Cambridge University Press & Assessment 978-1-107-02176-1 — Global Public Interest in International Investment Law Andreas Kulick Index More Information

Index

Additional Facility rules 19, 285 Ago, Roberto 203 Alexy, Robert 205 Alston, Philip 60-61 amicus curiae briefs 254-55, 262, 295, 304, 305 analysis of the case law pertaining to corruption 327-41 alternative approaches 331-41 balancing with the investor's rights on the merits stage 332-41 modification or adaptation of the main contract 331-32 arguments in favour of a balanced approach 335-39 policy considerations 337-39 State responsibility 335-36 venire contra factum proprium/estoppel 336-37 balancing with the investor's rights on the merits stage 332-41 arguments in favour of a balanced approach 335-39 challenges: host State consent, BIT definition of investment, nullity 332-35 integrating balanced approach according to Global Public Interest theory 339-41 Global Public Interest theory 339-41 case law on corruption in light of Global Public Interest theory 339-41 general principles of law: good faith, international public policy 339 preliminary conclusions 327-30 see also corruption and other irregularities

annulment procedure and Annulment Committees 20-21 scope of review 21, 23 arbitrations see investment arbitrations Argentine crisis Tribunals Argentine crisis Tribunals and beyond 38 - 45international and domestic law as comprehensive legal orders 39-40, 45 international law as ultimately supreme 40-45, 47, 49, 122 human rights and investment cases 276-81, 300-02 reluctance to consider human rights issues 278-79, 280-81 state of necessity: the Argentine crisis awards 130-46, 210 conclusion 140-46 necessity or not? the Tribunals' differing decisions 133-40 proportionality analysis 184-85 public interest considerations 144-46 summary of the crisis and background facts 131-33 Article 42 ICSID Article 42 (1) second sentence 4, 11, 12, 18, 45, 113, 114-15 case law see relationship of domestic and international law different language versions 22-23 drafting history 15-17, 34-35 open-endedness of provision allowing dynamic interpretation 17 party autonomy overriding first glance at Article 42 (1) 12-15 context: general principle of Article 42 is freedom of choice 12-13

365

Article 42 ICSID (cont.) international law applies even where exclusive choice of domestic law 14-15, 31 possible cases in which international law may be applicable under 13-14 proportionality analysis 169 relationship of domestic and international law see relationship of domestic and international law Atapattu, Sumudo Anopama 230 Banifatemi, Yas 29 Bilateral Investment Treaties (BITs) advent of BITs changing substantive international investment law 31, 46 as a comprehensive body of rules/framework 31, 45 corruption cases, relevant provisions in 312-13 see also corruption and other irregularities exhaustion of local remedies 81-82 fair and equitable treatment 207 fundamental rights 122-23 good faith interpretation 169-70, 204-05 investment, meaning of 312-13, 332, 334 investor rights 1-2, 42, 45, 46-47 direct engagement in dispute with host State 111-12, 153 general principles of law and limiting investors' rights 147-49 public interest considerations see under public interest considerations nature of BITs and States' obligations 210 - 11overriding domestic law 47, 91-93 and Global Public Interest 3-4, 11 as primary source of applicable law 33 proliferation 11, 12, 18-19, 51 BITs as a recent phenomenon 17-18 effects of proliferation 45, 47 public interest considerations see under public interest considerations reciprocal investor obligations 129-30, 205, 328, 330, 339 referring investor-host State arbitration to ICSID 1.11 role in international investment law see under international investment law similar structure and substantive rights in almost all BITs 18-19, 45, 117 state of necessity 38-39

see also Argentine crisis Tribunals

Vienna Convention see under Vienna Convention on the Law of Treaties bribery see corruption and other irregularities; see under OECD Broches, Aaron 17, 26-27 Brownlie, Ian 204, 210-11 Burke-White, William 194 Canada Charter of Rights and Freedoms 176, 177 Model BITs 72-73, 74-75 proportionality analysis 176-77, 178 Charter of the United Nations see under United Nations Chazournes, Laurence Boisson de 230 Chen, Lung-Chu 64 common but differentiated responsibility principle 231-32 compensation see damages and compensation conflicting interests, balancing see proportionality analysis/proportionality Constitutionalization 85-89, 91, 94-95 corruption and other irregularities 307-41 analysis of the case law see analysis of the case law pertaining to corruption corruption disputes in international investment law 313-27 international investment case law see under OECD; pertaining to corruption and other irregularities two different types of corruption disputes 313-14 forms of corruption, definitions and international instruments 309-13 'hard corruption' 309-10 'influence peddling' 309-10 fraud and corruption 328 no dispute jurisdiction as result of 127-29, 164-65, 205, 313, 316-17, 320-24, 332-35 reciprocal investor obligations 129-30, 205, 328, 330, 339 violations which justify declining jurisdiction 322-24, 333-35 how bad is corruption? 307-09, 337-38 hypothetical case 55-56, 220-21 international instruments 1, 310-11 BIT provisions relevant in corruption cases 312-13 Criminal Law Convention on Corruption of the Council of Europe 312, 332-33 OECD Bribery Convention see under OECD

