

INDEX

Note: abbreviations specific to particular cases can be found at 43–4 (*Methanex*), 217–18 (*Noble Ventures*) and 387–8 (*Aguas del Tunari*)

Abbreviations used in the index

ASEAN Agreement (1987) (ASEAN Agreement for the Promotion and Protection of Investments (1987))
Enron (*Enron Corporation v. Argentina*)
 FFIC (Fireman's Fund Insurance Company)
 FTC (NAFTA Free Trade Commission)
 FTC Interpretative Note (FTC Interpretative Note on Certain Chapter Eleven Provisions (31 July 2001))
GAMI (*GAMI Investments Inc. v. United Mexican States*)
 IBA (International Bar Association)
 ICJ (International Court of Justice (Statute))
 ILC (International Law Commission Draft Articles on State Responsibility)
LG&E (*LG&E Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*)
MTD (*MTD Equity Sdn Bhd and MTD Chile SA v. Chile*)
 NAFTA (North American Free Trade Agreement (1992))
 PO (Procedural Order)
 SCC Institute (Stockholm Chamber of Commerce Arbitration Institute)
 SPA (Romanian State Ownership Fund (SFO)–Noble Ventures Share Purchase Agreement (5 June 2000))
 UC Report (University of California Report of 12 November 1998)
Vacuum Salt (*Vacuum Salt Products v. Republic of Ghana*)
 VCLT (Vienna Convention on the Law of Treaties)

Additional Facility Rules (Arbitration)

14(2) (disclosure notice) 529
 16(2) (suspension of proceedings) 527

Administrative and Financial Regulations, 25 226

admissibility, jurisdiction distinguished 23

Aguas del Tunari (jurisdiction)

abbreviations used in index 387
 applicable law
 BIT/ICSID (substantive matters) 323
 English text 323
 VCLT (interpretation of BIT): *see also* interpretation of BIT/treaties (VCLT) *below*
 as expression of customary international law 323
 review of provisions 323–5
 Tribunal's approach to 325
 changes in AdT upstream ownership structure (Concession 37.1), effect on jurisdiction 339–43
 breach of contract distinguished 343
 founding and ultimate shareholders distinguished 340–1

Aguas del Tunari (jurisdiction) (*cont.*)

- parties' positions
 - claimant 339–40
 - respondent 339
- Tribunal's decision 340–3
- consent to ICSID jurisdiction, Concession as limitation on BIT consent/'reasonable contemplation' test 346–9
 - parties' positions
 - claimant 348
 - respondent 346–8
 - production of evidence (PO 1) and 348, 380–2
 - Tribunal's decision 348–9
- constituent subdivision or agency as party to the proceedings, designation requirement (ICSID 25(1)) 333–5
 - claimant 334–5
 - parties' arguments, respondent 333–4
 - Tribunal's decision 335
- contract, interpretation, *travaux préparatoires*/negotiating history and 333
- 'controlled directly or indirectly' (BIT 1(b)(iii)) 376
 - BIT practice 368–74
 - Bolivia 372–4
 - Netherlands 369–72
 - 'directly or indirectly'/actual control 356–60
 - joint/multiple control 358–9
 - 'foreign control' (ICSID 25(2)(b)) distinguished 365–7
 - jurisprudence 365–8
 - object and purpose of BIT and 357–60
 - ordinary meaning (VCLT 31(1)) 353
 - 'control' distinguished 354
 - ownership as indication of control 358
 - parties' positions
 - claimant 350
 - respondent 349
 - points agreed by parties 351
 - production of evidence (PO 1) and 364, 377, 382–6
 - 'special meaning' intended by parties (VCLT 31(4)), whether 354–6
 - statements of Netherlands government, whether 'subsequent practice' (VCLT 31(3)(b)) 360–3
 - travaux préparatoires*/production of evidence (PO 1) 364
 - Tribunal's analysis and findings 350–76
 - decision on 'direct or indirect control' of AdT 374–6
 - summary 363
- corporation, legal personality
 - corporate migration, effect 341–3
 - law of place of incorporation as applicable law 343
- decision 303, 379
- declaration (Alberro-Semerena) 379–86
- forum selection clause (Concession 41.2)/exclusive jurisdiction 325–33
 - conflicting mandatory obligations as threshold question 329–31
 - exclusive reference to Bolivian courts, whether 329–30

- parties' arguments
 - claimant 325–9
 - respondent 325–9
- preclusion of ICSID jurisdiction, dependence on parties' intention 329–30
- impossibility of determining 333
- proceedings not involving same matters and parties 330–1
- Tribunal's decision 329–33
- waiver of right to initiate ICSID proceedings
 - exclusive jurisdiction/forum selection clause as implied waiver 332–3
 - explicit waiver 331–2
- general considerations 320–1
- interpretation of BIT/treaties (VCLT)
 - article as a whole 337–8
 - non-hierarchical nature of general rule (VCLT 31) 324
 - object and purpose (VCLT 31(1)) 339, 357–60
 - ordinary meaning (VCLT 31(1)) 353
 - dictionary meanings 353–4
 - parties' subsequent practice establishing agreement concerning interpretation (VCLT 31(3)(b)) 360–3
 - supplementary means (VCLT 32), role 325
 - jurisprudence 365–8
 - travaux préparatoires* 364
- misrepresentation in relation to effect of changes to AdT upstream ownership structure 344–6
- parties' positions
 - claimant 344–5
 - respondent 344
- Tribunal's decision 345–6
- summary of case 305
 - claimant's position 321–2
 - respondent's objections 322–3
- Tribunal's overall decision
 - concluding observation 377–9
 - decision 379
- 'within the framework of its law and regulations' (BIT 2) as alleged exclusion of ICSID jurisdiction 336
 - parties' arguments
 - claimant 336
 - respondent 336
 - Tribunal's decision 336–9
- Aguas del Tunari* (procedural issues and background)**
 - documents
 - letter of 1 October 2004 from Tribunal to Netherlands Government (Appendix IV) 390
 - letter of 29 January 2003 from Tribunal to Earthjustice (Appendix III) 388
 - factual background 314–20
 - AdT status 314
 - AdT upstream ownership structure: *see also Aguas del Tunari* (jurisdiction), changes in AdT upstream ownership structure (Concession 37.1), effect on jurisdiction September 1999 316

Aguas del Tunari (procedural issues and background) (*cont.*)

September 1999, corporate reorganization following 318–19
 December 1999 319

Cochabamba Water and Sewage Concession

conclusion (3 September 1999) 315
 negotiating history 333
 public reactions to 317–18, 319
 termination (April 2000) 319

Cochabamba Water and Sewage Concession, terms 316

Art. 37.1 (obligation to keep to more than 50 per cent of original equity percentage)
 316, 339–43

Art. 41.2 (forum selection/choice of law) 316, 329–33

Art. 41.3 (dispute resolution: provisions in international treaties) 316

Art. 41.5 (dispute resolution: international arbitration) 316

procedural history

agreement to treat jurisdiction as preliminary matter 309
 appointment of arbitrators/constitution of Tribunal 306–7
 NGO request to intervene/participate 307–8
 notice of registration 306
 post-hearing inquiry to non-disputing party to BIT 314
 request for arbitration 306

Procedural Orders

1 (production of evidence) 309–11, 348, 377, 380–6
 2 (postponement of hearing because of events in Bolivia) 311–13
 3 (presentation of witnesses) 313

amicus curiae

discretion of arbitral tribunal 66
 legal representatives, status 67
 NAFTA tribunal (*Methanex*) 66–7
 rejection of NGO's request to intervene/participate 307–8

applicable law (arbitration: general)

choice of law clause/as agreed by parties, conflict with *jus cogens*/fundamental principle
 of international law, tribunal's obligations 194
 jurisdiction: *see* jurisdiction (ICSID), applicable law

applicable law (NAFTA arbitral tribunal) (NAFTA 1131)

applicable rules of international law
 customary international law 554–6
 GATT/WTO jurisprudence 48–9: *see also* precedent (NAFTA arbitral tribunal),
 GATT/WTO decision/decision of tribunal other than NAFTA
 as set out in ICJ 38(1) 48–9

UNCITRAL Arbitration Rules (NAFTA 1120(1)(c)) 50

arbitral award, binding nature, interim or partial award 88, 111

arbitrary and discriminatory treatment

jurisprudence, *ELSI* 274
 reorganization of government organs, whether 274–5

arbitrator

resignation
FFIC tribunal 527
Methanex tribunal 47, 85–6
 UNCITRAL Rules 89

Argentina–Belgo-Luxembourg Economic Union BIT (1990) 6–31

- ‘bifurcation clause’ (‘fork in the road’), absence 26
- interpretation
 - applicable law (VCLT) 28
 - parties’ intention 28–9
 - responsibility for 29

Argentina–Belgo-Luxembourg Economic Union BIT (1990) by article

- 1(2)(b) (‘investments’) 20–1
- 4(1) (MFN) 26–7
- 9 (applicable law: parties’ right to choose between BIT and legislation) 16
- 10(2) (umbrella clause) 22
- 12(4) (discontinuation of action in domestic courts on initiation of international arbitration) 26

ASEAN Agreement (1987), exhaustion of local administrative or judicial remedies, absence of provision 609–10**Belgium and Luxembourg–USSR BIT (1989)**

