This book evaluates the core of the concept of legitimate expectations from first principles in moral philosophy. It adopts an unconventional approach by examining this topic from a deep, philosophical perspective and delves into the debates on the binding nature of promise in moral philosophy. It then develops a doctrinal structure for the standard of protection. The author places the key premise of the book on the possibility of deriving firm conclusions from the debate and on creating a set of precise and prescriptive ‘guidelines of the application of legitimate expectations’. The features of this book are threefold: first, a significant body of literature on moral philosophy is assimilated; second, core philosophical principles are extracted and expressed as a normative framework to resolve concrete cases; third, the author’s analysis covers a vast number of investment treaty awards against the underlying framework.

Teerawat Wongkaew is a legal officer at the Department of Treaties and Legal Affairs, Ministry of Foreign Affairs, Thailand. His current practices focus on treaty-making and public international laws issues, in particular, international investment law, international humanitarian law and the laws of international organisations. Previously he was Legal Adviser at the Department of International Economic Affairs of Thailand and was involved with the negotiations of bilateral and regional investment treaties as well as free trade agreements and investment treaty disputes. He also worked as a legal consultant at International Investment Agreement Division, United Nations Conference on Trade and Development (UNCTAD). He earned degrees in Law with French Law and Master of Law (LLM) from University College London. In 2016, he completed his PhD study at the Graduate Institute of International and Development Studies, Geneva.
PROTECTION OF LEGITIMATE EXPECTATIONS IN INVESTMENT TREATY ARBITRATION

A Theory of Detrimental Reliance

TEERAWAT WONGKAEW

Ministry of Foreign Affairs, Thailand
CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India
79 Anson Road, #06–04/06, Singapore 079906

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It furthers the University’s mission by disseminating knowledge in the pursuit of
education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108474283
DOI: 10.1017/9781108675680
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First published 2019

Printed and bound in Great Britain by Clays Ltd, Elcograf S.p.A.

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data
Title: Protection of legitimate expectations in investment treaty arbitration : a theory of
detrimental reliance / Teerawat Wongkaew, Ministry of Foreign Affairs, Thailand.
Description: Cambridge, United Kingdom ; New York, NY, USA : Cambridge University
Press, 2018. | Based on author’s thesis (doctoral – Graduate Institute of International and
Development Studies (Geneva, Switzerland), 2016). | Includes bibliographical references
and index.
Identifiers: LCCN 2018039850 | ISBN 9781108474283 (hardback)
Subjects: LCSH: Investments, Foreign (International law) | International commercial
LC record available at https://lccn.loc.gov/2018039850

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accurate or appropriate.
For my parents, my brother
Saman and Prisana, Thitirat
CONTENTS

Foreword page xiii
Preface xv
Table of Cases xviii
List of Abbreviations xxv

PART I Why Do We Need a Theory of Legitimate Expectations? 1
1. Introduction 3

1.1 Setting the Scene: Legitimate Expectations in Search of a Principled Justification 3

1.2 Three Reasons for a Theory of Legitimate Expectations 5

1.2.1 Lack of Conceptual Clarity 6

1.2.2 Lack of Doctrinal Structure and the Adjudicative Problem 7

1.2.3 Legitimacy Deficit and Protection of Legitimate Expectations 8

1.3 The Argument: Protection against Detrimental Reliance as the Core of Protection of Legitimate Expectations 9

1.4 Theoretical and Practical Relevance and Contribution of the Book 13

1.5 Miscellaneous Points: Scope of the Book 14

2 The Formalist Conception of Legitimate Expectations and Different Paradigms of the Investment Treaty Regime: A Critique 16

2.1 Introduction 16
CONTENTS

2.2 Public Law Conception of Protection of Legitimate Expectations 18
   2.2.1 Legitimate Expectations as a General Principle of Law Revisited 18
   2.2.2 Argument by Analogy for the Public Law Conception of Legitimate Expectations 21

2.3 Public International Law Conception of Protection of Legitimate Expectations 33
   2.3.1 Treaty and Customary Law Basis for Protection of Legitimate Expectations 34
   2.3.2 Failure of the Good Faith Argument to Provide the Legal Basis for Protection of Legitimate Expectations 36
   2.3.3 Estoppel as the Legal Basis for Protection of Legitimate Expectations 37
   2.3.4 Legitimate Expectations through the Lens of the Doctrine of Unilateral Acts 41
   2.3.5 Precedent–based Approach to the Justification of Legitimate Expectations 47

