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Yearbook on International Investment Law and Policy, 2009-2010



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Yearbook on
International Investment Law & Policy
2009/2010

Edited by:

Karl P. Sauvant

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YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY

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Foreword

The reports of my death are greatly exaggerated.

Mark Twain

International investment law is a process comprised of law-making and law-applying. The law-making is carried out largely through negotiation of investment agreements and adjustments in international and national dispute resolution mechanisms. Application of the law takes place in arbitral and judicial forums. Both of these functions have registered significant changes in the past year, many of which are admirably described and dissected in the essays collected in this edition of the *Investment Yearbook*. The changes have taken place amidst unprecedented financial turbulence, so it is easy to see why some observers now take for granted that international investment law is in crisis.

They are wrong. The stresses that investment law-making and law-applying have experienced in the recent past are part of a dialectal process characteristic of all robust systems of law. Every legal arrangement is the product of the identification of some common interest shared by those who have shaped it; however, no sooner than any such arrangement is installed, it begins to be tested and challenged – not only by those who do not share in that common interest, but even by actors within the entities and communities which had established and participated in the arrangement, who have since come to believe that their interests are either insufficiently served or have changed. Thus every legal arrangement, whether substantive or procedural, is always under some pressure for change. The net result is that law, for all its pretensions to being stable and unchanging, is actually a continuous dynamic process of agreement, challenge, adjustment, accommodation, and new agreement *ad infinitum*. The struggles through which this process operates are not indicative of a weak system but rather of a system that is in full vigor.

The especially dramatic dynamism of international investment law derives from the convergence of very different interests that it must accommodate and manage. The popular demand to increase national wealth and, through some form of distribution, to expand economic and other life opportunities for all citizens is a universal feature of modern political life. That this demand can be met solely by autochthonous national development is no longer seriously argued. Responsible officials at the national level, knowing that positive development now requires a constant flow of incoming and outgoing investment, have little choice but to participate in the making and applying of international investment law. Yet, ironically, one of the consequences of more efficient democracies is that these same officials, however clearly they may see their states' long-term interests in an effective international investment regime, are prey, especially in times of crisis, to popular clamor for protectionist measures. Corporations, which are simultaneously vital instruments for achieving national economic goals as well as actors seeking to maximize their own profits for their more restricted universes of shareholders, also appreciate that, in pursuit of resources and markets, they must operate globally. They understand the indispensability of international investment law but can also fall prey to the sirens of protectionism when they believe that it serves their short-term interests. We think of the arbitration of investment disputes as quintessentially adversarial; but, in fact, the creation of new and the revision of old agreements and even the creation of “model” treaties are all adversarial. Rather than crisis, all of these conflicts evidence a commitment to international investment law.

The challenge to international investment law is continuously to ensure globally productive enterprise by accommodating these diverse interests, in arrangements which must, by the nature of things, be at once competitive and collaborative. In the best of times, the challenge is daunting. All things considered, it has not done badly in meeting it in a difficult period.

Michael Reisman
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Preface

All countries seek to attract foreign direct investment. For this purpose, governments have liberalized their national regulatory frameworks for such investment and have also established investment promotion agencies to attract foreign direct investment actively. They have also established a fairly robust international investment law and policy regime, replete with strong dispute settlement mechanisms, primarily to protect investment made abroad and to liberalize its entry conditions. This regime and its dispute settlement mechanism have developed particularly rapidly over the past two decades, and they continue to do so.

Not surprisingly, the rapid development of this regime and its principal orientation toward protection and liberalization have been accompanied by an ongoing examination and of its various features, both in terms of its substantive content and procedure. This discussion is being conducted in academic circles, as reflected in the plethora of publications on this subject; in the community of arbitration practitioners, particularly in relation to the rising number of treaty-based international arbitration cases; and in policy circles, particularly in the context of the negotiation and re-negotiation of international investment agreements and the review of model bilateral investment treaties.

In light of the complexity of this discussion and the breadth of issues involved, the *Yearbook on International Investment Law and Policy* (the “*Investment Yearbook*”) seeks to provide a forum in which this subject matter can be examined from various perspectives. It does this by first reviewing, in Part One of each edition of the *Investment Yearbook*, developments in terms of investment flows and their salient features; trends in international investment agreements and issues that are particularly noteworthy in that respect; treaty-based arbitration cases that have arisen in the preceding year; and issues relating to the primary sector, as this is the sector that has traditionally featured preeminently in the relations between foreign investors and host countries.

