Global Public Interest in International Investment Law

The strengths of international investment law – above all, a strong focus on investor interests and an effective adjudication and enforcement system – also entail its weaknesses: it runs the danger of impeding or even sanctioning the host states' legitimate regulatory interests and ignoring other fields of public international law. How does it cope with public interest concerns such as human rights, the environment, or the fight against corruption? At the heart of this book lies a fresh approach towards a general theory of such global public interest considerations in the investment realm. Delineating how and why those considerations matter, and why the current system does not accommodate them properly, Andreas Kulick fleshes out general principles and customary international law as defences the host state may raise against alleged investor rights infringements, and promotes proportionality as the appropriate balancing mechanism.

Andreas Kulick is currently finishing his Bar training at the Berlin Higher Regional Court (Kammergericht).
Established in 1946, this series produces high quality scholarship in the fields of public and private international law and comparative law. Although these are distinct legal sub-disciplines, developments since 1946 confirm their interrelations.

Comparative law is increasingly used as a tool in the making of law at national, regional and international levels. Private international law is now often affected by international conventions, and the issues faced by classical conflicts rules are frequently dealt with by substantive harmonisation of law under international auspices. Mixed international arbitrations, especially those involving state economic activity, raise mixed questions of public and private international law, while in many fields (such as the protection of human rights and democratic standards, investment guarantees and international criminal law) international and national systems interact. National constitutional arrangements relating to ‘foreign affairs’, and to the implementation of international norms, are a focus of attention.

The series welcomes works of a theoretical or interdisciplinary character, and those focusing on the new approaches to international or comparative law or conflicts of law. Studies of particular institutions or problems are equally welcome, as are translations of the best work published in other languages.

General Editors

James Crawford SC FBA
Whewell Professor of International Law, Faculty of Law,
University of Cambridge

John S. Bell FBA
Professor of Law, Faculty of Law, University of Cambridge

A list of books in the series can be found at the end of this volume.
Global Public Interest in International Investment Law

Andreas Kulick

Dissertation at the Eberhard Karls University, Tübingen D 21
Meiner Mutter
Dissertation of the University of Tübingen
D 21
Contents

Foreword page xiii
Acknowledgments xv
Table of Cases xvii
Table of Treaties and Other Documents xxvi

1 Introduction 1

Part I Towards the Global Public Interest theory

2 The “internationalization” of international investment law 11
   A. A first glance at Article 42(1) ICSID 12
      1. Context: general principle of Article 42 ICSID is freedom of choice 12
      2. Possible cases in which international law may be applicable under Article 42 ICSID 13
      3. International law as applicable even in case of an exclusive choice of domestic law according to Article 42(1) first sentence ICSID 14
   B. Drafting history of Article 42(1) second sentence ICSID 15
   C. The role of BITs in international investment law 17
      1. BITs as a recent phenomenon 17
      2. Codification and promotion of international law through BITs 18
   D. The relationship of domestic law and international law 19
## CONTENTS

1. Preliminary remarks 19
2. The Klöckner-Amco doctrine 21
3. The dissolution of the Klöckner-Amco doctrine 30
4. A new doctrine: Wena 33
5. The Argentine crisis Tribunals and beyond 38

E. The changing face of international investment law 45
   1. Six preliminary observations 45
   2. “Prominent role”: The “internationalization” of international investment law 46
   3. The “integration” of international investment law 48
   4. Outlook: The public interest challenge 50
   5. Consequences of the above findings: Three hypotheticals 52

3 Public interest and international economic law – current approaches 57
   A. Scholarly approaches towards international legal obligations of MNEs 57
      1. A scholarly attempt to shape the practice: The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights 58
      2. Scholarly approaches towards an international legal personality of MNEs 61
   B. Public interest considerations in recent BIT practice 66
      1. Prelude: The principle of good faith and Article XX GATT 66
      2. Public interest considerations in BITs 69

4 The Global Public Interest theory 77
   A. Setting the stage: International investment law as Global Public Law 77
      1. The Global Administrative Law face of international investment law 78
      2. Constitutional elements in international investment law 85
      3. International investment law as Global Public Law 94
CONTENTS

F. Operationalizing proportionality analysis in international investment law 193
   1. Why proportionality analysis? 193
   2. Doctrinal structure: Three-tier analysis 195
   3. “Obligations” vs. “defenses” 197
   4. Factors to be considered while balancing on the proportionality *stricto sensu* level 198
   5. Some doctrinal challenges 202
   6. Consequence: Reduced amount of compensation and damages 209

