CHAPTER THIRTEEN

BUSINESS CORPORATIONS AS NON-STATE ACTORS IN INTERNATIONAL LAW: A BRAND-NEW INTERNATIONAL LAW-MAKING PROCESS THROUGH INVESTMENT TREATY ARBITRATION

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I. INTRODUCTION

This chapter aims to describe and analyse a change of law-making process in one area of international law—international investment law. In particular, it explores the role of one group of non-State actors, namely business corporations, in the making of international investment law. A specific feature of international investment law in the last decade has been the emergence of a major increase in the utilization of investor-State arbitrations under investment treaties. They are generally used between a corporation in a developed country (an investor) and a State itself in a developing country (a host country). This type of arbitration enables a corporation to avoid defences based solely on the doctrine of sovereign immunity when it brings a suit against a developing country before the courts of that State and to file for arbitration directly against a State itself. Moreover, it enables a corporation to change the existing order of international law in the field of international investment.

This chapter first provides an overview of the rise of a form of international commercial arbitration I describe as ‘investment arbitration’.

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1 For instance, the total number of the cases by year registered at the International Centre for Settlement of Investment Disputes (‘ICSID’) has significantly increased over the past decade. Up until 1996, the number of cases registered each year was less than 5. From 1997 to 2002, the number of cases registered each year ranged from was more than 9 but less than 20. From 2002 to 2011, the total number by year was always more than 20 and was over 30 in 2003, 2007 and 2011. For more details, see International Centre for Settlement of Investment Disputes (2012) 1 The ICSID Caseload – Statistics <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>.

2 Strictly speaking, there have recently been many investment treaties between developing countries and ‘developing counties’. However, many of the ‘developing counties’ have been as powerful as developed countries. This type of ‘developing countries’ should be considered as ‘developed countries’ in this chapter.
In these cases a corporation files for arbitration not against a State but against another business corporation; frequently this will involve a corporation in a developed country (an investor) bringing arbitration against another business corporation in a developing country (a local corporation). My argument, set out below, is that this type of arbitration is in its nature different from traditional types of international commercial arbitration. Of course, this investment arbitration takes place not at the level of international law but at the level of national law. Nevertheless, it is important to analyse this phenomenon to better understand the behaviour of business corporations on the level of international law.

The chapter then goes on to explain why the investor-State arbitration model is now of special importance for business corporations. In particular it notes that the investment arbitration model does not work if the other party to a dispute is the host State itself. The discussion also analyses how the ‘investor-State arbitration’ model of arbitration operates in the contemporary world of international investment law and how it is changing the existing order of international law in a number of respects. Third, this paper describes how business corporations can strategically create a new order of international law through investment treaty arbitration. Finally, the chapter raises issues about the future, including whether this type of law-making process will emerge in other areas, and the range of possible responses to the challenges to which this gives rise.

II. STRATEGIC USE OF ARBITRATION IN INVESTMENT

A. Business Corporations’ Intent to Use Arbitration in Investment

The scene of international commercial arbitration has changed over the past decade. Precisely speaking, however, the scene of traditional ‘international commercial arbitration’ has not drastically changed. International commercial arbitration still enables business corporations to avoid unnecessary additional disputes on adjudicative jurisdictional matters

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3 For instance, the International Court of Arbitration of the International Chamber of Commerce (‘ICC’) has been one of the most significant arbitration institutions. The Arbitration Rules of the ICC were established in 1998 and have been used worldwide since then. The ICC has recently revised its Arbitration Rules, with the new rules entering into force on 1 January 2012. However, the new rules do not make any major changes compared with the earlier rules. For more details, see, ICC Rules of Arbitration, International Chamber of Commerce <http://iccwbo.org/court/arbitration/index.html?id=42394>.