It is against this background that Part Two of the *Investment Yearbook* addresses a number of topics that have stirred the minds and pens of distinguished experts. The chapters run the analytical gamut from the procedural to the material, progressing (in the present volume) from a discussion of the notion of “investment” to a broad analysis of the international investment law and policy regime itself.

More specifically, the 2009/2010 edition of the *Investment Yearbook* looks, on the procedural side, at rules for weaker players and the intricacies of the newly acquired competency of the European Commission in the field of investment treaties. Special attention is paid to ICSID as a premier dispute settlement forum, addressing ethical obligations, procedural and transparency-related amendments and the limits of annulment standards.

The *Investment Yearbook* then proceeds to address a number of substantive issues, including issues raised by the enforcement of intellectual property rights through bilateral investment treaties, the extent of leeway that countries have to enact emergency measures that detrimentally impact foreign direct investments, private

investment in sovereign debt, the importance of bilateral investment treaties and political risk insurance for promoting investment into developing countries. Part Two concludes with analyses of the global regime for international investment and the possible change in its orientation toward more respect for the rights of host countries.

Finally, the *Investment Yearbook* publishes the two winning memorials of the foreign direct investment international moot (FDI Moot – held this year in Frankfurt am Main, Germany), to acquaint a wider audience with how students from law schools and universities put teaching into practice in the field of investment law.

As this review shows, the 2009/2010 edition of the *Investment Yearbook* addresses timely issues related to international investment law and policy. It does so with an analytical rigor that is a tribute to the contributing authors. And the discussion continues – including in next year's edition of the *Investment Yearbook*.

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Andrea K. Bjorklund

Peter Muchlinski

Federico Ortino

Ucheora Onwuamaegbu

Karl P. Sauvant

Table of Contents

Submission policy

Contributors

Foreword by W. Michael Reisman

Preface by the Editorial Committee

PART ONE

1. Recent trends and issues in foreign direct investment, 2008/2009
Persephone Economou and Karl P. Sauvant
2. Trends in international investment agreements, 2008/2009: Review of the model bilateral investment treaties of Norway, South Africa and the United States
Peter Muchlinski
3. International investment law and arbitration: 2008/2009 in review
Ian A. Laird, Borzu Sabahi, Frédéric G. Sourgens and Sobia Haque
4. Using dynamic petroleum contract clauses to manage risk in volatile markets
Erlend Bakken and Tonje P. Gormley

PART TWO

5. Pren Nreka v. Czech Republic. The notion of investment under bilateral investment treaties: Does investment really mean “every kind of asset”?
Emmanuelle Cabrol
6. The 2006 procedural and transparency-related amendments to the ICSID Arbitration Rules: model intentions, moderate proposals, and modest returns
Jarrod Wong and Jason Yackee
7. Has the time come for an ICSID code of ethics for counsel?
Carolyn B. Lamm, Chiara Giorgetti and Hansel T. Pham
8. Testing the procedural limits of the ICSID annulment regime in cases against Argentina
Maria Vicien-Milburn and Yulia Andreeva
9. A proposed set of arbitration rules for weaker players in investor-state arbitration
Lee Caplan
10. The Lisbon Treaty and the expansion of EU competence over foreign direct investment and the implications for investor-state arbitration
Armand de Mestral
11. Latent grounds in investor-state arbitration: Do international investment agreements provide a new means to enforce intellectual property rights?
Christopher S. Gibson
12. Property rights for foreign capital: sovereign debt and private direct investment in times of crisis
Louis T. Wells
13. Emergency measures and international investment law: how far can states go?
Anne van Aaken and Jürgen Kurtz

14. The importance of BITs for foreign direct investment and political risk insurance: revisiting the evidence
Lauge Skovgaard Poulsen
15. Investment treaties through a different lens: a new global regime?
Jeswald W. Salacuse
16. Toward normlessness: the ravage and retreat of neo-liberalism in international investment law
Muthucumaraswamy Sornarajah

Special Section: Winning memorials from the 2009 foreign direct investment international moot competition (FDI Moot):

Memorandum for Claimant: *King's College London*

Memorandum for Respondent: *Murdoch University*