THE INTERNATIONAL LAW OF INVESTMENT CLAIMS

The International Law of Investment Claims is the first comprehensive account of the distinct principles governing the prosecution of a claim in investment treaty arbitration. The principles are codified as 54 'rules' of general application covering the juridical foundations of investment treaty arbitration, the jurisdiction of the tribunal, the admissibility of claims and the laws applicable to different aspects of the investment dispute. The commentary to each proposed rule contains a critical analysis of the investment treaty jurisprudence and makes extensive reference to the decisions of other international courts and tribunals, as well as to the relevant experience of municipal legal systems. Solutions are elaborated in respect of the most intractable problems that have arisen in the cases, including: the effect of an exclusive jurisdiction clause in an investment agreement with the host state; reliance on the most-favoured-nation clause in relation to jurisdictional provisions; and, the legitimate scope of derivative claims by shareholders.

ZACHARY DOUGLAS is a lecturer at the University of Cambridge Faculty of Law and a fellow of Jesus College. He has a substantial practice in public international law as a barrister at Matrix Chambers, London, and in particular is regarded as a leading specialist in investment treaty arbitration.

The International Law of Investment Claims

ZACHARY DOUGLAS

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For my parents,
Ronald and Susan

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Foreword

Some would say investment arbitration has reached its half-life. Emerging from, or in reaction against, earlier inter-state forms – diplomatic protection, FCN treaties, etc – it has a kind of 'boom-and-bust' feel to it. *Ad hoc* tribunals have produced an erratic pattern of decisions, with reasoning often impressionistic and displaying a certain disregard for state regulatory prerogatives. This is leading in turn to a reaction by some host states. Meantime there is much that is uncertain and unpredictable.

Zachary Douglas is unsparing in his criticism of particular decisions. But he does not accept either the rose-tinted view that the international investment tribunal is a new form of merchants' court, dispensing a relatively unconstrained justice – or the sceptic's alternative view that there is no point in the quest for explanations, and thereby for greater certainty. Rather he seeks to provide guidance, to say the law, even in Diceyan propositional form.

One characteristic of the field of investment arbitration is the overlapping and interaction of laws and legal systems. In analysing this phenomenon, Douglas displays fluency not only in public international law but also in private international law, adding greatly to the strength of his analysis – and to the collected wisdom of Dicey!

But there is much more. Douglas brings to his work a solid understanding of the functions – and sometimes dysfunctions – of international arbitration, generated by his practical and professional experience. He also brings – what those fortunate enough to work with him always saw – a desire to comprehend individual cases and disputes within some overall frame or matrix. This has not taken the form of a restlessness with particulars: he is too good a lawyer for that. But it has taken the form of a need to synthesise, of which this book is the fruit.

There is no shortage of books now on investment arbitration. But this will prove one of the best and, I believe, most enduring; it is fit as a work of synthesis to rank alongside Schreuer's *Commentary to the ICSID Convention*.

James Crawford
Lauterpacht Centre for International Law
University of Cambridge
17 March 2009

Preface

This volume is dedicated to the elucidation of rules governing the jurisdiction of international tribunals established pursuant to investment treaties, the admissibility of investment claims presented to them, and the laws applicable to the various legal issues arising out of such claims. The next volume will address the substantive obligations of investment protection that are common to the majority of investment treaties.

The recent exponential growth of claims being prosecuted under investment treaties by investors against states could not have happened without the expansion of the network of investment treaties by states. At first blush this might appear to be paradoxical: why are states actively embracing the inevitability of more international litigation against them? But it is a paradox only if the burden of defending claims eclipses the benefits attained by the states' compliance with these international engagements. Some form of cost-benefit analysis might shed some light on the rationality of the rush to sign investment treaties. It would not, however, reveal the full picture. What about the impact of the treaty upon the domestic rule of law? If regulatory practices in the host state of the foreign investment evolve in the direction of greater transparency and more respect for due process as a result of the discipline imposed by the state's international obligations, then this is surely a tangible benefit that may not be susceptible to precise valuation in economic terms. The factors that lead states to conclude investment treaties, and the advantages that flow from them, are unlikely to be uniform within the community of states that have participated in the construction of the modern network of investment treaties. One must, however, be sceptical of any claim that they have acted irrationally in doing so.

Another putative paradox that is closer to the concerns of this study lies in the basic architecture of an investment treaty. Within the domestic context, there are few areas of economic activity that inspire more intricate regulation than foreign investment: special regimes for taxation and property ownership; rules on anti-competitive practices, the transfer of technology and currency control; special employment or environmental obligations; rules on corporate governance and disclosure, and so on. And yet the technique favoured by states on the international plane is to superimpose a small number of general, open-textured, standards of investment protection upon these diverse and complex areas of

domestic regulation. Those standards are commonly elaborated in a text consisting of no more than a few pages. The contrast with other fields of international economic law is quite dramatic: consider the labyrinthine legal texts of the WTO on goods, services and intellectual property by way of example. The important insight from the architecture of the investment treaty is that states do not purport to displace municipal laws and regulations on foreign investment in a wholesale fashion by the perfunctory signing of an investment treaty. Instead they envisage a relationship of coordination between international and municipal laws. This explains the critical role that choice of law rules must play in the resolution of investment disputes.

