

ARBITRATING THE CONDUCT OF INTERNATIONAL INVESTORS

Investment arbitration has emerged from modest beginnings and matured into an established presence in international law. However, in recent years it has drifted from the reciprocal vision of its founders. This volume arises to serve as a comprehensive guide for those who might wish to reform international investment law from within, seeking a return to the mutuality of access that is in arbitration's essence. A detailed toolset is provided for enhancing the access of host States and their nationals to formal resolution mechanisms in foreign investment disputes. It concludes by offering model texts to achieve greater reciprocity and access to justice. This book will appeal to all those interested in the future of international investment law, including an international audience of scholars, government officials, private sector actors, and private citizens alike, and including diverse constituencies, communities, and collectives of host State nationals.

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FOREWORD

Private monies for centuries have been invested abroad. Over those centuries there have been numerous claims by the foreign investors that they were wrongfully treated by the host state, and there have been a correspondingly significant number of claims by host states alleging wrongful acts by the investors. In the last half of the twentieth century, a system was developed for the protection of foreign investment, known as investor-State dispute settlement (ISDS). But even as ISDS became increasingly relied upon, fundamental critiques of ISDS have gained momentum since approximately 1990. Even though ISDS continues to be employed somewhat more each year, it is clear that there is a substantial loss of confidence in ISDS by host states, investors and communities. The last fifteen years of ISDS have seen substantial reform both procedurally and substantively. But the critique, if anything, is more substantial. In the eyes of those critical of ISDS, reforms in the main have served only to tweak ISDS and do not address the concerns raised.

Simultaneously, from at least the 1950s, it has been clear that private funds for investment in developing states can exceed, or at least are a very important complement to, governmental or development bank funds. Amid the sustained critique of ISDS and the need for private investment funds, this slender volume makes an important contribution. It is important because it moves beyond either critique or reform within the ISDS model to asking how we might approach in other ways what is a crucial and complex challenge. This volume contributes to reconstructing our sense of how we as peoples and nations may cooperate – organise our affairs – so that entities may invest abroad and so that all nations may develop towards their objectives sustainably. ‘Reform is not forged in rage and frustration,’ our authors remind us. Most important for the authors is the recognition that peoples and nations around the world seek, indeed need, a way forward. The commitment of the authors to a fundamental rethinking and to the construction of mutually beneficial arrangements illuminates the possible directions to go. It does not exhaust the mapping

of the way forward, but it has opened a crucial line of inquiry that others may now join.

It is the authors' intent that this volume assist those who seek to address 'concerns of diverse constituencies within the design of a new generation of instruments'. Critical to this intent, the authors eschew 'rage and frustration' and welcome all of these diverse constituencies as a part of this project. The challenge the authors pose for themselves is a generation of instruments that address the valid concerns of the many diverse constituencies present in foreign investment. It is the embrace of this complexity of the diverse valid interests in foreign investment that is the essence of their commitment to reconstructing our sense of a way forward.

The calculus that will govern the way forward depends greatly on the particular circumstances. The authors thus look to the territory of dispute resolution. A large part of that territory is the various national courts; those of the host state, the home state, or yet some other state. As the authors observe, however, the particular court matters, and national courts can be 'often poorly suited to ensure international enforceability of their judgments'. To the national courts is thus added the territory of international courts, and international arbitration. With an eye on both the historical use and future promise of these courts and tribunals, the authors sketch the models that will underlay a new generation of instruments pointing to the strengths and weaknesses of each.

It is said that as Lewis and Clark were returning downriver in 1806 from their expedition to map the Northwest Territories of the United States, they were passed by the next generation of explorers going upriver, both guided and inspired by the expedition's work. I wish such success for the present authors: that they may see scholars, diplomats and practitioners revisit and refine the frontier they have here pioneered.

David D. Caron

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Arbitrating the Conduct of International Investors is born from a collaborative effort spanning over the course of the past three years. Each of us brings to this book different perspectives. We share the goal of offering tools for broadening the scope of international investment arbitration in order to surmount its inherent limitations and more widely avail the advantages of this progressive innovation.

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International Shoe Co. v. Washington, 326 U.S. 310 (1945)

Lawrence v. Fox, 20 N.Y. 268 (1859)

Ministry of Defense of the Islamic Republic of Iran v. Gould Inc., 887 F.2d 1357, 9th Cir. (1989)

SELECTED ABBREVIATIONS

CARIFORUM	The Caribbean Forum
COMESA	Common Market for Eastern and Southern Africa
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
ILR	International Law Reports
NAALC	North American Agreement on Labor Cooperation
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
SADC	Southern African Development Community
UDHR	Universal Declaration of Human Rights
UNCAC	United Nations Convention against Corruption
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGA	United Nations General Assembly
UNGP	United Nations Guiding Principles on Business and Human Rights
UNHRC	United Nations Human Rights Council
UNTS	United Nations Treaty Series

Note: This volume references a large number of instruments that fall within the two categories of bilateral investment treaties (BITs) and free trade agreements (FTAs). These instruments are often referenced in the format ‘Japan-Uruguay BIT (2015)’, ‘US Model BIT (2012)’, or ‘Colombia-Costa Rica FTA (2013)’.