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Book Review

Yearbook on International Investment Law & Policy 2010-2011
(Karl Sauvant, Ed., Oxford University Press 2012)

International investment law has resolutely stepped out of obscurity. The increasing economic significance of foreign direct investment flows, the exponential growth of investment treaties (currently numbering approximately three thousand), and the rise in investor-state arbitrations are all well-documented. Investment law is also coming into its own as a field of serious academic study: it is the subject of stand-alone law school courses, conferences, and of an ever-increasing number of books and journal articles.¹ Established in 2008, the Vale Columbia Center on Sustainable International Investment is at once a natural outgrowth of these developments and a significant force in pushing investment law scholarship and policy into a more mature phase.

The Vale Columbia Center has recently published the *Yearbook on International Investment Law & Policy 2010-2011* (“*Yearbook 2010-2011*”).² The *Yearbook 2010-2011* consists primarily of contributions by scholars and practitioners from different disciplines that were selected through a rigorous blind review process. Although the brief overview that follows cannot do justice to the depth of the scholarship in the *Yearbook 2010-2011*, it should provide a flavor of the breadth as well as the importance of the topics addressed.

Part One: As one might expect, the *Yearbook 2010-2011* starts out with an overview of recent trends in investment law. The first chap-

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¹ A quick search in Westlaw—admittedly, a non-comprehensive search in a non-comprehensive database—for articles with obvious references to investment law in the title yields 58 results before January 1, 2003, and 299 results after that date. Specifically, I conducted the following searches in Westlaw’s jlr database on August 22, 2012: ti (“international investment law” “investment arbitration” “investor-state arbitration” “investment treaty” icsid “international centre for settlement of investment disputes”) & da(bef 1/1/2003); and ti(“international investment law” “investment arbitration” “investor-state arbitration” “investment treaty” icsid “international centre for settlement of investment disputes”) & da(aft 1/1/2003).

² YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010-2011 (Karl P. Sauvant ed., 2012) [hereinafter YEARBOOK 2010-2011].

ter in this part situates data regarding foreign direct investment in the context of broader economic developments, including the global recession.³ The second chapter provides an in-depth analysis of several renegotiated investment treaties. It identifies a move toward greater precision: while states include stronger protections of host-country policy interests, these protections are delineated more clearly, creating greater certainty for investors.⁴ This second chapter also reports on an unresolved issue that was debated in the context of the recent revisions to the UNCITRAL arbitration rules: where to strike the balance between the investment community's interest in greater transparency and the parties' desire for confidentiality.⁵ The third chapter provides a useful overview of awards and annulment decisions in investor-state arbitrations rendered in 2010, organizing the decisions in several categories under the broad rubrics of Jurisdiction, Merits, Compensation and Damages, and Procedure.⁶

Part Two: The *Yearbook 2010-2011* continues with contributions to the Symposium on International Investment Law and the European Union, hosted by the Editorial Committee.⁷ The Symposium was devoted to the consequences of the recent entry into force of the Treaty

³ Persephone Economou & Karl P. Sauvant, *Recent Trends and Issues in Foreign Direct Investment, 2010*, in YEARBOOK 2010-2011, *supra* note 2, at 3.

⁴ Edward G. Kehoe & Paul B. Maslo, *Trends in International Investment Agreements, 2009/2010: Recent Steps in the Evolution of Bilateral Investment Treaties and the UNCITRAL Arbitration Rules*, in YEARBOOK 2010-2011, *supra* note 2, at 37, 43-62.

⁵ *Id.* at 39-43.

⁶ Ian A. Laird et al., *International Investment Law and Arbitration: 2010 in Review*, in YEARBOOK 2010-2011, *supra* note 2, at 63.

⁷ See Colin Brown & Maria Alcover-Llubià, *The External Investment Policy of the European Union in the Light of the Entry Into Force of the Treaty of Lisbon*, in YEARBOOK 2010-2011, *supra* note 2, at 145; Anna De Luca, *New Developments on the Scope of the EU Common Commercial Policy Under the Lisbon Treaty: Investment Liberalization vs. Investment Protection?*, in *id.* at 165; Steffen Hindelang, *Member State BITs—There's Still (Some) Life in the Old Dog Yet: Incompatibility of Existing Member State BITs With EU Law and Possible Remedies—A Position Paper*, in *id.* at 217; *The Development of EU Trade and Investment Policies: Drawing Lessons from Past Experiences*, in *id.* at 243. Part Two concludes with key documents from European Union institutions, as well as excerpts of relevant provisions of the Treaty on the Functioning of the European Union (formerly the Treaty establishing the European Community) as amended by the Lisbon Treaty. YEARBOOK 2010-2011, *supra* note 2, at 267-313.

