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978-0-521-19699-4 - Sovereign Defaults before International Courts and Tribunals

Michael Waibel

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Sovereign Defaults before International Courts and Tribunals

International law on sovereign defaults is underdeveloped because States have largely refrained from adjudicating disputes arising out of public debt. The next wave of sovereign defaults is likely to shift dispute resolution away from national courts to international tribunals and transform the current regime for restructuring sovereign debt.

Michael Waibel assesses how international tribunals balance creditor claims and sovereign capacity to pay across time. The history of adjudicating sovereign defaults internationally over the last 150 years offers a rich repository of experience for future cases: US state defaults, quasi-receiverships in the Dominican Republic and Ottoman Empire, the Venezuela Preferential Case, the Soviet repudiation in 1917, the League of Nations, the World War Foreign Debt Commission, Germany's thirty-year restructuring after 1918 and ICSID arbitration on Argentina's default in 2001. The remarkable continuity in international practice and jurisprudence suggests avenues for building durable institutions capable of resolving future sovereign defaults.

MICHAEL WAIBEL is a British Academy Postdoctoral Fellow at the Lauterpacht Centre for International Law and Downing College, University of Cambridge.

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Frontmatter

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Michael Waibel

Frontmatter

[More information](#)

Meinen Eltern, Eva Maria und Gottfried, von ganzem Herzen

It would be strange if now, in face of the formidable development
of international debts, there were nothing for the lawyer to say.

JOHN FISCHER WILLIAMS,
Chapters on Current International Law and the League of Nations (1929)

To the Pennsylvanians (1845)
Days undefiled by luxury or sloth,
Firm self-denial, manners grave and staid,
Rights equal, laws with cheerfulness obeyed,
Words that require no sanction from an oath,
And simple honesty a common growth –
This high reputation, with bounteous Nature's aid,
Won confidence, now ruthlessly betrayed
At will, your power the measure of your troth! –
All who revere the memory of Penn
Grieve for the land on whose wild woods his name
Was fondly grafted with a virtuous aim,
Renounced, abandoned by degenerate Men
For state-dishonour black as ever came
To upper air from Mammon's loathsome den.

WILLIAM WORDSWORTH

Contents

<i>Preface</i>	<i>page xv</i>
<i>Note: measuring sovereign liability over time</i>	<i>xviii</i>
<i>Table of cases</i>	<i>xx</i>
<i>Table of treaties</i>	<i>xlviii</i>
<i>List of abbreviations</i>	<i>liii</i>
 Part I Sovereign defaults across time	
1. Sovereign debt crises and defaults	3
A. US state defaults and arbitration	5
B. Sovereign defaults as a perennial feature of sovereign lending	8
C. Sovereign debt	11
D. Sovereign debt restructurings	14
E. Outlook	19
 2. Political responses to sovereign defaults	 22
A. Discretionary support by creditor governments	22
B. Diplomatic protection	26
C. Loan sanctions	27
D. The use of force	29
E. Diplomatic settlements	38
 3. Quasi-receivership of highly indebted countries	 42
A. Serbia’s Autonomous Administration of Monopolies	44
B. The Greek International Financial Commission of Control	44
C. Egypt’s Caisse de la Dette	46

xii CONTENTS

D.	Fiscal Administration in Haiti	47
E.	The Dominican Republic’s receivership	47
4.	Monetary reform and sovereign debt	58
A.	The <i>Serbian Loans</i> and <i>Brazilian Loans Cases</i>	60
B.	The <i>Norwegian Loans Case</i>	68
C.	The <i>Canevaro Brothers Case</i>	73
D.	The <i>Young Loan Arbitration</i>	75
E.	Conciliation	80
F.	Evaluation	84
5.	Financial necessity	88
A.	The <i>Russian Indemnity Case</i>	89
B.	<i>Société Commerciale de Belgique</i>	94
C.	ICSID cases arising out of Argentina’s default	98
6.	National settlement institutions	103
A.	Creditor organisations	103
B.	World War Foreign Debt Commission	105
C.	Foreign claims commissions	120
D.	National courts	121
7.	State succession and the capacity to pay	129
A.	Arbitrations on succession into sovereign debt	129
B.	Odious debt	136
C.	Payment capacity in arbitration	143
8.	Arbitration clauses in sovereign debt instruments	157
A.	Arbitration clauses before the twentieth century	157
B.	Arbitration clauses 1900–1945	160
C.	Arbitration clauses after 1945	162
D.	Reasons for the lack of arbitration clauses after 1945	167
9.	Creditor protection in international law	169
A.	Creditor claims before mixed claims commissions	171

	CONTENTS	xiii
B. Creditor claims before the ECHR		182
C. Creditor claims before the Iran–US Claims Tribunal		187
D. Creditor claims before foreign claims commissions		189
E. Creditor claims in arbitration		201
Part II The future role of arbitration on sovereign debt		
10. ICSID arbitration on sovereign debt		209
A. ICSID arbitration generally		209
B. The advantages of ICSID arbitration		211
C. ICSID jurisdiction over sovereign debt		212
D. The objective core of ICSID jurisdiction		227
E. Sovereign debt instruments under BITs		244
F. Summary and conclusion		250
11. Overlapping jurisdiction over sovereign debt		252
A. Contractual versus treaty causes of action		253
B. Choice of forum in sovereign bonds		260
C. Waiver of the right to arbitration		262
12. Sovereign default as trigger of responsibility		273
A. Most-favoured nation and national treatment		273
B. Expropriation		278
C. Coercion in sovereign debt restructurings		289
D. Summary		296
13. Compensation on sovereign debt		298
A. International law’s philosophy of creditor protection		298
B. Partial compensation		301
C. Speculation and partial compensation		303
D. Assignment of sovereign debt		308
E. Compensation on secondary market purchases of debt		312
14. Building durable institutions for the international adjudication of sovereign debt		316
A. The effectiveness of ICSID arbitration		318
B. Creditor incentives to participate in restructurings		320

Cambridge University Press
978-0-521-19699-4 - Sovereign Defaults before International Courts and Tribunals
Michael Waibel
Frontmatter
[More information](#)

xiv	CONTENTS	
	C. Arbitrating sovereign capacity to pay	323
	D. Balancing creditor protection and a fresh start for debtor countries	326
	<i>Bibliography</i>	330
	<i>Index</i>	350

Cambridge University Press

978-0-521-19699-4 - Sovereign Defaults before International Courts and Tribunals

Michael Waibel

Frontmatter

[More information](#)

Preface

This book is a revised and expanded doctoral thesis which I submitted to the Law Faculty of the University of Vienna in April 2008. First and foremost, I thank my supervisor August Reinisch. Not only did he stimulate my enthusiasm for international law early in my undergraduate career, he also encouraged me to work on sovereign debt, when I was still groping in the dark, answered an incessant flow of questions and challenged my assumptions. He was the best doctoral supervisor anyone could hope for.