2.4 Conclusion 49

PART II What Is the Theory of Legitimate Expectations? 51

3 Theoretical Foundations for the Use of Moral Philosophy of Promise and Conceptualisation of Legitimate Expectations 53
   3.1 Introduction 53
   3.2 First Principles in Moral Philosophy of Promise and Protection of Legitimate Expectations 54
      3.2.1 ‘Promise’ as the Source of Expectations: Recognition of Arbitral Jurisprudence 55
      3.2.2 Specific Types of Expectations Protected under the Principle of Legitimate Expectations 58
   3.3 Methodological Caveats 59
   3.4 Three Conceptions of Promissory Obligation and a Theory of Legitimate Expectations 60

4 The Voluntarist Conception of Legitimate Expectations and Enforcement of Sovereign Promise 64
## Contents

4.1 Introduction 64

4.2 Conceptual Analysis of Legitimate Expectations and the Voluntarist Theory of Promise 65
   4.2.1 Promise, Normative Power and Natural Law Thinking 66
   4.2.2 Non-conventional Voluntarist Conception of Promise 69
   4.2.3 Conventionalist Voluntarist Conception of Promise 70
   4.2.4 A Critique of Voluntarist Theories and the Conceptual Framework of Legitimate Expectations 72

4.3 Normative Implication of the Voluntarist Conception of Legitimate Expectations 75
   4.3.1 Assimilation of Contractual Right and Treaty Right 75
   4.3.2 Limited Scope of Legitimate Expectations and Administrative Representations 89
   4.3.3 'Neutralization of the Normative Power of States': Legal Stability and Voluntarist 94

4.4 Critical Reflections on the Voluntarist Conception of Legitimate Expectations 100

5 Letting Investors Down; Protection of Trust and the Assurance Conception of Legitimate Expectations 104

5.1 Introduction 104

5.2 Constructing the Analytical Framework Based on the Assurance Theory of Promise 106
   5.2.1 The Principle of Fidelity and Promissory Obligation 107
   5.2.2 Normative Implication of the Principle of Fidelity on Conceptualisation of Legitimate Expectation 111
   5.2.3 Conclusion: Rejection of the Assurance Conception of Legitimate Expectations 123

5.3 Variant Conception: Trust Theory of Promise and Legitimate Expectations 124
   5.3.1 Conceptual Foundations of Trust View of Promise 125
X

CONTENTS

5.3.2 Trust-based Conception of Legitimate Expectation as Applied in English Public Law 126
5.3.3 Assessing the Transposition of the Trust Conception of Legitimate Expectations to Investment Treaty Context 130

5.4 Conclusion 133

6 Protecting against Investor’s Detrimental Reliance: Reliance Conception of Legitimate Expectations 134
6.1 Introduction 134
6.2 The Reliance Theory of Promise and Conceptualisation of Legitimate Expectations 135
6.2.1 The Underlying Philosophical Framework Based on MacCormick’s and Atiyah’s Theories of Promise 135
6.2.2 Reformulated Reliance Principle and Protection of Legitimate Expectations 139
6.3 Normative Implications of the Reliance Conception of Legitimate Expectations 141
6.3.1 The ‘Conduct’ Capable of Creating Legitimate Expectations 141
6.3.2 Act of Reliance: Conception and Characteristics 153
6.3.3 Reasonableness of Expectations: Resolving the Mystery Case of Reasonable Investor 158
6.4 Critical Reflections on the Reliance Conception of Legitimate Expectations 170

7 In Search of the Most Suitable Conception of Legitimate Expectations 172
7.1 Introduction 172
7.2 Three Contending Conceptions of Legitimate Expectations 173
7.3 ‘Best-Fit’ Criteria for Choosing the Unifying Conception of Legitimate Expectations 173
7.3.1 Macro Aspect of the Investment Treaty Regime 176
7.3.2 Micro Aspect of the Investment Treaty Arbitration 178
CONTENTS

