

the distinction between ‘cognition’ and ‘acts of will’ when it comes to legal interpretation. Absent formal law-making powers, Petrov holds, the role of expert committees is limited to ‘cognition’ – that is, they should only set out legally permissible interpretations in the abstract. The concrete application of law requires an act of will, or, as Petrov puts it, ‘creativity’, and is thus the prerogative of those who enjoy the formal power to do so. It remains a little unclear what such restatements of law in the abstract would look like though. How could a reader make sense of abstract legal propositions other than through imagining what they mean in more concrete circumstances?

As Charles Sanders Peirce has argued, the meaning of the concept can only be ascertained by considering the conceivable effects. This is indeed what happens in manuals such as the *Tallinn Manual*: the reader is presented with an endless set of hypotheticals, a series of imagined applications of the general rule involved. If one follows the positivistic tradition, such acts of imagination can only be treated as scholarly opinions, acts of will by people without formal legal powers. However, if that is all there is to it, why should we bother? The answer to this can be found in the other parts of *Expert Laws of War*, especially the parts where the book builds on very different academic traditions and foregrounds the idea of humanitarian law as a community of interpreters. It is here that expert committees, despite their possible methodological flaws, do matter. The image of humanitarian law as a community is far from ‘pure’: it is the messy practice where formal sources and stringent methods of interpretation are often bypassed; where policy-makers and judges may use expert restatements because they lack time and resources to conduct independent research into state practice; where chairs of expert committees lobby to get their products accepted as reflection of customary law; where ‘authority’ may flow from other sources than the ones mentioned in Article 38 of the ICJ Statute.

Of course, this does not mean that all the messiness should be accepted, just because this is how the world is apparently run. It remains even more important to assess critically how claims to authority are made, accepted and effectuated. This is what gives *Expert Laws of War* its critical bite: not so much the assessment of expert restatements as falling short of the criteria of positivism but, rather, the use of the very same criteria by experts to claim authority – the idea that ‘experts do not make law’ and, yet, once we look at the way in which law evolved in the community of humanitarian law, this statement is ‘as true as it is misleading’.

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doi:10.1093/ejil/chab046

Jean Ho. *State Responsibility for Breaches of Investment Contracts*. Cambridge: Cambridge University Press, 2018. Pp. 374. £95. ISBN: 9781108415842.

To take an abandoned, monumental topic, follow its trajectory and streamline it requires a certain skill – yet this is what Jean Ho succeeds in doing in her monograph

State Responsibility for Breaches of Investment Contracts. Capable and revealing. Original and brave. Yet somewhat disturbing and provocative. The book addresses state responsibility for breaches of contracts concluded between investors and a state or state-related entity. International investment law and investment treaty arbitration appear, rather unsurprisingly, as being central to it. No other form of dispute resolution can compete with investment treaty arbitration in the number of cases directly dealing with state responsibility for breaches of contracts. The entirety of Ho's argument on the emergence (or, rather, maturity) of international rules on state responsibility for breaches of investment contracts would not be possible without a thorough study of arbitral awards in investment treaty arbitration. Engaging with these awards, her book contributes to the critical narrative of investment treaty arbitration and will resonate well with scholars and practitioners primarily involved with international investment law and investment treaty arbitration. Yet the book is not just another contribution in an already well-saturated field. It forms part of a fresh wave of scholarly interest in state responsibility,¹ approaches public international law as a system of different layers of rules and, for that reason, should appeal to a broader audience well beyond the self-contained regime of international investment law and investment treaty arbitration. Ho begins her work by taking the reader to the place of abandon: to the International Law Commission's (ILC) debates of 1969–1970 when the commission decided not to pursue the codification of state responsibility for contractual breaches. At that point, it was commonly agreed that cases concerning state responsibility for breaches of the rights of aliens, including those stemming from contracts with a sovereign, constituted a significant part of the available precedents on state responsibility. While some would have preferred to draw on this body of law to elaborate the rules on state responsibility in the well-defined field of injury to aliens, the ILC ultimately prioritized a more general perspective on state responsibility.² Adopting this general perspective in practice meant that issues of state responsibility for breaches of investment contracts were excluded from the ILC's focus. This particular decision may have allowed the ILC to avoid being weighed down in complex debates about a specific area of protection of aliens; perhaps it even enabled it to concentrate on the crystallization as well as the progressive development of key rules and principles of the general regime of state responsibility. That said, finalized some three decades later in 2001 and focused exclusively on the secondary rules of international law, the

¹ Among the recent notable works on various central and peripheral aspects of state responsibility under public international law, see, e.g., A. Nollkaemper and I. Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014); K.N. Trapp, *State Responsibility for International Terrorism* (2011); Devendra, 'State Responsibility for Corruption in International Investment Arbitration', 10(2) *Journal of International Dispute Settlement* (2019) 248; Baetens, 'Invoking, Establishing and Remediating State Responsibility in Mixed Multi-Party Disputes: Lessons from Eurotunnel', in C. Chinkin and F. Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (2015) 421.

