YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY

2014–2015

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YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY
2014–2015

EDITED BY
Andrea K. Bjorklund

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The *Investment Yearbook* is an annual publication published by Oxford University Press in association with the Columbia Center on Sustainable Investment. It draws on the guidance of a distinguished Advisory Board, ongoing engagement by an Editorial Committee consisting of leading academics in the field of investment law and policy, and skillful work by an Editorial Staff of students from Columbia Law School and McGill University Faculty of Law.

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 rigor, 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).

The Editorial Committee welcomes the submission of manuscripts to the *Investment Yearbook*. Manuscripts should be electronically sent to the Columbia Center on Sustainable Investment, ccsi@law.columbia.edu.

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FOREWORD

Investment arbitration is going through turbulent times. For decades, it has operated largely unnoticed by the public. More recently, investment arbitration has attracted much attention, mostly in the form of fierce criticism. Some would have it abolished altogether. Others have suggested far-reaching reforms.

Reform, almost by definition, has positive connotations. No human endeavor is perfect, and reform is a way of dealing with shortcomings. No doubt, there is room for improvement in the current system of settling disputes between states and foreign investors. Two areas that call for improvement are the phenomenon of rising costs and the lack of consistency in the practice of tribunals.

Not every change is tantamount to reform. For meaningful reform, it is necessary, first, to identify the shortcomings, second, to search for alternatives, and, third, to evaluate their capability for bringing about the desired improvement. Changes whose purpose is to placate public criticism, often based on ill-informed media reports, are not likely to lead to improvement and do not deserve the designation 'reform'.

An often-heard complaint is the perceived lack of *transparency* in investment arbitration. Recent years have seen much progress toward transparency in investor-state proceedings, which nowadays are often more transparent than domestic court proceedings. The process toward transparency is not yet completed, and some awards, regrettably, remain unpublished. A willingness by parties to release decisions for publication will not merely improve the image of investment arbitration but will also facilitate increased coherence in the practice of tribunals.

Another complaint is *regulatory chill*, the fear that tribunals will stop or impede measures that serve the public good. For the most part, this argument is hypothetical. Few cases involve investors opposing legitimate regulation. Moreover, tribunals consistently acknowledge that they will respect legitimate regulatory action.

Where the state professes to act in the public interest, it should be prepared to accept an independent determination of whether the regulatory action is genuinely legitimate. An international tribunal is in a better position to make this determination than an organ of the state whose action is under review. In many states, domestic structures for review are weak and judicial control is ineffective.

The rejection of judicial scrutiny of state action is quite out of line with the legal tradition of systems operating under the rule of law. Judicial control of public administration and regulation is perfectly normal in many states and is part of good governance. It is unclear why judicial restraint on administrative discretion should become objectionable when exercised by an international tribunal rather than by a domestic court. The objection to international judicial control of state action is also at odds with the acceptance of international human rights courts.

The assumption that host states invariably act in the public interest is open to question. At times, state action affecting investors is arbitrary or even the result of corruption. In some arbitration proceedings, investors insist upon compliance with the local law. This insistence can contribute to combatting corruption and establishing a measure of good governance.

The introduction of an *appeals procedure* has been under discussion for some time. Curiously, there is little discussion of the objective of such a mechanism. Rather, its beneficial effect is simply taken for granted. Appeal may serve the purpose of advancing the correctness of decisions or of securing the uniformity of judicial practice. Correctness is an elusive goal that takes time and effort and may take several layers of review. In arbitration, finality, i.e., the desire to have a dispute settled expeditiously, usually takes priority over the quest for correctness.

The addition of an appeals procedure would be likely to exacerbate one of the most pressing problems of investment arbitration. Inevitably, appeal would lead to a further increase in the cost of proceedings. Once an opportunity for appeal is established, it is unlikely that a dissatisfied party will forego the possibility to contest the award. The resulting delay and additional cost will affect particularly smaller and medium-size investors by hampering their access to judicial protection.

