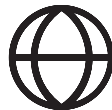
Building International Investment Law

The First 50 Years of ICSID

Edited by

Meg Kinnear
Geraldine R. Fischer
Jara Mínguez Almeida
Luisa Fernanda Torres
Mairée Uran Bidegain



ICSID
INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

Wolters Kluwer

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.wklawbusiness.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Disclaimer: The findings, interpretations, and conclusions expressed in this work do not necessarily reflect the view of the International Centre for Settlement of Investment Disputes (ICSID), its Secretariat, the members of its Administrative Council, or the governments they represent.

Cover: Vladimír Popovic, Slovak Republic, Untitled 2000, mixed media collage 17 5/8” x 24 3/8” World Bank PN: 513613, Collection of the World Bank used with permission of the artist.

Printed on acid-free paper.

ISBN 978-90-411-6133-8

© 2016 International Centre for Settlement of Investment Disputes (ICSID)

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: permissions@kluwerlaw.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

Editors

Meg Kinnear has been the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID") at the World Bank since 2009. She was formerly the Senior General Counsel and Director General of the Trade Law Bureau of Canada, where she was responsible for all international investment and trade litigation involving Canada, and participated in the negotiation of bilateral investment agreements. In November 2002, Ms. Kinnear was also named Chair of the Negotiating Group on Dispute Settlement for the Free Trade of the Americas Agreement. Prior to this, Ms. Kinnear was Executive Assistant to the Deputy Minister of Justice of Canada (1996-1999) and Counsel at the Civil Litigation Section of the Canadian Department of Justice (1984-1996) where she appeared before federal and provincial courts as well as domestic arbitration panels. Ms. Kinnear has published numerous articles and books on international investment law and procedure and is a frequent speaker on these topics.

Geraldine R. Fischer is a legal counsel with ICSID where she serves as secretary of tribunals in arbitration proceedings brought under the ICSID Convention and the ICSID Additional Facility Rules. Prior to joining ICSID, Ms. Fischer was a Senior Research Fellow at the Centre for International Law in Singapore focusing on investment arbitration. She also worked as an attorney with Foley Hoag LLP and Winston & Strawn LLP in Washington, D.C. representing companies and States in international arbitration and litigation proceedings. Ms. Fischer began her career at the U.S. Department of Commerce where she was a member of the negotiating team for several free trade and investment agreements. She is also currently an adjunct professor at Georgetown University Law Center where she co-teaches a course in international investment law. She is admitted to practice law in New York and the District of Columbia.

Jara Mínguez Almeida is a legal counsel with ICSID. In this capacity, she serves as secretary of tribunals in arbitration proceedings brought under the ICSID Convention and the UNCITRAL Arbitration Rules. She also acts as legal counsel on institutional matters. Prior to joining ICSID, Ms. Mínguez Almeida worked as legal counsel at the Permanent Court of Arbitration in The Hague and as international case manager at the International Centre for Dispute Resolution of the American Arbitration Association

where she also served as secretary of tribunals in investment and commercial arbitrations. She began her career at Lovells LLP advising parties on international dispute resolution. She holds a law degree from Universidad Carlos III (Madrid) and is admitted to practice in Madrid.

Luisa Fernanda Torres is a legal counsel with ICSID. In this capacity, she serves as secretary of tribunals and *ad hoc* committees in arbitration and annulment proceedings brought under the ICSID Convention, the ICSID Additional Facility Rules and the UNCITRAL Arbitration Rules. She also acts as legal counsel on institutional matters. Prior to joining ICSID, she worked at Covington & Burling LLP, acting in numerous international investment arbitration and international commercial arbitration proceedings. She began her career with the law firm of Rodríguez-Azuero Asociados in Bogotá, Colombia. She is also currently an adjunct professor at Georgetown University Law Center where she co-teaches a course in international investment law. She holds a J.D. from Universidad del Rosario, Bogotá-Colombia, a Specialization in Insurance Law from Pontificia Universidad Javeriana, Bogotá-Colombia and an LL.M. from Georgetown University. She is admitted to practice in the Republic of Colombia, the State of New York and the District of Columbia.

Mairée Uran Bidegain is a legal counsel with ICSID. In this capacity, she serves as secretary of tribunals, commissions and *ad hoc* committees in arbitration, conciliation and annulment proceedings brought under the ICSID Convention. She also acts as legal counsel on institutional matters. Prior to joining ICSID, Ms. Uran Bidegain practiced at White & Case LLP, where she advised sovereign States and private parties on international dispute resolution as well as on cross-border negotiations and international transactions. She lectured at American University Washington College of Law, and is currently an adjunct professor at Georgetown University Law Center where she co-teaches a course in international investment law. She holds a law degree from Université Panthéon-Assas (Paris II), a Master’s degree from Université Panthéon-Sorbonne (Paris I), an LL.M. from the University of Pennsylvania Law School and is admitted to practice in New York.

Contributors

Stanimir A. Alexandrov is a Partner at Sidley Austin LLP in Washington D.C. and co-chair of the firm's International Arbitration practice. Mr. Alexandrov focuses his practice in the areas of investor-State arbitration, as well as international commercial arbitration and resolution of trade disputes before the WTO. He has represented private parties and governments in arbitration before ICSID, as well as in ICC, UNCITRAL, and AAA arbitrations. Mr. Alexandrov has been appointed to the ICSID Panel of Arbitrators and serves as an arbitrator in numerous ICSID, ICC, LCIA, and UNCITRAL arbitrations. He has appeared as an expert witness in international arbitration on investment treaty interpretation. Mr. Alexandrov has been teaching for over 15 years at The George Washington University Law School and has published several books and numerous articles on matters of public international law and international arbitration. He obtained his degree in public international law from the Moscow Institute of International Relations, and Master's and Doctoral degrees in international law from The George Washington University Law School. Prior to engaging in private practice, Mr. Alexandrov was Vice Minister of Foreign Affairs of Bulgaria. He is fluent in several languages.

Mahnoush H. Arsanjani, former Director of the Codification Division of the Office of Legal Affairs of the United Nations, served as Vice-President of the American Society of International Law, and is a member of the Board of Editors of the *American Journal of International Law* and a member of the *Institut de Droit International*. She served as a member of the Expert Group established by the 2008 *Ad Hoc* Energy Ministers Meetings held in Jeddah and London, and as a special consultant to the International Energy Forum, Charter of the International Energy Forum 2010. She served as a member of the Bahrain Independent Commission of Inquiry. She is a judge on the World Bank Administrative Tribunal and practices international law.

Yas Banifatemi is a Partner in Shearman & Sterling's International Arbitration Group and heads the firm's Public International Law practice. She acts as both counsel and arbitrator in international arbitration proceedings, with particular focus on investment and oil & gas disputes. She holds a PhD in Public International Law from Panthéon-Assas University (Paris II) and an LL.M. from Harvard Law School. She is a Visiting

Lecturer in Law at Yale Law School and a Lecturer in Law at Panthéon-Sorbonne University (Paris I), where she teaches International Investment Law. She is a founding member of the International Academy for Arbitration Law (Arbitration Academy). She has authored numerous publications on international arbitration and public international law. She is a Member of the LCIA Court and a Vice-President of the ICC International Court of Arbitration.

Piero Bernardini is Of Counsel at the Ughi e Nunziante Law Firm and was previously the General Counsel at the Eni Group from 1980-1985. He was a Member of the Board and Executive Committee, of ENI SpA (1986-1990) as well as the Chair of International Arbitration at LUISS University – Rome (1982-2005). He practices principally in the following areas: arbitration, international business transactions, investment protection, construction contracts, mergers and acquisitions, oil and gas agreements and State contracts. He is President of the Italian Arbitration Association and a Member of the ICCA Advisory Board. He was also appointed by Italy as a Member of the ICSID Panel of Conciliators and Arbitrators. He has been an arbitrator, president of arbitral tribunals, member of ICSID annulment committees and counsel in more than 250 commercial and investment treaty cases, under the rules of ICSID, ICC, LCIA, NAI, Cairo Centre, UNCITRAL, CAM, AIA, VIAC, and SCC. He has been a speaker, moderator or chairman in national and international congress and seminars. He has also authored books and articles in the field of State contracts, investment protection, commercial contracts and arbitration.

Doak Bishop is Co-Head of King & Spalding's International Arbitration Practice group and a member of the firm's Latin American Practice Group. Mr. Bishop has over thirty-eight years' experience focusing on international arbitration and litigation of oil and gas, energy, construction, environmental, and foreign investment disputes. He has developed a reputation for his experience in international arbitration, serving both as an arbitrator and counsel in large business disputes. Mr. Bishop is Board Certified in Civil Trial Law by the Texas Board of Legal Specialization. He presently serves as Chairman of the Institute of Transnational Arbitration (2012-2015) and is a member of the Board of Directors of the American Arbitration Association. He also serves as a member of the US delegation to the NAFTA Advisory Committee on Private Commercial Disputes. He has served as Chairman of the Litigation Section of the State Bar of Texas (1998) and Co-Chair of the American Bar Association International Litigation Committee (1998-1999). Mr. Bishop received his B.A. degree, with high honors, and departmental distinction from Southern Methodist University in 1973, and his J.D. degree, with honors, from The University of Texas Law School in 1976 where he served as Research Editor of the Texas Law Review.

Andrea K. Bjorklund is the L. Yves Fortier Chair in International Arbitration and International Commercial Law at McGill University Faculty of Law. She is an adviser to the American Law Institute's project on restating the US law of international commercial arbitration and is the inaugural ICSID Scholar-in-Residence. She is on the panel of arbitrators of the International Center for Dispute Resolution of the American Arbitration Association. Professor Bjorklund is widely published in investment law and

dispute resolution and transnational contracts. Her articles have appeared, *inter alia*, in the *Oxford Handbook of International Investment Law*, the *American Review of International Arbitration*, the *Hastings Law Journal*, the *ICSID Review*, and the *Virginia Journal of International Law.* Professor Bjorklund has a J.D. from Yale Law School, an M.A. in French Studies from New York University, and a B.A. (with High Honors) in History and French from the University of Nebraska, Lincoln.

Laurence Boisson de Chazournes has been a Professor of International Law and International Organizations at the Faculty of Law of the University of Geneva since 1999. She has also been invited as a guest lecturer at numerous universities all over the world. She teaches and writes on, *inter alia*, general international law, dispute settlement, natural resources management and environmental law. Professor Boisson de Chazournes also serves as an advisor to various international organizations (UN, ILO, WHO) and governments. She is a member of the Permanent Court of Arbitration. From 1995-1999, she was Senior Counsel with the World Bank. In the area of international dispute settlement, she has served as Chairperson of WTO arbitration panels on pre-shipment inspections. Professor Boisson de Chazournes also pleads before the International Court of Justice ("ICJ") and is an arbitrator in investment arbitration ("ICSID") and other arbitration proceedings (PCA, UNCITRAL and the Court of Sport Arbitration).

Gary B. Born, Chair of the International Arbitration Practice Group at Wilmer Cutler Pickering Hale and Dorr LLP, is the world's pre-eminent authority on international arbitration and litigation. He has served as counsel in over 650 international commercial and investment arbitrations, including several of the largest arbitrations in ICC and *ad hoc* history. He has been ranked for the past twenty years as one of the world's leading international arbitration practitioners and is one of only two practitioners globally to achieve "star" status in Chambers and Partners' guides. He has published leading works on international arbitration, international litigation and other forms of dispute resolution, including *International Commercial Arbitration* (2nd ed., Kluwer 2014), the leading treatise in the field. He is President of the Singapore International Arbitration Centre ("SIAC") Court of Arbitration and an Honorary Professor of Law at the University of St. Gallen, Switzerland and Tsinghua University, Beijing.

Gabriel Bottini is an international arbitrator and advisor on issues of international law. He is the former National Director of International Affairs and Disputes of the Treasury Attorney-General's Office of Argentina. The Treasury Attorney General's Office defends Argentina before international arbitral tribunals. Mr. Bottini has extensive experience in ICSID, UNCITRAL and ICC arbitrations. Mr. Bottini teaches Public International Law at the University of Buenos Aires, Argentina. He has lectured at many universities and international organizations around the world on issues of investment litigation and international law, and has published extensively on such matters. He has been awarded scholarships by the Fulbright Commission and other international institutions. Mr. Bottini holds a law degree *magna cum laude* from the University of Buenos Aires, an LL.M. from New York University School of Law and a post-graduate degree from Cambridge University.

Charles N. Brower has been a Judge of the Iran-United States Claims Tribunal for thirty-two years, has served as Judge *ad hoc* of the Inter-American Court of Human Rights, and currently sits as Judge *ad hoc* of the International Court of Justice. He is a member of 20 Essex Street Chambers in London, and a Distinguished Visiting Research Professor of Law at The George Washington University Law School. Previously, Judge Brower served as Acting Legal Adviser to the United States Department of State, as Deputy Special Counsellor to the President of the United States, and as a partner at White & Case LLP, where he co-founded the firm's Washington, DC office. Among other honors Judge Brower has been awarded the American Society of International Law's Manley O. Hudson Medal (2009), the American Bar Association Section of International Law's Lifetime Achievement Award (2013) and the Global Arbitration Review's Lifetime Achievement Award (2015).

David Caron is Dean of The Dickson Poon School of Law, King's College London. He is a Barrister with 20 Essex Street; a member of the London Court of International Arbitration as well as a Bencher of Inner Temple. He is a member of the US State Department Advisory Committee on Public International Law, and the Editorial Board of the *American Journal of International Law*. He is a past President of the American Society of International Law and Chair of the Institute of Transnational Arbitration. His scholarship focuses on international courts and tribunals, law of the sea, international environmental law and general theory of international law.

Simon Consedine is a Senior Associate in the Freshfields Bruckhaus Deringer international arbitration group, based in Washington, DC. He represents clients in commercial and investor-State arbitrations. His time with Freshfields Bruckhaus Deringer includes three years in the firm's Paris office. Simon was educated at the University of Canterbury in New Zealand and Columbia University School of Law in New York, NY, where he studied as a Fulbright Scholar.

James Crawford AC SC, is a Judge of the International Court of Justice (2015). Previously he was Whewell Professor of International Law, University of Cambridge (1992-2015), and has held chairs at Adelaide, Sydney and Latrobe Universities (Australia) and Xi'an Jiaotong University, China. He was the first Australian member of the United Nations International Law Commission ("ILC") and in that capacity was responsible for the ILC's work on the International Criminal Court (1994) and for the second reading of the ILC Articles on State Responsibility (2001). In 2012, he was awarded the Hudson Medal by the American Society of International Law.