² Roberto Ago, First Report on State Responsibility, UN Doc. A/CN.4/217, 7 May 1969 – 20 January 1970, at 137.

Draft Articles on State Responsibility clearly are not free of difficulty.³ Ho does not hypothesize whether the ILC could have reached agreement if it had also considered breaches of state contracts entered into with aliens. However, she views the ILC's decision not to codify breaches of contracts as a lost opportunity and notes the rather astonishing gap that has since appeared in the scholarship. Yet it is not only a gap in the scholarship that magnetized Ho's attention. The actual trigger was an article entitled 'The Myth of International Contract Law', which questioned the existence of international law on state responsibility for breaches of state contracts.⁴ Written by Ho's mentor, Muthucumaraswamy Sornarajah, this article became the point of departure for Sornarajah's subsequent critique of international investment law – and it prompted Ho to 'respond' in book-length form. Throughout Ho's book, readers thus will find themselves, rather unsurprisingly, in the erudite and ultra-critical company of Sornarajah. His invisible presence in the audience turns the book into an advanced text rather than an entry point into the field. This advanced text is presented in the form of seven chapters, which address the question of state responsibility for breaches of contracts in a broadly chronological manner. Ho starts with the origins of contractual protection by examining diplomatic channels, the adjudicatory practices of mixed claims commissions and early codification efforts (Chapter 1). Having commented on the role of arbitral awards as generators of international law (an issue to be treated below), she then proceeds with discussing the current status of contractual protection in general international law and international investment law and the emerging international law on investment contract protection (Chapters 3–6). Ho concludes the book with observations on the future of international investment contract claims (Chapter 7).

Upon closer reading, the book's structure is not strictly linear though. Although Chapter 1 is primarily dedicated to the origins of state responsibility for breaches of contracts, useful historical references can be found throughout the volume. For instance, Chapter 3 unveils the origins of the minimum standard of protection for aliens, Chapter 4 traces the origin of viewing contractual rights as property rights and Chapter 5 examines the development of various schools of thought on the internationalization of investment contracts. For Ho, history is not simply a means of livening up her meticulous legal analysis. Nor is it merely a way to lay down or structure her material. Rather, she operationalizes historical discourses, develops her arguments from them and uses them to persuade the most sceptical of readers (including Sornarajah). History essentially appears as an important part of Ho's method and argument. Overall, it is possible to single out three important historical arguments that inform Ho's account. First, Ho draws on interstate diplomatic correspondence obtained in the national archives of France, the Netherlands, the United Kingdom and

³ International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/83, 3 August 2001. The history of the ILC's work on state responsibility is helpfully summarized by James Crawford, J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), at 1–60.

⁴ Sornarajah, 'The Myth of International Contract Law', 15(3) *Journal of World Trade* (1981) 187.

the USA to show that between the early 1800s and the early 1900s there was no such thing as rules on state responsibility for breaches of investment contracts. This previously untouched correspondence reveals that states satisfied or rejected claims for breach of contract without justifying their decisions by reference to any particular rule of international law. Ho explains that the reasons were 'seldom made known in diplomatic correspondence' and that they were 'probably unrelated to their [the claims'] legal merits' (at 59). Second, Ho exposes the unsuccessful attempts of state⁵ and private codifications⁶ to elaborate rules on state responsibility for breaches of investment contracts from 1930 to the 1990s. Third, based on the practice of the mixed claims commissions,⁷ as the first adjudicatory bodies grounding their decisions on state responsibility for breaches of contracts in legal rules, Ho distils three general principles of contractual protection for that period.⁸ It is not the content of these principles that interests Ho most, though she engages with their substance as well, but, rather, the capacity of adjudicative bodies to generate principles or rules. Together, these historical observations create an essential foundation for the underlying and most controversial part of Ho's argument – namely, that arbitral awards are the principal source of international law on state responsibility for breaches of investment contracts. To her, arbitral awards are the principal source notably because state practice and treaty making, which have generated international law in other fields, did not produce clear principles and rules: diplomatic correspondence from the early 1800s to the early 1900s did not rely on legal considerations, while early attempts at codification from the 1920s to the 1990s failed. Adjudicative bodies thus filled a normative gap. By distilling three general principles of state responsibility in the practice of the mixed claims commissions from the early 1900s to the 1920s, and alluding to their continuing significance in the modern contemporary arbitration practice, Ho demonstrates the capacity of the international arbitration/dispute resolution regime to crystallize and generate international law in this area of investment law. This core argument is developed in detail in Chapter 2, which explains how arbitral awards became a principal source for rules on state responsibility for breaches of investment contracts. According to Ho, arbitral awards 'generate binding legal content on disputing parties' (at 64–68) in the area evidencing 'lacuna' or 'ambiguity' (at 68–70) and are accessible to other arbitral

