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Yearbook on International Investment Law and Policy, 2011-2012

Yearbook on

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Editor

Karl P. Sauvant

Yearbook on International Investment Law and Policy

Vale Columbia Center on Sustainable International Investment

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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 follow the Vale Columbia Center's Style Sheet (available from the Editorial Committee).

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Foreword

Once again, the *Yearbook on International Investment Law and Policy* provides abundant food for thought.

Part I presents three reflections on the general trends and issues raised during 2011 in international investment law. Part 2 is composed, first, of articles dealing with "Regulatory and policy developments regarding FDI in extractives industries" and, second, of articles on different topics, either focusing on a state (three articles on Argentina's cases in the wake of recent annulments as well as the much commented *Abaclat* case, an article on the development of arbitration in China) or dealing with questions of substance, especially the extent of protection afforded by international investment treaties.

The extent of the protection afforded by investment treaties to foreign investors is, in my view, at the core of the contemporary development of international investment law, and it raises numerous issues of investment policy, which – as is well known – is a major concern of the Vale Columbia Center on Sustainable International Investment.

To take into account policy issues, the investment *problématique* must be embedded in reality. It is thus important to assess the economic implications of the substantive standards, as well as the balance they provide between the necessary regulatory power of the state in charge of the protection and promotion of the public interest and the promotion of the flow of FDI through the protection of foreign investors. But the reality is not only economic and political, it also includes ethical values that are -- or should be -- taken into account by both the national legal order and the international legal system. One cannot – and must not – forget that, as the authors of the Preface to this volume reminded us, "(a)fter all, attracting FDI should not be an end in itself for host countries, but rather a means toward an end: The ultimate goal is to improve the economic and social livelihoods of the host country's population while protecting the environment." The interaction between ethics and law is not necessarily simple or uni-dimensional: Issues raised by the treatment of a corrupt investor or the possible enforcement of human rights through the mechanisms of investment arbitration are issues that every stakeholder in the system should reflect upon, as they do not allow for simple or ready-made solutions.

Being a fully alive and growing system, international investment law is constantly in a dialectical evolution. As aptly stated by my colleague W. Michael Reisman in his Foreword to the issue of the *Investment Yearbook* two years ago, "every legal arrangement, whether substantive or procedural, is always under some pressure for change." This is of course even more so when the system evolves in a period of worldwide economic and financial crisis, as the present one. It must also be emphasized that the pressures for change come from many quarters. But they might be more widely exerted today, due to the enhancement of transparency, which, as stated in the Preface to this volume, "is often assumed to be intrinsically linked with the notion of 'accountability' […] therefore ultimately contributing to the sustainable management of non-renewable resources and furthering a host country's socio-economic development". Transparency is also being enhanced in the international arbitration system through the submission of *amicus curiae*; more hearings and these hearings being more frequently open to the public (even sometimes through diffusion on the internet), the developing trend toward the publication of the submissions of the parties, and the now almost routine publication of awards.

The often partly contradictory interests that have to be reconciled in the field of international investment law have not yet been always settled in clear and generally accepted standards and, hence, may give rise to different solutions. For example, everyone knows that issues such as the scope of the umbrella clause or the most-favored-nation clause are being debated, as are the frontiers of such a notion as fair and equitable treatment, not to speak of the mere definition of what constitutes the basis of all the reflections assembled in this *Investment Yearbook*, namely the definition of what constitutes an investment. Also, even if it is commonly agreed that the annulment procedure is not an appeal procedure in ICSID arbitration, the practice is not always in line with this theoretical position.

There are also new approaches to many issues in international investment law brought about by an evolution of the actors of the system. Particularly noteworthy here is the growing participation of developing countries in the system, not only as host countries for foreign direct investment, but also as home countries; the new competence that the European Union has obtained in the international investment area, and the rise of China as both host and home country. The first development raises issues concerning the relation between the state and the public entities through which it undertakes some economic activities, both domestically and internationally, and the necessary distinction between the state acting as a sovereign and the state acting as a merchant -- with important implications on the application of the rules on attribution of international responsibility. The second development implies an analysis of the complex relationship between European law and international investment law, both before and after the adoption of the Lisbon Treaty. The third development is too recent to determine whether China will experience the main predicaments of developed countries or will go its own way, giving thus rise to the adoption of a regional approach favoring regionalism in investment law.