Donald Francis Donovan is Co-Head of the International Disputes Group at Debevoise & Plimpton LLP. He has argued international law, arbitration law, commercial law, and other issues before, among other courts and tribunals, the International Court of Justice, the Arbitral Tribunal established by the 1930 Hague Agreement, and the International Criminal Tribunal for the Former Yugoslavia; the US Supreme Court, the US Courts of Appeals for the Second, Third, Fourth, Ninth, and District of Columbia Circuits, and other federal and state courts throughout the United States; and arbitration tribunals sitting around the world, in a wide range of economic sectors, in commercial and investor-State disputes. Mr. Donovan recently completed a term as

President of the American Society of International Law. He serves as a Member of the US Secretary of State's Advisory Committee on International Law; a Member and Honorary Vice-President of the International Council for Commercial Arbitration ("ICCA"); and as a Member of the Board of Human Rights First and Chair of its Litigation Committee. He served from 2000-2005 as Chair of the Institute for Transnational Arbitration. Mr. Donovan teaches International Arbitration and International Investment Law and Arbitration at New York University School of Law, and in July 2015 he taught the General Course on investor-State Arbitration at the International Academy of Arbitration Law in Paris.

Zachary Douglas QC is a barrister at Matrix Chambers and a Professor of International Law at the Graduate Institute of International and Development Studies, Geneva. He is the author of one of the leading treatises on investment treaty arbitration (*The International Law of Investment Claims*) as well as several other important studies in this field. After having acted as counsel in more than twenty investment arbitrations for investors and States, Professor Douglas QC is now a prominent arbitrator in both investment treaty and commercial disputes and has been appointed in more than sixty cases. He also has extensive experience in other international cases concerning territorial and maritime boundary disputes, human rights, corporate responsibility, State immunity, international humanitarian law and State succession, both before international tribunals and the national courts of different jurisdictions. He is frequently invited to give lectures on topics of public and private international law at universities around the world in English, French and Russian.

Stephen L. Drymer is a Partner and Head of International Arbitration at Woods LLP, where he practices exclusively in the area of domestic and international arbitration and alternative dispute resolution. He acts as counsel, and serves as arbitrator and mediator, in domestic and in international commercial and investment treaty disputes. Educated and trained in both the common law and the civil law, Mr. Drymer has represented parties and served as party-appointed arbitrator or president of tribunals in investment matters involving a wide range of industries. Mr. Drymer also advises and represents parties in matters involving maritime deliberation and transboundary resource management, and is as well very active in the resolution of sport-related disputes in Canada and internationally, in cases before the Sport Dispute Resolution Centre of Canada and the Court of Arbitration for Sport in Lausanne.

Pierre-Marie Dupuy is an Emeritus Professor at the University of Paris (Panthéon-Assas) and at the Graduate Institute of International and Development Studies, Geneva. He also held the Chair of General International Law at the European University Institute, Florence (2000-2008). Professor Dupuy has wide experience in international legal practice, in particular as counsel for governments in numerous cases before the International Court of Justice as well as an international arbitrator (ICSID, UNCITRAL, PCA). He chaired the PCA Abyei arbitration tribunal (2008-2009). Professor Dupuy taught the General Course of International Law at the Hague Academy of International Law in 2000 (Rec. 2002, Vol. 297). Professor Dupuy was awarded the ASIL Manley Hudson Medal (2015) and is a member of the *Institut de Droit International*.

Dmitri Evseev is a London-based Partner in Arnold & Porter's International Arbitration practice. He has served as counsel for more than ten sovereign States (including Hungary, the Czech Republic, Kyrgyzstan, Costa Rica and Venezuela) and numerous private parties in investor-State and commercial arbitrations under ICSID, UNCITRAL, ICC, SCC and Swiss Rules. Mr. Evseev is a Board Member of the Stockholm Chamber of Commerce Arbitration Institute and is recognized by Chambers Global as a leading foreign expert on dispute resolution in Russia. He also serves as an arbitrator in cases under ICC, LCIA and SCC rules. Mr. Evseev is English-Russian bilingual, is fluent in Spanish and has a working knowledge of French.

Mark Feldman is Associate Professor of Law at the Peking University School of Transnational Law. He also serves as a member of the E15 Initiative Task Force on Investment Policy (World Economic Forum/ICTSD), as a member of the Academic Council of the Institute for Transnational Arbitration, and as co-director of the Pearl River Delta Academy of International Trade and Investment Law. He previously served as Chief of NAFTA/CAFTA-DR Arbitration in the Office of the Legal Adviser at the US Department of State. His government experience also includes service as a law clerk to Judge Eric L. Clay on the US Court of Appeals for the Sixth Circuit and as a Peace Corps volunteer in Lesotho during South Africa's transition to democracy. In the private sector, he practiced law for several years at Covington & Burling.

The Honorable L. Yves Fortier, PC, CC, OQ, QC is the former Chair and Senior Partner of Ogilvy Renault in Montréal. Since 2012, he practices as an international arbitrator with offices in Montréal, London and Toronto. He has been President of the Canadian Bar Association, Canada's Ambassador and Permanent Representative to the United Nations in New York and President of the LCIA. During the last twenty-five years, he has acted as arbitrator and mediator in numerous international arbitrations under the auspices of all major arbitral institutions in the World. He is ranked as one of the world's leading international arbitration practitioners. Since 2012, he serves as Chairman of the Sanctions Board of the World Bank. In 2013, he was appointed as a Member of the Security Intelligence Review Committee of Canada and sworn in as a Member of the Privy Council.

Emmanuel Gaillard founded and heads Shearman & Sterling's International Arbitration Group. He acts as counsel and arbitrator in commercial and investment disputes, and has been involved in numerous landmark arbitration cases over the decades. He is a Member of the ICSID Panel of Arbitrators. He is a Professor of Law and a Visiting Professor at Yale Law School. He has written extensively on all aspects of arbitration law, including: *Fouchard Gaillard Goldman On International Commercial Arbitration*, a leading publication in this field; *Legal Theory of International Arbitration,* the first published essay on the legal theory of international arbitration*; La Jurisprudence du* CIRDI, a seminal volume on ICSID arbitration case law*;* as well as numerous articles on international commercial and investment treaty arbitration. Professor Gaillard chairs the International Arbitration Institute ("IAI") and was the first President and a founding member of the International Academy for Arbitration Law (Arbitration Academy).

Oscar M. Garibaldi is a member of the District of Columbia Bar and a retired partner of Covington & Burling LLP. Since his retirement in 2013, Mr. Garibaldi has continued to work independently, his practice being limited to sitting as chairman and co-arbitrator in investment and commercial cases. A native of Argentina and a naturalized US citizen, Mr. Garibaldi is trained in the common-law, civil law, and international law. He holds law degrees from the University of Buenos Aires and Harvard University, and taught international law and legal philosophy at Cornell Law School and the University of Virginia Law School. Mr. Garibaldi has extensive experience in investment arbitration as counsel and arbitrator, and has published frequently in the field. More information can be found in www.garibaldiarbitrator.com.

John Y. Gotanda is the Arthur J. Kania Dean and Professor of Law at Villanova University School of Law. He has published widely on the subject of damages in international law, and has been cited by courts, tribunals and commentators, including by the US Supreme Court. He has spoken widely on the subjects of damages, international arbitration, and international sales law, including at The Hague Academy of International Law. He also serves as an expert on damages and an arbitrator in international investment disputes. He is a member of the Advisory Council of the United Nations Conventions on Contracts for the International Sale of Goods, an Institute Member of the ICC Institute of World Business Law, and the Co-Editor of *The Journal of Damages in International Arbitration*.

Veijo Heiskanen is a Partner with Lalive in Geneva. He has acted as counsel and arbitrator in numerous international arbitration proceedings under the arbitration rules of the ICC, ICSID, WIPO, UNCITRAL, Swiss Rules of International Arbitration, SCC, Cairo Regional Centre for International Commercial Arbitration and various national chambers of commerce. He has extensive experience as counsel, adviser and arbitrator in international claims processes, including Iran-United States Claims Tribunal, United Nations Compensation Commission, Claims Resolution Tribunal for Dormant Accounts in Switzerland, UN Property Claims Commission in Kosovo and Eritrea-Ethiopia claims. Dr. Heiskanen is member of a number of panels of arbitrators, including the International Centre for Settlement of Investment Disputes ("ICSID") and the ICDR Energy Arbitrators List. Dr. Heiskanen has published extensively on international law and international arbitration and has taught at The Hague Academy of International Law (2002). He holds LL.M. and S.J.D. degrees from Harvard Law School and LL.B. and LL.Lic. degrees from the University of Helsinki.

Paula F. Henin is an Associate in the International Arbitration & Litigation Group of Skadden, Arps, Slate, Meagher & Flom LLP. She previously served as the International Arbitration Law Clerk to Judge Charles N. Brower. She obtained a Juris Doctor from Columbia University School of Law, a *Maîtrise* in French and American law (LL.B. equivalent) and a Master's degree in International Commercial Law (LL.M. equivalent) from the University of Paris I Panthéon-Sorbonne, and a Bachelor of Science in International Relations & History from the London School of Economics & Political Science.

Anne K. Hoffmann, LL.M. is a Special Counsel at Al Tamimi & Co. in Dubai. She joined Al Tamimi in 2013 after having practiced in London and Geneva for more than a decade. A lawyer qualified to practice both in Germany as well as in England & Wales, Ms. Hoffmann's practice focuses on international commercial and investment arbitration where she regularly acts as counsel in disputes arising under all major rules (in particular ICC, LCIA, ICSID, Swiss Rules, DIAC, UNCITRAL) as well as in *ad hoc* proceedings involving disputes from a great variety of sectors, governed by various procedural and substantive laws. Ms. Hoffmann also regularly serves as arbitrator. Ms. Hoffmann is also a visiting lecturer at Humboldt University Berlin and regularly speaks and publishes on arbitration issues. She speaks English, German, French and Russian.

Stephen Jagusch is the Global Chair of the International Arbitration Practice at Quinn Emanuel Urquhart & Sullivan. Mr. Jagusch is recognized as a leading expert in the field of international arbitration and disputes arising under contacts and bilateral or multilateral investment treaties, and is highly ranked by all international and domestic legal publications in international arbitration and public international law. Leading directories recognize Mr. Jagusch as a leader in his field and have recently described him as "one of the most impressive advocates around," "a masterful cross-examiner," a "tenacious fighter," the "maestro of strategy," "one of the gurus in the field," "one of the pre-eminent ICSID arbitration experts in the world," and praise his "finely honed instincts for strategy in advocacy." He won the inaugural (and subsequent) Client Choice Award for Best Arbitration Lawyer in the UK. Most recently, he was awarded "Best Lawyer in the United Kingdom for International Arbitration" by Best Lawyers.

Jean Kalicki is a Partner at Arnold & Porter LLP in Washington and New York. She has served as Chair, co-arbitrator and counsel in investment and commercial arbitrations on five continents, including treaty cases under the ICSID and UNCITRAL Rules, and is listed on the ICSID Panel of Arbitrators and the rosters of other leading institutions around the world. She is a member of the AAA Board of Directors, the LCIA Court and the ICC Commission, an adjunct professor at Georgetown and American University law schools, chair of the Washington, DC Branch of the Chartered Institute of Arbitrators, and a member of the editorial board of the ICSID Review. She was named Best Lawyers' 2015 "Washington, DC Lawyer of the Year" for International Arbitration - Governmental, and previously one of Global Arbitration Review's top 30 women in arbitration worldwide and Euromoney's top 30 commercial arbitration attorneys in the United States.

Mark Kantor is a retired partner of Milbank, Tweed, Hadley & McCloy, an international arbitrator in investment and commercial disputes, Adjunct Professor at the Georgetown University Law Center and Editor-in-Chief of the online journal Transnational Dispute Management. He is on the American Arbitration Association Board of Directors, Chair of the DC Bar International Investment Committee and former Chair of the DC Bar International Dispute Resolution Committee. He has authored numerous works, including *Reports of Overseas Private Investment Corporation Determinations* (eds. Mark Kantor, Michael D. Nolan and Karl P. Sauvant), *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (OGEMID Best Book

2008) and "A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?," 26 Arbitration International 323 (2010) (OGEMID Best International Dispute Resolution Article 2010). More information at www.markkantor.com.

The Honourable Marc Lalonde, PC, OC, QC has participated as arbitrator, mediator, expert determiner in over 125 international cases under the ICC, the ICSID, the AAA, the LCIA, the UNCITRAL Rules and under NAFTA. His experience covers the fields of energy, insurance, financing, foreign investment and State and international organization responsibilities, construction, commercial services, mining, technology, telecommunications, public utilities, transportation, distribution and manufacturing contracts, aviation industry, etc. In addition, Mr. Lalonde was appointed in two cases as *ad hoc* judge at the International Court of Justice in The Hague (*Spain v. Canada*, 1995-1998; and *Yugoslavia v. Canada*, 1999-2005).

Carolyn B. Lamm is a Partner and Co-Chair of International Arbitration-Americas of White & Case LLP based in Washington, DC. Ms. Lamm was appointed to the US Panel and now to the Uzbek Panel of Arbitrators for ICSID; she was a member of the American Arbitration Association Executive Committee and Board; a member of the ICCA Governing Board; a member of the Council of the American Law Institute (Advisory Committee for the Restatement of International Arbitration and a Counselor for the Restatement Fourth on Foreign Relations); and has served as an arbitrator in AAA/ICDR, SIAC, ICSID, and NAFTA Chapter 11 disputes. Ms. Lamm is a past President of both the District of Columbia Bar and the American Bar Association. She has been recognized repeatedly for her professional expertise in international dispute resolution and leadership: 2013 National Law Journal's "100 Most Influential Lawyers in America"; Legal Times 2010 Award "Visionary" and "Most Influential Women"; "Lawyer of the Year 2008" by the Bar Association of the District of Columbia; *National Law Journal*, 50 Most Influential Women in America; *Lawdragon 500 Leading Lawyers in America; National Law Journal*, Woman Lawyer of the Year Award by Women's Bar Association of Washington, DC; Chambers USA Award for Excellence: Outstanding Contribution to the Legal Profession, 2008.

Toby Landau QC is a barrister and arbitrator, and a member of the Bars of England & Wales, New York, British Virgin Islands, and Northern Ireland. As arbitrator, he has sat as President or Co-Arbitrator in numerous investor-State and commercial disputes worldwide. As counsel, he has argued hundreds of investor-State and commercial arbitrations, and many ground-breaking arbitration cases in court (including *Dallah v. Pakistan* in the UK Supreme Court, and *First Media v. Astro* in the Courts of Singapore and Hong Kong). He is Visiting Professor at Kings College London; a Director and Court Member of the LCIA; Member of the Boards of the SCC and SIAC; a member of the Panel of Advisors to the Attorney-General of Singapore; UK delegate to the UNCITRAL Working Group on Arbitration (1994-2013); and a draftsman of the English Arbitration Act 1996, the Pakistan Arbitration (International Investment Disputes) Ordinance 2006 and the Mauritius International Arbitration Act 2008. He was named "Most Highly

Regarded Individual" in International Arbitration in Who's Who Legal's global survey, 2014 and 2015.

Andrew Legg is a barrister at Essex Court Chambers in London. His practice encompasses, *inter alia*, public international law, including investment law, and international arbitration. Before commencing practice at the English Bar, he taught law at Oxford, where he completed his doctoral studies. He is the author of *The Margin of Appreciation in International Human Rights Law* (Oxford University Press 2012).

