

INDEX

Abbreviations used in the index

- ADF (*ADF Group v. US*)
 CA (Czech–Slovak Consolidation Agreement (1993))
 CAA (*Comité de la Agroindustria Azucarera*)
 CDC (*CDC Group v. Seychelles*)
 CRa (Ceské Radiokomunicace)
 CSOB (Ceskoslovenska Obchodni Banka)
 ECT (Energy Charter Treaty (1994))
 FIL (Foreign Investment Law) (Kyrgyz Republic)
 FTAA (Free Trade Area of the Americas)
 ILC (International Law Commission)
 JCACA (*Junta de Conciliación y Arbitraje de Controversias Azucareras*)
 KGM (Kyrgyzgazmunaizat Joint Stock Company)
 LA (Czech–Slovak Loan Agreement (1993))
 LSF (Arbitration Act) (Sweden)
 MINE (*Maritime International Nominees Establishment v. Guinea*)
 SCC Institute (Stockholm Chamber of Commerce Arbitration Institute)
 SGS (Société Générale de Surveillance)
 SI (Slovenská inkasná)
 Tecmed (*Técnicas Medioambientales Tecmed SA v. Mexico*)
 UPS (*United Parcel Service of America v. Canada*)
 VCLT (Vienna Convention on the Law of Treaties)

Note: This index focuses on legal issues and on the arbitral and judicial decisions under consideration. The summaries, parties' arguments, facts and ancillary documents are indexed only to the extent they are essential to an understanding of the legal issues. It has been designed in such a way as to be amenable to developing ICSID case law, so far as appropriate adopting the terminology of the index to C. H. Schreuer: *The ICSID Convention: A Commentary* (Cambridge University Press, 2001).

ad hoc Committee

- costs: *see* costs (ICSID arbitral tribunal: ICSID 61(2)), ad hoc Committee
 President, appointment 501
 second annulment 516 n. 63
 task/powers
 annulment on grounds set out in Article 52, limitation to 515–16
 provision of reasoning 515
 stay of execution, grant or extension 497

annulment of arbitral award

- appeal distinguished 508, 515–16
 applicable law
 procedure
 agreement of parties 502
 ICSID Arbitration Rules 502

- ICSID Convention 502
- time-limits 501
- annulment of arbitral award, grounds**
 - assumption of improper *ex aequo et bono* jurisdiction 512–13, 514, 523
 - excess of power
 - CDC* 513
 - error of law distinguished 513–14
 - MINE* 513
 - ‘manifest’ 513–14, 518, 521
 - total failure to apply law 512–13
 - failure to apply applicable law 518–23
 - failure to state reasons 523–32
 - contradictory reasons 514–15
 - correctness of reasons, relevance 514–15
 - failure to give reasons distinguished 517
 - serious departure from fundamental rules of procedure distinguished 517
 - standard of reasoning 527
 - statement of the obvious 515
 - Vivendi* 514–15, 523
 - relationship between 516–17
 - serious departure from fundamental rules of procedure
 - as challenge to procedure 514
 - failure to treat parties equally 514
 - ‘serious’ 514
 - Wena Hotels* 514
- annulment of arbitral award, resubmission**
 - Amco* 516
 - Klöckner* 516
 - undesirability of practice 516
- applicable law**
 - choice of law clause/as agreed by parties 195–6
 - applicability of rules providing for more favourable treatment of investment 49–50
 - domestic law of Contracting State 195–8, 521–3
 - contract, interpretation 522–3
 - private law 197–8
 - public law 196–7
 - international law, role 156
 - in case of treaty-based jurisdiction 518–19
 - standard of treatment of alien and 23–7
- applicable law (NAFTA arbitral tribunal) (NAFTA 1131), UNCITRAL Arbitration Rules**
 - 144 n. 2, 147
- arbitral award, procedure and form**
 - ‘award’, designation as
 - determination on substance or procedure as 100
 - failure to designate as decision, relevance 100–1
- arbitral award, review:** *see* review of arbitral award by domestic courts
- arbitral tribunal (UNCITRAL)**
 - seat 144 n. 2, 148
 - hearings distinguished 148
- arbitrary and discriminatory treatment** 22–3

arbitration, applicable law

BIT 66

law or rules of law considered by tribunal to be most appropriate 77
 procedure, law of place of arbitration 358–60, 362–3**arbitration clause/agreement**

applicability

challenge to, timeliness 449–50, 452

treaty or contract containing provision, limitation to 11–12, 23

ICSID jurisdiction, consent to 108

reference to another arbitration clause/agreement (including MFN provision) as
 311–21

FTAA and 315–16

NAFTA 1103 and 315

UNCITRAL Model Law and 315

separability 298

validity, challenge to, timeliness 449–50, 452

Arbitration Institute of the Stockholm Chamber of Commerce: *see* Stockholm Chamber
 of Commerce Arbitration Institute**arbitrator**

appointment

by Chairman of the Administrative Council 125

by party 148

by SCC Institute 10–11, 42

by Secretary General of ICSID 125

time-limit 10–11

resignation 184

reconstitution of tribunal following 184

Argentina–Chile BIT (1991), applicability to another party by way of MFN clause
 519**ASEAN Framework Agreement on Services (1995) by article,** Art. VI (denial of benefits)
 305**bank guarantee**

as an ‘investment’ 131–6

expropriation and 139

BITs (bilateral investment treaties)

as applicable law 195–6

‘fair and equitable’ as standard of treatment 22–5

object and purpose, promotion of investment 313–14

variations between 312–13

withdrawal from 108–9, 118

Bulgaria

misrepresentation 321

Privatization Act, s 5(1) (misrepresentation) 321

Bulgaria–Cyprus BIT (1987)

arbitration provisions (Art. 4.4.1)

expropriation disputes, limitation to 312

incorporation of provisions from other Bulgarian BITs 273–4

MFN treatment (Art. 3) as basis of ICSID jurisdiction 312–21, 323

‘treatment’, applicability to dispute settlement 312–21

- object and purpose, promotion of investment 313–14
- revision (1998 negotiations) 314
- text (extracts) 278–9
- travaux préparatoires*, absence 314
- Bulgaria–Cyprus BIT (1987) by article**
 - Art. 3 (MFN treatment) 312–21, 323
 - text 312
 - ‘treatment’ 312–21
 - Art. 4.4.1 (arbitration clause) 12
- burden of proof**
 - applicable law 237
 - damages 237
 - expropriation/nationalization 11, 13, 24, 27
 - investment 66
 - jurisdiction
 - burden of proof on merits distinguished 295
 - Mavrommatis* 294–5
 - Methanex* 295
 - Oil Platforms* 294
 - Salini* 295
 - ownership and control 307
- changed circumstances**, contract 37, 48, 49, 59, 60–1, 89
- Chile**
 - Decree Law 1263 of 1973, s 28 (fulfilment of final judgments) 498–9
 - Decree Law 3346 of 1980, s 2(m) (fulfilment of final judgments) 499
 - Decree Law 1304 (ICSID Convention) 499
 - foreign investment, approval contrary to government policy, effect 508, 511
 - Foreign Investment Commission (FIC)
 - effectiveness of coordination function 510
 - procedural requirements 510
 - role and obligations 509–10
 - ICSID Convention, compliance 498–9
- Chile–Croatia BIT (1993) by article**
 - Art. 3(2) (grant of permit in accordance with law and regulations) 506
 - Art. 3(3) (unreasonable or discriminatory measures) 506
 - Art. 4(1) (fair and equitable treatment) 507
- Chile–Denmark BIT (1993) by article**, Art. 3(1) (MFN/fair and equitable treatment) 506, 507, 518–19
- Chile–Malaysia BIT (1992)**, fair and equitable treatment, relationship between Arts. 2(2) and 3(1) 507, 523–4
- Chile–Malaysia BIT (1992) by article**
 - Art. 2(2) (fair and equitable treatment) 506, 507
 - Art. 3(1) (MFN treatment: fair and equitable treatment) 507, 519–20
 - Art. 4 (expropriation) 506
- compensation (expropriation/nationalization)**: *see also* damages for; damages, measure/valuation of company
- compétence de la compétence*: *see also* jurisdiction (ICSID), competence/duty of tribunal to determine; jurisdiction (UNCITRAL), competence/duty of tribunal to determine domestic courts 358–9, 375–6

consent to ICSID jurisdiction

- BIT, withdrawal from, exclusion 108–9, 118
- ECT (1994), accession to 299–300
- legislation as 108
- requirements
 - clear and unequivocal consent 315
 - writing: *see* written, need for *below*
- unilateral 142–3
- written, need for
 - consent by authorized person 298–9
 - submission of dispute to ICSID as 298–9

consent to UNCITRAL arbitration, BIT provision 7–8**contract, applicable law**, interpretation 522–3**contract, characteristics**