These are a few modest comments stimulated by the richness of the content of this edition of the *Investment Yearbook*. Hopefully, they will entice readers from all the stakeholders in the international investment law system to look at – and reflect on -- all the contributions contained in this volume.

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Preface

The years 2011-2012 remained under the shadow of the continuing Western financial and economic crises, with the sovereign debt problem of the Eurozone and its ramifications at the center. World foreign direct investment (FDI) inflows, however, held up and even recovered a bit, to US$ 1.5 trillion in 2011 (although they stayed below the 2007 peak of US$ 2.0 trillion). Emerging markets (roughly all countries not members of the Organisation for Economic Co-operation and Development - OECD) attracted about half of global investment flows.

At the same time, as Persephone Economou and Karl P. Sauvant show in Chapter 1, this performance was in no small measure reached thanks to some 30,000 multinational enterprises (MNEs) headquartered in emerging markets that further increased their investments abroad, having thus become major players in the global FDI market. In 2011, their FDI outflows amounted to US$ 457 billion, eight times *world* FDI flows some 25 years ago. This growth of outward FDI from emerging markets raises a range of challenges for the *firms* involved, as they typically have little experience in establishing and operating integrated international production networks. It also raises challenges for their *host countries*, because many emerging market MNEs are state-controlled entities, a category that includes state-owned enterprises and increasingly also sovereign wealth funds. The growth of FDI from emerging markets also raises challenges for the *home countries* of the firms involved: their governments have to consider whether they need to formulate policies and put in place instruments that not only permit outward FDI, but also encourage it. Virtually all developed countries have such policies and instruments in place, while few emerging markets do – putting the firms of the latter at a competitive disadvantage in the global FDI market.

This imbalance raises the broader question of “competitive neutrality”. This question emerged very recently in the context of fears in developed economies that there are some state-controlled entities from certain emerging markets that may benefit from special privileges and government support (including financial and fiscal support) when investing abroad and that such support provides a competitive edge over private sector competitors headquartered in OECD countries. While it is hard to assemble systematic evidence on the extent to which such support actually is given, it seems plausible that it is given, at least to a certain extent. This is therefore a question for future research – and the OECD Secretariat, among others, has begun to work on this matter.

There is no reason to limit such research only to state-controlled entities. All developed countries, as well as some emerging markets, have various policies and instruments in place that support the outward FDI of their firms, whether state-controlled or not. Hence the broader question is: What role should governments play as regards the outward FDI of the firms headquartered in their territories, regardless of the nature of their ownership? The concept “competitive neutrality” suggests that the support that has been given so far to domestic firms investing abroad is not in line with this concept and, at a minimum, should be subject to certain disciplines negotiated internationally and observed by all countries. This is likely to be a topic – and a difficult one, at that -- that will remain on the international agenda for some time to come.