⁵ Among state codifications, Ho names four principal attempts: codifications during the 1930 Hague Codification Conference; the codification resulting in the 1967 Organisation for Economic Co-operation and Development's (OECD) Draft Convention; the failed attempt at the ILC already addressed in the beginning of this review; and the equally failed attempt surrounding the OECD's Multilateral Agreement on Investment.

⁶ Among private codifications, Ho names two attempts: the 1959 Abs-Shawcross Draft Convention and the 1961 Harvard Draft Convention.

⁷ Ho deals with the Italy-Venezuela Claims Commission, the US-Mexico Claims Commission and the US-Guatemala Claim Commission.

⁸ Unlike an argument based on archival work, all three principles distilled from the practice of the mixed commission are not entirely new. The first principle establishes that a forum selection clause does not serve as a bar to international claims. The second principle specifies that contractual breaches are not violations of international law *per se*. The third principle recognizes only contractual breaches *iure imperii* as potential violations of international law.

tribunals (at 70–72). Because awards lack ‘a centralized law-generating authority’ (at 88) and do not constitute a *jurisprudence constante* in a proper sense, they do not as such yield rules of state responsibility (at 72–79). Rather, for such rules to emerge through arbitration, subsequent tribunals need to voluntarily adopt the reasoning of prior awards. In this process, Ho suggests that ‘arbitral awards exhibiting hallmarks of superior quality will be prized by later tribunals above arbitral awards that do not and will be followed as authorities for the legal propositions they advance’ (at 79–80). This will happen because subsequent arbitral tribunals are ‘more inclined to adopt a prevailing solution than to develop their own from scratch’ (at 80). At the same time, Ho concedes that full convergence cannot be achieved since arbitral awards remain an inherently unstable or ‘disorderly’ source of law (at 72–79).

On its proper reading, this argument does not automatically turn each and every arbitral award into a manifestation of international rules on state responsibility. No doctrine of precedent exists in investment treaty arbitration, and Ho does not invent one. Instead, she identifies two points of convergence, or ‘anchors’ (at 89), among arbitral awards that enable them to become the source of international rules. The first anchor is what Ho refers to as the core standard of treatment (Chapter 3). She draws the concept from the basal layer of general international law – the minimum standard of protection for aliens, of which denial of justice is a critical component.⁹ She further supplements the core standard by additional elements clarified through the application of the treaty standard of fair and equitable treatment (FET), such as a prohibition against arbitrariness, violation of due process, bad faith, coercion and harassment. The second anchor are the international legal rules on the protection of alien property (Chapter 4). Ho recognizes that in certain circumstances contractual rights may also be assimilated to property and enjoy protection either through rules prohibiting illegal expropriation under customary international law or through provisions of investment treaty law. Because of these two anchors, one should not expect Ho’s argument on the law-generative function of arbitral awards to be exactly reproduced in other fields of international law. For Ho, it is only those awards that demonstrate convergence around the core standard of treatment or international rules on protection of alien property that inform rules on state responsibility for breach of investment contracts. In other words, her argument is not general, but contextual and conditional; it does not open up for an unqualified proposition that arbitral awards give foundation for rules of international law.

