
INTERNATIONAL
INVESTMENT LAW
AND COMPARATIVE
PUBLIC LAW

EDITED BY
STEPHAN W. SCHILL



OXFORD

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INTERNATIONAL INVESTMENT LAW AND
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In memoriam Thomas Wälde

FOREWORD

There is a rise of academic interest in international investment law—one of the areas of international law where doctrine is still catching up with practice. The editor observes that ‘what is still missing is a comprehensive framework for the current thinking on international investment law as a whole’. This compilation is a step in this right direction, as it offers an up to date conceptual analysis of investment law from the perspective of comparative public law.

The editor employs a comparative public methodology as a framework for assessing ‘the clash in investment law between commercial arbitration and public international law approaches’. However this is used as a critical tool applied to the specificities of investment law rather than as a preconceived answer transposed ‘lock, stock, and barrel’ from one legal order to the other. The compilation covers in a balanced manner both the substantive and the procedural aspects of investment law, identifying the respective challenges. Investment law is systematically analysed from multiple public law perspectives, starting from the minimum standards of protection and procedural justice in administrative law and the principle of balancing individual rights with public interest in Part I, going through the evolution of standards of investment protection in national setting in Part II and including the regulation of pertinent issues in national administrative and constitutional laws, in WTO and in human rights law in Part III. In the final Part IV the specificities of investment treaty dispute settlement mechanisms are assessed, with a particular focus on the remedies available under the different regimes.

The study commemorates Thomas Wälde who inspired it through his Separate Opinion in *International Thunderbird Gaming v Mexico*. Following his academic legacy, the contributors tackle the broader economic and policy issues underpinning modern investment law and decision-making. While recognizing the imperfections of the existing legal framework and the resulting discontents of various interest groups, Stephan Schill expresses optimism about the systemic role of investment law and arbitration as a mechanism of global governance with the potential to accommodate the rights and interests of investors, States, as well as of civil society. As a method of achieving that, the authors suggest a systematic approach—internal reform aligned with informed application of modern public law principles, such as transparency, openness, and balancing competing values instead of a politically and practically unfeasible institutional reform.

I endorse without hesitation the study on *International Investment Law and Comparative Public Law* initiated by Thomas Wälde and led to a successful outcome by Stephan Schill together with his co-contributors.

James Crawford
Whewell Professor of International Law
University of Cambridge

PREFACE

International investment law has gained almost ubiquitous purview because of the increasingly widespread presence of foreign investors and the impact of virtually any area of public policy-making on investment activities. The problems dealt with in investor-state arbitration, however, are not novel as such. They have played a role in domestic administrative and constitutional litigation—and partly also in regional fora such as the European Court of Justice or the European Court of Human Rights—ever since the rise of the modern regulatory state. With the emergence of a truly global economy the same problems of public law now surface at the international level. Yet, even though international investment law and domestic public law are, to a certain extent, functional equivalents in governing investor-state relations, international investment law still lacks the conceptual and doctrinal clarity of sophisticated public law systems at domestic and regional levels.

The present book proposes the use of a comparative public law methodology to enhance our understanding of international investment law. This method does not treat the issues arising under the more than 2,600 bilateral, regional and sectoral investment treaties in isolation, but against the rich experience of more advanced public law systems. Thus, comparative public law can serve as a critical tool in analysing and in further developing international investment law and investor-state dispute resolution in ways that are tested and accepted in other public law contexts. This cannot only be of practical use in investor-state arbitrations, but ultimately may help to strengthen the often contested legitimacy of investor-state dispute resolution without requiring a fundamental redesign of the system.

The idea for the present book was born in the fall of 2007, after the late Thomas Wälde had asked me to co-organize a panel with him at the inaugural conference of the Society of International Economic Law on the interrelations between international investment law and comparative public law. The idea was to continue building on the groundwork Thomas had laid in his *Separate Opinion* in the *Thunderbird* case. It soon turned out, however, that the methodologically exacting approach to use comparative public law analysis to approach problems of international investment law required a more systematic and comprehensive treatment. This was particularly true as we found surprisingly little writing on the problems regularly arising in investment arbitrations from a comparative law perspective and could see equally little academic and professional interaction

between the groups dealing with public law problems relating to investment at domestic and international levels.