Cambridge University Press & Assessment 978-1-107-02176-1 — Global Public Interest in International Investment Law Andreas Kulick Index More Information

INDEX 367

not rooted in reciprocal relationship of

two States 145

persistent objectors 143

proportionality analysis illegitimate purposes 186 involvement of host State in infringing Global Public Interest 202, 212, 335 transaction costs 308 countermeasures defences 142-43, 145, 166 proportionality analysis 179-80 Crawford, James 137, 145 Criminal Law Convention on Corruption of the Council of Europe 312, 332-33 customary international law 14, 46, 115-16 ambiguous rules 31 as basis for limiting investors' rights/justifying infringements 164-65 non-State actor caveat 165-67 'obligations' vs. 'defenses' 197–98 capacity to create 62 common but differentiated responsibility principle 231-32 customary Union law 106, 107, 109, 115 denial of justice 50 emergence of customary international law 154-62 constitutive elements of practice/opinio iuris in traditional doctrine 155 critique of opinio iuris requirement 156-57 definition of 'international custom' 154-55 ICJ's view on emergence of customary rules 155-56, 157-59 importance of opinio iuris as expressing a normative consideration 157-59, 164 ius cogens 159-60 practice as a necessary requirement 160 - 62expropriations for public purposes 236 - 37fair and equitable treatment 206-07 general principles of law 147-49 guarantees 50 human rights law and investment disputes 305-06 in international investment law 18 as legal translation of the Global Public Interest 163-65 Norms on the Responsibilities of Transnational Corporations 59, 60 polluter pays principle 227 precautionary principle 227, 229-30 preventive action principle 227, 228 prohibition of use of force 157-59 state of necessity 38-39, 127, 133-39 financial loss 145-46

public interest 144-46 whether applicable to investors 140-44 right to water 305-06 treaty interpretation see Vienna Convention on the Law of Treaties damages and compensation 82, 83, 345 compensation under Article 27, ILC Articles 139-40, 144 recovery of 'material loss' not profit 145-46, 210 expropriations see under expropriations higher the public interest the higher the compensation threshold 254 - 55proportionality analysis and reduced amount of compensation 209-13 determined according to proportionality stricto sensu assessment 213 gravity of the infringement affecting amount of compensation 198-99 host State's contributing to infringement of Global Public Interest 202, 212 intentional nature of infringement reducing compensation 202 no compensation if Global Public Interest expressed as ius cogens 212, 213 particular public interest in reduced compensation 201-02, 205-06 right to water/affordable access 299 - 300special role of States and their obligations to citizens 210-11 Declaration on the Rights of Indigenous Peoples, UN 282, 284 democracy 150, 151 Descamps, Baron 203 developing countries 51 common but differentiated responsibility principle 231-32 drafting history of Article 42 (1) ICSID 15-17 legal systems 28 OECD Guidelines/ corporate social responsibility objectives 75 diplomatic protection see under ICSID direct effect 103, 126 European law system 101-03, 104, 106, 107, 109, 112, 116-17

domestic law applicability dependent on circumstances of case 33-35, 36-37, 43-44 Article 42 (1) ICSID cases in which international law may be applicable 13-14, 34-35 domestic law as the primary source see under Klöckner-Amco doctrine international law applies even where exclusive choice of domestic law 14 - 15.31complementary roles of international and domestic law 38, 39-40, 45, 83 as integrated legal order 48-49, 111 as comprehensive legal order 39-40, 45, 83 creation 114-15 in ECHR system 121, 124-25, 126 under European legal order 114-16 harmonizing effect of human rights/investor rights 123-24, 126 - 27and international law see relationship of domestic and international law interpreting domestic law by international law/comparing national codes 23, 31-32 investment disputes having domestic constitutional dimension 152-53 not justifying infringements 121 supplemental role 33 whether lacunae exist in domestic legal systems 27-29 Dupuy, Pierre-Marie 272 Economic, Social and Cultural Rights Committee 289-90, 296 enforcement 24, 82, 83, 84, 114 environment and international investment law 3-4, 50, 225-68 dispute case law see international investment disputes involving environmental issues hypothetical case 52-54, 218-19 international environmental law principles see under international law international environmental law treaties, relevance of 232-33 Model BITs 69-71 right to water see right to water case study soft law instruments 1, 258 erga omnes obligations 88 estoppel 257-58, 336-37

