

Schriften zur Europäischen Integration
und Internationalen Wirtschaftsordnung

61

Scheu | Hofmann | Schill | Tams (Eds.)

Investment Protection, Human Rights, and International Arbitration in Extraordinary Times



Nomos

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Europäischen Integration und
Internationalen Wirtschaftsordnung

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Wilhelm Merton-Zentrums für Europäische Integration und
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edited by

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Volume 61

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Stephan W. Schill | Christian J. Tams (Eds.)

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Preface

On 6 and 7 March 2020, the Wilhelm Merton Centre for European Integration and International Economic Order organized, in cooperation with the Glasgow Centre for International Law and Security of the University of Glasgow, the Amsterdam Centre for International Law of the University of Amsterdam, and the International Investment Law Centre of the University of Cologne, the 11th Frankfurt Investment Law Workshop, devoted to legal issues connected with ‘Investment Protection, Human Rights and International Arbitration’.

The decision to re-visit the interplay between investment protection, international arbitration and human rights which had been explored at the 2nd Frankfurt Investment Law Workshop in 2011 (see the contributions in Hofmann/Tams (Eds.), *International Investment Law and Its Others*, Nomos Baden-Baden 2012) was based on the assessment that recent developments justified to re-consider some crucial questions: How can treaty makers and arbitral tribunals ensure that investment law concepts are not only in conformity with, but also promote human rights? Do relevant specificities exist in the field of investments in land, food and water? Does investment protection take account of international labour rights? Is investment arbitration meeting the procedural standards that are necessary for being considered as a legitimate mechanism for the settlement of international disputes in which individual rights and public interests are at stake? And finally, is responding to all these demands legally feasible for the current system of international investment protection or are substantial reforms required?

Anne van Aaken opened the workshop with a keynote address asking whether the inter-relationship between investment protection, human rights and international arbitration constitutes an example of cross-fertilization or of regime-collision. The actual workshop addressed the (potential) role of human rights in the drafting of international investment agreements and shed human rights perspectives on substantive investment protection standards and on international investment arbitration. Based on the intensive discussion following the various presentations, some of the papers were substantially further developed and are now published in the present volume.

In addition thereto, a number of contributions were specifically solicited in order to take account of developments such as the conclusion of the

Preface

EU-China Investment Agreement, to address specific issues such as international investment law and the rights of indigenous peoples or to add a Latin-American perspective on business and human rights arbitration as well as African perspectives on investment law and human rights.

The workshop was held on 6 and 7 March 2020, probably one of the very last academic events which took place in physical presence before the COVID-19 pandemic brought public and consequently also academic life as previously known to quite an abrupt lock-down. Since then, we all live in extraordinary times. Obviously, the most fundamental impact of the pandemic on investment law and human rights called for the inclusion of studies specifically addressing this novel issue.

As in previous years, the directors of the Wilhelm Merton Centre wish to express their sincere gratitude to Professor Dr. *Stephan Schill* of the University of Amsterdam and Professor Dr. *Christian Tams* of the University of Glasgow for their strong input and support throughout the project. Specific thanks, however, are due to Professor Dr. *Julian Scheu* of the University of Cologne: His initiative and enthusiasm were instrumental for the success of the project. Furthermore, the organisers wish to thank *Alexander Heger*, Dr. *Orhan Bayrak* and *Moritz Malkmus* for their valuable assistance before, during and after the workshop. Finally, the editors of this volume wish to thank all the contributors for their papers and *Jana Jochem*, *Veronika Fuhrmann*, *Lisa Schöttmer* and *Pia Zurborg* for their excellent editorial skills and support during the editing process.

Frankfurt am Main, 20 July 2022

Rainer Hofmann

Stefan Kadelbach

Rainer Klump

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Abbreviations

ACHR	American Convention on Human Rights
AEC	African Economic Community
AfCFTA	African Continental Free Trade Area
AFSIL	African Society of International Law
AJICL	African Journal of International and Comparative Law
AJIL	American Journal of International Law
AMRII	African Multidimensional Regional Integration Index
ARS	Argentine Peso
ARSIWA	Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Text adopted by the International Law Commission at its fifty-third session in 2001
Art(t).	Article(s)
ASEAN	Association of Southeast Asian Nations
ASIL	American Society of International Law
AU	African Union
BAFA	Federal Office for Economic Affairs and Export Control
BHR	business and human rights
BHR Working Group	Working Group on International Arbitration of Business and Human Rights
BHRA	Hague Rules on Business and Human Rights Arbitration
BIT	Bilateral Investment Treaty
BOL	Brill Open Law
BTC	Baku-Tbilisi-Ceyhan oil pipeline project
CAFTA-DR	Dominican Republic-Central America Free Trade Agreement

Abbreviations

CAI	Comprehensive Agreement on Investment
CAO	Compliance Advisor/Ombudsman
CAP	Common African Position
CARIFORUM	Caribbean Forum of African, Caribbean and Pacific States
CCHR	Cambodia Centre for Human Rights
CCIA	COMESA Common Investment Area
CCSI	Columbia Center on Sustainable Investment
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEESP	Commission on Environmental, Economic and Social Policy
CERD	Committee on the Elimination of Racial Discrimination
CETA	Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States
cf.	confer
CFS-RAI	CFS Principles for Responsible Investment in Agriculture and Food Systems
CHRLR	Columbia Human Rights Law Review
CJEU	Court of Justice of the European Union
CODEGAM	García Moreno Development Council (Consejo de Desarrollo de García Moreno)
COMAI	Conference of African Ministers in charge of Integration
COMESA	Common Market for Eastern and Southern Africa
COVID-19	Coronavirus Disease of 2019
CPC	Central Product Classification
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CRC	Convention on the Rights of the Child
CSKFTA	China-South Korea Free Trade Agreement
CSR	Corporate social responsibility