- as multilingual treaty/authentic languages 489
- text 473

Belgium and Luxembourg–USSR BIT (1989) by article

- preamble (object and purpose: promotion of investment), indirect investment and 496–7
 - 1.1 (‘investor’) 488–9
 - 1.2 (‘investment’)
 - ‘any kind of asset invested by investors of one Contracting Party in the territory of the other’ 489, 490
 - ‘indirect investments . . . made by intermediary of third State’ 490, 491–7
 - kapitalovlozhenie/vlozhit* meaning 489
 - ‘made in the territory’ 491
 - 1.2.2 (‘investments’: shares . . . related debts) 490, 491
 - 1.2.3 (‘investments’: ‘rights of claim . . . having an economic value’)
 - contractual rights 490
 - property rights in construction site 490
 - 2 (MFN treatment), applicability to dispute settlement provisions 500–9
 - ‘all matters covered by’ 505–7, 515–18
 - parties’ intention 504–5
 - 10 (dispute resolution) 469
 - 10.1 (pre-arbitration procedure)
 - ‘concerning the . . . compensation to be paid under Art. 5’ 497–500, 512–15
 - ordinary meaning 497–8
 - other BITs compared
 - Belgium/Luxembourg compared 499
 - USSR/Russia 498–9
 - written notice 487–8
 - 10.3.1 (applicable law: terms of the treaty) 512
- Berschader**
- applicable law (jurisdiction)
 - BIT/relevant rules of international law 486–7
 - jurisprudence relating to ICSID 487
 - Russian law, relevance 486–7
 - correction of award (9 June 2006) 518–19

Berschader (*cont.*)

- factual background 468–9
- ‘investment’ (BIT 1.2)
 - classification as assets (BIT 1.2) 490–1
 - ‘made in the territory’ 491, 494
 - economic reality, relevance 497
 - ‘indirect investment’
 - absence of BIT provision for 494–6
 - promotion of investment as object and purpose (BIT preamble), relevance 496–7
 - ‘indirect investments . . . made by intermediary of third State’ 490, 491–7
 - kapitalovlozhenie/vlozhit*, meaning 489
 - lawfulness of investments as matter for the merits 489
 - ordinary meaning (VCLT 31(1)) 494–6
 - parties’ submissions
 - claimants 482–3
 - respondent 478–9
 - review of the jurisprudence 491–4
 - status of BI and 491
 - Tribunal’s findings 489
- ‘investor’ (BIT 1.1)
 - parties’ submissions
 - claimants 483
 - respondent 479
 - Tribunal’s findings 488–9
- pre-arbitration procedures, BIT (written notice) (BIT 10.1)
 - parties’ submissions
 - claimants 481–2
 - respondent 477–8
 - Tribunal’s findings 487–8
- procedural history
 - advance on costs 470, 510
 - appointment of arbitrators 470
 - challenge to arbitrator 470
 - challenge to Chairman 471
 - challenge to the jurisdiction, procedural orders relating to 471
 - costs, allocation and apportionment 486–511, 518
 - language of proceedings 470–1
 - oral hearings and post-hearing submissions 472–3
 - request for arbitration and response 469–70
- scope of arbitration
 - BIT 2 (MFN clause), applicability 500–9, 515–18
 - ‘all matters covered by’ 505–7, 515–18
 - parties’ intention 504–5, 507–9, 517 n.15, 517 n.16
 - review of the jurisprudence 505
 - BIT 10.1: ‘concerning the . . . compensation to be paid under Art. 5’ 497–500, 512–15
 - ordinary meaning 497–8
 - other treaties concluded by USSR/Russia/Belgium and Luxembourg compared 498–9, 517

- parties' submissions
 - claimants 484–5, 500
 - respondent 479–80, 500
- separate opinion 512–18
- Tribunal's findings 497–509
- separate opinion (Weiler) (scope of arbitration) 512–18
- standing of claimants/allegations of fraud on rightful claimant
 - parties' submissions
 - claimants 485–6
 - respondent 480–1
 - Tribunal's finding 509
 - Tribunal's Award 511–12
 - Tribunal's conclusion on jurisdiction 510
 - Tribunal's reasons for decision 486–511
- 'bifurcation clause' ('fork in the road')**, exhaustion of local remedies and 610–11
- BITs (bilateral investment treaties)**: *see also* ASEAN Agreement (1987); Bolivia–Netherlands BIT (1994); Greece–Yugoslavia (FRY) BIT (1997) by article; Romania–US BIT (1992) by article; Trinidad and Tobago–USA BIT (1994)
- breach
 - breach of investment contract as 458
 - parties' arguments 18–20
- interpretation: *see* treaties, interpretation
- as means of structuring investment 379
- pre-arbitration procedural requirements
- jurisprudence
 - Lauder* 487
 - Petrobart* 487
 - Salini* 487
- reason for 487
- written notification 487–8
- as source of applicable rules of international law, 'controlled directly or indirectly' 368–74
- variations between 368–74
- Bolivia**, BITs, practice relating to 372–4
- Bolivia–Netherlands BIT (1994)**: *see also* *Aguas del Tunari* (jurisdiction)
 - 'English text will prevail' 323
 - object and purpose (preamble/Art. 2) 337, 357
 - travaux préparatoires*, sparsity of record 364
- Bolivia–Netherlands BIT (1994) by article**
 - preamble (object and purpose), text 357
 - 1(b)(ii) ('nationals': legal persons under law of contracting party), text 322
 - 1(b)(iii) ('nationals': legal persons under law of other contracting party)
 - 'controlled directly or indirectly' 376
 - text 322
 - 2 (promotion of economic cooperation through protection of investments)
 - text 337
 - 'within the framework of its law and regulations' 336
 - 9(6) (forum selection/choice of law), text 321
- bribery**: *see* *FWO*, bribery and corruption charges (including withdrawal)

burden/standard of proof

- claimant (*onus probandi actori incumbit*) 258
- expropriation/nationalization 197
- jurisdiction 321

Camuzzi (objection to jurisdiction)

- admissibility and jurisdiction distinguished 23
- alleged asymmetry of treatment of company and its foreign shareholders 22, 23
- consent to jurisdiction, sufficiency of
 - BIT 28
 - ratification of ICSID Convention 28
- damages, determination and quantification as matter for the merits 23
- diplomatic protection and treaty-based investment protection distinguished 29–30
 - customary international law vs *lex specialis* 30
- forum selection clause in contract, effect on ICSID tribunal jurisdiction 24–6
 - parties' arguments 24–5
 - Tribunal's considerations 25–6
- international law considerations
 - parties' arguments 27–8
 - Tribunal's considerations 28–30
- interpretation of BIT
 - parties' intention 28–9
 - responsibility for 29
 - VCLT as applicable law 28
- interpretation of NAFTA
 - applicable law (VCLT) 52–3
 - FTC Interpretative Note (31 July 2001) as 'subsequent agreement' (VCLT 31(3)(a)) 52–3
- 'investment'/'foreign investment', applicable law (BIT/ICSID) 16–17, 20–1
- 'investor'/'foreign investor'
 - control of company, relevance 20–1
 - evidence of status as 24
- jurisdiction (ICSID)/*jus standi* (standing) 18–22
 - parallel bases in treaty and contract 21–2
 - parties' arguments 18–22
 - Tribunal's considerations 20–2
- legal dispute arising directly out of an investment
 - conflict view of rights or obligations, need for 15–16
 - 'directly', general measures not directly related to investment 17
 - ongoing renegotiation between parties, relevance 22–3
 - parties' arguments 14–16, 22–3
 - Tribunal's considerations 16–18
- MFN clause 26–7
- national of another contracting State (juridical person) (ICSID 25(2)(b))
 - agreement to treat as 12
 - foreign control
 - joint control by foreign investors of different nationalities under different BIT 13–14
 - non-controlling shareholder 10–14

- parties' arguments 10–14
 - Tribunal's considerations 11–14
- parties' arguments
 - claimant 9, 10–11, 14–16, 19–20, 23, 24–5, 28
 - respondent 8–9, 10, 11, 15, 18–19, 22–3, 24, 27–8
- proceedings and background 6–8
 - applicable law (jurisdiction) (ICSID 25/BIT) 9, 16
 - claimant's participation in privatization process 8
 - constitution of tribunal 7
 - procedural history 6–8
 - single tribunal/concurrent hearing of *Sempra* and *Camuzzi* cases 7, 8
 - summary of dispute 8
- Tribunal's decision 31
- consent to ICSID jurisdiction**
 - BIT 321
 - contractual agreement limiting scope of consent 346–9
 - interrelationship with ICSID jurisdiction provisions 433
 - sufficiency 28
 - ICSID Convention, ratification, whether 28
 - 'reasonable contemplation' test 346–9
 - written consent, need for, single/multiple instruments 321
- constituent subdivision or agency as party to the proceedings**, designation, relevance in
 - case of party named in document containing jurisdiction clause 335
- contract, breach**
 - by government, as party to contract/interference as non-party distinguished 440–1
 - prevention of conclusion of contract distinguished 439–40
- contract, formation/requirements** 443–51
 - agreement to agree/negotiate distinguished 279–80, 449–50
 - conditions precedent: *see FWO*, factual background (Soldado Fields), Tender Contract [Process Contract] (FWO stipulations/conditions precedent)
 - process/tender contracts, review of possibilities 445–7
- contract, interpretation**, aids, *travaux préparatoires*/negotiating history, inconclusive nature 333
- control of corporation**: *see* national of another contracting State (juridical person) (ICSID 25(2)(b)), foreign control; national of another contracting State (juridical person) (ICSID 25(2)(b)), agreement to treat as
- corporation, capacity/status/legal personality**
 - applicable law, place of incorporation 343
 - corporate migration 341–3
- costs (ICSID arbitral tribunal: ICSID 61(2))**
 - arbitration/tribunal costs, equal division 293, 461
 - discretion of tribunal 293
 - equitable 461
 - parties', parties to bear own 293, 461
 - relevant factors, success, partial 293
- costs (NAFTA arbitral tribunal)**
 - relevant factors, reasonableness of unsuccessful party's case 564–5
 - unsuccessful party's liability for 564–5
- costs (SCC Institute)**, advance on 470