European Convention on Human Rights (ECHR) system 5, 100, 108, 118-27, 247 access to courts 274 constitutional traits 122-24, 148 degree of 'internationalization' 124-25 hierarchy of norms 121-22 institutional and treaty setting 119-21 monetary damages as sanction for ECHR violations 209 participation of non-State actors 125-27 proportionality analysis see under European Court of Human Rights (ECtHR) protection of property 275 public interest defences 148 European Court of Human Rights (ECtHR) 118-19, 121, 124 exhaustion of local remedies 124-25 human rights issues in investment disputes 273-76 proportionality analysis 182-83, 244 expropriations 264-66 legitimate expectations 200 margin of appreciation 183, 189, 190, 194 proportional infringements of the ECHR 148 three tier analysis of fundamental rights violations 195 European Court of Justice 105-06, 112-13, 118 doctrine of supremacy and direct effect 101 - 02general principles of law/fundamental rights 107-09, 115, 147-48 precautionary principle 230 proportionality analysis 178-79, 244 three tier analysis of fundamental rights violations 195 European Law system 101-18 characteristic features of the European Law system 101-09 conclusion 109 creation of Union legal norms 106-09 European exceptionalism: an autonomous legal order 103-05, 109, 116-17 relationship of the State and non-State actors 105-06 supremacy and direct effect 101-03, 104, 106, 107, 109, 112, 116-17 customary Union law 106, 107, 109, 115 general principles 107-09, 115 international investment law system vs. European law system: five comparators 109-18

Cambridge University Press & Assessment 978-1-107-02176-1 — Global Public Interest in International Investment Law Andreas Kulick Index More Information

INDEX 369

hierarchy of norms 110-11 institutional and treaty setting in the respective systems 116-18 participation of non-State actors 111-13 relationship of the State and non-State actors 113-14 types of legal norms playing a role in the respective systems 114-16 polluter pays principle 227 public interest defenses 148 exhaustion of local remedies 81-82, 83, 124-25, 126, 148 expropriations 205-06 compensation 205-06 expropriation for environmental public purposes 235-37, 246-47, 262-64 no reinstatement of status quo ante 209 general regulatory schemes 236-37, 246-47, 251-52, 257-58, 262-64 indirect expropriations 183-84, 199-200, 238-39, 246-47 assessing occurrence of 206 pursuit of a public interest required 205, 262-63 fair and equitable treatment standard 184, 199-200, 206-08 clause standard in investment treaties 206 effect of legitimate expectations on interpretation 250-51 environmental regulatory schemes not violating standard 257-58 human rights 270 meaning of 'fair and equitable' 206-08 transparency 238-39 force majeure 145 fraud see under corruption and other irregularities fundamental rights see human rights and investment Gaillard, Emmanuel 29 Gaines, Sanford 226-27 GATS 72, 74-75 GATT Article XX 244, 261-62 introductory remarks on Article XX GATT 67-68 meaning of 'necessary' 135-36, 146, 182, 185 and principle of good faith 66-69, 72-73 proportionality analysis 180-82

transferability to international investment law 68-69 GATT Article XX in Argentine crisis Tribunal decision 135-36, 146 general human rights cases 276-88 analysis of the case law see under human rights and investment Glamis v. US 281-85, 303-04 a clandestine role of human rights? 284 - 85facts, issues and the Tribunal's finding 281-84 Piero Foresti, Laura de Carli and others v. South Africa 285-88 facts and issues 285-86 a very touchy issue 286-88 Sempra v. Argentina 279-81, 301-02 facts, issues and the Tribunal's findings 279-80 skepticism continued 280-81 Siemens v. Argentina 276-79, 300-01 facts, issues and the Tribunal's findings 276-78 half-effort and full skepticism 278-79 see also human rights and investment; right to water case study general principles of law as basis for limiting investors' rights/justifying infringements 147-49, 164-65, 339 non-State actor caveat 165-67 'obligations' vs. 'defenses' 197-98 emergence of general principles 162-63 comparison of domestic principles 163, 164 general principles of law in investment dispute cases 128-29 good faith see good faith international public policy see international public policy as legal translation of the Global Public Interest 163-65 proportionality analysis see proportionality analysis/proportionality as source of public international law 22, 115, 162, 170-71, 203, 204-05 German proportionality analysis 174-76, 177, 178, 182 standards of review 189, 190-91, 195 three tier analysis of fundamental rights violations 195, 196 Global Public Interest theory 2-3, 4-5, 77-167 comparative insights 99-127 ECHR system see European Convention on Human Rights (ECHR) system