of Lisbon⁸ for the investment landscape. Among other things, the Lisbon Treaty amends the definition of Common Commercial Policy of the EU to include foreign direct investment.⁹ As a result, the EU now has exclusive competence on this matter. Remarkably, the Lisbon Treaty does not address the transition period during which the bilateral investment treaties (BITs) to which EU Member States are parties are still in force. As a result, the status of the approximately 1,500 BITs to which EU Member States are parties—about half of the entire BIT universe—is unclear. The development also raises the question of how a common EU investment policy will take shape.¹⁰ The four chapters in Part Two are a must-read for those who are experts in European Union law or international investment law, but not both.

Part Three: Parts One and Two collectively take up less than a third of the *Yearbook 2010-2011*, which comes in at over a thousand pages. They are followed by fifteen “General Articles,” which the Editorial Committee’s *Preface* divides into four groups.¹¹ The first five articles in Part Three examine issues pertaining to “essential security” provisions in investment agreements.¹² Under these provisions, states preserve flexibility to respond to emergencies, notwithstanding treaty commitments they have made as to foreign investments. The scope of essen-

⁸ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1.

⁹ Consolidated Version of the Treaty on the Functioning of the European Union art. 207.1, Sep. 5, 2008 O.J. (C 83) 47.

¹⁰ Federico Ortino, *Symposium on International Investment Law and the European Union: Introduction*, in YEARBOOK 2010-2011, *supra* note 2, at 143-44.

¹¹ Editorial Committee, *Preface to YEARBOOK 2010-2011*, *supra* note 2, at xli-xliv.

¹² José E. Alvarez & Tegan Brink, *Revisiting the Necessity Defense: Continental Casualty v. Argentina*, in YEARBOOK 2010-2011, *supra* note 2, at 319; Michael D. Nolan & Frederic G. Sourgens, *The Limits of Discretion? Self-Judging Emergency Clauses in International Investment Agreements*, in YEARBOOK 2010-2011, *supra* note 2, at 363; Alberto Alvarez-Jiménez, *The Interpretation of Necessity Clauses in Bilateral Investment Treaties After the Recent ICSID Annulment Decisions*, in YEARBOOK 2010-2011, *supra* note 2, at 419; Katia Fach Gómez, *Ecuador’s Attainment of the Sumak Kawsay and the Role Assigned to International Arbitration*, in YEARBOOK 2010-2011, *supra* note 2, at 451; Stephan W. Schill & Yun-I Kim, *Sovereign Bonds in Economic Crisis: Is the Necessity Defense Under International Law Applicable to Investor-State Relations? A Critical Analysis of the Decision by the German Constitutional Court in the Argentine Bondholder Cases*, in YEARBOOK 2010-2011, *supra* note 2, at 489.

tial security provisions has been a subject of controversy, and has recently given rise to inconsistent awards and decisions.

The second group of articles in Part Three addresses a variety of new issues confronting the international investment regime: climate change;¹³ the effects of the acquisition and development of agricultural land on local communities (a practice denounced by many as “land-grabbing”);¹⁴ the increasing role of state-controlled entities in foreign direct investments, adding urgency to the issue of whether such entities qualify as “nationals” under the ICSID Convention;¹⁵ and the role of third-party funding in investment arbitration.¹⁶

The *Preface* characterizes the third group of articles in Part Three as discussing “many important and fascinating aspects of the international investment law and policy regime [that] continue to attract attention.”¹⁷ Again, this description could cover a wide array of topics, and it does. The first article in this group traces the evolution of investment law from the nineteenth century “gunboat diplomacy” to the current framework of bilateral treaties.¹⁸ The second article challenges the notion that investment arbitration has depoliticized the resolution of international investment disputes, arguing that investor states still play a role in the dispute resolution process as well as in constructing the international investment regime itself. The article submits that, instead, the defining characteristic of investment law is decentralization, in the sense that the power to give meaning to norms in investment law is given to investors, government parties, and arbitrators.¹⁹ The third article analyzes why claims by Japanese overseas investors almost always get settled

¹³ Daniel M. Firger & Michael B. Gerrard, *Harmonizing Climate Change Policy and International Investment Law: Threats, Challenges and Opportunities*, in YEARBOOK 2010-2011, *supra* note 2, at 517.

¹⁴ Olivier De Schutter & Peter Rosenblum, *Large-Scale Investments in Farmland: The Regulatory Challenge*, in YEARBOOK 2010-2011, *supra* note 2, at 567.

¹⁵ Mark Feldman, *The Standing of State-Owned Entities Under Investment Treaties*, in YEARBOOK 2010-2011, *supra* note 2, at 615.