Coherence of judicial practice is a legitimate concern, but it is doubtful whether appeals mechanisms are a suitable way to achieve consonance of decisions. Competing systems of appeal under different treaties are unlikely to advance the goal of consistency. More likely, they will lead to further fragmentation. A system of preliminary rulings is better suited to advance uniformity of practice. This would require the establishment of a central, permanent body, authorized to give rulings upon the request of tribunals. Moreover, Article 53(1) of the ICSID Convention explicitly rules out any appeal, whereas a mechanism of preliminary rulings would be compatible with ICSID arbitration.

Binding interpretations by the states parties to investment treaties are another reform proposal designed to achieve uniformity of interpretation. The Vienna Convention on the Law of Treaties (VCLT), in Article 31(3), foresees subsequent agreements between the parties regarding the interpretation of treaties but does not give them binding force: under the VCLT these interpretations of the parties 'shall be taken into account'.

Joint declarations of the states parties on the proper interpretation of an investment treaty may appear efficient and look like a convenient method to settle questions of treaty interpretation. However, if the question is relevant in pending proceedings, such an interpretation gives rise to serious concerns about the fairness of the procedure. Once a case is under way, the respondent state is motivated primarily by defensive concerns related to the pending dispute. It will promote a particular interpretation not because it believes in its intrinsic correctness but because it is helpful to its endeavor to win the case. The disputing investor's home state may be less interested in an interpretation favorable to its national in the pending dispute than in an interpretation that favors state respondents generally.

A mechanism whereby a party to a pending dispute is able to influence the outcome of judicial proceedings, by issuing an official interpretation to the detriment of the other party, is highly problematic. This is true even if that party needs the support of the other treaty party (or parties) and even if the interpretation is presented as being declaratory of the treaty's meaning. In a situation of this kind, the respondent state becomes judge in its own cause and, if the interpretation is binding, the international tribunal loses its power to decide independently. The rule *nemo judex in sua causa* should not have to yield to opportunistic ex post facto interpretations.

Permanent courts or semi-permanent tribunals under bilateral agreements are unlikely to advance either independence or uniformity. This is particularly so if tribunals are to be composed of nationals and co-nationals of the disputing parties. Arbitrators associated with the disputing parties through a bond of nationality inevitably face a problem of independence and impartiality, whether real or perceived. International judicial practice demonstrates that judges and arbitrators have a tendency to side with their home country or compatriots. The ICSID Convention, wisely, all but excludes nationals and co-nationals of the parties from serving as arbitrators.

The appointment of arbitrators or judges on a salaried basis would add costs with no guarantee that appointees will actually serve in a dispute. Moreover, permanent bodies inevitably generate international bureaucracies, further adding to costs. A multitude of bilateral investment courts would be wasteful and inefficient.

Permanent courts may be more likely to achieve consistency of decision than tribunals composed on an ad hoc basis. However, parallel courts with differing composition operating under separate treaties are unlikely to advance uniformity of decision.

Reform and improvement are a necessary part of our social fabric. But change for its own sake, unsupported by proper reflection, carries the danger of destroying the very institutions that we seek to reform.

Christoph Schreuer

PREFACE

Several themes emerge in this edition of the *Yearbook*. The first is a notable focus on country- and region-specific developments. Different articles focus on key developments in such countries as Australia, Brazil, China, Ghana, India, Indonesia, Russia, and South Africa. Others focus on regional innovations, in particular in Latin America. These local and regional initiatives are fascinating when set against the backdrop of one of the key developments of 2015, the completion of negotiations for the 12-nation Trans-Pacific Partnership, and the continuation of negotiations for the Trans-Atlantic Trade and Investment Partnership. These two 'mega-regionals' offer the potential for the coalescence of international investment law around one or two models and have attracted a great deal of attention, yet as the *Yearbook* illustrates, there is significant bilateral and 'mini-regional' activity as well.

A second area of attention is reform, and proposals for reform, in investor-state dispute settlement and in investment law generally. Novel proposals by Brazil, new model treaties released by multiple countries, and the continued questioning of, and occasional withdrawal from, the existing investment arbitration regime all point toward an area in flux. Whether the changes presage incremental amendments to the regime as it has developed over the past few decades or whether they presage wholesale reform is yet to be seen.

