

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Contributions to Books

Scholarship & Research

1-2011

Chapter 25. International investment arbitration: winning, losing and why

Susan Franck

American University Washington College of Law, sfranck@wcl.american.edu

Karl P. Sauvant

Columbia Program on International Investment, Columbia Law School

Lisa Sachs

Columbia University - Columbia Center on Sustainable Investment

Ken Davies

Vale Center for Sustainable International Investment

Ruben Zandvliet

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_bk_contributions

Grotius Centre for International Legal Studies, Leiden Law School



Part of the [Dispute Resolution and Arbitration Commons](#)

See next page for additional authors

Recommended Citation

Franck, Susan; Sauvant, Karl P.; Sachs, Lisa; Davies, Ken; Zandvliet, Ruben; Hufbauer, Gary Clyde; Kekic, Laza; Jensen, Nathan M.; Malesky, Edmund J.; Avi-Yonah, Reuven S.; Guimon, Jose; Cotula, Lorenzo; Bellak, Christian; Leibrecht, Markus; Ozawa, Terutomo; Mortimore, Michael; Razo, Carlos; Satyanand, Premila Nazareth; Bruche, Gert; van Aaken, Anne; Kurtz, Jürgen; Gordon, Kathryn; Pohl, Joachim; Fotak, Veljko; Megginson, William L.; Kovacs, Charles; Plotkin, Mark; Fagan, David N.; Bhattacharjee, Subrata; de Mestral, Armand Claude; Yackee, Jason Webb; Gallagher, Kevin P.; Skovgaard Poulsen, Lauge N. University College London; Smit, Hans; Nolan, Michael D.; Sourgens, Frederic G.; Peterson, Luke Eric; Van Harten, Gus; and de Gramont, Alexandre, "Chapter 25. International investment arbitration: winning, losing and why" (2011). *Contributions to Books*. 310.

https://digitalcommons.wcl.american.edu/facsch_bk_contributions/310

This Book Chapter is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Contributions to Books by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

Authors

Susan Franck, Karl P. Sauvant, Lisa Sachs, Ken Davies, Ruben Zandvliet, Gary Clyde Hufbauer, Laza Kekic, Nathan M. Jensen, Edmund J. Malesky, Reuven S. Avi-Yonah, Jose Guimon, Lorenzo Cotula, Christian Bellak, Markus Leibrecht, Terutomo Ozawa, Michael Mortimore, Carlos Razo, Premila Nazareth Satyanand, Gert Bruche, Anne van Aaken, Jürgen Kurtz, Kathryn Gordon, Joachim Pohl, Veljko Fotak, William L. Megginson, Charles Kovacs, Mark Plotkin, David N. Fagan, Subrata Bhattacharjee, Armand Claude de Mestral, Jason Webb Yackee, Kevin P. Gallagher, Lauge N. Skovgaard Poulsen University College London, Hans Smit, Michael D. Nolan, Frederic G. Sourgens, Luke Eric Peterson, Gus Van Harten, and Alexandre de Gramont



VALE COLUMBIA CENTER
ON SUSTAINABLE INTERNATIONAL INVESTMENT
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND
THE EARTH INSTITUTE AT COLUMBIA UNIVERSITY

FDI PERSPECTIVES

Issues in International Investment

Edited by
Karl P. Sauvant
Lisa Sachs
Ken Davies
Ruben Zandvliet

Vale Columbia Center on Sustainable International
Investment
January 2011

ISSN 2159-2217

The Vale Columbia Center on Sustainable International Investment (VCC) seeks to be a leader on issues related to foreign direct investment (FDI) in the global economy, paying special attention to the sustainability dimension of this investment. It focuses on the analysis and teaching of the implications of FDI for public policy and international investment law. Its objectives are to analyze important topical policy-oriented issues related to FDI, develop and disseminate practical approaches and solutions, and provide students with a challenging learning environment. For more information, please see <http://www.vcc.columbia.edu>.

The views expressed by the individual authors of the chapters in this eBook do not necessarily reflect the opinions of Columbia University or its partners and supporters. *Columbia FDI Perspectives* is a peer-reviewed series.

The material in this ebook may be reprinted if accompanied by the following acknowledgment: *FDI Perspectives: Issues in International Investment*. Reprinted with permission from the Vale Columbia Center on Sustainable International Investment (www.vcc.columbia.edu).