- costs (UNCITRAL arbitral tribunal: Rules 38–40)**
 arbitration costs, unsuccessful party to pay 44 n.1, 207
 costs incurred in, *Methanex* arbitration 206–8
 parties' costs
 practice of other tribunals compared 207–8
 unsuccessful party to pay reasonable costs 208
 presentation of written accounts 207
- critical date**, nationality (juridical person), institution of proceedings 599–600
- customary international law**
 in relation to domestic law
 as independent systems 248
 umbrella clause as exception 249
 requirements/sources, arbitral and judicial decisions 554
- damages for**
 costs incurred
 bidding and negotiation costs 440
 pre-contractual expenditure/development costs 439
- damages, measure/valuation of company**, jurisprudence, *GAMI* 22
- damages, procedural issues**, determination and quantification as matter for the merits
 23
- damages, as a remedy**, double payment, risk of, parallel treaty and contract-based
 jurisdiction and 22
- damages, requirements**, actual loss or prejudice, bankruptcy/insolvency and 280–4
- diplomatic protection**: *see also* exhaustion of local administrative or judicial remedies
 as declining/residual concept 30
 shareholders with nationality different from that of corporation, *ELSI* 30
 treaty-based rights distinguished 29–30, 610–11
 customary international law vs *lex specialis* 30
 treaty-based rights distinguished, jurisprudence
 Barcelona Traction 29–30
 CMS 30
 Enron 30
 GAMI 29
 LG&E 30
 Vacuum Salt 30
- disclosure obligation**
 28 USC 1782 (order to give evidence/disclose document) 97–103, 104–5
 applicable law, IBA Rules of Evidence 62–3
 discretion of tribunal 309–11
 expert's report 62–3
 IBA Rules of Evidence (1999): *see* IBA Rules of Evidence (1999)
 requirements, relevance to purposes of proceedings 309–11, 348, 377, 380–6
travaux préparatoires 53, 105–13
 tribunal orders 309–11
- equality of parties**, asymmetry of treatment of company and its foreign shareholders 22,
 23
- evidence**: *see also* disclosure obligation; witnesses
 admissibility

- determination by tribunal (UNCITRAL 25(6)) 113, 128–9
- IBA Rule 9 106
- post-hearing inquiry to non-disputing party to BIT 314
- exhaustion of local administrative or judicial remedies:** *see also* diplomatic protection
 - ASEAN Agreement, absence of provision 609–10
 - 'bifurcation clause' ('fork in the road') and 610–11
 - jurisprudence
 - AES* 607
 - CME* 610
 - ELSI* 606–7
 - Generation Ukraine* 607, 608
 - Lanco* 607
 - Loewen* 608–9
 - Waste Management* 609
 - Yaung Chi Oo* 609–10
 - NAFTA 1121 608–9
 - specific dispensation requirement 611
 - specific requirement, need for (ICSID 26) 607–8
 - UNCITRAL Rules, absence of provision 610
- expert's report:** *see also amicus curiae; Methanex* (Final Award), evidentiary matters
 - (Part III), expert reports; witnesses
 - disclosure of underlying materials 62–3
- expropriation/nationalization**
 - applicable law, customary international law 554
 - burden of proof 197
 - of intangible property 555
- expropriation/nationalization, classification as/requirements**
 - breach of memorandum of intent/draft contract 557, 559–60
 - compulsion to use funds for government purposes 557, 558
 - creeping expropriation/'measure tantamount to nationalization or expropriation' 555
 - de facto* expropriation 555
 - deprivation of use or reasonably expected economic benefit of property, 'in whole or significant part' 555
 - intention vs effects 555
 - legitimate expectation/acquired rights, frustration, repudiation of assurances 556
 - measures resulting from bankruptcy/insolvency of company 280–4
 - permanent vs temporary deprivation 555
 - return of non-performing loan portfolio 558, 562–3
 - taking/omission to act by government/government agency 555
 - transfer of ownership to another party 555
- expropriation/nationalization, jurisprudence**
 - Azinian* 557
 - ELSI* 283–4
 - Feldman* 199, 555
 - Iran–US Claims Tribunal 554
 - LIAMCO* 561
 - Metalclad* 556
 - Mondev* 555
 - Myers* 555, 556

expropriation/nationalization, jurisprudence (*cont.*)

NAFTA jurisprudence 554–6
Pope & Talbot 199, 555, 556
Revere Copper 197
Saluka 556
Schering 561
Tecmed 556
Waste Management 197, 557

expropriation/nationalization, lawfulness, requirements: *see also Methanex* (Final Award), jurisdiction and merits (Part V), NAFTA 1110 (expropriation) claim; State responsibility

due process 197–9, 562
 good faith 556
 non-discrimination 197–9, 556
 police power exception 556
 proportionality 556
 public interest/purpose 197–9, 556

fair and equitable treatment of alien, arbitrary or discriminatory treatment and 274–5

federal States, treaties, ‘party to’, constituent State 601–3

FFIC (NAFTA Chapter 14 (Financial Services)), procedural matters and background

546–65: *see also* financial services (NAFTA Chapter 14)
 admissibility of evidence related to matters outside the Tribunal’s jurisdiction 548
 applicable law
 arbitration (NAFTA and applicable rules of international law) (NAFTA 1131(1)) 546
 treaty interpretation (VCLT) 546
 factual background 529–41
 BanCreceer restructuring 533–41
 Memorandum of Intent 535–6
 Recapitalization Plan 533–5
 documents executed on 29 September 1995 532
 issue of dollar/peso debentures 531–2
 Law for the Protection of Bank Savings 1999 536
 Mexican authorities and other bodies involved
 Allianz Group 531
 Banco de México 529
 Comisión Nacional Bancaria y de Valores (CNBV) 530
 FFIC 531
 Fondo Bancario de Protección al Ahorro (FOBAPROA) 530
 Grupo Financiero BanCreceer (GFB) 531
 Instituto para la Protección al Ahorro Bancario (IPAB) 530
 Secretaría de Hacienda y Crédito Público (SHCP) 530
 Working Group (Grupo de Trabajo) 530, 548–50
 Programa de Capitalización y Compra de Cartera (PCCC) 530–1
 jurisdiction 546–8
 FFIC NAFTA 1110 claim 546–7
 NAFTA Chapter 14-based claims, limitation to 547–8
 parties’ arguments
 claimants 541–3
 respondent 543–5

- procedural history 526–9
- procedural matters
 - admissibility of evidence from Preliminary Question phase in absence of witness 527–8
 - claimant 524
 - claims/requests for relief, respondent 525
 - disclosure notice 529
 - parties 525
 - Preliminary Question including Decision (17 July 2003) 526–7
 - production of documents (Procedural Order 3) 527, 565
 - redaction 565
 - resignation of arbitrator 527
- FFIC (NAFTA Chapter 14 (Financial Services)), Tribunal's analysis and findings**
 - costs 564–5
 - decisions/Award 565
 - expropriation (NAFTA 1110) 553–64
 - acts allegedly amounting to
 - breach of Memorandum of Intent/draft contract 557, 559–60
 - compulsion to use funds for government purposes 557, 558
 - discriminatory act as such 560–2
 - return of non-performing loan portfolio 558, 562–3
 - balance of risk/high profits 557
 - definitions 554–6
 - Iran–US Claims Tribunal/NAFTA jurisprudence 554–6
 - order of analysis 554, 562
 - prudential measures (NAFTA 1410(1)) 551–3
 - State responsibility for acts of the Working Group (Grupo de Trabajo) 548–50
- financial services (NAFTA Chapter 14)**
 - investment and services (NAFTA Chapter 11) distinguished 547–8
 - prudential measures (NAFTA 1410(1)) 551–3
 - as affirmative defence 552
 - determination of validity (Financial Services Committee vs Tribunal) (NAFTA 1415) 552–3
 - discriminatory measure as 551–2
 - as 'exception'/defence to finding of violation 551, 552
 - State-to-State dispute settlement under Chapter 20 and 548
- foreign control of corporation:** *see* national of another contracting State (juridical person) (ICSID 25(2)(b)), foreign control; national of another contracting State (juridical person) (ICSID 25(2)(b)), agreement to treat as
- fork in the road:** *see* 'bifurcation clause' ('fork in the road')
- forum selection clause in contract** 325–33: *see also* *Aguas del Tunari* (jurisdiction), forum selection clause (Concession 41.2)/exclusive jurisdiction; exhaustion of local administrative or judicial remedies
 - as implied waiver of right to initiate ICSID proceedings 332–3
 - preclusion of ICSID jurisdiction, whether 24–6
 - conflicting mandatory obligations as threshold question 329–31
 - exclusive jurisdiction of non-ICSID fora provision, dependence on 329–30
 - parties' intention as determining factor 331–3
 - proceedings not involving same matters and parties 330–1

