PART I

Introduction

1

Introduction: Evolution in investment treaty law and arbitration

CHESTER BROWN AND KATE MILES

International investment law is a well-established discipline grounded in principles of customary international law that stretch back into the nineteenth century. In recent times, however, it has become quite evident that the law is in a state of flux. In particular, with the advent of investor–State arbitration in the latter part of the twentieth century, new levels of complexity, uncertainty and substantive expansion have been emerging. Indeed, in many ways, a discrete field of investment treaty law has developed, largely driven by the exponential growth in investment treaty arbitration over the last decade. Together with the continued proliferation of bilateral investment treaties (BITs) as well as the more recent trend of States concluding free trade agreements (FTAs) containing investment chapters, the now often very detailed reasoning set out in an increasingly large number of arbitral awards has contributed to rapid developments in the field. Such change has reached into almost all areas of investment treaty law and practice, encompassing the interpretation of substantive obligations, an intensified focus on procedural matters, the participation of new actors and the more nuanced content of recent BITs. In many investment treaty awards, the tribunals undertake a close examination of previous investment treaty decisions, leading to the creation of what is now being regularly described as an investment treaty jurisprudence.[1]

This acceleration of activity does not, however, indicate consensus. On the contrary, investment treaty law and arbitration has very much become a high-profile area of contestation. In this regard, the controversy is not only reflected in the continuing debates on the implications

[1] See e.g. the terminology used throughout Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive principles* (Oxford University Press, 2007).

of substantive rules, but there has also been a discernible shift towards the consideration of systemic issues, such as the 'legitimacy' of the investment treaty system, its interaction with other areas of international law, the role of economic development in the regime, the problem of inconsistencies in awards and related procedural issues such as challenges to arbitrators and the need for greater transparency. It is, therefore, an opportune moment to take stock of the point at which investment treaty law and arbitration has arrived and to reflect on the processes currently unfolding within the field.

The multiplicity of this evolutionary process is the core theme for this volume. Having been struck by the breadth, complexity and pace of the changes occurring within the field, we convened a conference in February 2010 at the University of Sydney, Australia, to explore the implications of these issues and of the sense that individual developments were linked as manifestations of a more fundamental evolutionary shift in the law: 'Investment Treaty Law and Arbitration: Evolution and Revolution in Substance and Procedure'. Reflecting the many different voices within the field, the presenters were drawn from Europe, the United Kingdom, Asia, North America, South America, Australia and New Zealand; from academia, practice, arbitral institutions, civil society and arbitrators themselves. Significantly, there was also a blend of emerging scholars and practitioners together with the more established figures within the discipline. Indeed, it became quite apparent at this gathering that a new generation of experts in international investment law is emerging with new perspectives and new ideas. Many contributions in this volume are based upon presentations at that conference. They have been carefully selected to reflect both the substantive theme of the book (i.e. the 'evolution' in the field of investment treaty law and arbitration) and, symbolically, the simultaneous evolution of the identity of the authors writing on investment treaty law and arbitration.

Within the framework theme of evolution, the chapters examine ways in which investment treaty law is developing, analyse the most significant contemporary issues in the field, and consider the future direction of investment treaty law and arbitration. What has emerged in the course of these analyses, in particular, is the interaction between public and private law, interests and governance. This interface appears throughout the chapters in this volume in any number of manifestations, ranging from the more conceptual discussions on systemic issues through to the practice-oriented points on procedure. Excavating the many forms of this public–private relationship is a common thread linking the specific

topics addressed in this volume. It is clear that these are issues without straightforward solutions. As they concern questions of fundamental importance on how to reconcile 'the public' and 'the private' within the law's own substance, structures and institutions, these issues will, undoubtedly, continue to occupy scholars and practitioners for many years still to come.