7.4 Proposed Guidelines for the Application of the Reliance Theory of Legitimate Expectations 182

PART III Application of the Reliance Theory of Legitimate Expectations 185

8 Normative Consequences of the Reliance Theory of Legitimate Expectations 187

8.1 Introduction 187

8.2 Restrictive Scope of Protection of Legitimate Expectations 187

8.2.1 Rejection of the Catchall Conception of Legitimate Expectations 188

8.2.2 Exclusion of Rhetorical Use of Legitimate Expectations 190

8.3 Application of the Reliance Theory of Legitimate Expectations in Different Situations 193

8.3.1 Protection of Legitimate Expectations Arising from Contract and the Reliance Theory 193

8.3.2 Boundary of Legitimate Expectations of Legal Stability and the Reliance Conception 202

8.3.3 Protection of Expectations Created by Non-legally Binding Representations 215

8.4 Relationship between the Reliance Theory and Other Relevant Rules 224

8.4.1 Umbrella Clause and the Reliance Theory of Legitimate Expectations 225

8.4.2 Principle of Non-arbitrariness and the Reliance Theory of Legitimate Expectations: Two Different Principles 228

8.4.3 The Reliance Theory of Legitimate Expectations and Estoppel Principle 230

9 Rethinking Remedies for a Breach of Legitimate Expectations: Corrective Justice and Reliance Damages 233

9.1 Introduction 233

9.2 Argument for Detrimental Reliance-based Relief 235

9.2.1 'Principle' Considerations 236
xii CONTENTS

9.2.2 Policy Considerations 242
9.2.3 Authority (Case Law) Considerations 245

9.3 A Critique of the Current Remedial Framework Based on the Interstate Rules 248
9.3.1 Fictional Notions of Damage and Victim 251
9.3.2 Restitution as a Primary Remedy in Conformity with Protection of Reliance Interest 253
9.3.3 Expectation Damages as Default Rule and the Reliance Interests 256

9.4 Conclusion 264

Bibliography 265
Index 281
Empowering international tribunals to adjudge a state’s conduct by reference to a ‘fair and equitable’ standard of treatment was a leap of faith when investment treaties first populated the global legal space. What does it mean? A cacophony of different voices quickly filled the silence of the treaty text. Some thought it was a broad licence to do equity; others saw it as a fossilised incarnation of the international minimum standard. Still others greeted the fair and equitable treatment standard as a commitment to a specific economic programme of liberalisation and investment promotion – a rather heavy burden for a few words to bear. Individual decisions, when they started to appear, added further voices, but little by way of harmony. There was no shortage of false notes. Did states really sign up to international responsibility on the basis of a subjective judgment that their laws and regulations are not ‘transparent’ or ‘stable’ enough?

One concept emerging from the body of decisions has nonetheless struck a chord: legitimate expectations. This concept has a pedigree in comparative public law and some rudimentary soundings in general international law as well. It does not come from thin air. But it has had its fair share of controversy in these formative years of international investment law, and the big questions are still to be answered: When exactly will expectations be protected? Is the investor’s conduct relevant? How is legitimacy to be assessed? What remedies should follow a breach?

As is so often the case in the life of the law, there is nothing new under the sun. Much of the hard thinking has already been done: on this occasion by analytical philosophers who may be presumed with confidence to be oblivious to investment treaties. There is in fact a vast philosophical literature providing a sophisticated and nuanced account of the different conceptions of legitimate expectations and the moral arguments underpinning them. If only this learning could be assimilated for problem solving in investment treaty arbitration.

xiii
And now it has. For those interested in and committed to the coherent development of international investment law, Dr Wongkaew’s book will be the most valuable of companions, if not a revelation. He has provided the first systematic study of the concept of legitimate expectations by exploring the three principal philosophical arguments for why expectations deserve protection: the voluntarist, assurance and detrimental reliance theories. He then sets about finding the best fit for investment treaty arbitration, and his meticulous reasoning leads him to the conclusion that the detrimental reliance theory of legitimate expectations provides the most compelling justification for imposing liability on a host state in this context.

