THE OXFORD HANDBOOK OF

INTERNATIONAL INVESTMENT LAW

Edited by

PETER MUCHLINSKI

FEDERICO ORTINO

AND

CHRISTOPH SCHREUER

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PREFACE

This volume is the product of the work of the International Law Association's Committee on the International Law on Foreign Investment. Its aim is to provide a representative overview of the most significant issues that arise in the field. The Committee first designed an outline of topics attempting to cover the various areas of international investment law as comprehensively as possible. These topics were then assigned to individual Committee members. Although each chapter is primarily the author's responsibility the volume as a whole is very much a joint effort of the Committee. More than one third of the contributions were written jointly by two authors. (In some cases non-members of the Committee were invited to act as co-authors). Each paper was assigned to one or more readers who provided comments and suggestions on early drafts. Most papers were discussed at Committee meetings leading to further revisions by authors.

Not surprisingly, the overall concept underwent revisions as the project developed. The final product offers thirty-one contributions in three major sections. These three sections address: (a) fundamental issues arising out of the nature, structure, sources and definitions of international investment law (including policy and objectives, applicable law and links to other areas of international law and international trade regulation); (b) substantive issues such as admission, standards of treatment, expropriation, taxation, most-favoured-nation (MFN), emergencies, insurance, corruption and corporate social responsibility; and (c) procedural issues mainly concerning the process of investor-state arbitration.

Unlike international trade, foreign investments typically involve a longer term presence and exposure to influences and interferences by the host state's authorities. The corresponding need for security has led to an elaborate system of protection that is contained in multilateral and bilateral treaties, in customary international law, in domestic statutes and in contracts between states and foreign investors. The case law of arbitral tribunals has also contributed substantially to the development of the law in this field.

Investors and host states share a mutual interest in this legal framework. The investor looks for the stability and certainty that will permit rational business planning and will protect the investment, once made, from adverse interferences of a political nature. Host states, eager to attract investments seek to project an image of security and predictability. As an arbitral tribunal once put it: 'to protect investments is to protect the general interest of development and of developing countries.'[1] The

[1] *Amco v Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389, at para 23.

host state's advantages from international investment law are not merely economic. Standards of due process and good governance required for foreign investment may spill over into domestic law and may set new standards also for the domestic legal system. In addition, settlement of disputes through investor-state arbitration is likely to improve the political climate between the states concerned. It averts diplomatic protection by states on behalf of their nationals, a source of frequent friction between states in the past.

The traditional dichotomy between industrialised countries as home states of investors and developing countries as host states of investments has been overtaken by developments. This is demonstrated by the growing number of bilateral investment treaties between developing countries. More and more countries are becoming aware of their dual role as recipients of foreign investments and as home countries of investors acting abroad. Thus the recent treaty practice of the United States shows signs of a shift toward positions protecting its interest as a recipient of foreign investments. In turn, the PR China has changed its treaty practice towards a more effective protection of its investors abroad. Therefore, the once clearly competing interests of different states are converging.

What this means for the future development of international investment law is not entirely clear. While the number of treaties is growing apace, there are also increasing voices of criticism that point to the unbalanced nature of first generation agreements. These criticisms arise on two main levels. First, it is only the host country that carries binding obligations towards investors under existing treaties. There is no reciprocal requirement for the investor to carry responsibilities. Nor is the home country required to act in any particular way. Thus the existing regime is seen by some as privileging investors over host countries. Secondly, international investment arbitration has been criticised for being non-transparent, inconsistent, unreliable and unpredictable, often leading to very large awards against host countries that may be developing or transitional countries barely able to afford such financial burdens. In addition the legitimacy of an internationalised system of dispute settlement has been questioned by reason of its carrying significant powers of review of national administrative action, but which is not subject to full systems of accountability and appeal, as is the case with a system of judicial tribunals. Both of these criticisms are addressed throughout the volume, though, as will be apparent, different authors have taken different positions on them. In this, the volume reflects the ongoing debates about the direction and evolution of the system of international investment law, as well as providing guidance upon some of the more technical substantive and procedural legal issues currently before arbitral tribunals.