The fact remains that FDI by state-controlled entities is substantial. The 49 largest (in terms of foreign assets) MNEs in the manufacturing and natural resources sectors that are state-controlled have about US$ 1.8 trillion in assets abroad. Although disputes initiated by them are rare, such disputes are bound to become more numerous as investors in general become more assertive in situations in which they feel aggrieved. Indeed, according to publicly available information, the year 2011 saw 38 new disputes registered with the International Centre for Settlement of Investment Disputes (ICSID) and 12 with other fora (and 40 decisions were made public); in addition, eight annulment proceedings were registered that year by ICSID. Ian A. Laird, Borzu Sabahi, Frédéric G. Sourgens, and Nicholas J. Birch review, in Chapter 2, the key case-driven developments in international investment law jurisprudence during 2011. They observe that investment arbitrations continue to be highly contentious and that there are serious points of divergence in the decisions of tribunals -- a constant over the past few years of the growth in claims and awards. This is reflected in the fact that 2011 was marked by a number of dissents in jurisdictional awards, as such issues as the definition of investment under the ICSID Convention and bilateral investment treaties continued to fuel debate. The fair and equitable treatment standard was again the most frequent basis on which liability was found in favor of claimants, while tribunals grappled with the scope of such principles as legitimate expectations and the infrequently applied (at least until the past few years) effective-means treaty standard. Tribunals continued to refine discussion of the principles of compensation in investment arbitrations; and, notably, there remains a large gap between the amounts claimed and the final amounts awarded. Challenges to arbitrators, despite a low success rate, became a more frequent strategy employed by parties in 2011. Although investment arbitration lacks the full power of precedent found in some domestic legal systems, there has been an observable effort by arbitrators to take into account other decisions, where possible, to build a body of consistent case law.

The number of treaty-based disputes remains high when compared with the number of disputes during the 1990s. But it is low if one considers the potential for disputes in the investment area, an area that involves the deep integration associated with the production process and its many and multifaceted possibilities for conflicts. This potential is further increased by the fact that there are over 100,000 MNEs worldwide and over 1 million foreign affiliates (and an untold number of shareholders in foreign affiliates), many of which – depending on the applicable international investment agreements – may have the right to bring claims against host country governments if they consider themselves aggrieved.

Moreover, this potential for conflict further increases as treaty making in the investment area continues unabated (and as these treaties include, as a rule, investor-state dispute settlement provisions). Stephan Schill and Marc Jacob analyze in Chapter 3 important developments and events in international investment treaty making in 2010 and 2011 and evaluate these in terms of their importance for the overall international investment law regime and policy-making. They suggest that the predominant view that international investment law is currently in a phase of rebalancing investor rights with state interests is overly simplistic and only partly reflective of state practice. Instead, they argue that the main trend is a growth in the complexity of international investment law, with different governments pursuing different interests in different forms and fora, based on different types of agreements. In addition, Schill and Jacob stress the increasing importance of new actors, in particular in Asia and the Pacific, leading to a shift in the geography of international investment law. Finally, they note a nascent but already marked trend toward regionalism in investment treaty making. Overall, these multifaceted developments lead, in the view of the authors, to the emergence of a poly-cultural, poly-centric and generally more pluralist universe of international investment law.

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Investment disputes can arise in any sector. However, none has been more prone to treaty-based disputes than the extractive industries. While the stock of FDI in this sector accounts for only about 10 percent of the world's FDI stock (although non-equity forms of involvement play an important role), UNCTAD data show that extractive industries account for about one-fifth of all disputes. In some senses, this is not surprising: Extractive industries are subject to substantial price fluctuations, inviting – especially when commodity prices rise – actions by governments to obtain a larger share of the benefits associated with the exploitation of their resources. This, in turn, combines with the "obsolescing bargain" and the fact that many governments (especially of emerging markets) consider extractive industries to be sensitive industries that are key to their economic development strategy and that interfere with uniquely sovereign resources.

The current commodity price boom has stimulated investment in natural resources, most of it in the form of FDI. Given that natural resource investments are typically large, they can have a transformative impact on host countries. In the past, resource projects often have operated as enclaves; in many instances, what should have been an unmitigated blessing for host countries became a curse. Increasingly, however, efforts are being made to make natural resource projects (often the principal assets of poor countries) the basis for integrated and sustainable socio-economic development – to turn natural capital into human capital, infrastructure capital and public services. Given the importance of this matter, this edition of the *Investment Yearbook* dedicates a Symposium to this subject.

Efforts to maximize the positive effects of natural resource investments, while minimizing the negative ones, begin in many countries with the contracts that define the relationship between investors and host country governments regarding the exploration and exploitation of natural resources. Because such contracts define the distribution of benefits and the management of impacts associated with such projects, often for decades to come, they are a critical part of the framework for natural resource development. Contracts are very complex, require high-level interdisciplinary expertise and are difficult to negotiate. Many governments, therefore, require assistance in such negotiations, which, in turn, is expensive; this situation needs to be improved.