Dr Wongkaew’s research and conclusions present a structure for the just and deliberative adjudication of claims for fair and equitable treatment through the prism of legitimate expectations and as such will be an indispensable tool for counsel and arbitrators alike and a first reference for scholars in this field. It is also an answer both to critics who maintain that the fair and equitable standard is infected with a fatal dose of indeterminacy (or worse) and to apologists who think nothing of converting subjective investor expectations into primary obligations of international law.

Professor Zachary Douglas QC
PREFACE

The concept of protection of legitimate expectations has provided a solution to the ‘indeterminacy’ problem of the vaguely worded provision of fair and equitable treatment in investment treaty. Frustration of the investor’s legitimate expectations gives one possible meaning to what is regarded as an unfair or inequitable conduct of the state towards the investor. However, as the jurisprudence has revealed, the notion of ‘legitimacy’ or ‘reasonableness’ of expectations seems to be just as indeterminate as the notion of fairness to which it is supposed to give meaning. For this reason, the jurisprudential development of the concept is far from being coherent and principled, which supplies critics of the investment treaty regime with another bullet to shoot. Given the great importance of the fair and equitable treatment standard in investment treaty arbitration, the stake of resolving this indeterminacy problem is high.

This book is dedicated to demarcating the boundaries of legitimate expectations by tackling a problem in an unconventional way – namely, by drawing insights from moral philosophy to resolve a legal problem. I realise that to elucidate the concept, one cannot simply analyse conflicting awards which are repeated one after another without deep reflections. Nor is it the way forward to draw from comparative public laws because each legal system is unique and the rules thereof cannot be uncritically transplanted into the investment treaty regime. I have long been interested in the interface between law and philosophy, so I explored such interface in the context of legitimate expectations given that the concept raises several philosophical questions about promise. The approach I adopt in the book is to return to ‘first principles’ underlying protection of legitimate expectations – examining the fundamental question of why the law should protect legitimate expectations.

The book addresses three interrelated questions: (1) Why do we need a theory of legitimate expectations? (2) What is the theory of legitimate expectations? and (3) What is the application of the reliance theory? The examination of philosophical underpinnings of the concept results
in a practical framework for adjudication of claims based on the protection of legitimate expectations.

The main idea of the book is that whilst there are three possible conceptions of legitimate expectations which focus on three different aspects of liability, the reliance theory of legitimate expectations should prevail. The reliance theory emphasises the act of detrimental reliance on the party of the investor as the basis for liability. This philosophical divide accounts for different reasoning and outcomes in the current investment treaty jurisprudence. As the chosen unifying conception, the reliance theory of legitimate expectations has three normative implications: purpose, conditions for liability and remedy. First, it underpins the concern of the law with compensation of harm suffered by the investor rather than enforcement of sovereign promise. Second, it dictates that the investor’s conduct is an important normative element in the determination of state liability. Third, it provides a conceptual framework for justifying the award of reliance damages.

Whilst this book is essentially about the justification and conceptualisation of protection of legitimate expectations from the moral discourse, I hope that this book will also prove to be a useful tool for practitioners in the field, especially the Proposed Guidelines for the Application of the Reliance Theory of Legitimate Expectations.

The book was delivered to the publisher in March 2018 and takes account of the relevant awards as of that date. However, given that the book takes an analytical account of the jurisprudence, it is only possible to subject certain awards to critical analysis. Nevertheless, the book tries to incorporate references to the relevant awards which address issue of legitimate expectations.

This book is a revised version of my doctoral thesis defended in 2016 under the same title at the Graduate Institute of International and Development Studies, Switzerland. Many people have helped me in some way in the process of producing this book.

First, I owe immense gratitude to the PhD Committee composed of Professor Zachary Douglas QC, my thesis supervisor; Professor Thomas Schultz, the second reader; and Professor Stephan Schill, the external examiner, for constructive comments and suggestions which enabled me to improve the work tremendously and for words of encouragement in publishing the thesis.

I had to admit that I had never imagined spending four years thinking over one topic. But life just took its course and here I am publishing the book based on my PhD thesis! I owe immense gratitude to one special...
friend, Ms Anna Brinkmeier, who was the source of inspiration for taking up the PhD in the first place, which then allowed me to discover many enjoyable things of life, one of which is the joy of thinking deeply. I would like to thank friends and colleagues in Geneva and Bangkok, especially those from the Thai Ministry of Foreign Affairs, who inspired and supported me throughout these years. I remain eternally grateful to the financial support from the Royal Thai Government for the PhD study. I also appreciate the opportunity to gain insights into the policy perspectives of investment treaty arbitration whilst working as a legal consultant at UNCTAD during the PhD years.