Barton Legum is a Partner in Dentons' Paris office and head of the firm's investment treaty arbitration practice. Mr. Legum has over twenty-five years' experience in litigating complex cases and has argued before numerous international arbitration tribunals, the International Court of Justice and a range of trial and appeals courts in the United States. His practice focuses on international arbitration in general and arbitration under investment treaties in particular. He is a Past Chair of the American Bar Association's Section of International Law, an international bar organization with over 24,000 members from over 90 countries around the world. Earlier in his career, Mr. Legum served as Chief of the NAFTA Arbitration Division in the Office of the Legal Adviser, United States Department of State. In that capacity, he acted as lead counsel for the United States Government in some of the first arbitrations under the investment chapter of NAFTA. The United States won every case decided under his tenure. He is a founding editor of *International Litigation Strategies and Practice* (2005; 2nd ed. 2014), a book published by the American Bar Association. He is often published on international dispute resolution topics and frequently speaks at conferences on international arbitration and litigation.

Vaughan Lowe QC is Emeritus Chichele Professor of International Law and emeritus Fellow of All Souls College, University of Oxford, and a Member of the *Institut de Droit International*. He previously taught at the universities of Cambridge, Manchester and Cardiff, and as a visiting professor at universities in Europe and the US. He is a Bencher of Gray's Inn, and practices as a barrister from Essex Court Chambers, London, mainly in the field of international law. He has appeared before international tribunals including the ICJ, ECHR, ITLOS, Iran-US Claims Commission and *ad hoc* tribunals, and has sat on tribunals as an arbitrator or judge.

Donald McRae is the Hyman Soloway Professor of Business and Trade Law and Distinguished University Professor in the Faculty of Law, at the University of Ottawa. He has been counsel in several fisheries and boundary arbitrations and in cases before the International Court of Justice. He has appeared as counsel before WTO panels and the Appellate Body and has been a member of several WTO panels. He has also been a member and chair of several investment dispute tribunals under NAFTA, ICSID and elsewhere. Professor McRae is a former Editor-in-Chief of the Canadian Yearbook of International Law, a member of the Board of Editors of the *American Journal of International Law*, and of the *Journal of International Economic Law*, an associate member of the *Institut de Droit International*, and a Companion of the Order of Canada.

Andrea J. Menaker is a Partner in White & Case's International Arbitration Group in the firm's Washington, DC office, where she specializes in investor-State arbitration, representing both sovereign States and claimant investors. Before joining White & Case, Ms. Menaker was Chief of the NAFTA Arbitration Division for the US State Department where she was lead counsel for the United States in investor-State arbitrations arising under the investment chapter of the NAFTA, represented the United States in NAFTA investor-State arbitrations against Canada and Mexico, and participated in the drafting of investment and dispute resolution provisions in US bilateral investment treaties and investment chapters of free trade agreements. Ms. Menaker served as an adjunct professor at Georgetown University Law Center for several years, where she taught international commercial arbitration. She is a frequent speaker and publisher on international arbitration topics, and a member of the Board of the Arbitration Institute of the Stockholm Chamber of Commerce, an Executive Council Member of the American Society of International Law and a former co-chair of ASIL's dispute resolution interest group, the Chair of the Programme Committee for ICCA's 2016 Congress in Mauritius, a member of the American Law Institute and an Adviser for its Restatement Third, Conflict of Laws, an advisory board member for the International Law Institute, a consultative forum member for the British Institute of International & Comparative Law, and a member of the Investment Experts Group for UNCTAD. Ms. Menaker is listed in *Global Arbitration Review's* "45 Under 45," the *Who's Who of Commercial Arbitration, Chambers Global and USA, Benchmark Litigation, The Best Lawyers in America, Top 250 Women in Litigation,* and *Expert Guides*.

Paul Mertensкötter is a Fellow of the Institute for International Law and Justice at New York University School of Law. Previously, he was a University Trainee at the International Court of Justice (2014-2015) for Vice-President Sepúlveda Amor and Judge Keith (until February 2015) and Judges Crawford and Robinson (until August 2015). He received his Juris Doctor, *cum laude*, from New York University School of Law where he was a Guarini Scholar and recipient of the Jerome Lipper Prize for outstanding work in international law.

Antonio R. Parra is currently a Consultant with the Corporate Secretariat of the World Bank. From 1984 to 2005, he held positions at the World Bank Group as Counsel, World Bank; Senior Counsel, World Bank; Senior Counsel, ICSID; Legal Adviser, ICSID; and Deputy Secretary-General, ICSID. His earlier positions included Assistant Legal Counsel, OPEC Fund for International Development. He is Honorary Secretary-General of the International Council for Commercial Arbitration (having been Secretary-General from 2004 to 2010); a Fellow of the Chartered Institute of Arbitrators; and a member of the Executive Committee of the Dubai International Arbitration Centre. He holds a doctorate in law from the University of Geneva and has published a book on ICSID and 45 articles and contributions to edited volumes.

Jan Paulsson was educated at Harvard College, Yale Law School, and the University of Paris. He is Professor of Law at the University of Miami and a partner of Three Crowns. His first experience with ICSID was as a young lawyer in the 1970s, participating in the settlement negotiations which ended the first ever ICSID case, *Occidental/Holiday Inns*

v. Morocco; his second was as counsel to the claimant in the first case not based on a contract clause (*SPP v. Egypt*); his third was as counsel to the respondent in the first ICSID annulment case, *Klöckner v. Cameroon;* and his fourth was as counsel to the respondent in the first ICSID case involving the seizure of State assets (*Atlantic Tritorn v. Guinea*). He also acted for the respondent in the leading corruption case, *World Duty Free v. Kenya*. Over the years, he has acted for States and foreign investors in roughly equal measure.

Alain Pellet is Emeritus Professor of the University Paris Ouest, Nanterre/La Défense. He is the author of numerous books and articles with special emphasis on general international law, dispute settlement and international investment Law. He is a former Member (1990-2011) and Chairperson (1997) of the UN International Law Commission. He has acted as the ICANN Independent Objector for generic top level domain names (new gTLD) (2012-2014). He is the Legal Adviser of the World Tourism Organization. Professor Pellet has acted and is still acting as counsel in more than 50 cases before the International Court of Justice and the International Tribunal for the Law of the Sea as well as several international and transnational arbitrations. He has served and is still serving as an arbitrator in investor-State arbitration cases and has been designated to the ICSID Panel of Arbitrators by the Chairman of the Administrative Council (2011).

Ioana Petculescu is an Associate in Dentons' Paris office. She concentrates on international arbitration and litigation practice, with an emphasis on investment treaty arbitration. Before joining Dentons, she worked as a lawyer at the European Court of Human Rights and as a law clerk at the International Court of Justice. She holds a PhD in public international law from the University of Strasbourg.

Lucy Reed is Co-Head of the Freshfields Bruckhaus Deringer Global International Arbitration Group, based in Asia. She represents private and public clients, specializing in complex commercial and investment treaty arbitrations. Ms. Reed is a vice-president of the ICC Court of Arbitration and a member of the SIAC Court, the board of the BIICL Investment Treaty Forum and the ICCA Governing Body, and formerly served as chair of the Institute for Transnational Arbitration and president of the American Society of International Law. Currently on the ICSID, SIAC, HKIAC, KCAB and KLRCA arbitrator panels, Ms. Reed also sat on the Eritrea-Ethiopia Claims Commission and co-directed the Claims Resolution Tribunal for Dormant Accounts in Switzerland. Before joining Freshfields Bruckhaus Deringer, she was general counsel of the Korean Peninsula Energy Development Organization and, while with the US State Department, the US Agent to the Iran-US Claims Tribunal. Ms. Reed is co-author of the *Guide to ICSID Arbitration* (2nd ed., Kluwer), *Guide to the SIAC Arbitration Rules* (Oxford University Press) and the *Freshfields Guide to Arbitration Clauses in International Contracts* (3d ed., Kluwer). Ms. Reed was educated at the University of Chicago Law School and Brown University.

August Reinisch has been a Professor of International and European Law at the University of Vienna since 1998. He currently serves as Head of the Section of International Law and International Relations and as Director of the LL.M. Program in

International Legal Studies. From 2004 to 2006 and as of 2010 he was/is Dean for International Relations of the Law School of the University of Vienna. He has served as arbitrator in investment cases mostly under ICSID and UNCITRAL Rules, and frequently provided expert opinions in the field. He is a Member of the ICSID Panels of Conciliators and of Arbitrators and of the Court of the Permanent Court Arbitration.

W. Michael Reisman, Myres S. McDougal Professor of International Law at Yale, is a member of the *Institut de Droit International*, Fellow of the World Academy of Art and Science, member of the Advisory Committee on International Law of the Department of State, President of the Arbitration Tribunal of the Bank for International Settlements and member of the Board of The Foreign Policy Association. He was President of the Inter-American Commission on Human Rights of the OAS, Vice-President and Honorary Vice-President of the American Society of International Law, Editor-in-Chief of the American Journal of International Law and Vice-Chairman of the Policy Sciences Center. His most recent books are *International Commercial Arbitration: Cases, Materials, and Notes on the Resolution of International Business Disputes* (with Craig, Park and Paulsson) (2015), *Foreign Investment Disputes: Cases, Materials and Commentary* (with Bishop and Crawford) (2014) and *Fraudulent Evidence Before Public International Tribunals: The Dirty Stories of International Law* (Hersch Lauterpacht Memorial Lectures) (with Skinner) (2014).

Andrés Rigo Sureda is an international arbitrator and mediator, a judge of the IMF Administrative Tribunal, Chairman of the Sanctions Committee of the Inter-American Development Bank, member of the Sanctions Panel of The Global Fund, and alternate member of the Sanctions Board of the African Development Bank. He is a former Assistant General Counsel and Deputy-General Counsel of the World Bank. He has written on issues of international law and international organizations, lectured at The Hague Academy of International Law on "The Law Applicable to the Activities of the International Development Banks" and delivered the lectures in honor of Sir Hersch Lauterpacht at Cambridge University, published as: *Investment Treaty Arbitration. Judging under Uncertainty*. He holds a law degree from the Universidad Complutense in Madrid (1966), a Diploma in International Relations from the School of Advanced International Studies (Bologna Centre) of the Johns Hopkins University (1968), and a PhD in international law from the University of Cambridge (1971).

Philippe Sands QC is Professor of Law and Director of the Centre for International Courts and Tribunals at University College London, and a practicing barrister at Matrix Chambers. He acts as counsel in cases before international courts and tribunals, and sits as an arbitrator in international investment disputes and on the Court of Arbitration for Sports. He is the author of *Lawless World* (2005), *Torture Team* (2008) and *East West Street* (forthcoming 2016), has written several academic books on international law, and writes occasionally for the *New York Review of Books*, *Vanity Fair*, the *Financial Times* and *The Guardian*. He is a vice president of the Hay Festival and a member of the board of English PEN and of the Tricycle Theatre.

Stephan W. Schill, Dr. iur. (Frankfurt); LL.M. (NYU); LL.M. (Augsburg) is Professor of International and Economic Law and Governance at the University of Amsterdam

and Principal Investigator of a European Research Council-funded project on "Transnational Public-Private Arbitration as Global Regulatory Governance." He is admitted to the bar in Germany and New York and is a Member of the ICSID Panel of Conciliators. He has published widely on international investment law and arbitration and serves as Editor-in-Chief of the *Journal of World Investment and Trade*.

Christoph Schreuer is a graduate of the Universities of Vienna, Cambridge and Yale. He is a Former Professor at Johns Hopkins University and University of Vienna. He is currently a Member of the ICSID Panel of Arbitrators and frequently sits as arbitrator in ICSID and UNCITRAL cases. He has authored numerous publications in international investment law. http://www.univie.ac.at/intlaw/wordpress/.

Jeremy K. Sharpe is a Partner in Shearman & Sterling's International Arbitration and Public International Law Groups. He was formerly Chief of Investment Arbitration in the Office of the Legal Adviser at the US Department of State, where he represented the United States in investor-State and State-to-State disputes arising under US international investment agreements, including NAFTA and CAFTA, and advised on the negotiation of such agreements. He also is an adjunct professor at Georgetown University Law Center, where he teaches courses on international dispute resolution. He has served as the Legal Adviser to the US Embassy in Baghdad and as an Attorney-Adviser in the State Department's Office of African and Near Eastern Affairs and Office of International Claims and Investment Disputes. He previously practiced arbitration with White & Case LLP in Washington, DC and served as Legal Assistant to Judge Charles N. Brower at the Iran-United States Claims Tribunal in The Hague. He received his J.D. from New York University School of Law and LL.M. from Harvard Law School.

Hi-Taek Shin is a Professor of Law at Seoul National University ("SNU") School of Law. He teaches courses on the cross-border transactions and the resolution of international investment disputes. Prior to joining the law faculty at SNU in 2007, he was a partner at Kim & Chang, the leading Korean law firm, where he specialized in cross-border investment projects and resolution of disputes arising therefrom. Since moving to academia, he sits regularly as an arbitrator both in investment treaty arbitrations and international commercial arbitrations. He is on the Panel of Arbitrators of ICSID, ICDR and Korean Commercial Arbitration Board. He is currently serving as the Chairman of the Seoul International Dispute Resolution Center. He received LL.M. and J.S.D degrees from Yale Law School, and LL.B. and LL.M degrees from SNU.

Esmé Shirlow is a PhD candidate at King's College London. Her research focuses on the adjudication of private property cases under public international law. She currently acts as a consultant to the Australian Government's Office of International Law and as Assistant Editor (Australia/New Zealand Region) with Kluwer Arbitration Blog. Esmé completed her LL.M. at the University of Cambridge (2012/2013), and was a Whewell Scholar in International Law (2013/2014). She obtained her LL.B. and a B.A. from the Australian National University and is admitted as a Solicitor of the Supreme Court of the Australian Capital Territory.

Mallory Silberman is an Associate at Arnold & Porter LLP, focusing primarily on investor-State arbitration. She has appeared as counsel in approximately thirty investor-State disputes, representing investors and sovereign governments alike. In 2015, Super Lawyers (Washington, DC) recognized Ms. Silberman as a "Rising Star" in international law. In addition to her work as counsel, Ms. Silberman is an adjunct professor at the Georgetown University Law Center, where, since 2012, she has taught a substantive and oral advocacy course on international arbitration.

Eduardo Silva Romero is a Partner of Dechert's worldwide International Arbitration Practice. He is professor of international law at Rosario University (Bogotá) and lecturer of international contracts and investment arbitration at Sciences Po (Paris). He has published many articles on international arbitration matters. He regularly acts as counsel and arbitrator in investment cases.

Anthony Sinclair specializes in international commercial arbitration, investment treaty arbitration, and public international law. He has extensive experience as counsel for both private investors and States handling disputes under BITs and the ECT, and has also been counsel in several ICSID annulment proceedings. Mr. Sinclair is co-author of the second edition of *The ICSID Convention: A Commentary* (Cambridge University Press 2009). He has a PhD from Cambridge University on *State Contracts in Investment Treaty Arbitration*. Chambers & Partners calls Mr. Sinclair "simply terrific" (International Arbitration 2012) and "especially acclaimed for his knowledge of investment treaty matters and for his academic prowess" (Public International Law 2014). Legal 500 says "Anthony Sinclair has 'fantastic analytic skills and a broad range of PIL knowledge'," (Public International Law 2012). He is rated by Who's Who Legal (Commercial Arbitration) and in 2011 was named one of Global Arbitration Review's "45 under 45."

