

## STATE RESPONSIBILITY FOR BREACHES OF INVESTMENT CONTRACTS

There is a wealth of material that shapes the law of State responsibility for breaches of investment contracts. First impressions of an unsettled or uncertain law have thus far gone unchallenged. But unchallenged first impressions point to the need for a detailed study that investigates and analyses the sources, the content, the characteristics and the evolution of this law. The argument at the heart of this monograph is that the law of State responsibility for breaches of investment contracts has carved a unique and distinct trajectory from the traditional route for the creation of international law, developing principally from arbitral awards, and mimicking, to a considerable extent, the general international law on the protection of aliens and alien property. This book unveils the remarkable journey of the law of State responsibility for breaches of investment contracts, from its origins, through its formation, to its arrival at the cusp of maturity.

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Cambridge University Press

978-1-108-41584-2 — State Responsibility for Breaches of Investment Contracts

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JEAN HO

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CAMBRIDGE  
UNIVERSITY PRESS

Cambridge University Press  
978-1-108-41584-2 — State Responsibility for Breaches of Investment Contracts  
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## CAMBRIDGE UNIVERSITY PRESS

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

Cambridge University Press is part of the University of Cambridge.

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

[www.cambridge.org](http://www.cambridge.org)  
Information on this title: [www.cambridge.org/9781108415842](http://www.cambridge.org/9781108415842)  
DOI: 10.1017/9781108235297

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First published 2018

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

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

ISBN 978-1-108-41584-2 Hardback

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Cambridge University Press

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## FOREWORD

For the last two decades, the focus in international investment law has been on *treaties*. At least for a while, it seemed like treaties were ‘the only game in town’. Following Jan Paulsson’s influential article in 1995 on ‘Arbitration without Privity’, the modality of consenting to arbitration by treaty moved centre stage. Yet the rise of arbitration without privity obscured the enduring importance of investments *contracts* in investment arbitration – as an alternative modality for investors and host states to agree to arbitration, as the legal instrument that governs nearly all cross-border investments and as part of the applicable law in investment treaty arbitration.

This focus on treaty, rather than contract, shaped the literature on the emerging investment treaty regime. Most authors have regarded investment contracts as a marginal phenomenon, not worthy of sustained attention – despite a long history of contract-based investment arbitration starting with *Suez Canal Co. v. Egypt* in 1864, as well as the continued importance of contract in the world of investment treaty arbitration. At the same time, this perception that the brave new world of investment treaty arbitration was all about treaties, rather than investment contracts, left a void regarding the core question in the law of state responsibility – whether and when breaches of (investment) contracts trigger the host state’s responsibility.

In 1970, at a time when the question of state responsibility for contractual breaches was as important as it was controversial due to decolonization, waves of nationalizations and the New International Economic Order, ILC Special Rapporteur Robert Ago decided to exclude contractual breaches from the ILC’s project of codifying state responsibility. Given the ILC’s decision then to leave aside the topic, the rightly celebrated Articles on State Responsibility, that the ILC finalised in 2001, did not address the question of state responsibility for contractual breaches beyond the general principle in Article 3 that the characterisation as internationally unlawful is independent of domestic law, and vice versa.

Against the virtually blank canvas enters Dr Ho's timely monograph on the law of state responsibility with respect to contractual breaches. While the literature on investment arbitration has exploded over the last decade, making it harder and harder for PhD students and academics to find gaps worthy of book-length treatments in international investment law, Dr Ho has without doubt found such a gap.

Dr Ho reminds us that most investment disputes have their origin in contract, and marshals an impressive range of materials against the background cacophonous state practice in the nineteenth and early twentieth century. The book is part of an important strand of recent scholarship in international law that takes archival materials seriously, and makes productive use of them to complement published sources and scholarly writings.

States generally, and France, Great Britain and the Netherlands in particular, on whose archival records Dr Ho principally draws, were reluctant to exercise diplomatic protection in respect of contractual breaches. Yet mixed claims commissions in the first third of the twentieth century, and later investment tribunals, started to tailor the general rules on state responsibility for breaches of international obligations to breaches of contractual breaches. Thus, the major impetus for the development of this species of state responsibility came from arbitral awards, rather than state practice. The analysis of this rich corpus of arbitral practice, particularly under the main standards of protection in investment treaties, forms the book's core.