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In summer 2005, I was privileged to work alongside an extraordinary group of international civil servants in the Legal Department of the International Monetary Fund. In particular, I am deeply indebted to Thomas Laryea who provided constant and invaluable advice, and strongly encouraged me to explore many facets of ICSID arbitration on sovereign debt.

Thanks are due to my two anonymous reviewers of Cambridge University Press. Their many useful comments helped me improve the final product. Damien Eastman, Cynthia Lichtenstein, Darshini Manraj and Christoph Schreuer gave extensive feedback on earlier drafts. John Barker, Charles Blitzer, James Crawford, Ignacio Rodriguez, Guglielmo Verdirame and Jeromin Zettelmeyer pointed me in new directions.

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Cambridge University Press

978-0-521-19699-4 - Sovereign Defaults before International Courts and Tribunals

Michael Waibel

Frontmatter

[More information](#)

xvi

PREFACE

A summarised version of Chapters 10 to 13 appeared as ‘Opening Pandora’s Box: Sovereign Bonds in International Arbitration’ in the *American Journal of International Law* (2007).

The list of people who helped with my research in one way or another is long: Georges Abi-Saab, Freya Baetens, Jaleh Barrett, Ronald Bettauer, Nigel Blackaby, Wouter Bossu, Juan Pablo Bohoslavsky, Lee Buchheit, Markus Burgstaller, George Bustin, Marcos Chamon, Zachary Douglas, William English, Gonzalo Flores, Anna Gelper, Douglas Guilfoyle, Mitu Gulati, Sean Hagan, Dan Jackson, Andrew Leyden, Yan Liu, Hernán Pérez Loose, Stefan Maier, Frank Michelman, Marko Milanovic, Christoph Paulus, Kunibert Raffer, Maurizio Ragazzi, Anthea Roberts, David Sabel, Stephan Schill, Hal Scott, Brad Setser, Alejandro Turyn, Cyrus Veaser, Mark Weidemaier, Ralph Wilde, Sir Michael Wood, Philip Wood, Andrew Yianni, Rumiana Yotova and Deborah Zandstra. Karin Bosshard, Emmanuel Cruz, Olivia Dhein, Ulrike Franke, Judy Fu, Florence Hediger, Tobias Lehman, Daniel Peat, Jil Schwieger, Stefan Sikl and Lucija Zigrovic assisted in revising the manuscript in 2010.

The London School of Economics and Political Sciences provided a stimulating research environment from 2004 to 2007. As an ideal counterbalance to my research, the Economics Department afforded me the opportunity to teach economic policy. Throughout, Silvana Tenreyro, the supervisor of my dissertation, has been a great source of academic advice and deepened my understanding of macroeconomics.

Thanks also to the Lauterpacht Centre for International Law and Downing College at the University of Cambridge for hospitality, first during a productive three-month research stay in 2006 and early 2007, and again when revising the thesis for publication as a book as a British Academy Postdoctoral Fellow from 2008 onwards. I am also immensely grateful to Cambridge’s diverse and enthusiastic group of international lawyers. Sarah Nouwen, my officemate and international lawyer *extraordinaire*, was as inspiring as she was supportive.

Generous financial assistance from the Austrian Academy of Sciences (DOC scholarship 2006), the University of Vienna (Förderstipendium 2005) enabled me to engage in full-time writing. From October 2008 onwards, the British Academy provided generous financial support under its Postdoctoral Fellowship Programme (2008–11) for which I am most grateful. While I was researching and writing, Darshini added much colour and meaning to it all. Her smile is a constant companion, no matter the hour: ‘To bien zoli’.

Cambridge University Press

978-0-521-19699-4 - Sovereign Defaults before International Courts and Tribunals

Michael Waibel

Frontmatter

[More information](#)

PREFACE xvii

At Cambridge University Press, Finola O’Sullivan, Nienke van Schaverbeke, Richard Woodham, Daniel Dunlavy, Rosina di Marzo, Kate Mertes and others have been a pleasure to work with throughout. The help of Laurence Marsh at the copy-editing stage was indispensable. I thank them for their dedication and patience. The book reflects developments up to August 2010.

My parents, Eva Maria and Gottfried, taught me to love life and learning. For making this work and everything else possible, I dedicate this book to them. Liebe Mama, Lieber Papa: ganz herzlichen Dank für all Eure Unterstützung.

Cambridge University Press

978-0-521-19699-4 - Sovereign Defaults before International Courts and Tribunals

Michael Waibel

Frontmatter

[More information](#)

Note: measuring sovereign liability over time

This book is full of numbers, mainly in US dollars (\$) and British pounds (£), from the last two centuries. It is important to understand their magnitude in the historical context. Converting the face value of a sovereign bond issued in the 1870s or the value of German reparations under the Versailles Treaty into current values is no easy undertaking. The purpose of the conversions is to show the true economic significance of the sovereign liabilities that are at the heart of this book.

The indicator that is most appropriate for comparing sovereign liabilities over time is the liability expressed as a percentage of GDP in the year it was assumed. GDP refers to the market value of all goods and services produced by an economy in a given year. Comparing a liability or expenditure with this measure tells us how much the equivalent liability or expenditure would be in the comparator year. The comparator year used throughout is 2009 (no data being yet available for 2010). For example, German war reparations under the Versailles Treaty were fixed at \$12 billion. The equivalent debt today would be roughly \$2.4 trillion.

All financial figures that predate the year 1980 are converted into 2009 US dollars, or 2009 British pounds, using the relative share of GDP. In particular cases, the conversion using the GDP deflator – a measure of the average prices of goods and services in an economy – is also given for comparison as the second number in brackets.

