

REASSERTION OF CONTROL OVER THE INVESTMENT TREATY REGIME

Driven by public opinion in host States, Contracting Parties to investment agreements are pursuing many avenues in order to curb a system that is being perceived – correctly or not – as having run out of control. *Reassertion of Control over the Investment Treaty Regime* is the first book of its kind to examine the many issues of procedure, substantive law and policy which arise from this trend. From procedural aspects such as early dismissal of claims, the establishment of appeals mechanisms or State-State arbitration to substantive issues such as joint interpretations, treaty termination or detailed definitions of standards of protection, this book identifies and discusses the main means by which States do or may reassert their control over the interpretation and application of investment treaties. Each chapter tackles one of these avenues and evaluates its potential to serve as an instrument in States' reassertion of control.

ANDREAS KULICK is a senior research fellow at Eberhard Karls University Tübingen. He has published extensively on various aspects of public international law, including a previous monograph, *Global Public Interest in International Investment Law* (Cambridge University Press, 2012). He has advised and represented States with regard to various matters of public international law before international courts and tribunals, as well as before domestic courts.

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Edited by Andreas Kulick

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CONTENTS

List of Contributors page vii
Preface xi

**PART I Introduction, Theory and Domestic Law
Approaches 1**

1 Reassertion of Control: An Introduction 3
ANDREAS KULICK
2 Masters and Guardians of International Investment Law:
How to Play the Game of Reassertion 30
MARTINS PAPARINSKIS
3 Reassertion of Control and Contracting Parties' Domestic
Law Responses to Investment Treaty Arbitration: Between
Reform, Reticence and Resistance 53
MAVLUDA SATTOROVA

**PART II Procedural Aspects and Avenues
of Reassertion 81**

4 Early Dismissal of Claims in Investment Arbitration 83
FRIEDRICH ROSENFELD
5 Keeping the Status Quo or Embarking on a New Course?
Setting Aside, Refusal of Enforcement, Annulment and
Appeal 103
FREYA BAETENS
6 State-State Investment Arbitration as a Means of Reassertion
of Control: From Antagonism to Dialogue 128
ANDREAS KULICK

**PART III Substantive Aspects and Avenues
of Reassertion 153**

- 7 Masters of Puppets? Reassertion of Control through Joint
Investment Treaty Interpretation 155

ELENI METHYMAKI AND ANTONIOS
TZANAKOPOULOS

- 8 Systemic Integration: An Instrument for Reasserting the
State's Control in Investment Arbitration? 182

RUMIANA YOTOVA

- 9 Reasserting Control through Withdrawal from Investment
Agreements: What Role for the Law of Treaties? 209

FERNANDO LUSA BORDIN

- 10 Legitimate Regulatory Interests: Case Law and
Developments in IIA Practice 230

PAUL BARKER

- 11 State Controls over Available Remedies in Investor-State
Arbitration 259

DIANE A. DESIERTO

**PART IV Reassertion of Control: Policy
and Trends 283**

- 12 States' Reassertion of Control over International
Investment Law: (Re)Defining 'Fair and Equitable
Treatment' and 'Indirect Expropriation' 285

ERIC DE BRABANDERE

- 13 How the European Commission and the EU Member States
are Reasserting Their Control over Their Investment
Treaties and ISDS Rules 309

NIKOS LAVRANOS

- 14 Arbitrator Selection: Towards Greater State
Control 333

MICHAEL WAIBEL

- 15 Arbitrator (Issue) Challenge: What's the Real Issue? 356

STEPHAN WILSKE AND MELANIE ECKARDT

Index 382

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ix

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PREFACE

This book, as many books, has taken a long journey from its first inception to eventual publication. First ideas regarding a project on States' reassertion of control over investment treaties and investment arbitration ripened in the spring of 2014, when I was still working as a full-time practitioner, and academic endeavours were, at the time, reserved for weekends or late nights. What appeared to be a growing trend then, in early 2014, seems to be an almost all-pervasive phenomenon in late 2016. Driven by public opinion turning from indifference towards investment protection and investor-State dispute settlement to scepticism or even fierce opposition, Contracting Parties to investment agreements are pursuing many avenues in order to curb a system that is being perceived – correctly or not – as having run out of control. What are these avenues? How do Contracting Parties pursue them? What is their potential for reasserting control over the investment treaty regime? What are the limits that public international law sets to their pursuit? This book offers answers to these and many other questions pertaining to Contracting Parties' reassertion of control. To my knowledge, it is the first one to do so systematically, from a distinctively doctrinal perspective and with a view towards covering the crucial doctrinal and theoretical issues of the phenomenon of reassertion. Its contributions focus on the various avenues to reassert control and evaluate their viability through the lens of public international law – in particular, albeit far from exclusively, the law of treaties. For this purpose, it takes an almost monographical approach – with a plurality of authors – in targeting the most pertinent issues of reassertion of control over the investment treaty regime with respect to theoretical, procedural, substantive and policy issues.

I am proud to say that for this task I have assembled a brilliant team of authors who come from a variety of different academic and professional backgrounds and who hold a variety of different views on international investment law and arbitration: academics and practitioners, investment law specialists and general public international lawyers, investment

arbitration enthusiasts and investment arbitration sceptics, among others. The result is, so I hope the esteemed reader agrees, an edited volume that offers new insights into this now all-pervasive phenomenon of reassertion of control by tackling the pivotal doctrinal and theoretical questions emerging from the various approaches and avenues that Contracting Parties do or might consider.

This book has profited from various sources of support. First and foremost, I extend my utmost gratitude to the German Academic Research Association (Deutsche Forschungsgemeinschaft (DFG)), which provided funding for this project. Such funding permitted financing, *inter alia*, access to specialised databases that considerably enhanced and facilitated the research, as well as a considerable amount of the costs of the authors' workshop I had the honour of organising and presiding over at Hohentübingen Castle in June 2015. Further, I wish to thank the Juristische Gesellschaft Tübingen e.V., particularly its president, Professor Dr Hermann Reichold, and Gleiss Lutz, for additional funding of the workshop; Michel Boven and Björn Ebert for their organisational support; and, of course, all participants of the workshop for spirited and inspiring discussions that further shaped the project. My academic mentor, Professor Dr Martin Nettesheim, inspires me every day with his academic and intellectual brilliance, inquisitiveness and innovation to push my own boundaries. He permitted me to pursue this project among many other academic extravagancies. Ms Isolde Zeiler and Mr Xu Tengfei were of great assistance with the proofreading. Parts of the work on the manuscript, including work on copy-editing and proofreading, were completed during research visits at the Lauterpacht Centre for International Law and the NYU School of Law in the late summers of 2015 and 2016, respectively. I thank both institutions for their hospitality and their vibrant intellectual communities. Finally, I extend my gratitude to Cambridge University Press's anonymous readers, who provided very valuable and thought-provoking comments at the peer-review stage, and last but certainly not least, I thank Elizabeth Spicer of Cambridge University Press, who supported this project from the very beginning and helped to turn it from a few sketchy ideas into the book the esteemed reader holds in his or her hands.

*Andreas Kulick
September 2016*