Since the rise of investor-State arbitration (ISA), the role that States play in the settlement of investment disputes has changed dramatically, both with regard to the State where the investment takes place (“host State”) and the State of which the investor is a national (“home State”). This book aims to highlight the most important facets of these developments.

Together, hosts and home States have been actively engaged in the negotiation of international agreements (IIAs), treaties that, as well as aiming to promote and protect foreign investment, allow foreign investors to lodge claims directly against host States, through ISA. Despite much heated debate, there is no consensus as to whether or not IIAs lead to more inflows of foreign direct investment (FDI) or if they achieve their objective of reducing political risks in host States. Nevertheless, by the end of 2012 more than 3,200 investment treaties
were in force, all of which provide for substantive and procedural guarantees to foreign investors.

Investment treaties, however, are not only about the protection or promotion of foreign investment. The question of balancing those objectives with other social values is currently being pondered by host and home States while they negotiate new investment treaties, or during litigation of investment disputes. The negotiators are aware that the original wording of some investment agreements could be interpreted more broadly than initially intended, reducing the “policy space” of the “regulatory State.” The contributions of Tarcisio Gazzini, Todd Tucker, Anna Katselas and David Gaukrodger look at precisely this issue. Gazzini shows us that through a process of conscious adjustment or norm creation — although largely underused — States parties to IIAs can fine-tune the scope of their obligations, providing more flexibility and certainty in the regulation of foreign investment while balancing investment protection against other social values. Looking at the case law of investment disputes, Tucker discusses how different social actors — arbitrators, lawyers, companies and governments — elaborate and dispute concepts regarding what States should be doing in national territories with respect to foreign investment. Katselas claims that, through investment treaties, States have created a de facto international organization. This de facto organization comprises a fragmented network that States are now increasingly trying to streamline in light of the “benefit” of their experience with investor-State arbitration. Gaukrodger provides a clear example of how some States are undertaking the task of exploring together the policy and legal challenges raised by IIAs and investor-State dispute settlement in the “Freedom of Investment” (FOI) Roundtable hosted by the Organisation for Economic Co-operation and Development (OECD).

But a major group of changes in the role of the State relate almost exclusively to the host State, as its powers and duties have been put through the test of litigation and settlement of investment disputes in the current regime of IIAs. The extension of these rights and obligations is analyzed by several of the contributors to this book. They conclude that, in general, host States should

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4 See Chapter 1 of this book.
5 See Chapter 5 of this book.
6 See Chapter 8 of this book.
7 See Chapter 9 of this book.
8 By the end of 2013, the total number of known treaty-based investor-State arbitration cases reached 568, a number that is likely to be higher, as besides ICSID, most arbitration forums