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A distinctive feature of modern international society is the increase in the number of international judicial bodies and dispute settlement and implementation control bodies; in their case-loads; and in the range and importance of the issues that they are called upon to address. These factors reflect a new stage in the delivery of international justice. The International Courts and Tribunals series has been established to encourage the publication of independent and scholarly works which address, in critical and analytical fashion, the legal and policy aspects of the functioning of international courts and tribunals, including their institutional, substantive and procedural aspects.

A COMMON LAW OF INTERNATIONAL ADJUDICATION

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For Catherine

Foreword

The past years have seen a proliferation of scholarly works on international courts and tribunals, reflecting the growing number of such bodies and the increasing importance that is being attached to adjudicative mechanisms of dispute settlement in the international community. These works are welcome as they explore the changing character of the international system and the development of international law as a hard system of rules and principles by which States and other subjects of international law can prosecute rights, protect interests and be held to account. In the main, however, the scholarly works to date have focused on the institutions of adjudication, and how they interact, or might usefully do so. Relatively few works take a step back and cast a strategic gaze over the evolution of the adjudicatory system more generally, and what the institutional proliferation means for the development of the underlying principles of evidence and procedure, of the power to award remedies, and of other powers relevant to the adjudicatory task.

It is these aspects that are the focus of this book. It is a timely and scholarly work, which will appeal in equal measure to academics and practitioners of international law, as well as to those interested in dispute settlement more generally. It also collects within its pages, in a systematic and accessible manner, a wealth of primary material which will be a useful mine for all those who wish to think further about the subject in the future. Not least, it is likely to be a book consulted frequently by judges and arbitrators as they reflect on their competence in novel or difficult areas, and consider whether it is appropriate for them to draw on decisions by and analogous practices of other bodies of similar character.

As the author makes clear in the opening pages, the phrase 'common law of international adjudication' is not intended as a reference to the Anglo-American legal tradition or an implied suggestion that this municipal law tradition is especially relevant in the development of international law. It is rather a reference to the emergence of a homogenous body of rules and principles applicable to international adjudication.

Quite apart from the breadth of its coverage—addressing issues of evidence, the power to grant provisional measures, the power to interpret and revise judgments and awards, and the power to award remedies—the book examines closely the sources of law relating to procedure and remedies, including the elusive but vitally important concept of the powers inherent in courts and tribunals as a necessary feature of their adjudicatory function. This discussion, in chapter 2, is amongst the most interesting in the book as it is here that the creative tools of the judge and arbitrator will be found.

As an academic and the author's PhD supervisor, I was delighted to watch this work unfold and to see the emergence of a text that combined a strategic overview with a sense of practical application. As a litigation lawyer, I turned to the text on many occasions as a source of information and to aid my understanding of the evolving adjudicatory system. As a government lawyer, I now turn to the work as a touchstone on the subject of the fragmentation of international law and the issues to which this gives rise in the adjudicatory field. I confidently expect that others will turn to this work in similar vein and will find it equally stimulating and useful.

Daniel Bethlehem QC
London

17 May 2007

General Editors' Preface

In 1935 Abraham H. Feller, a young international law scholar, described the procedure of international adjudicatory bodies as 'the Antarctica of international law' (*The Mexican Claims Commissions: 1923–34* (1935) vii). Seventy years on, the number of international courts and tribunals has grown significantly, and it has fallen to Chester Brown to pick up the gauntlet and present a doctoral thesis on this challenging topic. If not exactly Antarctic-like, the subject remains open to new explorers. Dr Brown has made a significant contribution to the development of international procedural law with this diligent examination of the extent of convergence—or divergence, perhaps—of the procedures, practice and remedies of the rapidly growing body of rules relating to international adjudicative bodies.

Dr Brown's argument is that international courts often—but not always—adopt common approaches to questions of procedure and remedies. The turn towards common approaches gives rise to an increasing commonality in the practice and case law of international courts, in relation to the identification and application of procedural and remedial powers. Dr Brown considers that this has given rise to a 'common law of international adjudication', or what might perhaps be referred to as international customary procedural law.

Those charged with the study and practice of international law have probably long suspected this tendency. Dr Brown's study describes circumstances in which some procedural practices migrate between courts and tribunals, and can in this way contribute to the development of a more structured and systemic international judicial architecture. His study also indicates the limits of that migratory tendency, describing also the occasions in which the different courts and tribunals retain an insular character. These efforts constitute an important contribution, examining the effects of the multiplication of international adjudicative bodies on the coherence—or incoherence—of the larger international legal order.

The International Courts and Tribunals series intends to provide an outlet for new scholarly works that examine, in a critical and analytical fashion, aspects of the substantive or procedural international law across several international courts and tribunals. We are very pleased that *A Common Law of International Adjudication* can be a part of this series.

Cesare P.R. Romano
Loyola Law School Los Angeles

Philippe Sands
University College London
10 April 2007

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This book is a revised and expanded version of a PhD dissertation which was submitted to the Law Faculty at the University of Cambridge in November 2004. While the process of writing a doctoral dissertation is largely a solitary task, many people supported and contributed to this undertaking in many ways. The encouragement and guidance of my supervisor, Daniel Bethlehem QC, Legal Adviser to the Foreign and Commonwealth Office, is greatly appreciated, and I am also indebted to him for writing the Foreword for this resulting publication. My PhD dissertation was examined by Professor Philippe Sands QC and Dr Guglielmo Verdirame, who subjected it to a thorough and searching analysis, and made thoughtful and perceptive comments which are gratefully acknowledged.

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Some parts of this book draw on and develop material first published elsewhere. A section of chapter 2 has appeared as Chester Brown, 'The Inherent Powers of International Courts and Tribunals' (2005) 76 *British Yearbook of International Law* 195. In addition, sections of chapter 1 develop ideas first presented in Chester Brown, 'The Proliferation of International Courts and Tribunals: Finding Your Way through the Maze' (2002) 3 *Melbourne Journal of International Law* 453.

St John's College, the Squire Law Library and the Lauterpacht Research Centre for International Law at the University of Cambridge proved to be excellent working environments during my time in Cambridge. I am grateful to the Director of the British Institute of International and Comparative Law, Professor Gillian Triggs, for granting me a Visiting Fellowship during the summer of 2006, which facilitated the revision and updating of the manuscript. I also wish to record my thanks to the partners in the International Law and International Arbitration Group of Clifford Chance LLP, in particular Audley Sheppard and John Beechey, for supporting my further work on this text and for affording the many practical

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Finally, I am especially grateful to my parents, David and Judith Brown, who have constantly supported all my endeavours in many ways. My warmest thanks are reserved for my wife, Catherine Brown, not only for reading and commenting on countless drafts of this book, but more importantly, for providing unstinting support for me and for this project. It is to her that this book is dedicated.

The views in this book are expressed in a personal capacity, and do not necessarily reflect those of the Foreign and Commonwealth Office. The law stated is as it appeared to me on 31 January 2007, although it has been possible to include some later developments.

Dr Chester Brown
London
17 May 2007

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