G. Potential safeguards against abuse 213
   1. Substantive safeguards: Recap 214
   2. Procedural safeguards: Provisional measures 215

H. What this means: Completing the three hypotheticals 217
   1. Environment 218
   2. Human rights 219
   3. Corruption 220

Part II Global Public Interest in international investment case law

6 International investment law and the environment 225
   A. Principles of international environmental law 225
      1. The polluter pays principle 226
      2. The principle of preventive action 227
      3. The precautionary principle 228
      4. Common but differentiated responsibility principle 231
   B. Do international environmental law treaties bear any relevance for the analysis at hand? 232
   C. International investment disputes involving environmental issues 233
      1. *Santa Elena* v. *Costa Rica* 234
      3. *S. D. Myers* v. *Canada* 240
      4. *Tecmed* v. *Mexico* 245
      7. *Biwater* v. *Tanzania* 252
      8. *Chemtura* v. *Canada* 255
D. Analysis of the case law
   1. Preliminary conclusions
   2. The case law on environment in the light of the Global Public Interest theory

7 Human rights and investment – friends or foes?
   A. Doctrinal approaches in a nutshell
   B. Human rights issues in investment disputes
      1. Alleged violations of the investor’s human rights
      2. Alleged violations of human rights by the investor
         (a) General human rights cases
         (b) Specific case study: The right to water
   C. Analysis of the case law
      1. What’s wrong with human rights?
      2. Through the back door
      3. Growing role of third parties
      4. The case law on human rights in the light of the Global Public Interest theory

8 Corruption and other irregularities
   A. How bad is corruption?
   B. Forms of corruption, definitions and international instruments
      1. “Hard corruption” and “influence peddling”
      2. International instruments
         (a) OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
         (b) Criminal Law Convention on Corruption of the Council of Europe
         (c) BIT provisions relevant in corruption cases
   C. Corruption disputes in international investment law
      1. Distinguish two different types of corruption disputes
      2. International investment case law pertaining to corruption and other irregularities
         (a) Wena v. Egypt and SGS v. Pakistan
         (b) World Duty Free v. Republic of Kenya
         (c) Inceysa v. El Salvador
xii CONTENTS

(d) Fraport v. Philippines 324
(e) Kardassopoulos v. Georgia 325

D. Analysis of the case law 327
  1. Preliminary conclusions 327
  2. Alternative approaches 331
     (a) Modification or adaptation of the main contract 331
     (b) Balancing with the investor’s rights on the merits stage 332

9 Concluding remarks 342

Bibliography 346
Index 365
Foreword

International investment agreements (otherwise known as BITs) deal, mostly if not exclusively, with the protection of foreign investment, and are generally seen as doing so from the perspective of investor rights. As it happens, unlike human rights treaties, they are not articulated as conferring substantive individual rights. But when combined with the powerful procedural tool of investor–state arbitration, that is their effect. However, as experience has shown and as fierce opposition to the creation of a multilateral framework has demonstrated, investment disputes often engage matters of the public interest, e.g. human rights, corruption, regulation of waste or chemicals, or more generally the environment. It is an unresolved question how well investment Tribunals are taking such factors into account.

Andreas Kulick, who has studied at Freiburg, Geneva, Berlin, New York and has received a Ph.D. from the University of Tübingen, finished the thesis on which this book is based at Cambridge’s Lauterpacht Centre. At the heart of his work is the (current and potential) influence of what he calls, in capitals, the Global Public Interest on international investment law and on the jurisprudence of the Tribunals. Borrowing from the Global Administrative Law movement and from Constitutionalization theory, he sees investment law as public law. Basing himself on a comparative analysis with European law and the European Convention on Human Rights, he argues that general (customary) international law and general principles of law can be employed by the host State as defences against investment claims; these should be balanced against each other according to the principle of proportionality. Of particular interest is how the defence of necessity (ILC Articles on State Responsibility, Article 25) has been used (or rejected) by the Tribunals as a means to serve the public interest.
His book seeks to draw out the pressing need for including public interest considerations in the realm of international investment law and to identify the challenges this entails. He focuses on three examples that epitomize this challenge: human rights, the environment and corruption.

