	1355
b. Comparable Sales	1356
i. <i>CME Czech Republic B.V. (The Netherlands) v. The Czech Republic</i> , UNCITRAL Final Award of 14 March 2003	1356
c. Discounted Cash Flow Method	1359
i. <i>Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran</i> , Award No. 310-56-3 (Chamber Three) of 14 July 1987, 15 Iran-US Cl. Trib. Rep. 189	1359
ii. <i>Government of the State of Kuwait v. American Independent Oil Co. (AMINOIL)</i> , Award of 24 May 1982, 21 I.L.M. 976 (1982)	1362



FOREIGN INVESTMENT DISPUTES

iii. <i>Phillips Petroleum Company Iran v. The Islamic Republic of Iran</i> , Award No. 425-39-2 (Chamber Two) of 29 June 1989, 21 Iran-U.S. Cl. Trib. Rep. 79	1365
iv. <i>CME Czech Republic B.V. (The Netherlands) v. The Czech Republic</i> , UNCITRAL Final Award of 14 March 2003	1367
v. Comments and Questions	1368
4. Underlying Asset Valuation Method	1369
a. <i>Phillips Petroleum Company Iran v. The Islamic Republic of Iran</i> , Award No. 425-39-2 (Chamber Two) of 29 June 1989, 21 Iran-U.S. Cl. Trib. Rep. 79	1369
b. Comments and Questions	1369
5. Alternate Confirming Valuation Methods	1370
a. Charles N. Brower & Jason D. Brueschke, <i>The Iran-United States Claims Tribunal</i> (Kluwer Law International 1998), Ch. 16	1370
6. Minority Share Discount and Share-Transfer Restrictions	1370
a. Charles N. Brower & Jason D. Brueschke, <i>The Iran-United States Claims Tribunal</i> (Kluwer Law International 1998) Ch. 16	1370
<b>VIII. Inflation</b>	<b>1372</b>
A. <i>Government of the State of Kuwait v. American Independent Oil Co. (AMINOIL)</i> , Award of 24 May 1982, 21 I.L.M. 976 (1982)	1372
<b>IX. Interest</b>	<b>1373</b>
A. <i>Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic</i> , Award of 12 April 1977, 20 I.L.M. 1 (1981)	1373
B. <i>McCullough &amp; Company, Inc. v. Ministry of Post, Telegraph and Telephone</i> , Award No. 225-89-3 (Chamber Three) of 22 April 1986, 11 Iran-U.S. Cl. Trib. Rep. 3	1374
C. John Gotanda, <i>Supplemental Damages in Private International Law</i> (Kluwer 1998)	1377
D. ILC Articles on State Responsibility, Fifty-third session (2001)	1380
E. Draft Convention on State Responsibility, art. 38, 55 Am. J. Int'l L. 545, 581 (1961)	1381
F. UNIDROIT Principles on International Commercial Contracts	1381
G. Compound Interest	1381
1. James Crawford, Special Rapporteur, <i>Third Report on State Responsibility</i> , International Law Commission 52nd Sess., at 22, U.N. Doc. A/CN.4/507 (2000)	1381
2. F.A. Mann, <i>Compound Interest as an Item of Damage in International Law</i> , in <i>Further Studies in International Law</i> 377-78, 383-85 (Oxford, Clarendon Press 1990)	1382
3. <i>Compania des Desarrollo de Santa Elena SA v. Republic of Costa Rica</i> , ICSID Case No. ARB/96/1, Award of 17 February 2000, 15 ICSID Rev. – Foreign Inv. L.J. 169 (2000), 39 I.L.M. 1317 (2000)	1383
H. Comments and Questions	1385
<b>X. Currency and Exchange Rate</b>	<b>1386</b>