A copy should kindly be sent to the Vale Columbia Center at vcc@law.columbia.edu

Table of Contents

Acknowledgments.....	iv
List of peer reviewers.....	v
Authors.....	vi
Foreword by <i>Gary Clyde Hufbauer</i>	xviii
Preface by <i>Karl Sauvant, Lisa Sachs, Ken Davies, and Ruben Zandyliet</i>	xix
List of abbreviations	xxi
PART I ATTRACTING FOREIGN DIRECT INVESTMENT AND ITS IMPACT	1
Chapter 1 The global economic crisis and FDI flows to emerging markets - <i>Laza Kekic</i>	2
Chapter 2 The FDI recession has begun - <i>Karl P. Sauvant</i>	7
Chapter 3 FDI incentives pay – politically - <i>Nathan M. Jensen and Edmund J. Malesky</i>	10
Chapter 4 President Obama’s international tax proposals could go further - <i>Reuven S. Avi-Yonah</i>	14
Chapter 5 It’s time for an EU investment promotion agency - <i>José Guimón</i>	17
Chapter 6 Land grab or development opportunity? International farmland deals in Africa - <i>Lorenzo Cotula</i>	20
Chapter 7 Improving infrastructure or lowering taxes to attract foreign direct investment? - <i>Christian Bellak and Markus Leibrecht</i>	23
Chapter 8 Can the United States remain an attractive host for FDI in the auto industry? New labor policy and flexible production - <i>Terutomo Ozawa</i>	26
PART II THE RISE OF EMERGING MARKET INVESTORS	29
Chapter 9 Outward investment by Trans-Latin enterprises: reasons for optimism - <i>Michael Mortimore and Carlos Razo</i>	30
Chapter 10 How BRIC MNEs deal with international political risk - <i>Premila Nazareth Satyanand</i>	36
Chapter 11 What will an appreciation of China’s currency do to inward and outward FDI? - <i>Karl P. Sauvant and Ken Davies</i>	39
Chapter 12 Will China relocate its labor-intensive factories to Africa, flying-geese style? - <i>Terutomo Ozawa and Christian Bellak</i>	42
Chapter 13 A new geography of innovation – China and India rising - <i>Gert Bruche</i> ..	45
PART III NATIONAL POLICIES	48

Chapter 14 The global financial crisis: will state emergency measures trigger international investment disputes? - <i>Anne van Aaken and Jürgen Kurtz</i>	49
Chapter 15 The response to the global crisis and investment protection: evidence - <i>Kathryn Gordon and Joachim Pohl</i>	53
Chapter 16 Are sovereign wealth funds welcome now? - <i>Veljko Fotak and William Megginson</i>	56
Chapter 17 Sovereign wealth funds: much ado about some money - <i>Charles Kovacs</i>	59
Chapter 18 The revised national security review process for FDI in the United States - <i>Mark E. Plotkin and David N. Fagan</i>	62
Chapter 19 Foreign direct investment and U.S. national security: CFIUS under the Obama administration - <i>Mark E. Plotkin and David N. Fagan</i>	65
Chapter 20 National security with a Canadian twist: the Investment Canada Act and the new national security review test - <i>Subrata Bhattacharjee</i>	68
PART IV INTERNATIONAL INVESTMENT TREATIES AND ARBITRATION	71
Chapter 21 Is a model EU BIT possible – or even desirable? - <i>Armand de Mestral C.M.</i>	72
Chapter 22 How much do U.S. corporations know (and care) about bilateral investment treaties? Some hints from new survey evidence - <i>Jason Webb Yackee</i>	74
Chapter 23 U.S. BITs and financial stability - <i>Kevin P. Gallagher</i>	77
Chapter 24 Political risk insurance and bilateral investment treaties: a view from below - <i>Lauge Skovgaard Poulsen</i>	80
Chapter 25 International investment arbitration: winning, losing and why - <i>Susan D. Franck</i>	83
Chapter 26 The pernicious institution of the party-appointed arbitrator - <i>Hans Smit</i> ..	86
Chapter 27 State-controlled entities as claimants in international investment arbitration: an early assessment - <i>Michael D. Nolan and Frédéric G. Sourgens</i>	88
Chapter 28 International investment law and media disputes: a complement to WTO law - <i>Luke Eric Peterson</i>	91
Chapter 29 Thinking twice about a gold rush: <i>PacRim Cayman LLC v. El Salvador</i> - <i>Gus Van Harten</i>	94
Chapter 30 Mining for facts: <i>PacRim Cayman LLC v. El Salvador</i> - <i>Alexandre de Gramont</i>	97

Acknowledgments

We would like to express our gratitude to the people who have made the *Columbia FDI Perspectives* series possible. Rex Chatterjee and Amanda Barnett both served as managing editor of the *Perspectives*, and did a wonderful job in the publication process. We also thank Zehra Gulay Kavame for her work in realizing this series.

Furthermore we would like to thank the authors, Reuven S. Avi-Yonah, Christan Bellak, Subrata Bhattacharjee, Gert Bruche, Lorenzo Cotula, Alexandre de Gramont, Armand de Mestral, David N. Fagan, Veljko Fotak, Susan D. Franck, Kevin P. Gallagher, Kathryn Gordon, José Guimon, Nathan M. Jensen, Laza Kekic, Charles Kovacs, Jürgen Kurtz, Markus Leibrecht, Edmund J. Malesky, William Megginson, Michael Mortimore, Michael D. Nolan, Terutomo Ozawa, Luke Eric Peterson, Mark E. Plotkin, Joachim Pohl, Lauge Skovgaard Poulsen, Carlos Razo, Premila Nazareth Satyanand, Hans Smit, Frédéric G. Sourgens, Anne van Aaken, Gus van Harten, and Jason Yackee for their inspiring contributions.