Capitalised Concepts are not without their difficulties, and this is certainly true of the Global Administrative Law, which seems to posit a system of *vires* and nullity without any of the accompanying institutions or procedures of review. In the common law tradition, at least, modern administrative law was the consequence, not the cause, of such institutions and procedures. On the other hand, international law went for much of its life with few or no institutions and with rudimentary procedures, yet it managed to generate general and constraining ideas. There is no reason to assume such potentiality has disappeared. While one might prefer to induce public interest on a case-by-case basis, a more *a priori* method may serve – and certainly Andreas Kulick presents a good argument for it. This is a welcome addition to the literature on international investment law at a time when the general and the particular are actively contesting the field.

James Crawford
Lauterpacht Centre for International Law
University of Cambridge
Acknowledgments

A Ph.D. thesis is a long-term project. This one has been no exception. That it came to life and that it eventually crystallized into the book the esteemed reader now holds in his or her hands is due to inspiration and support of various kinds and from various sources. Without them there would be a much weaker or even no book at all. Both people and institutions have contributed to its successful conclusion, to whom and which I owe the utmost gratitude.

First and foremost, I wish to thank my supervisor, Professor Dr. Martin Nettesheim, who was an inspiring mentor with the rare ability to combine unambiguous support for me and my project with the amount of critique necessary to transform good but sometimes lofty ideas into a thought-through and thorough thesis. Moreover, I am indebted to Professor Dr. Wolfgang Graf Vitzthum for so timely providing the second report on my Ph.D. thesis.

I had the great privilege to find time and inspiration to write in the New World as well as in the old. Hence, I am grateful to Professors José Alvarez and Robert Howse of New York University School of Law, who introduced me to the world of international investment law during my LL.M. year at NYU, and particularly to Professor James Crawford, SC, FBA of Cambridge University, who gave me the opportunity to find a peaceful and inspiring environment at the Lauterpacht Centre for International Law in the spring of 2010 and wrote such a learned foreword to this book.

Additionally, I have to thank many more people for their valuable comments on drafts of my work, above all the three anonymous readers at Cambridge University Press.

Moreover, without financial support from several institutions the academic extravagancies I was so lucky to pursue would never have been possible. Thus, many thanks go to the Fulbright Commission and the Friedrich
ACKNOWLEDGMENTS

Ebert Foundation for supporting my LL.M. studies at NYU, where first ideas started to ripen into the result of which I reap hereby. The German Academic Exchange Service (DAAD) sponsored my time at the Lauterpacht Centre.

Last but not least I wish to thank Cambridge University Press and above all Nienke van Schaverbeke for accompanying my book project from first proposal to final publication.

Andreas Kulick
# Table of Cases

## ICSID and UNCITRAL cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Decision details</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>ADC Affiliate Limited and ADC &amp; ADMC Management Limited v. Republic of Hungary (ICSID Case No. ARB/03/16), Award, October 1, 2006</td>
<td>209, 264</td>
<td>2006</td>
</tr>
<tr>
<td>Aguas del Tunari, SA v. Bolivia (ICSID Case No. ARB/02/3)</td>
<td>294–96</td>
<td>2002</td>
</tr>
<tr>
<td>ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan (ICSID Case No. ARB/08/2), Award, May 18, 2010</td>
<td>44</td>
<td>2010</td>
</tr>
<tr>
<td>Azurix v. The Argentine Republic (ICSID Case No. ARB/01/12), Award, July 14, 2006</td>
<td>38, 207, 296–99, 300–01, 363</td>
<td>2006</td>
</tr>
<tr>
<td>BG Group PLC v. Argentine Republic (UNCITRAL), Final Award, December 24, 2007</td>
<td>131, 133–34, 141, 143, 146</td>
<td>2007</td>
</tr>
</tbody>
</table>
## TABLE OF CASES

