Preface - The Intersection of Investment Arbitration and Public International Law

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SPECIAL FOCUS ISSUE

PREFACE

The Intersection of Investment Arbitration and Public International Law

Laurence Boisson de Chazournes\(^1\) and Campbell McLachlan\(^2\)

Only connect! That was the whole of her sermon. ... Live in fragments no longer.

— E.M. Forster *Howards End* (1910)

When we began the exercise of planning the focus of the special issues that would appropriately mark the thirtieth anniversary of the *ICSID Review* and the fiftieth jubilee of the International Centre for the Settlement of Investment Disputes (ICSID), it was at once clear that one such topic had to be the intersection of investment arbitration and public international law. International law may not be the only relevant legal system applicable in ICSID arbitration. Party autonomy and host State law also play important roles. But the framers of the ICSID Convention recognized from the outset a distinctive place for public international law within the arbitration system that they created.\(^3\) The explosive growth in recent years of investment arbitration pursuant to treaty has served to focus unprecedented attention on the diverse ways in which these specialized treaty regimes intersect with general public international law. Determining the precise contours of that intersection has not always been easy. Indeed, arbitrators and scholars have sometimes differed profoundly as to the influence to be accorded to doctrines of general international law in investment disputes. Nevertheless, the simple fact that investment treaties are themselves creatures of international law provides an important point of departure that makes the task of charting the relationship between the special and the general inescapable. No overarching issue of applicable law could be more fitting for a broad-ranging reassessment at the 30-year mark.

It is therefore a particular delight that 11 distinguished scholars and practitioners have accepted our invitation to contribute articles to the present issue that critically examine and appraise the role of general public international law within investment arbitration. The articles explore five aspects of the larger

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\(^3\) Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966).
theme: interpretation, application over time, State succession, State responsibility and applicable law.

Hervé Ascensio and Makane Mbengue examine the function of the general rules of treaty interpretation in the investment context, taking up respectively Articles 31 and 32 of the Vienna Convention. Four of the contributions explore different aspects of the application of investment treaties over time: Tomoko Ishikawa on provisional application; Nick Gallus on retroactivity; Alexander Orakhelashvili on successive investment treaties and Tania Voon and Andrew Mitchell on denunciation, termination, and the survival of investment treaty obligations. Christian Tams presents original research on the comparatively neglected topic of State succession to investment treaties. Simon Olleson and Martins Paparinskis explore two key elements of the application of the general law of State responsibility to investment claims: attribution and circumstances precluding wrongfulness. Finally, Kate Parlett considers the scope for the direct application of customary international law in investment arbitration. Framing the issue as a whole, Campbell McLachlan considers the extent to which it may properly be said that there is an evolving customary international law on investment.

While we do not claim that these topics exhaust the range of issues on the interface between investment arbitration and general public international law, this collection, nevertheless, taken together, makes available to readers a uniquely valuable set of insights on where investment arbitration might fit within the wider universe of international law. Whether the resulting intersection produces a centrifugal or a centripetal force (as Ascensio thought-provokingly asks in his article) may be partly a result of the designs of States as treaty drafters. However, it is also the responsibility of counsel, arbitrators and scholars to guide the development of international investment law. We hope that the present special focus issue will assist in this important endeavour.

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