Global Public Interest theory (cont.) European Law system see European Law system seven observations on international investment law 99-100 concluding remarks 342-45 corruption cases see under analysis of the case law pertaining to corruption environment see international investment disputes involving environmental issues human rights see human rights and investment international investment law as Global Public Law see international investment law as Global Public Law legal translation of Global Public Interest 154 - 67emergence of customary international law see customary international law emergence of general principles 162-63 general principles/customary international law as legal translations 163-65 non-State actor caveat 165-67 lessons learned from comparative insights 146-49 general principles of law and limiting investors' rights 147-49 public interest defenses 148 lessons learned from international investment law as Global Public Law 151 - 54equilibrium between the individual and the public interest 151-52 why the public interest is global 152 - 54proportionality analysis see proportionality analysis/proportionality public interest challenge see public interest challenge public interest considerations in international investment case law 127 - 46international public policy: Inceysa and Fraport 127-30, 164-65, 205 state of necessity: the Argentine crisis awards see Argentine crisis awards the State as agent of public interest 149-50, 153-54, 165, 194, 344 'obligations' vs. 'defenses' 197-98 Goldsmith, Jack L. 156 good faith in GATT see under GATT

as general principle of law 68 in investment dispute cases 128-29. 339 interpretation of treaties 169-70 misjudgment and proportionality analysis 187 Gottwald, Dorothee 331 Guzman, Andrew 160-62 Harten, Gus van 5-6, 81, 95-97 Higgins, Rosalyn 65-66 Hirsch, Moshe 97-99, 236, 272 human rights and investment 269-306 alleged violations of human rights by the investor 276-300 human rights cases see general human rights cases; right to water case study analysis of the case law 300-06 case law on human rights in the light of Global Public Interest theory 305-06 growing role of third parties 304-05 through the backdoor 303-04 what's wrong with human rights? 300 - 02body of human rights as 'trumps' 88, 96-97, 122-23 transformatory/harmonizing effect on domestic law 123-24, 126-27 doctrinal approaches in a nutshell 269 - 71fair and equitable treatment see under fair and equitable treatment standard 'theory of legal responsibility' 270-71 treaty interpretation 269-70 fundamental rights in European law 107-09, 147-48 expropriations 264-66 general principle of fundamental rights and conflicting interests 147-48 'praktische Konkordanz' and competing fundamental rights 191-92 human rights issues in investment disputes 271-300 alleged violations of human rights by the investor 276-300 alleged violations of the investor's human rights 271-76 hypothetical case 54-55, 219-20 and MNEs see under multinational enterprises/transnational corporations (MNEs)

soft law instruments 1, 284

INDEX 371

and a value-based system of public international law 89-91 ICSID 1, 91-93, 233, 261-62 amending and concluding ICSID Convention 114 Argentine crisis Tribunals see Argentine crisis Tribunals Article 42 ICSID Convention see Article 42 ICSID awards enforceable in every Member State 24, 82, 83 consent to arbitrate legal investment disputes 312-13 diplomatic protection, investors precluded from recourse to 24, 81, 111-12, 318 domestic and international law see relationship of domestic and international law exhaustion of local remedies 83. 124-25 expert knowledge of domestic legal systems 28-29 fraud and jurisdiction see corruption and other irregularities general considerations regarding ICSID arbitrations 20-21 annulment procedure 20-21 interpretations only binding on parties to the dispute 20, 50 previous Tribunal decisions as persuasive 'precedent' 20, 21, 50, 117 Tribunals established ad hoc 20, 50 human rights issues in investment disputes 276 institutional and treaty setting 119-20 margin of discretion in Tribunals applying international/domestic law 35, 37 nature and purposes 32-33, 116, 118, 153 participation of non-State actors 126 provisional measures 215-17 integration see under international investment law interdigitation 4, 91-92, 101-02, 104, 109, 111, 153 International Centre for the Settlement of Investment Disputes (ICSID) see ICSID International Convention on Economic, Social and Cultural Rights (ICESCR) 289 - 90International Court of Justice (ICJ) 16, 86-87, 119

counter-measures 179-80 emergence of customary rules 155-56, 157-59 human rights 89-90 precautionary principle 230 preventive action principle 227-28 proportionality analysis 179-80 sources of public international law 115, 154, 170-71 balancing customary international law/general principles and treaty law 203-05 subjects of international law 63 treaty interpretation 269-70 International Covenant on Civil and Political Rights (ICCPR) 150, 151, 282. 284 international investment case law pertaining to corruption and other irregularities 314-27 analysis of the case law 327-41 see analysis of the case law pertaining to corruption Fraport v. Philippines 324-25, 328, 334 facts and issues 324 following a bad precedent 325 Tribunal declines jurisdiction 324–25 Inceysa v. El Salvador 321–24, 328, 333, 334, 340-41 facts and issues 321-22 setting a bad precedent 322-24 Tribunal declines jurisdiction 322 Kardassopoulos v. Georgia 325-27, 328, 334 avoiding World Duty Free's mistakes 326-27 facts and issues 325-26 host State responsible for actions of its organs 326 Wena v. Egypt and SGS v. Pakistan 314-15 World Duty Free v. Republic of Kenya 315-21, 323-24, 326-30, 336, 340 commercial arbitration rationales in investment arbitration 316-17, 329-30 facts and issues 315-16 why the Tribunal got it wrong 317-21 international investment disputes involving environmental issues 233 - 58analysis of the case law 258-68 case law on environment in light of Global Public Interest theory 267 - 68elements of proportionality 266-67 Global Public Interest concerns 260-66