- investment contract distinguished 134–5
- as property right 50, 66–7

contract, formation/requirements

- agreement 363
- writing 355–6, 362–3

contract, interpretation

- aids
 - negotiations 200–1, 217–18, 220–1
 - subsequent conduct of parties 200–1, 221–3, 246
- guidelines
 - parties' intention 48, 200–4, 208–9
 - consistency with text, need for 201–4
- text, primacy 201–4, 209
- subsequent clarification by parties distinguished 203–4
- treaty interpretation distinguished 85

contract, termination, grounds, failure to comply with material obligation 251**contract, validity/voidability**

- clear and sufficient description of parties' obligations, need for 61–2, 87–90, 200–1, 205–6, 208–15, 218–20, 221, 241–2
- interpretation and 203–4
- subsequent agreement identifying parties' obligations 205–6
- subsequent clarification, possibility of 203–4
- estoppel/knowledge and acceptance of terms 210–12, 215–16, 217–18, 220–3

Contracts for the International Sale of Goods, UN Convention on (1980) 134–5**corporation**, IBM Ecuador and IBM World Trade Corporation, as distinct legal entities 109–11**costs (domestic courts)**

- in absence of jurisdiction, payment by requesting party 366–7
- interest on 98
- necessary costs 377
- parties to bear own 478
- review of arbitral award 101, 369
- right of appeal against allocation 368, 374–5
- time-limits 368, 375

costs (ICSID arbitral tribunal: ICSID 61(2))

- ad hoc Committee
 - CDC* 533
 - Centre costs (ICSID arbitral tribunal: ICSID 61(2)) 533
 - equal division 532–3
- discretion of tribunal, postponement of decision 322, 334
- parties'
 - employee costs related to proceedings 266
 - unsuccessful party to pay, partial in case of unsuccessful defence 267
- relevant factors, failure to cooperate with other party 322
- costs (SCC Institute) (Rules 43/44) 93–4**
 - disparity between claims 94
 - reasonable legal costs 93–4
 - unsuccessful party to pay 93
- costs (UNCITRAL arbitral tribunal: Rule 38)**
 - discretion of tribunal
 - not to order fees and expenses beyond amount of security deposit 28
 - request of parties, need for 366
 - parties to bear own 177
 - reasonableness 367
 - of legal fees 28, 367
 - relevant factors
 - conduct of parties 177
 - unnecessary extra hearing 177
 - unsuccessful party to pay 28, 366, 367
- critical date**, proper party 22
- CSOB (Ceskoslovenska Obchodni Banka)**
 - as party to CA 194, 223–4
 - privatization process 185–7
 - State succession and 186
 - shareholders post break-up of Czech and Slovak Republic 186 n. 4
- CSOB–Czech Republic Assignment Agreements**
 - Agreement on the Assignment of Certain Receivables of a Loan Portfolio (31 December 1993) 187, 207, 208
 - First (24 April 1998) 224
 - Future Assignment Agreement (FAA) (31 December 1993) 187–8, 208, 230
 - Second (25 June 1998) 224–5
 - Second (25 June 1998) (31 October 2001 amendments) 225
- CSOB–Slovak Republic Agreement on a Repayment Schedule Mechanism for Off-Balance Instruments (1 March 1996) 208**
- CSOB–Slovak Republic Agreements, Technopol OBS Loan Agreement and amendments**
 - signature on loans requirement 233–6
 - Slovak Republic's CA cover losses obligation and 234–5
- CSOB–Slovak Republic Loan Agreement on the Refinancing of Assigned Receivables (31 December 1993) (LA) 204–5, 207, 208**
 - applicable law, Slovak domestic law 233, 241
 - conclusion 188
 - contractual penalty (LA 8) 255–7
 - as penalty clause 255–6
 - Slovak law and 255

CSOB–Slovak Republic Loan Agreement (*cont.*)

- interest, capitalization (compound) (LA 5) 248–51, 263
 - as common business practice 250, 263
 - interest on interest 250–1
 - parties' agreement 248–50
- interest rates (LA 4)
 - clear and sufficient identification of obligations, whether 241–2
 - dates (LA 4(I)) 241–2
 - interbank/BRIBOR rates (LA 4(II)(a) and (b)) 241–2, 262–3
 - notification of rates by CSOB 245–6
 - refinancing cost as basis 243–5
 - Slovak law and 246
 - termination in case of default on cover losses obligations 251
 - text 241

CSOB–Slovak Republic Operation Agreement (Agreement on securing activities of SI)

- 188, 205
 - binding on Slovak Republic, whether 215–16
 - CSOB operating losses and 215–16
 - management fees, chargeability 216

Czech [and Slovak] Federal Republic–UK BIT (1992)

- applicable law, application of rules providing for more favourable treatment of investment (Art. 11) 49–50
- interpretation, applicable law 85
- 'investment'
 - applicable law 89
 - contractual right having a financial value 50, 66–7
- State succession and 79
- text (extracts) 39–41

Czech [and Slovak] Federal Republic–UK BIT (1992) by article

- Art. 1(a)(iii) ('investment': contract having a financial value) 50, 66–7, 86–7, 91–2
- Art. 2(3) (conclusion of specific agreements) 80, 85–7
- Art. 5(1) (expropriation: requirements) 85–7
- Art. 8(1) (arbitration clause)
 - limitation of applicability to certain articles 80
 - Stockholm Chamber of Commerce Arbitration Institute and 30 n. 2
 - text 97
- Art. 8(3) (arbitration clause: applicable law) 66
- Art. 11 (application of rules providing for more favourable treatment of investment) 49–50

Czech Republic

- burden of proof, damages 237
- Civil Code
 - s 35(2) (interpretation of contracts: parties' intention) 201–4, 209
 - Commercial Code, s 266 and 201–2
 - s 37(1) (validity of legal act: 'definite and intelligible' requirement) 200–1, 202, 205–6
 - s 41 (separability of contract provisions) 48
 - s 398 (claims for damages: time-limits) 76–7, 92–3
- Civil and Commercial Codes, relationship between 201–4
- Commercial Code
 - s 1(2) (scope of Code: resolution of issues not resolvable under provisions of Code) 201–4, 205

