

Contents

Abbreviations XII

Preface XV

1 "I Believe in the Power of Human Beings to be Agents of Change:"

An Interview with Kamal Hossain 1

Sharif Bhuiyan, Philippe Sands and Nico Schrijver

2 The Return of the NIEO and the Retreat of Neo-Liberal International

Law 32

Muthucumaraswamy Sornarajah

1 Introduction 32

2 The NIEO Package 35

2.1 The NIEO and Its Impact on Foreign Investment 38

2.2 Multinational Corporations and a System Based on Private Power 38

2.3 The Developing States' Response through the New International Economic Order 45

3 "The Roaring Nineties" 50

4 The Reaction against Neo-Liberalism 56

3 Critical Concepts in the New International Economic Order and Its Impact on the Development of International Economic Law:

A Tribute to the Call for a NIEO 60

Asif H. Qureshi

1 Introduction 60

2 Scrutiny of the "Waste Paper Basket Perspective" 62

3 Conclusion 67

4 Some Thoughts on the Making of International Law 69

M.C.W. Pinto

1 The Survival of International Law 69

2 Making International Law in the Twentieth Century 71

3 What is to be Done? 77

3.1 Universal Participation 78

3.2 Reducing the Cost of Participation 78

3.3 Voting Procedures 79

3.4 Representation 80

3.5 Building and Maintaining a Broad Ethical Consensus 81

5 International Trade Law and Human Rights: The ILA's 2008 "Rio de Janeiro Declaration" 83

Ernst-Ulrich Petersmann

- 1 Introduction 83
- 2 Justice and Rule of Law in the Worldwide Division of Labour among Citizens Depend on Respect for Human Rights 86
- 3 WTO Law Protects Legal Security and Judicial Remedies also for Individuals Engaged in International Trade 88
- 4 Justice Requires Coherent and Reasoned Interpretation of the Law "in Conformity with Principles of Justice" and Human Rights 89
- 5 Clarification of the Human Rights Dimensions of WTO Law by Human Rights Bodies 91
- 6 Political WTO Bodies Avoid References to Human Rights 92
- 7 The Emerging Human Rights of Access to Justice: Implications for WTO Law? 93
- 8 Focus of the ILA Draft Resolution on Customary Principles of Treaty Interpretation 94
- 9 The Final Text Approved by the ILA in August 2008: One Step on the Endless Road Towards "Constitutional Justice" 98

6 Judicial Supervision of Countering Terrorism: The Case of Palestine 103

Paul de Waart

- 1 Countering Terrorism 103
 - 1.1 *Legal Integration* 104
 - 1.2 *Defining Terrorism* 105
 - 1.2.1 Discretionary Powers of States 106
 - 1.2.2 Security Council 107
- 2 Law of the Future 108
 - 2.1 *Democratic Society* 108
 - 2.2 *Humanization of International Law* 110
 - 2.3 *Shared Values* 111
- 3 Judicial Supervision of the UN Counter Terrorism Strategy 112
 - 3.1 *International Court of Justice* 112
 - 3.2 *European Court of Human Rights* 113
 - 3.3 *Court of Justice of the European Communities* 115
- 4 The Case of Palestine 116
 - 4.1 *Palestinians with their Back to the Wall* 116
 - 4.1.1 Israeli Disengagement from Gaza 117
 - 4.1.2 *Self-Defence and Terrorism* 119
 - 4.2 *Remedies* 120

4.2.1	International Criminal Court	121
4.2.2	A Matter of Recognition	123
5	Meeting the Challenges	123
7	Climate Change and Financial Assistance: A Fragmented, Unified or Coordinated Approach?	126
	<i>Laurence Boisson de Chazournes</i>	
1	Common but Differentiated Responsibilities in the Climate Change Regime and the Provision of Financial Assistance to Developing Countries	126
2	Financial Obligations of Developed Countries under the Climate Change Convention, the Kyoto Protocol and the Global Environment Facility	130
3	The Adaptation Fund	134
4	The Least-Developed Countries Fund and the Special Climate Change Fund	136
5	Clean Development Mechanism	138
6	The World Bank's Carbon Funds and Facilities	141
7	New Instruments for Increasing Financial Resources through Multilateral Channels	146
8	The Green Climate Fund and the Post-2012 Climate Change Regime	148
9	Which Type of Coherence in a Context of Multiplication of Financial Mechanisms?	151
8	The Regulatory Framework of International Commercial Arbitration: The Amended UNCITRAL Rules	153
	<i>James Crawford</i>	
1	Introduction	153
2	Key Issues	154
2.1	<i>The Subject-Matter of Arbitration (UNCITRAL Rules Article 1)</i>	155
2.2	<i>Formal Requirements for an Arbitration Agreement: "An Agreement in Writing"</i>	157
2.3	<i>Applicable Law (Article 35)</i>	159
2.4	<i>Defences, Counterclaims and Set-Off</i>	162
2.4.1	Response to the Notice of Arbitration (UNCITRAL Rules Article 4)	162
2.4.2	Counterclaims and Set-Off (UNCITRAL Rules Article 21)	162
2.5	<i>Joinder and Consolidation</i>	163