forum selection clause in treaty including BIT/ICSID Convention, ‘within the framework of its law and regulations’ provision distinguished 336–9

forum selection clause in treaty/contract, jurisprudence

Azurix 331–2

Generation Ukraine 25–6

Lanco 330

MTD 25

SGS v. Pakistan 25–6

SGS v. Philippines 25–6

Vivendi 25, 330, 331

fraudulent misrepresentation/fraud (*dol*)

breach of contract as alternative 259

burden of proof 258

due diligence requirement 259

material fact, need for 258–9

in relation to ownership/foreign control of corporation 344–6

FTC Interpretative Note (31 July 2001) 191–5

as amendment 50–1, 111–12, 193–4

binding effect (NAFTA 1131(2)) 50–1, 193–4

breach of one Chapter 11 article as breach of another 193

minimum standard of treatment in accordance with international law

customary international law, endorsement of role 192, 193, 194–5

NAFTA jurisprudence

ADF 192

Loewen 192, 195

Mondev 192

Waste Management 192, 195

as subsequent agreement between the parties (VCLT 31(3)(a)) 52–3, 111–12, 194

FWO

bribery and corruption charges (including withdrawal)

announcement of withdrawal 414

exchanges relating to 414

parties’ positions

claimant’s letter to Tribunal (14 January 2004) 416

claimant’s memorial, amended version (16 January 2004) 414–15

respondent’s closing skeleton argument (January 2004) 416

Tribunal’s conclusions 459–60

uncertainties of position on withdrawal 416

contractual rights as ‘investment’ allegedly interfered with 438–51

agreement to negotiate in good faith, whether 449–50

bidding and negotiation costs as investor responsibility 440

breach of contract by government as party to contract and interference as non-party

distinguished 440–1

claim of interference with contract right based on failure to conclude contract,

illogicality 439–40

existence of enforceable contract/right 443–51

Definitive Operating Agreement 443–4

forum/applicable law for determining 442–3

Process Contract [Tender Contract] 444–5, 447–8

- existence of enforceable contract/right, unfulfilled pre-conditions
 - definitive written agreement ('subject to contract') 444–5
 - guarantee/security 443–4
 - interim agreement 444–5
- pre-contractual expenditure as investor risk 439
- process/tender contracts, review of possibilities 445–7
 - Tribunal's conclusion 450–1
- costs 461
- factual background (Soldado Fields) 399–405, 417–29
 - FWO–Trinmar negotiations (May 1999–February 2001) 400–2
 - Petrotrin/Trinmar role (Petroleum Act 1969) 399, 406, 417
 - summary (1982–1999) 417–18
 - summary (1999–2001) 418–29
- Tender Contract [Process Contract]
 - approval of FWO bid/letter of intent 425–6
 - as enforceable right 444–5, 447–8
 - Platform Option 420
 - revised guidelines/reformatted bid proposal 422–3
 - summary of issues relating to 403–5
 - tender requirements 419–20
 - Trinmar's authority in relation to 420–9
 - Trinmar's withdrawal from negotiations 428–9
- Tender Contract [Process Contract] (FWO stipulations/conditions precedent)
 - definitive written agreement ('subject to contract') 420, 444–5
 - effective date 420
 - guarantee/security 425–9, 443–4
 - interim agreement 424–5, 444–5
 - method of financing 420
- Trinmar, formation and status 417–18
- interpretation of BIT/treaties (VCLT) 433
 - object and purpose (VCLT 31(1)) 433
- 'investment'/'investment agreement'
 - applicable law, BIT/ICSID 430
 - 'covered investment' (BIT I(e)) 434
- distinguishability 436–8
- 'every kind of investment . . . owned or controlled directly or indirectly by [nationals or] companies' (BIT I(d)) 434–6
- 'in the territory of' (BIT I(l)) 434
- 'investment agreement' (BIT I(h)) 436–7
- legally enforceable right, need for 434–6
 - intellectual property rights in material used for tender 451
- parties' positions
 - claimant 430, 432
 - respondent 430–1, 432
- Tribunal's questions relating to 431–2
- jurisdiction 429–38
 - consent to, BIT/ICSID provisions, interrelationship 433
 - issues for determination 429–30
 - joinder to merits 429

FWO (*cont.*)

- procedural history 405–8, 414
 - hearing and post-hearing submissions 413–14
 - notice of registration 407
 - parties 405
 - parties' written pleadings
 - additional documents 413
 - claimant's memorial 408–9
 - claimant's reply 410–11
 - respondent's counter-memorial 409–10
 - respondent's rejoinder 411–13
 - request for arbitration 402–3, 405–6
 - 'investments' 406
 - 'legal dispute' 406
- State responsibility/attribution of acts of Petrotrin/Trinmar 451–9
 - applicable law (*BIT/lex specialis*) 458
 - breach of contract as breach of BIT 458
 - as entities empowered to exercise elements of government authority (ILC 5) 456–7
 - parties' arguments
 - claimant 455
 - respondent 455
 - review of discussion during proceedings 451–2
 - State involvement in bidding process 452–5
 - Tribunal's conclusions 456–9

good faith, arbitration proceedings, parties' obligation 127–9

Greece–Yugoslavia (FRY) BIT (1997) by article

- preamble (object and purpose) (intensification of economic cooperation/promotion and protection of investments) 588
- usage in other BITs compared 588
- 1(1) ('every kind of asset invested . . . including though not exclusively')
 - 'every kind' 614
 - 'in accordance with the legislation' 596–9, 612–16
 - 'invested' 593–6, 614
- 1(1)(c) ('claims to money or any other claim under contract having an economic value') 588–90
- 9 (settlement of disputes between investor and a contracting party), status of Serbia 601–3
- 9(2) ('fork in the road') 610–11
- 9(3)(b) (dispute settlement: statement of claim) 574
- 12 (application), 'consistent with the latter's legislation' 596–9

IBA Rules of Evidence (1999), as applicable law 50, 62–3

IBA Rules of Evidence (1999) by article

- 3 (documents) 50
 - text 54
- 3.1 (documents: party's obligation to submit those on which it relies) 62–3
- 3.6 (documents: 'relevant and material to outcome of case') 106, 111
 - IBA 9.2 objections 106

- 3.8 (documents: production of third-party documents which the party cannot obtain on its own) 97, 102–3, 105
- 4 (witnesses of fact) 50
 - text 55, 56
- 4.10 (witnesses: legal steps by tribunal to obtain) 97, 102–3, 105
- 5 (party-appointed experts) 50
- 6.5 (expert's report: transmission to parties) 63
- 9.2 (admissibility of evidence: grounds for exclusion) 106
- ICSID Arbitration Rules (1984)**
 - 4(1) 407
 - 4(4) 407
 - 6(1) 7, 226, 407
 - 31 408
 - 34(2) 309–11
 - 38(1) 414
 - 41(2) 321, 378
 - 47(1)(j) 461
 - 49(2) (rectification of award) 294–6
- ICSID Convention (1965) by Article**
 - 25 7
 - 36(3) 7, 226, 306, 407
 - 37(2)(b) 226, 306, 407
 - 38 307, 407
 - 41 306
 - 42 306
 - 43 309–11
 - 49 (rectification of award) 294–6
- Institution Rules (ICSID)**
 - 5 7, 226, 405
 - 7 7, 226, 407
- interim or partial award**, final and binding, whether 88, 111
- interpretation (NAFTA)**
 - aids, arbitral and judicial decisions 554
 - applicable law, VCLT 51–3, 185, 546
 - context (VCLT 31(2)), similar term in different treaties 51–2
 - responsibility for, Free Trade Commission (FTC): *see* FTC Interpretative Note (31 July 2001)
- interpretation/clarification of arbitral award (NAFTA):** *see* *Methanex* (Final Award), procedural matters (Parts I and II), Partial Award (2 August 2002), requests for clarification and reconsideration
- investment agreement, definition and purpose** 247–8
 - distinguishability from 'investment' 436–8
- 'investment'/'foreign investment'**
 - due diligence, investor's obligation 259
 - pre-contractual expenditure/development costs, right of recovery 439
- 'investment'/'foreign investment', definition/classification as (general considerations including procedural matters)**
 - applicable law
 - BIT provisions 20–1, 587, 592
 - BIT/ICSID 16–17, 430, 591–2

'investment'/'foreign investment', definition/classification (*cont.*)

choice of law, admissibility 16

ICSID 25(1) 590–3

approaches to/nature of concept

‘broad, asset-based’ 588–90

examples from ICSID jurisprudence 591

tribunal’s responsibility for determining as matter of law 587

'investment'/'foreign investment', definition/classification as (treaty formulations/possibilities for inclusion)

‘any kind of asset invested by investors of one Contracting Party in the territory of the other’ 490

‘assets invested’ 593–6, 614

contractual package of agreements taken as a whole 592–3

contractual right [having financial/economic value] 438–51, 490

applicability to commercial activities 590

‘claims to money or any other claim having an economic value’ 588–90

‘every kind of asset’, claim to money 614

‘every kind of asset . . . including but not exclusively’ 588–90

‘every kind of investment . . . owned or controlled directly or indirectly by [nationals or] companies of the other party’ 434–6

‘financial credits including shares . . . and related debts’ 490, 491

‘indirect investments . . . made by intermediary of third State’ 490, 491–7

intellectual property rights 451

‘rights of claim . . . having an economic value’ 490

tangible or intangible property 555

'investment'/'foreign investment', evidence of, agreement to agree/preliminary agreement 279–80, 443–51**'investment'/'foreign investment', jurisprudence***AMI* 492*Bayindir* 589–90*CME* 492*CMS* 21*CSOB* 592*Enron* 21, 492*Fedax* 435–6, 492–3, 589–90*Gas Natural* 492*Genin* 493–4*Gruslin* 597*Joy Mining* 592*Maffezini* 492*Mihaly* 435–6*Salini* 591–2, 597–8, 599*Saluka* 594*SGS v. Pakistan* 435–6*SGS v. Philippines* 435–6*Tokios Tokelès* 595, 598*Yaung Chi Oo* 596–7**'investment'/'foreign investment', requirements/relevant factors**

accordance with the laws and regulations of host country 596–9, 612–16

as test of validity of investment and definition distinguished 597–9

approval of host government, in absence of BIT provision for 596–7

- investment/expenditure in the territory 491
- legally enforceable right 434–6
 - determination of existence 443–51
 - forum/applicable law for determining 442–3
- terminology used in contract or other non-treaty agreement 587
- underlying economic reality 497
- ‘investor’/‘foreign investor’**
 - control of company, relevance 20–1
 - evidence of status as 24
- jurisdiction (general)**
 - critical date (including determination *ratione personae*), institution of proceedings 599–600
 - ‘jurisdiction’ and ‘competence’, equivalence 546 n.133
- jurisdiction (ICSID)**
 - applicable law, ICSID 25/BIT provision 9, 16
 - burden of proof 321
 - competence/duty of tribunal to determine
 - ex proprio motu* 321
 - parties’ interpretation of unilateral consent, relevance 363
 - designation of subdivision or agency, need for: *see* constituent subdivision or agency as party to proceedings, designation
 - jurisprudence, *Azurix* 9
 - merits, joinder 429
 - ‘not manifestly outside the jurisdiction of the Centre’ 306
 - objection to
 - procedure 309
 - submission ‘as early as possible’ 321
 - parallel bases in treaty and contract 21–2: *see also* ‘umbrella’ clause (undertaking to observe domestic commitments)
 - jurisprudence
 - Joy Mining* 21
 - SGS v. Pakistan* 21–2
 - SGS v. Philippines* 21–2
 - Vivendi* (Annulment) 21–2
 - Wena* (Annulment) 21–2
 - umbrella clause and 22
 - as preliminary issue 309
 - umbrella clause and 22
- jurisdiction (NAFTA)**
 - BIT and NAFTA-based claims distinguished 546–8
 - exclusion of disputes relating to, interpretation of GATT 49
 - merits, joinder 60–2, 176, 178
 - NAFTA 1101 200–5
- jurisdiction, prima facie legal case requirement, jurisprudence**
 - Amco* 603
 - Bayindir* 604
 - Impregilo* 604
 - Oil Platforms* 604
 - Plama* 604
 - United Parcel Service* 604

jurisdiction (UNCITRAL), prima facie legal case, sufficiency 603–6

language of proceedings 470–1

legal dispute arising directly out of investment

critical date, ongoing renegotiation between parties, relevance 22–3

‘directly’ 16–18

general measures not directly related to investment 17

jurisprudence

CMS 17

Enron 18

GAMI 17–18

Methanex 17, 18

Mondev 18

‘legal’ dispute, conflict view of rights or obligations, need for 15–16

legitimate expectations, frustration as expropriation 556

‘like circumstances’: see national treatment, ‘like circumstances’/‘like situations’

Methanex (Final Award): *Note*: index entries are divided in accordance with the structure of the report with entries at *Methanex (Final Award)*, procedural matters (Parts I and II); *Methanex (Final Award)*, evidentiary matters (Part III); *Methanex (Final Award)*, jurisdiction and merits (Part IV); *Methanex (Final Award)*, arbitration and legal costs (Part V); *Methanex (Final Award)*, Tribunal’s operative order (Part VI). The Partial Award is indexed in Volume 7 of the *ICSID Reports*

***Methanex (Final Award)*, arbitration and legal costs (Part V)** 206–8

arbitration costs

disbursement of unused balance held by ICSID 207

presentation of written accounts 207

unsuccessful party to pay (UNCITRAL 40(1)) 44 n.1, 207

parties’ legal costs

practice of other tribunals compared 207–8

unsuccessful party to pay reasonable costs 208

***Methanex (Final Award)*, evidentiary matters (Part III)** 131–75

California legislative and regulatory measures 74, 135–9

alleged motivation for 74–5, 158, 159–75, 203–5

Cal EPA Ethanol Report (1999) 137–8

California Bill 1997 72–3: see also United States of America (USA), California Bill 521 of 9 October 1997 (MTBE risk assessment)

California Executive Order 1999 73–4, 135–6

California Executive Order 2002 139

California Regulations (CaRFG3) (2000) 74, 138

California Regulations (CaRFG3) (2003 amendment) 74, 90–2, 139

California Senate Bill 989 of 8 October 1999 (implementation of Executive Order D-5-99) 137

federal RFG oxygenate requirement, request for waiver 136–7

good faith and 158

expert reports 141–58

Methanex witnesses 141–8

Exponent 141–4

Rausser 144–5

- Ward 145–6
- Williams 146–8
- US witnesses 148–58
 - Burke 148–9
 - Fogg 149–50
 - Happel 150–4
 - Miller 148
 - Simeroth 156–8
 - Whitelaw 154–6
- Tribunal’s findings 158, 173–5
- UC Report 73, 132–5
 - comparative cost–benefit analysis 134
 - environmental impact assessment (EIA), recommendation for 134
 - MTBE, use and effects 132–4
 - California’s water resources 133
 - health risks 133
 - phase-out 134
 - vehicle emissions 133
 - water contamination 133
 - water treatment costs 133
 - parties’ submissions, Methanex 139–40
 - parties’ submissions, US 140–1
 - public hearings 135
 - RFG (including CaRFG2), descriptions and effects 132
- Methanex (Final Award), jurisdiction and merits (Part IV) 175**
 - NAFTA 1101(1) (jurisdictional requirements) 200–5
 - motivation/intent to harm Methanex, failure to demonstrate 203–5
 - parties’ arguments
 - Methanex 202–3
 - US 200–2
 - Tribunal’s decision 203–5, 208
 - NAFTA 1102(3) (national treatment/treatment ‘no less favourable’) claim 178–88:
 - see also* national treatment
 - burden of proof 180
 - ‘like circumstances’ 179–88
 - ‘like goods’/‘like products’ (GATT III/NAFTA Chapter 3) distinguished 185
 - Methanex’s case 179–81
 - Tribunal’s decision 181–8
 - uniform treatment of MTBE producers 183
 - NAFTA 1105 (minimum standard of treatment) claim 188, 195
 - customary international law relating to 192, 193, 194–5
 - differential treatment, possibility of 192–3
 - Methanex’s case 189–91
 - Tribunal’s decision 191–5
 - NAFTA 1110 (expropriation) claim 195–9
 - burden of proof 197
 - compliance with public purpose, due process and non-discrimination requirements 197–9
 - Methanex’s case 195–7
 - Tribunal’s decision 197–9

Methanex (Final Award), jurisdiction and merits (Part IV) (cont.)

- preliminary and procedural considerations 175–6
 - joinder (UNCITRAL 21(4)) 60, 176, 178
 - relevant NAFTA articles (NAFTA 1101, 1102, 1105, 1110, 1116 and 1117)
 - order of consideration 176
 - text (Annex 4) 177
 - summary of claims 175–6
- summary and conclusions
 - absence of NAFTA 1101 jurisdiction 205
 - dismissal of NAFTA 1102, 1105 and 1110 claims 205–6
 - likely decisions had there been jurisdiction
 - loss and damage 205
 - NAFTA 1116/1117 claims and causation 205
 - ownership of Methanex-US and Methanex-Fortier 205
 - treaty interpretation, similar terms in different treaties 185

Methanex (Final Award), procedural matters (Parts I and II)

- admissibility of evidence/US request for exclusion 113–29
 - categories objected to by US 113
 - categories rejected by Tribunal 113–14
 - Vind Documents 114–29
 - Exhibit X8 (selection of site photographs) 131
 - Methanex photograph 121–4
 - Methanex submissions 124–6
 - Methanex’s initial response 114–15
 - Methanex’s request for embargo 115–16
 - Puglisi/Morisset testimony 116–19
 - US submissions 126–7
 - Vind testimony 119–21
 - Vind Documents (Tribunal’s decision) 127–9
 - materiality of Vind Documents 128
 - Tribunal’s discretion to determine admissibility (UNCITRAL 25(6)) 128–9
 - unlawfulness of Methanex’s conduct 128
- amendment of claim, request for 58–9, 89–97
 - in absence of claim for related loss or damage 96
 - amendment falling outside arbitration clause/agreement 94–6
 - on dishonest grounds 129
 - parties’ arguments
 - Methanex 93
 - USA 93–4
 - timeliness 96–7
 - Tribunal’s decision 94–7
- applicable law (NAFTA 1131)
 - conflict with *jus cogens*/fundamental principle of international law, tribunal’s obligations 194
 - GATT/WTO jurisprudence 48–9: *see also* precedent (NAFTA arbitral tribunal), GATT/WTO decision/decision of tribunal other than NAFTA
 - IBA Rules 50
 - NAFTA and applicable rules of international law (NAFTA 1131(1)) 48–9
 - UNCITRAL Arbitration Rules 50
- evidence from third parties, request for additional 58, 97–105
 - 28 USC 1782 (order to give evidence/disclose document) 97–103, 104–5

