CHAPTER 1
HOW WELL ARE INVESTMENT AWARDS REASONED?

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This collection of papers emerged from a seminar on international investment law that we taught jointly at the Yale Law School in 2005–2006. The students brought a rich experience and, as important for a subject like this, a rich national diversity. A considerable part of the seminar involved close reading of recent international investment arbitral awards. These decisions have emerged, for the moment, as the most important engines of legal development in this field.

Most of the major policies animating international investment law are now quite well known, so it is not particularly difficult to appraise the substantive outcomes of particular awards by reference to those standards. But our students were repeatedly struck by the number of cases in which the reasons purportedly supporting normative démarches or innovative formulations were either scanty or simply did not parse. In a few cases, the most careful reading of the award failed to reveal key factual findings, major or minor syllogistic premises, or normative judgments that were necessary to reach a conclusion. In one case, critical factors for determining damages—the bottom line—were not identified or discussed.

Interestingly, in almost all (but not all) instances, the students felt that the right decision had probably been reached. But without the building blocks that reasons reflect, one could not reconstruct or “reverse engineer” the reasoning of the tribunal. From this experience, we and our students concluded that it would be a useful exercise to examine the adequacy of reasons in some of the most important recent international investment law awards in order to see if there were significant trends with policy implications. The studies in this collection represent the best of the seminar.
I. THE REASON FOR THE REASONS

Reasons seem to be particularly important in the area of international investment law. Unlike international commercial arbitration, which is conducted entirely by and for professionals and whose awards are only rarely published, international investment awards may have a major political impact on an entire country. In some cases, the economic consequences of investment awards may have long-term implications for the economic vitality of the state concerned. Citizens, as “stakeholders” who may have to bear the consequences of an award, are entitled to know why a decision was made. Similarly, the political opposition in democratic states will wish to understand why a decision was made. The quality of internal political debate about investment policy, which is surely one of the most vital issues for developing countries, can hardly proceed if the reasons for decisions that are being taken are not clear. Thus, the reasons requirement, as a control mechanism in other sectors of arbitration, acquires a greater importance in international investment arbitration. Indeed, these considerations should lead to the drafting of awards that are accessible to reasonably intelligent people and are not so recondite that none but a small group of specialists can comprehend them.

Investment arbitrations are frequently conducted under the auspices of the International Center for the Settlement of Investment Disputes (ICSID). This was particularly important for the students’ inquiries because ICSID arbitration was designed exclusively for international investment disputes. Moreover, Article 48(3) of the ICSID Convention1 and Article 47(1) (i) of the ICSID Arbitration Rules,2 like the default rule in general arbitral law (e.g., Article 52(2)(i) of the ICSID Additional Facility Rules3 and Article 32(3) of the U.N. Commission on International Trade Law (UNCITRAL) Arbitration Rules),4 requires that a

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3 International Centre for Settlement of Investment Disputes, ICSID Additional Facility Rules, art. 52(2) (i).