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International Investment Law and Comparative Public Law

Stephan W. Schill

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Investment treaty arbitration has a hybrid nature combining public international law (as regards its substance) with elements of international commercial arbitration (mainly as regards procedure). However, in essence and function it deals with a special, internationalized form of judicial review of governmental conduct that is more akin to the judicial control of governmental action provided for by national administrative and constitutional law than to either classic inter-state dispute resolution or international commercial arbitration.

This has been recognized in some academic writing and several awards, where reference to national administrative law concepts and principles of international law-based judicial review of governmental action, such as international trade or human rights law, is used to help specify and apply the open-ended concepts of investment treaties. In-depth conceptualization is however often lacking. The current study is the first, pioneering effort to bring these under-developed ad hoc references to comparative and international administrative law concepts into a deeper theoretic and systematic framework.

The book thus intends to develop a 'bridge' between treaty-based international investment arbitration and comparative administrative law on both a theoretical and practical level. The major obligations in investment treaties (indirect expropriation, fair and equitable treatment, national treatment, umbrella/sanctity of contract clause) and major procedural principles will be compared with their counterpart in comparative public law, both on the domestic as well as international level. That 'bridge' will allow international investment law to benefit from the comparative public law experience, which could enhance its legitimacy, its political acceptance, and its ability to develop more finely-tuned interpretations of central treaty obligations.

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