Brigitte Stern is Professor Emeritus at the University of Paris I - Panthéon-Sorbonne. She was also a Member and the Vice-President of the United Nations Administrative Tribunal ("UNAT") from 2000 to 2009. She has served and serves as a Consultant and Expert for international organizations. She is active in international dispute settlement, acting as Counsel before the International Court of Justice and as Arbitrator (Sole Arbitrator, Member or President) in numerous ICSID, ICC, NAFTA, Energy Charter Treaty and UNCITRAL arbitrations. She holds a Master's degree and a JD from the University of Strasbourg, a Master of Comparative Jurisprudence (MCJ) from New York University, and a PhD from the University of Paris. She passed the Paris Bar exam and is *Agrégée* of the Law Faculties (1970). She has published many books, among others, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone 1973), *20 ans de jurisprudence de la Cour internationale de Justice*. 1975-1995 (La Haye, Nijhoff 1998); *La succession d'Etats*, Lecture at The Hague Academy of international law, RCADI, tome 262 (La Haye, Kluwer 2000), as well as numerous articles.

Margrete Stevens is a Consultant in King & Spalding's International Arbitration Group. Prior to joining King & Spalding she served for nearly twenty years as counsel and senior counsel at the World Bank Group's ICSID. Ms. Stevens is a former member of the Board of the Arbitration Institute of the Stockholm Chamber of Commerce, is the

Founding Member of the Washington, DC International Arbitration Club, is a former Vice Chair of the International Bar Association's Mediation Committee and was a member of the IBA Task Force on Counsel Ethics in International Arbitration. Ms. Stevens holds a Cand. Jur. degree from the University of Copenhagen and an LL.M. from the London School of Economics. She is fluent in Danish, English and Spanish.

Pierre Tercier primarily taught at the University of Fribourg, but also at the University of Geneva, the Graduate Institute for International and Development Studies, the *Ecole Polytechnique Fédérale* in Lausanne, the Universities of Paris I Panthéon Sorbonne and Paris II Assas (where he received the title of Dr. honoris causa), and the University of Torino in Italy. During this period, he was also the Chairman of the Swiss Antitrust Commission. He is the author of numerous publications in Swiss law. Until 30 June 2008, Professor Tercier was the Chairman of the International Court of Arbitration of the ICC. Over the last thirty years, he has acted as Chairman, sole arbitrator or party appointed arbitrator in numerous international arbitral proceedings, including twenty ICSID arbitral proceedings. He is also a member of the ICCA Governing Board, the ASA Board and the GIAC Arbitration Council.

J. Christopher Thomas QC has been a Senior Principal Research Fellow at the National University of Singapore's Centre for International Law since July 2011. He has acted as an arbitrator in investment treaty and commercial disputes and a panelist in international trade disputes. Before assuming his current position, Mr. Thomas acted as counsel in many international trade and investment disputes and in contentious matters before Canadian superior courts and administrative tribunals.

Peter Tomka, a Slovak national, has been a Member of the International Court of Justice since 6 February 2003. Between 6 February 2012 and 5 February 2015 he served as President of the Court, having previously served as its Vice-President from 2009-2012, and as Acting President in the case concerning *Pulp Mills on the River Uruguay (Argentina v Uruguay)*. He is also a Member of the Permanent Court of Arbitration, the Curatorium of the Hague Academy of International Law, and *Associé de l'Institut de Droit International*. He has been President or Member of several arbitral tribunals. He is on the ICSID Panel of Arbitrators and on the list of arbitrators under Annex VII to UNCLOS. He was a Member of the UN International Law Commission. He holds LL.M. (*summa cum laude*), Doctor *iuris* (international law) and Ph.D. in International Law degrees from Charles University, Prague.

Nhu-Hoàng Tran Thang, a French trained lawyer and a Swiss national with a Vietnamese background, has been working as Professor Tercier's associate since 2012. Prior to joining his office, she gained a vast experience in the arbitration teams of magic circle firms in Paris and at an arbitration boutique in Geneva. She has acted as arbitrator, counsel or assistant to the arbitral tribunal in over twenty-five arbitrations, including nine ICSID cases. She has been part of the Young ICCA events team since 2015, and is a member of various arbitral associations such as Young ICSID.

Albert Jan van den Berg, a Dutch national, is the President of the International Council for Commercial Arbitration ("ICCA") and a partner in Hanotiau & van den Berg

(Brussels, Belgium). He is a Visiting Professor at Georgetown University Law Center, Washington DC, at Tsinghua University, Beijing, Emeritus Professor at Erasmus University, Rotterdam and a member of the Faculty of the Geneva Master in International Dispute Settlement ("MIDS"), Geneva. Professor van den Berg is presiding and party-appointed arbitrator in numerous international commercial and investment arbitrations. He also acts as counsel in international commercial arbitrations. He is a former President of the Netherlands Arbitration Institute ("NAI") and Vice-President of the London Court of International Arbitration. Professor van den Berg has published extensively on international arbitration (see www.hvdb.com), in particular the New York Convention of 1958 (see www.newyorkconvention.org). He is Acting General Editor of *Yearbook: Commercial Arbitration and ICCA Congress Series*. His awards include: The International Who's Who of Business Lawyers, *Arbitration: Lawyer of the Year* in 2006 and 2011; Global Arbitration Review, "Best Prepared and Most Responsive Arbitrator" in 2013.

V.V. Veeder QC practices as an international arbitrator from Essex Court Chambers in London. He is a member of ICCA's Governing Board, Vice-President of the LCIA Court and Visiting Professor on Investment Arbitration at the Dickson Poon School of Law, King's College, University of London. He was educated in Paris, Bristol and Jesus College, Cambridge.

Romesh Weeramantry is a Foreign Legal Consultant at Clifford Chance. Based in Hong Kong, he specializes in complex arbitrations involving cross-border commercial disputes and investment treaty claims relating to Asia. He is also an Adjunct Professor at the University of Hong Kong. His prior professional experience includes work at the Iran-United States Claims Tribunal (The Hague) and the United Nations Compensation Commission (Geneva) on inter-government disputes arising from Iraq's invasion of Kuwait. He has advised major international organizations on dispute settlement and has trained government officials and judges in developing nations on arbitration and international law issues. His publications include *Treaty Interpretation in Investment Arbitration* (Oxford University Press 2012); and *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2011). He is an editor of *The Hong Kong Arbitration Ordinance: Commentary and Annotations*; the Asian Dispute Review and the Hong Kong White Book Arbitration and ADR Volume. He is also a member of the Editorial Board of the *ICSID Review*.

Manthi Wickramasooriya specializes in international commercial arbitration and public international law at Quinn Emanuel Urquhart & Sullivan. His experience includes handling disputes under ICC, LCIA, ICSID and UNCITRAL arbitration rules for numerous corporations, banking institutions and sovereign States in high-value arbitrations, with a special focus on the energy, banking and mining sectors. Prior to joining Quinn Emanuel, Mr. Wickramasooriya trained and practiced in the International Arbitration group at Allen & Overy in London.

Abdulqawi Ahmed Yusuf is a Judge of the International Court of Justice, The Hague, The Netherlands and Vice-President of the Court since February 2015. He is a member of the *Institut de Droit International*, a member of the Panel of Arbitrators of ICSID, and

a member of the Governing Board of ICCA. He is the founding Chairman of the African Institute of International Law ("AIIL"), Arusha, Tanzania, founder and General Editor of the *African Yearbook of International Law*, and Chairman of the Executive Committee of the African Foundation for International Law. He is the author of numerous publications on various aspects of international law. He holds a PhD in international Law, IUHEI, Geneva.

Guled Yusuf is an Associate at Clifford Chance LLP. He has experience in private practice and international organizations, and his areas of practice include investment treaty arbitration, international commercial arbitration and public international law. He has published a number of articles and book chapters on public international law and international arbitration. He received an LL.B. from the University of Warwick and an LL.M. from Columbia University, where he was a James Kent Scholar and recipient of the Edwin Parker Prize.

Eduardo Zuleta is a Member of the ICSID Panel of Arbitrators (designated by the Chairman of the Administrative Council), Vice President of the Court of Arbitration of the ICC and a member of the LCIA Court. Mr. Zuleta has acted as chair and co-arbitrator in investment arbitrations under ICSID, UNCITRAL and ICC rules, and as chair and committee member in ICSID annulments. He has also acted as chair, co-arbitrator and counsel in international commercial arbitration under the rules of major institutions worldwide. He is the past co-chair of the IBA Arbitration Committee, and President of the Latin American Arbitration Association. Eduardo actively participated in the drafting of the IBA Guidelines on Conflict of Interest and the Guidelines on Party Representation and in the drafting of the new Colombian International Arbitration Statute. Mr. Zuleta leads the practice of international arbitration and litigation at GPZ Abogados in Bogota, Colombia.

Summary of Contents

Editors v

Contributors vii

Preface li

Part I
General Principles **1**

Chapter 1
Applicable Law under the ICSID Convention: The Tortured History of the Interpretation of Article 42
W. Michael Reisman & Mahnoush H. Arsanjani 3

Chapter 2
Rules of Interpretation and Investment Arbitration
Laurence Boisson de Chazournes 13

Chapter 3
The Use of the ILC's Attribution Rules in Investment Arbitration
James Crawford & Paul Mertenskötter 27

Chapter 4
On Burden and Standard of Proof
Gary B. Born 43

Chapter 5
Res Judicata
Charles N. Brower & Paula F. Henin 55

Chapter 6
Precedent & *Jurisprudence Constante*
Abdulqawi Ahmed Yusuf & Guled Yusuf 71

Part II
Jurisdiction **83**

Chapter 7
The Tipping Point
Jan Paulsson 85

Chapter 8
The Long March towards a *Jurisprudence Constante* on the Notion of Investment
Emmanuel Gaillard & Yas Banifatemi 97

Chapter 9
Legality of Investment
Jean Kalicki, Dmitri Evseev & Mallory Silberman 127

Chapter 10
Criteria to Determine Investor Nationality (Juridical Persons)
Pierre Tercier & Nhu-Hoang Tran Thang 141

Chapter 11
Criteria to Determine Investor Nationality (Natural Persons)
Christoph Schreuer 153

Chapter 12
Continuous Nationality Rule in Investor-State Arbitration
Piero Bernardini 163

Chapter 13
Restructuring Investments to Achieve Investment Treaty Protection
Stephen Jagusch, Anthony Sinclair & Manthi Wickramasooriya 175

Chapter 14
The Meaning of "Foreign Control" under Article 25(2)(B) of the ICSID Convention
V.V. Veeder & Andrew Legg 191

Chapter 15
Indirect Shareholder Claims
Gabriel Bottini 203

Chapter 16
Preconditions to Arbitration and Consent of States to ICSID Jurisdiction
Pierre-Marie Dupuy 219

Chapter 17
Waiver of Local Remedies and Limitation Periods
Andrea K. Bjorklund 237

Chapter 18
Maffezini v. Plama: Reflections on the Jurisprudential Schism in the Application of Most-Favored-Nation Clauses to Matters of Dispute Settlement
Stephan W. Schill 251

Part III
Standards of Protection **267**

Chapter 19
The Minimum Standard of Treatment, *Glamis Gold*, and *Neer*'s Enduring Influence
Jeremy K. Sharpe 269

Chapter 20
Fair and Equitable Treatment: Legitimate Expectations and Transparency
Lucy Reed & Simon Consedine 283

Chapter 21
Fair and Equitable Treatment: Denial of Justice
Margrete Stevens & Doak Bishop 295

Chapter 22
Arbitrary and Discriminatory Treatment
Vaughan Lowe 307

Chapter 23
The Evolution of the Full Protection and Security Standard
Stanimir A. Alexandrov 319

Chapter 24
Property Rights as the Object of an Expropriation
Zachary Douglas 331

Chapter 25
Indirect Expropriation
L. Yves Fortier & Stephen L. Drymer 349

Chapter 26
Effective Means to Assert Claims and Enforce Rights
Oscar M. Garibaldi 359

Chapter 27
The Umbrella Clause
Andrés Rigo Sureda 375

Chapter 28
National Treatment
August Reinisch 389

Chapter 29
Most-Favored-Nation Treatment: Substantive Protection
David D. Caron & Esmé Shirlow 399

Chapter 30
Performance Requirements
Barton Legum & Ioana Petculescu 415

Part IV
Exceptions, Defenses and Counterclaims **431**

Chapter 31
The Consequences of Corruption in Investor-State Arbitration
Carolyn B. Lamm & Andrea J. Menaker 433

Chapter 32
Police Powers or the State's Right to Regulate
Alain Pellet 447

Chapter 33
Denial of Benefits after *Plama v. Bulgaria*
Mark Feldman 463

Chapter 34
Defenses Based on Necessity under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties
Peter Tomka 477

CHAPTER 35
Countermeasures and Investment Arbitration
Donald McRae 495

CHAPTER 36
Counterclaims
Anne K. Hoffmann 505

PART V
Valuation and Cost Considerations **521**

CHAPTER 37
Assessing Damages: Valuation Standards
John Y. Gotanda 523

CHAPTER 38
The Impact of Contributory Investor Conduct: Only with Difficulty Commensurable
Mark Kantor 533

CHAPTER 39
Allocation of Costs
Donald Francis Donovan 555

CHAPTER 40
Security for Costs: Authority of the Tribunal and Third-Party Funding
Eduardo Zuleta 567

PART VI
Procedural and Other Matters **583**

CHAPTER 41
The Role of Dissenting Opinions
Albert Jan van den Berg 585

CHAPTER 42
ICSID Arbitration Rule 41(5) Objections
Antonio R. Parra 593

CHAPTER 43
Consolidation and Parallel Proceedings
Eduardo Silva Romero 601

Chapter 44
And Others: Mass Claims in ICSID Arbitration
Veijo Heiskanen 613

Chapter 45
Interim/Provisional Measures
Brigitte Stern 627

Chapter 46
Quo Vadis Disqualification?
Marc Lalonde 641

Chapter 47
Conflict of Interest for Arbitrators and/or Counsel
Philippe Sands 655

Chapter 48
A Case for Transparency in Investment Arbitration
Toby Landau & Romesh Weeramantry 669

Chapter 49
Amicus Curiae in ICSID Arbitration
J. Christopher Thomas 685

Chapter 50
Annulment
Hi-Taek Shin 699

Index 715

Table of Contents

Editors v

Contributors vii

Preface li

Part I
General Principles **1**

Chapter 1
Applicable Law under the ICSID Convention: The Tortured History of the Interpretation of Article 42
W. Michael Reisman & Mahnoush H. Arsanjani 3
I. Introduction 3
II. The Cases 4
III. Implications for International Investment Law 9
IV. Conclusion 11