All conversions are done on the basis of MeasuringWorth, a tool for comparing currency values over time.¹ There is invariably substantial

¹ L. H. Officer and S. H. Williamson, 'Computing "real value" over time with a conversion between UK pounds and US dollars, 1830 to present', MeasuringWorth, 2009, www.measuringworth.com.

variation in these numbers. These conversions are designed to give the order of magnitude. But there is no single ‘correct’ measure, and economic historians use several indicators depending on the context and purpose.

Table of cases

1. Investment cases

Full citation	Abbreviated citation	Pages
<i>ADC Affiliate Limited, ADC & ADMC Management Limited v Republic of Hungary</i> (Award, 2 October 2006) ICSID Case No. ARB/03/16	<i>ADC v Hungary</i>	218, 222
<i>Aguas del Tunari SA v Republic of Bolivia</i> (Decision on Respondent’s Objections to Jurisdiction, 21 October 2005) ICSID Case No. ARB/02/3; (2005) 20 ICSID Rev 450	<i>AdT v Bolivia</i> (Jurisdiction)	270
<i>African Holding Company of America, Inc. and Société Africaine de Construction au Congo SARL v Democratic Republic of the Congo</i> (Sentence sur les déclinatoires de compétence et la recevabilité, 29 July 2008) ICSID Case No. ARB/05/21	<i>Africa Holding v DRC</i>	304
<i>AGIP v People’s Republic of the Congo</i> (Award, 30 November 1979) Case No. ARB/77/1, 1 ICSID Rep 313–22	<i>AGIP v Congo</i> (Award)	301
<i>AWG Group v Republic of Argentina</i> (Decision on Liability, 30 July 2010) UNCITRAL arbitration	<i>AWG v Argentina</i> (Award)	101
<i>Bayview Irrigation District and others v United Mexican States</i> (Award, 19 June 2007) ICSID Case No. ARB(AF)/05/1	<i>Bayview v Mexico</i>	239
<i>Giovanna A. Beccara and Others v Argentine Republic</i> (Procedural Order No. 3 – Confidentiality Order, 27 January 2010) ICSID Case No. ARB/07/5	<i>Beccara v Argentina</i> (Confidentiality Order)	18, 19

Full citation	Abbreviated citation	Pages
<i>Biwater Gauff (Tanzania) Limited v United Republic of Tanzania</i> (Award, 24 July 2008) ICSID Case No. ARB/05/22	<i>Biwater Gauff v Tanzania</i> (Award)	214, 228, 229, 300
<i>Booker PLC v Co-operative Republic of Guyana</i> (Discontinuance Order, 11 October 2003) ICSID Case No. ARB/01/9	<i>Booker v Guyana</i>	222
<i>Burlington Resources and others v Ecuador and Petroecuador</i> (Decision on Jurisdiction, 2 June 2010) ICSID Case No. ARB/08/5	<i>Burlington v Ecuador</i>	142
<i>Camuzzi International S.A. v Argentine Republic</i> (Decision on Objections to Jurisdiction, 11 May 2005) ICSID Case No. ARB/03/02	<i>Camuzzi v Argentina</i> (Jurisdiction)	231
<i>CDC Group PLC v Republic of the Seychelles</i> (Decision on Jurisdiction, 17 December 2003) ICSID Case No. ARB/02/14	<i>CDC v Seychelles</i> (Jurisdiction)	221, 222
<i>Chevron Corporation and Texaco Petroleum Corporation v Republic of Ecuador</i> (Interim Award, 1 December 2008)	<i>Chevron v Ecuador</i>	142
<i>CME Czech Republic B.V. (The Netherlands) v Czech Republic</i> (Partial Award, 13 September 2001) UNCITRAL arbitration	<i>CME v Czech Republic</i>	294
<i>CMS Gas Transmission Company v The Republic of Argentina</i> (Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003) ICSID Case No. ARB/01/8, (2003) 42 ILM 788	<i>CMS v Argentina</i> (Jurisdiction)	35, 298
<i>CMS Gas Transmission Company v Republic of Argentina</i> (Award, 12 May 2005) ICSID Case No. ARB/01/8; (2005) 44 ILM 1205	<i>CMS v Argentina</i> (Merits)	98, 101, 283, 296, 298
<i>CMS Gas Transmission Company v Republic of Argentina</i> (Decision on Annulment, 25 September 2007) ICSID Case No. ARB/01/18	<i>CMS v Argentina</i> (Annulment)	100
<i>Continental Casualty Company v Argentine Republic</i> (Award, 5 September 2008) ICSID Case No. ARB/03/9	<i>Continental Casualty v Argentina</i> (Award)	285

Full citation	Abbreviated citation	Pages
<i>Československa Obchodní Banka, A.S. v The Slovak Republic</i> (Decision on Jurisdiction, 24 May 1999) ICSID Case No. ARB/97/4; (1999) 13 ICSID Rev 251–64	<i>CSOB v Slovakia</i>	219, 220, 224–26, 233, 240, 243, 244, 248
<i>Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka</i> (pending) ICSID Case No. ARB/09/2	<i>Deutsche Bank v Sri Lanka</i>	245
<i>El Paso Energy International Company v Argentine Republic</i> (Decision on Jurisdiction, 27 April 2006) ICSID Case No. ARB/03/15	<i>El Paso v Argentina</i> (Jurisdiction)	226
<i>Enron Corporation and Ponderosa Assets, LP v Argentine Republic</i> (Award, 22 May 2007) ICSID Case No. ARB/01/3	<i>Enron v Argentina</i> (Merits)	99
<i>Enron Corporation and Ponderosa Assets, LP v Argentine Republic</i> (Decision on the Application for Annulment of the Argentine Republic, 30 July 2010) ICSID Case No. ARB/01/3	<i>Enron v Argentina</i> (Annulment)	100
<i>Mr Saba Fakes v Republic of Turkey</i> (Award, 14 July 2010) ICSID Case No. ARB/09/11	<i>Fakes v Turkey</i> (Award)	227, 234
<i>Fedax NV v Republic of Venezuela</i> (Award, 9 March 1998) ICSID Case No. ARB/96/3, 5 ICSID Rep 200; (1998) 37 ILM 1378; (1999) 24 Ybk Comm Arb 39; (1999) 126 JDI 276	<i>Fedax v Venezuela</i>	218, 219, 224–28, 233–38, 242, 243, 247–49, 257, 284, 298, 311, 312
<i>Generation Ukraine Inc. v Ukraine</i> (Award, 16 September 2003) ICSID Case No. ARB/00/9, 10 ICSID Rep 240; (2005) 44 ILM 404	<i>Generation Ukraine v Ukraine</i> (Merits)	298
<i>Global Trading Resource Corp. and Globex International, Inc. v Ukraine</i> (Award, 1 December 2010) ICSID Case No. ARB/09/11)	<i>Globex v Ukraine</i> (Award)	215, 222, 226, 227, 245
<i>Philippe Gruslin v Malaysia</i> (Award, 27 November 2000) ICSID Case No. ARB/99/3	<i>Gruslin v Malaysia</i>	249
<i>Hundekutter v Zimbabwe</i> (Award, 22 April 2009) ICSID Case No. ARB/05/6	<i>Hundekutter v Zimbabwe</i>	211

