International Investment Law
A Handbook

C.H.BECK · Hart · Nomos

Bungenberg / Griebel / Hobe / Reinisch

International Investment Law

C.H.BECK · Hart
Nomos
Editors’ Foreword

Four years have passed since our first discussion about a Handbook on International Investment Law in January 2010. This has been a time of conceptual work, numerous e-mail exchanges with some 90 authors, and correspondence with our publisher.

The main purpose of this handbook – aside from providing basic information – is to strive for more clarity and an attempt to achieve some coherence in this relatively young discipline of international law, a system consisting of arbitral awards and doctrinal interpretations, constituting the most dynamic field of international economic law. After a relatively slow beginning as an integral part of customary international law, international investment law has in the past decade evolved like almost no other field of public international law, especially on the basis of an increasing number of bilateral investment treaties. In this regard, the book approaches the most crucial aspects of international investment law and thereby hopefully provides answers to many questions arising in this field.

We are particularly grateful to the contributors who have anxiously awaited the publication of this work. We owe them not only thanks for their contributions, but also for their patience. We are equally grateful to our assistant editor, Ms Yun-I Kim, for her skilful, meticulous and dedicated management of the entire editorial process. Whoever has edited a book of approximately 2000 pages will appreciate such outstanding commitment. Thanks also go to Mr Christoph Hölken and Ms Katharina Diel-Gligor who supported Ms Kim during parts of the editing process, and to the publisher for their excellent cooperation. Finally, it should also be mentioned that the resources at both the International Investment Law Centre Cologne (IILCC) and at the Department of European, International and Comparative Law of the University of Vienna, provided the necessary basis for such a comprehensive work.

It goes without saying that this first attempt at providing an encompassing overview on existing international investment law is far from perfect. There is an academic responsibility of each author for every article, but also an overall responsibility of the editors who have read each contribution and where necessary, have discussed them with the authors. Therefore, any proposal for improvement of contributions is most welcome and can be directed to the authors as well as to the editors. In any event, we hope that you enjoy reading this handbook!

Cologne, Siegen, and Vienna,
December 2014

Marc Bungenberg  Jörn Griebel  Stephan Hobe  August Reinisch
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>List of Abbreviations</td>
<td>XIII</td>
</tr>
<tr>
<td>Notes on the Contributors</td>
<td>XXV</td>
</tr>
<tr>
<td>Chapter 1: General Introduction to International Investment Law</td>
<td>1</td>
</tr>
<tr>
<td><em>Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch</em></td>
<td></td>
</tr>
<tr>
<td>Chapter 2: The Law Relating to Aliens, the International Minimum</td>
<td>6</td>
</tr>
<tr>
<td><em>Stephan Hobe</em></td>
<td></td>
</tr>
<tr>
<td>State Responsibility</td>
<td>23</td>
</tr>
<tr>
<td><em>Stephan Wittich</em></td>
<td></td>
</tr>
<tr>
<td>III. The Protection of Individuals under Public International Law</td>
<td>46</td>
</tr>
<tr>
<td><em>Rainer Hofmann</em></td>
<td></td>
</tr>
<tr>
<td>IV. Outlook on the Developments in Public International Law and the</td>
<td>64</td>
</tr>
<tr>
<td><em>Burkhard Schöbener</em></td>
<td></td>
</tr>
<tr>
<td>Chapter 3: State Contracts and the Relevance of Investment Contract</td>
<td>80</td>
</tr>
<tr>
<td>Arbitration</td>
<td></td>
</tr>
<tr>
<td>I. Investor-State Contracts in the Context of International Investment</td>
<td>80</td>
</tr>
<tr>
<td><em>André von Walter</em></td>
<td></td>
</tr>
<tr>
<td>II. Typical Questions Arising within Negotiations</td>
<td>93</td>
</tr>
<tr>
<td><em>Morris Besch</em></td>
<td></td>
</tr>
<tr>
<td>Chapter 4: International Investment Agreements – History, Approaches,</td>
<td>153</td>
</tr>
<tr>
<td>Schools</td>
<td></td>
</tr>
<tr>
<td>I. The Evolution of the Regime of International Investment Agreements</td>
<td>153</td>
</tr>
<tr>
<td><em>Chester Brown</em></td>
<td></td>
</tr>
<tr>
<td>II. Bilateral Approaches</td>
<td>186</td>
</tr>
<tr>
<td>A. European Bilateral Approaches</td>
<td>186</td>
</tr>
<tr>
<td><em>John P. Gaffney and Zeynep Akçay</em></td>
<td></td>
</tr>
<tr>
<td>B. The Americas</td>
<td>202</td>
</tr>
<tr>
<td><em>Andrew Newcombe</em></td>
<td></td>
</tr>
<tr>
<td>C. Chinese Investment Law</td>
<td>221</td>
</tr>
<tr>
<td><em>Marc Bungenberg and Manjiao Chi</em></td>
<td></td>
</tr>
<tr>
<td>III. Pluri-/Multilateral and Regional Approaches</td>
<td>240</td>
</tr>
<tr>
<td>A. The Energy Charter Treaty</td>
<td>240</td>
</tr>
<tr>
<td><em>Richard Happ</em></td>
<td></td>
</tr>
<tr>
<td>B. NAFTA's Contributions to Investor-State Dispute Settlement</td>
<td>261</td>
</tr>
<tr>
<td><em>Andrea K. Bjorklund</em></td>
<td></td>
</tr>
<tr>
<td>C. The ASEAN Comprehensive Investment Agreement and ‘ASEAN Plus’ –</td>
<td>283</td>
</tr>
<tr>
<td>The Australia–New Zealand Free Trade Area (AANZFTA) and the PRC–</td>
<td></td>
</tr>
<tr>
<td>ASEAN Investment Agreement</td>
<td></td>
</tr>
<tr>
<td><em>Vivienne Bath and Luke Nottage</em></td>
<td></td>
</tr>
</tbody>
</table>
Table of Contents