## CONTENTS

A. <i>Lighthouses Arbitration Between France And Greece, Permanent Court of Arbitration</i> , Award of July 24, 1956, 1956 I.L.R. 299, 302	1386
B. <i>McCollough &amp; Company, Inc. v. Ministry of Post, Telegraph and Telephone</i> , Award No. 225-89-3 (Chamber Three) of 22 April 1986, 11 Iran-U.S. Cl. Trib. Rep. 3	1387
C. Draft Convention on State Responsibility, 55 Am. J. Int'l L. 545, 581 (1961)	1388
<b>XI. Costs</b>	<b>1389</b>
A. Draft Convention on State Responsibility, 55 Am. J. Int'l L. 545, 581 (1961)	1389
B. <i>Bridas S.A.P.I.C. v. Government of Turkmenistan</i> , Case No. 9058/FMS/KGA, Third Partial Award of 2 September 2000	1389
<b>XII. Taxes</b>	<b>1390</b>
A. Draft Convention on State Responsibility, 55 Am. J. Int'l L. 545, 581 (1961)	1390
B. Comments and Questions	1390
<b>CHAPTER 12</b>	
<b>PROCEDURE AND PROOF: DEVELOPING THE CASE</b>	<b>1391</b>
<b>I. Introduction</b>	<b>1391</b>
A. Source of Procedural Rules	1391
B. Strategizing the Case and Selecting Arbitrators	1392
1. R. Doak Bishop, <i>Toward a Harmonized Approach to Advocacy in International Arbitration</i> , in <i>The Art of Advocacy in International Arbitration</i> (Juris Publishing 2004)	1392
<b>II. Initiation of ICSID Case</b>	<b>1395</b>
A. ICSID Convention, Article 36 – Request for Arbitration	1395
B. ICSID Institution Rules, Rule 6	1395
C. <i>Compania de Aguas del Aconquija, S.A. v. Argentine Republic</i> , ICSID Case No. ARB/97/3, 16 ICSID Rev. – FILJ 643, 650-52 (2001)	1395
D. Comments and Questions	1396
<b>III. Preliminary Hearing</b>	<b>1397</b>
A. ICSID Arbitration Rules, Rules 20-21	1397
B. Judge Howard Holtzmann (Judge, Iran-United States Claims Tribunal), Streamlining Arbitral Proceedings: Some Techniques of the Iran-United States Claim Tribunal, 11 Arb. Int'l 39 (1995)	1397
C. Karl-Heinz Bockstiegel, <i>Presenting Evidence in International Arbitration</i> , 16(1) ICSID Review – FILJ 1 (2001)	1402
D. ICSID Model Agenda for the Organizational Hearing	1402
E. UNCITRAL Notes on Organizing an Arbitral Proceeding	1403



FOREIGN INVESTMENT DISPUTES

F. Stanton Belland, <i>The Iran-United States Claims Tribunal: Some Reflections on Trying a Claim</i> , 1 J. Int'l Arb. 237 (1984)	1413
G. Comments and Questions	1413
<b>IV. Jurisdictional Objections</b>	<b>1414</b>
A. ICSID Arbitration Rules, Rule 41	1414
B. UNCITRAL Arbitration Rules, Article 21	1415
C. <i>Compañía de Aguas del Aconquija, S.A. v. Argentine Republic</i> , ICSID Case No. ARB/97/3, Award of 21 November 2000, 16 ICSID Rev. – FILJ 643, 650-52 (2001)	1415
D. Comments and Questions	1416
<b>V. Arbitral Procedure</b>	<b>1418</b>
A. ICSID Arbitration Rules, Rules 29-38	1418
B. UNCITRAL Arbitration Rules, Articles 15, 24-25	1420
C. ICC Arbitration Rules, Articles 15, 20-21	1421
D. International Bar Association's (IBA) Rules on the Taking of Evidence in International Commercial Arbitration (1999)	1422
E. Michael Bühler & Carroll Dorgan, <i>Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration</i> , 17 J. Int. Arb. 1 at 3, 20-21, 24-25, 28-29 (2000)	1423
F. Nicolas C. Ulmer, <i>Winning the Opening Stages of an ICC Arbitration</i> , 8 J. Int'l Arb. 33 (1991)	1426
G. Paul D. Friedland, <i>A Standard Procedure for Presenting Evidence in International Arbitration</i> , 11(4) Mealey's Int'l Arb. R. 25 (April 1996)	1429
H. R. Doak Bishop, <i>Toward a Harmonized Approach to Advocacy in International Arbitration</i> , in <i>The Art of Advocacy in International Arbitration</i> (Juris Publishing 2004)	1431
I. <i>Metalclad Corp. v. United Mexican States</i> , ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000, 16 ICSID Rev. – FILJ 168, 174 (2001)	1432
J. <i>Société Ouest Africaine Des Bétons Industriels [SOABI] v. State of Senegal</i> , ICSID Case No. ARB/82/1, Award on Merits of 25 February 1988, 2 ICSID Rep. 165, 195-96 (1994)	1435
K. <i>Tradex Hellas S.A. v. Republic of Albania</i> , ICSID Case No. ARB/94/2, 14 ICSID Rev. – FILJ 197 (1999)	1436
L. <i>Robert Azninian, Kenneth Davitian, &amp; Ellen Baca v. The United Mexican States</i> , ICSID Case No. ARB(AF)/97/2, 14 ICSID Rev. – FILJ 538 (1999)	1436
M. L. Yves Fortier, <i>The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration – "A Few Plain Rules and a Few Strong Instincts,"</i>	1438