List of peer reviewers

Columbia FDI Perspectives is a peer-reviewed series. We would like to acknowledge our deep appreciation for the contributions of all the peer-reviewers, most of whom work in the field of international investment as academics or practitioners. Their insightful comments have strengthened the *Perspectives* series and this volume. We thank:

José Alvarez	Ian Laird
Harvey Arbeláez	David Leblang
Todd Arena	Thea Lee
Anthony Baldanza	Al Litvak
Mark Barenberg	Howard Mann
Agnès Bénassy-Quéré	James Mendenhall
Rudy Bogni	Ruth Meinzen-Dick
Mary Bonar	Jack Muttifor
Karen Brown	Nanette Neuwahl
Glen Biglaiser	Andrew Newcombe
Andrea Bjorklund	Beatriz Nofal
Deborah Brautigam	Michael Nolan
Rachel Brewster	Herbert Oberhaensli
Marc Bungenberg	Jeffrey Owens
Tim Büthe	Stephen Y.K. Pan
Stephen Canner	Hugh Patrick
John Cantwell	Jan Paulsson
Efi Chalamish	Robert Pearce
Armand de Mestral	Clint Peinhardt
Christopher Drahozal	Ted Posner
Mark Drumbl	Lauge Poulsen
Persa Economou	Ed Safarian
Lorraine Eden	Jeswald W. Salacuse
Thomas Eilmansberger	Manfred Schekulin
Geza Feketekuty	Andrea Schneider
Veljko Fotak	Christoph Schreuer
Torbjörn Fredriksson	Greg Shaffer
José María Serena Garralda	Edward Turner III
Joern Griebel	Anne van Aaken
Jerry Haar	Daniel van den Bulcke
Robert Howse	Gus Van Harten
Gary Hufbauer	Jan Winter
Mark Kantor	Jason Yackee
Edward Kehoe	Stephen Young
Laza Kekic	David Zaring
John Kline	
April Knill	
Jürgen Kurtz	

Authors



Anne van Aaken is Max-Schmidheiny Tenure Track Professor for Law and Economics, Public, International and European Law at the University of St.Gallen, Switzerland, Fellow at the Institute for Advanced Studies in Berlin, Germany 2010-2011, Vice-President of the European Association of Law and Economics, Member of the Programmatic Steering Board of the Hague Institute for the Internationalization of Law and Member of the ILA Investment Committee and the ILA Committee on Non-State Actors. Her main research areas are international investment law and its interaction with other areas of

international law, legal theory, law and economics, and corruption. She can be contacted at Anne.vanAaken@unisg.ch.



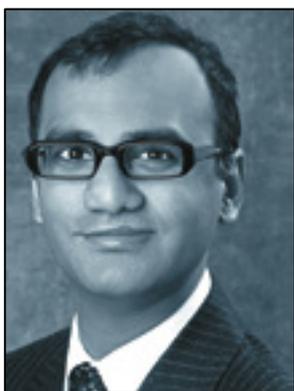
Reuven S. Avi-Yonah is Irwin I. Cohn Professor of Law and Director of the International Tax LL.M. Program at the University of Michigan Law School. He has published numerous articles on domestic and international tax issues, and is the author of *International Tax as International Law: U.S. Tax Law and the International Tax Regime* (Cambridge: Cambridge University Press, 2007) and *U.S. International Taxation: Cases and Materials* (New York: Foundation Press, 2nd ed. 2005, with Brauner & Ring). He is currently a member of the Steering Group of the International Network for Tax Research of the Organisation

for Economic Co-operation and Development (OECD) and Chair of the ABA Tax Section Tax Policy Committee, an International Research Fellow of the Oxford University Centre for Business Taxation, and a Trustee of the American Tax Policy Institute. He can be contacted at aviyonah@umich.edu.



Christian Bellak is currently Associate Professor of Economics at the Department of Economics, University of Economics and Business, Vienna (Austria). His research interests include international factor flows (determinants and effects of foreign direct investment; migration) and economic policy. He has published several book chapters and is the author of several articles published in international scientific journals, e.g. *Oxford Bulletin of Economics and Statistics*, *Applied Economics*, *International Journal of the Economics of Business*, *Transnational Corporations*, *Economic Dynamics and Structural Change*, *The World Economy*, and *Public Finance*

Analysis. He is a consultant to international bodies and has been a visiting lecturer at several universities abroad. He can be contacted at bellak@wu-wien.ac.at.



Subrata Bhattacharjee is co-chair of Heenan Blaikie’s National Trade & Competition Group and a partner in the Toronto office of the firm. He carries on an extensive foreign investment practice, and advises non-Canadian investors on Canadian foreign investment issues under the *Investment Canada Act* and other federal legislation. In this regard, he has advised foreign buyers, including state-owned enterprises, on some of the most high profile foreign takeovers in recent years, including Phelps Dodges/Inco/Falconbridge, Abu Dhabi National Energy Company/PrimeWest and Philip Morris/Rothmans. Mr. Bhattacharjee is recognized as one of Canada’s leading lawyers in his areas of expertise in *Chambers Global: The World’s Leading Lawyers for Business* and other major peer-rated surveys. He can be contacted at sbhattach@heenan.ca.



Gert Bruche is Professor of International Management at Berlin School of Economics and Law. After his studies (Dipl.-Ing, Technische Universität Berlin, Dr. rer. pol., Freie Universität Berlin) Dr. Bruche worked with the United Nations Development Programme in Turkey, with the International Institute of Management in Berlin (WZB) and with Schering AG. He has served as the Berlin School of Economics and Law’s Dean and Vice President and Director of the Executive Training Program at Nanyang Business School in Singapore. Dr. Bruche also advises leading multinational companies in their Asia strategies. In his research he focuses on the Asia Pacific with particular reference to R&D offshoring, talent and knowledge management, and Chinese and Indian Multinationals’ FDI strategies. He can be contacted at gert.bruche@hwr-berlin.de.



Lorenzo Cotula is a senior researcher at the International Institute for Environment and Development (IIED), a policy research institute based in the U.K. At IIED, he undertakes research and policy advocacy on land rights and on investment in agriculture and extractive industries, and coordinates a multi-country program to strengthen local capacity to get a better deal from natural resource investment. Before joining IIED in 2002, Lorenzo worked on assignments with the Food and Agriculture Organization of the United Nations and with two Italian NGOs. He holds a law degree (cum laude) from the University “La Sapienza” of Rome, an MSc in Development Studies (distinction) from the London School of Economics, and a PhD from the University of Edinburgh. He can be contacted at lorenzo.cotula@iied.org.



Ken Davies is a Senior Staff Associate at the Vale Center for Sustainable International Investment. Davies has a BA in Chinese Studies and Sociology from the University of Leeds and a BSc in Economics from the University of London. He has been Head of Global Relations in the Investment Division of the Organisation for Economic Co-operation and Development (OECD), where he produced investment policy reviews of China, India and Russia. Before that he was Chief Economist for Asia at the Economist Intelligence Unit (EIU) in Hong Kong. He can be contacted at kenneth.davies@law.columbia.edu.



David Fagan is a partner at Covington & Burling LLP in Washington, DC. His practice covers national security law and international trade and investment. Mr. Fagan has represented clients before federal and state government agencies and Congress on a range of issues, including regulatory approvals of international investments, national-security-related criminal investigations, and high-profile congressional investigations. On investment issues, Mr. Fagan has represented foreign and domestic clients in various industries in securing the approval of the Committee on Foreign Investment in the United States (CFIUS), as well as in connection with ongoing compliance matters related to mitigation agreements with CFIUS. Mr. Fagan also is an Adjunct Professor of Law at Georgetown University Law Center, teaching a seminar on "National Security Law and the Private Sector". He can be contacted at dfagan@cov.com.



Veljko Fotak earned a BS degree in Business Administration, an MBA with a concentration in Finance and an MS in Applied Statistics from the Rochester Institute of Technology, in Rochester, NY. He is currently a PhD candidate at the University of Oklahoma and a Senior Research Associate at the Fondazione Eni Enrico Mattei. Veljko's research interests focus on the role of governments in financial markets and, in particular, on state capitalism and sovereign wealth funds. He can be contacted at veljko@ou.edu.



Susan Franck is an Associate Professor at the Washington and Lee University School of Law. Professor Franck's teaching and scholarship relates to international economic law and dispute resolution. She has recently served as a Scholar-in-Residence at the United Nations Conference on Trade and Development (UNCTAD) in Switzerland (spring 2010) and a Visiting Associate Professor at Vanderbilt University (fall 2010). Prior to joining W&L, she was an Assistant Professor at the University of Nebraska Law College and a Visiting Associate Professor at the University of Minnesota Law School. Before returning to the academy,

Professor Franck practiced in the area of international economic dispute resolution on both sides of the Atlantic. She can be contacted at francks@wlu.edu.



Kevin P. Gallagher is Associate Professor of International Relations at Boston University and senior researcher at the Global Development and Environment Institute. His recent books are *The Dragon in the Room: China and the Future of Latin American Industrialization* (Palo Alto: Stanford University Press, 2010), *The Enclave Economy: Foreign Investment and Development in Mexico's Silicon Valley* (Cambridge: MIT Press, 2007), and *Rethinking Foreign Investment for Development: Lessons from Latin America* (London: Anthem Press, 2009). He serves on the investment subcommittee of the U.S. State Department Advisory

Committee on International Economic Policy. He can be contacted at kpg@bu.edu.



Kathryn Gordon is a senior economist in the Investment Division of the OECD. Ms. Gordon is currently working on international investment policies, including the role of national security and of emergency responses to economic and financial crises. Earlier, she was one of the main Secretariat participants in the negotiations that led up to the successful 2000 review of the OECD Guidelines for Multinational Enterprises and was responsible for OECD research on corporate responsibility. In earlier positions at the OECD, she dealt with fiscal, tax and regulatory issues. Prior to taking her position at the OECD, Ms. Gordon was a

professor at a French business school (École Supérieure des Sciences Économiques et Commerciales). She is a U.S. citizen and has been a resident of France for more than 20 years. She obtained a PhD and an MBA-Finance from the University of California, Berkeley before moving to France. She can be contacted at kpg@bu.edu.



Alexandre de Gramont is a partner in the Washington, D.C. office of Crowell & Moring LLP, where he is vice-chair of the International Arbitration practice. Mr. de Gramont has represented both investors and states in numerous investor-state arbitration matters. He has also written and spoken widely on the subject of investor-state arbitration and international investment law. Mr. de Gramont received his law degree from New York University and his undergraduate degree from Wesleyan University. As noted in his Chapter, Mr. de Gramont and his firm represent the claimant in *Pac Rim Cayman LLC v. El Salvador*. He can be

contacted at AdeGramont@crowell.com.



José Guimón is a lecturer in international economics at Universidad Autónoma de Madrid. His research focuses on the interaction between multinational companies, innovation systems and economic development. In recent years he has participated in several E.U.-funded research projects and has been a visiting researcher at Trinity College Dublin. In addition to his academic engagements he has worked seven years as a public sector consultant for CSC. He holds a PhD in economics from UAM and a master in industrial engineering from Cornell University. He can be contacted at jose.guimon@uam.es.



Gus Van Harten is an Associate Professor at Osgoode Hall Law School of York University in Toronto, Canada. He was previously a lecturer at the Law Department of the London School of Economics. His research examines international and comparative aspects of public law, including aspects of investment treaty arbitration. He is the author of *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007) and numerous academic articles and is coordinating a knowledge mobilization project called Investment Treaty Arbitration & Public Policy. He was educated at the University of Guelph, Osgoode Hall Law School, and York University, and

obtained his PhD from the LSE. He clerked at the Ontario Court of Appeal. He can be contacted at GVanHarten@osgoode.yorku.ca.



Nathan Jensen is an Associate Professor in the Department of Political Science at Washington University in St. Louis, Fellow at the Center for Political Economy, and Director for the Program on Multinational Enterprises and the Global Economy at the Weidenbaum Center on the Economy, Government, and Public Policy at Washington University. He teaches courses and conducts research on international financial markets, multinational corporations and development, political risk in emerging markets, trade policy, international institutions and civil conflict. His research includes *Nation-States and the Multinational Corporation* (Princeton: Princeton University Press, 2008) and his peer-reviewed articles include publications in the *American Journal of Political Science*, *Journal of Politics*, and *International Organization*. He can be contacted at njensen@wustl.edu.



Laza Kekic is Regional Director, Central and Eastern Europe, Director of Country Forecasting Services, EIU, London. He heads the EIU's regional team of analysts who provide economic, political and business coverage for Eastern Europe. He also heads the EIU's Country Forecasting Services, which include the Economist Intelligence Unit's main traditional product, the Country Reports, as well as the Country Forecasts (medium and long-term forecasts for 82 countries aimed at foreign direct investors). Areas of main specialization and interest are: Eastern Europe, foreign direct investment, economic forecasting, and growth economics. He has written extensively on these topics and is also a frequent speaker at Economist Conferences and other conferences and seminars. He was educated at the London School of Economics (BSc and MSc Econ) and joined the Economist Intelligence Unit in 1993. He can be contacted at lazakekic@eiu.com.



Charles Kovacs is an American living in Budapest where he is Chairman of Hid Radio Zrt, and is a member of the Supervisory Board of CIG Pannonia Life Insurance PLC. By profession, he is an international and investment banker, including 25 years with the Chase Manhattan Bank and Barclays de Zoete Wedd, with academic credentials from Clark University (B.A.) and the Fletcher School of Law and Diplomacy (M.A., M.A.L.D). He can be contacted at charles.kovacs@hidradiort.hu.



Jürgen Kurtz is an Associate Professor and Director of the International Investment Law Program of the Institute for International Law and the Humanities at the University of Melbourne, Australia. In 2010, he was the Fernand Braudel Senior Fellow at the European University Institute and Visiting Professor at Bocconi University Law School in Milan and Universidade Católica Law School in Lisbon. He can be contacted at j.kurtz@unimelb.edu.au.



Markus Leibrecht is a Senior Economist at the Vienna University of Economics and Business. His main research interests include the impact of globalization on the functioning and the structure of the public sector. He has published in journals including *Public Choice*, *Applied Economics*, *Economics of Transition*, *Finanzarchiv*, *Open Economies Review* or *Structural Change* and *Economic Dynamics*. He is also the author of several chapters in edited volumes. He can be contacted at markus.leibrecht@wu-wien.ac.at.



Edmund Malesky is Assistant Professor of political science at the Graduate School of International Relations and Pacific Studies at the University of California – San Diego. He has published in leading political science and economic journals, including the *American Political Science Review* and *Journal of Politics*, and has been awarded the Harvard Academy Fellowship and Gabriel Almond Award for best dissertation in comparative politics. Malesky serves as the lead researcher for the Vietnam Provincial Competitiveness Index and Cambodian Business Environment Scorecard. He has consulted for the Asia Foundation, USAID, and the

World Bank Group. Malesky is a noted specialist in the political development in Vietnam and China, comparative political economy in Southeast Asia, as well as economic transitions in developing economies, especially Southeast Asia. He can be contacted at emalesky@ucsd.edu.



Bill Megginson is Professor and Rainbolt Chair in Finance at the University of Oklahoma's Michael F. Price College of Business, and was recently named a George Lynn Cross Research Professor. From 2002 to 2007, he was a voting member of the Italian Ministry of Economics and Finance's Global Advisory Committee on Privatization. During spring 2008, he was the Fulbright Tocqueville Distinguished Chair in American Studies and Visiting Professor at the Université-Paris Dauphine. He has published refereed articles in several top academic journals, including the *Journal of Economic Literature*, the *Journal of Finance*, the *Journal of Financial Economics*, the *Journal of Financial and Quantitative Analysis*, and *Foreign Policy*. He has been a Visiting Professor at Duke University, Vanderbilt University, the University of Zurich, the University of Amsterdam, Bocconi University, and Université-Paris Dauphine. He can be contacted at L.wmegginson@ou.edu.



Armand de Mestral is Emeritus Professor of Law, McGill University, Jean Monnet Chair in the Law of International Economic Integration; Co-Director McGill - Université de Montréal, Institute of European Studies 2002- 8; Interim Director, Institute of Air and Space Law McGill University, 1998-2002. He is a panelist and arbitrator in disputes under WTO, CUFTA and NAFTA, member of the Canadian Delegation to the UN Law of the Sea Conference from 1973 to 1980, consultant to NACEC and Law Commission of Canada and was president of the Canadian Red Cross Society from 1999 to 2001. He can be contacted at armand.de.mestral@mcgill.ca.



Michael Mortimore is a Canadian with a PhD from the University of Toronto whose career in the United Nations included many years as Chief of the Unit on Investment and Corporate Strategies of the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) in Santiago, Chile as well as Chief of the Development Issues section of the Division on Investment, Technology and Enterprise Development of UNCTAD in Geneva, Switzerland. The UN-ECLAC Unit manages produces the ECLAC annual report entitled *Foreign Investment in Latin America and the Caribbean*. The UNCTAD Unit that Mr. Mortimore managed produces the thematic section of the annual report entitled *World Investment Report*. Mr. Mortimore retired in 2009 and is living happily ever after. He can be contacted at michaeldmortimore@gmail.com.



of the University of
MNolan@milbank.com.

Michael D. Nolan is a partner in the Washington, DC office of Milbank, Tweed, Hadley and McCloy LLP. Mr. Nolan has represented clients or served as arbitrator in arbitrations under AAA, ICC, ICSID, UNCITRAL and other rules and is consistently listed in *Euromoney Guide*, *Experts in Commercial Arbitration* and *Chambers USA* for international arbitration. Mr. Nolan teaches as an Adjunct Professor at the Georgetown University Law Center. He is a member of the Board of Directors of the American Arbitration Association and of the Panel of ICSID Arbitrators. Mr. Nolan is a graduate of Harvard College and Chicago Law School. He can be contacted at



Terutomo Ozawa is Professor Emeritus of Economics, Colorado State University, and Research Associate, Center on Japanese Economy and Business, Graduate School of Business, Columbia University. He is currently a visiting professor, Foreign Trade University, Hanoi, Vietnam. He can be contacted at T.Ozawa@colostate.edu.



Luke Eric Peterson is the publisher of the website InvestmentArbitrationReporter.com, a popular electronic news and analysis service dedicated to legal disputes between foreign investors and their host governments. He can be contacted at editor@iareporter.com.



Mark Plotkin, a partner in the Washington, DC office of Covington & Burling LLP, co-chairs the Firm's practice before CFIUS. His experience includes handling many of the leading successful CFIUS cases and negotiating several of the most significant, complex and sensitive national security agreements with the U.S. government in recent years. Mr. Plotkin has served as counsel to some of the world's leading companies and private equity funds on CFIUS matters, and also represents some of the most active and respected Asian and Middle Eastern sovereign wealth funds and state-owned companies. Mr. Plotkin is a summa

cum laude graduate of Yale College and an honors graduate of Harvard Law School. He has been recognized by *Chambers USA: America's Leading Lawyers for Business*, *Best Lawyers in America*, *The Legal 500*, and *Super Lawyers*. He is an adjunct professor of law at Georgetown University Law Center, and has lectured on national security matters at Yale Law School.

He can be contacted at mplotkin@cov.com.



Joachim Pohl of the OECD Investment Division monitors and analyses governments' investment policies. Mr. Pohl, a German national, joined the OECD in 2003 to advise countries, predominantly in Asia, on public governance and anti-corruption policies. Prior to his career at OECD, he taught public law at Humboldt University, Berlin and MGLU Moscow. Mr. Pohl holds a PhD in law from Humboldt University and a master's degree in political science from the University of Bordeaux. He can be contacted at joachim.pohl@oecd.org.



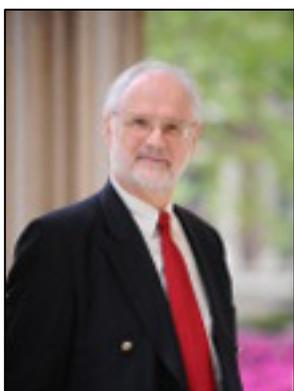
Lauge Skovgaard Poulsen is a PhD candidate from the London School of Economics. His thesis investigates why, and how, developing countries have entered into bilateral investment treaties. He has been a non-residing guest-scholar at the Brookings Institution (spring 2009) and did his graduate coursework at the London School of Economics (2006-2007) and the University of California, Berkeley (2005-2006). He can be contacted at L.N.Poulsen@lse.ac.uk.