- IBA Rules 3.8 and 4.10 97, 102–3, 105
- Methanex submissions (June 2004) 104–5
- Methanex’s 28 USC 1782 applications/withdrawal of applications 104
- Methanex’s resubmission of request 102–3
- procedural meeting of 31 March 2003 and 100–2
 - Tribunal’s decision 105
- glossary and abbreviations 43–4
- good faith obligation of parties 127–9
- interpretation (NAFTA)
 - FTC Interpretation (31 July 2001) and 50–1
 - VCLT 31(1) 51–3
- jurisdiction of Tribunal, exclusion of dispute relating to interpretation of GATT 49
- Partial Award (7 August 2002), requests for clarification and reconsideration 57–8, 77–89
 - binding nature of award (UNCITRAL 32(2)) and 83–4, 87, 111
 - grounds (absence of fair and full opportunity to present case) 82–3
 - resignation of arbitrator, response to 85–6
 - resignation of arbitrator, Tribunal’s competence (UNCITRAL Rules) 89
- parties’ arguments
 - Methanex 84, 85
 - USA 83, 84–5
- request for interpretation (28 August 2002) 80–2
- request for reconsideration (28 January 2004) 82–9
 - timing of request 82
- summary of Partial Award 77–80
- Tribunal’s decision 87–9
- parties to the dispute and other participants
 - ADM and the Andreas family 46
 - California 45
 - Gray Davis 45
 - Methanex 45
 - Methanex-Fortier 45
 - Methanex-US 45
 - USA 45
- place of arbitration 48
- procedural history
 - amici*, status of legal representatives 67
 - amici* submissions 66–7
 - hearing (June 2004) 67–9
 - Methanex’s application on evidentiary matters 65
 - Methanex’s application to amend second amended statement of claim 58–9, 89–97
 - Methanex’s request for disclosure of NAFTA *travaux préparatoires* 53, 105–13
 - Methanex’s requests for additional evidence from third persons 58, 97–105
 - Methanex’s requests for clarification and reconsideration of Partial Award 57–8, 77–89
 - post-hearing written submissions 69–70
 - pre-hearing written submissions 65
 - procedural meeting of 31 March 2003 59–60
 - subsequent to the Partial Award (7 August 2002) 44–5
 - summary 40
 - third-party submissions (NAFTA 1128) (Canada and Mexico) 67

Methanex (Final Award), procedural matters (Parts I and II) (cont.)

- Tribunal Order of 2 June 2003 (joinder of jurisdictional challenges to the merits) 60–2
- Tribunal Order of 30 June 2003 (form of proceedings under UNCITRAL 21) 62
- Tribunal Order of 10 October 2003 (disclosure of expert's report/underlying material) 62–3
- Tribunal Order (main hearing procedure) 63–5
- summary of dispute 70–7
 - alleged breach of
 - NAFTA 1102(3) 75
 - NAFTA 1105 75
 - NAFTA 1110 75
 - NAFTA 1116 75
 - NAFTA 1117 76
 - alleged loss and damage 76
 - challenged measures: *see Methanex (Final Award), evidentiary matters (Part III)*
 - description of products: *see also Methanex (Final Award), evidentiary matters (Part III), UC Report*
 - ethanol 71
 - interchangeability 71
 - methanol 71
 - MTBE 70
 - USA's amended statement of defence 76–7
- summary of Partial Award 77–80
- summary of procedural history 40
- travaux préparatoires* (NAFTA), request for disclosure 53, 105–13
 - IBA Rules 3.6 and 9.2 106, 111
 - justification for request (VCLT 32) 110–12
 - parties' arguments
 - Methanex 108–9
 - USA 108
 - requests prior to 10 May 2004 106–8
 - timeliness of request 106, 110
 - Tribunal's decision 109–13
- Tribunal
 - Administrative Secretary 47
 - Legal Secretary 47
 - members 47
 - resignation of Warren Christopher 47, 85–6
- Methanex (Final Award), Tribunal's operative order (Part VI)*** 208–9
 - jurisdiction 208
 - merits 208
- Mexico:** *see also FFIC* (NAFTA Chapter 14 (Financial Services))
 - law of, Protection of Bank Savings Law 1999 536
- MFN (most favoured nation) treatment**
 - dispute settlement provisions, applicability to 26–7, 500–9
 - jurisprudence
 - Gas Natural* 502, 505
 - Maffezini* 500–1, 502–4
 - Plama* 503–4
 - Salini* 502–3
 - Siemens* 501

minimum standard of treatment in accordance with international law: *see also* FTC

- Interpretative Note (31 July 2001)
- differential treatment, possibility of 192–3
- ‘in accordance with international law’, customary international law as reference point
 192, 193, 194–5

***Mytilineos* (partial award on jurisdiction), procedural matters**

- factual background 576–8
 - bank guarantees 577
 - Mytilineos*/RTB-BOR cooperation agreements 576
 - non-performance by RTB-BOR 577–8
- parties’ claims and defences
 - claimants 582–6
 - respondents 578–82
- procedural history 573–5
 - appointment of arbitrators 574
- Procedural Orders
 - 1 (preliminary determination of jurisdiction) 574
 - 2 (deposit) 575

***Mytilineos* (partial award on jurisdiction), Tribunal’s analysis and findings 586–611:**

- see also* Greece–Yugoslavia (FRY) BIT (1997) by article
- exhaustion of local remedies 611
 - BIT 9(2) (‘fork in the road’) 610–11
- institution of proceedings as critical date for establishing jurisdiction 599–600
- ‘investment’, definition/classification as
 - applicable law
 - BIT provisions 587, 592
 - BIT/ICSID 591–2
 - ICSID 25(1) 590–3
 - ‘assets invested’ 593–6, 614
 - ‘broad, asset-based’ approach 588–90
 - ‘claims to money or any other claim under contract having an economic value’
 588–90
 - contractual package of agreements taken as a whole 592–3
 - terminology used in contract or other non-treaty agreement, relevance 587
 - tribunal’s responsibility for determining as matter of law 587
- ‘investment’, requirements
 - accordance with the laws and regulations of host country as test of validity
 597–9
 - approval of host government in absence of BIT provision for 596–7
- legality of *Mytilineos* investments 599
- prima facie legal case requirement 603–6
- proper parties
 - non-parties to contracts (respondents) 600–1
 - Serbia as political subdivision 601–3
- State responsibility for acts of
 - political subdivision (ILC 4(1)) 602–3
 - private persons (ILC 5) 605–6
- treaties, interpretation (VCLT 31(1))
 - object and purpose 587–8
 - similar terms in different treaties 588
- Tribunal’s decisions 611

NAFTA (1992)

dissenting opinion (Mitrović) 612–16
 financial services: *see* *FFIC* (NAFTA Chapter 14 (Financial Services)); financial services (NAFTA Chapter 14)

NAFTA (1992) by article

Part V, Chapter 11, Section A (Investment)

1101(1) 111, 200–5: *see also* *Methanex* (Final Award), jurisdiction and merits (Part IV), NAFTA 1101(1) (jurisdictional requirements)

1102: *see* *Methanex* (Final Award), jurisdiction and merits (Part IV), NAFTA 1102(3) (national treatment/treatment ‘no less favourable’) claim

1102(3) 178–88

1105 (minimum standard of treatment) 111–12, 188, 195: *see also* *Methanex* (Final Award), jurisdiction and merits (Part IV), NAFTA 1105 (minimum standard of treatment) claim

1105(1) 562

1110 (expropriation and compensation) 195–9, 553–64: *see also* *Methanex* (Final Award), jurisdiction and merits (Part IV), NAFTA 1110 (expropriation) claim

Part V, Chapter 11, Section B (Settlement of Disputes)

1121(1)(b) 608–9

1128 (participation by a party) 67

1131(1) 48–9, 546, 554

1131(2) (binding effect of FTC interpretation) 50–1, 193–4

Part V, Chapter 14 (Financial Services): *see also* *FFIC* (NAFTA Chapter 14 (Financial Services)); financial services (NAFTA Chapter 14)

1410(1) 551–3

1415(4) 552–3

Part VII, Chapter 20, Section B (Dispute Settlement) 548

national of another contracting State (juridical person) (ICSID 25(2)(b))

applicable law, place of incorporation 343

changes to corporate structure, effect on jurisdiction and as breach of contract distinguished 343

corporation with nationality other than that of parties to dispute 12

foreign control

BIT use of ‘control’/‘controlled’ distinguished 365–7

Bolivia–Netherlands BIT (1994) 376: *see also* *Aguas del Tunari* (jurisdiction),

consent to ICSID jurisdiction, Concession as limitation on BIT

consent/‘reasonable contemplation’ test

direct/indirect control 356–7

as flexible concept 366–7

joint/multiple control 358–9

by foreign investors of different nationalities under different BIT 13–14

non-controlling shareholder 10–14

ownership as indication of 358

travaux préparatoires 367

jurisprudence

Barcelona Traction 495

Sempra 12

Vacuum Salt 12–13, 30

national of another contracting State (juridical person) (ICSID 25(2)(b)), agreement to treat as 12