As a further step, Ho cannot avoid addressing the much-debated doctrine – or, rather, theories – of the internationalization of investment contracts. As the term suggests, the internationalization of these contracts decouples them from the applicable national regime governing remedies. In place of a domestic regime, international law

⁹ Here, Ho identifies the often-cited early cases, like the *Neer Claim (USA v. United Mexican States)* (1926) 4 RIAA 60; the *Claim of the Salvador Commercial Company (USA v. El Salvador)* (1902) 15 RIAA 467; the *International Fisheries Company Case (USA v. United Mexican States)* (1931) 4 RIAA 691; the *Mexican Union Railway Case (Great Britain v. United Mexican States)* (1930) 5 RIAA 115; the *Shufeldt Claim (Guatemala v. USA)* (1930) 2 RIAA 1079, and some others.

is said to govern these contracts, and investors' rights are protected by international law. Historically, and largely in the period before the emergence of investment treaty arbitration, the mechanics of internationalization rested on scholarly writings and occasional arbitral awards endorsing versions of the internationalization thesis. More recently, this practice has found a new and even more controversial channel via umbrella clauses in investment treaties, pursuant to which states, as a matter of treaty law, accept to honour contractual commitments.

Ho chooses to isolate the assessment of state responsibility and internationalization from her earlier account of the historical development of state responsibility in Chapter 1 and the role of arbitral awards in the clarification of the rules on state responsibility in Chapter 2. Her discussion appears in a separate chapter (Chapter 5) immediately after Ho has explained that states incur responsibility for breaches of investment contracts when they violate the core standard of treatment or rules on protection of alien property under general international law. Because internationalization does not rest as a rule on any of these two anchors for state responsibility, Chapter 5 unsurprisingly accumulates Ho's critique. This is an extremely carefully written part of the book, particularly in relation to its discussion of the effect of umbrella clauses, for which Ho insists on an 'internationalization-free' interpretation that would offer some enhanced protection but would not automatically transfer contractual breaches into breaches of international law.

Having addressed internationalization as 'a magnet of controversy' (at 89) in Chapter 5, Ho clears the way for salient concluding observations in the two final chapters. Here, she refers to the ongoing development of the rules on state responsibility for breaches of investment contracts (Chapter 6) and the future of international investment contract claims (Chapter 7). In Chapter 6, her argumentative edifice appears in a finalized full view. Because of the growing practice of investment treaty arbitration, Ho recognizes that state responsibility for breaches of investment contracts is and will be mediated through the application of investment treaties. Their interpretation, she argues, should be aligned with, or informed by, general international law. The link with general international law allows Ho to tie her argument back to the earlier discussion, in Chapters 3 and 4, of the two 'anchors' of arbitral jurisprudence: for her, not each and every contractual breach qualifies as an international wrong but only those that either violate the core standard of treatment or amount to an unlawful expropriation.

According to Ho, this moderate approach will stabilize the development of the rules of state responsibility for breaches of investment contracts and 'leave a lasting imprint on legal development' (at 225). In conclusion, Chapter 7 outlines the practical implications of the book's core thesis that state responsibility for breaches of investment contracts gravitates to the core standard of protection and protection of alien property under international law. Here, Ho carefully delineates the various causes of action under general international law and investment treaties and concludes that, ultimately, claims based on breaches of the FET standard will dominate as the most promising standard to invoke state responsibility for breaches of investment contracts. What makes the FET standard stand out (and superior to provisions against