Chapter 2
Rules of Interpretation and Investment Arbitration
Laurence Boisson de Chazournes 13
I. Introduction 13
II. The International Law Rules of Interpretation in Light of the *Cemex v. Venezuela* Case 17
A. The *CEMEX v. Venezuela* Case 17
B. The International Canons of Interpretation Applied to Unilateral Declarations of States 18
C. *Effet Utile* and the Interpretation of Unilateral Declarations 21

III. The Contribution of the *Cemex v. Venezuela* Decision to the Development of Investment Law 22
IV. Conclusion 23

CHAPTER 3
The Use of the ILC's Attribution Rules in Investment Arbitration
James Crawford & Paul Mertensкötter 27
I. Introduction 27
II. The Role of ILC Article 4(2) 28
A. Is a Classification of an Entity as a State Organ under Domestic Law Dispositive? 28
B. *De Facto* Organs of the State 29
III. Applicability of the ILC Articles to Umbrella Clause Determinations 30
A. First Position: The ILC Articles Determine the Question 31
B. Second Position: A Question for International Law, but Not the ILC Articles 32
C. Third Position: A Question for the Proper Law of the Contract 34
IV. Corruption and Attribution under ILC Article 7 35
V. Conclusion 42

CHAPTER 4
On Burden and Standard of Proof
Gary B. Born 43
I. Introduction 43
II. The Burden of Proof in Investment Arbitration 44
A. Burden of Proof with regard to the Merits 44
B. The Burden of Proof in Relation to Jurisdiction 48
III. Standard of Proof in Investment Arbitration 50
IV. Conclusion 53

CHAPTER 5
Res Judicata
Charles N. Brower & Paula F. Henin 55
I. Introduction 55
II. The Case 60
A. *ConocoPhillips v. Venezuela* 60
B. *ConocoPhillips v. Venezuela* in Context 65
III. *Conocophillips v. Venezuela*'s Impact and Contribution to the Development of Investment Law 66
IV. Conclusion 69

CHAPTER 6
Precedent & *Jurisprudence Constante*
Abdulqawi Ahmed Yusuf & Guled Yusuf 71
I. Introduction 71

II. The Case 73
III. *AES v. Argentina*'s Impact and Contribution to the Development of Investment Law 77
IV. Conclusion 80

Part II
Jurisdiction **83**

Chapter 7
The Tipping Point
Jan Paulsson 85
I. Introduction 85
II. The Case: *SPP v. Egypt* 87
III. The Implications 90
IV. Prospects 94

Chapter 8
The Long March towards a *Jurisprudence Constante* on the Notion of Investment
Emmanuel Gaillard & Yas Banifatemi 97
I. Introduction 97
II. The Case 99
III. Impact and Contribution of *Salini v. Morocco* to the Development of Investment Law 104
A. Investment as an Objective Requirement under the ICSID Convention: The Dissociation by *Salini* of the Requirement of Investment under Article 25(1) from Party Consent under the Applicable Investment Treaty 105
B. Investment Defined: The Introduction of a True Definition by *Salini* 111
1. The Competing Methodologies for the Determination of an Investment 111
a. The Intuitive Approach 112
b. The Deductive Approach 113
2. The Factors to Be Taken into Account to Assess an Investment 114
a. The *Salini* Test: The Reason for Four Criteria 115
b. Evolving from Four to Three Criteria 117
c. Three – Not Four, Five or Six Criteria 119
IV. Conclusion 124

Chapter 9
Legality of Investment
Jean Kalicki, Dmitri Evseev & Mallory Silberman 127
I. Introduction 127
II. The Cases 128

A. *Fraport v. Philippines I* 128
B. *Fraport v. Philippines II* 130
III. *Fraport v. Philippines I* and *Fraport v. Philippines II* in Context 131
A. Does a Legality Requirement Exist? 132
1. Express Legality Requirement 132
2. Implicit Legality Requirement 133
B. Has There Been a Violation of the Legality Obligation? 134
1. Illegal or Intentionally Wrongful Investor Conduct 135
a. Investments That Are Inherently Illegal 135
b. Illegal or Wrongful Procurement of an Otherwise Valid Investment 135
2. Materiality 136
C. Is the Respondent Estopped from Claiming Breach of the Legality Requirement? 138
IV. Conclusion 139

CHAPTER 10
Criteria to Determine Investor Nationality (Juridical Persons)
Pierre Tercier & Nhu-Hoang Tran Thang 141
I. Introduction 141
II. The Case 142
A. Overview: General Principles of International Law 142
B. *Tokios Tokelės v. Ukraine* and Professor Weil's Dissenting Opinion 143
III. *Tokios Tokelės v. Ukraine*'s Impact and Contribution to the Development of Investment Law 147
IV. Conclusion 152

CHAPTER 11
Criteria to Determine Investor Nationality (Natural Persons)
Christoph Schreuer 153
I. Introduction 153
II. The Case 154
A. *Soufraki v. UAE* 154
B. *Soufraki v. UAE* in Context 156
III. *Soufraki v. UAE's* Impact and Contribution to the Development of Investment Law 157
A. Governing Law on Nationality 157
B. The Tribunal's Power to Decide 158
C. Probative Value of Documents 160
IV. Conclusion 161

CHAPTER 12
Continuous Nationality Rule in Investor-State Arbitration
Piero Bernardini 163

I. The Different Role of Nationality for Diplomatic Protection Claims and Investment Treaty Claims 163
II. The Case 168
A. *Loewen v. US,* ICSID Case No. ARB(AF)/98/3 168
B. *Loewen v. US* in Context 169
III. *Loewen's* Impact on the Development of International Investment Law 170
A. Through the Prism of Legal Scholars 170
B. Through the Prism of Other Investment Treaty Cases 170
C. Through the Prism of the ICSID Convention 172
IV. Conclusion 173

Chapter 13
Restructuring Investments to Achieve Investment Treaty Protection
Stephen Jagusch, Anthony Sinclair & Manthi Wickramasooriya 175
I. Introduction 175
II. Nationality Planning in Context 176
A. Breadth of Jurisdictional Offer 176
B. Most-Favored Nation Treatment Clauses 177
C. Denial of Benefits Clauses 178
D. Temporal Limits on Jurisdiction 179
III. The Case Study: *Mobil v. Venezuela* 180
IV. The Key Emerging Principles 185
A. The Legitimacy of Planning to Achieve Treaty Coverage Generally 185
B. Pre-existing or Future Disputes 186
C. Future Disputes within the Claimant's Reasonable Contemplation 188
V. Conclusion 190

Chapter 14
The Meaning of "Foreign Control" under Article 25(2)(B) of the ICSID Convention
V.V. Veeder & Andrew Legg 191
I. Introduction 191
II. The Case 193
III. The Impact and Contribution of the ICSID Convention's "*Travaux*" 195
IV. Conclusion 202

Chapter 15
Indirect Shareholder Claims
Gabriel Bottini 203
I. Introduction 203
II. Prior Decisions by Investment Tribunals 205
III. The Case 207
A. The Decision on Jurisdiction 207

B. The Award and the Decision on Annulment 213
IV. *CMS v. Argentina*'s Impact on the Development of Investment Law 215
V. Conclusion 218

CHAPTER 16
Preconditions to Arbitration and Consent of States to ICSID Jurisdiction
Pierre-Marie Dupuy 219
I. Introduction 219
II. The Case 221
A. *Wintershall v. Argentina* 221
B. *Wintershall v. Argentina* in Context 222
1. General Philosophy of the Award with regard to Its Own Jurisdiction 223
2. The Mandatory and Jurisdictional Feature of the 18-Month Requirement 224
3. The Relationship between the 18-Month Requirement and Exhaustion of Local Remedies 225
4. The Way the Award Approaches the Futility Test 226
III. The *Wintershall v. Argentina* Case: Impact and Contribution to the Development of Investment Law 227
A. A Brief Review of the ICJ's Case Law with regard to Preconditions as Elements of Consent to Jurisdiction 227
B. Legal Nature of Preconditions: Mandatory or Not? Jurisdictional or Admissibility Issues? 229
1. The Distinction between Admissibility and Jurisdictional Issues 229
2. The Distinction Applied 231
C. The Futility Test 233
IV. General Conclusion 234

CHAPTER 17
Waiver of Local Remedies and Limitation Periods
Andrea K. Bjorklund 237
I. Introduction 237
II. Waivers of Local Remedies 238
A. The Case (Waiver of Local Remedies): *Waste Management v. Mexico I* 238
B. *Waste Management v. Mexico I*: Impact and Contribution to the Development of Investment Law 241
III. Limitation Periods 244
A. The Case (Limitation Periods): *Grand River v. US* 244
B. *Grand River v. US*: Impact and Contribution to the Development of Investment Law 247
IV. Conclusion 250

CHAPTER 18
Maffezini v. Plama: Reflections on the Jurisprudential Schism in the Application of Most-Favored-Nation Clauses to Matters of Dispute Settlement
Stephan W. Schill 251
I. Introduction: Precedent Games in the Tower and the Arena 251
II. The Protagonists of the Jurisprudential Split 253
A. *Maffezini v. Spain* 253
B. *Plama v. Bulgaria* 255
C. *Maffezini v. Spain* and *Plama v. Bulgaria*: Two Visions of International Investment Law 256
III. The Impact of *Maffezini v. Spain* and *Plama v. Bulgaria* on the Development of International Investment Law 259
A. From Jurisprudential Split to Jurisprudential Schism 259
B. Emerging Consensus on Basic Rules of Interpreting MFN Clauses 261
C. The Challenges of the Jurisprudential Schism for International Investment Law Generally 262
IV. Conclusion: From Precedent Game to Appointment Game 264

PART III
Standards of Protection **267**

CHAPTER 19
The Minimum Standard of Treatment, *Glamis Gold*, and *Neer*'s Enduring Influence
Jeremy K. Sharpe 269
I. Introduction 269
II. The Case 270
A. *Glamis v. US* and *Neer*'s Resurgence 270
B. *Glamis v. US* in Context 275
III. *Glamis v. US*'s Impact and Contribution to the Development of Investment Law 276
IV. Conclusion 280

CHAPTER 20
Fair and Equitable Treatment: Legitimate Expectations and Transparency
Lucy Reed & Simon Consedine 283
I. Introduction 283
II. The Case 284
A. *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* 284
1. Indirect Expropriation 284
2. FET and Legitimate Expectations 285
3. Damages 286
B. *Tecmed v. Mexico* in Context 287

III. *Tecmed*'s Impact and Contribution to the Development of Investment Law 289
A. *Tecmed v. Mexico*'s Progeny 289
B. Resistance to *Tecmed v. Mexico* and Legitimate Expectations 290
C. *Tecmed v. Mexico* Today 292
D. Transparency 293
IV. Conclusion 294

CHAPTER 21
Fair and Equitable Treatment: Denial of Justice
Margrete Stevens & Doak Bishop 295
I. Introduction 295
II. The Case 296
A. *Mondev v. US* 296
1. The Dismissal of LPA's Contract Claim against the City 299
2. The SJC's Failure to Remand the Contract Claim 300
3. The SJC's Failure to Consider whether It Retrospectively Applied a New Rule 300
4. The Boston Redevelopments Authority's Statutory Immunity 300
B. *Mondev v. US* in Context 301
III. *Mondev v. US*'s Impact and Contribution to the Development of Investment Law 303
IV. Conclusion 305

CHAPTER 22
Arbitrary and Discriminatory Treatment
Vaughan Lowe 307
I. Introduction 307
II. The Case 308
A. *Lemire v. Ukraine* 308
B. *Lemire v. Ukraine* in Context 309
III. *Lemire v. Ukraine*'s Impact and Contribution to the Development of Investment Law 310
A. Relationship with FET 310
B. Discrimination 310
C. Arbitrariness 312
D. Relationship with Other Concepts 313
1. Legitimate Expectations 313
2. Transparency 314
3. Independence 315
4. Systemic and Transactional Deficiencies 316
5. Balancing State Rights 317
IV. Conclusion 317

Chapter 23
The Evolution of the Full Protection and Security Standard
Stanimir A. Alexandrov 319
I. Introduction 319
II. Landmark Cases regarding Full Protection and Security: *AAPL v. Sri Lanka* & *Azurix v. Argentina* 320
A. *AAPL v. Sri Lanka* 320
B. From *AAPL* to *Azurix*: The Full Protection and Security Standard Evolves 322
1. The Adoption of AAPL's Due Diligence Standard 322
2. The Standard Expands to Legal Security 323
C. *Azurix v. Argentina* 324
D. The Post-*Azurix v. Argentina* Standard 326
III. Conclusion 329

Chapter 24
Property Rights as the Object of an Expropriation
Zachary Douglas 331
I. Introduction 331
II. The Distinction between Contract and Property 331
III. The Norwegian Shipowners' Claim 333
IV. Defining the Proper Object of an Expropriation 335
A. Not All Intangible Rights or Interests Are Capable of Expropriation 335
B. The Characterization of the Rights as Property or Contract Has Consequences in Terms of Jurisdiction and Applicable Law 336
C. The Object of an Expropriation Cannot Be the Value of Contracts or Property 341
V. *Emmis v. Hungary* 344
VI. Conclusion 347

Chapter 25
Indirect Expropriation
L. Yves Fortier & Stephen L. Drymer 349
I. Introduction 349
II. First Definitions: IUSCT 351
III. The Cases: Seminal ICSID Definitions in *Santa Elena v. Costa Rica*, *Tecmed v. Mexico* and *Generation Ukraine v. Ukraine* 353
IV. The Cases' Impact and Contribution to the Development of Investment Law: An Indirect Expropriation Checklist – Or, Once More unto the Breach 355
V. Conclusion 357

Chapter 26
Effective Means to Assert Claims and Enforce Rights
Oscar M. Garibaldi 359
I. Introduction 359
II. *Duke Energy v. Ecuador* 361
III. The Earlier Cases 364
A. *Petrobart v. Kyrgyz Republic* 364
B. *Amto v. Ukraine* 365
IV. The Later Cases 368
A. *Chevron v. Ecuador* 368
B. *White Industries v. India* 371
V. Conclusion 373

Chapter 27
The Umbrella Clause
Andrés Rigo Sureda 375
I. Introduction 375
II. The Cases 376
A. Brief Description of the Pakistan Case and Its Holdings 376
B. Brief Description of the Philippines Case and Its Holdings 377
C. The Two Cases in Context 379
III. The Pakistan and Philippines SGS Cases' Impact and Contribution to the Development of Investment Law 380
IV. Conclusions 387

Chapter 28
National Treatment
August Reinisch 389
I. Introduction 389
II. The Case 391
III. *Bayindir v. Pakistan's* Impact and Contribution to the Development of Investment Law 394
IV. Conclusion 397

Chapter 29
Most-Favored-Nation Treatment: Substantive Protection
David D. Caron & Esmé Shirlow 399
I. Introduction 399
II. The Case 401
A. *MTD v. Chile* 401
1. The Tribunal's Award 402
2. The Annulment Proceeding 403
B. *MTD v. Chile* in Context 403
III. *MTD v. Chile*'s Impact and Contribution to the Development of Investment Law 405