international investment disputes (cont.) hesitancy to refer to international environmental law instruments 258-59 preliminary conclusions 258-67 Biwater v. Tanzania 252-55, 260-62, 268, 299-300, 303 amicable towards environmental issues 254-55 facts and issues 252-54 Chemtura v. Canada 255-58 chutzpah not rewarded 257-58 facts and issues 255-57 Metalclad v. Mexico 237-40, 258-59, 262, 285 controversial award 239-40 facts and issues 237-38 transparency as part of FET? 238-39 Methanex v. United States 251-52, 260-66 facts and issues 251 right to regulate 251-52 Santa Elena v. Costa Rica 234-37, 258-59, 262-64 conservative decision 236-37 facts and issues 234-35 public purpose does not affect duty to pay compensation 235-36 S.D. Myers v. Canada 240-45, 259, 260, 261-62, 266 environmental considerations and distrusting Canada 242-43 facts and issues 240-42 a progressive award 243-45 Tecmed v. Mexico 245-49, 262-66, 274-75, 276, 298 dubious take on challenging Santa Elena 247-49 facts and issues 245-46 reference to ECtHR 246-47 Waste Management v. Mexico 249-51, 262 facts and issues 249-50 public interest having an impact on the Tribunal's finding 250-51 international investment law BITs' role in 17-19 BITs as a recent phenomenon 17-18 codification and promotion of international law through BITs 18-19 changing face of see under 'internationalization' of international investment law control of exercise of State's public authority 97, 100, 114, 123, 126, 146, 318 and corruption see corruption and other irregularities

domestic law not justifying infringements 121 and environmental issues see environment and international investment law as global governance 153 as Global Public Law see international investment law as Global Public Law and human rights see human rights and investment integration 4, 5, 6, 48-50, 100, 111, 146 meaning of legal integration 49 'internationalization' see 'internationalization' of international investment law proportionality analysis see proportionality analysis/proportionality public law character see international investment law as Global Public Law seven observations on international investment law 99-100 international investment law as Global Public Law 4-5, 6, 77-99 constitutional elements in international investment law 85-94 constitutional features of international investment law 91-94 Constitutionalization in public international law theory 90 incremental development from a State-centric to a value-based system of; public international law 89-91, 149-50, 153-54, 165 global administrative law face of international investment law 78-85 global administrative law as a concept 78 - 81international investment law as Global Administrative Law 80, 81-85 types of globalized administrative regulation 79 international investment law as Global Public Law 4-5, 94-99 combining Global administrative and constitutional features 96-97 criticisms of public law characterization of international investment law 97-99 international investment law as a system of Global Public Law 97 lessons learned from international investment law as Global Public Law 151 - 54equilibrium between the individual and the public interest 151-52

why the public interest is global 152 - 54international law applicability dependent on circumstances of case 33-35, 36-37, 43-44 complementary roles of international and domestic law 38, 39-40, 45, 83 as integrated legal order 48-49, 111 as a comprehensive body of rules/legal order 30, 34-35, 39-40, 41-43, 45, 46 equal to domestic law/fully applicable 33-35, 37-38, 39, 43, 83, 111, 112-13 customary international law see customary international law and domestic law see relationship of domestic and international law estoppel 257-58, 336-37 European law see European law system growing importance in ICSID disputes 31-33, 45, 46-47 international criminal law 161 international environmental law 225-32 common but differentiated responsibility principle 231-32 polluter pays principle see polluter pays principle precautionary principle see precautionary principle principle of preventive action see preventive action principle international investment law see international investment law international legal personality see international legal personality as interpretive instrument 22, 23, 31-32 ius cogens see ius cogens and principles under national legal orders 22, 23 private international law 23 public international law 7, 23, 101–02 Constitutionalization in public international law theory 90 development of normative features 153 - 54and domestic law 22, 23, 110-11 and European law 101-02, 104, 105, 106.109 general principles of law 22, 147-49, 162, 203, 204-05 horizontal relationships between actors 105, 113 international legal personality see international legal personality