Carlos Razo is an economist with the United Nations and is currently assigned to UNCTAD. His areas of expertise are industrial organization and international economics. At the United Nations Economic Commission for Latin America and the Caribbean (UNECLAC), Mr. Razo was one of the main authors of the annual report on foreign direct investment in the Latin American and Caribbean region and he coordinated various studies on industrial development. Before joining the United Nations he worked in London for one of the leading European consulting firms in the area of competition policy. Mr. Razo started his professional career as an industrial engineer in the manufacturing sector. He can be contacted at carlos.razo@cepal.org.



Premila Nazareth Satyanand started her career at the United Nations Centre on Transnational Corporations, New York (1988-1993), and served with the United Nations' electoral missions in South Africa and the Western Sahara. She joined the Economist Intelligence Unit, New Delhi, in 1996, where she helped facilitate the Government-MNE dialogue around FDI liberalization and advised foreign investors on India strategy. She now writes independently on FDI issues, for the Economist Intelligence Unit, the United Nations, and the Multilateral Insurance Guarantee Agency, among others. She has a B.A. in History from St. Stephen's College, New Delhi, and an M.A. in International Relations from Columbia University, New York. She can be contacted at premila@foreigndirectinvestment.in



Karl P. Sauvant is the founding Executive Director of the Columbia Program on International Investment, Research Scholar and Lecturer at Columbia Law School, Co-Director of the Millennium Cities Initiative, Columbia Program on International Investment, US, and Guest Professor at Nankai University, China. Before that, he was Director of UNCTAD's Investment Division. He is the author of, or responsible for, a substantial number of publications. In 2006, he was elected an Honorary Fellow of the European International Business Academy. He can be contacted at karl.sauvant@law.columbia.edu.



Hans Smit is the Stanley H. Fuld Professor Emeritus of Law at the Columbia University School of Law. Prior to joining the Columbia Law School faculty in 1960, he worked in private practice in the Hague and New York. He served as the director of the Project on International Procedure, Leyden-Amsterdam-Columbia Summer Program in American Law, Project on European Legal Institutions, the Parker School of Foreign and Comparative Law at Columbia, Center for International Arbitration and Litigation Law and Center for East European Law. Hans Smit was the reporter to the U.S. Commission on International Rules of Judicial Procedure, former adviser to the U.S. Delegation to UNCITRAL and consultant to the Judicial Conference of the State of New York. He is a member of the Royal Dutch Academy of Sciences and International Academy of Comparative Law and was awarded the E.M. Meijers Medal by University of Leyden (Netherlands). He was knighted by the Queen of The Netherlands (Order of Netherlands Lion). Hans Smit is the Stanley H. Fuld Professor Emeritus of Law at Columbia Law School. He can be contacted at hsmit@law.columbia.edu.



Frédéric G. Sourgens is an associate in the Washington, D.C. office of Milbank, Tweed, Hadley & McCloy and an Adjunct Professor at Georgetown University Law Center. He is a contributor to the forthcoming *Reports of the Overseas Private Investment Corporation Determinations*, edited by Mark Kantor, Michael Nolan and Karl P. Sauvant and published by Oxford University Press (OUP), and an editor of the OUP online database of international investment treaties and decisions (www.investmentclaims.com). He can be contacted at FSourgens@milbank.com.



Jason Yackee is an assistant professor of law at the University of Wisconsin. His research centers on international investment law and administrative law and politics. Professor Yackee graduated summa cum laude and Phi Beta Kappa from University of Pittsburgh, earned an M.A. and Ph.D. in political science (International Relations) from the University of North Carolina at Chapel Hill, and earned a J.D., summa cum laude and Order of the Coif, from Duke University School of Law where he was an editor for the *Duke Law Journal*. He has also studied French and European law at L'Université Panthéon-Assas (Paris-2). Professor Yackee has published articles in a variety of peer-reviewed social science journals, student-edited law reviews, and edited volumes. He can be contacted at jyackee@wisc.edu.

Foreword

Succinct yet insightful reports are most welcome – especially in our era, distracted as it is by a rising tide of shallow commentary. For those who care about foreign direct investment (FDI), the premier reports are *Columbia FDI Perspectives*, published every few weeks by the Vale Columbia Center on Sustainable International Investment. Since the first issue (here republished as chapter 2) appeared in November 2008, the *Perspectives* have adhered to a format of about two pages, authored by a leading expert, on an FDI question of immediate interest. Consequently, there is no better way to keep abreast of changing trends and emerging themes.

Chapter 2 carries the prescient title, “The FDI recession has begun”; several issues (chapters 9-13) document the ascent and challenges of multinational enterprises based in emerging markets, particularly Brazil, India and China; chapter 6 explores farm deals in Africa with the provocative title, “Land grab or development opportunity?”; chapter 1 reveals that emerging markets would attract more than half of FDI in the midst of the Great Recession; chapters 29 and 30 debate the arbitration featuring environmental claims between Pacific Rim LLC and El Salvador; chapter 22 surprisingly reports that general counsels often know little and care less about bilateral investment treaties.