- s 266 (interpretation of contracts: parties' intention) 48
- s 266 (interpretation of contracts: parties' intention: negotiations, subsequent practice and conduct of parties) 200–1, 208–9, 217–18, 220–3
- s 269(1) (nominate contract) 205
- s 269(2) (contract: validity: requirements) 61–2, 87, 200–1, 205–6, 218–20
- s 269(3) (contract: identification of obligation in subsequent agreement) 205–6
- s 356 (change of circumstances) 89
- s 365 (delay in fulfilment of obligations) 238
- s 367 (delay in fulfilment of obligations) 238
- s 373 (breach of contract: damages for) 236–8
- s 379 (measure of damages) 236
- s 380 (damages for costs incurred) 236
- contract, interpretation
 - aids
 - negotiations 200–1, 217–18, 220–1
 - subsequent conduct of parties 200–1, 221–3
 - parties' intention 48, 200–4, 208–9
 - consistency with text, need for 201–4
 - subsequent clarification by parties distinguished 203–4
 - text, primacy 201–4, 209
- contract, validity/voidability
 - clear and sufficient description of parties' obligations, need for 61–2, 87–90, 200–1, 205–6, 208–15, 218–20, 221
 - interpretation and 203–4
 - subsequent agreement identifying parties' obligations 205–6
 - subsequent clarification, possibility of 203–4
- damages for
 - breach of contract 236–66
 - costs incurred 236
- damages, measure/valuation of company
 - actual damage 236
 - full compensation 236–8
 - lost profit 236
- separability, exclusivity clause 48
- State, as corporation 72–3
- State agency/organ
 - right/power to bind government 63–4, 90–1
 - as separate entity 63–4, 90–1
- State Enterprise Law 111/1990 63–4
- State responsibility, acts and omissions of, State agency/organ 63–6, 90–1
- time-limits, submission of claim for damages 76–7, 92–3
- Czech Republic, cellular telephone network (GMS)**
 - absence of records of position taken by government 84–5
 - Ceské Radiokomunikace (CRA), as successor to Sprava Radiokomunikaci Praha (SRa) 35
 - Czech Ministry of the Economy–TMobil BV–CRA Agreement (1996) 37
 - Fundamental Principles of State Telecommunications Policy (Resolution 428 of 10 August 1994) and 36, 49, 60–1, 79, 91–2
 - Millicom–Sprava Radiokomunikaci Praha (SRa) Cooperation Agreement
 - applicable law 61–3
 - exclusivity clause, separability 48

Czech Republic, cellular telephone network (GMS) (cont.)

- licence rights distinguished 91–2
- object and purpose 63
- termination
 - as breach of contract 92
 - changed circumstances and 37, 48, 49, 59, 60–1, 89
- text 34–5
- validity/binding nature 47–8, 61–6, 87–92
- Nagel–CRa Settlement Agreement (1999)
 - Czech Government, applicability to claims against under BIT 80–3
 - Czech Government as
 - affiliate 73–4, 82
 - parent corporation 82
 - dispute settlement clause 39
 - stockholder 82
 - text 38–9
- privatization policy and 35–6
- RadioMobil, formation 47
- SRa as State enterprise, act or instrumentality of State, whether 63–4

Czech–Slovak BIT (1992)

- arbitration clause (Art. 8), incorporation in CA 195–6
- protection and security of investment (Art. 2(2)) 196
 - compensation for covered loss, failure to pay and 219–20

Czech–Slovak BIT (1992) by article

- Art. 2(2) (protection and security of investment) 196, 219–20
- Art. 8 (arbitration clause) 195–6

Czech–Slovak Consolidation Agreement (CA) (1993): see also CSOB (Ceskoslovenska Obchodni Banka); CSOB–Slovak Republic Agreements

- applicable law (CA 7) 191–8
 - Czech law (CA 7(4)) 195–6, 205–6, 208–9
 - private law 197–8
 - public law 196–7
 - damages for breach 236–7
 - international law, relevance 194–6
- assigned non-performing receivables (CA 3(II))/losses: *see also* cover losses provision (CA 3(II)(5)); ‘losses’ *below*
- loss-making nature (CA 3(II)(4)) 198–9, 206, 209
- off-balance sheet receivables 207, 230–6
 - deficiencies in CSOB internal guarantee procedures, relevance 230–3
 - failure to challenge assignment decisions, effect 230–3
 - receivables assigned after CA deadline (‘late transfers’) 235–6
 - selection of assignable receivables 230
- on-balance sheet receivables 207
 - devaluation loans 226–8
 - origin and nature, relevance 226
 - Polnopo/Mykoprogres guarantee payment and 228–9
 - receivables assigned after CA deadline (‘late transfers’) 229–30
 - Slovak Republic’s obligation to pay 226–30
 - payment of ‘consideration’ and interest thereon (CA 3(II)(3)) 199, 207, 235
 - contractual penalty (LA 8) and 255–7

- losses from loan for purposes of, exclusion 207–9, 256–7
 - payment by instalments, exclusion 207–8
 - proof of ‘non-performance’, relevance 228
 - schedule of payments related losses 206–9
 - selection and allocation, validity of arrangements for 210–15
 - time-limit for identification of receivables (CA 3(II)(2)) 229–30, 235–6
- capital adequacy ratio (CA 3(I))
 - over-assignment, liability for 214–15
 - precise and certain requirement, whether 212–15
- Collection Companies (CA 3(II)) 187
 - negative balance/shortage of funds as ‘losses’ 209–10
 - operating cost losses (CA 3(II)(4)) 215–16
 - payments of interest, calculation of damages due in case of default 241–57
 - conclusion 186–7
- cover losses provision (CA 3(II)(5)) 216–25
 - binding on Slovakia, whether 217–18
 - clear and sufficient identification of obligations, whether 218–20
 - ‘compensation’, Slovak Republic’s obligation 219–20
 - CSOB’s right to claim against Czech Republic and 196–8, 223–5
 - CSOB–Czech Republic Assignment Agreements and 224–5
 - Czech Civil Code, applicability 209
 - Czech Commercial Code, applicability 205–6, 208–9, 218
 - date of liability to pay 238
 - default, procedure in case of 237–8, 251
 - as innominate agreement 204–6, 209–10, 218
 - legal nature 204–6
 - loss-covering mechanism requirement 210
 - Slovak Republic’s obligations 219–23, 233–6
 - damages for breach of 236–66
 - text 189
 - validity 199–200, 210–15, 221
- ICSID jurisdiction and 190–1
- improvement of CSOB’s balance as objective 198–9
- legal status
 - commercial agreement 205
 - CSOB–Yemen Agreement (1979) distinguished 194
 - Czechoslovakia–Yemen Economic Cooperation Agreement (1978) distinguished 194, 196
 - ‘framework agreement’, relevance of description as 193–4, 196–7, 205–6
 - innominate agreement 204–6, 209–10, 218
 - legal obligations under 192–4, 205–6
 - private law agreement 197–8
 - public law instrument, whether 196–7
 - State contract, whether 195
 - treaty, whether 194
- ‘losses’ 206–16: *see also* assigned non-performing receivables (CA 3(II))/losses; cover
 - losses provision (CA 3(II)(5)) *above*
 - actual losses, limitation to 216
 - Collection Companies negative balance/shortage of funds as 209–10
 - operating cost losses 215–16

Czech–Slovak Consolidation Agreement (*cont.*)

- object and purpose 192
- operating cost losses (CA 3(II)(4)) 215–16, 264
- parties, CSOB as 194, 223–4
- remedies for breach, termination of LA 251

damages for

- breach of contract 236–66
- costs incurred
 - critical dates 506, 511–12, 530–2
 - financing costs 511–12
 - interest on loan 241–57
 - calculation 247–8, 252–5
 - legal costs 477
 - operating costs 264
 - overheads 477
 - travel and accommodation costs 477
- non-payment of delivered goods 475
- ‘other relief’ 477

damages, measure/valuation of company

- actual damage 236
- applicable law 236–7
- calculation, failure to meet guarantee/loan obligations 239–57
- financial position of defendant, relevance 469–74
- full compensation 236–8
- jurisprudence, *Chorzów Factory* 467–8, 511–12
- lost profit 236, 257–63
 - ‘abstract’ lost profit 258–9
 - burden of proof 259–60
 - calculation, difficulty, relevance 476–7
 - interest on damages as alternative means of addressing 260–3
 - market of reference 258–9
 - real and ascertainable loss, limitation to 259–60
- mitigation/offset
 - contributory fault 511, 528–30
 - tax gains/windfall as result of lower liability base 265–6

damages, procedural issues

- applicable law, domestic law of Contracting State 237
- burden of proof: *see* burden of proof
- exhaustion of alternative methods of recovery 238
- legal reasons, need for 528–32

denial of justice, definitions/applicability, fair and equitable treatment, compliance with obligation and 170 n. 24**diplomatic protection**