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PM
FO
CS

List of Contributors

Pia Acconci, Associate Professor of European Union Law and International Law, University of Teramo, Italy

Alan S Alexandroff, Research Director, Program on Conflict Management and Negotiation, University of Toronto

Stefan D Amarasinha, Directorate General for Trade, European Commission

Vladimír Balaš, Lecturer in International Law, Charles University, Prague

Andrea K Bjorklund, Acting Professor, School of Law, University of California, Davis

Joachim Delaney, Clifford Chance LLP, London

Ignacio Gómez-Palacio, Founding Partner, Gómez-Palacio y Asociados, Mexico City; Professor, School of Law, Universidad Iberoamericana

Dorothee Gottwald, Desk officer, Federal Ministry of the Interior, Berlin

Louis-Philippe Gratton, Teaching and Research Assistant, University of Lausanne; PhD Candidate, Université Toulouse 1—Sciences Sociales, France

Todd Grierson-Weiler, Adjunct Professor, Faculty of Law, University of Calgary and the Washington College of Law

Moshe Hirsch, Arnold Brecht Professor in European Law, Faculty of Law and Department of International Relations, Hebrew University of Jerusalem

Kaj Hobér, Partner, Mannheimer Swartling, Stockholm; Professor of East European Commercial Law, Uppsala University

Anne K Hoffmann, Rechtsanwältin (Germany) and Solicitor (England and Wales), Python & Peter, Geneva

Juliane Kokott, First Advocate General, Court of Justice of the European Communities

Abba Kolo, Lecturer in Energy and Investment Law, Centre for Energy Petroleum and Mineral Law and Policy, University of Dundee, Scotland

Akira Kotera, Professor, Graduate School of Public Policy, University of Tokyo

Ian A Laird, Special Legal Consultant, Fulbright & Jaworski LLP, Washington, DC

Daniel Barstow Magraw, President, Center for International Environmental Law, Washington, DC

Loretta Malintoppi, Of Counsel, Eversheds, Paris

Giuditta Cordero Moss, Professor, Institute of Private Law, University of Oslo

Peter Muchlinski, Professor in International Commercial Law, School of Oriental and African Studies, London

Federico Ortino, Reader in International Economic Law, King's College London

Asif H Qureshi, Professor of International Economic Law, Law School, University of Manchester

Hilmar Raeschke-Kessler, Rechtsanwälte beim Bundesgerichtshof, Karlsruhe; Honorary Professor, University of Cologne, Germany

August Reinisch, Professor of International and European Law, University of Vienna; Professorial Lecturer, Bologna Center of SAIS/Johns Hopkins University

Borzu Sabahi, Adjunct Professor of Law, Doctoral (SJD) Candidate, Georgetown University Law Centre, Washington, DC

Engela C Schlemmer, Professor of Law, Department of Constitutional, International and Indigenous Law, School of Law, University of South Africa

Christoph Schreuer, Professor, University of Vienna; Chair, ILA International Law on Foreign Investment Committee

Audley Sheppard, Partner, Clifford Chance LLP; Rapporteur of the ILA International Arbitration Committee (1996–2006)

Ole Spiermann, Professor, Faculty of Law, University of Copenhagen

Jacomijn J van Haersolte-van Hof, Advocaat and Counsel, Freshfields Bruckhaus Deringer, Amsterdam

Thomas W Wälde, Professor and Jean-Monnet Chair, Centre for Energy Petroleum and Mineral Law and Policy, University of Dundee, Scotland; Essex Court Chambers

Matthew Weiniger, Partner, Herbert Smith LLP, London

Friedl Weiss, Professor of European Law and International Economic Law, University of Vienna

David AR Williams QC, Barrister, Bankside Chambers, Auckland, New Zealand; Essex Court Chambers, London

Katia Yannaca-Small, Legal Advisor on International Investment, OECD, Paris

Andreas R Ziegler, Professor, Faculty of Law and Criminal Sciences, University of Lausanne

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