Editorial

In this issue, Raquel Macedo looks at the proposals to reform the justice process which is widely known as Investor-State Dispute Settlement (ISDS), including proposals from the European Commission, the UNCITRAL Working Group III (WGIII) and UNCTAD. As is well-known, the proposals include a root and branch reform option to *replace* the party-appointed and hoc system of ISDS with a permanent system of adjudication. Raquel asks the question: 'Can we still call it arbitration?' It is a valid question to ask.

Of course, it is not axiomatic that investor-state disputes should be resolved through arbitration. It is useful to recall that ISDS has been available for no more than fifty years and has really taken off in the course of the last twenty-five years. Historically, the method to remedy injuries caused to investors by host states was through diplomatic protection, ad hoc commissions and state-to-state dispute settlement. Under customary international law, there is nothing to prevent states to replace the modern practice of ISDS with a court-based system of adjudication.

The question, however, is whether the nature of the current criticism against ISDS justifies such a radical reform, and – importantly – whether the transition to a permanent investment body of adjudication will account for a better system of resolving investor-state disputes. The current work at the WGIII suggests that a number of options of selection and appointment of adjudicators are currently examined. There are efforts, for example, to identify inclusive models for appointment of adjudicators to the proposed permanent body of adjudication which include nominations not only by Member States, but also by an independent commission. There are also discussions to include non-state actors in the process of appointment, including civil society and investor groups. These discussions suggest that reforms are approached with an open mind. This is encouraging and, indeed, welcome. Whether the outcome of the discussions will eventually lead to inclusive procedures for the appointment of adjudicators is something that remains to be seen. Whatever the outcome, though, the paradigm of resolving investor-state disputes *will* change. Without the option of the parties to unilaterally appoint an arbitrator it *will not* be an arbitration-based system. Indeed, arbitration is all about *trust*. And the disputing parties' ability to appoint on an ad hoc basis arbitrators, whom they trust is a fundamental value of international arbitration. Any reform that aims to replace the party-appointment system must also consider how

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to replace the trust in party-appointed arbitrators with trust to adjudicators whom the parties might not be familiar with. If investors do not trust the new system including the tenured adjudicators, they may stop relying on international treaties to bring a claim and may, instead, rely on the concession contract or other investment contracts to bring a claim in arbitration.

In other words, without addressing the fundamental issue of trust by, any reform of the current ISDS system may end up a wonderful solution for a problem which will not exist anymore.

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