I owe my gratitude to the entire Cambridge University Press team for the opportunity to work on this project and for continuous support throughout the process.

I am thankful for the help of Ms Sukanya Wisedsri for her research and technical assistance which proved to be essential to the completion of the book.

Above all, I am greatly indebted to my parents and brother and my partner in life, Ms Suchaya Tancharoenpol, who have given me endless love and support throughout these years.
### TABLE OF CASES

**Investment Treaty Cases**

<table>
<thead>
<tr>
<th>Case</th>
<th>Jurisdiction</th>
<th>Award Date</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>ADC Affiliate Limited, ADC &amp; ADMC Management Limited v. Hungary, ICSID</td>
<td>No ARB/03/16, Award (2 October 2006)</td>
<td>ICSID Rep 534</td>
<td>25</td>
</tr>
<tr>
<td>AES Summit Generation Limited and AES – Tisza Erőmű Kft. v. Hungary, ICSID</td>
<td>No ARB/07/22, Award (23 September 2010)</td>
<td>2011 50 ILM 186</td>
<td>96</td>
</tr>
<tr>
<td>Alex Genin and Others v. Republic of Estonia, ICSID Case No ARB/99/2, Award</td>
<td>(25 June 2001)</td>
<td>167</td>
<td></td>
</tr>
<tr>
<td>Alpha Projektholding GmbH v. Ukraine, ICSID Case No ARB/07/16, Award</td>
<td>(8 November 2010)</td>
<td>6, 76</td>
<td></td>
</tr>
<tr>
<td>Ammar Al-Bahloul v. The Republic of Tajikistan, SCC Case No V (064/2008), Final Award</td>
<td>(8 June 2010)</td>
<td>97, 139</td>
<td></td>
</tr>
<tr>
<td>Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID</td>
<td>Case No ARB/00/5 (23 September 2003), Award on Jurisdiction (12 February 2010)</td>
<td>258</td>
<td></td>
</tr>
<tr>
<td>AWG Group v. Argentina, UNCITRAL Case, Decision on Liability (30 July 2010)</td>
<td>4, 7, 31, 134</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bayindir Insaat Turizm Ticaret ve Sanayi A S v. Pakistan, ICSID Case No ARB/03/29, Award (24 August 2009)</td>
<td>166, 179</td>
<td></td>
<td></td>
</tr>
<tr>
<td>BG Group Plc v. Argentina, UNCITRAL Case, Final Award (24 December 2007)</td>
<td>206</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Biwater Gauff (Tanzania) Ltd v. Tanzania, ICSID Case No ARB/05/22, Award (24 July 2008)</td>
<td>196</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Blusun S.A., Jean-Pierre Lecorci er and Michael Stein v. Italian Republic, ICSID Case No ARB/14/3, Final Award (27 December 2016)</td>
<td>209</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Charanne and Construction Investments v. Spain, SCC Case No V 062/2012, Award (21 January 2016)</td>
<td>207</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CME v. Czech Republic, UNCITRAL Case, Partial Award (13 September 2001)</td>
<td>9 ICSID Rep 121 139, 244, 263</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CMS Gas Transmission Company v. Argentina, ICSID Case No ARB 01/08, Final Award (12 May 2005)</td>
<td>(2005) 44 ILM 1205 203, 256</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CMS Gas Transmission Company v. Argentina, ICSID Case No ARB 01/08, Decision of the ad hoc Committee on the Application for Annulment (25 September 2007)</td>
<td>14 ICSID Rep 251 203</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina, ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002)</td>
<td>84</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