¹⁶ Philippe Pinsolle, *Note on Third-Party Funding and Nationality Issues in Investment Arbitration*, in YEARBOOK 2010-2011, *supra* note 2, at 639.

¹⁷ Editorial Committee, *Preface to YEARBOOK 2010-2011*, *supra* note 2, at xxxviii, xliii.

¹⁸ O. Thomas Johnson Jr. & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, in YEARBOOK 2010-2011, *supra* note 2, at 649.

¹⁹ David Schneiderman, *Revisiting the Depoliticization of Investment Disputes*, in YEARBOOK 2010-2011, *supra* note 2, at 693.

without resort to arbitration.²⁰ The last article in this group compares protections accorded to foreign investors under recent investment agreements to which the United States is a party and recent NAFTA awards with protections of investors under domestic U.S. law. It finds that, with some limited exceptions, the scope of protection enjoyed by foreign investors is comparable to that enjoyed by U.S. investors under domestic law.²¹

Part Three concludes with articles that explore the possibilities and limitations of empirical research in international investment law.²²

Special Section: In a “Special Section,” the *Yearbook 2010-2011* presents the winning memoranda in the Foreign Direct Investment International Moot Competition.²³ These memoranda, prepared by law students, deserve to be prominently featured on a designated website so that future participants in the Moot Competition can easily locate them. Their presence in a book that is otherwise entirely devoted to scholarship is, however, somewhat perplexing.

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The *Yearbook 2010-2011*, it should be clear, exemplifies the flourishing state of the scholarship in international investment law and arbitration. Ironically, however, it is the diversity of topics addressed in the contributions that exposes the weakness of the *Yearbook* in its cur-

²⁰ Louis T. Wells & Chieko Tsuchiya, *Japanese Multinationals in Foreign Disputes: Do They Behave Differently, and Does It Matter for Host Countries?*, in *YEARBOOK 2010-2011*, *supra* note 2, at 715.

²¹ Parvan P. Parvanov & Mark Kantor, *Comparing U.S. Law and Recent U.S. Investment Agreements: Much More Similar Than You Might Expect*, in *YEARBOOK 2010-2011*, *supra* note 2, at 741.

²² See Clint Peinhardt & Todd Allee, *Devil in the Details? The Investment Effects of Dispute Settlement Variation in BITs*, in *YEARBOOK 2010-2011*, *supra* note 2, at 837; Gus van Harten, *The Use of Quantitative Methods to Examine Possible Bias in Investment Arbitration*, in *YEARBOOK 2010-2011*, *supra* note 2, at 859; Susan D. Franck et al., *Response: Through the Looking Glass: Understanding Social Science Norms for Analyzing International Investment Law*, in *YEARBOOK 2010-2011*, *supra* note 2, at 883; Gus Van Harten, *Reply*, in *YEARBOOK 2010-2011*, *supra* note 2, at 917; Susan D. Franck et al., *Rejoinder*, in *YEARBOOK 2010-2011*, *supra* note 2, at 939.

²³ *Special Section: Winning Memorials from the 2010 Foreign Direct Investment International Moot Competition (FDI Moot)*, in *YEARBOOK 2010-2011*, *supra* note 2, at 945.

rent form, namely that it aims to be too many things at once. The lack of a connecting theme is not inconsequential. In an era in which researchers rely heavily on searchable electronic databases, it is easy to miss sources that are only available in hard copy. This risk is exacerbated by the non-descriptive title of the book. Undoubtedly, many chapters from the *Yearbook 2010-2011* will emerge, as articles that are accessible online start citing them. Yet I fear that more than a few scholars, practitioners, and policy makers will fail to locate pertinent chapters for at least some time. This is unfortunate, because all of the contributions are stellar—a consequence, no doubt, of the care that went into the selection and editing process.

My suggestion to the Editorial Committee is, therefore, to re-evaluate the format of the Yearbook. Part of the solution might be to publish a thinner version that is limited to a discussion of trends and specific occurrences during the years covered. At the same time, the *Yearbook 2010-2011* provides a strong case for peer-reviewed publications in this field, and for collecting interdisciplinary research in one place. Perhaps the Vale Center could use the infrastructure it has built to launch an investment law journal. A peer-reviewed, interdisciplinary journal should continue to attract outstanding submissions by reputable scholars. In the meantime, I hope that the readers of this review will find their way to articles in the *Yearbook 2010-2011* that are of particular interest to them. I suspect that many will end up at least glancing through the entire book, and enjoy reading about a wide variety of topics that form a small but representative part of the rapidly developing scholarship on investment law.