One way to do that is to provide model agreements that can be used as a basis for negotiations, by indicating the issues that have to be considered and suggesting possible solutions. Developing such models is not an easy task as the great majority of these agreements are not in the public domain; hence it is difficult to benchmark current practice, develop better agreements, spread innovation, or understand how improved agreements can contribute to more acceptable development outcomes. Moreover, since there are so many polarized positions, the development of a model agreement with a reasonable balance among the interests of investors, host countries and other interested parties (such as mine-impacted communities) is very difficult.

Still such a model -- the Model Mine Development Agreement (MMDA 1.0) -- was developed through a highly consultative two-year process by the Mining Law Committee of the International Bar Association. Luke J. Danielson and Mark D. Phillips provide a commentary on this Model in Chapter 4. The MMDA 1.0 is largely based on the best of current practice and was constructed through detailed analysis of the provisions of several dozen agreements. While each section of the MMDA 1.0 has a lead clause, there are also several alternative clauses or variants proposed for each significant issue. The authors look at best practice solutions to the traditional issues in such agreements, including defining a property right that is sufficiently established and secure that equity investors and lenders will feel comfortable hazarding large amounts of money on the future of a project; balancing the rights of mining companies regarding land and use of water, wood, construction materials, and other natural resources with the rights of traditional occupants and resource users; achieving a fair and stable tax regime; ensuring that rights and obligations survive changes of ownership and changes of government; balancing the need for transparency of what are very important public policy provisions against reasonable requirements that certain proprietary information remains confidential; and the extent, if any, to which any legal requirements should be stabilized in an agreement. But the MMDA 1.0 also deals with some of the emerging issues in mine development agreements, such as the need to create conditions for effective community development in the project area; to ensure effective recognition of the rights of local people to traditional occupation of the land and use of its resources; to establish effective replacement living conditions and livelihoods for those who are resettled; to plan rigorously for project closure, including social and economic conditions post closure; and to engage with both Professor Ruggie's work as Special Representative of the Secretary-General on business and human rights and Professor Anaya's work as Special Rapporteur on the rights of indigenous peoples. Finally, the MMDA 1.0 seeks to integrate the growing body of soft law requirements in extractive industry agreements, notably the new 2012 Performance Standards of the International Finance Corporation, the Equator Principles, the Extractive Industries Transparency Initiative, the Global Reporting Initiative guidelines, the Voluntary Principles on Security and Human Rights, the OECD Guidelines for Multinational Enterprises, and a variety of other emerging sources of rules for mining investment.

Government officials (and others) negotiating such agreements can benefit from consulting model agreements, especially as other agreements that address similar matters are typically not in the public domain, as noted earlier. Not surprisingly, therefore, there has been a growing demand for increased transparency in the governance of extractive industries during the past fifteen years or so. "Transparency", i.e. openness and communication of information in connection with public and corporate governance, is often assumed to be intrinsically linked with the notion of "accountability" -- which implies taking responsibility for actions, decisions and policies and their implementation. It is commonly assumed that transparency, through increased accountability, is an effective measure against the mismanagement of natural resources and corruption, and even helps dealing with the resource curse, therefore ultimately contributing to the sustainable management of non-renewable resources and furthering a host country's socio-economic development.

It is against this background that Tonje Gormley discusses, in Chapter 5, two legal mechanisms designed to increase transparency in the extractive industries: national implementation of the Extractive Industries Transparency Initiative (EITI) and the introduction of domestic law requirements for companies to undertake country-by-country (and project-by-project) reporting on their international operations. Both mechanisms are aimed at increasing revenue transparency through reporting requirements. The Chapter discusses whether these legal mechanisms serve their intended purpose or whether there is need for complementary measures in order to achieve and ensure governmental accountability for the management of extractive industries and thus to improve the national policy and regulatory context in order for broader economic and societal change to take hold -- goals that these mechanisms also are intended to address.