xviii
Table of Cases

Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina, ICSID Case No ARB/97/3, Award (20 August 2007) 258
Continental Casualty v. Argentina, ICSID Case No ARB/03/9, Award (5 September 2008) 100, 157, 164, 165, 171, 205
Crystalex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No ARB(AF)/11/2, Award (4 April 2016) 149
ECE Projektmanagement v. The Czech Republic, UNCITRAL, PCA Case No 2010–15, Award (19 September 2013) 170
EDF (Services) Ltd v. Romania, ICSID Case No ARB/05/13, Award (2 October 2009) 39, 97, 157, 193
Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No ARB/13/36, Award (4 May 2017) 208
El Paso Energy International Company v. The Argentine Republic, ICSID Case No ARB/03/15, Award (31 October 2011) 48, 55, 90, 163, 203
Electrabel S.A. v. Republic of Hungary, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) 3, 15, 76
Enron Corporation & Ponderosa Assets, L.P. v. Argentina, ICSID Case No ARB/01/3, Award (22 May 2007) 146, 225
Eureko B.V. v. Poland, UNCITRAL Case, Final Award (12 November 2010) 6, 149
Franck Charles Arif v. Republic of Moldova, ICSID Case No ARB/11/23, Award (8 April 2013) 8, 58, 100, 131, 203, 254
Frontier Petroleum Services Ltd v. Czech Republic, UNCITRAL Case, Final Award (12 November 2010) 6, 149
GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No ARB/08/16, Award (31 March 2011) 92
Generation Ukraine v. Ukraine, ICSID Case No ARB/00/9, Award (16 September 2003) 15, 26, 166, 187
Glamis Gold, Ltd v. United States of America, NAFTA/UNCITRAL, Award (8 June 2009) 113, 179, 216
Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Additional Facility Case No ARB(AF)/09/1, Final Award (22 September 2014) 19, 151, 223
Grand River Enterprises Six Nations Ltd et al. v. USA, NAFTA/UNCITRAL, Award (12 January 2011) 15, 187
Gustav F W Hamester GmbH & Co. KG v. Ghana, ICSID Case No ARB/07/24, Award (18 June 2010) 85

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<table>
<thead>
<tr>
<th>Case</th>
<th>Jurisdiction/Arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hochtief AG v. The Argentine Republic, ICSID Case No ARB/07/31</td>
<td>Decision on Liability (29 December 2014) 76</td>
</tr>
<tr>
<td>Impregilo S.p.A. v. Argentine Republic, ICSID Case No ARB/07/17</td>
<td>Award (21 June 2011) 203</td>
</tr>
<tr>
<td>Impregilo S.p.A. v. Pakistan, ICSID Case No ARB/03/3</td>
<td>Decision on Jurisdiction (22 April 2005) 12 ICSID Rep 245 179</td>
</tr>
<tr>
<td>International Thunderbird Gaming Corporation v. Mexico, UNCITRAL Case, Final Award (26 January 2006), Separate Opinion of Arbitrator Waelde 4, 7, 19, 140, 176, 252</td>
<td></td>
</tr>
<tr>
<td>International Thunderbird Gaming Corporation v. Mexico, UNCITRAL Case, Final Award (26 January 2006) 4, 7, 19, 140, 176, 252</td>
<td></td>
</tr>
<tr>
<td>Ioannis Kardassopoulos v. The Republic of Georgia, ICSID Case No ARB/05/18, Award (3 March 2010) 39</td>
<td></td>
</tr>
<tr>
<td>Jan de Nul N.V. and Dredging International N.V. v. Egypt, ICSID Case No ARB/04/13, Award (6 November 2008) 15 ICSID Rep 437 188, 192, 234, 262</td>
<td></td>
</tr>
<tr>
<td>Joseph Charles Lemire v. Ukraine, ICSID Case No ARB/06/18, Award (14 January 2010) 188, 192, 234, 262</td>
<td></td>
</tr>
<tr>
<td>Lauder v. Czech Republic, UNCITRAL Case, Award (3 September 2001) 9 ICSID Rep 66 199</td>
<td></td>
</tr>
<tr>
<td>LG &amp; E Energy Corp. v. Argentine Republic, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006) 117, 157, 191, 256</td>
<td></td>
</tr>
<tr>
<td>M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador, ICSID Case No ARB/03/6, Award (31 July 2007) 76, 216</td>
<td></td>
</tr>
<tr>
<td>Merrill &amp; Ring Forestry L.P. v. The Government of Canada, UNCITRAL Case, ICSID Administered Case, Award (31 March 2010) 113</td>
<td></td>
</tr>
<tr>
<td>Metalclad v. Mexico, ICSID Case No ARB (AF)/97/1, Award (30 August 2000) 221, 222, 247, 248</td>
<td></td>
</tr>
<tr>
<td>Metalpar v. Argentine Republic, ICSID Case No ARB/03/5, Award (6 June 2008) 48, 97, 169</td>
<td></td>
</tr>
<tr>
<td>Methanex Corporation v. US, UNCITRAL Case, Final Award (3 August 2005) 16 ICSID Rep 40 164</td>
<td></td>
</tr>
<tr>
<td>Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada, ICSID Case No ARB(AF)/07/4, Decision on Liability and Principles of Quantum (22 May 2012) 56, 139, 204</td>
<td></td>
</tr>
<tr>
<td>MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No ARB/01/7, Award (25 May 2004) 14</td>
<td></td>
</tr>
<tr>
<td>MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile, ICSID Case No ARB/01/07, Decision on Annulment (21 March 2007) 13 ICSID Rep 500 48, 84, 169, 198, 244</td>
<td></td>
</tr>
<tr>
<td>National Grid v. Argentina, UNCITRAL Case, Award (3 November 2008) 146</td>
<td></td>
</tr>
</tbody>
</table>
TABLE OF CASES