Full citation	Abbreviated citation	Pages
<i>I&I Beheer v Bolivarian Republic of Venezuela</i> (Proceedings discontinued, 28 December 2007) ICSID Case No. ARB/05/4	<i>I&I Beheer v Venezuela</i>	223
<i>Impregilo SpA v Islamic Republic of Pakistan</i> (Decision on Jurisdiction, 22 April 2005) ICSID Case No. ARB/03/3, 12 ICSID Rep 245	<i>Impregilo v Pakistan</i>	202, 218, 255, 268, 278, 279, 280
<i>Joy Mining Machinery Limited v The Arab Republic of Egypt</i> (Award on Jurisdiction, 6 August 2004) ICSID Case No. ARB/03/11; (1987) 26 ILM 647; (1988) 13 Ybk Comm Arb 35	<i>Joy Mining v Egypt</i> (Jurisdiction)	213, 215, 221, 224, 226, 231, 236, 238, 256, 280
<i>Ronald S. Lauder v Czech Republic</i> (Final Award, 3 September 2001) UNCITRAL, 9 ICSID Rep 66	<i>Lauder v Czech Republic</i> (Merits)	289
<i>Consorzio Groupement L.E.S.I. – Dipenta (Italie) v République Algérienne Démocratique et Populaire</i> (Award, 10 January 2005) ICSID Case No. ARB/03/08, (2004) 19 ICSID Rev 426	<i>LESI v Algeria</i>	230, 231, 234, 240–42
<i>Liberian Eastern Timber Corp. (LETCO) v Liberia</i> (Award, 31 March 1986) ICSID Case No. ARB/83/2, 2 ICSID Rep 358; (1987) 26 ILM 647; (1988) 13 Ybk Comm Arb 35	<i>LETCO v Liberia</i> (Merits)	301
<i>LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic</i> (Decision on Liability, 3 October 2006), 21 ICSID Rev 203 (2007); 46 ILM 36 (2006)	<i>LG&E v Argentina</i> (Liability)	98
<i>Emilio Agustín Maffezini v Kingdom of Spain</i> (Award, 13 November 2000) ICSID Case No. ARB/97/7, 5 ICSID Rep 419, (2001) 16 ICSID Rev 248; (2003) 124 ILR 35	<i>Maffezini v Spain</i> (Merits)	275, 276, 294, 298
<i>Malaysian Historical Salvors Sdn Bhd v Government of Malaysia</i> (Decision on the Application of Annulment, 16 April 2009) ICSID Case No. ARB/05/10	<i>Malaysian Historical Salvors v Malaysia</i> (Annulment)	214, 215, 224, 227, 228, 232, 250
<i>Malaysian Historical Salvors Sdn Bhd v Government of Malaysia</i> (Award, 17 May 2007) ICSID Case No. ARB/05/10	<i>Malaysian Historical Salvors v Malaysia</i> (Merits)	215, 224, 230–32, 235, 298

Full citation	Abbreviated citation	Pages
<i>Metalclad Corporation v United Mexican States</i> (Award, 30 August 2000) ICSID Case No. ARB(AF)/91/1, (2001) 6 ICSID Rev 168; (2001) 40 ILM 36; (2001) 26 Ybk Comm Arb 99; (2002) 119 ILR 618; (2002) 129 JDI 233	<i>Metalclad v Mexico</i> (Merits)	289, 294
<i>Methanex Corporation v United States of America</i> (Final Award on Jurisdiction and Merits, 3 August 2005) UNCITRAL	<i>Methanex v USA</i> (Merits)	203
<i>Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka</i> (Award, 15 March 2002) ICSID Case No. ARB/00/2, 6 ICSID Rep 310; (2002) 41 ILM 867; (2002) 17 ICSID Rev 142	<i>Mihaly v Sri Lanka</i> (Jurisdiction)	224
<i>Patrick Mitchell v Democratic Republic of the Congo</i> (Decision on the Application for the Annulment of the Award, 1 November 2006) ICSID Case No. ARB/99/7	<i>Mitchell v DRC</i> (Annulment)	216
<i>Mondev International Ltd v United States of America</i> (Award, 11 October 2002) ICSID Case No. ARB(AF)/99/2, 7 ICSID Rep 192; (2003) 42 ILM 85; (2004) 123 ILR 110	<i>Mondev v USA</i> (Merits)	202, 203, 294
<i>Murphy Exploration and Production Company International v Republic of Ecuador</i> (Award on Jurisdiction, 15 December 2010) ICSID Case No. ARB/08/4	<i>Murphy v Ecuador</i>	142
<i>Mytilineos v Serbia and Montenegro</i> (Partial Award on Jurisdiction, 8 September 2006) UNCITRAL	<i>Mytilineos v Serbia</i>	221
<i>National Grid PLC v Argentine Republic</i> (Decision on Jurisdiction, 20 June 2006) UNCITRAL	<i>National Grid v Argentina</i> (Jurisdiction)	276
<i>Noble Energy, Inc. and Machalapower Cia Ltda v Ecuador and Consejo Nacional de Electricidad</i> (Decision on Jurisdiction, 5 March 2008) ICSID Case No. ARB/05/12	<i>Noble v Ecuador</i> (Jurisdiction)	255