On the substantive side, an issue receiving increased attention in contracts is sustainable development. After all, attracting FDI should not be an end in itself for host countries, but rather a means toward an end: The ultimate goal is to improve the economic and social livelihoods of the host country's population while protecting the environment. In other words, it is not the quantity of incoming investment that should be of dominant importance, but its quantity in relation to quality – and "quality" needs to be assessed based on the characteristics of an investment. This involves a thorough scrutiny of the economic, social and environmental impact characteristics of an investment and the extent to which the investment takes place in the context of fair governance mechanisms that foresee an equitable distribution of the associated benefits, on the basis of its commercial viability. These considerations need to permeate the procedural and substantive aspects of an investment contract.

Given that investment contracts have a direct impact on the extent to which an investment supports, or undermines, sustainable development goals, Lorenzo Cotula and Kyla Tienhaara examine, in Chapter 6, specific contractual terms that can affect the value of an investment project in terms of employment and business opportunities, as well as the effectiveness of contractual safeguards for affected people and the environment. The authors argue furthermore that, given the multiple economic, social and environmental issues at stake, investment contracts should be considered public policy documents, rather than just commercial deals. As such, these contracts should be disclosed and freely available for public scrutiny. In addition, the content of investment contracts needs to be reconsidered in important ways so as to ensure that investments make a maximum contribution to sustainable development.

Another substantive issue – one of long standing – concerns stabilization clauses in investment contracts. Since the purpose of such clauses is to impose strict limits on future actions by host country governments, they are increasingly criticized as too rigid in a highly dynamic world and, in any event, as imposing problematic limitations on the sovereignty of host countries. Peter Cameron addresses this *problematique* in Chapter 7, drawing on the experience with petroleum contracts. In particular, he examines the changing trend in the design of stabilization clauses and how they have been understood in the recent literature. Further, he considers whether there is a shift in the response to state sovereignty that would justify a more liberal interpretation of a host country's obligations. And, finally, where governments have chosen to exercise their sovereign right to revise the economic core of a petroleum contract, he considers what protection a stabilization clause may provide for the investor concerned in such circumstances. Essentially, Cameron holds that the much noted flexibility in the design of modern stabilization clauses is part of a climate of realism by investors about the limits they can impose upon future actions of a host country's government and hence is not indicative of a decline in their efficacy. Cameron argues that the continued popularity of stabilization clauses among investors and their wide acceptance by governments suggest that they retain a value in preserving the economic core of long-term resources contracts, and this implies a presumption of enforceability by tribunals and courts. Accordingly, the author suggests that lawyers need to shift the prevailing discourse from one about the alleged negative attributes of stabilization clauses to one in which their analysis is located in the current global context of a retrenchment of sovereign rights among countries, and what protection such clauses may provide the investor in such circumstances.

In Chapter 8, Lisa Sachs, Perrine Toledano, Jacky Mandelbaum, and James Otto pick up on the global trend of fiscal reforms in the natural resource sector, in which governments are seeking to claim a larger portion of the windfall profits of recent years. More specifically, this Chapter surveys fiscal reforms in the oil, gas and mining sector through seven case studies and analyzes investors' responses to these reforms as well as the change in a country's attractiveness for existing and potential investors as a result of reforms. The Chapter also highlights differences in the reform processes in the countries studied and examines their potential implications for the outcomes of the reform processes and the investors' reactions. The Chapter considers the implications of the system of regulation (contract-based versus legislated), the consultative process, the role of external parties and expert reports, and the threat of investor-state arbitration. Finally, the authors explain why fiscal reforms are more likely in the natural resource sector, and they consider whether other mechanisms or processes could be implemented to anticipate and manage the inherent risks and fluctuations in the sector, reducing the need for, and incidences of, contested fiscal reforms. Suggestions made include addressing the information asymmetry between investors and host country governments in the negotiation for natural resources contracts, inserting built-in review mechanisms in contracts and adopting progressive fiscal regimes.

