International Investment Law and Arbitration
SECOND EDITION

International investment law and arbitration form a rapidly evolving field, and can be difficult for students to acquire a firm understanding of, given the considerable number of published awards and legal writings. The first edition of this text, cited by courts in Singapore and Colombia, overcame this challenge by interweaving extracts from these arbitral decisions, treaties and scholarly works with concise, up-to-date and reliable commentary. Now fully updated and with a new chapter on arbitrators, the second edition retains this practical structure, along with carefully curated end-of-chapter questions and readings. The authors consider the new chapter an essential revision to the text, and a discussion that is indispensable to understanding present calls for reform of investment arbitration. The coverage of the book has also been expanded, with the inclusion of over sixty new awards and judicial decisions, comprising both recent and well-established jurisprudence. This textbook will appeal to graduates studying international investment law and international arbitration, as well as being of interest to practitioners in this area.

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International Investment Law and Arbitration

COMMENTARY, AWARDS AND OTHER MATERIALS

Second Edition

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Foreword to the Second Edition

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 20 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.

Since the publication of the remarkable first edition in April 2018, this book has already been cited with approval by the Constitutional Court of Colombia and by the Court of Appeal of Singapore. The second edition, which promises to be as impactful as the first, will continue to be an indispensable resource and an important contribution to the mastery of a prominent discipline.

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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.
Preface to the Second Edition

The aim of the second edition remains that of the first. We are grateful to our colleagues in the law school teaching profession for adopting the first edition, which appeared just less than three years ago. When Cambridge University Press requested a new edition so swiftly, we did not hesitate due to the rapid, even clamorous, movements in the field.

The second edition is expanded slightly with a new chapter, Chapter 7, by Lim and Paparinskas on arbitrators, not least as the authors feel that this discussion is indispensable to an understanding of present calls for reform of investment arbitration. The concerns with a small club, double-hatting and repeat appointments go to the heart of the reform debate. Accordingly, the numbering of previous chapters has shifted, the old Chapter 7 having become Chapter 8 and so on, and there are now twenty rather than nineteen chapters. That apart, and as before, Lim was tasked with what now are Chapters 1, 4, 9, 12, 15, 18, 19 and 20, Ho with Chapters 2, 3, 6, 8, 10, 11, 14 and 17, and Paparinskas with what now are Chapters 5, 13 and 16. Altogether, over sixty new awards and judicial decisions have been added in this second edition. They consist not simply of those that have appeared since the publication of the first edition, but at times as an attempt to expand upon the coverage of the book, and consequently the stock of awards and judgments.

Chapter 1 remains largely unchanged. Chapter 2 contains new text on the involvement of indigenous communities as stakeholders in investment contracts, while Chapter 3 tracks new developments in treaty redesign and the further inroads made into the establishment of a multilateral investment court, the possible replacement of treaty protection with domestic legislation in the form of South Africa’s Protection of Investment Act (Act No. 22 of 2015, Official Gazette, Vol. 606, No. 39514), the impact of COVID-19 on increasingly prominent issues such as investor responsibility and questions about whether investment treaties remain an appropriate tool for investment protection. Chapter 3 also touches now on the mass termination of intra-EU bilateral investment treaties. Chapter 4 now includes discussion of the US–Mexico–Canada Agreement and Swissbourgh Diamond Mines (Pty) Ltd. v. Kingdom of Lesotho [2018] SGCA 81.

The discussion of jurisdiction and admissibility in Chapter 5 was cited by the Singapore Court of Appeal in Swissbourgh Diamond Mines (Pty) Limited and Others v. Kingdom
of Lesotho [2018] SGCA 81 and in BBA & Others v. BAZ [2020] SGCA 53. Both cases are discussed in this second edition. Other cases newly excerpted include the curious Oded Besserglik v. Mozambique, ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019, where the non-existence of the treaty instrument providing consent was only discovered at a very late stage, and Orascom TMT Investments S.à r.l. v. Algeria, ICSID Case No. ARB/12/35, Award, 31 May 2017. This last provides an important gloss to Ampal–American Israel Corp. and Others v. Egypt, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016, which had dominated discussion of the parallel proceedings jurisprudence in the previous edition. Chapter 6 retains the form and substance of the first edition.