D. The New EU Investment Policy Approach ................................................. 304
   Jörn Griebel

E. MERCOSUR and CAFTA ................................................................. 326
   Gabriel Bottini, Veronica Lavista and Mariana Lozza

F. The Negotiations on the OECD Multilateral Agreement on Investment .... 342
   Joachim Karl

Chapter 5: International Investment Agreements and the General Body of Rules of Public International Law ................................................................. 361

I. Two Worlds, but Not Apart: International Investment Law and General International Law ................................................................. 361
   Bruno Simma and Dirk Pulkowski

II. The Interpretation of International Investment Agreements ..................... 372
    August Reinisch

III. The Application of the Rules of State Responsibility .......................... 411
     James Crawford and Simon Olleson

IV. Circumstances Precluding Wrongfulness ............................................. 442
    Christina Binder

Chapter 6: The Scope of Application of International Investment Agreements ........ 481

I. Ratione Temporis ................................................................. 481
   Noah Rubins and Ben Love

II. Ratione Materiae ................................................................. 495
   A. The Notion of Investment ..................................................... 495
      Jan Asmus Bischoff and Richard Happ
   B. Protection of Investments Owned by States ............................... 545
      Sabine Konrad
   C. Protection for Non-Profit Organisations .................................... 555
      Sabine Konrad
   D. Investment in Accordance with the Law ..................................... 566
      Katharina Diel-Gligor and Rudolf Hennecke
   E. Investment in Accordance with the Law – Specifically Corruption .... 577
      Ralph Alexander Lorz and Manuel Busch
   F. The Territorial Nexus between an Investment and the Host State ........ 590
      Christina Knahr
   G. Denial of Benefits ............................................................. 598
      Anne K. Hoffmann

III. Ratione Personae ................................................................. 614
   A. Who is a Protected Investor? ................................................. 614
      Lucy F. Reed and Jonathan E. Davis
   B. Protection for Legal Persons .................................................. 638
      Markus Perkams

Chapter 7: The Liberalisation of the International Movement of Capital and of International Investments ......................................................... 653

I. WTO Rules and Obligations Related to Investment ............................... 653
   Michael Hahn

II. EU Rules and Obligations Related to Investment .................................. 671
   Michael Hahn

III. Pre-Entry Obligations under International Law ................................... 685
   Armand de Mestral
Table of Contents

Chapter 8: Standards of Protection .............................................................. 700
I. Fair and Equitable Treatment: Content, Practice, Method .......................... 700
   Marc Jacob and Stephan W. Schill
II. Protection and Security (Including the NAFTA Approach) ......................... 764
   Ralph Alexander Lorz
III. Arbitrary/Unreasonable or Discriminatory Measures .............................. 790
   Ursula Kriebaum
IV. Most Favoured Nation Treatment .......................................................... 807
   August Reinisch
V. National Treatment .................................................................................. 846
   August Reinisch
VI. Transfer of Funds .................................................................................... 870
   Carsten Kern
VII. Umbrella Clause .................................................................................... 887
   Anthony Sinclair
VIII. Expropriation ......................................................................................... 959
   Ursula Kriebaum