- as declining/residual concept 314–15
- shareholders with nationality different from that of corporation
 - ELSI* 153
 - Goetz* 153
- treaty-based rights distinguished, *Barcelona Traction* 152–3

domestic courts: *see also* exhaustion of local administrative or judicial remedies

decisions, relevance, jurisdiction of international tribunal and 155–6
 as option 9
 resort to by some shareholders, relevance 154–6

domestic law

tribunal proceedings
 evaluation and compliance with distinguished 167–8
 relevance in 156, 166–8

due diligence, investor's obligation of 510

Ecuador–US BIT (1993) by article

Art. I (applicability: investment owned or controlled directly or indirectly by nationals of the other party) 110–12
 Art. VI(1)(c) (breach of treaty right with respect to investment) 118
 Art. VI(2) (amicable resolution through consultation and negotiation) 117
 Art. VI(2)(a) (submission of disputes to domestic courts) 117, 118–20
 Art. VI(3) (arbitration clause) 117–18

effective remedy, ECT 10(12), executive intervention in judicial proceedings and 466

Egypt–UK BIT (1975) by article

Art. 1(a) ('investment . . . every kind of asset'), bank guarantee, whether 131–2
 Art. 1(a)(i) ('investment . . . mortgage, lien or pledge'), bank guarantee, whether 132
 Art. 1(a)(iii) ('investment . . . contract having a financial value'), bank guarantee, whether 132

Energy Charter Treaty (1994) (ECT)

accession to 296
 as consent to ICSID jurisdiction 299–300
 amicable settlement, as preliminary to arbitration (ECT 26(1)–(2)) 462–3
 applicability, Gibraltar 449–51, 486
 certainty of rights, need for 306–7
 denial of advantages of Part III (investment promotion and protection), applicability to ECT 26 (dispute settlement): *see* Energy Charter Treaty (1994) (ECT) by article, Part III (investment promotion and protection), Art. 17 (non-application of Part II in case of ownership or control by foreign nationals with no substantial business activities in Area)
 denial of Part III advantages in case of ownership or control by foreign nationals with no substantial business activities in Area (ECT 17(1))
 ASEAN Framework Agreement on Services (1995) compared 305
 dispute settlement (ECT 26), effect on 302–4
 exercise of right, need for 304–5
 as jurisdictional issue 301–4
 NAFTA 1113(2) compared 305
 'no substantial business activities' 307–8, 311, 323
 notification requirements 305
 retrospective effect of denial 305–7, 323
 dispute settlement provisions: *see* Energy Charter Treaty (1994) (ECT) by article, Part V (dispute settlement)
 effective remedy (ECT 10(12)), executive intervention in judicial proceedings and 466
 fair and equitable treatment (ECT 10(1)) 463–6
 object and purpose (ECT 2), promotion of long-term cooperation in energy 276
 provisional application (ECT 45) 300, 450–1
 termination 451, 486

Energy Charter Treaty (1994) (ECT) (cont.)

- ratification, Bulgaria 276 n. 1
- reservations, exclusion (ECT 46) 300
- text (extracts) 396–401

Energy Charter Treaty (1994) (ECT) by article

Part I (definitions and purpose)

- Art. 1(2) ('contracting party') 296
- Art. 1(4) ('energy materials and products') 401, 460
- Art. 1(5) ('economic activity in the energy sector') 401, 460, 486
- Art. 1(6) ('investment') 296–8, 459–62, 486
 - 'owned or controlled by an investor' 307
- Art. 1(6)(b) ('shares, stock or other forms of equity participation') 296
- Art. 1(6)(c) (claims to money/claims to performance) 459–62
 - 'associated with an investment' 461–2
 - 'having an economic value' 461–2
- Art. 1(6)(f) (any right conferred by law, contract or licence under economic activity in energy sector law) 459–60, 462
- Art. 1(7) ('investor') 297
- Art. 1(7)(ii) ('investor': company organized in accordance with law of contracting party) 296, 459
- Art. 1(10) ('Area') 296
- Art. 2 (object and purpose) 276

Part III (investment promotion and protection)

- Art. 10(1) (stable, equitable, favourable and transparent conditions) 330, 463–6
- Art. 10(12) (effective means under domestic law for assertion of claims) 330, 466
- Art. 12(1) (compensation) 331
- Art. 13 (expropriation) 330–1
- Art. 13(1) (expropriation: compensation), 'measures having equivalent effect' 466–7
- Art. 17 (non-application of Part III in case of ownership or control by foreign nationals with no substantial business activities in Area) 276–7, 301–11, 323, 451–2
 - text 277
- Art. 17(2) (non-application of Part III to investment of investor of third State in a restricted relationship with denying State) 306
 - 'owned or controlled' 308–11
 - 'third State' 308

Part IV (miscellaneous provisions), Art. 22(1) (obligation to ensure conduct compatible with Part III) 467

Part V (dispute settlement) 295–304

- Art. 26 (settlement of investor–State disputes)
 - breach of ECT Part III obligations, limitation to 296
 - procedural nature 302
 - res judicata* considerations 453–4
 - separability 298
 - text 277–8
- Art. 26(1) (jurisdiction), 'shall be settled amicably' 462
- Art. 26(2) (requests for amicable settlement) 462–3
- Art. 26(3)(a) (unconditional consent) 300
- Art. 26(4)(c) (submission to Stockholm Chamber of Commerce Arbitration Institute) 449

- Art. 26(6) (applicable law: ECT and applicable rules and principles of international law) 453
- Art. 27 (inter-State disputes), applicability 296, 303
- Part VIII (Final Provisions)
 - Art. 45(1) (provisional application) 300, 450–1
 - Art. 45(3)(a) (provisional application: termination) 451, 486
 - Art. 46 (reservations) 300
- Annex EM (energy material and products) 401, 460
- Annex IA (Contracting Parties not allowing submission of certain disputes to arbitration) 402
- Annex ID (Contracting Parties not allowing resubmission of same dispute to arbitration) 402
- Annex NI (non-applicable energy material and products) 401, 460
- equality of parties**, agreement between two or more States and a private party 196–7
- estoppel**
 - conduct in parallel proceedings in domestic courts or other tribunal 455–7
 - fork-in-the road provision, relevance 456–7
 - SGS v. Pakistan* 456
 - contract, validity, knowledge and acceptance of terms and 210–12, 215–16, 217–18, 220–3
 - failure to challenge transactions [in timely fashion] 230–3
 - as general principle of international law 455–6
 - as general principle of law 455
 - requirements, reliance on act/undertaking 50
- EU Regulations**, 44/2001 of 22 December 2000 (Recognition and Enforcement of Foreign Judgments) 80
- evidence**
 - admissibility, determination by tribunal 237
 - conflicting evidence 508–9
 - sufficiency
 - absence of records of position taken by government 84–5
 - absence of records relating to alleged meeting 508–9
- evidence of**
 - contract terms 362–3
 - ownership 309–11
- ex aequo et bono***
 - agreement of parties, need for 192
 - annulment of arbitral award and 512–13, 514, 523
- exhaustion of alternative methods, obligation**, damages for breach of contract and 238
- exhaustion of local administrative or judicial remedies**
 - BIT provisions
 - freedom of choice 116–17, 118–20
 - obligation to seek legislative change and 9
 - NAFTA 170
- expropriation/nationalization**: *see also* NAFTA (1992) by Article, Part V, Chapter 11, Section A (Investment), 1110 (expropriation and compensation)
 - burden of proof 11, 13, 24, 27
 - de facto* expropriation, derivative claim and 153–6

expropriation/nationalization, classification as

- bank guarantee, failure to release 139
- breach of contract, distinguished 83, 92
- creeping expropriation / 'measure tantamount to nationalization or expropriation'
 - applicable law, international law and practice 12–13
 - ECT 13(1) 466–7
 - jurisprudence
 - Metalclad* 176
 - Myers* 76, 175
 - Pope & Talbot* 175, 176
 - Santa Elena* 174–5, 176
 - Starrett Housing* 174
 - legislation having retroactive effect 466–7
 - legislative rights, disregard of 12–13
 - partial deprivation 174–7
 - transfer of assets of creditor 466–7
- failure to modify law 506
- maladministration 153
- tax measures
 - abusive taking, need for 23–5
 - cancellation/refusal of VAT refunds 12–13
 - change of rates 11–12, 24–7
 - confiscatory tax 12–13

expropriation/nationalization, lawfulness, requirements, BIT provisions 11–13**fair and equitable treatment of alien:** *see also* minimum standard of treatment in accordance with international law

- approval of project contrary to government policy as breach 508, 511
- BIT provisions as measure of 22–5, 507
- ECT 10(1) 463–6
- executive intervention in judicial proceedings and 393, 464–5, 474–5
- jurisprudence, *Tecmed* 166, 507, 520–1
- legislation introducing restrictive interpretation affecting existing transactions 465–6
- legitimate expectations and, *Tecmed* 166, 520–1
- maladministration by authorities and 153, 156–72
- Mexico sugar regulatory system and 153, 165–72
- prejudice, need for 165
- standard of review: *see* standard of treatment of alien, standard of review
- transfer of assets to detriment of creditors 464, 466

Foreign Judgments, Recognition and Enforcement, EU Regulation 44/2001 80**forum selection clause in contract**, preclusion of ICSID jurisdiction, whether 140–3**forum selection clause in treaty including BIT/ICSID Convention**

- effect on forum selection clause in investment contract 111–15
- jurisprudence
 - Vivendi* 114–15
 - Vivendi Annulment* 115, 141

fraudulent misrepresentation, effect on, consent to investment 321**general principles of international law**

- estoppel 455–6

res judicata 452–3
 uncertainty of 366
general principles of law, estoppel 455
Gibraltar, ECT (1994), applicability 449–51, 486

ICSID Convention (1965)

travaux préparatoires

Art. 52 515

Art. 53 515

ICSID Convention (1965) by Article

21(a) 309

25 109–12, 118

25(1) 132–6, 277, 298–301

26 117

36(2) 107

36(3) 124, 143–4, 274, 303, 310, 321–2

38 105

41 105–6, 294

41(2) 322

42 192, 518

42(1) 195–6, 512–13, 518–23

42(3) 513, 514, 518

47 325, 328

50(2) 516 n. 63

51(3) 516 n. 63

52 508

52(1) 512

52(1)(b) 512–14

52(1)(d) 512, 514, 517

52(1)(e) 512, 514–15, 523–32

52(2) 501

52(5) 493, 496–9, 501

53 498

ICSID Rules (Arbitration) (1984)

5(3) 125

6(1) 125, 183, 275

10(2) 184

13(1) 125

14 105–6

34(1) 237

35(2) 309

39 324, 325–6, 328

39(1) 331–2

41 184

43(1) 143

50(2) 493

54 496–9

54(1) 493, 497, 501

54(2) 493, 501

54(3) 532–3

ICSID Rules (Institution of Conciliation and Arbitration Proceedings) by Article

- 2(1)(c) 107–9
- 2(1)(d)(iii) 109–12
- 2(3) 107–9
- 5 124, 274
- 6 274
- 7 125, 274

ILC (International Law Commission)

- State Responsibility for Internationally Wrongful Acts, [Draft] Articles on (2001)
 - compensation for wrongful damage
 - contributory fault 529
 - measure 467

interest

- on compensation/damages 478
 - as compensation for lost profit 260–3
- compound
 - agreement of parties, need for 248–50
 - as common business practice 250, 263
 - interest on interest 250–1
- date of commencement/*dies a quo*, date of critical court decision 478
- rate, BRIBOR 241–2, 262–3

international law, in relation to domestic law, interpretation of legislation, as aid to 365–6

‘investment’ / ‘foreign investment’

- applicable law
 - BIT 50
 - domestic law of Contracting State 86, 89, 363–5
 - treaty under consideration 459
- approval of host government, relevance, approval contrary to government policy, effect 508, 511
- bank guarantee 131–6
- BIT provisions 50, 110
- definition/classification as 460
 - ‘any kind of asset owned or controlled either directly or indirectly through an investor of a third State’, ‘third State’ 308
 - ‘any right conferred by law, contract or licence’, under economic activity in energy sector law 459–60
- bankruptcy, declaration of 460
- ‘claim to money’ 460–2
- claims to money 459–62, 465
- company or shares of stock or other interests in company or assets thereof [and any form of participation in company] 110–11
- contract for supply of goods as part of ‘broader investment scheme’ 362–3
- contractual right [having financial value] 50, 66–7, 86–7, 110–12
 - legitimate expectation and 87, 91–2
 - requirements 133–5
- ‘contribution of foreign investor to object of economic activity in territory of contracting State’ 363–6, 395, 465
- ‘contribution’ 364–5
- ‘investments appearing as contribution’ 363

- ‘object of economic activity’ 364
- equity or debt 11
- ‘every kind of asset’, bank guarantee 131–2
- ‘every kind of investment . . . owned or controlled directly or indirectly by [nationals or] companies of the other party’ 11
- ‘investment appearing as contribution of foreign investor into objects of economic activity in territory of contracting State’ 363–6, 465
- mortgages, liens, guarantees and similar rights 132
- multilateral treaties, Energy Charter Treaty (1994) 296–8
- ‘owned or controlled, directly or indirectly’ 307
 - burden of proof 307
- shares of stock or other interests in a company [owned or controlled, directly or indirectly], equity share 152
- tangible or intangible property 364, 395
 - ‘in expectation of or used for economic benefit’ 366, 465
- evidence of, terms of contract 362
- ICSID jurisprudence 110
- jurisprudence
 - Alcoa* 133
 - Amco Asia Annulment* 133
 - Atlantic Triton* 133
 - CSOB* 130
 - Fedax* 132, 133, 135, 460–1
 - Salini* 111–12, 133, 135, 461
 - SGS v. Pakistan* 112, 133, 461
- as preliminary issue 360–2, 375–6
- risk, relevance, due diligence, investor’s obligation 510
- ‘investment dispute’**
 - BITs 11–12
 - breach of right conferred by treaty with respect to an investment 11–12
 - domestic law provisions, ‘dispute between a foreign investor and the contracting State in respect of a foreign investment’ 360–1
- investment licence**, cooperation agreement distinguished 91–2
- ‘investor’ / ‘foreign investor’**
 - ‘any entity founded or registered in accordance with the legislation of a foreign State’ 361, 459
- control of company, relevance 152–4
 - Vivendi Annulment* 153
- jurisdiction (general)**
 - concurrent jurisdiction in domestic courts, relevance 155–6
 - Betsy* 155–6
 - Selwyn* 155–6
 - doctrine of assertion 375–6
- jurisdiction (ICSID)**
 - basis, Energy Charter Treaty (1994): *see* Energy Charter Treaty (1994) (ECT) by article, Part V (dispute settlement), Art. 26(1) (jurisdiction)
 - burden of proof 294–5
 - competence/duty of tribunal to determine 322
 - contractual basis, null and void contract 106–7

jurisdiction (ICSID) (*cont.*)

equity/equitable principles, improper resort to as ground for annulment 512–13, 514
 limitations on, matters within exclusive competence of domestic courts 116

Maffezini 129

objection to

ECT 17(1) (non-application of ECT Part III) as basis for 302–4

submission ‘as early as possible’, need for 297

parallel bases in treaty and contract 137–9

jurisprudence

CMS 138

Genin 137

Lauder 137

SGS v. Pakistan 138, 139

SGS v. Philippines 138–9, 141

Vivendi Annulment 137, 138

Wena Annulment 137, 138

prima facie legal case, sufficiency 107, 298

Methanex 128–9

Oil Platforms 298

Salini 129

SGS v. Pakistan 129

UPS 128–9

jurisdiction (UNCITRAL)