Nordzucker v. Poland, UNCITRAL, Second Partial Award (Merits) (28 January 2009) 76, 82, 83, 168
Occidental Exploration and Production Co v. Republic of Ecuador, LCIA Case No UN 3467, Award (1 July 2004) 31, 200, 211
Occidental Petroleum Corp., Occidental Exploration and Production Co v. Republic of Ecuador, ICSID Case No ARB/06/11, Award (5 October 2012) 200
Parkerings Compagniet AS v. Lithuania, ICSID Case No ARB/05/8, Award on Jurisdiction and Merits (14 August 2007) 85, 203, 166, 179, 187, 203
Perenco Ecuador Ltd v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability (12 September 2014) 98
Peter A. Allard v. The Government of Barbados, PCA Case No 2012–06, Award (27 June 2016) 155
Philippe Gruslin v. Malaysia, ICSID Case No ARB/99/3, Award (27 November 2000) 39
PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Turkey, ICSID Case No ARB/02/05, Award (19 January 2007) 55, 90, 203, 246
Ron Fuchs v. The Republic of Georgia, ICSID Case No ARB/07/15, Award (3 March 2010) 222
Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID No ARB/05/16, Award (29 July 2008) 188, 191
Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL Rules, Partial Award (17 March 2006) 6, 48, 99, 188
Sempra Energy International v. Argentine Republic, ICSID Case No ARB/02/16, Award (28 September 2007) 31
SGS Société Générale de Surveillance SA v. Paraguay, ICSID Case No ARB/07/29 (10 February 2012) 226
SGS Société Générale de Surveillance SA v. Republic of the Philippines, ICSID Case No ARB/02/6, Decision on Objections to Jurisdiction and Separate Declaration (29 January 2004) 226
Spyridon Roussalis v. Romania, ICSID Case No ARB/06/1, Award (7 December 2011) 163
TABLE OF CASES

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No ARB/03/19, Decision on Liability, Final Award, 30 July 2010 5, 20, 147

Técnicas Medioambientales Tecmed, S.A. v. Mexico, ICSID Additional Facility Case No ARB (AF)/00/02, Award (29 May 2003) 10 ICSID Rep 134 3, 19, 132, 188, 256

TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No ARB/10/23, Award (19 December 2013) 95


Total S.A. v. Argentina, ICSID Case No ARB/04/1, Decision on Liability (21 December 2010) 19, 20, 55, 75, 131, 142, 187

Toto Construzioni Generali SpA v. Republic of Lebanon, ICSID Case No ARB/07/12, Award (7 June 2012) 15, 19, 167, 203

Ulysseas, Inc. v. The Republic of Ecuador, UNCITRAL, Final Award (12 June 2012) 211

Venezuela Holdings, B.V., et al. (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd, Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd, and Mobil Venezolana de Petróleos, Inc.) v. Bolivarian Republic of Venezuela, ICSID Case No ARB/07/27, Award (9 October 2014) 121