Dr Ho charts a middle course between absolute and in-existent contractual protection under international law. She challenges the common perception that state responsibility for contractual breaches, both under customary international law and under investment treaties, is exceptional, without going to the opposite extreme of absolute contractual protection. The school of absolute protection advocates state responsibility for contractual breaches as a matter of course, as reflected in theories of internationalisation that flourished at the time of the New International Economic Order, and in the contemporary investment regime in one view of umbrella clauses according to which these clauses transform contractual breaches automatically into breaches of international law. The opposing school holds that state responsibility for contractual breaches is triggered only in the most extreme circumstances.

In 1987, fittingly in a *Festschrift* dedicated to Roberto Ago, Stephen Schwebel concluded 'a State is responsible under international law if it commits not any breach, but an arbitrary breach, of a contract between

that State and an alien. What is “arbitrary”? It is a breach “for governmental rather than commercial reasons”.<sup>1</sup> To Dr Ho, by contrast, determining whether there is a breach of international law depending on a measure’s sovereign or commercial character is ‘artificial’, and yields considerable uncertainty about the scope of contractual protection. Instead, she calls for a focus on the FET standard itself.

With her nuanced analysis of this and many other aspects of state responsibility for contractual breaches, Dr Ho’s début dispels the uncertainties surrounding what the law on state responsibility for contractual breaches is and calls our attention to the emergence of a distinct, and well-settled body of rules on state responsibility for contractual breaches. She uncovers how this species of state responsibility developed, how FET became the most important standard in the contemporary investment treaty regime for the protection of contractual breaches, and looks ahead at its future. What is virtually certain is that state responsibility for contractual breaches will only grow in importance in the coming decades.

Dr Ho was my first PhD student at the University of Cambridge. We arrived in Cambridge at around the same time, and I had the pleasure of observing from up close the evolution of this work and her blossoming career as a scholar, as well as participating, modestly, in this endeavour. The supervisor’s joy in seeing his former PhD student’s book in print, especially of his very first PhD student, must be second only to the author herself. Here is wishing that my future PhD students bring similar scholarly abilities, personal qualities and passion to their PhD projects.

As her former supervisor of the PhD dissertation on which this book is based, I am not the most objective judge of this book’s quality. It will be for the reader to judge its contribution. That said, this book will be of interest to a wide audience in academia and practice, and establishes Dr Ho as a leading scholar of investment law among the younger generation.

**Michael Waibel**

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<sup>1</sup> Stephen M. Schwebel, ‘On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law’ in *Le Droit International à l’Heure de sa Codification: Etudes en l’Honneur des Roberto Ago* (Milan: Giuffrè, 1987).

Cambridge University Press

978-1-108-41584-2 — State Responsibility for Breaches of Investment Contracts

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## PREFACE

I was intrigued by ‘The Myth of International Contract Law’. Published in 1981, this article questions the existence of a body of international law dedicated to State breaches of contracts concluded with foreign investors. It also identifies the challenges and controversies associated with articulating and applying such a body of law. Scholarly deference over the next three decades to the findings in this article indicated acceptance of the myth as real. Yet, there is widespread acknowledgement that State responsibility may be engaged for a breach of contract. So long as there are internationally wrongful contractual breaches, there has to be a body of law, however rudimentary, incomplete, even unsatisfactory, from which to ascertain international wrongfulness. Can the myth be debunked? The article’s author and my mentor, C. J. Koh Professor M. Sornarajah, stands his ground, but never stopped me from finding mine. After spending seven years pondering this question, I believe I have an answer.

This monograph is a substantially revised version of my doctoral thesis, which was written from October 2011 to October 2014 at the University of Cambridge. The thesis was supervised by Dr Michael Waibel, with advice from Professor John Bell. It was examined by Professor Christoph Schreuer and H. E. Judge James Crawford (then Whewell Chair in International Law at the University of Cambridge) in December 2014, and passed as is. Revisions to the thesis were undertaken from May 2016 to December 2017.

Video synopses of the monograph are available in English, French and Mandarin at the United Nations Audiovisual Library of International Law. My take on the law and its surrounding developments is informed by legal materials available up to 31 December 2017.