Chapter 8 now includes Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, Decision on Respondent's Application to Dismiss the Claims (With Reasons), 10 November 2017 as authority against a ‘shifting’ burden of proof, and fleshes out the operation and drawbacks of a malleable standard of proof which tribunals appear to apply when confronted with allegations of fraud and corruption on the part of both investors and States with reference to Bernhard Friedrich Arnd Rüdiger von Pezold and Others v. Zimbabwe, ICSID Case No. ARB/10/15, Award, 28 July 2015, EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award, 8 October 2009, Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, and Spentex Netherlands, B.V. v. Republic of Uzbekistan, ICSID Case No. ARB/13/26, Award, 27 December 2016. Chapter 9 remains essentially unchanged.

Chapter 10 delves now into the increasingly controversial objective criterion of capital contribution for the establishment of a protected investment. This has been held by some tribunals to require an active investment by the claimant. The debate over the eligibility of passive investments for treaty protection is borne out in a discussion of Alapli Elektrik B.V. v. Republic of Turkey, ICSID Case No. ARB/08/13, Award, 16 July 2012, Anglo-Adriatic Group Limited v. Republic of Albania, ICSID Case No. ARB/17/6, Award, 7 February 2019, Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplan v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, Standard Chartered Bank v. The United Republic of Tanzania, ICSID Case No. ARB/10/12, Award, 2 November 2012 and Clorox Spain S.L. v. Bolivarian Republic of Venezuela, PCA Case No. 2015–30, Award, 20 March 2019.

Chapter 11 now includes an extended discussion of the eligibility of dual nationals for treaty protection. It places the spotlight on the recent award in Michael Ballantine and Lisa Ballantine v. The Dominican Republic, PCA Case No. 2016–17 (UNCITRAL), Final Award, 3 September 2019. The chapter now follows up on the previous discussion of ‘divisible investors’ with the recent publication of Lao Holdings v. Laos, ICSID Case No. ARB(AF)/12/6, Award, 6 August 2019 and Sanum Investments Ltd v. Government of Laos, UNCITRAL, PCA Case No. 2013–13, Award, 6 August 2019. It explains how these awards enhance the risk of double recovery when claims by ‘divisible investors’ are entertained.

The discussions of fair and equitable treatment in Chapter 12, as with those on national treatment and most-favoured-nation treatment in Chapter 13, were cited in 2019 by the Colombian Constitutional Court in Judgment C-252/19. Additions now made to Chapter
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12 include Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, 4 May 2017, where the tribunal links the stability and transparency requirements in the Energy Charter Treaty, and also the stability requirement with the investor’s legitimate expectations. The tribunal in Anglo American plc v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019 has since referred to the question of linking the fair and equitable treatment standard to a minimum customary standard as ‘sterile’, while at the same time supporting the view that the minimum standard of treatment under international custom has evolved. The tribunal also lent support to the view, discussed in the earlier edition, that the full protection and security standard extends beyond the assurance merely of physical security, and that it includes an assurance of legal stability.

Chapter 14 as it is now elaborates on the concept of expropriation with reference to Waste Management Inc. v. Mexico (‘No. 2’), ICSID Case No. ARB(AF)00/3, Award, 30 April 2004, and on the exercise of a State’s police powers with reference to Emanuel Too v. Greater Modesto Insurance Associates, Award, 29 December 1989, 23 Iran–United States Cl. Trib. Rep. 378. Chapter 14 also contains a new section on judicial expropriation which reproduces and critiques excerpts from a series of awards, namely Saipem v. Bangladesh, ICSID Case No. ARB/05/07, Award, 30 June 2009, Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/16, Award, 6 July 2012, Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, Award, 19 December 2016 and Krederi Ltd. v. Ukraine, ICSID Case No. ARB/14/17, Award, 3 July 2018.

Chapter 15 on umbrella clauses has sought to include WNC Factoring Ltd v. The Czech Republic, PCA Case No. 2014–34, Award, 22 February 2017 in respect of a requirement of privity between Claimant and Respondent.

The law of defences, now in Chapter 16, will also be tested in the coming years by COVID-19-related claims. In this edition, the most significant addition is the duo of Indian telecommunication cases, discussing similar facts and prima facie similar rules but reaching very different conclusions on the point concerning the applicability of treaty exceptions: CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India, PCA Case No. 2013–09, Award on Jurisdiction and Merits, 25 July 2016 and Deutsche Telekom AG v. India, PCA Case No. 2014–10, Interim Award, 13 December 2017. A reminder, if one was needed, that the law of crises has moved on since the Argentinian decisions. Chapter 17 retains the form and substance of the first edition.