Walter Bau v. Thailand, UNCITRAL Case, Award (1 July 2009) 195, 259

Waste Management v. Mexico, ICSID Case No ARB (AF)/00/3, Award (30 April 2004) 39, 157, 179

Wena Hotels Ltd v. Arab Republic of Egypt, ICSID Case No ARB/98/4, Award (8 December 2000) 39

White Industries Australia Limited v. India, UNCITRAL Case, Final Award (30 November 2011) 48, 113


Decisions of International Courts


Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, [1962] ICJ Rep 6 38

Elettronica Sicula SpA (ELSI) (United States v. Italy) [1989] ICJ Rep 15 228
TABLE OF CASES

Factory at Chorzów (Germany v. Poland), Merits, [1928] PCIJ Rep Series A No 17 103
233, 251, 252
International Status of South-West Africa Case, ICJ Reports, Advisory Opinion, Judge
McNair Opinion, 1950, 148 23, 234
Legal Status of Eastern Greenland, Judgment of 5 April 1933, PCIJ, Series A/B, No 53 40
Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United
States of America), Merits, Judgment [1986] ICJ Rep 14 40
North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic
of Germany v. Netherlands) ICJ Rep 1969 40
Nuclear Tests Case (New Zealand v. France) (Judgment) [1974] ICJ Rep 268 46
Payment of Various Serbian Loans Issued in France (France v. Serb-Croat-Slovene)
[1929] PCIJ (Series A) No 20, 38 40
SS Wimbledon, 17 August 1923, [1923] PCIJ Series A, No 1 78, 320 64
Territorial Dispute (Libyan Arab Jamahiriya v. Chad) (Merits) [1994] ICJ Rep 6,
78 40
The Anglo-Norwegian Fisheries Case (United Kingdom v. Norway) 1951, ICJ Rep
116 60

Decision of Municipal Courts

England

Abdi v. Secretary of State for the Home Department [2005] EWCA Civ 1363
Ashby v. White, 92 Eng Rep 126 (KB 1703) 233
Blyth v. Birmingham Waterworks (1856) 11 Ex 781 160
EB (Kosovo) v. Secretary of State for the Home Department [2008] UKHL 41 [2009] 1 AC
1159 4
Helow v. Advocate General [2008] 1 WLR 2416
Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR
896 160
Minister of State for Immigration & Ethnic Affairs v. Ah Hin Teoh [1995] HCA 20
157–58
Pierson v. Altrincham Urban Council (1917) 86 LJ KB 969 142
R (Niazi) v. Secretary of State for the Home Department [2008] EWCA Civ 755 56
R (on the Application a/Rashid) v. Secretary of State for the Home Department [2005]
EWCA Civ 744 158
R v. Secretary of State for the Home Department, ex p Hindley [2000] UKHL 21 157
R (on the Application of Bancoult) v. Secretary of State for Foreign and Commonwealth
Affairs [2008] UKHL 61; [2009] 1 AC 453 32, 57, 91
237 158
xxiv            TABLE OF CASES

R (on the Application of Nadarajah) v. Secretary of State for the Home Department
(2005) EWCA Civ J 363  32

Australia

Minister of State for Immigration & Ethnic Affairs v. Ah Hin Teoh [1995] HCA
20  157–58
# ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>BIT</td>
<td>bilateral investment treaty</td>
</tr>
<tr>
<td>BOT</td>
<td>build-operate-transfer</td>
</tr>
<tr>
<td>CDCA</td>
<td>California Desert Conservation Area</td>
</tr>
<tr>
<td>CEO</td>
<td>chief executive officer</td>
</tr>
<tr>
<td>DCF</td>
<td>discounted cash flow</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>FET</td>
<td>fair and equitable treatment</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<td>International Centre for Settlement of Investment Disputes</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>INECEL</td>
<td>Instituto Ecuatoriano de Electrificacio, Ecuador</td>
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<tr>
<td>IPO</td>
<td>initial public offering</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<tr>
<td>PPA</td>
<td>purchase power agreement</td>
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<tr>
<td>SPA</td>
<td>share purchase agreement</td>
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<td>United Kingdom</td>
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XXV