As mentioned earlier, disputes in extractive industries are a relatively frequent occurrence. Some of these end up before national courts or in international arbitration. Ivar Alvik examines this issue in Chapter 9 for one particular class of contracts, those concerned with petroleum investments. In particular, he examines what implications the choice of international arbitration over domestic litigation has for the applicable law in long-term petroleum contracts, while showing how such choice also brings into play different procedural premises than those that apply in municipal courts. One important aspect of this choice-of-law issue is that an international arbitral tribunal will be more inclined to draw on principles of international public law when dealing with the various public law aspects of such investments. Another, and as significant, aspect concerns the applicable contract law, and related interaction between the host country law and international contract practices and principles supplementing the host country law. This Chapter shows how arbitral tribunals face a complex picture consisting of rules and principles rooted in the host country law, international contract law and public international law, all underpinned by the general notion of party autonomy and freedom of contract in international commercial arbitration.

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The range of issues in international investment law and policy is expanding as governments negotiate new international investment agreements and renegotiate or withdraw from old ones, while tribunals continue to hand down decisions on the ever more complicated matters brought before them. Not surprisingly, Argentina figures prominently in this respect, as the country that has faced the highest number of treaty-based disputes ever (over 50). Argentina's catastrophic economic crisis a decade ago and the subsequent wave of investment arbitrations brought against the country afford a singular opportunity to examine ICSID's arbitral system, including the effectiveness of the annulment process under Article 52 of the ICSID Convention.

As Leah D. Harhay argues in Chapter 10, instances of an inconsistent and overreaching application of the Article 52 mandate are more visible with parallel claims because of their susceptibility to ready comparison. An increased perception of inconsistency can harm the international reputation of ICSID dispute resolution and its perceived efficacy -- which, in turn, can make the actual execution and payment of awards by democratically accountable governments significantly more difficult. For this reason, the author suggests, the arbitral community must evaluate whether the current system of review for ICSID awards is sufficient to address multiple claims, or whether the current procedures potentially undermine the investor-state arbitral system itself. She therefore recommends that, for the sake of optimal correctness and consistency of multiple awards with a similar factual matrix at their basis, tribunals should receive additional instruction when dealing with parallel cases.

What could be the reason for inconsistent outcomes when different tribunals are asked to apply the same treaty and same customary international law rule to a given situation? Javier El-Hage argues in Chapter 11 that the different opinions in the nine ICSID decisions arising under the Argentina-United States bilateral investment treaty could be a consequence of a lack of agreement on the interpretive parameters that may guide an arbitration tribunal's reasoning when faced with a rule of customary international law that is applicable to an investment dispute under a bilateral investment treaty. Specifically, the author argues that inconsistencies seem to have emerged as tribunals have failed to agree on the principles that would allow them to deal with the interaction of Article XI of the Argentina-United States bilateral investment treaty and the rule of necessity under customary international law. Drawing from Article 31(3)(c) of the Vienna Convention on the Law of Treaties, as dealt with in the International Law Commission's Report and Conclusions on the Fragmentation of International Law, El-Hage suggests a set of interpretive parameters that may serve future tribunals dealing with this same issue. He concludes that a "harmonized fall-back" solution for the application of Article XI in interaction with the customary rule of necessity may be more desirable from the perspective of international law, to the extent that tribunals wish to avoid conflict and convey adherence to the principles of systemic integration, harmonization and the strong presumption against conflict.

