

International Investment Law and Arbitration

COMMENTARY, AWARDS AND OTHER MATERIALS

What was once a contested body of principles applied peripherally to the international settlement of expropriation disputes has been transformed and in its place now stands an important area of international disputes practice. *International Investment Law and Arbitration* offers a comprehensive introduction to the subject. Presenting the facts of daily legal practice and the largely unaltered aims of the subject alongside a broad selection of key awards and original materials, historical developments are discussed in the context of the changing directions in the arbitral jurisprudence and current treaty and arbitration reform debate. Accessible and engaging commentary is integrated throughout, end of chapter questions test reader understanding and further reading lists support and encourage exploration of the subject. Suitable for postgraduate law students studying modules on international investment arbitration, *International Investment Law and Arbitration* offers an indispensable introduction to the subject.

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Chin Leng Lim , Jean Ho , Martins Pappas
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COMMENTARY, AWARDS AND OTHER
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Foreword

International investment law and arbitration commands global interest. It is the arena in which investor-State dispute settlement unfolds, a taught subject at the undergraduate and postgraduate levels, a field of practice, an academic pursuit, and even a political campaign. Shaped by general international law, investment treaties, arbitral *jurisprudence* and academic writings, international investment law and arbitration is as dynamic as its constituent variables. The variety of viewpoints on virtually every legal issue sustains an intense, ongoing international dialogue. Yet, this variety also poses a serious challenge to the systematic study of international investment law and arbitration.

This book is the first to synthesise the moving parts of international investment law and arbitration into a comprehensive narrative with a hybrid casebook-textbook format. By pairing carefully curated extracts from voluminous Awards and other documents with original commentary and analysis, Lim, Ho and Paparinskis deftly enhance the informative value of a traditional casebook with the explanatory value of a traditional textbook. And in doing so, they have written a book that gives their readers the best of both worlds.

Relying on their significant combined teaching, publishing and practical experience, Lim, Ho and Paparinskis deconstruct the many legal complexities and controversies of international investment law and arbitration in nineteen meticulous and engaging chapters. *International Investment Law and Arbitration: Commentary, Awards and Other Materials* fills the niche in the market for a compact general treatise which strikes a fine balance between doctrinal rigour and practical relevance. It is a book that both students and specialists will find accessible and instructive.

This remarkable first edition is an indispensable resource and an important contribution to the mastery of a prominent discipline.

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Preface

The past two decades epitomised the emergence of international investment arbitration as one of the most dynamic areas of legal practice. Given the considerable number of published arbitral awards and legal writings, and the underlying public international law principles, acquiring a firm understanding of international investment law and arbitration has become harder for students, practitioners and others. There is a place for a book which reproduces within a single, portable volume selected extracts from arbitral decisions, other documents and legal writings accompanied by concise, up-to-date and reliable commentary on both the law and procedure of international investment arbitration. Questions of procedure and practice have become bound up with the application of substantive international law protections, raising important questions of technical international law. There is also the need for the subject to be explained in academic institutions in a way which reflects its historical development, conceptual basis and intellectual contribution to the peaceful settlement of disputes. It is this combination of aims which this book seeks to advance.

A further justification is that the field is in a renewed state of flux. It appeared to us that there is scope for a book which aims to convey the effect of these broader developments, not least on the latest innovations in treaty design and language. However, we have also been wary of exaggerating the current backlash against investment treaties and arbitration. While this book is alive to the gathering forces of change, for now one need look no further than the facts of daily legal practice and the largely unaltered aims of the subject.

The present book draws upon the experience derived from teaching the subject in three different jurisdictions. No work can be faultless. It is especially true of a first edition and we hope to benefit from the comments of our peers about the ways in which this first attempt might be improved. In terms of the allocation of writing responsibility, Lim was tasked with Chapters 1, 4, 8, 11, 14, 17, 18 and 19; Ho with Chapters 2, 3, 6, 7, 9, 10, 13 and 16; and Paparinskis with Chapters 5, 12 and 15. We have tried to state the law and its surrounding developments as they appeared to us in May 2017.

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Treaties, National Legislation, Cases and Awards

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¹ For the texts of bilateral investment treaties (BITs), see UNCTAD's 'Investment Policy Hub' at www.investmentpolicyhub.unctad.org. For the investment chapters of free trade agreements (FTAs), see the WTO's 'RTA Information System' at www.rtais.wto.org.

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Abbreviations

TREATIES AND OTHER INSTRUMENTS

ACIA	ASEAN Comprehensive Investment Agreement
C–J–K TIT	China–Japan–Korea Trilateral Investment Treaty
CAFTA-DR	Dominican Republic–Central America–United States Free Trade Agreement
CETA	Comprehensive Economic and Trade Agreement
DR–CAFTA	Dominican Republic–Central America Free Trade Agreement
ECT	Energy Charter Treaty
FTAA	Free Trade Area of the Americas
GATS	General Agreement on Trade in Services
Hague Choice of Court Convention	Convention of 30 June 2005 on Choice of Court Agreements ('Hague Convention on Choice of Court Agreements')
ICSID Additional Facility Rules	Self-contained rules which define the scope of the Additional Facility for investor–State disputes which do not fall under the ICSID Convention; for example, where one of the parties is not an ICSID Member State or a national thereof
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICSID Arbitration Rules	ICSID Convention Arbitration Rules
GATT	General Agreement on Tariffs and Trade
NAFTA	North American Free Trade Agreement
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
TPP	Trans–Pacific Partnership
TRIMS	Trade–Related Investment Measures Agreement
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration
UNCITRAL Rules	UNCITRAL Arbitration Rules
VCLT	Vienna Convention on the Law of Treaties

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Bodies

AAA	American Arbitration Association
AALCO	Asian–African Legal Consultative Organisation
ACICA	Australian Centre for International Commercial Arbitration
AF	Additional Facility
ASEAN	Association of Southeast Asian Nations
BIICL	British Institute of International and Comparative Law
EC	European Commission
EU	European Union
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IUSCT	Iran–US Claims Tribunal
ILC	International Law Commission
IUSCT	Iran–United States Claims Tribunal
KLRCA	Kuala Lumpur Regional Centre for Arbitration
LCIA	London Court of International Arbitration
NAFTA FTC	NAFTA Free Trade Commission
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
UN	United Nations
UNCC	UN Compensation Commission
UNCITRAL	UN Commission on International Trade Law
UNCTAD	UN Conference on Trade and Development
WTO	World Trade Organization

Common Terms

ASR	Articles on State Responsibility
BIT	bilateral investment treaty
BOT	build-operate-and-transfer
CFtE	costs follow the event
DCF	discounted cash flow
DELIC	<i>damnum emergens plus lucrum cessans</i>
EPA	Economic Partnership Agreement
FET	fair and equitable treatment
FMV	fair market value
FPS	full protection and security

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FTA	free trade agreement
GSP	Generalized System of Preferences
IIA	international investment agreement
MFN	most-favoured nation
MIT	multilateral investment treaty
MST	minimum standard of treatment
MTBE	methyl tertiary-butyl ether
NIEO	New International Economic Order
NT	national treatment
PPA	power purchase agreement
PPP	public–private partnership
USSR	Union of Soviet Socialist Republics