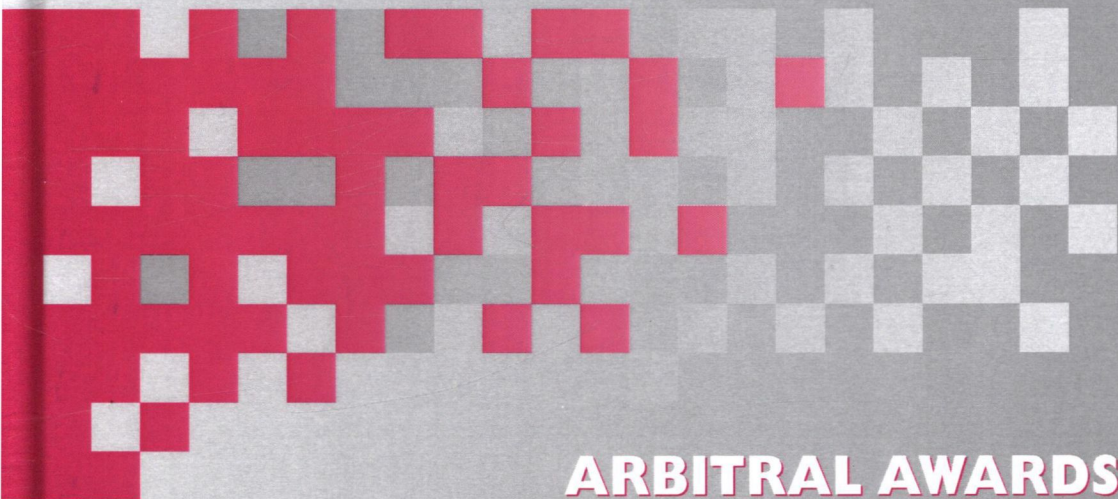


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**ARBITRAL AWARDS
AS INVESTMENTS**
TREATY INTERPRETATION AND
THE DYNAMICS OF INTERNATIONAL
INVESTMENT LAW

MAXIMILIAN CLASMEIER



Wolters Kluwer

ARBITRAL AWARDS AS INVESTMENTS

Treaty Interpretation and the Dynamics of International Investment Law

MAXIMILIAN CLASMEIER

The rise of international investment arbitration has resulted in the emergence of a number of intriguing legal and political challenges. One of those is the question of whether or not arbitral awards may constitute investments pursuant to existing investment treaties. In approaching the problem, it is the interconnection between theory and practice that delivers solutions. This book presents the first detailed analysis of the existing tribunals' approaches to date. In examining the principles of treaty interpretation, their application in arbitral practice, shortcomings and their ramifications and possible routes to improvement, the book addresses the following questions:

- What is the foundation of interpretation in public international law and when is it adequately carried out?
- Can arbitral awards constitute investments, offering relief from frustrated enforcement attempts?
- Is there a trend of convergence of commercial and investment arbitration?
- Do respective interpretative outcomes stem from adequate interpretation?
- What are the ramifications, if interpretation is not fully adequate?
- What are the feasible routes to greater interpretive discipline?

The book is mindful of the underlying public international law principles, such as state sovereignty and the increasing legal and political dynamics of international investment law.

This is the first in-depth treatise on arbitral awards' qualification as investments within international investment law. Its detailed analysis of the interpretive approaches, their foundation and consequences will, from a theoretical and practical point of view, prove of great value to international tribunals, counsel and sovereign entities.

Maximilian Clasmeier has gained international arbitration experience in the dispute resolution practices of international law firms in Frankfurt, Düsseldorf and Singapore and worked for the World Bank Group in Washington, D.C.

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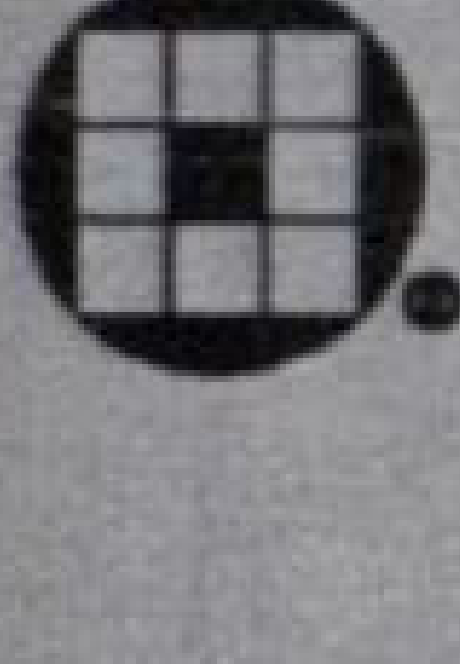


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Arbitral Awards as Investments

International Arbitration Law Library

VOLUME 39

Editor

Professor Julian D.M. Lew QC has been involved with international arbitration for more than 40 years as counsel, as arbitrator and as an academic. He has held the position of Professor and Head of the School on International Arbitration, Centre for Commercial Law studies, Queen Mary University of London since its creation in 1985. He is now an independent arbitrator at 20 Essex Street, London.

Introduction

Since its first volume published in 1993, this authoritative practitioner-oriented series has published in-depth and analytical works on niche aspects of international arbitration, authored by specialists in the field.

Objective

This authoritative and established series covering in-depth analyses of niche areas appeals to both practitioners and academics.

Frequency

A volume is published whenever an interesting topic presents itself.

The titles published in this series are listed at the end of this volume.