A related, third theme is continued concern about states' regulatory autonomy and the importance of their retaining their ability to protect the interests of their nationals. These interests include ensuring that policies favoring sustainable development and high labor standards are accommodated by the investment law regime. Thoughtful inquiries address whether investment law hinders state preferences with respect to the preservation of small landowners' rights and also whether it in fact encourages more responsible outward foreign investment.

A fourth inescapable theme is the continued contribution that investment arbitration makes to the development of international law, and the influence that it is starting to have on other areas of law, whether that is as a source of inspiration in the interpretation of other norms or as a source of potentially powerful persuasive authority given the 'teeth' that investment law has with respect to enforcement.

One of the *Yearbook*'s enduring contributions to the study of international investment law has been the rigorous analysis of yearly trends in international investment policies, in the negotiation of international investment agreements, and in the development of international investment jurisprudence. This year is no exception.

We welcome back Michael Gestrin, of the Organisation for Economic Co-operation and Development, who undertook an empirical analysis of the trends in international investment law and the activities of multinational enterprises. Against the backdrop of the reorganization of the international business landscape in light of the global financial crisis, the author concludes that 2014 saw the deeper integration of emerging markets, on the one hand, and the decline in international investment flows in advanced economies, on the other hand. In particular, the author identifies a foreign investment bubble that has developed and that might be starting to deflate. In addition, he highlights the blurring of the traditional north-south divide as both north and south countries now act as host and home states. Finally, he tackles the new challenges created by this changing landscape, including fragmentation, economic distortions, and the new policies undertaken by states in response to the evolution of their roles.

Lise Johnson, Lisa Sachs, and Jesse Coleman have contributed a thoughtful and encompassing piece that traces developments in the negotiation of investment treaties through 2014 and in to 2015. They highlight the numerous countries that are considering the wisdom of maintaining their existing investment agreements and questioning the desirability of entering into new ones, as well as considering modifications to their model treaties. They note developments in other treaties, such as the UN Convention on Transparency in Treaty-Based Investor-State Arbitration (the 'Mauritius Convention'), which will affect investment arbitration. Their piece provides an insightful and provocative analysis of various responses to and efforts to help shape the international investment regime, with an illuminating juxtaposition of the Comprehensive Economic and Trade Agreement between Canada and the European Union, Brazil's Cooperation and Facilitation Investment Agreements, and India's revision of its Model BIT.

Finally, the review of investment jurisprudence by Ian Laird, George Ruttinger, and James Saulino notes several milestones in investment arbitration in 2014, including the rendering of the largest award in investment arbitration history—more than US$ 50 billion in *Yukos v. Russia*, as well as the first-ever grant of interim measures in favor of the claimant in the *TSIKinvests LL.C. v. Moldova* arbitration. Their substantive analysis highlights developments in three areas of law: the continuing popularity of the fair and equitable treatment standard as a basis for claims and the continuing evolution of its content; differing approaches to quantum-related issues, with particular emphasis on the methodologies tribunals employed in arriving at their damages awards; and the practice of ICSID ad hoc annulment committees when presented with requests to stay enforcement of the judgment pending the outcome of an annulment application, including the hiccup presented by the decision to reject the requested stay in *SGS v. Paraguay* in the otherwise-consistent record of granting requested stays.

We have continued our partnership with the British Institute of International and Comparative Law to publish papers presented at investment treaty fora they so ably organize each year. This year we have two BIICL-based contributions.

The first, by Yannick Radi, presents a striking analysis of the extension of certain investment agreements to encompass the imposition of labor standards on host states, and the resolution of labor-related disputes in state-state arbitration. He suggests that this form of dispute settlement, a move away from the 'legalized' form of dispute settlement available for the resolution of typical investment disputes, in fact politicizes the resolution of disputes in ways that permit more nuanced considerations of the myriad policy interests that drive governmental regulation of labor. Yet even state-state dispute settlement is subject to claims of illegitimacy on the grounds that foreign tribunals will be seen to be interfering with key issues of domestic governance.