Thanks to Thomas' incessant enthusiasm, creativity and ability to bring people together, the idea formed quickly to work on an edited book that would assess the principles of international investment law against a comparative public law background and provide, from that perspective, exemplary analyses of important problems of substantive law and procedure arising in investor-state arbitration. The purpose of this was to show the potential of this approach both for thinking about international investment law in conceptual terms and for contributing to the resolution of practical cases. We had already finished the concept of the book and had found a publisher, when Thomas' unexpected passing away in October 2008 came as a shock to the whole investment law community, to the contributors of this book and to me as Thomas' co-editor.

I am thus all the more grateful to Oxford University Press, in particular to John Louth and Merel Alstein, and to the contributors of this book for their continued support of this project despite the tragic loss of its spiritus rector. I am equally grateful to Prof. Armin von Bogdandy, Director at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, for giving me the necessary freedom and support to finish this time-demanding project after I joined the Institute last fall. Much appreciated editorial assistance in formatting the contributions and putting together the tables of cases, treaties and legislation came from Dominik Fronert, Johannes Pörtl and Andrea Schaf. Fiona Stables and Alison Floyd of Oxford University Press managed production and copy-editing in an outstanding way.

Having made Thomas' native city my new academic home, I hope that his ideas and enthusiasm for investment law and comparative law find in the present book a legacy that he would have approved of and enjoyed.

Stephan W. Schill
Heidelberg
June 2010

LIST OF ABBREVIATIONS

General

| | |
|------------------|--|
| ACHPR | African Charter of Human and People's Rights |
| ACHR | American Convention on Human Rights |
| BGH | Bundesgerichtshof |
| BIT | bilateral investment treaty |
| BVerwG | Bundesverwaltungsgericht |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CFI | Court of First Instance (renamed the General Court by the Treaty of Lisbon) |
| CFR | Charter of Fundamental Rights of the European Union |
| CRC | Convention for the Rights of the Child |
| DCF | discounted cash flow |
| EBRD | European Bank for Reconstruction and Development |
| ECHR | European Convention for the Protection of Human Rights and Fundamental Freedoms |
| ECJ | European Court of Justice (renamed Court of Justice of the European Union by the Treaty of Lisbon) |
| ECT | Energy Charter Treaty |
| ECtHR | European Court of Human Rights |
| FCN treaty | friendship, commerce, and navigation treaty |
| FERC | Federal Energy Regulatory Commission (US) |
| FMV | fair market value |
| FPS | full protection and security |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade |
| HRC | Human Rights Committee |
| IACHR | Inter-American Commission on Human Rights |
| IACtHR | Inter-American Court of Human Rights |
| IAR | informal administrative representations |
| ICC | International Chamber of Commerce |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Court of Justice |
| ICSID Convention | Convention on the Settlement of Investment Disputes between States and Nationals of Other States |
| ICSID | International Centre for Settlement of Investment Disputes |
| IEEPA | International Emergency Economic Powers Act of 1977 (US) |
| IIA | international investment agreement |

List of Abbreviations

| | |
|---------------------|---|
| ILC | International Law Commission |
| ILO | International Labour Organisation |
| ITLOS | International Tribunal for the Law of the Sea |
| LCIA | London Court of International Arbitration |
| MFN | most-favoured-nation |
| NAFTA | North American Free Trade Agreement |
| NEA | National Emergencies Act of 1976 (US) |
| New York Convention | United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards |
| NGO | non-governmental organization |
| NIEO | New International Economic Order |
| NPM | non-precluded measures |
| OECD | Organization for Economic Cooperation and Development |
| PCIJ | Permanent Court of International Justice |
| PPP | public-private partnership |
| SCC | Stockholm Chamber of Commerce |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| UDHR | Universal Declaration of Human Rights |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNCTAD | United Nations Conference on Trade and Development |
| UNTS | United Nations Treaty Series |
| VCLT | Vienna Convention on the Law of Treaties |
| WTO | World Trade Organization |

Publications

| | |
|----------------|--|
| AJCL | American Journal of Comparative Law |
| AJIL | American Journal of International Law |
| Am Bankr LJ | American Bankruptcy Law Journal |
| Am Rev Int Arb | American Review of International Arbitration |
| Arb Int | Arbitration International |
| AU ILR | American University International Law Review |
| AU LR | American University Law Review |
| Berk JIL | Berkeley Journal of International Law |
| Brooklyn JIL | Brooklyn Journal of International Law |
| BYBIL | British Yearbook of International Law |
| Cal LR | California Law Review |
| Camb LJ | Cambridge Law Journal |
| Can YBIL | Canadian Yearbook of International Law |
| Cardozo JICL | Cardozo Journal of International and Comparative Law |
| Chi JIL | Chicago Journal of International Law |
| CMLR | Common Market Law Review |
| Col JEL | Columbia Journal of European Law |
| Col JTL | Columbia Journal of Transnational Law |