<table>
<thead>
<tr>
<th>Case</th>
<th>Citation</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana (UNCITRAL), Award on Jurisdiction and Liability, October 27, 1989</td>
<td>ILR, 184</td>
<td>119</td>
</tr>
<tr>
<td>Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana, Award on Damages and Costs, June 30, 1990 (UNCITRAL)</td>
<td>ILR, 95 (1993), 184</td>
<td>272, 275</td>
</tr>
<tr>
<td>Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (ICSID Case No. ARB/05/22), Award, July 24, 2008</td>
<td>234, 252–55, 260–61, 268, 299–300, 303</td>
<td></td>
</tr>
<tr>
<td>Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis (ICSID Case No. ARB/95/2), Award, December 16, 1996</td>
<td>ICSID Review, 12 (1997), 330</td>
<td>32</td>
</tr>
<tr>
<td>Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada, Ad Hoc NAFTA Arbitration under UNCITRAL Rules, Award, August 2, 2010</td>
<td>255–58</td>
<td></td>
</tr>
<tr>
<td>Chevron Corporation (USA) and Texaco Corporation (USA) v. Republic of Ecuador (UNCITRAL), Partial Award on the Merits, March 30, 2010</td>
<td>44</td>
<td></td>
</tr>
<tr>
<td>CME Czech Republic BV (The Netherlands) v. Czech Republic (UNCITRAL), Final Award, March 13, 2003</td>
<td>210–11</td>
<td></td>
</tr>
<tr>
<td>Compañía de Aguas de Aconquija, SA (AdA) &amp; Compagnie Générale des Eaux v. Argentina (ICSID Case No ARB/97/3), Award, November 21, 2000</td>
<td>ICSID Reports, 5 (2002), 299</td>
<td>291–93</td>
</tr>
<tr>
<td>Compañía de Aguas de Aconquija, SA (AdA) &amp; Vivendi (formerly Compagnie Générale des Eaux) v. Argentina (ICSID Case No ARB/97/3), Decision on Annulment, July 3, 2002</td>
<td>ILM, 41 (2002), 1135</td>
<td>291–93</td>
</tr>
<tr>
<td>Compañía de Aguas de Aconquija, SA (AdA) &amp; Vivendi (formerly Compagnie Générale des Eaux) v. Argentina (ICSID Case No ARB/97/3), Award, August 20, 2007</td>
<td>291–93</td>
<td></td>
</tr>
<tr>
<td>Continental Casualty Company v. Argentine Republic (ICSID Case No. ARB/03/9), Award, September 5, 2008</td>
<td>73, 131, 133, 135–37, 144, 146, 185</td>
<td></td>
</tr>
<tr>
<td>Desert Line Projects LLC v. The Republic of Yemen (ICSID Case No. ARB/05/17), Award, February 6, 2008</td>
<td>273, 275</td>
<td></td>
</tr>
<tr>
<td>Case Description</td>
<td>Jurisdiction/Date</td>
<td>Pages</td>
</tr>
<tr>
<td>----------------------------------------------------------------------------------</td>
<td>------------------------------------------</td>
<td>-------</td>
</tr>
<tr>
<td>Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB(AF)/07/1), Award, August 4, 2010</td>
<td>285–88</td>
<td></td>
</tr>
<tr>
<td>Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe (ICSID Case No. ARB/05/6), Award, April 22, 2009</td>
<td>44</td>
<td></td>
</tr>
<tr>
<td>Ioannis Kardassopoulos v. Georgia (ICSID Case No. ARB/05/18), Decision on Jurisdiction, July 6, 2007</td>
<td>325–28, 334</td>
<td></td>
</tr>
<tr>
<td>Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia (ICSID Case No. ARB/05/18 and 07/15), Award, March 3, 2010</td>
<td>44, 57–58</td>
<td></td>
</tr>
<tr>
<td>Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais (ICSID Case No. ARB/81/2), Award of the Tribunal, October 21, 1983, 1983 WL 510000 (APPAWD)</td>
<td>22</td>
<td></td>
</tr>
<tr>
<td>Metalpar SA and Buen Aire SA v. The Argentine Republic (ICSID Case No. ARB/03/5), Award, June 6, 2006</td>
<td>131</td>
<td></td>
</tr>
<tr>
<td>Middle East Cement Shipping and Handling Co. SA v. Arab Republic of Egypt (ICSID Case No. ARB/99/6), Award of the Tribunal, April 12, 2002, ICSID Review – FILJ, 17 (2002), 602</td>
<td>36</td>
<td></td>
</tr>
<tr>
<td>National Grid PLC v. Argentine Republic (UNCITRAL), Award, November 3, 2008</td>
<td>131, 133–34, 138, 143, 146</td>
<td></td>
</tr>
<tr>
<td>Patrick Mitchell v. Democratic Republic of Congo (ICSID Case No. ARB/99/7), Decision on the Application for Annulment of the Award, November 1, 2006</td>
<td>273</td>
<td></td>
</tr>
<tr>
<td>Case</td>
<td>Jurisdiction</td>
<td>Published or Available Date</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------</td>
<td>------------------------------</td>
</tr>
<tr>
<td>Phoenix Action Ltd. v. Czech Republic (ICSID Case No. ARB/06/5)</td>
<td>Award, April 15, 2009</td>
<td></td>
</tr>
<tr>
<td>Siemens AG v. Argentine Republic (ICSID Case No. ARB/02/8), Award, February 6, 2007, 2007 WL 1215068 (APPAWD)</td>
<td>38–39, 44, 276–79</td>
<td></td>
</tr>
<tr>
<td>Société Ouest Africaine des Bétons Industriels v. Senegal (ICSID Case No. ARB/82/1), Award, February 25, 1988</td>
<td>125</td>
<td></td>
</tr>
<tr>
<td>Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt (ICSID Case No. ARB/84/3), Award, May 20, 1992, ICSID Reports, 3 (1992), 189</td>
<td>14, 25, 31, 47, 199, 212, 259</td>
<td></td>
</tr>
<tr>
<td>Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA, and AWG Group v. The Argentine Republic (ICSID Case No. ARB/03/19), Decision on Liability, July 30, 2010</td>
<td>44</td>
<td></td>
</tr>
<tr>
<td>Tecnicas Medioambientales Tecmed SA v. The United Mexican States (ICSID Case No. ARB (AF)/00/2), Award, May 29, 2003</td>
<td>183–84, 206, 208, 237, 245–46, 262–66, 274–76, 278, 298</td>
<td></td>
</tr>
<tr>
<td>Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18), Decision on Jurisdiction, April 29, 2004</td>
<td>323, 333</td>
<td></td>
</tr>
</tbody>
</table>

