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).

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Andreas Kulick
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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

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

B. Comparative insights 99
1. Recall the seven observations on international investment law 99
2. The European law system 101
3. The European Convention on Human Rights system 118
C. The Global Public Interest theory 127
1. Two examples of public interest considerations in international investment case law 127
2. Lessons learned from the comparative insights 146
3. The State as the agent of public interest 149
4. Lessons learned from international investment law as Global Public Law 151
5. The legal translation of Global Public Interest 154

5 How to balance the conflicting interests: Proportionality analysis 168
A. Doctrinal avenues of proportionality analysis in international investment law 168
B. Some skepticism regarding proportionality analysis 171
C. Comparative insights 173
1. The German pedigree of proportionality analysis and its reception in other domestic constitutional orders 174
2. Proportionality analysis in the European legal order – ECJ jurisprudence 178
3. Proportionality in the jurisprudence of international Tribunals 179
4. A glimpse into investment arbitration jurisprudence vis-à-vis proportionality 183
D. Elements of proportionality analysis 186
1. Suitability 186
2. Necessity 187
3. Proportionality *stricto sensu* 188
E. Principles relevant in proportionality analysis 189
1. Standards of review (*Kontrolldichte*), margin of appreciation and standards of scrutiny 189
2. "Praktische Konkordanz" 191
3. Limits to the balancing test (*ius cogens*) 192

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
2. *Metalclad* v. *Mexico* 237
3. *S. D. Myers* v. *Canada* 240
4. *Tecmed* v. *Mexico* 245
5. *Waste Management* v. *Mexico* 249
6. *Methanex* v. *United States* 251
7. *Biwater* v. *Tanzania* 252
8. *Chemtura* v. *Canada* 255

D. Analysis of the case law 258
1. Preliminary conclusions 258
2. The case law on environment in the light of the Global Public Interest theory 267

7 Human rights and investment – friends or foes? 269
A. Doctrinal approaches in a nutshell 269
B. Human rights issues in investment disputes 271
1. Alleged violations *of* the investor's human rights 271
2. Alleged violations of human rights *by* the investor 276
(a) General human rights cases 276
(b) Specific case study: The right to water 288
C. Analysis of the case law 300
1. What's wrong with human rights? 300
2. Through the back door 303
3. Growing role of third parties 304
4. The case law on human rights in the light of the Global Public Interest theory 305

8 Corruption and other irregularities 307
A. How bad is corruption? 307
B. Forms of corruption, definitions and international instruments 309
1. "Hard corruption" and "influence peddling" 309
2. International instruments 310
(a) OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 310
(b) Criminal Law Convention on Corruption of the Council of Europe 312
(c) BIT provisions relevant in corruption cases 312
C. Corruption disputes in international investment law 313
1. Distinguish two different types of corruption disputes 313
2. International investment case law pertaining to corruption and other irregularities 314
(a) *Wena* v. *Egypt* and *SGS* v. *Pakistan* 314
(b) *World Duty Free* v. *Republic of Kenya* 315
(c) *Inceysa* v. *El Salvador* 321

(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.

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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.

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Andreas Kulick

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ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary (ICSID Case No. ARB/03/16), Award, October 1, 2006 209, 264

ADF Group Inc. v. United States, Award, January 9, 2003, *ICSID Review – FILJ*, 18 (2003), 195; *ICSID Reports*, 6 (2004), 470 207

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Aguas del Tunari, SA v. Bolivia (ICSID Case No. ARB/02/3) 294–96

Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1), Decision on the Application for Annulment, May 16, 1986, *ICSID Reports*, 1 (1990), 509 21, 24–25, 27, 33, 217

Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1), Resubmitted Case, Award, May 30, 1990, *ICSID Reports*, 1 (1990), 569 30, 46

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ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan (ICSID Case No. ARB/08/2), Award, May 18, 2010 44

Autopista Concesionada de Venezuela, CA v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/00/5), Award of the Tribunal, September 23, 2003, available at http://icsid.worldbank.org/ICSID/FrontServlet 36–37, 46–47