Full citation	Abbreviated citation	Pages
<i>Noble Ventures, Inc. v Romania</i> (Award, 12 October 2005) ICSID Case No. ARB/01/11	<i>Noble Ventures v Romania</i> (Merits)	259
<i>Occidental Exploration and Production Company v The Republic of Ecuador</i> (Final Award, 1 July 2004) LCIA Case No. UN 3467, 12 ICSID Rep 59	<i>Occidental v Ecuador</i>	142
<i>OKO Osuuspankkien Keskuspankki Oyj and Others v Republic of Estonia</i> (Award, 19 November 2007) ICSID Case No. ARB/04/06	<i>OKO Pankki Oyj v Estonia</i> (Merits)	223
<i>Eudoro A. Olguín v Republic of Paraguay</i> (Award, 26 July 2001) ICSID Case No. Arb/98/5, 18 ICSID Rev 143	<i>Olguín v Paraguay</i> (Merits)	236, 282, 300
<i>Perenco Ecuador v Ecuador and Petroecuador</i> (pending), ICSID Case No. ARB/08/6	<i>Perenco v Ecuador</i>	142
<i>Phoenix Action v Czech Republic</i> (Award, 15 April 2009) ICSID Case No. ARB/06/5	<i>Phoenix Action v Czech Republic</i>	227, 229, 230
<i>Plama Consortium Limited v Republic of Bulgaria</i> (Decision on Jurisdiction, 8 February 2005) ICSID Case No. ARB/03/24, (2005) 20 ICSID Rev 262, (2005) 44 ILM 721	<i>Plama v Bulgaria</i> (Jurisdiction)	255, 276
<i>Pope & Talbot, Inc. v Government of Canada</i> (Award in Respect of Damages, 31 May 2002), 41 ILM 1347, (2003) 97 AJIL 937–50	<i>Pope & Talbot v Canada</i>	290
<i>PSEG Global, Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v Turkey</i> (Decision on Jurisdiction, 4 June 2004) ICSID Case No. ARB/02/5	<i>PSEG Global v Turkey</i>	258
<i>Renta 4 v Russian Federation</i> (Award on Preliminary Objections, 20 March 2009) Stockholm Chamber of Commerce Arbitration	<i>Renta 4 v Russian Federation</i>	223, 239, 249, 250
<i>Repsol YPF Ecuador, S.A. and others v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador</i> (PetroEcuador) (pending), ICSID Case No. ARB/08/10	<i>Repsol v Ecuador</i>	142

Full citation	Abbreviated citation	Pages
<i>Consortium RFCC v Royaume du Maroc</i> (Award, 22 December 2003) ICSID Case No. ARB/00/6	<i>RFCC v Morocco (Merits)</i>	202, 258, 278, 279, 300
<i>RSM Production Corp. v Grenada</i> (Award, 13 March 2009) ICSID Case No. ARB/05/14	<i>RSM v Grenada</i>	229
<i>Salini Costruttori SpA and Italstrade</i> <i>SpA v Kingdom of Morocco</i> (Decision on Jurisdiction, 23 July 2001) ICSID Case No. ARB/00/4, 6 ICSID Rep 400, (2005) 44 ILM 569	<i>Salini v Morocco</i>	227–29, 231, 234, 235
<i>Saluka Investments BV (The Netherlands)</i> <i>v The Czech Republic</i> (Partial Award, 17 March 2006), UNCITRAL/PCA	<i>Saluka v Czech Republic</i>	236, 298, 300, 321, 326
<i>Sempra Energy International v Argentine</i> <i>Republic</i> (Award on Merits, 28 September 2007) ICSID Case No. ARB/02/16	<i>Sempra v Argentina</i> (Award on Merits)	223, 240, 280
<i>Sempra Energy International v Argentine</i> <i>Republic</i> (Decision on the Argentine Republic’s Application for Annulment of the Award, 29 June 2010) ICSID Case No. ARB/02/16	<i>Sempra v Argentina</i> (Annulment)	100, 101, 240
<i>Société Générale de Surveillance S.A. v</i> <i>Islamic Republic of Pakistan</i> (Decision on Objections to Jurisdiction, 6 August 2003) ICSID Case No. ARB/01/13, 8 ICSID Rep 406, (2003) 18 ICSID Rev 307, 42 ILM 1290	<i>SGS v Pakistan</i>	226, 268, 269
<i>Société Générale de Surveillance S.A. v</i> <i>Republic of the Philippines</i> (Decision on Objections to Jurisdiction, 29 January 2004) ICSID Case No. ARB/ 02/6, 8 ICSID Rep 518	<i>SGS v Philippines</i>	215, 249, 255, 257, 260, 261, 262, 269, 270, 272, 283, 294
<i>Société Ouest Africaine des Bétons</i> <i>Industriels v State of Senegal</i> (Award on the Merits, 25 February 1988) ICSID Case No. ARB/82/1, (1994) 2 ICSID Rep. 164	<i>SOABI v Senegal</i>	220
<i>Southern Pacific Properties (Middle East)</i> <i>Limited v Arab Republic of Egypt</i> (No. 2) (Jurisdiction, 14 April 1988) ICSID Case No. ARB/84/3, 3 ICSID Rep 131, (1991) 16 Ybk Comm Arb 28	<i>SPP v Egypt</i> (Jurisdiction)	202, 268, 272

Full citation	Abbreviated citation	Pages
<i>Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v Argentine Republic</i> (Decision on Liability, 30 July 2010) ICSID Case No. ARB/03/17	<i>Suez v Argentina I</i>	101, 291
<i>Suez, Sociedad General de Aguas de Barcelona S.A. v Argentine Republic</i> (Decision on Liability, 30 July 2010) ICSID Case No. ARB/03/18	<i>Suez v Argentina II</i>	291
<i>Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v Argentine Republic</i> (Decision on Liability, 30 July 2010) ICSID Case No. ARB/03/19	<i>Suez v Argentina III</i>	101, 291
<i>Técnicas Medioambientales Tecmed S.A. v United Mexican States</i> (Award, 29 May 2003) ICSID Case No. ARB(AF)/00/2, 10 ICSID Rep 134, 19 ICSID Rev 158, (2004) 43 ILM 133	<i>Tecmed v Mexico</i> (Merits)	279, 290, 291
<i>Telenor Mobile Communications AS v Republic of Hungary</i> (Award, 13 September 2006) ICSID Case No. ARB/04/15	<i>Telenor v Hungary</i> (Jurisdiction)	262
<i>Tokios Tokelés v Ukraine</i> (Decision on Jurisdiction, 29 April 2004) ICSID Case No. ARB/02/18, 11 ICSID Rep 313, (2005) 20 ICSID Rev 205	<i>Tokios v Ukraine</i> (Jurisdiction)	213
<i>TSA Spectrum de Argentina S.A. v Argentine Republic</i> (Award, 19 December 2008) ICSID Case No. ARB/05/5	<i>TSA v Argentina</i>	258
<i>Victor Pey Casado et Fondation 'Presidente Allende' v République du Chili</i> (Sentence Arbitrale, 8 May 2008) ICSID Case No. ARB/98/2	<i>Victor Pey Casado v Chile</i>	232, 233
<i>Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux/ Vivendi Universal v Argentine Republic</i> (Decision on Annulment, 3 July 2002) ICSID Case No. ARB/97/3, 6 ICSID Rep 340	<i>Vivendi v Argentina No. 1</i> (Annulment)	254, 255, 267, 268

