

Global Public Interest in International Investment Law

The strengths of international investment law – above all, a strong focus on investor interests and an effective adjudication and enforcement system – also entail its weaknesses: it runs the danger of impeding or even sanctioning the host states' legitimate regulatory interests and ignoring other fields of public international law. How does it cope with public interest concerns such as human rights, the environment, or the fight against corruption? At the heart of this book lies a fresh approach towards a general theory of such global public interest considerations in the investment realm. Delineating how and why those considerations matter, and why the current system does not accommodate them properly, Andreas Kulick fleshes out general principles and customary international law as defences the host state may raise against alleged investor rights infringements, and promotes proportionality as the appropriate balancing mechanism.

ANDREAS KULICK is currently finishing his Bar training at the Berlin Higher Regional Court (Kammergericht).

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Andreas Kulick

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Foreword

International investment agreements (otherwise known as BITs) deal, mostly if not exclusively, with the protection of foreign investment, and are generally seen as doing so from the perspective of investor rights. As it happens, unlike human rights treaties, they are not articulated as conferring substantive individual rights. But when combined with the powerful procedural tool of investor–state arbitration, that is their effect. However, as experience has shown and as fierce opposition to the creation of a multilateral framework has demonstrated, investment disputes often engage matters of the public interest, e.g. human rights, corruption, regulation of waste or chemicals, or more generally the environment. It is an unresolved question how well investment Tribunals are taking such factors into account.

Andreas Kulick, who has studied at Freiburg, Geneva, Berlin, New York and has received a Ph.D. from the University of Tübingen, finished the thesis on which this book is based at Cambridge’s Lauterpacht Centre. At the heart of his work is the (current and potential) influence of what he calls, in capitals, the Global Public Interest on international investment law and on the jurisprudence of the Tribunals. Borrowing from the Global Administrative Law movement and from Constitutionalization theory, he sees investment law as public law. Basing himself on a comparative analysis with European law and the European Convention on Human Rights, he argues that general (customary) international law and general principles of law can be employed by the host State as defences against investment claims; these should be balanced against each other according to the principle of proportionality. Of particular interest is how the defence of necessity (ILC Articles on State Responsibility, Article 25) has been used (or rejected) by the Tribunals as a means to serve the public interest.

His book seeks to draw out the pressing need for including public interest considerations in the realm of international investment law and to identify the challenges this entails. He focuses on three examples that epitomize this challenge: human rights, the environment and corruption.

Capitalised Concepts are not without their difficulties, and this is certainly true of the Global Administrative Law, which seems to posit a system of *vires* and nullity without any of the accompanying institutions or procedures of review. In the common law tradition, at least, modern administrative law was the consequence, not the cause, of such institutions and procedures. On the other hand, international law went for much of its life with few or no institutions and with rudimentary procedures, yet it managed to generate general and constraining ideas. There is no reason to assume such potentiality has disappeared. While one might prefer to induce public interest on a case-by-case basis, a more *a priori* method may serve – and certainly Andreas Kulick presents a good argument for it. This is a welcome addition to the literature on international investment law at a time when the general and the particular are actively contesting the field.

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A Ph.D. thesis is a long-term project. This one has been no exception. That it came to life and that it eventually crystallized into the book the esteemed reader now holds in his or her hands is due to inspiration and support of various kinds and from various sources. Without them there would be a much weaker or even no book at all. Both people and institutions have contributed to its successful conclusion, to whom and which I owe the utmost gratitude.

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I had the great privilege to find time and inspiration to write in the New World as well as in the old. Hence, I am grateful to Professors José Alvarez and Robert Howse of New York University School of Law, who introduced me to the world of international investment law during my LL.M. year at NYU, and particularly to Professor James Crawford, SC, FBA of Cambridge University, who gave me the opportunity to find a peaceful and inspiring environment at the Lauterpacht Centre for International Law in the spring of 2010 and wrote such a learned foreword to this book.

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Andreas Kulick

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