Andrea Bjorklund presented a keynote speech for the investment treaty forum held in September 2014. That short manuscript, entitled 'Can international investment law be restated? Or is *jurisprudence constante* the El Dorado of investment treaty lawyers?', presents a skeptical view of the possibility of codifying, in the form of a restatement, the current law of investment arbitration. She highlights several challenges that would need to be overcome in order for such an enterprise to succeed, including the dispersed and sometimes divergent nature of substantive obligations themselves, difficulty in using the restatement process to include meaningful participation by people from every affected jurisdiction, and problems associated with identifying those who would be appropriate drafters.

The general section commences with an article by Arwel Davies that undertakes a comparative analysis of the nondiscrimination principles as understood and applied in international trade law under the WTO framework and in international investment law. In particular, this contribution focuses on arguably the most divergent aspect of the nondiscrimination analysis: the choice between the group comparison approach (i.e., the demonstration that a given measure affects disproportionately or asymmetrically imported goods or foreign investments relative to domestic comparators) endorsed in the WTO context and the 'best treatment' approach (which merely requires demonstrating that an individual imported product or foreign investment is adversely affected by a measure when a domestic comparator is not), which has received a more sympathetic hearing from investment tribunals. In his insightful enquiry supported by WTO and investment case analysis, Arwel Davies argues that the nondiscrimination principle in both systems is not, in fact, fundamentally different, and provides important advice for treaty drafters.

Lorenzo Cotula continues his service to *Yearbook* readers by exploring the reconfiguration of property associated with the global resource squeeze and the links between land tenure systems, national legislation regulating property, and investment law and arbitration. In particular, his chapter analyzes the notion of 'land grabbing' and the consequences and implications of the recent wave of large-scale agribusiness investments in land deals in low- and middle-income countries. This thoughtful analysis of the ongoing reconfiguration of control over natural resources and of property itself argues for a more subtle understanding of international investment law and a holistic consideration of property rights that evaluates the distributive consequences of so-called 'land grabbing'.

Robert Ginsburg's chapter analyzes the need for more systematic reviews of host government investment climates through political risk assessment. In particular, he demonstrates how thorough and dynamic (as opposed to static and stereotypical) political risk assessment can help both investors and tribunals to determine whether expectations are reasonable. Mr. Ginsburg explains the micro and macro assessments that must be undertaken and applies his theoretical framework of political risk assessment to concrete examples with a specific emphasis on the case of Russia by demonstrating how political risk assessment would have identified Shell's significant exposure to risk with respect to the latter's investment in Russia. He concludes by arguing that a dynamic, thorough, and host-state-specific political risk assessment can provide a good overview of what can be legitimately expected in a given investment climate and from a given investment.

Lucas Bento's contribution takes place against the background of the 'crisis' international investment law is facing, as illustrated by the withdrawal of several countries from the ICSID Convention; the denunciation by a number of states of their investment treaties; the opposition of many states to investor-state dispute settlement clauses in investment agreements; and difficulties associated with the enforcement of investment awards over the past few years. This series of events has been seen by some as the sign that international investment law is coming to an end; however, Lucas Bento argues in his contribution that these 'Negation Events', as he calls them, are in fact evidence that the international investment law regime is evolving into its next developmental phase, which will be characterized by regionalism, symmetry, and rational design as it moves to become a fully fledged multilateral system of governance. In fact, the author argues that these Negation Events are a 'blessing in disguise, and a gentle reminder that the potential of IIL [international investment law] is yet to be fulfilled'.

Dessislav Dobrev's contribution explores the imbalances that are intrinsic in international investment law, with a particular focus on the dichotomy between obligations assumed by the foreign investor and the host government and the potential that investment law has to diminish the scope of state sovereignty. On the basis of this premise the author analyzes the feasibility of a general rethinking of the current framework for foreign direct investment in order to recalibrate the system and to rebalance the various interests at issue through a new international social contract. The author argues for the inclusion of an extensive range of obligations for investors under this new contract, including the governance of social issues such as environmental protection, human rights, anti-corruption measures, and labor standards.