## CONTENTS

N. Comments and Questions	1439
<b>VI. Confidentiality</b>	<b>1440</b>
A. <i>Metalclad Corp. v. United Mexican States</i> , ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000, 16 ICSID Rev. – FILJ 168, 174 (2001)	1440
B. <i>Amco Asia Corporation v. Republic of Indonesia</i> , ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures of 9 December 1983, 1 ICISD Rep. 377, 410-12 (Cambridge Grotius 1993)	1441
<b>VII. Burden of Proof</b>	<b>1443</b>
A. Durward V. Sandifer, <i>Evidence Before International Tribunals</i> (U. Virginia Press 1975, revised edition)	1443
B. Charles N. Brower, <i>Evidence Before International Tribunals: The Need for Some Standard Rules</i> , 28 Int’l Law. 47 (1994)	1446
C. Karl-Heinz Bockstiegel, <i>Presenting Evidence in International Arbitration</i> , 16(1) ICSID Review – FILJ 1 (2001)	1446
D. <i>The Loewen Group, Inc., and Raymond L. Loewen v. United States of America</i> ; ICSID Case No. ARB(AF)/98/3 Award of 26 June 2003	1446
E. <i>Marvin Feldman v. Mexico</i> , ICSID Case No. ARB/(AF)/99/1, Award of December 16, 2002	1447
F. Comments and Questions	1448
<b>VIII. Presumptions and Inferences</b>	<b>1448</b>
A. Durward V. Sandifer, <i>Evidence Before International Tribunals</i> (U. Virginia Press 1975, revised edition)	1448
B. Charles N. Brower, <i>Evidence Before International Tribunals: The Need for Some Standard Rules</i> , 28 Int’l Law. 47 (1994)	1451
C. G. C. Christie, <i>What Constitutes a Taking of Property Under International Law</i> , 38 Brit. Y.B. Int’l L. 307 (1962)	1451
D. Comments and Questions	1452
<b>IX. Discovery</b>	<b>1452</b>
A. Document Production	1452
1. International Bar Association’s (IBA) Rules on the Taking of Evidence in International Commercial Arbitration (1999)	1452
2. Judge Howard M. Holtzmann (Judge, Iran-United States Claims Tribunal), <i>Fact-Finding by the Iran-United States Claims Tribunal</i> , Eleventh Sokol Colloquium at 101, 119-20 (Transnational Publishers, Inc. 1992)	1454
3. Karl Heinz Bockstiegel, <i>Presenting Evidence in International Arbitration</i> , 16(1) ICSID Rev. – FILJ 1 (2001)	1455
4. Christoph H. Schreuer, <i>The ICSID Convention: A Commentary</i> Art. 93 (11)(c), p 650 (Cambridge U. Press 2001)	1456
5. <i>CME Czech Republic B. V. (The Netherlands) v. The Czech Republic</i> , UNCITRAL Partial Award of 13 September 2001	1456



