

# Kluwer Arbitration Blog

## Just Published: The Future of Investment Arbitration (ITA-ASIL, Oxford Press), Edited by Catherine A. Rogers and Roger P. Alford

Lucy Reed (International Council for Commercial Arbitration) · Monday, May 4th, 2009 · Freshfields Bruckhaus Deringer

Dedicated to the late Thomas Wälde, The Future of Investment Arbitration examines some of the current pressures on investment arbitration and looks toward the future of the system as a whole. The authors address issues such as gaps in the procedural rules, the lack of development in certain substantive areas of international investment law, inconsistencies in decision-making and public policy concerns.

### Part One: Adequacy of Existing Rules for Investor-State Arbitration

**Gary Born** and **Ethan Shenkman** provide a comparative analysis of confidentiality and transparency issues in commercial and investment arbitration, and propose an approach that strikes a balance between the competing interests of transparency and confidentiality.

**Catherine Kessedjian** tackles the use of precedent in investment arbitration with a comparative law analysis and proposes a model based on the principle of an “obligation de moyens” or “best effort” approach, whereby arbitrators “have an obligation to consider previous decisions rendered” but “have no duty to look at previous decisions unless those previous decisions are pleaded by the parties.”

**Ucheora Onwuamaegbu** discusses the ways in which investment treaties can define the rules of procedure in investment arbitration and fill in gaps in arbitration rules, covering issues ranging from the submission of claims to post-award remedies.

**Carolyn Lamm**, **Hansel Pham** and **Chiara Giorgetti** discuss the 2006 amendments to the ICSID Rules, with a focus on interim measures and the new procedure for dismissal of frivolous claims.

**Jack Coe** analyzes Article 28 of the 2004 US Model BIT, which provides for the circulation of a draft award. Coe discusses the possible impact of this provision on settlement, “post-award ripple effects,” and possible amicus participation.

### Part Two: The Future of BITs

**Susan Rose-Ackerman** and **Jennifer Tobin** address the inconsistencies arising from empirical studies of the correlation between BITs and foreign investment and propose that further empirical research needs to be carried out with more attention paid to the host state’s legal and political environment.

**Anna Joubin-Bret**’s piece examines global trends in the international investment universe, and provides important statistics from UNCTAD reports on investment treaties.

**Andrea Menaker** takes a close look at the ambiguities and gaps in the protection of foreign investment in the BIT network, and concludes that despite the large number of investment treaties,

this area of law is far from being fully developed.

**William Dodge** focuses on investment treaties between developed States, and proposes that investor-State arbitration between developed States should provide for the submission of investment disputes to domestic courts.

**Christoph Schreuer** examines arbitrary and discriminatory treatment in investment arbitration in terms of its customary law roots and its development by arbitral tribunals.

**Arif Ali** and **Kassi Tallent** analyze the origin and development of the minimum standard of treatment of aliens and the development of the fair and equitable treatment standard.

### **Part Three: Public Functions of Investment Arbitration Decision-Making**

**William Park** discusses tax measures and the difficult balance that must be struck in investment arbitration in determining the point at which a sovereign's tax measures are tantamount to an expropriation.

**Stephan Wilske** and **Martin Raible** focus their discussion on the criticism of investment treaty arbitration based on public policy grounds and the question of whether and to what extent arbitrators should address public policy matters.

**M. Sornarajah** discusses “the retreat of neo-liberalism in investment treaty arbitration,” in which he maps out what he considers to be “expansionist trends” of investment treaty arbitration, trends which have inevitably resulted in a retreat from the system, such as withdrawals from ICSID and the denunciation of BITs.

**Lee Caplan** proposes that small and medium-sized enterprises are vital for a dynamic global economy and that the investor-State arbitration system needs to be more accessible to smaller enterprises. Among potential solutions he proposes are political risk insurance, strategic alliances, and streamlining the arbitral process.

**John Crook** addresses the challenges of fact-finding in investor-State disputes and inter-State disputes, including access to information held by an opposing party and the difficulties in determining facts resulting from large-scale events.

**Charles H. Brower, II (“Chip”)** looks to the future of investment arbitration, analyzing questions such as the consistency of awards and the question of whether a top-down or bottom-up solution for consistency is suitable or desirable.

Lucy Reed

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