

# Contracting with Sovereignty

State Contracts  
and International Arbitration

Ivar Alvik

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## CONTRACTING WITH SOVEREIGNTY

The application of international law to state contracts with foreign private companies was the cause of continuing controversy throughout much of the twentieth century. State contractual undertakings with foreign investors raise a number of legal issues that do not fit well into the traditional pattern of international law as a law between states, but which also cannot be satisfactorily resolved by the exclusive application of the municipal law of the contracting state. In recent years the controversy has gained new prominence as a result of the advent of a new form of international dispute settlement, namely the mechanism of investment treaty arbitration. The main feature of this model of dispute resolution is that foreign investors are entitled to bring claims against states directly before international arbitral tribunals. This model, which emerged strongly in the late 1990s, has generated a rapidly expanding body of arbitral case law and in the process become one of the most significant new developments in modern international law. Many of the disputes subject to investment treaty arbitration have their origin in contractual commitments made by states toward foreign investors. At the same time international commercial arbitration continues to be the preferred means of dispute resolution in contracts between foreign investors and states or state entities. This book explores how contract claims against states are dealt with in the two parallel processes of treaty-based and contract-based arbitration. The book charts the development of commercial arbitration into an international legal remedy in this field, discusses the theoretical problems which it creates for international law, and outlines the most significant substantive features of the international law applicable to contract claims as developed by arbitral tribunals on the basis of treaty standards and customary law.

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## *Preface*

This book is the result of my four years as a research fellow with the Institute of Public and International Law at the University of Oslo. It was submitted for the degree of *dr juris* at the Faculty of Law in November 2006 and defended for the same degree in August 2007. For a young scholar with an academic interest, writing a doctoral dissertation is probably one of the most intellectually rewarding things one can do. It is, however, also an exhausting experience, and it has therefore taken some time to prepare the script for publication. Especially investment treaty arbitration is a new and rapidly developing field of law, and there have been significant developments in relation to certain of the issues that I discuss in the book. I have attempted to take account of the most significant new developments in arbitral practice. To the best of my abilities the book is therefore up to date as of January 2010. This nevertheless cannot fully hide the fact that the most rigorous and thorough review of the literature and cases underlying the general analysis of the book relates to developments before November 2006. Fortunately, I should add, I have found most developments in practice since the book was initially written to have strengthened the main lines of reasoning in the book. Thus, it has not been necessary to substantially revise the general structure of the analysis made.

When that is said, it is only right to add that the structure of the presentation in the book has undergone some significant changes from the originally submitted manuscript, to a large extent thanks to the insightful comments and critique received from my opponents, Professor James Crawford, Professor Jan Paulsson and Professor Giuditta Cordero Moss, both in the written evaluation and in their 'opposition' at the public defence of the dissertation. I owe them all great thanks, both for their positive and constructive comments and critique, and for having taken time out of their busy schedules to take on the job in the first place. Similar great thanks go to Richard Hart in Hart Publishing, both for his insightful comments on how to make a good dissertation into a good book, and for agreeing to print the book. In this regard I would especially like to thank both him and the others at Hart Publishing for their constructive, welcoming and friendly approach throughout the revision process. The greatest thanks and the most credit for their contributions to the book nevertheless go to my two supervisors, Professor Geir Ulfstein and Professor Ola Mestad, who provided continuing academic guidance and personal support throughout the writing of the original dissertation, and who with gentle prodding and constant