FOREIGN INVESTMENT DISPUTES

6. <i>Ceskoslovenska Obchodni Bana, A.S. v. The Slovak Republic</i> , ICSID Case No. ARB/97/4, 14 ICSID Rev. – FILJ 251 (1999)	1457
<b>B. Adverse inferences</b>	<b>1457</b>
1. Durwood V. Sandifer, <i>Evidence Before International Tribunals</i> (U. Va. Press 1975, revised edition)	1457
2. Charles N. Brower, <i>Evidence Before International Tribunals: The Need for Some Standard Rules</i> , 28 Int’l Law. 47 (1994)	1458
3. Judge Howard M. Holtzmann (Judge, Iran-United States Claims Tribunal), <i>Fact-Finding by the Iran-United States Claims Tribunal</i> , Eleventh Sokol Colloquium at 101, 127-28 (Transnational Publishers, Inc. 1992)	1459
<b>C. Comments and Questions</b>	<b>1459</b>
<b>X. Evidence</b>	<b>1460</b>
A. ICSID Administrative and Financial Regulations, Regulation 30	1460
B. International Bar Association’s (IBA) Rules on the Taking of Evidence in International Commercial Arbitration (1999)	1461
C. Karl Heinz Bockstiegel, <i>Presenting Evidence in International Arbitration</i> , 16 (1) ICSID Rev. – FILJ 1 (2001)	1461
D. Charles N. Brower, <i>Evidence Before International Tribunals: The Need for Some Standard Rules</i> , 28 Int’l Law. 47 (1994)	1463
E. Judge Howard M. Holtzmann (Judge, Iran-United States Claims Tribunal), <i>Fact-Finding Before the Iran-United States Claims Tribunal</i> , Eleventh Sokol Colloquium at 101, 126-27 (Transnational Publishers, Inc. 1992)	1466
<b>F. Interested witnesses</b>	<b>1466</b>
1. Michael Straus, <i>The Practice of the Iran – U. S. Claims Tribunal in Receiving Evidence from Parties and from Experts</i> , 3 J. Int’l Arb. 57 (1986)	1466
2. Charles N. Brower, <i>Evidence Before International Tribunals: The Need for Some Standard Rules</i> , 28 Int’l Law. 47 (1994)	1469
<b>G. <i>Asian Agricultural Products Limited v. Republic of Sri Lanka</i>,</b> ICSID Case No. ARB/87/3, 4 ICSID Rep. 246 (1997)	1469
<b>H. <i>Tradex Hellas S.A. v. Republic of Albania</i>,</b> ICSID Case No. ARB/94/2, 14 ICSID Rev. – FILJ 197 (1999)	1470
<b>J. <i>Parker v. United Mexican States (U.S. v. Mex.)</i>,</b> 4 R.I.A.A. 35, 39 (General Claims Commission 1926)	1472
<b>J. <i>Western Co. of North America v. Oil and Natural Gas Comm’n</i>,</b> 13 Y.B. Com. Arb. 5, 13-14 (1988) (ad hoc arbitration, Ian Kinnell, umpire, 1985)	1473
<b>K. <i>Shufeldt v. Guatemala (Guatemala v. US)</i>,</b> 2 R.I.A.A. 1083	1474
<b>L. <i>Hatton v. United Mexican States (U.S. v. Mexico)</i>,</b> 4 R.I.A.A. 329, 331 (General Claims Commission 1928)	1474
<b>M. <i>McCurdy v. United Mexican States (U.S. v. Mex.)</i>,</b> 4 R.I.A.A. 418, 421 (General Claims Commission 1929)	1475