Structurally, the book has been organised to address four key subject areas within investment treaty law: shifts in fundamental character, actors in international investment law, the new significance of procedure and engagement with cross-cutting issues. Following on from this introductory section, Part II of the book explores shifts of a systemic nature and considers issues arising out of the conceptualisation, and, indeed, re-conceptualisation, of international investment law. It opens with a chapter from Professor Philippe Sands QC addressing the notion of ethics and conflicts of interest within the investment treaty regime. Such matters can not only impact upon procedural and substantive issues, but also on conceptual questions related to the 'public' and the 'private' character of investment treaty law, and, perhaps, ultimately most significantly for the future legitimacy of the regime, on the practice of the law. His central theme also reflects the changing nature of our assumptions and understandings of the law as he extends the concept of conflict (until recently, largely concerned with conflict over substantive legal issues) to the 'internal' areas of contestation within the system, in particular, to the formal conflicts of interest that arise for counsel and arbitrators in investment disputes. In the course of his enquiry, Professor Sands focuses on questions about the less formal, but equally 'conflicted', nature of the arbitral system and the position of its participants, such as the ease with which counsel, arbitrators and expert witnesses switch from one role to another in successive disputes. Professor Sands argues strongly for the introduction of rules precluding the continuation of these practices, counteracting the standard objections, such as the proposition that not everyone is in a financial position to elect to accept appointments as solely an arbitrator or counsel, with a condemnation of self-serving economic justifications when it is a fundamental matter of principle that is at stake – and one that is, indeed, increasingly seen as a source of disquiet more broadly at the operation of the investment arbitration.

The critique of the investment treaty regime as a whole is continued throughout the remainder of the chapters in Part II of this volume. Professor David A. R. Williams QC and Simon Foote consider recent

developments in the very concept of 'investment' within the treaty system. The authors examine the divergent methodologies used to determine whether there is an 'investment' within the scope of the Convention for the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention),[2] and explore the current tensions created by the co-existing, yet conflicting, prescriptive and broader approaches to interpretation. From a systemic perspective, it is indicative of the depth of the ruptures currently within the field that discord of this nature has developed around such a foundational concept within investment treaty law. The accommodation of conflicting approaches is also explored by Dr Martins Paparinskis, albeit with a different emphasis. In his chapter, Dr Paparinskis analyses attempts to interpret investment treaties by reference to customary international law, identifying disagreement as to the relevance of such rules as a key source of inconsistency in the case law. Interestingly, although Dr Paparinskis confines his detailed analysis to the interaction between investment treaty law and 'general customary investment protection law', he also alludes to its wider application, almost as a case study for the future development of more generalised rules on interpretation by reference to custom.

The theme of 'the public' and 'the private' within international investment law is, perhaps, most overtly articulated in the chapter by Dr Alex Mills. Appraising the investment treaty system from a conceptual perspective, Dr Mills explores its inherent public–private dualities and argues that this innately contradictory character is located in its foundations and is at the heart of current controversies. It is this duality that allows either characterisation to be adopted as an essentially 'public' or 'private' system, leading to the development of the law in ostensibly conflicting directions. Dr Mills contends that as the system is neither wholly that of a public or private orientation, but simultaneously a complex coming together of both, a focus on one to the exclusion of the other has resulted in the emergence of explicable, but ultimately incomplete and inaccurate, representations. A systemic analysis of investment treaty arbitration is also undertaken by Jonathan Bonnitcha, although in his chapter, he brings a philosophical perspective to issues of interpretative methodology. He develops a normative framework for the

[2] Convention for the Settlement of Investment Disputes between States and Nationals of other States, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).

evaluation of the different approaches adopted by arbitral tribunals, exploring the theories of, amongst others, Bentham, Epstein and Rawls, and grounding his proposal in the work of Amartya Sen. In essence, Bonnitcha presents an assessment of the consequences of applying different interpretations to the protections guaranteed under investment treaties and an evaluation of the desirability of the various approaches. Again, in the chapter by Daniel Kalderimis, questions of a systemic nature are addressed. The focus for his investigation is the recently emerged conceptual framing of investment treaty arbitration as 'global administrative law'. In particular, Kalderimis presents the viewpoint of a practitioner, considering what the implications of this characterisation might be in practice. Ultimately, he argues, it is most likely that arbitrators of investment disputes will be called upon to contribute to the development of this new field of global administrative law and the formation of further regulatory principles.

