

YEARBOOK ON INTERNATIONAL
INVESTMENT LAW & POLICY 2017

YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY

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The *Investment Yearbook* addresses legal and policy issues in the area of international investment—from national, regional, and international perspectives. The Editorial Committee invites for publication manuscripts that are of outstanding quality in terms of academic rigour, quality of the argument, originality, and contribution to the field of international investment law and policy. The *Investment Yearbook* will not consider a manuscript that has been published previously. Every manuscript that is considered for publication will be assessed through an external double-blind peer-review process. The style of the manuscripts should be in accordance with the OSCOLA guidelines, as adapted to the *Yearbook* (available from the Editorial Committee).

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FOREWORD

It is a privilege to write a foreword for a yearbook, as it allows one to take a pause, to think back and ponder about the year that has passed. And it is particularly gratifying to prepare a foreword for a yearbook on international investment law when every year comes with a host of new developments. Unlike international trade law which has crystallized over decades and consolidated with the 1995 Marrakesh Agreements establishing the WTO, issues in investment law continue to unfold, bringing with them calls for a more unified development, for more consistency, especially against the background of over 3,000 underlying treaties. At the same time, the system devised to settle disputes arising under international investment laws, treaties, and conventions in the 1960s has come under scrutiny and strong criticism not only by the users of the investment dispute settlement system—states, private investors, and practitioners—but also, and most importantly, in several regions, by civil society, parliaments, and political decision-makers.

The recurrent question for over a decade now has been about how to revisit the investment arbitration system, how to assess whether it still serves the purposes for which it had been originally designed, and whether it needs to be reformed. Not surprisingly, different views have been expressed over the years about relying on the international arbitration community to correct deficiencies encountered with the arbitration system, to deal with inconsistency in outcomes, to give meaning to broad concepts by developing jurisprudence, and to decide on procedural innovations drawing upon arbitral practice in commercial cases. Some have suggested that institutions in charge of administering investment arbitration should be able to adapt the rules and the practice to an evolving international context. At the same time, states have begun to modify their model treaties and to conclude new generation treaties where they clarify the meaning of core protection standards, express what they do not agree to, protect their right to regulate not only through positive wording but also through procedural safeguards in investor-state dispute settlement (ISDS), and enhance predictability of the arbitration process by including detailed dispute settlement procedures into the treaties themselves. But while doing so, going forward, very little has been done with respect to the existing network of over 3,000 treaties that cover an important part of the investment flows across the globe.

The latest wave of discontent and suspicion with the ISDS system has been more powerful than previous ones, or possibly it has gathered power from the previous ones. The view expressed by the former Solicitor General of Singapore, Mr

Sundaresh Menon, that it was up to the states, the masters of investment promotion and protection treaties, to take up the reform of the system they themselves had set up, reflects the state of mind of the delegations participating in the 50th UNCITRAL Commission in July of 2017.

The Commission had heard about the challenges posed by investment treaty arbitration already in the context of the negotiation of the Transparency Rules and the Mauritius Convention in 2010 onwards. It had seen proposals for reform that were being considered by a number of other organizations, including the European Union proposal to replace the existing ISDS system with international investment courts. In 2016, it considered mechanisms for states to incorporate reform options into the investment treaty negotiation process. Then, in 2017, after consultations with a wide variety of stakeholders, the Commission gave UNCITRAL's Working Group III a mandate to work on ISDS reform.

In its mandate, the Commission requested the Working Group to: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Working Group was requested to ensure that the deliberations would be government-led with high-level input from all governments while benefiting from the widest possible breadth of available expertise from all stakeholders, consensus-based and fully transparent.

Emphasis is put in the mandate on 'high-level' input from governments, in light of the importance of the broader policy messages and implications but also because complex issues of public international law are involved.

It is gratifying to note that at the same time the UNCITRAL Commission is embarking on this reform agenda, efforts are under way also in a multilateral context in the ICSID Secretariat to revise and refine the arbitration rules and further address shortcomings and concerns with the existing ISDS system. The process at ICSID also takes a broad and inclusive approach, involving many stakeholders and ultimately turning to the member states of the ICSID Convention for a revision of the rules underlying the system.

While the pendulum of international relations keeps swinging, from unilateralism to bilateralism, regionalism to multilateralism and back, it is rewarding to consider that when it comes to reforming an important component of international economic law, the multilateral route has been preferred over other avenues for reform.

UNCITRAL, drawing on the global convening power of the United Nations, is the most multilateral forum available to deliberate such issues. UNCITRAL has a reputation for serious and substantive legal work with both developing and developed countries. It is our shared responsibility to live up to the expectations of

Foreword

our states (members and non-members) and numerous stakeholders and ensure in the year to come that the UNCITRAL forum indeed provides the platform for constructive and effective deliberations on the reform of ISDS.

Beyond the interesting exercise of taking a big picture approach to the foreword of the *Yearbook*, it is the *Yearbook* and its many chapters that are really the important contribution to international investment law. The *Yearbook* for 2017, like the previous editions, constitutes the valuable stocktaking of steps and stages in the development of international law. It will inform generations of researchers and practitioners about what today's actors had in mind and how from the contractions and convulsions of international deliberations and negotiations, a body of law has taken shape.

Anna Joubin-Bret
June 2018



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