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Dissertation zur Erlangung des akademischen Grades eines Doktors der Rechte
(Dr. iur.) der Juristischen Fakultät der Heinrich-Heine-Universität Düsseldorf

Erstgutachter: Prof. Dr. R. Alexander Lorz, LL.M. (Harvard)

Zweitgutachter: Prof. Dr. Siegfried H. Elsing, LL.M. (Yale)

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Meinen Eltern
To my parents

About the Author

Maximilian Clasmeier has studied law at the University of Münster, the University of Barcelona, the National University of Singapore and the University of Düsseldorf. He has completed his legal traineeship at the Higher Regional Court (Oberlandesgericht) Frankfurt, Germany and has gained experience in international arbitration and litigation in Düsseldorf, Frankfurt and Singapore as well as with the World Bank in Washington, DC.

Foreword

International investment law and investment arbitration as the primary means to resolve disputes stemming from the former have, especially in Europe, become a focal point of a heated public debate. It is an unfortunate reality that this debate is oftentimes fueled by incomplete or even false information. Therefore, thorough legal analyses within the realm of this dynamic field of public international law are ever more needed. From a political perspective, they provide the starting point for countering improper allegations against the field; from a legal perspective, they must be seen either as an opportunity to improve the functioning of international investment law mechanisms where the criticism hits a point or as assurance that the criticism is unfounded. In any case, however, legal analyses within international investment law as in any other field of law are indispensable for theory and practice alike.

Vital to the operations of any investment tribunal is the determination of a dispute as one arising out of an “investment.” Despite its immense importance, tribunals can mostly not avail themselves of a definition of the term that will easily clarify whether or not an investment is really at hand. Rather, it is the interpretation of the underlying treaties that will lead tribunals to the determination. This operation becomes especially challenging where investment and commercial arbitration intersect. When a foreign investor encounters a dispute with another company (e.g., owned by the host state) within the territory of that host state, secures a commercial arbitral award and fails to enforce the latter before the courts as a result of host state interference, the intersection between commercial and investment arbitration is by no means a rare occurrence. If that commercial arbitration award is then protected by the guarantees given by the host state within the framework of an investment treaty or contract, investment arbitration may be an avenue of legal recourse. Once again, however, that recourse can only be successful if the arbitral award may be qualified as an “investment.”

This question has so far not been addressed in utmost depth. Therefore, the book at hand constitutes an important contribution to further development of legal analysis in this exciting field. The author analyzes if, and under which circumstances, arbitral tribunals are likely to find arbitral awards to fall under an applicable investment definition and thereby enriches theory and practice of international investment law

alike. The book approaches the existing decisions on the matter clearly and concisely, guiding the reader through differences and similarities. It is particularly noteworthy that the author considers the perspectives of both the investor and the host state. The analysis is mindful of the ramifications of possible interpretive insufficiencies and highlights the utterly important consequences of the respondent to an investment arbitration being a sovereign state. The book is thus a strong reminder of the relevance of core public international law principles such as state sovereignty within disputes, regardless of the apparent sophistication of an interpretive question.

Additionally, it does not stop at pointing to certain interpretive insufficiencies. Rather, it seeks reasons for these insufficiencies and carves out potential elements of their impact on treaty interpretation. These may be trends of convergence between international commercial and investment arbitration, tendencies to protect arbitration within public international law and similar progression within international investment law itself. The analysis thereby provides new insights into the broader environment in which international investment arbitration nowadays operates. As a result, the reader receives a balanced perspective on the criticism voiced towards treaty interpretation within international investment arbitration as well as various possible solutions to existing problems.

Besides its contribution to the theoretical context of the public sphere in which international investment arbitration functions, the book appeals especially to practitioners of international arbitration. It assists tribunals and counsel alike as a useful reference in determining if and under which circumstances an arbitral award may be qualified as or like an investment and thereby enjoys protection under investment treaties or contracts. At the same time, it is a similarly useful guide for state actors in the process of treaty negotiations. By stressing the importance of treaty drafting, the possible effects of a particular wording or trends within international investment law in an exemplary manner apart from one single practical issue, it serves as a valuable resource for sovereigns in assessing the effects of their conduct at an early stage.

Prof. Dr. R. Alexander Lorz, LL.M. (Harvard)

List of Abbreviations

ASEAN	Association of Southeast Asian Nations
ASEAN-ANZ-FTA	Association of Southeast Asian Nations, Australia and New Zealand Free Trade Agreement
BIT	Bilateral Investment Treaty
CAFTA-DR	Dominican Republic-Central America-United States Free Trade Agreement
DIS	Deutsche Institution für Schiedsgerichtsbarkeit
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECT	Energy Charter Treaty
EPA	Environmental Protection Agency
EU	European Union
FCN	Friendship, Commerce and Navigation
FIDIC	International Federation of Consulting Engineers
FTA	Foreign Trade Agreement
GAFTA	Grain and Feed Trade Association
GATS	General Agreement on Trade in Services
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
IDA	International Development Association
IFC	International Finance Corporation

List of Abbreviations

LCIA	London Court of International Arbitration
MIGA	Multilateral Investment Guarantee Agency
MIT	Multilateral Investment Treaty
MTBE	Methyl Tert-Butyl Ether
NAFTA	North American Free Trade Agreement
NYC	New York Convention
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SADC	South African Development Community
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
SORTAMAR	Société Mixte de Transports Maritimes
TFEU	Treaty on the Functioning of the European Union
TRIMS	Trade-Related Investments Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization