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Karl P. Sauvant is the Founding Executive Director of the Yale Columbia Center on Sustainable International Investment. The Yale Columbia Center, formerly the Columbia Program on International Investment (CfII), is one of the most important research centers worldwide specialized in foreign investment issues. Despite its recent foundation, the Center has become a well-established leader in the field of international investment law and policy thanks to its tremendous research and publishing activities, as well as its other activities such as hosting conferences and symposia and promoting teaching. The Center takes an interdisciplinary approach, dealing with investment (particularly foreign direct investment) from policy, legal and economic perspectives.

The Investment Yearbook, prepared in the context of Yale Columbia Center’s activities, shares the same interdisciplinary approach followed by the latter in dealing with international investment. By adopting an interdisciplinary approach, this volume (which covers also international investment policy, as its title indicates) makes a valuable contribution to the understanding of international investment law and its development. Moreover, this volume, coming after the boom of treaty-based arbitral case law on investment protection within the last decade, analyses the current reappraisal of international treaty protection and national policies on foreign investment in both legal and political circles. In fact, the 2008-2009 Investment Yearbook pays special attention to the current re-balancing between the protection of foreign investment and protection of regulatory powers of States in both national FDI policies and the new generation of international investment agreements.

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The Investment Yearbook consists of two parts and brings together twelve contributions by authors who have an academic and a practitioner's background in the field of international investment law and policy. Among these are, just to mention a few names, Patrick Juillard, Kenneth J. Vandevelde, Stanimir A. Alexandrov, José E. Alvarez, Andrea K. Bjorklund and the late Thomas Wälde. It would be impossible in this note to deal with all the issues analysed in the various contributions of the Investment Yearbook. For this reason, this note will first describe the contents of the volume and then touch on some contributions only — or, to be more precise, on some specific issues dealt with in some contributions.

Part one (from Chapter 1 to Chapter 4) focuses on trends in foreign investment matters from the perspective of economic and policy developments, as well as from a legal perspective: trends in international investment (Chapter 1 by P. Economou, J. H. Dunning, and K. Sauvant); trends in international investment agreements, with a focus on the issue of national security (Chapter 2 by P. Muchlinski); trends in international investment disputes, with a focus on 2007 arbitral case law (Chapter 3 by I. A. Laird and B. Sabahi); and trends in foreign direct investment in the oil and gas sector (Chapter 4 by A. Bressand).

Part one starts, in Chapter 1, with the analysis of recent trends in international investment by P. Economou, J. H. Dunning, and Karl P. Sauvant. The authors give first an overview of flows of FDI on a global, regional and sectoral basis and of long-term prospects for FDI. Then they describe the principal ways of investing abroad by multinational enterprises (particularly through M&As) and the growing role of new FDI players. Among these are multinational enterprises from emerging markets and private equity funds, venture capital funds and sovereign wealth funds. The authors do not fail to mention the concerns that foreign control of, or foreign interests in, assets considered as "strategic" raise in host States when sovereign wealth funds (as well as foreign State-owned enterprises' investments) undertake such investments. This aspect, as well as national FDI policy changes in general, are the subjects of the in-depth study by K. Sauvant in Chapter 5 where he highlights the rise of national FDI protectionism. Finally, the contribution contains a review of recent literature on FDI determinants and on FDI contributions to the economic development of host States. This review and the authors' summaries of the conclusions reached by the most recent research is particularly interesting as it gives a tentative answer to the question as to whether or not foreign investment can contribute to the economic development of host States. In the authors' words, "FDI can contribute to growth and development. But maximizing its positive contribution and minimizing any negative effects is not something that occurs automatically. It depends on local resources and capabilities, the nature of the investment a country gets, corporate strategies and, more importantly, national policies. In the end, as Jagdish Bhagwati observed: 'FDI is as good or as bad as your own policies'".1 This answer is indirectly also relevant to another closely-related question,

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1 See page 30 of the volume.
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namely whether BITs (as well as the increasing number of PTA agreements that include chapters on investment protection) can actually contribute to the economic development of host States. Attracting foreign investment for the economic development of host States is the secondary objective stated in many Preambles of BITs, the protection of foreign investments being their primary objective. In other words, BITs and the strong protection they guarantee to foreign investors are not per se sufficient for a developing country to attract foreign investment. BITs (like FDI) do not automatically (though indirectly) contribute to economic development unless they are integrated in broader development strategies.

Part two (from Chapter 5 to Chapter 12) is centred on the broad subject-matter of foreign investment promotion and protection vs. host States’ regulatory powers. Notably, the “essential security interests” issue is the topic of three out of eight contributions included in Part two. In particular, these are Chapter 5 by K. Sauvant on national FDI policies and their evolution. Chapter 10 by J. B. Alvarez and K. Khamsi containing a critical review of arbitral case law on the essential security interests exception of Article XI in the Argentina-US BIT, and Chapter 11 by A. K. Bjorklund on economic security defences in international investment law. The other contributions deal, from various perspectives, with the main theme running through the volume, i.e., foreign investment protection provided for by international investment agreements vs. host States’ rights to legislate in the public interest.

The imbalance of international investment law is the topic of Chapter 6 by P. Juillard. More specifically, he points out that the imbalance of legal treaty regimes on investment protection (the main criticism levelled at investment arbitration) does not lie with the ICSID Convention. Rather, in the author’s words, “It solely lies with BITs. BITs are imbalanced instruments. They were originally intended to define and protect the rights of investors, not the rights of States…” (p. 280). The US 2004 Model BIT compared to the 1994 U.S. Model BIT is dealt with in Chapter 7 by K. J. Vandevelde. The author analyses the new model and concludes that “the U.S. model BIT of 2004 rebalances the U.S. program to strengthen the position of the BIT parties in their relationship with investors and with the investor-state arbitral tribunals that may be created to enforce investor rights” (p. 314).2 The doctrine of “proximate causation” in international investment disputes is the subject matter of Chapter 8 by A. Alexandrov and J. M. Robbins. Obstacles and pathways to the consideration of the public interest in investment treaty disputes are dealt with in Chapter 9 by C. H. Brower, II.

The volume concludes with a contribution by T.W. Walde (Chapter 12) on the means of improving the mechanisms for treaty negotiations and investment disputes. The author discusses some selected proposals for improving investment treaty

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2 This rebalancing reflects the changed perspective by the U.S., now perceiving itself as both a home and a host country rather than as a home country only. This occurred after the U.S. had found itself in the unexpected situation of being the respondent State in NAFTA Chapter 11-based arbitrations.
arbitration (such as the inclusion in investment treaties of provisions providing for investors' responsibilities for social, environmental, human rights and corporate social responsibility duties and the establishment of a single world investment adjudication mechanism) and their feasibility in light of the purposes of investment arbitration. In the author's view, these purposes are not only the formal objectives stated by the Parties in the Preambles of Brrs (i.e., "the objective to promote investment by an internationally enforceable commitment to protect investments"), but include also the promotion of the "rule of law". In Walde's words, this concept "as a favourable, and even perhaps necessary condition for long-term and solid economic development (as compared to the booms and busts of resource-dependent petro-states) should be seen as the one unifying concept and purpose underlying the bilateral and multilateral investment treaty and investment arbitration program initiated and fully developed since the late 1980s" (p. 514). In the author's view, the international investment regime should be considered as more advanced than both the WTO regime (because it incorporates non-state actors directly in investment disputes) and international environmental and human rights law (which he qualifies as soft-enforcement or soft-law systems) (p. 514). The author goes on to underline the emergence of "a common law of international investment". On these premises, the author highlights critically that "most if not all proposals for improvement have a one-dimensional focus: they see "one system" of investment arbitration (though operating through multiple treaties, procedural rules, and institutional settings and tribunals), and they criticize this overall "system" as fragmented, producing inconsistent results lacking in legitimacy" (pp. 516-517). In this respect, the author emphasizes that, on the one hand, the lamented fragmentation of international investment law, even if it results in a certain lack of consistency, is an opportunity for investment law to develop within a competitive framework; this is due also to the unrealistic character of the proposal of a World Investment Code and a single world investment adjudication mechanism (pp. 522-523). On the other hand, Walde emphasizes that the lack of consistency and coherence, a widespread criticism addressed to treaty-based case law, to a great extent depends on treaties' different languages and on arbitrators' efforts to disentangle "the complexity of facts of real-life cases" (p. 525). Lastly "pushing for overall "system" coherence suggests that infinite, often small, variations between treaties are disregarded and investment treaties considered as one uniform body of law" which, in his opinion, is definitely not the case (p. 526). Among feasible proposals for improving investment arbitration (or more generally international means of investment dispute settlement) are, in Walde's view, mandatory mediation (pp. 534-536), the creation of a Legal Aid Facility (pp. 563-566) and the conclusion of a soft-law instrument on international investment law (pp. 530-534).

The volume provides a broad range of positions as to the interpretation as well as the scope of application of the "non-precluded measures clause" such as Article XI of

\[\text{\footnotesize See p. 513 of the volume (and the examples provided there).}\]
the Argentina–U.S. BIT. This is one of the most debated questions in recent years and still unsettled in investment arbitral case law. Of course we cannot deal with all the facets of this issue in this note. Instead we will highlight some points regarding the meaning of the term “essential security interests” and the standard of review to be followed by tribunals when they apply clauses such as Article XI.

As to the meaning of the term “essential security interests”, it is interesting to compare the position of Alvarez and Khamsi, where they suggest that “security” refers to military or defence matters and “essential” means only the most important or serious” (p. 452), with the position of Muchlinski. According to the latter “[G]iven that a major function of the modern welfare-oriented state is to ensure freedom from ‘want, disease, ignorance, squalor and idleness’, the economic security of the state may be as vital as its military and strategic security” (p. 54). The position of the latter author is comforted by arbitral case law interpreting the term “essential security interests” in Article XI of Argentina–U.S. BIT in the context of the Argentine economic crisis of 2001–2002 as well as international jurisprudence (pp. 57–58).

With regard to the appropriate standard of review to be used by treaty-based arbitral tribunals, it is also interesting to compare the position of Alvarez and Khamsi with the position of Muchlinski. According to Alvarez and Khamsi, Article XI should be interpreted as a specification of the state of necessity under customary international law (with reference to the CME, Enron, Sempra awards and the LG&E decision on liability). Therefore a State defence based on Article XI should be upheld only where the very restrictive conditions of applicability of the state of necessity defence (as restated by Article 25 I lc Articles) are satisfied (pp. 427 and seq.). The authors criticize the different interpretation of the clause adopted by the CME ad hoc Committee (p. 457) and the Continental Tribunal, that is the interpretation of Article XI “as a specific provision limiting the general investment protection obligations (of a “primary” nature) bilaterally agreed by the Contracting Parties.” To use the Continental Tribunal’s words, the invocation of Article XI “is not necessarily subject to the same conditions of application as the plea of necessity under general international law.” This conclusion leads the latter Tribunal to refer to the

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4 In 2010 the Sempra award has been annulled for not having properly examined the applicability of Art. XI of the Argentina–U.S. BIT on non-precluded measures (Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, Annulment Decision of 19 June 2010, paras. 194 ff) while the Enron award has been annulled for not having dealt adequately with Argentina’s defence based on ‘state of necessity’ under customary international law (Enron Corporation and Ponderosa Assets, L.P. v. Argentina, ICSID Case No. ARB/01/3, Annulment Decision of 30 July 2010, paras. 367–395).

5 At the same time the author does not fail to underline that “[T]hat said, the extension of “national security” to “economic security” contains a major threat to economic welfare. Specifically, an appeal to economic security can be used as a protectionist device...”, (p. 55).

6 See for example Continental Casualty Company v. Argentina, ICSID Case No. ARB/03/9, Award of 5 September 2008, paras. 175 and 178 where the Tribunal refers to the concept of international security of States in the Post World War II international order as intended to cover also States’ economic security and reviews previous awards dealing with the meaning of the term “essential security interests”, respectively.

7 It is well-known that these tribunals have taken a different evaluation in concreto as to the gravity of the Argentine economic crisis. The LG&E Tribunal upholds Argentina’s defence based on Article XI while the other tribunals reject Argentina’s defence. In this respect see also A. Bjorklund at pp. 484–485 of the volume.


9 Ibidem.
standard of review under WTO law in defining the requirements of “necessity” under Article XI, taking into account the common origin of Article XI and Article XX of the GATT 1947. The authors criticize the Continental Tribunal also for having employed the standard of review under WTO law. This is an important systemic question for the very concept of a coherent international economic law that has been addressed recently by a number of authors expressing different views.

Notwithstanding their reliance on the state of necessity under customary international law in interpreting and applying Article XI, Alvarez and Khamisi seem to exclude that the term “essential security interests” can encompass emergency situations different from those regarding military or defence matters, as it would be if one follows an approach in accordance with that of the International Law Commission which does not limit the use of the concept to any specific set of circumstances. As observed by the International Law Commission, the state of necessity defence “has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population.” Moreover, the authors consider that Article XI of Argentina-U.S. Brt cannot cover Argentina’s economic emergencies at all, due to the objective, the purpose and the legislative history of Argentina-U.S. Brt, particularly viewed from the U.S. side (pp. 414, 452).

In contrast, Muchlinski does seem to argue for the development of a standard of review as to the concept of necessity under Article XI different from the one applied under the customary defence of necessity (pp. 70-74). While criticizing the European Court of Human Rights Margin of Appreciation Doctrine suggested by Burke-White

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10 Continental Casualty Company v. Argentina, ICSID Case No. ARB/03/9, Award of 5 September 2008, para. 192 where the Tribunal finds it more appropriate to refer to the standard of review under WTO law “[s]ince the text of Art. XI derives from the parallel model clause of the U.S. FCN treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947.”

11 See p. 441 and footnotes 332 and 440 of the volume.


13 ILC, Commentary, at Art. 25, para. 14. We note that the CMS, Enron, Sempra awards and LG&E decision on liability followed the ILC’s approach (as stated in the CMS award at para. 359, “there is nothing in the context of customary international law or the object and purpose of the treaty that could on its own exclude major economic crises from the scope of Art. XI”). See also LG&E decision on liability, para. 238; Enron award, para. 352. Alvarez and Khamisi seem to argue for a limited role of ILC’s Commentary at Article 25 in interpreting the term “essential security interests” in the context of U.S. Brts. This is because at the time the U.S. was drafting its first model Brt in the early 1980s ILC’s work on State Responsibility was still ongoing (p. 430). In fact, the State Responsibility Articles in the current version were finalized in 2001 only. For a different view on this point see A. Björkstén, footnote 16 at pp. 482-483 of the volume.

14 Contrary to the position of Alvarez and Khamisi, the following position taken by the Tribunal in Continental v. Argentina appears more in accordance with Art. 31-32 of the Vienna Convention of the Law of the treaties: “It may well be that in drafting the model text for Art. XI, the U.S. intended to protect first of all its own security interests in the light of geopolitical, strategic and defence concerns, typical of a world power [...]. This intention would not exclude from the protection provided by Art. XI different measures taken by the other Contracting Party in relation to emergency situations affecting essential security interests of a different nature of such other Contracting Party [such as an emergency of economic nature]. An interpretation of a bilateral reciprocal treaty that accommodates the different interests and concerns of the parties in conformity with its terms accords with an effective interpretation of the treaty...” (para. 181).
and Von Staden (pp. 74–75), the author contends that "there exist similar doctrines, specifically developed in the context of international economic law, which might be a more suitable template for investment tribunals to use. One such is the "standards of review" under WTO law (p. 75). In addition, the author points to the doctrine of necessity and proportionality developed by European Union Court of Justice in its case law on "golden shares" for the purpose of developing an appropriate balancing test under BITs (pp. 76–77). The present writer is, however, not convinced that the European Union’s internal market’s principles are “exportable” to the BIT context.

Even if this discussion does not resolve the matter conclusively, it is precisely for this very reason that the debate on this issue adds further weight to the inaugural volume of the Investment Yearbook. It makes the reader eager to examine the following one(s), expecting further high-level analyses of the evolution and the multifaceted aspects of international investment law and policy.
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