xxviii TABLE OF CASES

Full citation	Abbreviated citation	Pages
<i>Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A., v Argentine Republic</i> (Decision on the Argentine Republic’s Request for Annulment of the Award rendered on 20 August 2007, 10 August 2010) ICSID Case No. ARB/97/3	<i>Vivendi v Argentina No. 2</i> (Annulment)	255, 257
<i>Waste Management Inc. v United Mexican States</i> (No. 2) (Award, 30 April 2004) ICSID Case No. ARB (AF)/00/3, 11 ICSID Rep 361, (2004) 43 ILM 967, (2004) 98 AJIL 838–840	<i>Waste Management v Mexico No. 2</i>	282, 293, 294

2. Other arbitration cases

<i>In re Accounts of Käthe Friedländer, Holocaust Claims Resolution Tribunal</i> , 4 April 2004, Case No. CV96-4849; Claim Number 213599/RT	<i>In re Accounts of Käthe Friedländer</i>	315
Arbitral Award of Rapperschwyl (France v Chile), 5 July 1901	Arbitral Award of Rapperschwyl	139
<i>Bulgarian Foreign Trade Bank Limited v A.I. Trade Finance Inc.</i> , 27 October 2000, UNCITRAL arbitration	<i>Bulbank v A.I. Trade</i>	155
<i>Canevaro Brothers</i> (Italy v Peru), 3 May 1912, (1912) 6 AJIL 746; 39 JDI 1317	<i>Canevaro Brothers Case</i> (Italy v Peru)	73, 74, 75, 138
<i>Cerruti Arbitrations</i> (Italy v Colombia), (Award, 6 July 1911) (1912) 6 AJIL 965–75; (1912) RGDIP 268–74	<i>Cerruti Arbitrations</i> (Italy v Colombia)	30
<i>In re City of Tokyo 5 Per Cent Loan of 1912 – Plan for Resumption of Payment of Principal and Interest on the French Tranche of the Loan, Conciliation</i> , 1 April 1960, 29 ILR 11–20	<i>In re City of Tokyo 5 Per Cent Loan of 1912</i>	83, 87
<i>Claims arising out of Decisions of the Mixed Greco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles</i> , Arbitral Tribunal for the Agreement on German External Debt, 26 January 1972, 19 RIAA 27–64	<i>Claims re Decisions of the Mixed Greco-German Arbitral Tribunal</i> (1972)	152

Full citation	Abbreviated citation	Pages
<i>Charles R. Crane (United States v Austria and City of Vienna) Agreement of 26 November (1925) 6 UNRIAA 244</i>	<i>Crane v Austria (US v Austria)</i>	59, 82
<i>Société Civile des Porteurs d'Obligations du Crédit Foncier Mexicain, Award No. 79, Feller, 122–23</i>	<i>Crédit Foncier Mexicain v Mexico</i>	171
Arbitral Tribunal of Interpretation, Created under the Provisions of the Annex II to the London Agreement of 9 August 1924 between the Reparation Commission and the German Government, Award No. II, 29 January 1927, 21 (1927), AJIL, 344–49	<i>Dawes Award II (1927)</i>	149
Arbitral Tribunal of Interpretation, Created under the Provisions of the Annex II to the London Agreement of 9 August 1924 between the Reparation Commission and the German Government, Award No. III, 29 May 1928, 22 (1928), AJIL, 913–20	<i>Dawes Award III (1928)</i>	149
<i>Re Dues For Reply Coupons Issued in Croatia; Re Transit Charge for Mails From Occupied Yugoslavia (Postal Administration of Portugal v Postal Administration of Yugoslavia), 17 March (1956) 23 ILR 591–96; (1956) 81 (9) L'Union Postale, 90A.</i>	<i>Re Dues For Reply Coupons Issued in Croatia (Portugal v Yugoslavia)</i>	141
<i>Egyptian Workers' Claim, United Nations Compensation Commission, Report and Recommendation on Jurisdiction and the Merits, 7 July 1995, 117 ILR 195–242</i>	<i>Egyptian Workers' Claim</i>	283
<i>Energoinvest v DRC and Société Nationale d'Electricité, 30 April 2003, ICC Arbitration</i>	<i>Energoinvest v DRC</i>	154
<i>Dreyfus Brothers and Company v Peru ('French Claims against Peru') (France v Peru), 11 October 1921, Arbitration under Chapter IV of the Hague Convention of 18 October 1907 for the Pacific Settlement of International Disputes, Permanent Court of Arbitration, (1922) 16 AJIL 480–84; I UNRIAA 215–22</i>	<i>French Claims against Peru (France v Peru)</i>	138