Chapter 9: Restitution, Damages and Compensation ........................................ 1031
I. The System of Reparation and Questions of Terminology ............................ 1031
   Irmgard Marboe
II. Methods of Valuing Losses ........................................................................ 1045
   Richard E. (Rory) Walck
III. Valuation in Cases of Expropriation ......................................................... 1057
   Irmgard Marboe
IV. Valuation in Cases of Breaches of International Law Unrelated to Expropriation .......................................................... 1082
   Irmgard Marboe
V. Valuation in Cases of Breach of Contract .................................................. 1103
   Irmgard Marboe
VI. Limits on Compensation for Internationally Wrongful Acts .................... 1115
   Borzu Sabahi, Kabir Duggal and Nicholas Birch
VII. Moral Damages ....................................................................................... 1130
   Patrick Dumberry
VIII. Interest .................................................................................................. 1142
   John Y. Gotanda

Chapter 10: Obligations of Investors ................................................................ 1154

Chapter 11: Dispute Resolution ...................................................................... 1186
I. Alternatives to Investment Arbitration ....................................................... 1186
   Jan K. Schäfer
II. Investment Arbitration: Jurisdiction and Admissibility ............................. 1212
   Michael Waibel
III. Investment Arbitration: Procedure .......................................................... 1288
   Monique Sasson
IV. Investment Arbitration: Applicable Law ................................................. 1373
   Ole Spiermann
V. Investment Arbitration: Remedies ............................................................. 1391
   Stephan Wittich
Table of Contents

VI. Investment Arbitration: Challenges to the System ........................................ 1431
   A. ICSID Annulment .................................................................................. 1431
      Jean-Christophe Honlet, Barton Legum and Anna Crevon
   B. National Setting Aside Proceedings in Investment Arbitration .............. 1460
      Lars Markert and Helene Bubrowski

VII. Enforcement of Awards .......................................................................... 1482
      Stefan Kröll

VIII. Precedents in International Investment Law ........................................... 1505
       Marc Bungenberg and Catharine Titi

Chapter 12: Political Risk Insurance and Financing of Foreign Direct Investment .... 1517
   I. Political Risk Insurance and Investment Treaty Protection .................... 1517
      Kay Hobér and Joshua Fellenbaum
   II. Excursus: German Political Risk Insurance ......................................... 1552
      Joachim Steffens
   III. Financing of Foreign Direct Investment by Development Finance Institutions .. 1569
      Ulrich Klenon

Chapter 13: Contemporary Issues and Outlook ............................................. 1585
   I. Investment Law and the Individual ....................................................... 1585
      Yun-I Kim
   II. The Relationship of International Investment Law and European Union Law .. 1602
      Marc Bungenberg and Stephan Hobe
   III. Investment Law and Public Services .................................................. 1629
      Markus Krajewski
   IV. Investment Law and Energy ................................................................ 1644
      Achim-R. Börner
   V. Investment Law and Taxation ................................................................ 1677
      Arno Gildemeister
   VI. Investment Law and Intellectual Property Rights .................................... 1692
      Henning Grosse Ruse-Khan
   VII. Investment Law and Sustainable Development: The Environment breaks into Investment Disputes ................................................................. 1714
      Jorge E. Viñuales
   VIII. Human Rights and Investment Disciplines: Integration in Progress ........ 1739
       Pierre-Marie Dupuy and Jorge E. Viñuales
   IX. International Investment Law and Good Governance ............................ 1768
       Catharine Titi
   X. Investment Law in Conflict with WTO Law? ........................................ 1784
      Andreas R. Ziegler
   XI. Investment Law and Sovereign Wealth Funds ....................................... 1802
      Christian Tietje
   XII. Multilateralization: An Ordering Paradigm for International Investment Law .. 1817
      Stephan W. Schill
   XIII. Approaches to Investment Protection outside of Specific International Investment Agreements and Investor-State Settlement ............................ 1839
       Giorgio Sacerdoti and Matilde Recanati
Table of Contents

Chapter 14: The Future of International Investment Law ................................. 1863

I. The Future of International Investment Law – Substantive Protection and
    Dispute Settlement ...................................................................................... 1863
    Karl-Heinz Böckstiegel

II. Does Investment Arbitration have a Future? .............................................. 1873
    Kaj Hobér

III. Where Public meets Private: a Few Thoughts on Investment Law and
    Arbitration .................................................................................................. 1879
    Catherine Kessedjian

IV. The Likely Content of Future EU Investment Agreements ....................... 1884
    August Reinisch

V. The Future of International Investment Law .............................................. 1904
    Christoph Schreuer

Index ............................................................................................................. 1913