The authors in Part II address a variety of topics. However, there is a shared approach that links their chapters. Each author takes a holistic view of the investment treaty regime and is concerned with matters of a systemic or fundamental nature. In particular, the issues identified and questions asked reflect recent trends away from a sole focus on individual points of substantive law towards enquiries into questions of legal theory, conceptual framings, and systemic legitimacy. Indeed, in many respects, this shift in mode of analysis is, in itself, a further manifestation of the current evolutionary state of affairs within international investment law. As the field of investment treaty law expands and develops, it is quite apparent that attention is turning from the immediately controversial issues to reflect also on questions of a more fundamental character. The chapters in Part II represent just such a transition.

Part III of this book focuses on another key area of transformation – actors in international investment law. In recent times, not only have new actors emerged within investment treaty arbitration, significantly changing the face of investment disputes, but important new issues for host States and investors have also materialised. Each of the chapters in Part III addresses an aspect of this dramatically shifting landscape. Opening the discourse, Dr Markus Burgstaller examines one of the most striking recent developments in the character of investors, being the escalation of transnational commercial activity by sovereign wealth funds. He argues that recent shifts in the investment strategies of many sovereign wealth funds, particularly the intensified focus on foreign rather than domestic investment, have fuelled host State anxieties

regarding national security issues and economic influence over key sectors. In considering the implications of these trends, Dr Burgstaller discusses 'best practice' soft law initiatives developed by the Organisation for Economic Cooperation and Development and the International Monetary Fund so as to stave off a backlash against the activities of sovereign wealth funds. He also draws attention to restrictive regulation increasingly introduced by host States to limit the reach of sovereign wealth funds and explores whether such domestic measures contravene international investment law.

Pursuing the enquiry into new circumstances for existing actors in the field, Associate Professor Andrew Newcombe examines the changing environment for investors, in which the spotlight has recently turned from a sole focus on the conduct of host States to include also that of investors. Associate Professor Newcombe paints a picture of a 'quantum of solace' that must exist between the host State and the investor for the investment relationship to thrive, but explains that it is a mode of interaction that also impacts on the resolution of disputes. Exploring the ambiguities of reciprocal levels of trust between these participants, he argues for the adoption of differentiated responses to investor misconduct rather than treating the issue as a matter of jurisdictional exclusion.

A significant new actor in the investment treaty regime is the European Union (EU) – and, interestingly, in a number of capacities. As discussed by Dr Christina Knahr in Part IV of this volume in the section on procedural developments, the EU has recently appeared as *amicus curiae* in several investment treaty disputes filed against its Member States. In Part III, Dr Paul James Cardwell and Professor Duncan French analyse the EU's role as an actual party to investment treaties. In this capacity, the EU has recently concluded Economic Partnership Agreements that contain investment provisions with African, Caribbean and Pacific States. The authors examine the implications of the EU as a 'global investment actor', exploring both the ostensible synergies, and innately problematic relationship, between foreign investment as a development assistance tool and as a means to promote market liberalisation. Their analysis of the EU's approach to foreign investment is also considered against the backdrop of the unique set of pressures under which the EU must operate more generally.