Azurix v. The Argentine Republic (ICSID Case No. ARB/01/12), Award, July 14, 2006 38, 207, 296–99, 300–01, 363

BG Group PLC v. Argentine Republic (UNCITRAL), Final Award, December 24, 2007 131, 133–34, 141, 143, 146

Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana (UNCITRAL), Award on Jurisdiction and Liability, October 27, 1989, *ILR*, 184 119
Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana, Award on Damages and Costs, June 30, 1990 (UNCITRAL), *ILR*, 95 (1993), 184 272, 275
Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (ICSID Case No. ARB/05/22), Award, July 24, 2008 234, 252–55, 260–61, 268, 299–300, 303
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, *ICSID Review*, 12 (1997), 330 32
Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada, Ad Hoc NAFTA Arbitration under UNCITRAL Rules, Award, August 2, 2010 255–58
Chevron Corporation (USA) and Texaco Corporation (USA) v. Republic of Ecuador (UNCITRAL), Partial Award on the Merits, March 30, 2010 44
CME Czech Republic BV (The Netherlands) v. Czech Republic (UNCITRAL), Final Award, March 13, 2003 210–11
CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Award, May 12, 2005, available at http://icsid.worldbank.org/ICSID/FrontServlet 38–41, 45, 131–35, 137–41, 144–46
Compañia de Aguas de Aconquija, SA (AdA) & Compagnie Générale des Eaux v. Argentina (ICSID Case No ARB/97/3), Award, November 21, 2000, *ICSID Reports*, 5 (2002), 299 291–93
Compañia de Aguas de Aconquija, SA (AdA) & Vivendi (formerly Compagnie Générale des Eaux) v. Argentina (ICSID Case No ARB/97/3), Decision on Annulment, July 3, 2002, *ILM*, 41 (2002), 1135 291–93
Compañia de Aguas de Aconquija, SA (AdA) & Vivendi (formerly Compagnie Générale des Eaux) v. Argentina (ICSID Case No ARB/97/3), Award, August 20, 2007 291–93
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Desert Line Projects LLC v. The Republic of Yemen (ICSID Case No. ARB/05/17), Award, February 6, 2008 273, 275–76
Enron Corporation & Ponderosa Assets v. Argentine Republic (ICSID Case No. ARB/01/3), Award, May 22, 2007 (hereinafter: Enron v. Argentina), 2007 WL 5366471 (APPAWD) 38–40, 44–46, 48, 131, 134, 135, 137–38, 141, 144, 146, 203

Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB(AF)/07/1), Award, August 4, 2010 285–88
Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (ICSID Case No. ARB/03/25), Award, August 16, 2007 127–30, 205, 324–25, 328, 334, 336, 339
Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe (ICSID Case No. ARB/05/6), Award, April 22, 2009 44
Goetz and others v. Republic of Burundi, Award, September 2, 1998 and February 10, 1999, *ICSID Reports*, 6 (2000), 5 209
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Inceysa Vallisoletana, SL v Republic of El Salvador (ICSID Case No. ARB/03/26), Award, August 2, 2006 127–30, 164–65, 205, 321–24, 325, 328–29, 333–34, 337, 339–40
Ioannis Kardassopoulos v. Georgia (ICSID Case No. ARB/05/18), Decision on Jurisdiction, July 6, 2007 325–28, 334
Iaonnis Kardassopoulos and Ron Fuchs v. Republic of Georgia (ICSID Case No. ARB/05/18 and 07/15), Award, March 3, 2010 44, 57–58
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Metalpar SA and Buen Aire SA v. The Argentine Republic (ICSID Case No. ARB/03/5), Award, June 6, 2006 131
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 36
National Grid PLC v. Argentine Republic (UNCITRAL), Award, November 3, 2008 131, 133–34, 138, 143, 146
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 273