A. Patterns of Usage: MFN Clauses as Substantive Protection Standards 405
B. The Role of Express Exceptions in the Treaty in Interpretation of the Scope of MFN Standards as Substantive Protection Obligations 408
C. The Role of the Wording of the MFN Clause in Interpretation of Its Scope as a Substantive Protection Standard 409
D. The Relevance of Constraints in the Comparator Treaty 412
IV. Conclusion 413

CHAPTER 30
Performance Requirements
Barton Legum & Ioana Petculescu 415
I. Introduction 415
II. The Case 418
A. *Mobil v. Canada*'s Approach to Performance Requirements 418
1. Factual Background of the Case 418
2. Unanimous Finding That the Measure Was a Prohibited Performance Requirement 419
3. Majority Finding No Exemption under NAFTA Article 1108 420
B. An Important Contribution to the Evolution of NAFTA Case Law 421
III. *Mobil v. Canada*'s Impact and Contribution to the Development of Investment Law 424
A. Expansion of Performance Requirement Prohibitions in Recent Treaty Practice 424
1. NAFTA-Like Prohibitions 424
2. Provisions Incorporating the 1994 TRIMs Agreement Prohibition 426
B. Little Discussion of Performance Requirements outside of the NAFTA Context 427
IV. Conclusion 428

PART IV
Exceptions, Defenses and Counterclaims **431**

CHAPTER 31
The Consequences of Corruption in Investor-State Arbitration
Carolyn B. Lamm & Andrea J. Menaker 433
I. Introduction 433
II. The *World Duty Free v. Kenya* Case 436
A. Factual Background 436
B. The Tribunal's Analysis 437
1. Whether the Admitted Facts Constituted Corruption 437
2. Whether the Contract Was "Obtained by" Corruption 438

3. Consequences under Applicable Law and "Transnational Public Policy" 438
4. The Implications of the President's Participation 439
5. Issues Excluded from Consideration: Jurisdiction and Burden and Standard of Proof 440

III. Investor-State Tribunals' Subsequent Development of Corruption Jurisprudence 441
A. *Niko Resources v. Bangladesh* 441
B. *Metal-Tech v. Uzbekistan* 442
IV. Conclusion 445

Chapter 32
Police Powers or the State's Right to Regulate
Alain Pellet 447
I. Introduction 447
II. The Case 450
A. The Context of the *Chemtura v. Canada* Case 450
1. The Origins and Early Challenges to the Police Powers Doctrine 450
2. The Recognition of the Police Powers Doctrine in Modern Investment Arbitration Law 454
B. The *Chemtura v. Canada* Case 455
III. *Chemtura v. Canada*'s Impact and Contribution to the Development of Investment Law 457
A. The Relatively Limited Scope of the Doctrine 457
B. The Search for a Truly Balanced Conception of the Police Powers Doctrine 458
C. An Uncertain Test 460
IV. Conclusion 461

Chapter 33
Denial of Benefits after *Plama v. Bulgaria*
Mark Feldman 463
I. Introduction 463
II. Denial of Benefits and the ICSID Convention 464
III. The Case 466
A. *Plama v. Bulgaria*: The Dispute 466
B. The *Plama* Tribunal's Interpretation of ECT Article 17(1) 467
1. Denial of Benefits as a Merits Issue 467
2. The "Retrospective" Application of ECT Article 17(1) 468
IV. *Plama v. Bulgaria*'s Impact and Contribution to the Development of Investment Law: Denial of Benefits after *Plama v. Bulgaria* 469
A. The *Plama v. Bulgaria*/ECT Line of Denial of Benefits Jurisprudence 470

B. The Non-ECT Line of Denial of Benefits Jurisprudence 470
C. *Plama v. Bulgaria*'s Flawed "Retrospective" Analysis 471
V. Conclusion 474

CHAPTER 34
Defenses Based on Necessity under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties
Peter Tomka 477
I. Introduction 477
II. The Case 479
A. *LG&E v. Argentina* 479
B. *LG&E v Argentina* in Context 480
III. *LG&E v. Argentina*'s Impact and Contribution to the Development of Investment Law 483
A. The Interpretation of Article XI 485
B. Threats to "Essential" Interests 487
C. "Necessary" Measures 489
D. Contribution to the State of Necessity 490
E. Consequences of Necessity 491
IV. Conclusion 492

CHAPTER 35
Countermeasures and Investment Arbitration
Donald McRae 495
I. Introduction 495
II. The *Corn Products v. Mexico* Case 496
III. The Countermeasures Problem 498
IV. The Broader Contribution of *Corn Products v. Mexico* 500
A. The Nature of Investors' Rights 500
B. The Meaning and Limits of *Lex Specialis* 501
V. Conclusions 503

CHAPTER 36
Counterclaims
Anne K. Hoffmann 505
I. Introduction 505
II. The Case 506
A. *Roussalis v. Romania* 506
B. *Roussalis v. Romania* in Context 506
1. The Issue of Consent 508
2. The Connection between Claim and Counterclaim 511
III. Impact and Contribution of *Roussalis v. Romania* to the Development of Investment Law 512
IV. Conclusion 518

Part V
Valuation and Cost Considerations **521**

Chapter 37
Assessing Damages: Valuation Standards
John Y. Gotanda 523
I. Introduction 523
II. The Case 524
III. *ADC v. Hungary*: Impact and Contribution to the Development of Investment Law 527
A. Significance of the Award 527
B. Impact of the Award 529
IV. Conclusion 531

Chapter 38
The Impact of Contributory Investor Conduct: Only with Difficulty Commensurable
Mark Kantor 533
I. Introduction 533
II. The Cases 535
A. *MTD v. Chile* 535
1. The Rulings 536
2. Background and Context 536
B. *Occidental v. Ecuador* 538
1. The Rulings 538
2. Background and Context 539
C. The *Yukos* Awards 541
1. The Rulings 542
2. Background and Context 542
III. The Cases' Impact and Contribution to the Development of Investment Law 552
IV. Conclusions 553

Chapter 39
Allocation of Costs
Donald Francis Donovan 555
I. Introduction 555
II. The Case 556
A. *Libananco v. Turkey* 556
B. *Libananco v. Turkey* in Context 558
III. The Impact and Contribution of *Libananco v. Turkey* on the Development of Investment Law 560
IV. Conclusion 564

CHAPTER 40
Security for Costs: Authority of the Tribunal and Third-Party Funding
Eduardo Zuleta 567
I. Introduction 567
II. The Case 569
A. The Facts of the Case and the Parties' Arguments 569
B. The Decision 572
1. Whether the Tribunal Has the Power to Order Security for Costs 572
2. What Are the Rights to Be Preserved by the Provisional Measures 573
3. Whether There Are Exceptional Circumstances 574
a. Necessity of the Measure 574
b. Urgency of the Measure 576
III. The Development of Investment Law on Two Key Issues: Powers of the Tribunal and Third-Party Funding 577
IV. Conclusion 581

PART VI
Procedural and Other Matters **583**

CHAPTER 41
The Role of Dissenting Opinions
Albert Jan van den Berg 585
I. Introduction 585
II. The Case 586
III. The Weil Dissent's Impact and Contribution to the Development of International Investment Law 589
IV. A Matter of Treaty Interpretation, Not Abuse of Rights 591
V. Conclusion 592

CHAPTER 42
ICSID Arbitration Rule 41(5) Objections
Antonio R. Parra 593
I. Introduction 593
II. The Decision of the Tribunal in the *MOL* Case 596
III. Conclusion 598

CHAPTER 43
Consolidation and Parallel Proceedings
Eduardo Silva Romero 601
I. Introduction 601
II. The Case 603
A. *Corn Products International v. Mexico* 603
B. *Corn Products International v. Mexico* in Context 604

1. The First Known Application of NAFTA Article 1126 604
C. The First Time Consolidation Arises in an ICSID-Administered Case 606
III. *Corn Products International v. Mexico*'s Impact and Contribution to the Development of Investment Law 607
A. A Different Approach by a Different Tribunal? 607
B. Significance and Impact of *Corn Products International v. Mexico*: *De facto* Consolidations 609
IV. Conclusion 611

CHAPTER 44
And Others: Mass Claims in ICSID Arbitration
Veijo Heiskanen 613
I. Introduction 613
II. The Case 615
A. *Abaclat and Others v. Argentina* 615
B. *Abaclat v. Argentina* in Context 616
III. *Abaclat v. Argentina's* Impact and Contribution to the Development of Investment Law 620
IV. Conclusion 624

CHAPTER 45
Interim/Provisional Measures
Brigitte Stern 627
I. Introduction 627
A. Overview of Provisional Measures 627
B. The Importance of Provisional Measures in Relation to the ICSID System and Investor-State Arbitration 630
1. The Binding Character 630
2. The Specificity of the Balancing of Interest and the Proportionality Test 631
II. The Case 632
A. *Occidental v. Ecuador* 632
1. The Facts 632
2. The Parties' Arguments 633
3. The Tribunal's Analysis 633
B. *Occidental v. Ecuador* in Context 634
1. The Test Followed by the Tribunal 634
2. The Rights Protected by Provisional Measures 634
3. The Two Requests for Provisional Measures 634
a. Request of Provisional Measures on the Basis of a Right to Specific Performance 635
b. Request for Provisional Measures on the Basis of the Right to Non-aggravation of the Dispute 636

III. *Occidental v. Ecuador*'s Impact and Contribution to the Development of Investment Law 636
A. The Preservation of "Theoretically Existing Rights" via Provisional Measures 636
B. The Impossibility to Claim Specific Performance Pursuant to a State's Termination of the Disputed Contract in the Exercise of Its Sovereign Powers 638
IV. Conclusion 640

CHAPTER 46
Quo Vadis Disqualification?
Marc Lalonde 641
I. Introduction 641
II. The Standard under ICSID to Disqualify Arbitrators 645
III. The Case: *Blue Bank v. Venezuela* 648
IV. *Blue Bank v. Venezuela*'s Impact and Contribution to the Development of Investment Law 650
V. Conclusion 652

CHAPTER 47
Conflict of Interest for Arbitrators and/or Counsel
Philippe Sands 655
I. Introduction 655
II. The Case 656
A. *Urbaser v. Argentina* 656
B. The Context 659
III. Impact and Contribution to International Investment Law 659
A. *Saint-Gobain v. Venezuela* 660
B. *Perenco v. Ecuador* 661
C. *Hrvatska v. Slovenia* 662
D. *Rompetrol v. Romania* 663
E. Assessment 664
F. The Court of Arbitration for Sport ("CAS") 666
G. In Defense of the Current System 666
IV. Conclusion 667

CHAPTER 48
A Case for Transparency in Investment Arbitration
Toby Landau & Romesh Weeramantry 669
I. Introduction 669
II. *Aguas del Tunari v. Bolivia* 670
A. Factual Background 670
B. Procedural History 671
C. The Petition 672

D. The Arbitral Tribunal's Response 674
III. *Aguas del Tunari v. Bolivia* and the Development of Investment Law 675
A. The Demand for Transparency 675
B. Responses 679
1. ICSID 680
2. NAFTA 680
3. Other Treaties 681
4. The UNCITRAL Rules and Mauritius Convention 681
IV. Conclusion 682

CHAPTER 49
Amicus Curiae in ICSID Arbitration
J. Christopher Thomas 685
I. Introduction 685
II. The Case 692
III. *Aguas Argentinas'* Impact and Contribution to the Development of Investment Law 696
IV. Conclusion 696

CHAPTER 50
Annulment
Hi-Taek Shin 699
I. Introduction 699
II. The Cases 701
A. *Klöckner v. Cameroon I* 701
B. *Wena v. Egypt* 702
C. Holdings of *Klöckner v. Cameroon I* and *Wena v. Egypt* Annulment Decisions 702
1. Limited Nature of Annulment Proceedings 702
2. The Interpretation of Specific Grounds for Annulment 703
a. Manifest Excess of Powers Relating to Jurisdiction 703
b. Manifest Excess of Powers Relating to the Applicable Law 703
c. Serious Departure from a Fundamental Rule of Procedure 704
d. Failure to State the Reasons on Which the Award Is Based 704
e. Discretion of *Ad Hoc* Committees 706
D. *Klöckner v. Cameroon I* and *Wena v. Egypt* Annulment Decisions in Context 706
III. *Klöckner v. Cameroon I* and *Wena v. Egypt*'s Impact and Contribution to the Development of Investment Law 706
A. Limited Nature of Annulment Proceedings 706
B. The Interpretation of Specific Grounds for Annulment 707
1. Manifest Excess of Powers Relating to Jurisdiction 707
2. Manifest Excess of Powers Relating to the Applicable Law 708

3. Serious Departure from a Fundamental Rule of Procedure 710
4. Failure to State the Reasons on Which the Award Is Based 710
5. Discretion of *Ad Hoc* Committees 712

IV. Conclusion 712

Index 715

CHAPTER 44

And Others: Mass Claims in ICSID Arbitration

Abaclat and Others v. Argentina, ICSID Case No. ARB/07/5[1]

Veijo Heiskanen

I. INTRODUCTION

Mass claims are a relatively new phenomenon in ICSID arbitration. However, they have already posed a challenge to ICSID arbitration, and indeed the large number of claims arising out of the 2001 Argentine financial crisis have raised issues about the legitimacy of the whole ICSID system.[2] Are mass claims capable of being handled within the ICSID system, based on *ad hoc* procedures and procedural decisions, or are amendments required to the ICSID Convention and/or the ICSID Arbitration Rules to accommodate mass claims processing?

Before considering the challenge posed by mass claims, and what the possible approaches might be, one must take a closer look at the concept. What are international mass claims in the first place? There is no agreed legal definition, apart from the technical definition flowing from the laws of large numbers. Indeed, statisticians suggest that the laws of big numbers become relevant when the number of claims amounts to somewhere between 300 to 2,000, the precise threshold depending on the homogeneity of the claims population, the margin of error and the level of confidence

1. *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) (Tercier, van den Berg, Abi-Saab) [hereinafter *Abaclat v. Argentina*].
2. The term "legitimacy" is used here in a technical and non-political sense, referring to "the consent of the users" rather than "the consent of the governed." There is considerable literature on international mass claims outside the context of investment arbitration.

required.[3] Stated differently, as a technical term mass claims refers to a level of numerosity in which statistical methods become available in claims processing.[4] In a less technical sense, mass claims may be understood as referring to any situation in which there is a multiplicity of claims against the same party, arising out of the same event or circumstance, whether an armed conflict, a civil disorder, a financial or economic crisis, or any other extraordinary event. In this less technical sense, for instance, all of the approximately 50 ICSID arbitrations brought against Argentina in the aftermath of the 2001 financial crisis are "mass claims" in that they all share a common factual background.