## CONTENTS

N. <i>Studer v. Great Britain (U.S. v. U.K.)</i> , 6 R.I.A.A. 149, 152 (American & British Claims Arbitration Tribunal 1925)	1476
O. <i>Robert Azninian, Kenneth Davitian, &amp; Ellen Baca v. United Mexican States</i> , ICSID Case No. ARB(AF)/97/2, 14 ICSID Rev. – FILJ 538 (1999)	1476
P. Comments and Questions	1477
<b>XI. Experts</b>	<b>1478</b>
A. ICC Arbitration Rules, Article 20 (4)	1478
B. UNCITRAL Arbitration Rules, Article 27	1478
C. International Bar Association’s (IBA) Rules on the Taking of Evidence in International Commercial Arbitration (1999)	1479
D. Gillian White, <i>The Use of Experts by International Tribunals</i> (Syracuse U. Press, Syracuse, NY 1965), Appendix III	1481
E. Durward V. Sandifer, <i>Evidence Before International Tribunals</i> §77 at 327-28 (U. Virginia Press 1975, revised edition)	1482
F. Michael Straus, <i>The Practice of the Iran-U.S. Claims Tribunal in Receiving Evidence from Parties and from Experts</i> , 3 J. Int’l Arb. 57, 63-67 (1986)	1483
G. R. Doak Bishop, <i>Toward a Harmonized Approach to Advocacy in International Arbitration</i> , in <i>The Art of Advocacy in International Arbitration</i> (Juris Publishing 2004)	1486
H. <i>Société Ouest Africaine Des Bétons Industriels [SOABI] v. State of Senegal</i> , ICSID Case No. ARB/82/1, Award on Merits of 25 February 1988, 2 ICSID Rep. 165, 196 (1994)	1487
I. <i>Lehigh Valley RR Co. v. Germany (Sabotage Cases) (U.S. v. Germany) (Mixed Claims Commission 1932)</i> , 8 Rep. Int’l Arb. Awards 121 (UN 1948-1980)	1487
J. Comments and Questions	1488
<b>XII. Oral Hearings</b>	<b>1489</b>
A. International Bar Association’s (IBA) Rules on the Taking of Evidence in International Commercial Arbitration (1999)	1489
B. Michael Bühler and Carroll Dorgan, <i>Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration</i> , 17 J. Int. Arb.1 at 3, 20-21, 24-25, 28-29 (Kluwer 2000)	1490
C. Judge Howard Holtzmann (Judge, Iran-United States Claims Tribunal), <i>Streamlining Arbitral Proceedings: Some Techniques of the Iran – United States Claims Tribunal</i> , 11 Arb. Int’l. 39 (1995)	1492
D. Stanton Belland, <i>The Iran – United States Claims Tribunal: Some Reflections on Trying a Claim</i> , 1 J. Int’l Arb. 237 (1984)	1494