Examining what has recently become a particularly controversial protection guarantee, Nick Gallus explores the fair and equitable treatment standard from the perspective of the host State, and, in particular, the relevance of the host State's level of economic development. He

argues that the inconsistency in recent awards of the interpretation of States' obligations under the standard has led to uncertainty for host States. Based on arbitral awards, he identifies factors which are relevant in assessing whether the fair and equitable treatment standard may be applied in a differentiated way, in light of the circumstances faced by the host State. Similarly approaching current questions in the law from the viewpoint of the host State, Avidan Kent and Alexandra Harrington examine the recent engagement of investment arbitral tribunals with the customary international law defence of necessity. Kent and Harrington discuss recent awards addressing the doctrine and then consider the application of the defence to investment issues arising out of the most recent Global Financial Crisis, focusing in particular on the circumstances faced by Iceland. In the course of their enquiry, Kent and Harrington assert that the necessity doctrine is not only an important tool for States in times of crisis, but is also an essential instrument in their recovery trajectories. In arguing that the current application of the doctrine does not meet the contemporary needs of States, the authors suggest that, through an 'evolutive' approach to treaty interpretation,[3] several of the doctrine's conditions should be modified so as to produce more just outcomes for host States. Again linked in with the circumstances of the host State, one of the most contentious issues within investment treaty law and arbitration to date has been how to take better account of the public interest within investment treaties, host State–investor contracts, and the resolution of disputes. Suzanne Spears addresses this topic, highlighting the controversy surrounding the potential impact of investment treaty protections on host State regulation. She examines key substantive treaty protections and the implications of recent awards involving non-investment issues. In particular, she focuses on the shift in emphasis seen in the so-called 'new generation BITs'. She speculates that these investment treaties, which display a more balanced consideration of issues from the host State perspective, could, perhaps, prove to be the salvation of the regime, providing a much-needed boost to its internal legitimacy and, in the process, rescuing it from both its most blinkered 'cheerleaders' and most ardent critics.

[3] i.e. recognising that the meanings of certain terms may change with time: see e.g. C. Brown, 'Bringing sustainable development issues before Investment Treaty Tribunals' in M.-C. Cordonnier-Segger, M. Gehring and A. Newcombe, *Sustainable Development in World Investment Law* (The Hague: Kluwer, 2011), pp. 171, 185–7; and C. Brown, *A Common Law of International Adjudication* (Oxford University Press, 2007), pp. 46–9.

Exploring the theme of actors within international investment law from a unique angle, Professor Andrea Bjorklund poses the question whether the investment treaty regime would be strengthened by enhancing the role of sub-national government entities, such as State rather than federal governments, within investment arbitration. In particular, she considers the possibility of provincial governments appearing as disputing parties or *amicus curiae* in investment disputes, together with both the public-interest implications and the problematic aspects of doing so. Professor Bjorklund discusses recent examples of an expansionary approach to participation in investment arbitration, focusing on the Quechan tribe submission in *Glamis Gold* v. *United States of America*[4] and the argument that the federal government could not fully represent the tribe's perspective. She also points to the recent intervention of the EU as *amicus curiae* in investor claims made against its Member States. From this, Professor Bjorklund argues that, in the future, it is also likely that local and provincial governments will seek to appear in investor–State disputes on the basis that their interests are separate from, and not adequately represented by, the national government.

The chapters in Part III of this volume reveal a dynamic and changing environment in which new actors are emerging, previously inconceivable possibilities are taking shape and new issues are confronting those more established participants within the investment treaty field. What continues to manifest, even if indirectly, throughout the enquiries in this section, is the sense that so many aspects of the investment treaty regime are really only just beginning to grapple with the exact nature of the public–private relationship within the law and its processes. This underlying preoccupation is also quite clear in the remainder of the book with its addressing of the acceleration of procedural developments in investor–State arbitration and the multitude of cross-cutting issues with which investment treaty law comes into contact.

Part IV considers an intriguing development that has crept up almost unnoticed and taken the field somewhat by surprise – the new significance of procedure, which now rivals the participants' focus on the content of substantive obligations arising under BITs. It is, perhaps, the intensity of the recent focus on procedure and its application to investment arbitration, rather than the notion itself, that is surprising. Litigators have always been aware of the importance of procedural

[4] *Glamis Gold Ltd* v. *United States* (Application for Leave to File a Non-Party Submission of 19 August 2005).