2.6	<i>Interim Measures and Preliminary Awards (UNCITRAL Rules Article 26)</i>	164
2.7	<i>Confidentiality and Privacy</i>	170
2.8	<i>The Role of the PCA as Default Authority</i>	172
3	<i>Conclusion</i>	173
9	Improving the Process and Institutions of Investment Arbitration: A Modest Contribution to a Complicated Debate	174
	<i>Arif Hyder Ali and Thomas Waelde</i>	
1	<i>Introduction</i>	174
2	<i>Towards More Rigorous Conflict-of-Interest Rules</i>	175
3	<i>The Relevance of Arbitral Precedent to the Transparency versus Confidentiality Debate</i>	179
4	<i>Amicus Participation – Public Interest Representation</i>	184
5	<i>Standing ICSID Annulment Committee</i>	188
6	<i>A World Investment Court?</i>	190
7	<i>Conclusion</i>	195
10	Risk Management and Dispute Avoidance in Oil and Gas Investments in Developing Countries: The Way Forward	198
	<i>A.F.M. Maniruzzaman</i>	
1	<i>Introduction</i>	198
2	<i>Risk and Dispute Management in the Host Country</i>	199
3	<i>Legal / Contractual Risk-Mitigation</i>	200
3.1	<i>International Law or a-National Law as the Governing Law Clause of the Contract</i>	200
3.2	<i>Dispute Settlement Clause: International Arbitration / Mediation</i>	202
3.3	<i>Stabilization Clause</i>	205
3.4	<i>Progressive Taxation / Profit-Sharing Method</i>	207
3.5	<i>Political Risk Insurance</i>	209
4	<i>Risk Management and Dispute Avoidance Tools and Strategy</i>	211
4.1	<i>Equity Participation with the Host Government</i>	211
4.2	<i>Corporate Social Responsibility: Social, Environmental and Health Considerations for the Host Community</i>	212
4.3	<i>Transparency</i>	215
4.4	<i>Early Detection and Prevention Mechanism of Disputes</i>	217

4.5	<i>Involvement of International Financial Institutions</i>	218
5	Conclusion	218
11	Relationship between Investment Contracts and Human Rights: A Developing Countries' Perspective	220
	<i>Abdullah Al Faruque</i>	
1	Introduction	220
2	Shaping Factors of Human Rights Dimension of Investment Contracts	222
3	Legal Character of Investment Agreements	226
4	Quest for Stability in Investment Contracts	227
5	Different Forms of Stabilization Clauses	229
6	Arbitral Practice on Stabilization Clauses	231
7	Stabilization Clauses and Human Rights	235
8	Exceptions to Stabilization Clauses	237
9	Case Studies: BTC and Chad-Cameroon Pipeline Projects	240
10	Applicable Law and Human Rights	243
11	Transparency in Contract	245
12	Human Rights in Contract Based Investment Arbitration	248
13	Conclusion	249
12	The Commission on the Limits of the Continental Shelf with Special Reference to Developing Countries	251
	<i>L.D.M. Nelson</i>	
1	Introduction	251
2	Allocation of Seats in the Commission	251
3	Functions of the Commission	254
4	Establishment of Trust Funds	255
4.1	<i>Trust Fund for the Purpose of Facilitating the Preparation of Submissions to the Commission</i>	255
4.2	<i>Trust Fund for Defraying Expenses of Members of the Commission Participating in Meetings</i>	255
5	Status of the Trust Funds	256
6	Emoluments and Expenses of the Members of the Commission	257
7	Date of Submission of Data and Information	257
8	Concluding Observations	260

13 Transparency as an Element of Good Governance in the Practice of the WTO 262

Silke Steiner and Friedl Weiss

- 1 Introduction 262
- 2 The Concepts of Good Governance and Transparency: Origin, Content and Definitions 264
 - 2.1 *Origins of "Good Governance"* 264
 - 2.2 *Content of Good Governance* 265
 - 2.3 *International Organizations: Definitions and Practice* 265
 - 2.3.1 Definitions 265
 - 2.3.2 Practice 267
- 3 Transparency in the WTO 268
 - 3.1 *Article X GATT* 270
 - 3.1.1 Doctrinal Views 270
 - 3.1.2 Panel Practice on Article X GATT 271
 - 3.2 *Other WTO Agreements* 275
 - 3.2.1 Transparency through Notification Obligations in Other WTO Agreements 275
 - 3.2.2 Transparency Provisions in WTO Agreements 278
 - 3.3 *Transparency in Dispute Settlement* 279
 - 3.4 *Does the WTO Grant Transparency to Individuals?* 281
 - 3.5 *Recent Developments in WTO Practice* 283
 - 3.6 *Transparency in Relation to Developing Countries* 285
- 4 Final Assessment and Outlook 287

14 China's Changing Judicial System in the Time of Globalization: Challenges of Integrating International Standards and the National Realities 288

Yuwen Li

- 1 Introduction 288
- 2 The Transition from Tradition to Modernization: Progress Achieved 289
 - 2.1 *A Change in the Perception of the Judicial System* 289
 - 2.2 *Changes in Trial Procedure and Open Trials* 289
 - 2.3 *Expanding the Jurisdiction of the Courts into New Fields* 291
 - 2.4 *The Modernization of the Infrastructure of Courts* 291
 - 2.5 *An Increased Caseload, Judicial Organs and Personnel* 292
- 3 The Challenges and Dilemmas Faced by the Judiciary 293
 - 3.1 *Multiple Functions of the Courts vs. Adjudication according to the Law* 293

3.2	<i>A Weak Historical Legacy of the Courts vs. An Increasing Necessity for its Independence</i>	295
3.3	<i>Detached Professionalism vs. Judicial Populism</i>	296
3.4	<i>The Integration of International Rules vs. National Realities</i>	298
3.5	<i>The Infantile Judicial Situation vs. High Public Expectations</i>	301
4	Conclusion	304
	Biographical Data of Kamal Hossain	305
	About the Contributors	316
	Index	321