xxx TABLE OF CASES

Full citation	Abbreviated citation	Pages
<i>International Financial Commission v Greece</i> , Award of Arbitrator Moriaud, November 1928	<i>IFC v Greece</i>	44, 45
<i>C. Itoh Middle East E.C. v The People's Republic of the Congo and the Congolese Redemption Fund</i> , ICC Arbitration No. 6219, 31 July 1990	<i>Itoh v People's Republic of the Congo (ICC)</i>	152, 155
<i>Norwegian Shipowners' Claims</i> (Norway v USA), (Award, 13 October 1922), (1948) 1 UNRIAA, 307–46	<i>Norwegian Shipowners' Claims</i>	202
<i>Orinoco Steamship Company v Venezuela</i> (1906), 6 Moore, <i>International Law Digest</i> 305	<i>Orinoco Steamship v Venezuela</i>	266
<i>Ottoman Public Debt Arbitration</i> , 18 April 1925, 1 UNRIAA 529–614; (1925–1926) 3 ILR 78–79	<i>Ottoman Public Debt Arbitration</i>	129, 130–33
<i>Russian Indemnity Case</i> (Russia v Turkey), Award of the Arbitral Tribunal of 11 November 1912, (1913) 7 AJIL 178–201; (1912) 11 UNRIAA 431	<i>Russian Indemnity Case</i>	89–97, 139, 205
<i>Claims of the San Domingo Improvement Company of New York and its Allied Companies</i> (United States v Dominican Republic), Arbitration under the Protocol of 31 January 1903, Award, 12 April 1904, FRUS 1904, 274–79	<i>United States v Dominican Republic (1904)</i>	47, 51
<i>Social Insurance (Upper Silesia) Case</i> , Arbitral Tribunal for the Interpretation of the Experts' Plan under the Agreement of London of August 9, 1924, 24 March 1926, Cooke (Arbitrator); (1926) 20 AJIL 556; <i>Die Entscheidungen des internationalen Schiedsgerichts zur Auslegung des Dawes-Plans</i> (Schoch, ed.) (1927), vol. 1, 184; (1925–1926) 3 ILR 349–51	<i>Social Insurance (Upper Silesia) Case</i>	149, 150
<i>Switzerland v Federal Republic of Germany</i> , Arbitral Tribunal for the Agreement on German External Debt, (1958) 19 ZaöRV 761; (1958) 34 BYBIL 363	<i>Switzerland v Germany</i>	151

Full citation	Abbreviated citation	Pages
<i>Tinoco Arbitration</i> (Great Britain v Costa Rica), 18 October 1923, (1924) 2 ILR 34–39; (1924) 18 AJIL 147–74; (1922) 116 BFSP 438–43; 1 UNRIIA 369	<i>Tinoco Arbitration</i> (Great Britain v Costa Rica)	136, 137, 140
<i>United States of America ex rel. Continental Insurance Company v Japan</i> , 20 July 1960, US–Japanese Property Commission, 29 ILR 431–37	<i>US Continental Insurance Company v Japan</i>	81
<i>Venezuelan Preferential Case</i> , Protocol of Washington of 7 May 1903, Award of the Arbitral Tribunal, 22 February 1904, 9 UNRIIA 99–110	<i>Venezuelan Preferential Case</i>	30–35, 50, 55, 204
<i>Young Loan Arbitration</i> (Belgium, France, Switzerland & UK v Germany), (Decision, 16 May 1980), 19 UNRIIA 67–145; (1980) 59 ILR 524	<i>Young Loan Arbitration</i>	67, 75–80, 83, 87, 144–148, 160
<i>Biens Britanniques au Maroc Espagnol (Réclamation 53 de Melilla - Ziat, Ben Kiran)</i> (Great Britain v Spain) (1925), 2 UNRIIA 729	<i>Ziat, Ben Kiran Arbitration</i>	170

3. Foreign Claims Settlement Commission of the United States

<i>Albert C. Schwarting v Bulgaria</i> , Claim No. BUL-2–016, Decision No. BUL-2–8, 30 September 1970	<i>Schwarting v Bulgaria</i>	191
<i>American Cast Iron Pipe Company v Cuba</i> , Claim No. CU-0249, Decision No. CU-13, 19 October 1966	<i>American Cast Iron Pipe v Cuba</i>	189
<i>Ann A. Unger v Czechoslovakia</i> , Claim No. CZ-3137, CZ-3138 and CZ-3142, Decision No. CZ-3538, 17 FCSC Rep 262	<i>Unger v Czechoslovakia</i>	189
<i>Artus v German Democratic Republic</i> , Claim No. G-2887; Decision No. G-3085, 4 February 1981	<i>Artus v GDR</i>	193
<i>Bert McCord v Soviet Union</i> , Claim No. SOV-40033, Decision No. SOV-1493, 10 FCSC Rep 181	<i>McCord v Soviet Union</i>	307

Full citation	Abbreviated citation	Pages
<i>Bessie M. Marcus v Cuba</i> , Claim No. CU-1752; Decision No. CU-254, 10 April 1968	<i>Marcus v Cuba</i>	169
<i>Bill Lacey v Cuba</i> , Claim No. CU-4854, Decision No. CU-2641, 14 July 1971	<i>Lacey v Cuba</i>	306
<i>Carl Joseph Baird v Soviet Union</i> , Claim No. SOV-40744, Decision No. SOV-1939, 10 FCSC Rep 193	<i>Baird v Soviet Union</i>	194
<i>Chalifoux v Soviet Union</i> , 27 May 1957, 10 FCSC Rep 194; 26 ILR 272–73	<i>Chalifoux v Soviet Union</i>	193, 194
<i>Charles D. Siegel v Soviet Union</i> , Claim No. SOV-40017, Decision No. SOV-230, 10 FCSC Rep 187; 26 ILR 275	<i>Siegel v Soviet Union</i>	191, 192, 194
<i>Charles H. Sisam v Czechoslovakia</i> , Claim No. CZ-1551, Decision No. CZ-397, 17 FCSC Rep 197	<i>Sisam v Czechoslovakia</i>	194
<i>Charles Simonek v Czechoslovakia</i> , Claim No. CZ-3147, Decision No. CZ-2299, 7 September 1960, 14 FCSC Rep 174	<i>Simonek v Czechoslovakia</i>	189
<i>Claire Claus v Czechoslovakia</i> , Claim No. CZ-1082, Decision No. CZ-683, 17 FCSC Rep 201	<i>Claus v Czechoslovakia</i>	286
<i>Deere & Company v Cuba</i> , Claim No. CU-2392; Decision No. CU-1150, 7 August 1968	<i>Deere v Cuba</i>	169
<i>Dora Frankenbusch v Czechoslovakia</i> , Claim No. CZ-2474, Decision No. CZ-2380	<i>Frankenbusch v Czechoslovakia</i>	194
<i>Doris Abbott Hedges, Individually and Doris Abbott Hedges, as Mother and Natural Guardian of Maria Teresa Hedges</i> , Claim No. CU-3436, Decision No. CU-5727, 28 October 1970	<i>Hedges v Cuba</i>	169
<i>Elastic Stop Nut Corporation of America v Cuba</i> , Claim No. CU-0195, Decision No. CU-304, 20 September 1967	<i>Elastic Stop Nut v Cuba</i>	190
<i>Ella Wyman, et al. v Czechoslovakia</i> , Claim Nos. CZ-4347 and CZ-4348, Decision No. CZ-3529	<i>Wyman v Czechoslovakia</i>	288