A special aspect arising in the context of the Argentine cases (but one with broader implications) – specifically in *Abaclat and Others v. Argentine Republic* – is discussed by Michael Nolan, Frédéric Sourgens and Hugh Carlson in Chapter 12: The intersection of sovereign debt restructuring and investment arbitration. In *Abaclat,* a divided ICSID tribunal found jurisdiction under the ICSID Convention and a bilateral investment treaty to hear the aggregate claims of a group of bondholders arising from a sovereign debt restructuring. The authors of this Chapter submit that the majority, as well as the dissenting, opinion should have accorded greater interpretative significance to the ordinary meaning of the treaty text and the drafting history of the ICSID Convention. In particular, more attention should have been paid – according the authors – to determining what is unique about *sovereign* bonds, rather than devoting substantial effort debating whether debt obligations constitute "investments" for the purposes of Article 25(1) ICSID Convention. By further construing both the relevant bilateral investment treaty and the Convention as silent on the issue of admissibility of collective claims, the tribunal focussed its disagreement on the abstract issue of the nature of consent, rather than addressing *prima facie* relevant provisions in both treaty and Convention texts. The authors further suggest that the tribunal did not adequately take into account the broader context for sovereign debt restructuring to understand the unique nature of bilateral investment treaty claims with regards to sovereign bonds.

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The remaining chapters in this edition of the *Investment Yearbook* deal with aspects of three sets of tensions inherent in the international investment law and policy regime: The challenge of finding the right balance with respect to maintaining a predictable regulatory regime protecting investors and facilitating their operations while recognizing the desire of governments to maintain policy space to regulate in the public interest; the challenge of balancing the rights of investors with their obligations; and the challenge of balancing the interests of a given country in its capacity as a *host* country with its interests in its capacity as a *home* country.

To what extent should tribunals take legitimate public interest objectives into account when investors bring claims under international investment agreements that seek compensation for harm caused to their investments by government regulatory measures that were, at least purportedly, aimed at addressing such objectives? More specifically, should tribunals adopt a deferential standard of review when adjudicating claims relating to public interest regulatory measures? Rahim Moloo and Justin Jacinto assert, in Chapter 13, that it is neither necessary nor appropriate for tribunals to adopt an additional deferential standard of review as a general matter (i.e., to govern the overall application of a treaty). They argue instead that a textual basis for according some degree of deference to the ability of governments to regulate in the public interest is inherent to treaty standards. As opposed to a general deferential standard that is the same in all cases, however, the text, though open-ended in some circumstances, and given the evolution of the jurisprudence concerning the interpretation of certain key terms, provide guidance to tribunals as to the interests to be weighed and the degree of deference to be accorded to the government. The authors further find that countries have not substantially abridged their ability to engage in *bona fide* regulatory conduct such that additional deference might be needed to respect a country's sovereign right and responsibility to regulate in the public interest. This issue is likely to continue to pose a difficult challenge as governments seek to maintain sufficient policy space in the interest of having the right to regulate in the public interest, on the one hand, while maintaining the stability and predictability of the international investment regime, on the other.

Another balancing challenge arises from the fact that the international investment regime primarily grants rights to investors and barely – if at all – imposes obligations on them. One area for which this challenge is increasingly debated involves human rights and, in particular, whether or not bilateral investment agreements should impose direct human rights (and other) obligations upon corporations when they invest in a host country. At present, these agreements are silent on human rights issues. Patrick Dumberry and Gabrielle Dumas-Aubin examine concretely in Chapter 14 how these agreements could be drafted (and existing ones amended) to incorporate such obligations. Some of the practical issues examined in this Chapter include the identification of the types of obligations that should be imposed upon investors, how those obligations could be incorporated into international investment agreements and which enforcement mechanism could be chosen to sanction corporate violations of human rights obligations contained in such agreements. For example, the authors suggest that international investment agreement provisions could directly refer to standards that have already been accepted by the vast majority of countries in a number of well-recognized international treaties. Moreover, they suggest that the investor-state dispute resolution clause of agreements should contain a provision indicating specifically how human rights obligations imposed upon corporations can be enforced before an arbitral tribunal.