## FOREIGN INVESTMENT DISPUTES

E. Paul D. Friedland, <i>A Standard Procedure for Presenting Evidence in International Arbitration</i> , 11 (4) Mealey's Int'l Arb. R. 25 (April 1996)	1496
F. Jack J. Coe, Jr., <i>International Commercial Arbitration: American Principles and Practice in a Global Context</i> at 249 (Transnational Publishers, Inc. 1997)	1497
G. R. Doak Bishop, <i>Toward a Harmonized Approach to Advocacy in International Arbitration</i> , in <i>The Art of Advocacy in International Arbitration</i> (Juris Publishing 2004)	1498
H. <i>Vacuum Salt Products Limited v. Government of the Republic of Ghana</i> , ICSID Case No. ARB/92/1, 4 ICSID Rep. 320, 347-48 (1997), Award of 16 February 1994	1501
I. <i>Tradex Hellas S.A. v. Republic of Albania</i> , ICSID Case No. ARB/94/2, 14 ICSID Rev. – FILJ 197 (1999)	1501
J. Comments and Questions	1502
<b>XIII. Translations</b>	<b>1503</b>
A. ICSID Arbitration Rules, Rule 22 – Procedural Languages	1503
B. Durward V. Sandifer, <i>Evidence Before International Tribunals</i> § 68, p. 285 (U. Virginia Press 1975, Rev. Ed.)	1503
C. Jack J. Coe, Jr., <i>International Commercial Arbitration: American Principles and Practice in a Global Context</i> at 249 (Transnational Publishers, Inc. 1997)	1503
D. Stanton Belland, <i>The Iran-United States Claims Tribunal: Some Reflections on Trying a Claim</i> , 1 J. Int'l Arb. 237 (1984)	1504
E. Comments and Questions	1504
<b>XIV. The Role of Amicae in Investment Disputes Involving Public Issues</b>	<b>1505</b>
A. <i>Methanex v. United States</i> ; Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae”	1505
B. Statement of the NAFTA Free Trade Commission on non-disputing party participation (October 7, 2003)	1512
C. United States Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations (October 7, 2003)	1514
D. Comments and Questions	1514
<b>CHAPTER 13</b>	
<b>RECOGNITION AND ENFORCEMENT OF INTERNATIONAL ARBITRAL PROCEEDINGS AND AWARDS</b>	<b>1515</b>
<b>I. Introduction</b>	<b>1515</b>
<b>II. Recognition and Enforcement Mechanisms</b>	<b>1515</b>
A. The Special Regime of the ICSID Convention	1515



## CONTENTS

1. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”) Done at Washington, 18 March 1965; Entered into force, 14 October 1966; 575 U.N.T.S. 160 (1966)	1515
2. Christoph H. Schreuer, <i>The ICSID Convention: A Commentary</i> (Cambridge, 2001), Article 54	1516
3. <i>Benvenuti et Bonfant SRL v. The Government of the People’s Republic of the Congo</i> , ICSID Case No. ARB/77/2, Judgment of 26 June 1981, 1 <i>ICSID Reports</i> 368, France, Cour d’appel	1521
B. Enforcement of Arbitral Awards (Other than ICSID)	1524
1. The New York Convention	1524
a. In general	1524
i. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) Done at New York, 10 June 1958; Entered into force, 7 June 1959; 330 U.N.T.S. 38 (1959)	1524
b. Direct effect of international arbitral awards made under treaties	1528
i. <i>Dallal v. Bank Mellat</i> , Judgment of 26 July 1985, 75 I.L.R. 151, England, High Court, Queen’s Bench Division	1528
c. Grounds for Refusal of Recognition and Enforcement	1531
i. <i>Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt</i> , ICSID Case No. ARB/84/3, Judgment of 12 July 1984, 3 <i>ICSID Reports</i> p. 92 (86 I.L.R. 492), The Netherlands, District Court of Amsterdam	1531
2. Regional Conventions	1533
a. Inter-American Convention on International Commercial Arbitration (“Panama Convention”) Done at Panama City, 30 January 1975; Entered into force, 16 June 1976; 1438 U.N.T.S. 248 (1986)	1533
b. European Convention on International Commercial Arbitration Done at Geneva, 21 April 1961; Entered into force, 7 January 1964	1536
<b>III. Challenge to Arbitral Awards</b>	<b>1542</b>
A. Challenge to Awards under the ICSID Convention	1542
1. Interpretation, Revision and Annulment of an ICSID Award	1542
a. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”) Done at Washington, 18 March 1965; Entered into force, 14 October 1966; 575 U.N.T.S. 160 (1966)	1542
b. <i>Wena Hotels Limited v. Arab Republic of Egypt</i> , ICSID Case No. ARB98/4, Decision on Annulment of 8 December 2000, 6 <i>ICSID Rep.</i> p. 129, 41 <i>ILM</i> 933 (2002) <i>Ad Hoc</i> Committee	1544
c. <i>Compañía de Aguas del Aconquija S.A. and Vivendi Universal (Formerly Compagnie Générale Des Eaux) v. Argentine Republic</i> , ICSID Case No. ARB97/3, Decision on Annulment of 3 July 2002, 6 <i>ICSID Rep.</i> 340, 41 <i>ILM</i> 1135 (2002) <i>Ad Hoc</i> Committee	1549
d. Comments and Questions	1561
2. Supplementation and Rectification of an ICSID Award	1561