- national treatment:** *see also Methanex* (Final Award), jurisdiction and merits (Part IV), NAFTA 1102(3) (national treatment) claim; NAFTA (1992) by article, Part V, Chapter 11, Section A (Investment), 1102(3)
 differential treatment, differential and less favourable treatment, need for 183
 jurisprudence, *Pope & Talbot* 183
 ‘like circumstances’/‘like situations’ 179–88
 ‘like goods’/‘like products’ (GATT III/NAFTA Chapter 3) as trade criterion/relevance 185
- Netherlands**, BITs, practice relating to 369–72
- NGOs, standing** 307–8
- Noble Ventures (Award)** 216–96
 alleged misrepresentation relating to Slag Pile Association Agreement (H.II) 255
 breach of contract (SPA 15(1)) as alternative 259
 burden of proof 258
 due diligence requirement 259
 facts, difficulty of establishing 258
 parties’ arguments
 claimant 255–6
 respondent 256–8
 in relation to material fact 258–9
 Tribunal’s conclusions 258–61
 events prior to conclusion of SPA (SPA 15(1)) 258–9
 SOF’s obligations (SPA 7.5) 259–61
 collective employment agreement as alleged breach of good faith obligation to observe contract (BIT II(2)(c)) (H.VI) 276–7
 parties’ arguments
 claimant 276
 respondent 276
 Tribunal’s findings 276–7
- costs
 parties’ submissions
 claimant 293
 respondent 293
 Tribunal’s decision 293
- damages, parties’ views (H.X) 286–92
 claimants 286–9
 respondents 289–92
 Tribunal’s determination on liability as block to further consideration 286, 292
- expropriation claim (BIT III(1)) (H.VIII) 280–4
 measures resulting from bankruptcy/insolvency and expropriation distinguished 283–4
 parties’ arguments
 claimant 280–3
 respondent 283
 Tribunal’s findings 283–4
- interpretation of BIT by reference to VCLT 31 247
 effectiveness 248
 object and purpose 248
 ordinary meaning/plain words 247–8
 parties’ intention 249

Noble Ventures (Award) (*cont.*)

- judicial reorganization as alleged breach of BIT II(2)(a)/II(2)(b) (H.V) 272–6
 - arbitrary and discriminatory treatment, whether 274–5
 - parties' arguments
 - claimant 272–3
 - respondent 273–4
 - Tribunal's findings 274–6
- pre-emption rights (GD 1280/GEO 172), obligation to respect (BIT II(2)(c)) (H.IX) 284–6
 - parties' arguments
 - claimant 284–5
 - respondent 285–6
 - status as 'obligations entered into with regard to investment' 286
 - Tribunal's findings 286
- rescheduling of CSR debts (SPA 7.4.2) (H.III) 261
 - obligation of result vs best efforts 261–2
 - parties' arguments
 - claimant 262–4
 - respondent 264–5
 - Tribunal's findings 265–70
- settlement agreement (Novak–Dijmarescu Protocol), status (H.VII) 277–80
 - agreement and agreement to negotiate distinguished 279–80
 - parties' arguments
 - claimant 277–8
 - respondent 279
 - Tribunal's findings 279–80
- State responsibility for 'full protection and security' of investment (BIT II(2)(a)) (H.IV) 270–2
 - BIT as implementation of principle 271–2
 - loss or prejudice to claimant, need for 272
 - parties' arguments
 - claimant 270–1
 - respondent 271
 - reasonable preventive measures requirement 271–2
 - Tribunal's findings 271–2
- State responsibility/attribution of acts of SOF/APAPS 250–5
 - acta jure gestionis*/*acta jure imperii* distinction, relevance 254–5
 - applicable law (customary international law) 252
 - as entities empowered to exercise elements of government authority (ILC 5) 252–5
 - Privatization Law (Law 99/1999) (Romania) and 252–4
 - parties' arguments
 - claimant 250–1
 - respondent 251
 - representation of State for purpose of entering international law commitments distinguished 255
 - Tribunal's findings 252–5
 - ultra vires* acts (ILC 7) 254
- umbrella clause (H.I): *see also* 'umbrella' clause (undertaking to observe domestic commitments)
 - classification as, strict requirements 249
 - conversion of contract obligations into international obligations and 245, 255

- as exception to independence of international and municipal law systems 249
- ICSID jurisprudence reviewed 246–7, 249–50
- parties' arguments
 - claimants 245
 - respondent 245
- Tribunal's findings 245–50
- Noble Ventures* (procedure and background)**
 - abbreviations used in Award 217
 - applicable arbitration rules (text) 228–31
 - changes 233–6, 237–8
 - constitution of Tribunal (ICSID 37(2)(b)) 226
 - appointment of President 226
 - disclosure of documents 232–3
 - parties' claims for relief
 - claimant 243
 - respondent 243
 - parties' contentions
 - claimant 243–4
 - respondent 244
 - parties' positions 221–5
 - claimant 221–3
 - respondent 223–5
 - preliminary counterclaim (Romania) 231
 - procedural history 226–39
 - Procedural Orders
 - 1 (PO 1) (disclosure of documents) 232–3
 - 2 (PO 2) (changes to procedure) 233–6
 - 3 (PO 3) (changes to procedure) 237–8
 - relevant legal texts
 - Romania–US BIT (1992) (extracts) 239–41
 - SPA text (including alternative versions)
 - Art. 7.4.1(3) 241, 242
 - Art. 7.4.2 241, 242
 - Art. 7.5 259
 - Art. 9.4 242
 - Art. 9.5 242, 243
 - Art. 15(1) 259
 - disputed translation 241
 - summary of dispute/factual background 220–1
- Noble Ventures* (Rectification of Award)** 294–6
- precedent (NAFTA arbitral tribunal)**
 - GATT/WTO decision/decision of tribunal other than NAFTA
 - as aid to interpretation of NAFTA 49, 554
 - as 'judicial decisions'/'subsidiary means for the determination of the rules of law' 49
- procedure (ICSID)**
 - constitution of tribunal 7, 306–7, 407–8
 - single tribunal/concurrent hearing of parallel cases 7, 8
 - registration of Application with Secretary-General, acceptability of request 'not manifestly outside the jurisdiction' 306

procedure (NAFTA)

- revision/amendment of statement of claim (ICSID Arbitration Rule 4 or UNCITRAL Rule 20)
 - in absence of claim for related loss or damage 96
 - amendment falling outside arbitration clause/agreement 94–6
 - Methanex* 58–9, 89–97
 - timeliness 96–7

procedure (UNCITRAL), joinder, jurisdiction and admissibility/merits 60–2**protection and security of investment, State responsibility**

- BITs as implementation of principle 271–2
- jurisprudence
 - AAPL* 271–2
 - AMT* 271–2
 - ELSI* 272
- loss or prejudice to claimant, need for 272
- reasonable preventive measures requirement 270–2

rectification of arbitral award, clerical, arithmetical or similar error 294–6**risk, ‘investment’/‘foreign investment’ and, balance of risk/high profits 557****Romania**

- Privatization Law (Law 99/1999)
 - SOF/APAPS as ‘empowered public institutions’ 252–4
 - text (extracts) 252–4

Romania–US BIT (1992) by article

- I (definitions), text 239
- II (standard of treatment)
 - alleged breach 272–6
 - text 239
 - II(2)(a) (‘fair and equitable treatment’) 275–6
 - II(2)(a) (‘full protection and security’) 270–2
 - II(2)(b) (arbitrary and discriminatory treatment) 274–5
 - II(2)(c) (umbrella clause) 245
 - ‘any obligation it may have entered into’ 247–8
 - ‘with regard to investments’ 286
 - classification as, requirements 249
 - good faith obligation to observe contract 276–7, 284–6
 - object and purpose/effectiveness 248
 - parties’ intention 249
 - ‘shall’ 247
- III (expropriation/nationalization), text 240
- III(1) (expropriation/nationalization: requirements) 280–4
- VI(1) (arbitration clause: ‘investment dispute’), text 241
- XII (applicability to political subdivisions) 241

standing: *see* constituent subdivision or agency as party to the proceedings; ‘investor’/‘foreign investor’; jurisdiction (ICSID); national of another contracting State (juridical person) (ICSID 25(2)(b)); national of another contracting State (juridical person) (ICSID 25(2)(b)), agreement to treat as; standing (ICSID); standing (NAFTA 1116 and 1117)