‘colourable’ claim, sufficiency 13

competence/duty of tribunal to determine 358–9

merits, distinguished 11–13

Kazakhstan–US BIT (1992) by article, Art. VI(1) (‘investment dispute’) 11–12

KGM (Kyrgyzgazmunaizat Joint Stock Company): *see also* Petrobart–KGM Goods Supply Contract 1/98-PB

bankruptcy (1999) 370, 393–4, 406–7, 464–5, 466

ECT 22(1) obligations and 467

establishment and purpose 390

financial situation prior to transfer of assets to Kyrgyzgaz 470–1

Government Decrees relating to in date order

28 (measures for improving the supply of natural gas and stabilizing the activity of KGM) 390–1

649 of 5 October 1998 (replacement of Kyrgyzgaz by new State company ‘Kyrgyzgaz’ managed by Kyrgyzenergo) 391, 408

11 of 11 January 1999 (Kyrgyzgaz: financing arrangements) 392, 408, 464, 466

79 of 11 February 1999 (Individual Programme of Privatization of KGM) 393

141 of 9 March 1999 (Munai: responsibility for Kyrgyz petrol sector) 393, 408, 464

Presidential Decrees relating to in date order

30 of 29 January 1997 (KGM) 390, 405

282 of 23 September 1998 (establishment of Kyrgyzgaz) 391, 408, 463–4

as State entity 406, 467

supply of all types of oil products, responsibility for (charter 3.22) 405–6

transfer of assets to Kyrgyzgaz

damage to Petrobart resulting from 470–4

propriety 464–5, 466–7

value of transferred assets 471–2

- Kyrgyz Republic:** *see also* Petrobart–KGM Goods Supply Contract 1/98-PB
 Arbitration Procedure Code, s 178 (execution of monetary judgment) 464–5
 Bankruptcy Law
 s 9 (knowledge of insolvency) 357
 s 18 (non-payment of debt) 439
 s 21 (right of insolvent to dispose of property) 357, 421–2, 437–9
 s 21(3) (seizure of assets: agreement of court of arbitration) 475
 Business Partnerships and Companies Law, s 55 (joint stock company: charter capital)
 364–5
 Civil Code
 s 144 (joint stock company: charter capital) 364–5
 s 172 (‘transaction’) 355
 s 176 (substance of transaction, need for writing) 355
 s 177 (contracts: requirements) 355, 362
 s 178.3 (foreign economic transaction: validity) 355
 s 395 (consent to contract: form) 355–6
 s 415 (contracts for the sale of goods) 354
 s 422 (satisfaction of creditors) 421
 s 470 (long-term supply contracts) 354
 s 1190 (foreign economic transaction: writing, need for) 355
 Constitution, Art. 9(4) (universally recognized principles of international law) 366, 395–6
 contract, formation/requirements, writing 355–6, 362–3
 economic and political background 405
 energy sector, organization 405
 Foreign Investment Interpretation Law 2000 363, 365
 retroactive, whether 465–6
 s 1 (‘foreign investment’), text 353, 395, 465
 Foreign Investment Law (FIL)
 international law as aid to interpretation 365–6
 text 378–80
 Foreign Investment Law (FIL) by article
 s 1 (‘investment’) 364
 s 1.2 (‘foreign investment’) 363–6, 465
 s 1.3 (‘foreign investor’) 361
 s 1.5 (‘investment dispute’) 360–1
 s 23.2 (arbitration clause), text 339, 394
 s 23.3 (arbitration: consent to)
 text 94, 339
 UNCITRAL Rules and 359
 international law in relation to domestic law, interpretation of legislation, as aid to
 365–6
 ‘investment’ / ‘foreign investment’
 claims for money, exclusion 465
 ‘investment appearing as contribution of foreign investor into objects of economic
 activity in territory of contracting State’ 363–6, 465
 ‘appearing as’ 365
 ‘investment’ as tangible or non-tangible asset 364, 395, 465
 ‘object of economic activity’ 364, 395
 ‘investor’ / ‘foreign investor’ 361
 KGM: *see* KGM (Kyrgyzgazmunaizat Joint Stock Company)
 separation of powers, executive intervention in judicial proceedings 393, 464–5, 474–5

legal dispute arising directly out of investment, political elements, relevance 192

legislation, interpretation

aids, international law 365–6
 guidelines, actual language 365

legislation, retroactive effect, interpretation distinguished 465–6

legitimate expectations

fair and equitable treatment and 520–1
 financial value of asset and 87, 91–2

lost profit: *see* damages, measure/valuation of company, lost profit

Mexico

law of

Expropriation Decree of 3 September 2001 150
 Sugarcane Decree 1991: *see* Mexico sugar industry, regulatory framework with particular reference to the Sugarcane Decree 1991

Mexico sugar industry, regulatory framework with particular reference to the Sugarcane Decree 1991 156–60

CAA (*Comité de la Agroindustria Azucarera*) 158
Comités de Producción Cañera de los Ingenios del País 158
 fair and equitable treatment (NAFTA 1105) and 153, 165–72

implementation and enforcement

Acuerdo of 25 March 1997 (determination of national reference price), government role 159–60, 171–2

Acuerdo of 31 March 1998 (production ceilings) 160
 alleged breach 160–1, 164

Acuerdo of 2000 (production ceilings: method for calculating) 160, 164
 alleged failures 150, 160–73

economic certainty/profitability/equity to all producers, government's obligations 158–9

export quotas, obligation to comply with 157–8, 161–4

JCACA (*Junta de Conciliación y Arbitraje de Controversias Azucareras*) 158

national treatment (NAFTA 1102) and 153, 156–64, 172–3

nationalization of sugar mills (1970s) 158, 172–3

scope, object and purpose of Sugarcane Decree 1991 158–60

MFN (most favoured nation) treatment

dispute settlement provisions, applicability to 312–21, 323

Ambatielos 318

Anglo-Iranian Oil 318

CSOB distinguished 317

Maffezini 316, 318–20

Rights of US Nationals in Morocco 318

Siemens 316, 320

Tecmed 320

minimum standard of treatment in accordance with international law

'in accordance with international law', treaty standard, BITs 22–3

jurisprudence, *Myers* 167

standard of review: *see* standard of treatment of alien, standard of review

Moldova

Budget Law 1997 6, 14

Budget Law 1998 6–7, 14–15

- arbitrary and discriminatory, whether 24–7
- fair and equitable, whether 24–7
- Expo-Business-Chișinău FEZ 625–XIII of 3 November 1995 9, 12, 14
 - Art. 5 (customs regime) 25–6
 - text 18–19
 - Art. 6 (tax regime) 25–6
 - text 19
 - Art. 7 (stabilization clause) 12–13, 18, 25–7
 - text 18
- expropriation/nationalization, classification as, tax measures 11, 24–7
- Foreign Investment Law 998 of 1 April 1992, Art. 43(2) (customs, tax, financial, credit, currency and anti-monopoly legislation, exclusion from stabilization clause) 12–13, 21, 25–7
- Free Zones Law 1451–XII of 25 May 1993 19
- Regulation 05/1–07/507 of 11 April 1996 (exemption from export duties) 14
 - text 19–20
- stabilization clauses 12–13, 18, 25–7
- Moldova–US BIT (1993)**
 - 6 months rule (Art. VI(3)) 9–10
 - appointment of arbitrators 10–11
 - arbitrary and discriminatory treatment (Art. II(3)) 22–3
 - damages, measure/valuation of company (Art. III(1)) 12
 - denial of BIT advantages (Art. I(2)) 8
 - dispute settlement alternatives (Art. VI(2)) 9
 - expropriation, lawfulness (Art. III(1)) 11–13
 - fair and equitable treatment/minimum international law standard (Art. II(3)) 22–3
 - ‘investment dispute’ 11–12
 - proper parties (Art. VI(8)) 8
 - taxation (Art. X)
 - applicability to (Art. X(2)) 10
 - as expropriation 11, 24–7
 - fairness and equity in treatment of 23–5
- Moldova–US BIT (1993) by article**
 - Art. I(1)(a) (‘investment’) 11
 - Art. I(2) (denial of BIT advantages) 8
 - Art. II(3)(a) (fair and equitable treatment/minimum international law standard) 22–3
 - Art. II(3)(b) (arbitrary or discriminatory measures) 22–3
 - Art. II(3)(c) (obligations entered into with regard to investments) 25
 - Art. III(1) (expropriation: justification/measure of damages) 12, 25
 - Art. VI(1) (‘investment dispute’) 11–12
 - Art. VI(2) (State–investor dispute settlement: alternatives) 9
 - Art. VI(3) (6 months rule) 9–10
 - Art. VI(8) (proper parties) 8, 22
 - Art. VII(2) (2 months rule) 10
 - Art. X(1) (tax matters: fairness and equity) 23–5
 - Art. X(2)(a) (tax matters: applicability to: expropriation) 12
 - Art. X(2)(c) (tax matters: applicability to: investment agreement provisions) 10
- MTD–Chile dispute**
 - annulment proceedings 500–33
 - history and background 503–5