Mass claims may arise in the field of foreign investment protection in three different contexts: (1) State-to-State arbitration; (2) consolidated investor-State arbitration; and (3) individual mass claims. The first of these contexts is not relevant in ICSID arbitration. While State-to-State arbitration is often available under investment treaties, State-to-State disputes cannot be submitted to ICSID arbitration, which is designed to deal exclusively with investor-State disputes. However, while State-to-State arbitration may seem an anachronistic solution as it implies a return to the bygone era of diplomatic protection, it may often be the most effective way to deal with international mass claims, as the relevant provisions in investment treaties tend to leave more room for adjustment of the arbitral process to cater for the specific features and requirements of mass claims processing.[5]

Consolidation of all or most arbitrations arising out of the triggering event into one proceeding is another way of dealing with mass claims. For instance, all claims arising out of the 2001 Argentine financial crisis, or out of the civil unrest that has recently affected some of the Middle Eastern and North African countries, could have been, theoretically, consolidated and submitted to one and the same arbitral tribunal. This could have offered opportunities for enhanced procedural efficiencies, while also reducing the risk of inconsistent decisions – an issue that is more acute in a mass claims situation and therefore more likely to affect the legitimacy of the ICSID system than in the context of traditional *ad hoc* arbitration of individual disputes.[6] However, this is not an option under the ICSID system as compulsory consolidation is not available, and voluntary consolidation after the claims have already arisen is unlikely, for well-known reasons of moral hazard.[7]

3. *See, e.g.*, William. G. Cochran, *Sampling Techniques 3rd ed.* (John Wiley & Sons 1977) and Arlene Fink, *The Survey Handbook* (Thousand Oaks, CA: Sage Publications 1995), as well as the author's personal experience in working with experts in various international mass claims programs.
4. For further discussion *see, e.g.*, Veijo Heiskanen & Sandrine Giroud, "Aristotle's Statistics: Consistency and Accuracy in International Mass Claims" in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2013* 109-22 (Arthur W. Rovine (ed.), Brill Nijhoff, 2014).
5. For an example of the use of State-to-State arbitration along these lines (the claim initially covering sixteen claims, but subsequently reduced to nine) *see, e.g.*, *The Republic of Italy v. The Republic of Cuba*, *ad hoc* arbitration, Final Award (15 January 2008) (Derains, Tanzi, Cobo-Roura).
6. Heiskanen & Giroud, *supra* n.4.
7. *Ibid.* at 117. Simply put, each claimant is likely to calculate that it will be better off, and more likely to prevail, if a specific tribunal dedicated to deal with the particular claim is established.

It is therefore hardly surprising that the ICSID system – and ICSID tribunals – have in practice been faced with a *fait accompli*: they have been confronted with individual mass claims, raised by claimants originating from one and the same country against one particular respondent State, that need to be registered, processed and resolved even if there are no specific provisions either in the ICSID Convention or in the ICSID Arbitration Rules to provide much guidance on how to deal with them. Mass claims therefore tend to raise a threshold challenge to the ICSID system as a whole – should they be admitted into the system at all, given the absence of regulation or, if admitted, how should one deal with them, in the absence of regulation?

II. THE CASE

A. *Abaclat and Others v. Argentina*[8]

The purpose of this chapter is not to undertake an analysis of the systemic issues raised by the Argentine claims, and not even by all mass claims submitted to ICSID arbitration, but to focus on one particular case which, in itself, may properly be characterized as a mass claim, even in the technical sense of the term – the approximately 180,000 claims brought against Argentina by Italian holders of Argentine government debt, represented in the proceedings by an entity known as Task Force Argentina ("TFA") – *Abaclat and Others v. Argentina*.[9] To date, no final award has yet been issued, but there is a series of procedural orders as well as the much-commented Decision on Jurisdiction and Admissibility dated 4 August 2011, in which a majority of the Tribunal consisting of President P. Tercier and co-arbitrator J. van den Berg rejected Argentina's objections (the "Majority") and addressed preliminary issues such as its jurisdiction and the admissibility of mass claims in the ICSID context.

Abaclat v. Argentina arises out of Argentine's default on its foreign sovereign debt in the aftermath of the 2001 financial crisis. Argentina raised a number of preliminary issues that were related to the substantive aspects of the case, including whether bonds qualify as an "investment" under the ICSID Convention and the applicable investment treaty, the Argentina-Italy BIT (the "Treaty" or the "BIT"). However, the key findings of *Abaclat v. Argentina* that are relevant from the perspective of mass claims relate to preliminary objections raised by Argentina on the basis of the mass nature of the proceeding. These include the Tribunal's decisions on issues such as whether Argentina's consent to arbitrate in the BIT covered mass claims, and whether the Tribunal had the power to take procedural decisions and adopt procedural directions to address the mass nature of the proceedings, in the absence of any specific provisions in the ICSID Convention applicable to mass claims. As agreed by the Parties, the Tribunal's decision was limited to "general issues" and did not deal with issues "'touching specifically upon each individual claimant,' except where the presentation

8. *Abaclat v. Argentina, supra* n.1.
9. The number of claimants was subsequently reduced to approximately 60,000, following their acceptance of Argentina's exchange offer of 2010. *See Abaclat v. Argentina*, *supra* n.1, ¶¶ 4 and 216.

of the general issue (of jurisdiction or admissibility) cannot be done without reference to a particular situation."[10] The "general issues" had been identified by the Tribunal in a "List of Issues" provided to the parties on 9 May 2008.[11]

The Tribunal's key findings on issues relating to the mass nature of the claims were:

- Argentina's consent to the jurisdiction of the Centre included claims presented by multiple claimants in a single proceeding;
- The Claimants' claims were in principle admissible;
- The Declaration of Consent signed by the individual Claimants was in principle valid, but this finding was without prejudice to the Tribunal's subsequent decision on whether the consent of any specific individual claim was invalid due to fraud, coercion or essential mistake; and
- TFA, the entity created by Italian banks to coordinate the proceedings, was to be considered the Claimants' agent pursuant to Rule 18 of the ICSID Arbitration Rules, and there was no abuse of right in this regard.

The first two of these points are addressed in more detail below.

B. *Abaclat v. Argentina* in Context

The *Abaclat* Tribunal took a series of decisions on points that related to the mass nature of the claims before it. Noting the many preliminary objections raised by Argentina in the proceedings, the Tribunal deemed it "not only appropriate but also necessary to distinguish issues relating to ICSID's jurisdiction *stricto sensu* and admissibility issues."[12] The Tribunal explained that, when distinguishing between these two sets of issues, it had been guided by the following "cornerstone consideration":

> If there was only one Claimant, what would be the requirements for ICSID's jurisdiction over its claim? If the issue raised relates to such requirements, it is a matter of jurisdiction. If the issue raised relates to another aspect of the proceedings, which would not apply if there was just one Claimant, then it must be considered a matter of admissibility and not of jurisdiction.[13]

This is a novel approach in that it links the distinction between jurisdiction and admissibility to the mass nature of the claims; indeed, Professor Abi-Saab in his dissenting opinion went so far as to attack the Majority's approach as being "conceptually wrong."[14] While the Majority's approach indeed seems unorthodox as this is not how the concepts of "jurisdiction" and "admissibility" are usually distinguished, the Majority appears to have sought to make a conceptual distinction that is in and of itself entirely valid – preliminary issues that were related to the mass nature of the claims,

10. *Abaclat v. Argentina, supra* n.1, ¶ 226.
11. *Ibid.*, ¶ 228.
12. *Abaclat. v Argentina*, *supra* n.1, ¶ 248.
13. *Ibid.*, ¶ 249.
14. *Abaclat v. Argentina, supra* n.1, Dissenting Opinion of G. Abi-Saab, ¶ 126.

and those that were not. While it might have been technically more appropriate to refer to the issue in different terms – for instance, as an issue of judicial or (more accurately) arbitral propriety[15] rather than admissibility – not much turns in the end on how the issue is conceptualized. Whether the Tribunal's decisions on the issues raised by the mass nature of the claims are characterized as decisions on admissibility or as determinations on arbitral propriety (*i.e.,* whether it is proper or appropriate for an ICSID tribunal to deal with mass claims, in the absence of any guidance in the ICSID Convention or in the ICSID Arbitration Rules on how to deal with them), the fact remains that in either case the decision would be a matter of discretion or exercise of judgment rather than a strict binary test of yes or no.[16] Once the Majority had determined that the claims before it fell, as a matter of general principle, within the field of its jurisdiction *ratione personae* and *ratione materiae*, its decision on whether to deal with the claims because of their mass nature can only be matter of judgment rather than a decision dictated by hard and fast jurisdictional rules.

On the other hand, the Tribunal also had to consider Argentina's objection that the mass nature of the claims deprived the Tribunal of jurisdiction as they fell outside the scope of its consent to arbitrate under Article 8(3) of the BIT.[17] While the Claimants took the view that the mass nature of the claims merely raised procedural issues and no issues of jurisdiction, Argentina argued that its consent could not cover mass claims for a whole series of reasons, *inter alia* because the ICSID framework was silent on collective proceedings; because at the time the ICSID Convention was concluded collective claims were not allowed in Italy or Argentina and could therefore not have been envisaged; and because collective proceedings would change the nature of ICSID arbitration by not allowing the individual examination of each claim.

Distinguishing the present proceedings from class actions (as Claimants were claiming individually and not through a representative of a "class"), the Majority noted that it could "not ignore" that some aspects of the proceedings resembled representative actions, in particular because the Claimants were pursuing their claims through an agent, the TFA, which represented their interests and made all decisions

15. "Judicial propriety" is the term used by the International Court of Justice, for instance, when determining whether it is appropriate for the Court to issue an advisory opinion, or whether to refrain from exercising its jurisdiction on the merits. For discussion *see, e.g.*, Andreas Zimmerman, Christian Tomuschat & Christian J. Tams, *The Statute of the International Court of Justice: A Commentary* 578 *et seq*. (2nd ed., Oxford University Press 2012). The term "arbitral propriety" has been used, *e.g.*, by the annulment committee in *Amco Asia Corp. et al. v. Republic of Indonesia,* ICSID Case No. ARB/81/1, *Resubmitted Case, Decision on Annulment* (3 December 1992) (Sucharitku, Fatouros, Schindler) 9 ICSID Rep. 9, ¶ 7.55 (2006).
16. For discussion *see* Veijo Heiskanen, *Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration,* in 29 ICSID Rev. F.I.L.J. 231-246 (2014).
17. Art. 8 of the Argentine-Italy BIT provides that, "[i]f a dispute still exists between investors and a Contracting Party, after a period of 18 months has lapsed since notification of the commencement of the proceeding before the national jurisdictions indicated in paragraph 2, the dispute may be submitted to international arbitration." Under Art. 8(3) of the BIT, "[f]or this purpose and in conformity of the terms of this Agreement, each Contracting Party hereby gives its advance and irrevocable consent that any dispute may be submitted to arbitration."

relating to the conduct of the proceedings.[18] However, this did not justify the conclusion that Argentina's consent did not cover mass proceedings:

> [B]oth parties have consented to ICSID arbitration as dispute resolution method for disputes arising out of the BIT. The only remaining question is whether a specific consent regarding the specific conditions in which the present arbitration would be conducted is required, i.e., regarding the form of collective proceedings.
>
> This question led the Tribunal to the conclusion that the answer should be in the negative, mainly for the following reasons:
>
> – Assuming that the Tribunal has jurisdiction over the claims of several individual Claimants, it is difficult to conceive why and how the Tribunal could loose [sic] such jurisdiction where the number of Claimants outgrows a certain threshold. First of all, what is the relevant threshold? And second, can the Tribunal really "loose" [sic] a jurisdiction it has when looking at Claimants individually?
> – In addition, the collective nature of the present proceeding derives primarily from the nature of the investment made. The ICSID Convention aims at promoting and protecting investments, without however further defining the concept of investment and leaving this task to the parties through relevant instruments such as BITs … . Thus, where the BIT covers investments, such as bonds, which are susceptible of involving in the context of the same investment a high number of investors, and where such investments require a collective relief in order to provide effective protection to such investment, it would be contrary to the purpose of the BIT and to the spirit of ICSID, to require in addition to the consent to ICSID arbitration in general, a supplementary express consent to the form of such arbitration. In such cases, consent to ICSID arbitration must be considered to cover the form of arbitration necessary to give efficient protection and remedy to the investors and their investments, including arbitration in the form of collective proceedings.
>
> Thus, with regard to the "mass" aspect of the present proceedings, the Tribunal considers that the relevant question is not "has Argentina consented to the mass proceedings?", but rather "can an ICSID arbitration be conducted in the form of 'mass proceedings' considering that this would require an adaptation and/or modification by the Tribunal of certain procedural rules provided for under the current ICSID framework." If the answer is in the affirmative, then Argentina's consent to ICSID arbitration includes such mass aspect. If the answer is in the negative, then ICSID arbitration is not possible, not because Argentina did not consent thereto, but because mass claims as the ones at stake are not possible under the current ICSID framework.[19]

The Majority concluded that the "mass aspect" of the proceedings related to "the modalities and implementation of the ICSID proceedings," and not to the question of

18. *Abaclat v. Argentina, supra* n.1, ¶ 487.
19. *Abaclat v. Argentina, supra* n.1, ¶¶ 489-91.

consent. Thus, the issue was, in the Majority's terminology, one of "admissibility" rather than "jurisdiction." While one may debate, as noted above, the basis on which the Majority distinguished between jurisdiction and admissibility, its approach to the determination of jurisdiction left less room for conceptual argument; it reflects the established understanding that jurisdiction is a "field" concept that may be defined in terms of time (*ratione temporis),* nationality (*ratione personae)* and subject matter (*ratione materiae)*. The consent of the State to arbitrate covers this entire field, and so long as the claimants' claims fall within this general field, an arbitral tribunal constituted under the treaty has jurisdiction over the claims, regardless of the numerosity of the claims. This is arguably so because such a general consent, given by a State in an investment treaty, is not addressed to any particular individual investor of the other contracting State; it is addressed to an unspecified or anonymous *class* of foreign investors that is neither limited nor defined, nor identified, except in the general terms of time, nationality and subject matter. Such a general consent, unlike a consent expressed in an arbitration agreement, has an inherent potential to trigger numerous claims – if not necessarily a mass claim – in any instance where a governmental measure affects a broader class of foreign investors, precisely because it is delimited in general terms.[20] In other words, mass claims are, in principle, not something alien to investment treaty arbitration; they are a potential (although not necessarily a necessary) consequence of the general and abstract nature of the consent to arbitrate given in an investment treaty.

As noted above, the *Abaclat* Majority considered that the "mass aspect" of the claims was not a matter of jurisdiction but of admissibility. The Majority rejected Argentina's argument that since collective proceedings were not provided in the ICSID Convention, there was a "qualified" or intended silence on the issue and collective arbitration was therefore not possible. This finding was based on the same reasons as the Tribunal's finding that Argentina's consent covered mass claims:

> [T]he Tribunal finds that it would be contrary to the purpose of the BIT and to the spirit of ICSID to interpret this silence as a "qualified silence" categorically prohibiting collective proceedings, just because it was not mentioned in the ICSID Convention:
>
> – First, at the time of conclusion of the ICSID Convention, collective proceedings were quasi inexistent, and although some discussions seem to have taken place with regard to multi-party arbitrations, these discussions were not conclusive on the intention to either accept or refuse multi-party arbitrations, and even less so with regard to the admissibility of collective proceedings;
> – ICSID sets forth a standard arbitration mechanism. Insofar as investments can be of varying nature and scope, it is possible that the current ICSID procedure may not be fully adapted to resolve a dispute arising out of any kind of investment. Indeed, where an investment, protected under a BIT providing for ICSID arbitration, shows certain particular characteristics, these characteristics may influence the way of conducting the arbitration, and lead the Tribunal to make certain adaptations to the standard procedure in order to give effect to

20. *See* Veijo Heiskanen, *Forbidding dépeçage: Law Governing Investment Treaty Arbitration*, 32 Suffolk Transnational Law Review, 367, 373 n.14 (2009).