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978-1-108-41584-2 — State Responsibility for Breaches of Investment Contracts

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## ACKNOWLEDGEMENTS

My former Dean, Professor Tan Cheng Han, my current Dean, Professor Simon Chesterman, and my mentors, C. J. Koh Professor M. Sornarajah and Professor Tan Yock Lin, encouraged me to pursue doctoral research at the University of Cambridge. The Faculty of Law at the National University of Singapore awarded me a full scholarship and relieved me of all teaching and administrative duties for the entire duration of my doctoral studies. The monograph was completed between May 2016 and December 2017 while I was on extended teaching relief. During this time, I held visiting appointments at Shearman & Sterling LLP in Paris, at WilmerHale in London, at the Lauterpacht Centre for International Law in Cambridge, and at the International Centre for the Settlement of Investment Disputes of the World Bank in Washington DC. This arrangement was made possible by my Vice-Dean for Academic Affairs, Associate Professor David Tan, my Vice-Dean for Research, Kwa Geok Choo Professor James Penner, and a grant from the Singapore Ministry of Education Academic Research Fund Tier 1 (WBS No. R-241-000-156-115). My stints in Paris, London, Cambridge and Washington DC were facilitated by Professor Emmanuel Gaillard, Professor Gary Born, Professor Eyal Benvenisti and Secretary-General Meg Kinnear.

Finola O'Sullivan, Elizabeth Spicer (until February 2017), Tom Randall (from April 2017) and the team at Cambridge University Press guided me throughout the publishing process. The monograph benefited from the comments of my examiners, Professor Schreuer and Judge Crawford, on my thesis, as well as the comments of two anonymous referees.

Archival research was conducted at various intervals from 2012 to 2017 at the Archives Diplomatiques at La Courneuve in Paris (France), the National Archives at Kew (United Kingdom), and the Nationaal Archief Den Haag at The Hague (Netherlands), where I was assisted by knowledgeable personnel.

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978-1-108-41584-2 — State Responsibility for Breaches of Investment Contracts

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ACKNOWLEDGEMENTS

Portions of the monograph were presented at Shearman & Sterling LLP in London, WilmerHale in London, l'Université de Paris II (Panthéon-Assas), the Investment Law and Policy Workshop at University College London, and at ICSID. The organisers and the participants gave feedback on my working drafts.

Yas Banifatemi, Emmanuel Gaillard, Kevin Gray, Thomas Hale, Ana Joubin-Bret, Meg Kinnear, Federico Ortino, James Penner, Lauge Poulsen, Margaret Ryan, Jeremy Sharpe, M. Sornarajah and Michael Waibel helped me refine my ideas.

Alastair Simon Chetty provided research assistance.

My loved ones soldiered on with me.

ABBREVIATIONS

**Treaties and Other Instruments**

ACIA	ASEAN Comprehensive Investment Agreement
CETA	EU-Canada Comprehensive Economic and Trade Agreement
ECT	Energy Charter Treaty
GATT	General Agreement on Tariffs and Trade
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
NAFTA	North American Free Trade Agreement
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
TPP	Trans-Pacific Partnership
UNCITRAL Rules	UNCITRAL Arbitration Rules
VCLT	Vienna Convention on the Law of Treaties

**Bodies**

ASEAN	Association of Southeast Asian Nations
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law 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
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law

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UNCTAD	United Nations Conference on Trade and Development
UNHRC	United Nations Human Rights Council

**Common Terms**

BIT	bilateral investment treaty
FET	fair and equitable treatment
FTC	Free Trade Commission
IIA	International Investment Agreement
MFN	most favoured nation
MIT	multilateral investment treaty
MST	minimum standard of treatment
NIEO	New International Economic Order
NPM	non-precluded measures

**Journals**

AJIL	<i>American Journal of International Law</i>
BYIL	<i>British Yearbook of International Law</i>
EJIL	<i>European Journal of International Law</i>
ICLQ	<i>International &amp; Comparative Law Quarterly</i>

**Law Reports**

ILR	<i>International Law Reports</i>
ILM	<i>International Legal Materials</i>
IUSCTR	<i>Iran-US Claims Tribunal Reports</i>
RIAA	<i>Reports of International Arbitral Awards</i>

## TREATIES, NATIONAL LEGISLATION, CASES AND AWARDS

### Treaties and Other International Instruments

Abs-Shawcross Draft Convention on Investments Abroad, 1959.