MTD–Chile dispute (*cont.*)

- MTD Chile, as national of another contracting State 505
- MTD Equity, as ‘investor’ 505

NAFTA (1992) by Article

- Part V, Chapter 11, Section A (Investment)
 - 1102 151–2
 - 1102(2) 172–3
 - 1103 (MFN treatment) 315
 - 1105(1) 151, 165–72
 - 1110 (expropriation and compensation) 152, 173–7
 - 1113(2) (denial of benefits: notification and consultation) 305
- Part V, Chapter 11, Section B (Settlement of Disputes)
 - 1116 (investors on own behalf) / 1117 (investors on behalf of an enterprise) distinguished, standing issues 152–6
 - 1120 (submission of claim to arbitration) 147
 - 1128 (participation by a party) 149
- Part V, Chapter 11, Section C (Definitions), 1139 (definitions) 152

NAFTA Free Trade Commission (FTC), Interpretative Note on Certain Chapter Eleven Provisions (31 July 2001)

- minimum standard of treatment in accordance with international law 167 n. 14
- NAFTA jurisprudence
 - ADF* 168
 - Myers* 167

national treatment

- differential treatment
 - as between national and foreign claimants 154–5
 - Hopkins* 154–5
 - Myers* 154–5
- differential treatment, grounds/justification, public policy 172–3
- maladministration by authorities and 153, 156–64, 172–3

nationality (juridical person)

- foreign control
 - agreement to treat as national of another Contracting State and 109–14
 - Moldova–US BIT (1993) 8, 22

new claims, exclusion 22–3

- classification as 22–3
- cross references within treaty to another article, relevance 22–3

non-discrimination obligation, Chile–Croatia BIT (1993) 506**notice of arbitration (UNCITRAL)**

- new claim, exclusion 22–3
- proposal for appointing authority, possibility of 10–11
- requirements
 - general nature of claim and amount sought 10
 - increase in amount 23
 - proposed number of arbitrators 10
 - reference to contract out of or in relation to which dispute arises, BIT as 10

oral hearings

- necessity 17
- telephone conference, limitation to 329–30

- Pakistan–Switzerland BIT (1995)**, ‘bifurcation clause’ (‘fork in the road’), absence 456
- Petrobart–KGM Goods Supply Contract 1/98-PB**
 arbitration agreement (Kyrgyz Foreign Investment Law, ss 23.2 and 23.3) 339
 arbitration clause (Art. 8), text 390
 conclusion 338, 389, 406, 448
 dispute relating to
 history and background 338–40, 370–1, 394–6, 448–9, 481–2
 parties’ arguments
 Kyrgyz 351–8, 371–2, 373–4, 425–43, 482–6
 Petrobart 272–3, 343–51, 371, 406–25, 443–8, 483
 ‘foreign investment’ by Petrobart, whether 361–6, 459–62, 465, 486
 as ‘broader investment scheme’ 362–3
 ‘foreign investor’ status of Petrobart 361, 457–9
 price of goods (Art. 4), text 389–90
 SCC proceedings, summary 402–4
 stay of execution of monetary judgment, effect on Petrobart 474–5
 subject matter (Art. 1), text 389
- place of arbitration**, law of as applicable law, on procedure 358–60, 362–3
- precedent (ICSID arbitral tribunal)**, domestic court decisions, binding on tribunal, whether 359–60
- precedent (UNCITRAL)**, domestic court decisions, binding on tribunal, whether 359–60, 361
- procedure (ICSID arbitral tribunal)**, registration of Application with Secretary-General, acceptability of request ‘not manifestly outside the jurisdiction’ 321–2
- procedure (UNCITRAL)**, applicable law, law of place of arbitration 358–9, 362–3
- proper party**
 critical date 22
 joinder, need for consent 8
 third party status and additional representation of same party distinguished 8
- provisional measures**
 possible measures
 suspension of proceedings in domestic court 324–34
 identity of parties, need for 332–3
 purpose
 avoidance of irreparable damage 331
 damage which can be made good by financial reparation, exclusion 333–4
 non-aggravation of dispute, *Amco* 331–2
 preservation of parties’ rights, ‘rights in dispute’, limitation to 331–3
 requirements, necessity/urgency 331
- recognition and enforcement of arbitral award**
 final judgment of domestic courts, equality with (ICSID 54(1)) 498–9
 obligation to implement/comply with ICSID 54 498–9
 State immunity from execution/attachment 498
 stay: *see* stay of enforcement of arbitral award
- remedies**, repeal of offending legislation 9
- res judicata***
 decisions on jurisdiction and costs distinguished 375
 as general principle of international law 452–3
 identity of parties and issue, need for 453–5
 new evidence and 453

- retroactive effect**, interpretative legislation 465–6
- review of arbitral award by domestic courts** 96–101
 appeal from, right of 377
 partial award and 101
- review of arbitral award by domestic courts, standard of review/grounds**
 error of law, failure to examine competence 487
 failure to rule on issues submitted to tribunal, decision to dismiss 100–1
- separability**
 arbitration clause 298
 exclusivity clause 48
 invalid/valid clauses 89–90
- separation of powers**, executive intervention in judicial proceedings 393, 464–5, 474–5
- settlement on agreed terms in case of**, Joy Mining–Egypt 143
- Slovak Republic**: *see also* Czech–Slovak Bit (1992); Czech–Slovak Consolidation Agreement (CA) (1993); *and entries at* Czech [and Slovak Federal] Republic
 ‘abstract’ lost profit 258–9
 Civil Code
 s 122(3) (appurtenances to a receivable) 255
 s 544 (penalty clause) 255
 s 545 (penalty clause) 255
 Commercial Code
 s 266 (interpretation of contracts: parties’ intention) 246
 ss 300–2 (penalty clause) 255
 s 379 (lost profit: foreseeability requirement) 260
 s 381 (‘abstract’ lost profit). 258–9
 s 735 (default interest: as appurtenance to receivable) 255, 261–3
 contract, interpretation, aids, subsequent conduct of parties 246
- specific performance**, impossibility 467–8
- stabilization clause**
 expropriation and 12–13, 25–7
 legislative changes, protection from 12, 18, 25–7
- stable and predictable economic framework, importance**, Mexico sugar industry 158–9
- standard of treatment of alien**
 arbitrariness: *see* arbitrary and discriminatory treatment
 domestic law, compliance obligation 166–72
 failure to comply falling short of breach of international law 168–9
 good faith efforts, relevance 168
 record as a whole as determining factor 168–72
 fair and equitable: *see* fair and equitable treatment of alien
 jurisprudence
 ADF 168–9
 Neer 168
 Tecmed 166
 Waste Management II 166–7, 168–70
 standard of review 166–72
 ‘treatment’, dispute settlement, applicability to 312–21
- standing (NAFTA 1116 and 1117)**
 Articles 1116 and 1117 distinguished 152–3
 ‘has suffered loss or damage’ (NAFTA 1116), directness of damage 152–3

