Foreword

On 6 April 2014, at the 23rd biannual Congress of the International Council for Commercial Arbitration (ICCA), Stephen M. Schwebel, former Judge and President of the International Court of Justice, delivered a keynote speech placing international investment arbitration in a historical context. It was an important contribution to the discussion on Investor-State Dispute Settlement (ISDS), adding a big-picture perspective at a time when different views appeared pre-destined to crouch in their respective trenches. But as the saying goes: 'if you do not know where you come from, then you probably don't know where you are going'.

Since 1959, States have entered into over 3,000 bilateral treaties for the purpose of protecting foreign investments. A majority of these treaties provide for arbitration between investors and the State in a situation of potential breach of the investment protection provisions of the treaty. And by the end of 2019, a global total of 1,023 investor-State cases were known to have been filed.[1]

The inclusion of international arbitration in bilateral investment agreements represents what some would call a revolutionary development in international law. Judge Schwebel, in his remarks, referred to it as 'one of the most progressive developments in the procedure of international law of the last fifty years, indeed in the whole history of international law'.[2] Among other things, it confirms that not only States could be the subject of international law, reflecting a general development of international law, as seen also in international human rights.

The inherently evolutionary character of international law has thus brought us ISDS, a relatively young system for resolving disputes. A system (actually a false label as it is rather a collection of separate systems than a single system) which is hailed by some, and heavily criticized by others. Where do we go from here?

In Stockholm, the start of the ISDS engagement was the very first treaty-based investor-State arbitration filed at the Arbitration Institute of the Stockholm Chamber of

1. As at 31 December 2019, UNCTAD Investment Policy Hub (https://investmentpolicy.unctad.org/).
2. The full speech is available in the ICCA Congress Series No. 18, *Legitimacy: Myths, Realities, Challenges*, Wolters Kluwer (2015).

Commerce (SCC) in 1993 under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. Three years later, the SCC saw the first treaty-based case under the SCC Rules.

At that time, treaty-based investor-State arbitration was a relatively unknown creature in the fauna of international arbitration. Now of course things are different. Since the early cases in the 1990s, the Stockholm trajectory of investor-State arbitration has followed the global trend. With a total of 112 investment arbitration cases[3] and the SCC Rules being the third most commonly used rules in ISDS cases globally, the SCC is an outlier among international arbitral institutions usually administrating primarily commercial arbitration cases.

Against this background, the SCC has closely followed the debate on ISDS – to feed in our practical experience; to contribute to a fact-based discourse; and always to be prepared to contribute to a constructive dialogue on how to develop and, if needed, improve investor-state arbitration.

The proverb alluding to the importance of a historical context has a continuation: 'if you do not know where you are going, then you are probably going wrong'.[4]

Many arguments have been made in recent years that investor-State arbitration has indeed ended up in the wrong place, and that reform is therefore necessary. Some voices assert that this was a futile journey from the very start and that ISDS needs to be replaced with something different. And in parallel to the debate, governments are in the course of negotiating modernized treaties, while new cases are being heard, argued and decided.

It's complicated.

How to address change in a legal universe like that of ISDS? UNCITRAL approached the issue by delegating the task to its Working Group III in 2017. Working Group III was commissioned to start by identifying issues giving rise to concern, and then follow up by working on reform for each of these issues. Working Group III agreed on three main themes around which the work has since been organized: (i) concerns pertaining to consistency, coherence, predictability and correctness of arbitral awards, (ii) concerns pertaining to arbitrators and decision makers, and (iii) concerns pertaining to the cost and duration of ISDS cases.

While UNCITRAL is addressing only procedural aspects of ISDS, the discussion in the Working Group has however illustrated how difficult it can be at times to separate substance from procedure when evaluating and debating ISDS issues. A myriad of issues needs to be addressed. The task has at times appeared Herculean.

The UNCITRAL Member States have had the benefit of working with a large number of observer delegations, along with external experts representing both academia and the private sector. Together everyone is putting in their best effort to answer the question where ISDS needs to be going in the best possible way.

3. As at 31 December 2019.
4. A google search on 'if you don't know where you have been how do you know where you are going' gives multiple results and variations. This particular wording is attributed to the author Terry Pratchett. The full quote is 'If you do not know where you come from, then you don't know where you are, and if you don't know where you are, then you don't know where you're going. And if you don't know where you're going, you're probably going wrong.'

It is against this background that a publication like the one you are currently holding in your hands (or perhaps viewing on your screen) is both timely and important. The authors of this book have each contributed to the map going forward. Whether it takes you as a reader to your preferred place of destination – this is up to you. I, for one, am grateful for all our cartography experts offering their advice on the terrain ahead, where some parts are admittedly quite challenging. But just as the historical context matters, so do the chapters of this book in their capacity as building blocks for the better future we need to be ready to build together.

And speaking of building a better future, in the context of ISDS reform there is one question we must not forget to ask: could investment treaty arbitration be 'a force for good' – used to motivate a change of state behaviour to tackle some of our greatest challenges, including climate change? Could ISDS reform potentially pave the way? With global principles for dispute resolution and future investment agreements on the table, adding the perspective of sustainable development could be a tremendous opportunity for governments to contribute to – for example – climate change efforts in a truly meaningful way. Indeed, it is pleasing to see that the perspective is also included in this book.

The debate on ISDS reform needs to continue if we as a global community want to move forward. And move forward we must. Congratulations are therefore due to the authors of this book, who are contributing to the conversation. And I do hope some of its ideas will find a way into the negotiating rooms where the future of ISDS is being carved out.

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