expropriation or umbrella clauses) is its all-encompassing scope and flexibility in addressing contractual breaches under international law. According to Ho, arbitral awards assessing contract-related FET claims will further contribute to the development of the law on state responsibility for breaches of investment contracts; this in turn reflects the FET standard's 'capacity for incremental evolution, while staying grounded to the core standard of treatment' (at 277). Practitioners in international investment law will particularly appreciate this final chapter as a sort of guidance across complex and frequently overlapping causes of actions relating to protection for breaches of investment contracts under international law. Overall, throughout the chapters, Ho persuades gently and confidently. She does so, first, by explaining how arbitral awards have become the principal arena for developing the law on state responsibility; second, by identifying the centre of gravity of the current and emerging development of rules on state responsibility within the fundamental rules of general international law; and third, by explaining the future of the rules of state responsibility evolving around FET. Her analysis is well equipped with historical argument and strong analytics. Her argument is also enriched with an impressive trail of material consisting of treaties, archival documents, no less than 152 arbitral awards, 26 public international law cases before international courts and tribunals, dozens of state courts' decisions from various jurisdictions, and so on. At the same time, Ho's argument would have been even more persuasive if complemented by quantitative empirical analysis. With all her rich references to jurisprudence, it remains somewhat unclear how empirics support Ho's work. It would have been particularly revealing to know how many of the arbitral awards studied by her actually contributed to the crystallization of the rules of state responsibility for breaches of investment contracts. It would also have been illuminating to learn how those arbitral awards that form a central part of the study were selected from the body of known and publicly available arbitral awards. A stringent empirical methodology could probably find a place in a second edition of the monograph and enrich the work's otherwise compelling doctrinal findings. While Ho's argument on arbitral awards as the principal source of rules on state responsibility stands out, she delivers more than that. Through her thorough and meticulous analysis of an unfurrowed field, Ho clarifies that international law and international investment law indeed do not offer unfettered protection for breaches of state contracts and that state responsibility only arises from the most serious and obvious violations. The book is deeply anchored in general international law and equally distanced from the extreme views that, on the one side, endorse an absolute level of contractual protection and, on the other side, negate the existence of contractual protection under international law. Furthermore, the book does far more than demonstrate that breaches of investment contracts can result in state responsibility. Readers will not only take away that rules on state responsibility for breaches of investment contracts exist, and learn a lot about their content, but they will also be introduced to an entire intellectual framework of thinking about investment contract, which enables the author to reach this conclusion and assess the content of these rules. There is beauty and strength in the way in which Ho arranges her argument. In this sense, this book is particularly rewarding to read thoroughly throughout all

seven chapters. This review started by situating the book among works in general international law and international investment law. It concludes by saying that the book stands out due to its sharp and nuanced analysis of general international law and the evolving investment arbitration jurisprudence. The work makes a tangible contribution to the development of international law and merits particular praise for the conceptual clarification and delineation of investment law standards *vis-à-vis* breaches of investment contracts. From numerous sketches, taken at different times and in various contexts, state responsibility for breaches of investment contracts appears to have finally received a rather detailed portrait in Ho's work. It will inevitably have a lasting impact for all subsequent writings on the subject.

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doi:10.1093/ejil/chab043

Tom Ruys and Nicolas Angelet (eds), Luca Ferro (assistant ed.). **The Cambridge Handbook of Immunities and International Law**. Cambridge Cambridge University Press, 2019. Pp. 790. £150.00. ISBN: 9781108417884.

It is testament to the perennial newsworthiness of this canonical topic of international law that, despite the imprint on the collective consciousness of an epochal global pandemic, mention of 'immunities' to an international lawyer is still more likely to call to mind diplomats, dictators and the *jure imperii/jure gestionis* distinction than vaccines, variants and viral loads. In the past year alone, two international judgments,¹ one international arbitral award,² at least eight national judgments³ and two diplomatic *causes célèbres*⁴ implicating jurisdictional immunities have jostled with COVID-19 for the international legal and even mainstream press headlines. The myriad state and international organizational activities and property to which they can be relevant, the multiplicity of national courts worldwide in which they can be at issue, the minor and

¹ Case C-641/18, *Rina* (EU:C:2020:349); *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Merits, Judgment, 11 December 2020 (not yet published).

² PCA, *The 'Enrica Lexie' Incident (Italy v. India) – Award*, 21 May 2020, PCA Case no. 2015–28, available at <https://pca-cpa.org/en/cases/117/>.

³ Hague District Court, Case C-09-554385-HA ZA 18–647, Judgment of 29 January 2020; District Court for the District of Colombia, Civil Action no. 2015-0612, *Jam v. International Finance Corporation*, Opinion of 14 February 2020; *A Local Authority v. AG*, [2020] EWFC 18; Svea Court of Appeal, Decision 11729, *Republic of Kazakhstan and National Bank of Kazakhstan v. Ascom Group SA*, Judgment of 17 June 2020; *R (Dunne) v. Secretary of State for Foreign and Commonwealth Affairs*, [2020] EWHC 3185 (Admin); Seoul Central District Court, Case no. 2016 Ga-Hap 505092, Judgment of 8 January 2021; German Federal Supreme Court, Case 3 StR 564/19, Judgment of 28 January 2021; US Supreme Court, Case no. 19–351, *Federal Republic of Germany v. Philipp*, Opinion of 3 February 2021.

⁴ M. Gatti, 'Diplomats or Fonctionnaires? The Contested Status of the EU's "Embassy" in the UK', *EJIL:Talk!*, 1 March 2021; S. Top, 'The Waiver of Immunity of Catalan MEPs: Reintroducing Politics in EU Extradition Law', *EJIL:Talk!*, 11 March 2021.