



State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation (Studies in International Law)

Santiago Montt

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Today, there are more than 2,500 bilateral investment treaties (BITs) around the world. Most of these investment protection treaties offer foreign investors a direct cause of action to claim damages against host-states before international arbitral tribunals. This procedure, together with the requirement of compensation in indirect expropriations, and the fair and equitable treatment standard, have transformed the way we think about state liability in international law. We live in the BIT generation, a world where BITs define the scope and conditions according to which states are economically accountable for the consequences of regulatory change and administrative action. Investment arbitration in the BIT generation carries new functions which pose unprecedented normative challenges, such as the arbitral bodies established to resolve investor/state disputes defining the relationship between property rights and the public interest. They also review state action for arbitrariness, and define the proper tests under which that review should proceed. State Liability in Investment Treaty Arbitration is an interdisciplinary work which focuses on five key dimensions of BIT arbitration. First, it analyzes the past practice of state responsibility for injuries to aliens, placing the BIT generation in historical perspective. Second, it develops a descriptive law-and-economics model that explains the proliferation of BITs, and why they are all worded so similarly. Third, it addresses the legitimacy deficits of this new form of dispute settlement, weighing its potential advantages and democratic shortfalls. Fourth, it gives a comparative overview of the universal tension between property rights and the public interest, and the problems and challenges associated with liability grounded in illegal and arbitrary state action. Finally, it presents a detailed legal study of the current state of BIT jurisprudence regarding indirect expropriations and the fair and equitable treatment clause.

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