Phoenix Action Ltd. v. Czech Republic (ICSID Case No. ARB/06/5), Award, April 15, 2009 302
Saipem SpA. v. People's Republic of Bangladesh (ICSID Case No. ARB/05/7), Decision on Jurisdiction and Recommendation on Provisional Matters, March 21, 2007, available at http://icsid.worldbank.org/ICSID/FrontServlet 20, 50, 262
Saluka Investments BV v. Czech Republic, Partial Award, March 17, 2006, PCA, available at www.pca-cpa.org/showpage.asp?pag_id=1149 184, 236–37, 257, 263
Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16), Award of the Tribunal, September 28, 2007, available at http://icsid.worldbank.org/ICSID/FrontServlet 38, 44–46, 131, 133–35, 137–38, 141, 144, 146, 276, 279–81, 301
Siemens AG v. Argentine Republic (ICSID Case No. ARB/02/8), Award, February 6, 2007, 2007 WL 1215068 (APPAWD) 38–39, 44, 276–79
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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 44
Tecnicas Medioambientales Tecmed SA v. The United Mexican States (ICSID Case No. ARB (AF)/00/2), Award, May 29, 2003 183–84, 206, 208, 237, 245–46, 262–66, 274–76, 278, 298
Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18), Decision on Jurisdiction, April 29, 2004 323, 333
Tradex Hellas SA v. Republic of Albania (ICSID Case No. ARB/94/2), Award, April 29, 1999, *ICSID Review – FILJ*, 15 (2000), 197 31–32, 47
Wena v. Egypt, Decision on Application for Annulment, February 5, 2002, *ILM*, 41 (2002), 933 19, 33, 35–41, 43–44, 46, 48, 50, 111, 314, 327
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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
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WTO Appellate Body, European Communities – Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, February 13, 1998 230
WTO Appellate Body, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, December 11, 2000 136
WTO Appellate Body, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, October 12, 1998, AB-1998–4 68, 78, 80
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European Court of Human Rights, Dudgeon v. United Kingdom, App. No. 7525/76 (Eur. Ct. HR, October 22, 1981) 182–83
European Court of Human Rights, Görgülü v. Germany, App. No. 74969/01, Final Judgment of May 26, 2004 125
European Court of Human Rights, Handyside v. United Kingdom, App. No. 5493/72 (Eur. Ct. HR, December 7, 1976) 182–83, 190
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

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

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European Court of First Instance, Case T-13/99, Judgment of November 23, 2002 – Pfizer Animal Health SA v. Commission [2002] ECR II-3305 179
ECJ, Case 26/62, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Aministratie der Belastingen [1963] ECR 1 102
ECJ, Case 6/64, Flaminio Costa v. ENEL [1964] ECR 585 101, 103–04, 116–18
ECJ, Case 11/70, Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide [1970] ECR 1125 108
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ECJ, Case 120/78, Cassis de Dijon, Judgment of February 20, 1979 – see [1979] ECR 649 179
ECJ, Case 44/79, Hauer v. Rheinland-Pfalz [1979] ECR 3727 108
ECJ, Case C-479/93, Francovich v. Italy [1995] ECR I-3843 82
ECJ, Case C-112/00, Schmidberger v. Austria [2003] ECR I-5659 108–09, 147–48
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ECJ, Joined Cases C-402/05 and C-415/05 P: Yassin Abdullah Kadi v. Council of the European Union & Al Barakaat International Foundation v. Council of the European Union, 2008 WL 4056300, [2008] 3 CMLR 41, Celex No. 605J0402, ECJ, September 3, 2008 78

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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

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
Indian Supreme Court, Vellore Citizens' Welfare Forum v. Union of India and Others, Writ Petition (C) No. 914 of 1991, Judgment of August 28, 1996 230
Irish High Court, Heaney v. Ireland [1994] 3 IR 593 (Ir.) 177
Irish High Court, Rock v. Ireland [1997] 3 IR 484 (Ir.) 177
Isreali 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, Railway Express Agency, Inc. v. New York, 336 US 106 (1949) 190
US Supreme Court, Craig v. Boren, 429 US 190, 197 (1976) 190

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Agreement Between the Kingdom of Norway And . . . . For The Promotion and Protection of Investments, issued December 19, 2007, available at http://ita.law.uvic.ca/investmenttreaties.htm 73

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