Art. II

Accord entre la Confédération Suisse et la République Populaire Hongroise concernant la promotion et la protection réciproques des investissements, 5 October 1988.

Art. 1(2)(e)

Agreement between Japan and the State of Israel for the Liberalization, Promotion and Protection of Investment, 1 February 2017.

Agreement between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments, 29 April 1996 ('Canada-Ecuador investment treaty').

Art. XVIII(2)

Agreement between the Government of Great Britain, Northern Ireland and the Government of Malaysia, 21 May 1981.

Art. 1(1)(a)(v)

Art. 4(1)

Agreement between the Government of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment, 28 August 2016.

Art. 5(1)

Agreement between the Government of the Islamic Republic of Pakistan and the Government of the Italian Republic on the Promotion and Protection of Investments, 19 July 1997.

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hungarian People's Republic for the Promotion and Reciprocal Protection of Investments, 9 March 1987 ('UK-Hungary investment treaty').

Art. 1(a)

## XXIV TREATIES, NATIONAL LEGISLATION, CASES AND AWARDS

Art. 1(a)(iii)

Art. 1(a)(v)

Agreement between the Government of the Republic of Cyprus and the Government of the Hungarian People's Republic on Mutual Promotion and Protection of Investments, 24 May 1989.

Agreement between the Kingdom of the Netherlands and the Republic of Paraguay on Encouragement and Reciprocal Protection of Investments, 29 October 1992.

Art. 3(4)

Agreement between the Republic of the Philippines and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, 31 March 1997 ('Philippine-Swiss investment treaty').

Art. VIII(2)

Art. X(2)

Agreement between the Republic of Turkey and the Republic of Kazakhstan concerning the Reciprocal Promotion and Protection of Investments, 1 May 1992.

Preamble

Agreement between the Swiss Confederation and the Hungarian People's Republic on the Reciprocal Promotion and Protection of Investments, 5 October 1988.

Art. 1(a)

Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments, 11 July 1995.

Art. 3

Art. 4

Art. 5

Art. 6

Art. 7

Art. 9

Art. 10

Art. 11

Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, 29 April 1991.

Art. 3(1)

Agreement on the Promotion and Reciprocal Protection of Investments between the United Mexican States and the Kingdom of Spain, 10 October 2006.

Art. 4(1)



## TREATIES, NATIONAL LEGISLATION, CASES AND AWARDS XXV

Agreement on the Reciprocal Promotion and Protection of Investments between Oman and Yemen, 18 September 1998 ('Oman-Yemen investment treaty').

Art. 3

Association of South East Asian Nations (ASEAN) Comprehensive Investment Agreement, 26 February 2009 ('ACIA').

Art. 4(c)(v)

Art. 11(2)(a)

Art. 14(1)

Charter of Economic Rights and Duties of States, 12 December 1974.

China-Australia Free Trade Agreement, 17 June 2015.

Convention between Germany and Poland Relating to Upper Silesia, 15 May 1922.

Art. 6

Convention between the Government of the French Republic and the Government of the Federal Socialist Republic of Yugoslavia on the Protection of Investments, 28 March 1974.

Convention for the Establishment of the General Claims Commission, 8 September 1923.

Art. I

Art. II

Art. VIII

Convention on the Settlement of Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159 ('ICSID Convention').

Art. 52(1)

Draft Convention on Responsibility of States for Damage Done on Their Territory to the Person or Property of Foreigners, April 1929.

Art. 8(a)

Energy Charter Treaty, 17 December 1994, 2080 UNTS 95.

Art. 1(6)(f)

Art. 13

Art. 13(1)

EU-Canada Comprehensive Economic and Trade Agreement, 30 October 2016 ('CETA').

Art. 8.10

Art. 8.10(1)

Art. 8.10(2)

Art. 8.10(2)(a)

Art. 8.10(2)(c)

Art. 8.10(2)(e)

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