Christian Vidal-León's article analyzes South Africa's decision to terminate its investment treaties and the underlying objectives of South Africa's new investment regime, namely: (1) reinforcing the 'sovereign right to regulate in the public interest'; (2) doing away with international investment arbitration; and (3) placing foreign and domestic investments on an equal footing. Along similar lines, the article examines the standards of investment protection *not* explicitly laid down in the Promotion and Protection of Investment Bill 2013 and inquires whether these standards are otherwise protected by the constitution or other laws. The article concludes that whilst South Africa's policy decision on its investment protection regime is open to debate, the government has followed a comprehensive, transparent, and inclusive process, in which relevant stakeholders have been heard and with which they have engaged.

The next contribution moves to Asia, and Mahdev Mohan's analysis of Asian perspectives on investment agreements and arbitration by focusing in particular on four different countries: Indonesia, India, Australia, and China. He clearly demonstrates how such countries, even if in a more discrete manner, are changing their attitude toward international investment law. In particular, he shows how Indonesia, which is seemingly in the process of withdrawing from its BITs, is in fact likely seeking to merely revise its existing commitments. Similarly, the position of India toward international investment law is undergoing some changes, as illustrated by the redrafting of its Model BIT to enhance the preservation of the country's regulatory authority. Australia, for its part, does not seem to have a consistent position about investor-state dispute settlement, while China currently maintains a balance between older and newer BITs. This chapter provides a thoughtful backdrop against which the negotiation and enforcement of new agreements involving Asian countries, such as the Trans-Pacific Partnership and the US-China BIT, are taking place.

Cristelle Maurin and Pichamon Yeophantong address the regulation of outbound investment in light of the need to reach a 'responsible investment' policy framework. In particular, this chapter focuses on Chinese outbound direct investments to the developing world in a global international economic context characterized by a rise in foreign direct investment both to and from emerging markets and also by the ever-more preeminent role of corporate responsibility and sustainable development in the international policy environment for cross-border investment. Through an analysis supported by numerous examples, they demonstrate how the Chinese government and its state-owned enterprises, traditionally criticized for demonstrating little or no concern for standards of compliance, are revisiting their approach with respect to outbound direct investment in the developing world, and especially in Africa, to take into account international standards of responsible business conduct and ultimately engage in 'responsible investment'.

In the next chapter, Rodrigo Polanco Lazo offers a very good account of an alternative approach chosen by Latin American countries to resolving investor-state disputes. The contribution analyzes the approach chosen by countries such as the Plurinational State of Bolivia, the Republic of Ecuador, and the Bolivarian Republic of Venezuela, which have all taken a strong stance against the traditional investment arbitration system by denouncing the ICSID Convention and terminating several investment treaties. The approach involves emphasizing contract-based investment arbitration and promoting a regional mechanism for the settlement of investment disputes that is currently under study at UNASUR. In his analysis of the UNASUR proposal, Mr. Polanco addresses questions such as how it will operate in practice in Latin America, home of some of the countries that have been the most heavily involved in investor-state dispute settlement, and how it is both similar to and different from the existing framework of investor-state dispute resolution provided under the ICSID Convention.

In this edition of the *Yearbook* we welcome Dominic N. Dagbanja, who analyzes the interaction between the international investment treaty regime and the development policy of Ghana. In particular, based on the premise that there is a link between investment and development and that the international investment law regime limits the regulatory autonomy of host countries, he argues that other means of encouraging development exist and, accordingly, states should preserve a certain degree of regulatory autonomy to enact domestic policies that go beyond mere liberalization of the legal and regulatory environment for investment. Rather than analyzing the limits imposed by international investment treaties on the regulatory autonomy of a host state, the author assesses how the implementation of other development policies should influence and limit the types of investment treaty obligations assumed by states and how such obligations should be interpreted, with a specific reference to Ghana.

Finally, we have the privilege of including the winning memorials of the FDI Moot for both 2014 and 2105. In 2014 a team from the University of Ottawa submitted the winning claimant's memorial, while students from Harvard Law School submitted the winning respondent's memorial. In 2015 Harvard repeated its stellar performance, again winning best respondent's memorial. The winning claimant's memorial in 2015 was submitted by students from the National and Kapodistrian University of Athens. These excellent memorials reveal once again the growing interest of students in international investment law and demonstrate a striving for excellence and an enthusiasm for grappling with intellectually challenging issues.

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