CTSD	CETA's Committee on Trade and Sustainable Development
DAG	Domestic Advisory Groups
DNA	deoxyribonucleic acid
Doc.	Document
e.g.	<i>exempli gratia</i>
EAC	East African Community
EACJ	East African Court of Justice
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Community of Western African States
ECOWIC	ECOWAS Common Investment Code
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
ed(s).	editor(s)
edn.	edition
EFILA	European Federation for Investment Law and Arbitration
EFTA	European Free Trade Association
EJIL	European Journal of International Law
ELC	economic land concessions
EP	European Parliament
EPA	Economic Partnership Agreement
EPRS	European Parliamentary Research Service
EPZ	Export Processing Zone
ESIA	Environmental and Social Impact Assessment
et al.	<i>et alia</i>
et seq(q).	<i>et sequentes/ et sequentia</i>
etc.	<i>et cetera</i>
EU	European Union
FAO	UN Food and Agriculture Organization
FDI	Foreign direct investment
FET	Fair and Equitable Treatment

Abbreviations

fn.	footnote
FPIC	free, prior, and informed consent
FPS	Full Protection and Security
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
HAGL	Hoang Anh Gia Lai (Vietnamese Football Club)
Hague Rules	Hague Rules on Business and Human Rights Arbitration (BHRA)
HCR	United Nations Human Rights Council
HED	Economic and Trade Dialogue
i.e.	<i>id est</i>
IACtHR	Inter American Court of Human Rights
ibid.	<i>ibidem</i>
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLO	International and Comparative Law Quarterly
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICNEA	Industrial Classification for National Economic Activities
ICSID	International Centre for Settlement of Investment Disputes
ICT	information and communication technology

Abbreviations

IFC	International Finance Corporation
IGWG	Intergovernmental Working Group
IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
ILR	Indian Law Reports
IMF	International Monetary Fund
IOLR	International Organizations Law Review
ISDS	investor-State dispute settlement
JEFTA	Japan-EU Free Trade Agreement
KORUS	US-Korea Free Trade Agreement
LCIA	London Court of International Arbitration
LDC	Least Developed Countries
lit.	<i>littera</i>
LL.M.	Master of Laws
LLP	Limited Liability Partnership
M. Sc.	Master of Science
MAFF	Cambodian Ministry of Agriculture, Forestry and Fisheries
MEA	Multilateral Environmental Agreements
MEP	Member of the European Parliament
MERCOSUR	Mercado Común Del Sur (Southern Common Market)
MFN	most-favoured-nation
MIC	Multilateral Investment Court
MIGA	Multilateral Investment Guarantee Agency
MLC	Maritime Labour Convention
MNE Declaration	Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy
MP	Member of Parliament

Abbreviations

MPIL	Max Planck Institute for International Law
NAFTA	North American Free Trade Agreement
NAP	National action plan
NCP	National Contact Point
NDC	Nationally Determined Contribution
NGO	Non-governmental organization
NIEO	new international economic order
No.	Number
NT	National Treatment
OAU	Organization of African Unity (now called African Union)
OECD	Organization for Economic Cooperation and Development
OECD Guidelines	OECD Guidelines on Multinational Enterprises
ÖFSE	Austrian Foundation for Development Research
OHCHR	Office of the High Commissioner for Human Rights
OIC	Organization of Islam Cooperation
p(p).	page(s)
PAIC	Pan-African Investment Code
para(s).	paragraph(s)
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PELJ	Potchefstroom Electronic Law Journal
PIA	South Africa's new Protection of Investment Act
Pmbl.	Preamble
PRAI	Principles for Responsible Agricultural Investment
PTA	Preferential Trade Area
PTPA	Peru-United States Trade Promotion Agreement
RECs	Regional Economic Communities
SADC	Southern African Development Community

SADC FIP	Southern African Development Community Finance and Investment Protocol
SADCC	Southern African Development Coordination Conference
SCC	Stockholm Chamber of Commerce
SDGs	United Nations Sustainable Development Goals
SIA	Sustainability Impact Assessment
SME	small and mid-size enterprise/small and medium enterprise
TDM	Transnational Dispute Management
TEU	Treaty on European Union
TFUE	Treaty on the Functioning of the European Union
TRIMS Agreement	WTO Agreement on Trade and Investment Measures
TRIPS Agreement	WTO Agreement on Trade-Related Aspects of Intellectual Property Rights
TSD	trade and sustainable development
TTIP	Transatlantic Trade and Investment Partnership
U.S.	United States
UCL	University College London
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNECA	United Nations Economic Commission for Africa
UNFCCC	UN Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNGP	United Nations Guiding Principles on Business and Human Rights
UN-Habitat	UN Human Settlements Programme

Abbreviations

UNHRC	United Nations Human Rights Council
UNYB	Max Planck Yearbook of United Nations Law
USA	United States of America
USD	United States Dollar
USMCA	United States-Mexico-Canada Agreement
v.	<i>versus</i>
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
VVGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
WTO	World Trade Organization