sources of public international law 22, 115, 154, 162, 203–05

sovereign equality see under sovereignty value-based system of public international law 89-91, 149-50, 153-54, 165 supremacy of international law 40-43, 45, 47, 49, 83, 91-93, 121 conflict of laws 40-41 prevalence of international over domestic law 4, 24, 27, 32-33, 46-48 International Law Commission (ILC) Articles on State Responsibility 133-39, 336, 345 applying only to States 140, 141 Article 4 State's conduct 319-20 Article 7 ultra vires State action attributable 326, 336 Article 25 justifying infringements of BITs 134-35, 280 addressing 'grave and imminent peril' 137, 138–39, 144 bilateral relationship of investor's host and home State 143-44, 166 interpretation of 'essential interest' 137-38, 144 persistent objectors 143 Article 27 compensation see under damages and compensation counter-measures defense 142-43, 145, 166 international legal personality derived international legal personality 62-63 indicia of 62, 65 as legal fiction 65-66 of MNEs 63-66 functionalist approach 63-64, 66 legal pluralism 65 policy-oriented approach 64-65 States only as subjects of international law 62-63, 65, 66, 111, 113 direct effect 103 international public policy corruption cases 316-17, 320-21, 339 public interest considerations/ international public policy: Inceysa and Fraport purpose to protect the public 320-21 'internationalization' of international investment law 4, 5, 6, 11-56 Article 42 ICSID Convention see Article 42 ICSID changing face of international investment law 45-56

'integration' of international investment law 48–50

'internationalization' of (cont.) outlook: the public interest challenge see public interest challenge 'prominent role: internationalization' of international investment law 46-48 six preliminary observations 45, 99-100 three hypotheticals: environment, human rights and corruption 52-56 domestic and international law see relationship of domestic and international law ECHR system compared 124-25 exhaustion of local remedies 124-25 role of BITs in international investment law see under international investment law investment arbitrations Argentine crisis Tribunals see Argentine crisis Tribunals characteristics of international investment arbitration 81-82. 84-85 environment see international investment disputes involving environmental issues ICSID arbitrations see ICSID and international commercial arbitration 99, 316-17, 329-30 international investment arbitrations having features of administrative review 83 investment contracts 98, 331-32 proportionality analysis see under proportionality analysis Investment Treaty Arbitration as Public Law (Van Harten) 5-6 investment treaty system 6 Israel proportionality analysis 177 ius cogens compensation excluded if Global Public Interest expressed as 212, 213 constituting the public international law system 87-90, 159-60 customary international law 159-60 and the corrective function of international law 29 investment disputes 305-06 proportionality analysis illegitimate purposes 186 limits to the balancing test 192 prohibition of forced labor 55 sources of public international law $203 - 0\hat{4}$

Kill, Theodor 269-70 Kingsbury, Benedict 79, 84, 170, 187-88 Klöckner-Amco doctrine 19, 21-29 approaches to scholarly writing 26-29 critique of the Klöckner-Amco doctrine 27 - 29Reisman: corrective function only when collision with fundamental norms of; international law 29 scholarly writing promoting the Klöckner-Amco doctrine 26-27 case law under ICSID 21-26 conclusion 25-26 domestic law as the primary source 25. 32-33. 42-43 'supplemental and corrective functions' of international law 21 - 25dissolution of the Klöckner-Amco doctrine 30 - 33advent of BITs 31, 46 first doubts: the Amco resubmitted case award 30 growing role of international law 31-33, 45, 46-47 two-step test 22-23, 25-26 Koskenniemi, Martti 89–90, 159–60 Krauss, Rupprecht von 174-75 Krisch, Nico 79, 84 least-restrictive-measure-test see under necessity legitimate expectations 199-200, 202, 215 investors and fair and equitable treatment 206, 207-08, 250-51 host State's human rights obligations 270 Lerche, Peter 174 Loughlin, Martin 81 Malanczuk, Peter 62 margin of appreciation/discretion in proportionality analysis 186-87, 189-91, 194-95 in ECHR system 183, 189, 190, 194 in Tribunals applying international/domestic law 35, 37 Mathews, James 177 Multilateralization of International Investment Law (Schill) 6 multinational enterprises/transnational corporations (MNEs) influence on global stage 60, 64

Kafka, Franz 66

Cambridge University Press & Assessment 978-1-107-02176-1 — Global Public Interest in International Investment Law Andreas Kulick Index More Information

INDEX 375

scholarly approaches towards international legal obligations of MNEs 57-66 conclusion 65-66 different approaches endorsing MNE international legality personality 63-65 strict positivist view: only States as subjects of international law 62-63 scholarly approaches towards international legal personality 61-65 scholarly attempt to shape practice: norms on TNCs/business enterprises responsibilities and human rights 58-61 NAFTA 142-43, 166, 233, 261-62 environmental regulatory schemes and fair and equitable treatment 257-58 human rights in investment cases 284 - 85international environmental law treaties 232-33, 240-45 prevailing over investor rights 233 proportionality test 244 relevance of ECtHR case law 274 necessity as element of proportionality analysis 187-88, 214 least-restrictive-measure-test 182, 187-88, 214, 244 as substantive safeguard 214 see also proportionality analysis New Haven School 87, 157 New Institutional Economics 308 non-State actors participation of non-State actors in ECHR 125 - 27participation of non-State actors in European law system 111–13 participation of non-State actors in ICSID $12\bar{6}$ relationship of the State and non-State actors 105-06, 113-14 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (ECOSOC) 58-61 Norway Draft Model BITs 73-75 OECD 344

