Foreword: Yearbook on International Investment Law & Policy 2012-2013

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FOREWORD

The international investment law and policy regime has developed rapidly over the past four decades and, in the process, undergone considerable changes. As Jeswald W. Salacuse and Nicholas P. Sullivan observed when writing about the regime as it existed in the mid-1970s: “foreign investors who sought the protection of international investment law encountered an ephemeral structure consisting largely of scattered treaty provisions, a few questionable customs, and contested general principles of law.” Today, the investment regime is stronger than it has ever been in terms of protecting foreign investors. In fact, the investor-state dispute-settlement mechanism arguably makes it stronger than the international trade regime.

Partly because of this rapid development of the investment regime, it is far from perfect. As Brigitte Stern suggested several years ago, the regime was undergoing a “crise de croissance, a teenager’s crisis,” although she updated her observation in 2013 to say that “the teenager is now in his twenties and should become more reasonable. In fact, in my view, he does.” Certainly, more countries are strengthening the regime by entering into new international investment agreements and accepting its functioning, thus firming it up, than are leaving the regime or seriously questioning key aspects of it (including its dispute-settlement mechanism), thus diminishing its legitimacy.

This state of affairs is not surprising: Like any regime, the international investment regime is in constant evolution. All stakeholders and others who have an interest in the investment regime – governments, business, trade unions, local communities, nongovernmental organizations, practitioners, academics – contribute to this evolution in one way or another, either by changing the regime’s substantive and procedural provisions or by advocating various changes – some small, some big. Some of the proposed changes would strengthen the protection of foreign investors and investments, some seek greater liberalization, some aim for a new balance between the rights and obligations of governments and investors, some want to emphasize the right to

regulate, and some seek a reorientation of the purpose of the regime. Other proposed changes relate to procedural matters and, especially, the dispute-settlement mechanism. However, virtually all proposed changes reflect the recognition that international investment needs a strong rule of law, debated is what, precisely, that rule of law should encompass and how it should be implemented, in the interest of strengthening the legitimacy of the international investment regime and in light of changing circumstances and new realities.

Among the new realities, none is more important than the growing number of emerging markets (all non-OECD countries) that are becoming significant outward investors. During the period 2007–2011, at least 129 emerging markets reported outward foreign-direct-investment transactions; outflows from these economies reached US$ 460 billion in 2011 – some nine times world outflows during the first half of the 1980s. Emerging markets have become important participants in the world foreign-direct-investment market. This gives especially the most important among them (including the BRICs) a different stake in the international investment law and policy regime. It is a stake that is no longer almost exclusively defined by their position as capital-importing host countries, but increasingly also as capital-exporting home countries, interested in protecting their investments abroad and facilitating the operations of their investors. Conversely, the traditional home countries, the developed countries, are increasingly “discovering” that they are also important host countries, interested in maintaining their own policy space to pursue legitimate public policy objectives. Moreover, governments in both groups of countries have become respondents in a growing number of investment disputes; and the potential for such disputes is very high, considering that there are more than 100,000 multinational enterprises that control over one million foreign affiliates, in a world in which the great majority of countries are bound by international investment agreements that typically include investor-state dispute-settlement provisions.

This fundamental shift in the interest situation of a growing number of countries toward mixed interests as home and host countries may lead to a narrowing of differences (and perhaps even a convergence of interests) between the traditional host and home countries that, eventually, may allow a multilateral investment regime to emerge. But we are certainly still quite far from such a regime. At the same time, though, the series of bilateral and regional investment negotiations among major countries that are underway could potentially further narrow the differences in various approaches, yielding perhaps a template that could become the guidepost for future common efforts.

In this rapidly evolving setting, myriad issues emerge that require the attention of scholars, practitioners, investment negotiators, business executives, trade-union officials, members of nongovernmental organizations, and other interested parties. This edition of the Investment Yearbook offers, as in the past, a platform for the examination of the various aspects of the international investment problématique, with a view toward reaching a better understanding of the subject matter. All of the authors who contributed to it have taken full advantage of this opportunity. Particularly noteworthy is that the present edition pays special attention, in the context of its Symposium, to issues relating to sustainable international investment. This is important and timely, as the ongoing discussions about improving the international investment law and policy regime need to include, if not to start from, a review of the purpose(s) that the regime is meant to serve. Everything else – including its substantive content and it procedural mechanisms – flows from the purpose(s) of the regime.

I congratulate the new Editor of the *Investment Yearbook* and the members of its Editorial Committee for this edition of the *Investment Yearbook* and wish them every success for future editions.

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