The rules for prosecuting claims in investment treaty arbitration are also small in number and general in prescription in the texts of investment treaties. The state parties have thus entrusted the development of these rules to the international tribunals constituted to adjudicate investment disputes on an *ad hoc* and incremental basis. This act of faith on the part of the contracting states does not provide international tribunals with a *carte blanche*; the rules for prosecuting claims in investment treaty arbitration must be fair and just and the system for the resolution of investment disputes must be internally coherent and sustainable for the duration of the treaty. Indeed, according to the Vienna Convention on the Law of Treaties: 'disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law'. These fundamental principles might appear to be modest in prescription, but they are capable of carrying an important part of the interpretative burden in the elucidation of the rules in this volume.

Solutions to the problems of jurisdiction, admissibility and choice of law must ultimately contribute to the fairness and justice of the system for resolving disputes between foreign investors and host states. The principles of fairness and justice are a more legitimate source of guidance for resolving these questions than the policy objectives for concluding the investment treaty as revealed in its preambular clauses. There is no inexorable connection between the general policy of encouraging foreign investment and a decision to uphold jurisdiction in relation to a specific investment dispute.

The sustainability of the system of dispute resolution is also an important factor. If the basis for the decision to uphold jurisdiction were in one instance to be universalised for all future cases, what would be the consequences for the state parties to the treaty? Would it open the floodgates to an unlimited number of claims in respect of the same underlying damage to a particular investment? Would it undermine the sanctity of commercial contracts? Would it have a deleterious effect on the capacity of municipal courts to provide effective remedies? If such questions can be answered in the affirmative, then the tribunal has strayed off the path towards the fair and legitimate interpretation of the treaty.

Much has been said about the importance of attaining consistency from one investment treaty award to the next. But what about coherency? Coherency entails consistency in principle. As Dworkin has written, it must 'express a single and comprehensive vision of justice'. In a system with no appellate review, the danger inherent in the uncritical adoption of a previous solution to a recurring problem is manifest. Hart has warned us that 'consistency in dealing is compatible with great iniquity'. The examples in legal history are plentiful and notorious. The international law of investment claims must aspire to the higher value of coherency rather than the mere absence of a direct contradiction between the statements of law revealed in different arbitral awards.

In this volume, 54 rules covering the juridical foundations of investment treaty arbitration, the jurisdiction of the tribunal, the admissibility of claims and the laws applicable to different aspects of investment disputes are elaborated by reference to a diverse range of legal texts including investment treaty awards, the decisions of other international courts and tribunals, model investment treaties, municipal laws and decisions of municipal courts and the writings of leading publicists. The proposed rules do not purport to be definitive or complete or even free from error.

This volume is a first attempt at codifying a specialist domain of international law that is at a nascent stage of development and that is barely idle for more than an instant. Notwithstanding the inevitable imperfections of a first attempt, it is hoped that the arguments deployed to justify the codified rules will be met with approval and with dissent in awards and pleadings and academic writing. Constructive disagreement will lead to the development of better rules and to a more enlightened second edition of this volume. In the absence of a centralised and supreme law-making agency for the international law of investment claims, a free and fair battle of ideas is the only way to achieve coherency in the law and the sustainability of the system. One might be forgiven for alluding to a process of natural selection in this anniversary year of the father of evolution.

The manuscript for this volume was delivered to the publisher in June 2008 and hence takes account of the relevant decisions and awards in the public domain as of that date. It has, nonetheless, been possible to incorporate references to the awards and decisions available as of February 2009 in the footnotes to the text.

Citations of decisions and awards of investment tribunals are in the following format: *CME v Czech Republic* (Damages) 9 ICSID Rep 264, 291/87–93, where '291' refers to the page number in Volume 9 of the *ICSID Reports* and '87–93' refers to the paragraph numbers of the award. If paragraph numbers were not used in the original text of the award then only the page reference to the *ICSID Reports* is provided. For awards that are not published in the *ICSID Reports*, citations are in the following format: *ADC v Hungary* (Merits) para. 136, where 'para. 136' is a reference to the paragraph numbers in the original text of the award.

If a decision or award has not yet been published in the *ICSID Reports*, then it can be found on one of the several electronic collections available on open access, such as www.ita.law.uvic.ca and www.naftaclaims.com; or by subscription, such as www.investmentclaims.com and Westlaw International (APPLETON-ISR). No purpose would be served by referring to one of these electronic collections for each decision and award cited in the text.

A great number of people have contributed in some way to the process of writing this volume, and it would be impossible to recall all of them and to thank them individually. Moreover, it would be painful to name the various opposing counsel who advanced submissions contrary to my initial views with such skill and dexterity that I have been compelled to redraft sections of this book! There are, however, several people whose contributions must be acknowledged in these pages. James Crawford, Jan Paulsson and Philippe Sands have been mentors and friends throughout in matters going well beyond the subject matter of this volume and my debt to them is enormous. Michael Mustill has generously presided over our joint seminars at Cambridge University on various topics loosely related to arbitration and his constant challenges to my working assumptions were invaluable. Sam Wordsworth cast his expert eye over the 54 rules and was able to alert me to some of the errors. Saar Pauker and Monique Sasson assisted with the research on some of the more esoteric points. Finola O'Sullivan, Daniel Dunlavey and Richard Woodham of Cambridge University Press and Laurence Marsh brought it all together at the production stage.

It is Marion, my partner in life, who deserves my gratitude above all. She has suffered on account of this book more than any reader will. Apart from providing a bedrock of support, without which I can barely function, she brought our daughter into the world last year. Céleste's contribution was to delay the publication of this volume significantly and, in so doing, provided her father with the happiest moments of his life thus far.

Zachary Douglas
Cambridge, February 2009

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