replenishment of academic inspiration, both in their own way, proved to be the perfect combination of supervisors. Marius Emberland deserves special mention and great thanks for his constant support throughout the project and for having read and commented on an early version of the manuscript. I also owe thanks to the Faculty of Law at the University of Oslo, and specifically the Institute of Public and International Law, which made it possible for me to write the book in the first place. Having had quite extensive contacts with researchers from other countries throughout the writing of the dissertation, the Norwegian system of employing aspiring doctoral researchers as Research Fellows at the university with almost complete freedom, a decent salary and great office facilities always seemed to me a great privilege. Special thanks go to my fellow stipendiary colleagues at the Institute of Public and International Law, as well as in other departments of the Faculty, for having contributed to create such a great social and academic environment during the four years I spent writing this book. As part of my research for this book I spent a few rewarding months at the Lauterpacht Research Centre for International Law at the University of Cambridge, and at the Institut des Hautes Etudes Internationales at the Université de Paris II (Panthéon-Assas). Thanks are owed to both these great institutions and to the people I met there for inspiration and a friendly welcome. I would finally like to add my thanks to the Faculty of Law at the University of Oxford and to Somerville College, where I spent a formative year before I started writing this book and where I first came into contact with this fascinating field of law.

On a more personal note, I would like to extend my thanks to the many people close to me who have in an extended sense contributed to this work, probably more than they might know. Submitting and defending this doctoral dissertation has in a sense represented the 'crowning achievement' of my education and upbringing, and the stepping-stone into professional adulthood. The publication of this work thus represents the culmination of a long journey, from childhood, school and university, and onto being an academic and researcher and, currently, a practising lawyer. First and foremost among those who deserve thanks are naturally my parents, whose unwavering love, support and trust in their children have given me the best basis in life. This book is dedicated to them. I would also like to express my thanks to my sparring partners throughout childhood and into adulthood, my sister and brother, who, each in their own way, are always there to remind their older brother about the proper perspectives in life. My final thanks naturally go to my dear Ane and to my little daughter Martha, who give meaning to this and to everything else.

Oslo, 1 March 2010



## *List of Abbreviations*

AJIL	American Journal of International Law
Ann IDI	Annuaire Institut de Droit International
Arb Int'l	Arbitration International
BIT	Bilateral Investment Treaty
BYIL	British Yearbook of International Law
ECHR Reports	European Court of Human Rights: Reports of Judgments and Decisions
EJIL	European Journal of International Law
GA Res	General Assembly Resolution
Harv Int'l L J	Harvard International Law Journal
Harv L Rev	Harvard Law Review
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICJ Reports	International Court of Justice: Reports of Judgments, Advisory Opinions and Orders
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
ICSID Reports	Reports of Cases decided under the Convention on the Settlement of Investment Disputes between States and Nationals of other States
ICSID Rev-FILJ	ICSID Review – Foreign Investment Law Journal
ILC	International Law Commission
Int'l Law Forum	International Law Forum: Journal of the International Law Association
ILM	International Legal Materials
ILR	International Law Reports
Iran-US CT Rep	Iran-US Claims Tribunal Reports
J Dr Int'l	Journal de Droit International
J Int'l Arb	Journal of International Arbitration
JWIT	Journal of World Investment and Trade
La Fontaine	La Fontaine, H: Pasicrisie Internationale 1794-1900: Histoire Documentaire des Arbitrages Internationaux
NYU J Int'l Law and Politics	New York University Journal of International Law and Politics
PCIJ	Permanent Court of International Justice

PCIJ Series	Permanent Court of International Justice: Judgments, Orders and Advisory Opinion
Recueil des Cours	Recueil des Cours: Collected Courses of the Hague Academy of International Law
Rev Arb	Revue d'Arbitrage
Rev B Dr Int'l	Revue Belge de Droit International
Rev Cr Dr Int'l Privé	Revue Critique de Droit International Privé
Rev G Dr Int'l Privé	Revue Générale de Droit International Privé
RIAA	Reports of International Arbitral Awards
Series A	European Court of Human Rights: Series A: Judgments and Decisions
Stockholm Int'l Arb. Rev.	Stockholm International Arbitration Review
TDM	Transnational Dispute Management
Tex Int'l L J	Texas International Law Journal
TfR	Tidsskrift for Rettsvitenskap
Trans Grot Soc	Transactions of the Grotius Society
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
Va J Int'l Law	Virginia Journal of International Law
YbCA	Yearbook of Commercial Arbitration

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