- 'investor of a Party' (NAFTA 1139) 152
- standing (UNCITRAL)**, third parties 22
- State**, as corporation 72–3
- State agency/organ**
 - right/power to bind government 63–4, 90–1
 - as separate entity 63–4, 90–1
- State contract**
 - breach, breach of international law/BIT obligations, whether 169–72
 - classification as, Czech–Slovak Consolidation Agreement (CA) (1993), whether 195
 - interpretation, guidelines, agreement as a whole 133–4
 - investment contract and contract for sales or services distinguished 134–5, 139
- State entity**: *see* State agency/organ
- State immunity from execution/attachment**, recognition and enforcement of arbitral award and 498
- State responsibility**
 - acts and omissions of, State agency/organ 63–6, 90–1
 - for, failure to achieve legislative purposes 171–2
- State succession**, Czech and Slovak Republic 79, 186
- stay of enforcement of arbitral award**
 - dilatoriness, effect 498
 - ICSID jurisprudence 497
 - pending decision in action for annulment 493–9
 - reasons
 - irreparable harm 498
 - interest and 498, 501–2
 - security, provision of 498–9, 501–2
- Stockholm Chamber of Commerce Arbitration Institute (SCC Institute)**
 - as appointing authority 10–11
 - appointment of arbitrators 41–2
 - arbitration agreement, objection to, timeliness 449–50, 452
 - costs 93–5
 - establishment of tribunal 41–2
 - jurisdiction, merits and, establishment of facts and 79–80
 - Petrobart–Kyrgyz Republic proceedings, summary 402–4
 - statement of claim/statement of defence, limitation to issue of liability 42
 - submission of dispute to
 - Czech and Slovak Federal Republic–UK BIT 30 n. 2
 - Energy Charter Treaty 381 n. 3
 - time-limits, extension, for rendering of award 42
 - witnesses
 - head of State as 43
 - oral hearings and 43
- Stockholm Chamber of Commerce Arbitration Institute (SCC Institute), Arbitration Rules (1999)**
 - 10(2) (objection to arbitration agreement) 449–50
 - 13(2) (appointment of tribunal chair) 42
 - 14 (advance on costs) 42, 402
 - 16(1) (number of arbitrators) 41
 - 16(2) (more than one arbitrator), failure to meet time-limits and 42
 - 21(1) (statement of claim) 42

Stockholm Chamber of Commerce (*cont.*)

- 21(2) (statement of defence) 42
- 24(1) (applicable law), law or rules of law considered by tribunal to be most appropriate 77
- 31(1) (interim measures: payment of security) 402
- 39 (arbitration costs) 93–4, 404

sugar: *see* Mexico sugar industry, regulatory framework with particular reference to the Sugarcane Decree 1991

suspension of proceedings (ICSID), pending outcome of proceedings in municipal courts 311

suspension of proceedings (UNCITRAL arbitration), settlement negotiations and 17

Sweden

- arbitral award, procedure and form
 - ‘award’, designation as
 - determination on substance or procedure as 100
 - failure to designate as decision, relevance 100–1
- Arbitration Act 1999 (*LSF*)
 - s 2 (*compétence de la compétence*) 358–9, 375–6
 - s 26 (designation as arbitral award) 100
 - s 36 (application to set aside award) 98–101, 368, 374–7
 - provisions of 1929 Arbitration Act distinguished 100, 377
 - s 37(1) (arbitration costs), finding of lack of jurisdiction and 366–7
 - s 43 (right of appeal) 98, 377
 - s 43 (right of appeal: from Court of Appeal) 487
- arbitration, applicable law, procedure, law of place of arbitration 358–60, 362–3
- costs of arbitration 366–8
 - necessary costs 377
 - review of arbitral award 101, 369, 377
 - right of appeal against allocation 368, 374–5
 - time-limits 68, 375
- Interest Act 1975, s 6 (interest on costs) 98, 370, 481
- jurisdiction (general), doctrine of assertion 375–6
- res judicata*, decisions on jurisdiction and costs distinguished 375
- review of arbitral award by domestic courts 97–101
 - appeal from, right of 377
 - partial award and 101
- review of arbitral award by domestic courts, standard of review/grounds
 - error of law, failure to examine competence 487
 - failure to rule on issues submitted to tribunal (including decision to dismiss) 100–1

tax measures, as expropriation: *see* expropriation/nationalization, classification as, tax measures

third parties: *see* proper party, third party status and additional representation of same party distinguished

time-limits

- 6 months rule 9–10
 - purpose 10
 - start date 9
- appeal against allocation of costs 368, 375
- applicable law 92–3

extension

for preparation of proposals 16

for rendering of award 42

submission of claim for damages 76–7, 92–3

submission of claim to UNCITRAL tribunal, treaty and municipal law provisions distinguished 23

travaux préparatoires

absence/failure to produce 314

ICSID Convention: *see* ICSID Convention (1965), *travaux préparatoires*

treaties, compliance/implementation (VCLT 26–7)

domestic law as justification for non-compliance (VCLT 27) 115–16, 156, 167–8

provisional application (ECT 45) 300

treaties, domestic law and, primacy 116

treaties, form (including classification as)

‘framework agreement’, relevance of description as 193–4

parties, States, limitation to 194

State contract distinguished 195

treaties, interpretation

aids

other treaties concluded by some or all parties covering same subject matter, minor variation in terminology, relevance 312–13

travaux préparatoires: *see* *travaux préparatoires*

applicable law

general principles of international law 85

VCLT (1969) 294

guidelines, literal approach/adherence to the text 451

interpretation of contracts distinguished 85

treaties, interpretation (VCLT 31(1)) (general rule: good faith, ordinary meaning, context, object and purpose) 459

good faith 85, 302

[natural and] ordinary meaning 85, 294

‘treatment’ 312–13

object and purpose 85, 111, 294, 313–14

treaties, interpretation (VCLT 31(2)) (context) 294

circumstances of conclusion of Agreement 314

structure and content of treaty 313

treaties, interpretation (VCLT 31(3)) (points to be taken into account together with context), parties’ subsequent practice establishing agreement concerning interpretation (VCLT 31(3)(b)) 314

treaties, interpretation (VCLT 31(4)) (special meaning of term by agreement of parties) 314

treaties, State succession and 79

treaties, termination/withdrawal, BITs and 108–9, 118

‘umbrella’ clause (undertaking to observe domestic commitments), conversion of contract obligations into international obligations distinguished 139

UNCITRAL Arbitration Rules

3(3)(c) (notice of arbitration: requirements: reference to arbitration clause/agreement) 10

3(3)(d) (notice of arbitration: requirements: reference to contract giving rise to dispute) 10

UNCITRAL Arbitration Rules (*cont.*)

- 3(3)(e) (notice of arbitration: requirements: general nature of claim and amount involved) 10
- 5 (number of arbitrators) 10
- 7(2)(a) (appointment of arbitrators) 340
- 15(2) (general provisions: oral hearings) 341–2
- 16(1) (place of arbitration: agreement by parties/choice by tribunal) 341
- 21(1) (*compétence de la compétence*) 13, 341, 358–9
- 21(4) (jurisdiction as preliminary issue) 13
- 32(1) (interim, interlocutory and partial awards) 13
- 38 (costs) 28, 177
- 38–40 (fees and costs) 366–7
- 40 (costs: allocation of) 28
- witness testimony in proof of agreement, admissibility 362–3

UNCITRAL Model Law of International Commercial Arbitration, arbitration agreement, reference to document containing arbitration clause as 315

unilateral declaration, effect 142–3

witnesses

- admissibility of witness testimony to prove terms of agreement 362–3
- head of State as 43
- oral hearings and 43