standing (ICSID), NGOs 307–8

- standing (NAFTA 1116 and 1117)**, third parties, right to make submissions on interpretation of NAFTA Agreement (NAFTA 1128): *see* NAFTA (1992) by article, Part V, Chapter 11, Section B (Settlement of Disputes), 1128
- State agency/organ**
 classification as
 applicable law, domestic law 252
 privatization/commercialization policy and 252–4
 SOF/APAPS (Romania) 252–4
- State responsibility**: *see also* *Noble Ventures* (Award), State responsibility/attribution of acts of SOF/APAPS
- acts and omissions of
 decision-making power, need for 548–50
 political subdivision (ILC 4(1)) 602–3
 private person or entity empowered to exercise elements of governmental authority (ILC 5) 252–5, 456–7, 605–6
 State agency/organ (ILC 4), *de jure* organ 252
- applicable law
 BIT/*lex specialis* 458
 customary international law 252
 ILC Articles on State Responsibility (2001) 252
- attribution
 acta jure gestionis/acta jure imperii distinction, relevance 254–5
 authority to represent State for purpose of entering into international law commitments distinguished 255
- for
 breach of contract 255
 ultra vires act (ILC 7) 254
- Stockholm Chamber of Commerce Arbitration Institute (SCC Institute)**
 appointment of arbitrators 470
 challenge to arbitrator on grounds of partiality 470
 costs 510–11
 interim order to pay share of advance, exclusion 510
 language, parties' right to choose 470–1
- Stockholm Chamber of Commerce Arbitration Institute (SCC Institute), Arbitration Rules (1999)**
 14 (advance on costs) 470, 510
 37 (amendment/interpretation of award) 512
 39 (arbitration costs) 510
 40(1) (arbitration costs: joint and several liability) 511
 40(2) (arbitration costs: apportionment) 511
- Sweden**
 Arbitration Act 1999 (*LSF*), s 36 (application to set aside award) 512
 s 32 (amendment/interpretation of award) 512
- travaux préparatoires* as aid to interpretation of agreements other than treaties**, Cochabamba Water and Sewage Concession 333
- travaux préparatoires* as supplementary means of treaty interpretation (VCLT 32)**
 absence/failure to produce 364
 definition/classification as, explanatory statements to legislature 499
 ICSID Art. 25(2)(b) ('foreign control') 367

travaux préparatoires as supplementary means of treaty interpretation (*cont.*)

jurisprudence, *Canfor* 111 n.14, 112 n.18

NAFTA

Art. 1101 111

Art. 1105 111–12

release of Chapter 11 draft negotiating texts 106

request for disclosure 53, 105–13

justification under VCLT 32, need for 110–12

supplementary nature/use 53, 325

in case of ambiguity 111–12, 513 n.2

to avoid manifestly absurd or unreasonable result 111–12, 364

‘to confirm result’ 325

treaties

amendment (VCLT 39) 193–4: *see also* FTC Interpretative Note (31 July 2001), as amendment

treaties, interpretation

aids

arbitral and judicial decisions 487, 491–4, 554

State practice 368–74

applicable law

domestic law, exclusion 487

VCLT (1969) 28

responsibility for, courts/arbitral tribunals 29

treaties, interpretation (VCLT 31(1)) (general rule: good faith, ordinary meaning, context, object and purpose) 247

absence of provision 494–6

effectiveness (*ut res magis valeat quam pereat*) (*effet utile*), in context of treaty 248

jurisprudence, *OSPAR* 51–2

literal approach/adherence to the terms of the treaty (including limitations on) 51–2

[natural and] ordinary meaning

‘all matters covered by’ 505–7, 515–18

‘any dispute concerning . . . Art. 5’ 497–8

‘any obligation it may have entered into’ 247–8

‘controlled directly or indirectly’ 353

dictionary definitions 353–4

‘indirect investments . . . made by intermediary of third State’ 494

‘investment’ 494–6

‘made in the territory’ 494

NAFTA 546

non-hierarchical nature of rule 324

object and purpose

BITs 248, 357–60, 496–7, 587–8

preamble as evidence of 357, 496–7

parties’ intention 28–9

in absence of direct evidence 507–9

party’s treaty practice and 508–9

incorporation by reference and 504–5

precise choice of terms as evidence of 249, 512–13

treaties, interpretation (VCLT 31(2)) (context)

article as a whole 337–8

other treaties concluded by one of the parties 498–9, 517

- preamble and annexes 512–13
- similar terms in different treaties 51–2, 185, 588
- similar terms in same treaty, clear intent to use different terminology 185
- treaties, interpretation (VCLT 31(3)) (points to be taken into account together with context)** 52–3
 - parties' subsequent practice establishing agreement concerning interpretation (VCLT 31(3)(b)) 360–3
 - subsequent agreement between the parties regarding the interpretation or application of the treaty (VCLT 31(3)(a))
 - FTC Interpretative Note (31 July 2001) 52–3, 111–12, 194: *see also* FTC Interpretative Note (31 July 2001)
- treaties, interpretation (VCLT 31(4)) (special meaning of term by agreement of parties)** 354–6
- treaties, interpretation (VCLT 32) (supplementary means):** *see also travaux préparatoires* as supplementary means of treaty interpretation (VCLT 32)
 - jurisprudence 365–8
 - manifestly unreasonable or absurd result and (VCLT 32(b)) 364
- treaties, interpretation (VCLT 33) (multilingual treaties/treaties authenticated in two or more languages)**
 - dictionaries as aid 489
 - ordinary meaning of term in one of the authentic texts as aid 489
 - treaty provision for 323
 - usage in other treaties compared 489
- Trinidad and Tobago–USA BIT (1994):** *see also FWO*
 - object and purpose (preamble) (promotion of economic cooperation on basis of stable investment framework) 433
- Trinidad and Tobago–USA BIT (1994) by article**
 - I(d) ('investment') 434–6
 - I(e) (covered investment) 434
 - I(h) ('investment agreement') 436–7
 - I(l) ('territory') 434
 - IX(1) (jurisdiction), 'investment'/'investment agreement' as parallel concepts 436–8
 - IX(4) (consent to arbitration) 433
- 'umbrella' clause (undertaking to observe domestic commitments):** *see also Noble Ventures (Award)*, umbrella clause (H.I)
 - classification as, strict requirements 249
 - conversion of contract obligations into international obligations and 245, 255
 - as exception to independence of international and municipal law systems 249
 - internationalization of contract and 249
 - jurisprudence
 - Salini* 247, 248, 249
 - SGS v. Pakistan* 246, 250
 - SGS v. Philippines* 246, 248, 250
 - parallel bases in treaty and contract, relevance 22
 - 'shall observe any obligation it may have entered into' 247–8
- UNCITRAL Arbitration Rules**
 - challenge to arbitrator, competence to determine 89
 - exhaustion of local remedies, absence of provision 610
 - interpretation, ordinary meaning 88, 89

UNCITRAL Arbitration Rules by article

- 6(3) (appointment of president) 574
- 7(1) (appointment of arbitrators: three arbitrators) 574
- 7(2)(b) (appointment of appointing authority) 574
- 7(3) (appointment of president) 574
- 12(1) (challenge to arbitrator: decision in absence of withdrawal) 89
- 15(1) (arbitral tribunal's right to determine procedure)
 - equal treatment/full opportunity to present case 82–3, 127–8
 - UNCITRAL 32 and 88, 89
- 20 (statement of claim or defence: amendments) 94–7
- 21 (pleas as to jurisdiction) 60–2, 208
- 21(4) (jurisdiction as preliminary issue) (joinder to merits) 60, 176, 178, 208
- 25(6) (admissibility of evidence) 113, 128–9
- 29 (closure of hearings) 69
- 32(2) (award: in writing, final and binding nature, obligation to carry out without delay)
 - 83–4, 87
 - partial award, applicability to 88
- 33(1) (applicable law: agreement by parties/determination by tribunal) 50
- 35(1) (interpretation of arbitral award) 80–2: *see also Methanex* (Final Award), procedural matters (Parts I and II), Partial Award (7 August 2002), requests for clarification and reconsideration
- 38 (costs) 44 n.1, 207
- 38–40 (fees and costs) 206–8
- 38(e) (costs: legal representation) 208
- 40(1) (costs: allocation of: unsuccessful party/reasonable apportionment) 207
- 40(2) (costs: allocation of: legal representation) 208
- 41(4) (deposit) 575

United States of America (USA)

- California Bill 521 of 9 October 1997 (MTBE risk assessment)
 - s 2 (object and purpose) 72
 - s 3(a) (funding) 72
 - s 3(d) (submission of draft assessment) 72
 - s 3(e) (certification of risks) 72, 73
 - s 3(f) (certification of risks: action consequent on) 72
 - s 4(a) (discontinuance of sale and use of gasoline) 72
 - UC Report 73, 132–5
- California Executive Order 2002 139
- California Executive Order D-5-99 of 25 March 1999 (MTBE) 73–4, 135–6
 - measure relating to Methanex, whether 158, 159–75, 203–5
- California Executive Order D-5-99 of 25 March 1999 (MTBE) by paragraph
 - para. 4 (timetable for removal of MTBE) 73
 - para. 7 (labelling) 74
 - para. 10 (ethanol risk assessment) 73
 - para. 11 (development of substitute for MTBE) 73
- California Regulations (CaRFG3) (2000) 74, 138
- California Regulations (CaRFG3) (2003 amendments) 74, 139
 - history of amendments 90–2
 - s 2262.6(a)(1) (prohibition on sales of MTBE gasoline), text 92
- California Regulations (CaRFG3) by section
 - Tit. 13

INDEX

651

- s 2262.6(a)(1) (prohibition on sales of MTBE gasoline) 74
- s 2273 of 16 December 1999 (labelling) 74
- California Senate Bill 989 of 8 October 1999 (implementation of Executive Order D-5-99) 137
- disclosure obligation (28 USC 1782) 97–103, 104–5
- waiver of right to initiate ICSID proceedings**
 - explicit waiver 331–2
 - implied waiver, exclusive jurisdiction/forum selection clause as 332–3
- witnesses, presentation at hearing** 313