The question of balancing rights and obligations of investors is not limited to the human rights area. This issue has already arisen in the area of corruption, especially since international treaties prohibit active corruption (the payment of bribes) by investors and increasingly seek to penalize passive corruption (the receipt of payments) by government officials as well. This raises the question of how tribunals should deal with treaty claims brought by bribe-giving investors, bearing in mind that government officials would have received, and in some cases even solicited, bribes from the investors. Kevin Lim submits in Chapter 15 that it is tempting for tribunals to adopt the traditional legal response to investor illegality in such cases and dismiss all claims tainted by investor corruption, whether on the basis of lack of jurisdiction, inadmissibility of the investors' claims or their failure on the merits. But he also points out that it is important not to lose sight of the fact that the corrupt investor is merely one side of the equation. On the other side of the equation, there will frequently be a participating host country government and, in some cases, a condoning one. A host country government may participate in an investor's corrupt acts by soliciting and receiving bribes from the investor. The government may also condone investor corruption by refusing to prosecute a corrupt investor or complicit state official(s). Relying on countervailing benefits in the elucidation and eradication of corruption, the principles of recognition, acquiescence and estoppel, and a flexible conception of the "Clean Hands" doctrine under international law, Lim argues that tribunals ought to entertain some claims brought by corrupt investors. He this concludes that, while this approach apparently endorses universally condemned practices by investors, he suggests that this is not a path that tribunals should fear to tread.

The challenge of balancing the rights and obligations of investors extends beyond the area of human rights and corruption to the question also of the contribution of investments to development. From a host country point of view – and especially from the point of view of a developing country – FDI is but a tool to help it advance its economic development. Given that developing countries have seen international investment agreements primarily as economic policy tools with this objective in mind, it is appropriate to consider carefully their underlying economic rationale. The contribution by Jonathan Bonnitcha and Emma Aisbett in Chapter 16 aids such consideration by conducting an economic analysis of the substantive protections that investment treaties provide to established foreign investments. Common substantive protections contained in investment treaties include guarantees of fair and equitable treatment, national treatment and compensation for expropriation. Bonnitcha and Aisbett argue that the economic case for conferring protection on foreign investment is weaker than is generally assumed: broader substantive protections are not necessarily preferable from an efficiency perspective. Simply put, the gains for investors are likely to be smaller than the costs for host governments. Furthermore, their classic welfare economic approach suggests that the question of whether the protections contained in international investment agreements increase economic efficiency is more important than the question of whether such agreements cause higher FDI flows. This analysis is relevant to policy makers and treaty negotiators, both in informing judgments about whether given substantive protections should be included in international investment agreements and in informing judgments about how protections commonly included in such agreements should be drafted.

Finally, there is the challenge of balancing the interests of a country in its capacity as a host country with its interests in its capacity as a home country of investors. Nowhere can this be observed more clearly than in the case of China. Opening up to FDI only fairly recently and becoming, in the past decade or so, the most important host country for investment among developing countries, China has also become the most important home country for investors in the same group of countries (in fact the eighth largest in the world in 2011, not counting Hong Kong); it is also the country with the largest number of bilateral investment agreements among developing countries. China's international investment agreements, therefore, are a case study of how this particular balancing challenge can be undertaken. Valentina S. Vadi, in Chapter 17, undertakes this task. She explores the main features of Chinese outward foreign direct investment and the implications of the proactive role China has played in investment treaty making for international investment law and international law more generally. Vadi argues that the architecture of Chinese bilateral investment agreements has recently tended to converge with that of the investment agreements of major traditional capital exporting countries, as China itself has become a major capital-exporting country.

As was discussed at the beginning of this Preface, China is not the only emerging market that is becoming an important outward investor – there are other countries that are following the same path. It remains to be seen, therefore, whether they, too, will seek to find a new balance in defining their interests as a host country versus those as a home country when negotiating (or renegotiating) international investment agreements. If they do – especially at a time when traditional home countries, in their investment treaty making, are seeking more policy space to be able to regulate in the public interest – a new consensus may emerge about the nature of the international investment law and policy regime.

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As in past editions, this edition of the *Investment Yearbook* includes the winning claimant and respondent memorials of the 2011 Foreign Direct Investment International Moot Competition (FDI Moot). Including these memorials is part of this publication's objectives, namely to provide a platform for exploring the many-faceted aspects of the international investment law and policy regime and to stimulate discussions on the full range of issues relating to it. We hope that the present volume makes a contribution in this regard.

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