> the choice of ICSID arbitration. The need for certain adaptations to the standard ICSID arbitration procedure merely derives from the impossibility to anticipate all kinds of possible investments and disputes, and is certainly not a sufficient motive to simply close the door of ICSID arbitration to investors who are not "standard investors" having made "standard investments."[21]

The Tribunal concluded that the silence of the ICSID framework regarding collective proceedings was to be interpreted as "gap" and not as a "qualified silence," and the Tribunal had the power under the ICSID Convention to fill this gap, within the limits of the ICSID Convention.[22]

III. *ABACLAT V. ARGENTINA'S* IMPACT AND CONTRIBUTION TO THE DEVELOPMENT OF INVESTMENT LAW

While the *Abaclat v. Argentina* decision has already triggered a debate about mass claims processing in the ICSID context, its most important contribution may be yet to come as the final award has not yet been issued. It is therefore premature to draw conclusions, at this stage, about the contribution that the *Abaclat v. Argentina* decision may or may not make to the development and indeed the feasibility of mass claims processing within the ICSID system or, more broadly, to the development of international investment law. In the meantime, however, it is possible to assess the contribution that the *Abaclat v. Argentina* decision has made to the manner in which ICSID tribunals should or should not address preliminary issues arising in the context of mass claims arbitration.

Two other ICSID cases, *Ambiente Ufficio S.p.A. and Others v. Argentina* and *Giovanni Alemanni and Others v. Argentina*, have addressed largely the same issues as *Abaclat v. Argentina,* and not surprisingly so since all three cases involve claims brought by Italian nationals for purported violations by Argentina of the latter's obligations under the Argentina-Italy BIT in the aftermath of the 2001 financial crisis.[23] However, as both *Ambiente Ufficio v. Argentina* and *Alemanni v. Argentina* involve a substantially lower number of claimants – the former initially 119 Italian individuals and legal entities, subsequently reduced to 90, whereas the latter involved initially 183 individuals and legal entities, subsequently reduced to 74 – they are less important than *Abaclat v. Argentina* when assessing the feasibility or otherwise of mass claims arbitration in the ICSID context.[24]

Indeed, the *Ambiente Ufficio* tribunal highlighted the difference between the number of claimants and stressed that it was not dealing with "mass claims," but rather with a "multi-party action" or "multi-party proceeding":

21. *Abaclat v. Argentina, supra* n.1, ¶ 519.
22. *Ibid.*, ¶ 520.
23. *See Ambiente Ufficio S.p.A. and Others v. The Argentine Republic*, ICSID Case No. ARB/08/9, *Decision on Jurisdiction and Admissibility* (8 February 2013) (Simma, Böckstiegel, Torres Bernárdez) [hereinafter *Ambiente Ufficio v. Argentina*] and *Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (17 November 2014) (Berman, Böckstiegel, Thomas) [hereinafter *Alemanni v. Argentina*].
24. In both cases, the number of claimants was reduced following acceptance by some of the claimants of Argentina's renewed exchange offer.

> [T]he Tribunal would want to point out that the "mass claim" concept was commonly relied upon in the context of the *Abaclat* proceedings with its initially 180,000 and now still 60,000 claimants. Whilst the Tribunal does not take any stand on the question of appropriate terminology to be used in that case, it would emphasize that the dimension of the Claimants in the case to be decided by the present Tribunal can in no way be compared to the *Abaclat* case, being merely one thousandth of the latter. Especially insofar as the use of the term "mass claim" or "mass proceedings" might convey the connotation that already the sheer number of claimants in itself calls for modifications or adaptations of the procedural arrangements to guarantee the manageability or fairness of the case, the Tribunal strongly insists that it does not see any such implications arising from the number of initially 119 and now 90 Claimants as such. … [T]he Tribunal will in its subsequent reasoning stick to qualifying the present proceeding as a "multi-party action" or "multi-party proceeding."[25]

Nonetheless, since Argentina raised largely the same preliminary objections in *Ambiente Ufficio v. Argentina* as it did in *Abaclat v. Argentina*, the *Ambiente Ufficio* tribunal had to deal with largely the same issues. On all the key points, the *Ambiente Ufficio* tribunal endorsed the findings of the *Abaclat* Tribunal. Thus, on the issue of whether a "specific" consent of the respondent State was required, beyond the "general" consent in the Argentina-Italy BIT, the *Ambiente Ufficio* tribunal concluded that "it [was] evident that multi-party arbitration is a generally accepted practice in ICSID arbitration," and that "the institution of multi-party proceedings therefore does not require any consent on the part of the respondent Government beyond the general requirements of consent to arbitration."[26] Nor did the tribunal accept that the mere number of claimants would make the proceedings "unmanageable" or that they would violate fundamental principles of due process or would be otherwise unfair to the respondent State.[27]

Similarly, the *Alemanni* tribunal in its decision only dealt with Argentina's general objections to jurisdiction and admissibility.[28] However, contrary to the *Abaclat* Tribunal, the *Alemanni* tribunal was "not convinced" that the distinction between jurisdiction and admissibility raised any major difficulty, nor was it convinced that the distinction was "of any particular importance in disposing of the issues presently before it."[29] Nor did the *Alemanni* tribunal see "[any] advantage whatsoever in entering into a battle of terminology" of whether the claim before it constituted a "mass claim" and merely noted that the number of claims before it did not, in ordinary usage, fit the descriptor "mass," and that the proceedings were not of a representative character, as each claimant was claiming in his own name.[30] Nor was the tribunal persuaded by the need to have an additional, specific consent, noting that "consent is not more valid by being given twice, any more than it is less valid for having been given only once."[31] The question therefore was rather whether "on the proper interpretation

25. *Ambiente Ufficio v. Argentina*, *supra* n.23, ¶¶ 120, 122 (footnote omitted).
26. *Ibid.*, ¶ 141.
27. *Ibid.*, ¶ 166.
28. *Alemanni v. Argentina*, *supra* n.23, ¶ 252.
29. *Ibid.*, ¶ 257.
30. *Ibid.*, ¶ 267.
31. *Ibid.*, ¶ 269.

of the BIT, has the respondent, or has it not, given a consent which is wide enough in scope to cover the proceedings brought (as in this case) by the multiple group of co-claimants."[32] The tribunal considered that the issue before it was one of whether "the instrument setting up the arbitration or establishing the Respondent's consent to it can be properly interpreted, on the particular facts of the case, as covering the particular multiplicity of claimants within that consent."[33] This required the tribunal to interpret Article 8 of the Italy-Argentina BIT, which referred to "[a]ny dispute relating to investments" and "a dispute … between investors and a Contracting Party." The tribunal considered that since the term "investors" was used in plural in Article 8(3), there might be in appropriate circumstances more than one investor involved in a dispute; however, "whether there is only one investor, or more than one, there must be a 'dispute.'"[34] In other words, "the use of the singular must be read as presupposing a substantive unity in the 'dispute' submitted to arbitration,"[35] and consequently, "[t]he Tribunal must therefore proceed to determine whether what the multiple Claimants have brought before it in this case is a 'a dispute.'"[36]

Noting that both the *Abaclat* Tribunal and the *Ambiente Ufficio* tribunal had failed to direct their minds to the issue, the *Alemanni* tribunal found that the link that must exist between a group of claimants and between their claims, in the absence of a consent by the respondent to the hearing of their claims together, lies in the notion of the "dispute":

> [T]he jurisdiction created by Article 25(1) of the ICSID Convention "extends to" (which in this context means, is confined to) "any legal dispute arising directly out of an investment." … The focus on "a" dispute is continued in both the ICSID Institution Rules (Article 2) and the ICSID Arbitration Rules (Rule 1). There is an exact match with the terms of the dispute settlement clause in Article 8 of the BIT, under which the Respondent issued its standing consent to arbitration, which refers sequentially to "any dispute," "a dispute" and "the dispute." The intention and effect are obvious. These treaty clauses provide a mechanism for the settlement of individual disputes; they do not (absent either special agreement to that effect or joinder) provide a mechanism for the joint settlement of a collection of separate disputes. … The Tribunal has already indicated that it is perfectly possible, in its opinion, for a "dispute" to have more than one party on the claimant's side. But the interest represented on each side of the dispute has to be in all essential respects identical for all of those involved on that side of the dispute.[37]

The *Alemanni* tribunal found that, in the case before it, it was unable to determine, at this preliminary stage of the proceedings, "whether the actual rights of all of the Claimants … and whether the actual effect … on those rights (or associated

32. *Ibid.*
33. *Ibid.*, ¶ 286.
34. *Ibid.*, ¶ 287.
35. *Ibid.*
36. *Ibid.*, ¶ 288.
37. *Ibid.*, ¶ 292. Arbitrator Böckstiegel, who is also a member of the *Ambiente Ufficio* tribunal, did not share the *Alemanni* tribunal's criticism of the former's findings. *Ibid.*,¶ 291.

expectations) of Argentina's conduct were sufficiently the same as to amount to a single 'dispute' over Argentina's obligations under the BIT, even within the broad and non-technical understanding of a 'dispute' that is appropriate to Article 8 of the BIT read in conjunction with Article 25 of the ICSID Convention."[38] Consequently, the tribunal concluded that the substance of the jurisdictional issue before it, *i.e.*, whether there was a single dispute over Argentina's obligations under the BIT, was so closely intertwined with the substantive disagreement between the parties, both factual and legal, that it had to be joined to the merits.[39]

The *Alemanni* tribunal's approach to the notion of "dispute" put it on a different path of reasoning from that adopted by the *Abaclat* and the *Ambiente Ufficio* tribunals.[40] This is noteworthy as the determination of whether there was a "dispute" between the parties goes to the heart of the issue of how mass claims are understood and indeed defined in the ICSID context. The issue is, in essence, whether it is sufficient, for a mass claim to be admissible before an ICSID tribunal or (in terms of the *Alemanni* tribunal, which did not make a strict distinction between jurisdiction and admissibility) to fall within the jurisdiction of an ICSID tribunal, that the claims are disputed by the respondent State, or whether an additional substantive link must be found to exist between the claims and the claimants, beyond the fact that all of the claims are alleged to arise out of the same event or circumstance. The approach adopted by the *Alemanni* tribunal suggests that such an additional substantive link must indeed exist, for the dispute to amount to a "single" dispute, and that this determination must be made on a claim-by-claim basis rather than on the basis of a global determination of whether all the claims appear to arise, *prima facie*, out of the same event or circumstance (which, as noted above, was the approach adopted by the *Abaclat* and *Ambiente Ufficio* tribunals).[41]

However, it is difficult to see why such a further substantive link should be required, and indeed what it could be, to establish jurisdiction. Is it not sufficient, for a "dispute" to exist, in the broad and non-technical meaning of the term adopted by the *Alemanni* tribunal, that the respondent State objects to the claims as a whole and denies its liability? Or should there be evidence that the respondent State has disputed each and every claim, individually, before the arbitration proceedings were brought? If the answer to the latter question is yes, the door would certainly be closed to mass

38. *Ibid.,* ¶ 293 (emphasis in original).
39. *Ibid.*
40. The *Abaclat* Tribunal considered that "group examination of claims is acceptable where claims raised by a multitude of claimants are to be considered identical or at least sufficiently homogenous," concluding that in the circumstances, all of the claims derived from the BIT, arose out of the same event, and were similarly affected by the measures taken by Argentina, and consequently "appear[ed] to be homogenous." *Abaclat v. Argentina*, *supra* n.1, ¶¶ 540-44. Similarly, the *Ambiente Ufficio* tribunal noted that the issue of whether there must be "a necessary link" between the claims in a multi-party proceeding could be left open, as it did not consider it "necessary or useful to elaborate on the question *in abstracto* whether it is required that the claims be "homogeneous" or whether it suffices that they are "sufficiently comparable," etc., and to try to devise a general standard or threshold in that regard." *Ambiente Ufficio v. Argentina*, *supra* n.23, ¶ 154.
41. *See supra* n.40.

claims processing in the ICSID context. However, this does not appear to be what the *Alemanni* tribunal meant, and indeed the tribunal appears to have confused the issue of whether a dispute existed, *i.e.*, whether the claims were disputed, which is a preliminary question, and the question of the legal and factual basis on which the claims were disputed, which is a matter for the merits.[42] However, so long as this confusion persists, the *Alemanni* tribunal's ruling to suspend the decision on whether the claims before it constituted a single "dispute" has created some uncertainty as to whether the ICSID mechanism continues to remain available for mass claims processing.

IV. CONCLUSION

As a result of the *Abaclat v. Argentina, Ambiente Ufficio v. Argentina* and *Alemanni v. Argentina* decisions, the issue of mass claims has been placed firmly on the ICSID agenda. While the ICSID system has survived the test and proved capable of accommodating mass claims within the existing framework, there is no doubt that the current system is not ideally suited to mass claims processing – which is hardly surprising, given that State contracts and contract-based arbitration were the paradigm of foreign investment at the time the ICSID Convention was negotiated. It is indeed investment treaty arbitration, and the general and abstract nature of the consent to arbitrate given by States in investment treaties, that have created the regulatory environment that has enabled the emergence of mass investor claims as a novel form of investment arbitration.

Given the moral hazard that in practice precludes the consolidation of mass claims after they have already arisen, there is no doubt that by far the best solution to deal with the challenge posed by mass investor claims to the ICSID system would be an amendment of the ICSID Convention that would enable the compulsory consolidation of all claims arising out of the same extraordinary event or circumstance. This would not only ensure consistency in decision-making, which in turn would protect and promote the legitimacy of the system as it would preclude different tribunals from reaching different conclusions on the basis of what are essentially the same facts. It would also result in considerable procedural and economic efficiencies, in particular by allowing the respondent State to consolidate the legal and evidentiary basis of its defense, as well as by ensuring that the consolidation tribunal would be fully familiar with the relevant factual circumstances, without having to be educated effectively from scratch in the context of each individual case.

However, for the time being the prospect that the ICSID Convention will be amended any time soon to accommodate mass claims processing seems highly unlikely. Not only is the amendment of the Convention exceedingly difficult as it would

42. What could have been joined to the merits is the question of whether each and every claim in fact arose out of the measures taken by Argentina in the aftermath of the 2001 financial crisis, however, this issue had effectively already been "joined" (or rather left) to the merits as the *Alemanni* tribunal's decision only dealt with Argentina's objections "of a general character." *Supra* n.28.

require a consent of each Contracting State; there does not appear to be much policy support for such an outcome in the first place, judged by the lack of any debate on the issue. In the meantime, as the challenge is unlikely to go away, ICSID tribunals and the ICSID Secretariat will have to make the best out of the current legal framework, regardless of its flaws. When assessing their performance, it is important to keep mind that those flaws were not their creation.