**NAFTA cases**

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States (ICSID Case No. ARB (AF)/04/5 (NAFTA)), Award, November 21, 2007 142
**Corn Products International, Inc. v. United Mexican States (ICSID Case No. ARB (AF)/04/1 (NAFTA)), Decision on Responsibility, January 15, 2008** 142–43, 145, 166


**Int’l Thunderbird Gaming Corp. v. United Mexican States, 2006 WL 247692 (separate opinion of Thomas W. Walde), January 26, 2006** 119

**Metalclad Corporation v. United Mexican States (ICSID Case No. ARB(AF)/97/1), Award, August 30, 2000** 237–40, 245, 258–59, 262, 285

**Methanex Corporation v. United States of America (UNCITRAL) (NAFTA), Final Award, August 3, 2005** 234, 236, 251–52, 254, 257, 260–64, 266

**Mondev International Ltd v. United States of America (ICSID Case No. ARB(AF)/99/2 (Award)), Award, October 11, 2002,** ILM, 42 (2003), 85 274, 276

**S. D. Myers, Inc. v. Canada (UNCITRAL) (NAFTA) Partial Award, November 13, 2000** 233, 240–43, 259–61, 266

**Waste Management, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/00/3), Award, April 30, 2004** 249–51, 262

### ICJ and PCIJ cases


**Cameroon v. Nigeria,** *ICJ Reports,* (1998), 275 258

**Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment of February 5, 1970,** *ICJ Reports,* 3 (1970), 32 90

**Case Concerning the Delimitation of the Maritime Boundary Limitation in the Gulf of Maine Area (Canada v. United States of America), Judgment of October 12, 1984,** *ICJ Reports,* (1984), 246 170, 212

**Case Concerning United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran), Judgment of May 24, 1980,** *ICJ Reports,* (1980), 3 90

**The Corfu Channel Case (The United Kingdom v. Albania), Merits, Judgment of April 9, 1949,** *ICJ Reports,* (1949), 4 89


**The Case of the SS “Lotus,” France v. Turkey, September 7, 1927,** PCIJ, Series A, No. 9, 18 87–89
Military and Paramilitary Activities in and against Nicaragua
(Nicaragua v. United States of America), Merits, ICJ Reports, (1986), 14 90, 157–58, 180
North Sea Continental Shelf Cases, ICJ Reports, (1969), 43 107, 155, 157

GATT and WTO Panel and Appellate Body reports
WTO Appellate Body, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, December 17, 2007 185