Convention on Combating Bribery of Foreign Public Officials in International

Business Transactions 310-11, 332-33 'active bribery' and 'passive' bribery 310-11 grease payments' 311 'hard corruption' 309-10 relevance in investment context 311 sanctions 311 Guidelines for Multinational Enterprises 58, 59, 343 Model BITs 75 polluter pays principle 226, 227 opinio iuris see under customary international law polluter pays principle 226-27 customary international law 227 rationale 226-27 Posner, Eric A. 156 precautionary principle 53, 228-30 customary law 227, 229-30 purpose 229 preventive action principle 227-28, 229 customary law 227, 228 proportionality analysis/proportionality 5, 148, 168-221, 343, 345 comparative insights 173-85 German proportionality analysis and reception in other domestic orders 174-78 investment arbitration jurisprudence 183-85 proportionality analysis in European legal order - ECJ jurisprudence 178-79 proportionality in the jurisprudence of international Tribunals 179-83 doctrinal avenues of proportionality analysis in international investment law 168-71 elements of proportionality analysis 186-88 necessity 187-88, 214 proportionality stricto sensu 188, 191-92, 214-15 suitability 186–87 factors to be considered while balancing on proportionality stricto sensu 198 gravity of the infringement 198-99, 214-15 importance of the Global Public Interest 200 importance of the investor right 201 intentional or incidental infringement? 202 involvement of the host State 202

Cambridge University Press & Assessment 978-1-107-02176-1 — Global Public Interest in International Investment Law Andreas Kulick Index More Information

376 INDEX

proportionality (cont.) legitimate expectations 199-200, 202, 215 particular public interest in reduced compensation 201-02, 205-06 seriousness (in pursuit) of the Global Public Interest (camouflage) 200-01, 215 operationalizing proportionality analysis in international investment law 193-213 consequence: reduced amount of compensation and damages 209-13 doctrinal structure: three tier analysis 195-97 factors to be considered while balancing on proportionality stricto sensu 198 'obligations' vs. 'defenses' 197-98 some doctrinal challenges 202-08 why proportionality analysis 193-95 origins 174-76 potential safeguards against abuse 213 - 17procedural safeguards: provisional measures 215-17 substantive safeguards 214-15 principles relevant in proportionality analysis 189-92 limits to the balancing test (ius cogens) 192 'praktische Konkordanz' 191–92 standards of review, scrutiny and margin of appreciation 189-91 some doctrinal challenges 202-08 balancing customary international law/general principles and treaty law 203-05 proportionality analysis and expropriation 205-06 proportionality analysis and fair and equitable treatment standard 206 - 08some skepticism regarding proportionality analysis 171-73 outcome dependent on level of scrutiny and emphasis chosen 172-73 perversion of judge/arbitrator's role as decision-maker/law-maker 171-72 substantive safeguards 214-15 gravity of infringement of Global Public Interest 214-15 legitimate expectations 215 necessity 214 seriousness in pursuit of the Global Public Interest 215

three step test 177, 178-79, 186-88 what this means: completing the three hypotheticals 217-21 provisional measures 215-17 public interest challenge 2, 6, 7, 11, 50–52 public interest considerations 2-3 BITs 69-76 broader public interest considerations in treaty language 73-75 domestic labor protection 71 environmental considerations 69-71 opt-out clauses/exceptions 71-73, 74-75 conflicting with BIT investor rights 51 - 52State regulation according to public interest 50 current approaches to public interest considerations in the investment regime 57-76 MNEs see multinational enterprises/transnational corporations (MNEs) equilibrium between the individual and the public interest 151-52 dimensions of the public interest 151 - 52in European law and ECHR systems 148 in international investment case law see under Global Public Interest theory in recent BIT practice 66-76 principle of good faith and Article XX GATT see GATT the State as agent of public interest see under Global Public Interest theory why the public interest is global 152-54 see also Global Public Interest theory public international law see under international law Raeschke-Kessler, Hilmar 331 Ratner, Steven 270-71 Reisman, W. Michael 29 relationship of domestic and international law 18, 19-45, 47, 91-93 Argentine crisis Tribunals and beyond 38-45 international and domestic law as comprehensive legal orders 39-40, 45 international law as ultimately supreme 40-45, 47, 49, 122 dissolution of the Klöckner-Amco doctrine see under Klöckner-Amco doctrine Klöckner-Amco doctrine see Klöckner-Amco doctrine a new doctrine: Wena see Wena doctrine