| | |
|----------------|--|
| Col LR | Columbia Law Review |
| Conn JIL | Connecticut Journal of International Law |
| Corn ILJ | Cornell International Law Journal |
| Corn LR | Cornell Law Review |
| CWRJIL | Case Western Reserve Journal of International Law |
| Duke JCIL | Duke Journal of Comparative and International Law |
| Duke LJ | Duke Law Journal |
| Econ & Pol | Economics & Politics |
| EJIL | European Journal of International Law |
| ELJ | European Law Journal |
| ELR | European Law Review |
| Emory ILR | Emory International Law Review |
| ERPL | European Review of Public Law |
| Eur Pub Law | European Public Law |
| Ford ILJ | Fordham International Law Journal |
| Ford JCFL | Fordham Journal of Comparative and Financial Law |
| Ford LR | Fordham Law Review |
| Geo IELR | Georgetown International Environmental Law Review |
| Geo Wash JILE | George Washington Journal of International Law and Economics |
| Geo Wash LR | George Washington Law Review |
| GYBIL | German Yearbook of International Law |
| Harv LR | Harvard Law Review |
| Hast CLQ | Hastings Constitutional Law Quarterly |
| Hast ICLR | Hastings International and Comparative Law Review |
| IBLJ | International Business Law Journal |
| ICLJ | International Comparative Law Journal |
| ICLQ | International and Comparative Law Quarterly |
| ICSID Rev–FILJ | ICSID Review–Foreign Investment Law Journal |
| IJ Const L | International Journal of Constitutional Law |
| ILC Ybk | International Law Commission Yearbook |
| ILSA JICL | International Law Students Association Journal of International and Comparative Law |
| Int L Forum | International Law Forum du Droit International |
| Int Org LR | International Organizations Law Review |
| J Pol Econ | Journal of Political Economy |
| JI Arb | Journal of International Arbitration |
| JI Econ L | Journal of International Economic Law |
| JL & Econ | Journal of Law and Economics |
| JL Econ & Org | Journal of Law, Economics, and Organization |
| JLS | Journal of Legal Studies |
| JWELB | Journal of World Energy Law and Business |
| JWIT | Journal of World Investment and Trade |
| L & CP | Law & Contemporary Problems |
| LPICT | Law & Practice in International Courts & Tribunals |
| LQR | Law Quarterly Review |

List of Abbreviations

| | |
|----------------|--|
| Mich JIL | Michigan Journal of International Law |
| Mich LR | Michigan Law Review |
| Minn JIL | Minnesota Journal of International Law |
| MLR | Modern Law Review |
| Neth ILR | Netherlands International Law Review |
| Nw JILB | Northwestern Journal of International Law and Business |
| Nw LR | Northwestern Law Review |
| NYU ELJ | New York University Environmental Law Journal |
| NYU JILP | New York University Journal of International Law and Politics |
| NYU LR | New York University Law Review |
| OGEI | Oil, Gas and Energy Law Intelligence |
| OJLS | Oxford Journal of Legal Studies |
| PPLR | Public Procurement Law Review |
| San Diego ILJ | San Diego International Law Journal |
| Stan ELJ | Stanford Environmental Law Journal |
| Stan L & PR | Stanford Law & Policy Review |
| Tex ILJ | Texas International Law Journal |
| Trans Disp Man | Transnational Dispute Management |
| U Chi LR | University of Chicago Law Review |
| U Colo LR | University of Colorado Law Review |
| U Miami ICLR | University of Miami International and Comparative Law Review |
| UC Davis JILP | University of California Davis Journal of International Law and Policy |
| UPa J Const L | University of Pennsylvania Journal of Constitutional Law |
| UPa LR | University of Pennsylvania Law Review |
| Va JIL | Virginia Journal of International Law |
| Va LR | Virginia Law Review |
| Va Tax Rev | Virginia Tax Review |
| Van JTL | Vanderbilt Journal of Transnational Law |
| Wisc ILJ | Wisconsin International Law Journal |
| Wisc LR | Wisconsin Law Review |
| Yale JIL | Yale Journal of International Law |
| Yale L & PR | Yale Law and Policy Review |
| Yale LJ | Yale Law Journal |
| YBILP | Yearbook of International Law and Policy |

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