European Court of Human Rights cases
European Court of Human Rights, Gørgülü v. Germany, App. No. 74969/01, Final Judgment of May 26, 2004 125
European Court of Human Rights, In the case of James and Others v. United Kingdom, Judgment of February 21, 1986 247, 274, 278, 288
European Court of Human Rights, M. v. Germany, App. No. 19359/04, Judgment of December 17, 2009 125
### TABLE OF CASES

| European Court of Human Rights, In the case of Matos e Silva, Lda., and Others v. Portugal, Judgment of September 16, 1996 | 264–65 |

#### European Court of Justice and European Court of First Instance cases

| ECJ, Case 120/78, Cassis de Dijon, Judgment of February 20, 1979 – see [1979] ECR 649 | 179 |
| ECJ, Case C-479/93, Francovich v. Italy [1995] ECR I-3843 | 82 |
| ECJ, Case C-112/00, Schmidberger v. Austria [2003] ECR I-569 | 108–09, 147–48 |
| ECJ, Case C-36/02, Omega v. Germany [2004], ECR I-9609 | 109 |

#### Cases decided by domestic courts

| Canadian Supreme Court, Regina v. Oakes [1986] 1 SCR 103 | 176 |
| Canada, Supreme Court of British Columbia, The United Mexican States v. Metalclad Corporation, 2001 BCSC 664, Judgment, Tysoe J., May 2, 2001 | 239 |
| German Federal Constitutional Court, “Lüth,” Judgment of January 15, 1958, 1 BvR 400/51, BVerfGE 7, 198 | 174 |
| German Federal Constitutional Court, “Apothekenurteil,” Judgment of June 11, 1958, 1 BvR 596/56, BVerfGE 7, 377 | 175, 177 |
| German Federal Constitutional Court, Judgment of December 15, 1965, 1 BvR 513/65, BVerfGE 19, 342 | 176 |
| German Federal Constitutional Court, Judgment of December 18, 1968, 1 BvL 5, 14/64, BVerfGE 25, 1 | 187 |
| German Federal Constitutional Court, “Solange I,” May 29, 1974, BVerfGE 37, 271 | 108 |
**Table of Cases**

German Federal Constitutional Court, Decision of December 17, 1975, 1 BvR 63/68, BVerfGE 41, 29 192

German Federal Constitutional Court, “Solange II,” October 22, 1986, BVerfGE 73, 339 108

German Federal Constitutional Court, Judgment of October 24, 2002, 2 BvF 1/01, BVerfGE 106, 62 191

German Federal Constitutional Court, Judgment of August 25, 2005, 2 Be 4, 7/05, BVerfGE 114, 121 191

German Federal Constitutional Court, Judgment of May 31, 2006, 2 BvR 1693/04 192


Irish High Court, Heaney v. Ireland [1994] 3 IR 593 (Ir.) 177

Irish High Court, Rock v. Ireland [1997] 3 IR 484 (Ir.) 177

Israel Supreme Court, CA 6821/93, United Mizrahi Bank Ltd. v. Migdal Cooperative Village [1995] IsrSC 49(4) 177

New Zealand High Court, Ministry of Transport v. Noort [1992] 3 NZLR 260 (CA) 177

New Zealand High Court, Hansen v. The Queen [2007] 3 NZLR 1 (SC) 177

South African Supreme Court, State v Makwanyane & Another, 1995 (3) SA 391, 436 (CC) 178

South Africa, North and South Gauteng High Court, Pretoria, Agri South Africa and Annis Möhr van Rooyen v. Minister of Minerals and Energy, Case 55896/2007, Judgment of March 6, 2009 287

US Court of Appeals, United States v. Postal, 589 F.2d 862 (5th Cir. 1979) 102

US Supreme Court, Marbury v. Madison, 5 US (1 Cranch) 137 (1803) 84

US Supreme Court, Asakura v. City of Seattle, 265 US 332 (1924) 102

US Supreme Court, United States v. Carolene Products Co., 304 US 144 (1938) 189–90, 196


US Supreme Court, Craig v. Boren, 429 US 190, 197 (1976) 190

**Cases decided by other tribunals and courts**


Lake Lanoux, Spain v. France, Arbitral Award, November 16, 1957, Report of International Arbitral Awards, 12, (1957), 281 289
<table>
<thead>
<tr>
<th>Table of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Russian Indemnities case (Russia v. Turkey), Award of the Arbitral Tribunal, November 11, 1912, Permanent Court of Arbitration, UNRIAA, vol. XI, 421 141</td>
</tr>
</tbody>
</table>