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Law and Practice of Investment Treaties

Standards of Treatment

By

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Authors' Preface

There have been significant developments in investment treaty law and practice over the past twenty years. Since 1990, the date of the first investor-state arbitral award under a modern investment treaty, the growth in the number of investment treaties and treaty disputes has been exponential. This book, drawing on the authors' academic and professional expertise, examines the origins and evolution of investment treaty law and practice, the law applicable to investment treaty disputes, and substantive investment law issues: standards of treatment and exceptions and defences to treaty obligations. Our aim is to provide a systematic, comprehensive and detailed statement of the law, along with applicable principles and policies, and to analyze critically investment treaty jurisprudence in the subject areas covered by the book.

The book is the product of extensive collaboration between the co-authors. Primary research and writing responsibilities were allocated as follows: Chapters 1, 3-8 and 10, Newcombe; and Chapters 2, 9 and 10, Paradell.

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List of Abbreviations

GENERAL

ACP	African, Caribbean and Pacific Group of States
ASEAN	Association of South East Asian Nations
BIT	Bilateral Investment Treaty
BLEU	Belgo-Luxembourg Economic Union
CAFTA-DR	Central America-Dominican Republic-United States Free Trade Agreement
DCF	Discounted Cash Flow
DSB	Dispute Settlement Body
EC	European Community
ECJ	European Court of Justice
ECT	Energy Charter Treaty
EU	European Union
FDI	Foreign Direct Investment
FCN	Treaty of Friendship, Commerce and Navigation
FIPA	Foreign Investment and Protection Agreement
FIRA	Foreign Investment Review Act
FTA	Free Trade Agreement
FTC	Free Trade Commission (NAFTA)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes

ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965
IGO	Intergovernmental Organization
IIA	International Investment Agreement
ILA	International Law Association
ILC	International Law Commission
IPPA	Investment Promotion and Protection Agreement
JSEPA	Japan-Singapore Economic Partnership Agreement
LCIA	London Court of International Arbitration
MAI	Draft Multilateral Agreement on Investment
MERCOSUR	Mercado Común del Sur (Common Market of the South)
MFN	Most-Favoured-Nation
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
SCC	Stockholm Chamber of Commerce
SLA	Softwood Lumber Agreement
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRIMS Agreement	Agreement on Trade-Related Investment Measures
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UAE	United Arab Emirates
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTC	United Nations Centre on Transnational Corporations
UNCTAD	United Nations Conference on Trade and Development
UNGA Res	United Nations General Assembly Resolution
UK	United Kingdom
US	United States
USD	United States Dollars
USSR	Union of Soviet Socialist Republics
Vienna Convention	Vienna Convention on the Law of Treaties 1969
WTO	World Trade Organization
WWI	World War I
WWII	World War II

JOURNALS, REPORTS AND TREATY SERIES

ABAJ	American Bar Association Journal
AULR	American University Law Review
AUILR	American University International Law Review
AIAJ	Asian International Arbitration Journal
AJIL	American Journal of International Law
AJIL Spec Supp	American Journal of International Law Special Supplement
AJCL	American Journal of Comparative Law
AI	Arbitration International
ARIA	American Review of International Arbitration
ASIL Proc	American Society of International Law Proceedings
AYIL	Asian Yearbook of International Law
BCICLR	Boston College International and Comparative Law Review
BLI	Business Law International
BYIL	British Yearbook of International Law
Can-USLJ	Canada-United States Law Journal
CBLJ	Canadian Business Law Journal
CLP	Current Legal Problems
CILJ	Cornell International Law Journal
CJIL	Chicago Journal of International Law
CJICL	Cardozo Journal of International and Comparative Law
CJTL	Columbia Journal of Transnational Law
CLQ	Cornell Law Quarterly
Con TS	Consolidated Treaty Series
CTS	Canadian Treaty Series
CYIL	Canadian Yearbook of International Law
EELR	European Environmental Law Review
EJIL	European Journal of International Law
ELJ	Energy Law Journal
ELR	Environmental Law Reporter
Foreign Aff	Foreign Affairs
Foreign Pol'y	Foreign Policy
FILJ	Fordham International Law Journal
FLR	Fordham Law Review
GYIL	German Yearbook of International Law
GGULR	Golden Gate University Law Review
GBDLJ	Global Business and Development Law Journal
GWJILE	George Washington Journal of International Law and Economics
HICLR	Hastings International and Comparative Law Review

HILJ	Harvard International Law Journal
IALR	International Arbitration Law Review
ICJ Rep	International Court of Justice Reports
ICLQ	International and Comparative Law Quarterly
ICLR	International Community Law Review
ICSID Rep	ICSID Reports
ICSID Rev	ICSID Review - Foreign Investment Law Journal
IFLR	International Financial Law Review
IALR	International Arbitration Law Review
IL	International Lawyer
ILF	International Law Forum
ILM	International Legal Materials
ILR	International Law Reports
ILSA JICL	ILSA Journal of International and Comparative Law
Iran-USCTR	Iran-United States Claims Tribunal Reports
ITBL	International Tax & Business Lawyer
IYBHR	Israel Yearbook on Human Rights
JAIL	Japanese Annual of International Law
JBL	Journal of Business Law
JCE	Journal of Comparative Economics
JDI	Journal de droit international
JENRL	Journal of Energy and Natural Resources Law
JILE	Journal of International Law and Economics
JIA	Journal of International Arbitration
JIEL	Journal of International Economic Law
JPL	Journal of Public Law (now Emory Law Journal)
JWI	Journal of World Investment (now JWIT)
JWIT	Journal of World Investment and Trade
JWT	Journal of World Trade
LCP	Law and Contemporary Problems
LNOJ	League of Nations Official Journal
LN Doc	League of Nations Documents
LNTS	League of Nations Treaty Series
LSI	Law & Social Inquiry
Marq LR	Marquette Law Review
Mich LR	Michigan Law Review
Minn LR	Minnesota Law Review
MJGT	Minnesota Journal of Global Trade
MJIL	Michigan Journal of International Law
NCLR	North Carolina Law Review
NILR	Netherlands International Law Review
NJILB	Northwestern Journal of International Law and Business
NYLJ	New York Law Journal
NYUJIL	New York University Journal of International Law