Full citation	Abbreviated citation	Pages
<i>Emil Bohadlo v Czechoslovakia</i> , Claim No. CZ-1734, Decision No. CZ-379, 17 FCSC Rep 196	<i>Bohadlo v Czechoslovakia</i>	288
<i>Eric G. Kaufmann v Yugoslavia</i> , Claim No. Y-778, Decision No. Y-393, FCSC D&A 118	<i>Kaufmann v Yugoslavia</i>	287
<i>Erwin P. Hexner v Czechoslovakia</i> , Claim No. CZ-2408, CZ-3255, and CZ-3290, Decision No. CZ-2470, 17 FCSC Rep 266	<i>Hexner v Czechoslovakia</i>	189
<i>Eugene L. Beyl v Romania</i> , Claim No. RUM-2-036; Decision No. RUM-2-004, 14 October 1970	<i>Beyl v Romania</i>	191
<i>Feierabend v Czechoslovakia</i> , Claim No. CZ-2529, Decision No. CZ-1423, 7 September 1960, 42 ILR 157-61	<i>Feierabend v Czechoslovakia</i>	286, 287
<i>Felix Wolf v Yugoslavia</i> , Claim No. Y-874, Decision No. Y-385, 22 November 1961, 17 FCSC Rep 231; 42 ILR 161-62; FCSC D&A 118	<i>Wolf v Yugoslavia</i>	287
<i>First National City Bank v Cuba</i> , Claim No. CU-2629; Decision No. CU-1868, 20 October 1971	<i>First National City Bank v Cuba</i>	195
<i>First National City Bank of New York v Soviet Union</i> , Claim No. SOV-41261, Decision No. SOV-3126, 15 July 1959, FCSC D&A 324-41	<i>First National City Bank of New York v Soviet Union</i>	306
<i>F. J. Killkalee v Cuba</i> , Claim No. CU-1002, Decision No. CU-203, 31 January 1968	<i>Killkalee v Cuba</i>	169
<i>Gordon Theophilus Malan v Italy</i> , Claim No. IT-10066, Decision No. IT-434, FCSC D&A 292-94	<i>Malan v Italy</i>	190, 191
<i>Green Claim v Soviet Union</i> , 6 November 1957 10 FCSC Rep 205; 26 ILR 341-42	<i>Green Claim v Soviet Union</i>	194
<i>Guaranty Trust Company of New York v Soviet Union</i> , 10 FCSC Rep 224	<i>Guaranty Trust v Soviet Union</i>	194
<i>Hedwiga Geller v Hungary</i> , 12 April 1957, 10 FCSC Rep 38; 26 ILR 262-66	<i>Geller v Hungary</i>	195
<i>Helen Modell v Soviet Union</i> , Claim No. SOV-40836, Decision No. SOV-2256, 10 FCSC Rep 201	<i>Modell v Soviet Union</i>	307

xxxiv TABLE OF CASES

Full citation	Abbreviated citation	Pages
<i>Ignatius A. Pietrzak v Poland</i> , Claim No. PO-1004, Decision No. PO-1, 27 February 1961	<i>Pietrzak v Poland</i>	286
<i>Ivan Baran v Yugoslavia</i> , Claim No. Y-1694, Decision No. Y-341, FCSC D&A 118	<i>Baran v Yugoslavia</i>	287
<i>James De Marco v Italy</i> , Claim No. IT-10086, Decision No. IT-249, 10 FCSC Rep 142	<i>De Marco v Italy</i>	191
<i>John Stipkala v Czechoslovakia</i> , Claim No. CZ-1616, Decision No. CZ-135, 17 FCSC Rep 191	<i>Stipkala v Czechoslovakia</i>	287
<i>Jon M. Groetzinger v German Democratic Republic</i> , Claim No. G-3160; Decision G-3271, 13 May 1981	<i>Groetzinger v GDR</i>	189
<i>Joseph Smolik v Czechoslovakia</i> , Claim No. CZ-4032, Decision No. CZ-3417 (1961)	<i>Smolik v Czechoslovakia</i>	189
<i>Jovo Miljus v Yugoslavia</i> , Claim No. Y-1561, Decision No. Y-352-A; FCSC D&A 117; 20 ILR 434	<i>Miljus v Yugoslavia</i>	287
<i>Koloman Lebovic v Czechoslovakia</i> , Claim No. CZ-2-0047, Decision No. CZ-0664	<i>Lebovic v Czechoslovakia</i>	287
<i>Marietta J. Poras v Czechoslovakia</i> , Claim No. CZ-3020, Decision No. CZ-3528, 17 FCSC Rep 256	<i>Poras v Czechoslovakia</i>	189
<i>Mellon National Bank and Trust Company v Cuba</i> , Claim No. CU-2498, Decision No. CU-2883, 20 October 1971	<i>Mellon Bank v Cuba</i>	189
<i>Michael Tomasko v Czechoslovakia</i> , Claim No. CZ-2-0319, Decision No. CZ-2-0268	<i>Tomasko v Czechoslovakia</i>	286
<i>Mitar Paige v Yugoslavia</i> , Claim No. Y2-0143, Decision Y2-12, 6 September 1967	<i>Paige v Yugoslavia</i>	193
<i>Morgan Guaranty Trust Company of New York, as Trustee v Cuba</i> , Claim No. CU-1594, Decision No. CU-134, 25 October 1967	<i>Morgan Guaranty Trust Company of New York, as Trustee v Cuba</i>	195
<i>Owen Arthur Nash v Yugoslavia</i> , Claim No. Y-363, Decision No. Y-38, FCSC D&A 118; 20 ILR 213-14	<i>Nash v Yugoslavia</i>	194, 287