Cambridge University Press & Assessment 978-1-107-02176-1 — Global Public Interest in International Investment Law Andreas Kulick Index More Information

INDEX 377

preliminary remarks 19-21 general considerations regarding ICSID arbitrations 20-21 Vienna Convention see Vienna Convention on the Law of Treaties right to water case study 288-300 Aguas del Tunari v. Bolivia 294–96 analysis of the case law see under human rights and investment Azurix v. Argentina 296-99, 301, 303 concealed relevance again 298-99 facts, issues and the Tribunal's decision 296-98 Biwater v. Tanzania 299-300, 303 Compañia de Aguas de Aconquija v. Argentina (The Vivendi story) 291-94, 301 the awards 292-93 facts and issues 291-92 no camouflage permitted 294 recognising legal/human rights to water 289 see also general human rights cases; human rights and investment Rio Declaration on Environment and Development 226, 227, 228, 231, 258 Sands, Phillipe 231 Schill, Stephan 6, 93, 170, 187-88 Schwebel, Stephen 142 Simma, Bruno 269-70 soft law 1, 58, 60, 258, 284, 343 South Africa human rights issues in investment cases 285-88 proportionality analysis 177-78 sovereignty European law system direct effect 102 States limiting their sovereign rights 104 general regulatory standards 251-52 intrusive nature of remedies other than compensation 209 limited by States consenting to arbitration 42, 45, 81-82, 93, 95, 97, 153 over natural resources 227 sovereign equality principle 91, 197, 231 sovereignty vs. humanity 7 Staden, Andreas von 194 state of necessity see under Argentine crisis Tribunals; customary international law States as agents of public interest under see Global Public Interest theory

behaviour explained by rational choice 160.161 common but differentiated responsibility principle 231-32 involvement of host State in infringement of Global Public Interest 202, 212, 335 legal personality see under international legal personality preventive action principle 227-28 relationship of the State and non-State actors 105-06, 113-14 responsibility of States 319-20, 326-27, 329-30, 331-32, 335-36 see also International Law Commission (ILC) Articles on State Responsibility sovereignty see sovereignty special role of States and their obligations to citizens 210-11 treaty-making and amending 106, 114 Stewart, Richard B. 79, 84 Stone Sweet, Alex 177 Streinz, Rudolf 101-02 suitability see under proportionality analysis supremacy doctrine of supremacy 101-03, 104, 109, 116 - 17of international law see under international law Svarez, Carl Gottlieb 174 Thielbörger, Pierre 291 Tomuschat, Christian 89, 90, 149, 159 transnational corporations see multinational enterprises/transnational corporations (MNEs) Transparency International 338 Trouwborst, Arie 229 UNCITRAL 91, 233, 261-62 United Nations 94-99 Charter 73, 86-87, 119 normative foundations 158-59 prohibition of the use of force 158-59 sovereign equality of States 231 universal conflict of norms rules 88 Economic and Social Council (ECOSOC) 59 General Assembly 18, 86-87 Global Compact 58, 75, 343 Human Rights Commission 59 Security Council 3, 86-87 smart sanctions regime 78, 79, 80 United States 102 BITs 75-76 Model BITs 69-73, 74

Cambridge University Press & Assessment 978-1-107-02176-1 — Global Public Interest in International Investment Law Andreas Kulick Index <u>More Information</u>

378 INDEX

United States (cont.)
levels of scrutiny 189, 190, 195
civil liberties analysis as single
uniform process 195-96
reliance on Friendship, Commerce and
Navigation Treaties 18, 135-36
Universal Declaration on Human Rights 59
unjust enrichment 321
Vienna Convention on the Law of Treaties
Article 27 41-43, 44-45, 47
international law overriding domestic
43, 45, 48, 101, 110-11, 114-15, 123

- international law as primary source of international investment law 44, 48 investment disputes unambiguously international disputes 42–43, 45
- Article 31 and proportionality analysis 169–70, 204–05 applied to investor-State relationship

42, 45 treaty interpretation 269–70 Waibel, Michael 138 Washington Convention see ICSID Weiler, Joseph 103 Weiler, Todd 66-67, 68-69, 72 Weissbrodt, David 58-59 Wena doctrine 19-20, 33-38, 314 confirmation and interpretation of the Wena doctrine 37-38 first years after Wena: some ambiguities 35-37 differentiating between 'inconsistency' and 'violation' 36 - 37domestic law not affecting or overriding international law 36 general international law supplementing the BIT 36 Wena decision 33-35 World Bank 16, 288-89, 295, 307 World Trade Organization 67–68, 72 dispute settlement 78, 79, 80 precautionary principle 230 see also GATT