## FOREIGN INVESTMENT DISPUTES

a. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”)	1561
b. <i>Compañía de Aguas del Aconquija S.A. and Vivendi Universal (Formerly Compagnie Générale Des Eaux) v. Argentine Republic</i> , ICSID Case No. ARB97/3, Decision on Supplementation and Rectification of 28 May 2003, 7 ICSID Rep. p. 489, <i>Ad Hoc</i> Committee	1561
B. Challenge of Awards of non-ICSID Tribunals	1562
1. UNCITRAL Model Law on International Commercial Arbitration, 1994	1562
2. Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration	1563
3. <i>The Czech Republic v. CME Czech Republic B.V.</i> , UNCITRAL Judgment of 15 May 2003, Challenge to Arbitration Award Sweden, Court of Appeal, Stockholm, 9 ICSID Rep. (in press)	1564
4. Comments and Questions	1578
5. Swedish Arbitration Act 1999 (sfs 1999:116)	1578
6. United Kingdom Arbitration Act 1996	1579
7. <i>Arab Republic of Egypt v. Southern Pacific Properties Limited and Southern Pacific Properties (Middle East) Limited</i> , Judgment of 12 July 1984, 3 ICSID Reports 79, France, <i>Cour d’appel</i> , Paris (First Additional Chamber)	1583
C. Interpretation and Supplementary Decisions of Awards under the ICSID Additional Facility	1589
1. Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility Rules)	1589
2. <i>United Mexican States v. Metalclad Corporation</i> , ICSID Case No. ARB(AF)97/1, Judgment of 2 May 2001, 5 ICSID Reports 238 (119 International Law Reports 647), Canada, Supreme Court of British Columbia (Tysoe J)	1590
<b>IV. Issues of State or Sovereign Immunity</b>	<b>1613</b>
A. Basic Distinctions	1613
1. “Sovereign” and “Commercial” Activity	1613
a. ILC, Ad Hoc Committee on Jurisdictional Immunities of States and Their Property Draft Articles on jurisdictional immunities of States and their property	1613
2. Immunity from Jurisdiction and Immunity from Enforcement	1616
a. Restatement of the Law (Third): The Foreign Relations Law of the United States, §451 St Paul, American Law Institute, 1987	1616
b. Restatement of the Law (Third): The Foreign Relations Law of the United States, §460 St Paul, American Law Institute, 1987	1617
c. ILC, Ad Hoc Committee on Jurisdictional Immunities of States and Their Property Draft Articles on jurisdictional immunities of States and their property	1619



## CONTENTS

d. ILC, Ad Hoc Committee on Jurisdictional Immunities of States and Their Property Draft Articles on jurisdictional immunities of States and their property	1621
B. Differing National Approaches	1621
1. The US Approach: <i>Foreign Sovereign Immunities Act 1976</i>	1621
a. United States Foreign Sovereign Immunities Act 1976	1621
b. <i>Creighton Limited v. Government of the State of Qatar</i> , Decision of 2 July 1999, US Court of Appeals, Dist. of Columbia Circuit decided 2 July 1999, 181 F.3d 118 (D.C. Cir. 1999)	1628
c. <i>S &amp; Davis International, Inc. v. The Republic of Yemen</i> , Decision of 21 July 2000, United States, Court of Appeals, 11th Circuit, 218 F.3d 1292 (11th Cir. 2000)	1636
d. Restatement of the Law (Third): The Foreign Relations Law of the United States, §456 St Paul, American Law Institute, 1987	1646
2. The U.K. Approach – <i>State Immunity Act 1978</i>	1649
C. Assets Subject to Attachment and Execution	1650
1. United States “Helms Amendment”	1650
2. Foreign States Immunities Act 1985 (Australia)	1652