In the costs chapter (now Chapter 18) the available figures have been updated, and we have included EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic, ICSID Case No. ARB/14/14, Award, 18 August 2017, where the tribunal considered the complexity of the legal issues, a factor which should be taken into account in cost allocation. This complements the broader view that a party should not be penalised on costs when the claim raises a novel legal issue. In the very recent decision in Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan, ICSID Case No. ARB/18/35, Decision on the Respondent’s Request for Security for Costs and the Claimant’s Request for Security for Claim, 27 January 2020, the tribunal rescinded
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its own previous order for security notwithstanding the existence of third-party funding. A comparison is to be drawn with the order in *RSM Production Corp. v. St Lucia*, ICSID Case No. ARB/12/10, Decision on St Lucia’s Request for Security for Costs, 13 August 2014, which, as a landmark ruling, had been dominant in the previous edition’s discussion of the subject.

Chapter 19 (Challenging and Enforcing Awards) now includes *Capital Financial Holdings Luxembourg SA v. République du Cameroun*, ICSID Case No. ARB/15/18, Award, 22 June 2017, which contains some attempt to clarify the ‘Salini’ criteria. Two new English judgments have been added. The first is *GPF GP S.à.r.l. v. The Republic of Poland* [2018] EWHC 409, which gives an example of an application under s. 67 of the Arbitration Act of 1996 in respect of an investment tribunal’s award on jurisdiction. The second is the Supreme Court decision in *Micula and others v. Romania* [2020] UKSC 5. We have also been able to include *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Spain*, ICSID Case No. ARB/13/36, Decision on Annulment, 11 June 2020. It opens up two fronts, simultaneously, in respect of challenges against arbitrators and annulment on the ground of improper constitution of the tribunal.

Finally, in Chapter 20 (New Directions), quite apart from the discussions on creation of a multilateral investment court (MIC) in UNCITRAL Working Group III, the provisions in the EU–Canada Comprehensive Economic and Trade Agreement, the EU–Vietnam Investment Protection Agreement and the EU–Singapore Investment Protection Agreement that are relevant to that discussion have been included. Be that so, it remains the EU proposed text in connection with the moribund trans-Atlantic trade and investment Partnership (TAPI) which is excerpted. Analogous provisions in CETA, as well as in the EU–Vietnam and EU–Singapore IPAs are referred to and discussed. Something needed to be, and is, said about the new US–Mexico–Canada Agreement.

Aside from that, there are other developments which have also been reflected throughout the new edition. For example, the previous edition contained several references to – and excerpts from – the Trans-Pacific Partnership. Some of these have been retained. However, references have now been added to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which came into force on 30 December 2018. Perhaps the most important thing to note in terms of key differences in the substantive application of the CPTPP as compared with the TPP is that the TPP’s clauses on investment agreements have been suspended under the CPTPP. Because, by and large, common provisions remain between the two treaty texts due to the wide harvesting in the CPTPP and transplantation of the TPP’s parts as an organ donor, in such excerpts that refer both to the TPP and CPTPP a slash (/) symbol is used, as in ‘Trans Pacific Partnership Agreement/Comprehensive Agreement for Trans-Pacific Partnership’. Elsewhere, reference is made simply to CPTPP.

We hope this new and expanded edition will prove as useful as the first, and we have endeavoured to take account of developments, and to state the law, as they appeared to us on 30 June 2020.
Acknowledgments

FIRST EDITION

With the usual caveat, we would like to express our immense gratitude to Finola O’Sullivan, Marta Walkowiak, Caitlin Lisle and Valerie Appleby at Cambridge University Press, without whose initial encouragement and enthusiasm, subsequent patience, forbearance, experience and expert guidance this book would not have been possible. We are likewise grateful to Sophie Rosinke and Amy Mower of Cambridge for their consummate professionalism during the copyediting and proofing stages. We would like to thank Chao Junqing at the University of Hong Kong and Alastair Simon Chetty at the National University of Singapore for their research and editorial assistance, and also Cheng Chi, now in practice, who provided much-needed assistance during the early stages of the book. Finally, we thank our students in Hong Kong, Singapore and London. Hopefully they will discover both things that are familiar as well as some improvements in this book. C. L. Lim acknowledges with gratitude Hong Kong University’s grant of leave, the Class of ’61’s generosity which made a Lionel Astor Sheridan Visiting Professorship possible at the National University of Singapore and the support of King’s College, London, the Shanghai 1000 Plan, Professor Zhang Lei and SUIBE, Shanghai. Jean Ho would like to acknowledge partial funding support from the Singapore Ministry of Education Academic Research Fund Tier 1 (WBS No. R-241-000-156-115).

SECOND EDITION

In respect of the preparation of this second edition, the authors are grateful to Yuanyuan Zhang and Xueji Su in Hong Kong, and also to Zhao Jingtong in Singapore. They have provided valuable assistance in one way or another.
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