

# Contents

<b>1</b>	<b>Introduction</b> . . . . .	1
	References . . . . .	6
<b>2</b>	<b>The Backlash Against Investment Treaty Arbitration: Treat the Cause and Not the Symptom</b> . . . . .	9
2.1	Introduction . . . . .	9
2.2	Brief Historical Account of Investment Treaty Arbitration . . . . .	10
2.2.1	Colonial Era . . . . .	10
2.2.2	Late Nineteenth and Early Twentieth-Century . . . . .	11
2.2.3	Post-World War II Developments . . . . .	13
2.2.4	Modern Regime of Investment Treaty Arbitration . . . . .	14
2.3	Normative Foundations of Investment Treaty Arbitration . . . . .	18
2.3.1	Preliminary Observations . . . . .	18
2.3.2	Investment Arbitration as a Private Dispute Settlement Mechanism . . . . .	21
2.4	The Backlash Against Investment Treaty Arbitration . . . . .	24
2.4.1	Preliminary Observations . . . . .	24
2.4.2	Multiple Proceedings and Conflicting Awards . . . . .	25
2.4.3	Public Interest Concerns . . . . .	27
2.4.4	Perceived Bias . . . . .	29
2.4.5	Confidentiality and High Costs . . . . .	30
2.5	Responses to the Backlash Against Investment Treaty Arbitration . . . . .	32
2.5.1	The Way Forward . . . . .	32
2.5.2	Investment Arbitration as a Public Law System . . . . .	33
2.6	Conclusion . . . . .	37
	References . . . . .	38

<b>3 Investment Treaty Arbitration and the Rule of Law: Tensions and Solutions</b> . . . . .	45
3.1 Introduction . . . . .	45
3.2 Historical Origins of the Rule of Law . . . . .	45
3.2.1 Classical Origins . . . . .	45
3.2.2 Medieval Period . . . . .	47
3.2.3 Modern Period . . . . .	48
3.3 Scope and Content . . . . .	49
3.3.1 Procedural Aspect of the Rule of Law . . . . .	49
3.3.2 Substantive Aspect of the Rule of Law . . . . .	53
3.4 The Rule of Law in the Context of Investment Treaty Arbitration . . . . .	55
3.4.1 Preliminary Observations . . . . .	55
3.4.2 Substantive Rule of Law . . . . .	56
3.4.3 Procedural Rule of Law . . . . .	59
3.5 Conclusion . . . . .	70
References . . . . .	71
<b>4 Legal Certainty and CETA: The Fallacy of a Single Treaty As a Solution</b> . . . . .	77
4.1 Introduction . . . . .	77
4.2 Investment Protection Provisions . . . . .	77
4.2.1 Fair and Equitable Treatment . . . . .	77
4.2.2 Expropriation . . . . .	82
4.2.3 Most-Favored-Nation Clause . . . . .	86
4.3 Interpretation of Investment Protection Provisions . . . . .	88
4.3.1 Vienna Convention on the Law of Treaties . . . . .	88
4.3.2 Joint Interpretative Declarations . . . . .	91
4.4 Multiple Proceedings and Conflicting Awards . . . . .	96
4.4.1 Conflicting Awards . . . . .	96
4.4.2 Multiple Proceedings . . . . .	98
4.5 Conclusion . . . . .	103
References . . . . .	105
<b>5 Human Rights Protection in CETA: More Artificial Than Substantial</b> . . . . .	109
5.1 Introduction . . . . .	109
5.2 Jurisdictional Stage . . . . .	109
5.3 Applicable Law . . . . .	112
5.3.1 General Observations . . . . .	112
5.3.2 CETA . . . . .	115
5.4 <i>Amicus Curiae</i> Briefs . . . . .	121
5.5 Appellate Mechanism . . . . .	124
5.6 Conclusion . . . . .	127
References . . . . .	129

<b>6</b>	<b>Procedural Fairness and CETA: Ghosts of Decades Past . . . . .</b>	<b>133</b>
6.1	Introduction . . . . .	133
6.2	Code of Conduct and Enforcement Mechanism . . . . .	134
6.2.1	IBA Guidelines and Ethics Provisions . . . . .	134
6.2.2	Enforcement Mechanism . . . . .	140
6.3	Investment Court System . . . . .	142
6.3.1	Appointing Mechanism . . . . .	142
6.3.2	Compensation Scheme . . . . .	147
6.3.3	Qualification Requirements . . . . .	149
6.4	Conclusion . . . . .	150
	References . . . . .	152
<b>7</b>	<b>Transparency and Access to Justice in CETA: Issues and Shortcomings . . . . .</b>	<b>155</b>
7.1	Introduction . . . . .	155
7.2	Transparency . . . . .	155
7.2.1	Preliminary Observations . . . . .	155
7.2.2	UNCITRAL Transparency Rules and Other Related Provisions . . . . .	157
7.2.3	<i>Amicus Curiae</i> Briefs . . . . .	161
7.3	Access to Justice . . . . .	165
7.3.1	Costs and Fees . . . . .	165
7.3.2	Third-Party Funding . . . . .	168
7.4	Conclusion . . . . .	171
	References . . . . .	172
<b>8</b>	<b>Conclusion . . . . .</b>	<b>175</b>