NYUELJ	New York University Environmental Law Journal
NYULQR	New York University Law Quarterly Review
NYULR	New York University Law Review
RDCADI	Recueil des cours de l' Académie de Droit International de La Haye
RIAA	Reports of International Arbitral Awards
RGD	Revue Générale de Droit
RGDIP	Revue Générale de Droit International Public
SJIL	Stanford Journal of International Law
TDM	Transnational Dispute Management
TILJ	Texas International Law Journal
UCDJILP	UC Davis Journal of International Law and Policy
UCDLR	UC Davis Law Review
UPJIEL	University of Pennsylvania Journal of International Economic Law
UTLJ	University of Toronto Law Journal
UKTS	United Kingdom Treaty Series
UNTS	United Nations Treaty Series
UST	United States Treaties
VJIL	Virginia Journal of International Law
VLR	Virginia Law Review
WCR	World Court Reports
WD	World Development
WILJ	Wisconsin International Law Journal
YJIL	Yale Journal of International Law
VJTL	Vanderbilt Journal of Transnational Law
YBCA	Yearbook of Commercial Arbitration
YBILC	Yearbook of the International Law Commission
YBUN	Yearbook of the United Nations
YWBA	Yearbook of World Affairs

FREQUENTLY CITED DRAFT CONVENTIONS AND OTHER INSTRUMENTS

1929 Draft Convention	<i>Convention on the Treatment of Foreigners</i>
1929 Harvard Draft	<i>Draft Convention on Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners</i>
1961 Harvard Draft	<i>Draft Convention on the International Responsibility of States for Injuries to Aliens</i>
1967 Draft OECD Convention	<i>Draft Convention on the Protection of Foreign Property</i>

Abs-Shawcross Draft Convention	<i>Draft Convention on Investments Abroad</i>
Charter	<i>Charter of Economic Rights and Duties of States</i>
ICC Code	<i>International Code of Fair Treatment for Foreign Investment</i>
ILA Statute	<i>Draft Statutes of the Arbitral Tribunal for Foreign Investment and the Foreign Investment Court</i>
NIEO Declaration	<i>Declaration on the Establishment of a New International Economic Order</i>

NOTE ON REFERENCES TO BILATERAL INVESTMENT TREATIES

For ease of reference, specific bilateral investment treaties in this book are listed by referring to the two treaty parties in alphabetical order, followed by the date the treaty was signed (not the date of ratification). For example, the *Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment* (signed 14 November 1991, entered into force 20 October 1994) is referred to as Argentina-US (1991).

Guide to Investment Treaty Resources

INTERNATIONAL INVESTMENT AGREEMENTS AND INSTRUMENTS

International investment agreements and instruments are available in two print sources:

United Nations Conference on Trade and Development, *International Investment Instruments: A Compendium* (New York: United Nations, 1996) in three volumes.

International Centre for Settlement of Investment Disputes, *Investment Promotion and Protection Treaties*, looseleaf (New York: Oceana Publications, Inc., 1983) in ten volumes.

The United Nations Conference on Trade and Development (UNCTAD) website has two searchable electronic databases – a compilation of bilateral investment treaty texts and a compendium of international investment instruments. In addition, a number of commercially available databases including Kluwer Arbitration and Investment Claims have various treaty materials available online.

INVESTMENT TREATY AWARDS AND DECISIONS

Investment treaty awards and decisions are reproduced in various print sources including ICSID Reports, ICSID Review-Foreign Investment Law Journal, International Law Reports and International Legal Materials.

Online access to current and past investment treaty awards and decisions, along with links to other materials and resources, is available through Professor Andrew Newcombe's Investment Treaty Arbitration website: <<http://ita.law.uvic.ca>>.

OTHER RESOURCES

A number of specialized websites provide access to current investment treaty decisions, awards and other materials, including links to further resources:

Digest of Investment Treaty Decisions and Awards: <<http://arbitration-icca.org>>

ICSID: <<http://icsid.worldbank.org>>

Investment Arbitration Reporter: <<http://iareporter.com>>

Investment Claims: <<http://investmentclaims.com>>

Investment Treaty Arbitration: <<http://ita.law.uvic.ca>>

Investment Treaty News: <<http://iisd.org/investment/itn>>

Kluwer Arbitration: <<http://kluwerarbitration.com>>

NAFTA Claims: <<http://naftaclaims.com>>

Transnational Dispute Management: <<http://transnational-dispute management.com>>

UNCTAD international investment agreement: <<http://unctad.org>>

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