Fortunately for FDI watchers, these issues of the *Perspectives* and many more – in fact the complete collection through 2010 – are now available in a single eBook. Corporate executives, who always have too much to read, will find this eBook essential for a quick briefing. Scholars, who always want to read more, will find the eBook a great place to start their quest. And policy officials, who want to know how the wind is blowing on hot questions, can find the direction from these *Perspectives*.

Much credit for this collection goes to the editor-in-chief, Karl P. Sauvant, the world’s pioneer in gathering reliable statistical information on foreign direct investment, a lifelong observer of FDI questions and a foremost scholar of multinational enterprises. Together with his team at the Vale Columbia Center, Sauvant has done a great service to those of us who care about FDI trends and emerging themes.

Gary Clyde Hufbauer
Reginald Jones Senior Fellow
Peterson Institute for International Economics

Preface

Foreign direct investment (FDI) has become an increasingly important feature of the globalized economy in the past 20 years. Global FDI inflows more than quintupled from 1990 to 2009, rising from US\$208 billion to US\$1.1 trillion, resulting in a cumulative stock of nearly US\$18 trillion by end-2009. International investment has become roughly twice as important as trade in delivering goods and services across frontiers. The rapid growth of global FDI—which has grown faster than world GDP—reflects major underlying policy changes toward FDI in host and home countries. In addition to widespread liberalization of national investment policies, especially in developing countries and former centrally planned economies, many countries have now also adopted active FDI attraction strategies through a proliferation of investment promotion agencies at both national and sub-national levels.

The rapid growth in the importance of investment flows raises a number of important issues. There is first of all the question of the impact of FDI on host and home countries, particularly the extent to which positive effects can be enhanced and negative effects minimized – largely a policy question. The steep rise in the number of international investment agreements and disputes has generated discussion about the nature of the international investment regime. The proliferation of treaties that govern investment flows has raised questions not only about their utility and importance but also about the suitability of their content, especially (but not only) for developing countries. There are also questions about the ability of international arbitration mechanisms to resolve disputes fairly, affordably and consistently. Increased FDI flows from sovereign wealth funds and state-owned enterprises have raised concerns about the impact of such investment on national security and created a ripple effect of legislation and guidelines to govern sovereign investment. More generally, there is continuing discussion about the balance in the international investment regime between investors' rights and responsibilities on the one hand and host countries' rights and responsibilities on the other, and whether we are heading for a “rebalancing” of the regime. The discussions about these and other issues raised by the global surge in FDI take place in classrooms, boardrooms and legislatures.

In late 2008, as financial markets were crashing, the Vale Columbia Center on Sustainable International Investment launched the *Columbia FDI Perspectives*. The first *Perspective*, entitled “The FDI recession has begun”, correctly forecast an FDI recession in the following year. From that first *Perspective* in late 2008 to the end of 2010, the series published thirty-three concise notes on topical FDI-related issues by diverse experts in the field. The purpose of these *Perspectives* is to inform readers about some of the important issues and trends in the contemporary debate on FDI, and to promote a wide-ranging discussion about the policy implications of these trends and events.

The topics of these *Perspectives*, while not an exhaustive list of the issues raised by the global investment regime, capture a dynamic period in the global debate on international

investment and reflect many hot topics and issues of continuing relevance in 2009-2010. Topics ranged from the implications of the financial crisis and recession for major economies, to the changing geography of the international investment regime and policy questions faced by emerging markets; from the implications of sovereign investment for national security and measures taken to restrict such investment, to policy options for countries seeking to increase inward investment flows and trying to stay competitive in a downward market; from investment in land and agriculture, to investment in extractive industries – raising important questions both for national policy and for the international investment regime.

The range of topics reflects the multifaceted, interdisciplinary and rapidly evolving nature of key issues in international investment. This compilation of the *Perspectives* offers snapshots of some of the most topical issues of 2009-2010 and an opportunity to connect the dots, drawing out the interconnections among the various themes addressed in the stand-alone *Perspectives*. It is the collection of these issues and policy considerations that, woven together, forms the changing fabric of the international investment regime. By putting these pieces together in one volume, this e-book allows a clearer picture to emerge.

Two years of these *Perspectives* capture an extraordinary range of topics. Yet some important areas remain underexposed in this volume. We expect that future *Perspectives* (to be posted on www.vcc.columbia.edu) will fill some of these gaps, including, for instance, by addressing the implications of the investment regime for climate change policy, the impact on human rights and mechanisms to maximize the contribution of investment to sustainable development.

The Vale Columbia Center welcomes submissions on these and all other FDI-related topics for future *Perspectives*, to share new and important developments in the field and to continue the generation and discussion of new approaches and policy recommendations to keep apace with the ever-growing importance of foreign direct investment.

Karl P. Sauvant
Lisa Sachs
Ken Davies
Ruben Zandvliet

New York, January 2011

List of abbreviations

BIT - bilateral investment treaty

BRIC - Brazil, Russia, India, China

CAFTA - Central America Free Trade Agreement

FDI - foreign direct investment

FTA - free trade agreement

GDP - gross domestic product

ICSID - International Centre for Settlement of Investment Disputes

IMF - International Monetary Fund

M&A - mergers and acquisitions

MAI - Multilateral Agreement on Investment

MNE - multinational enterprise

NAFTA - North American Free Trade Agreement

NATO - North Atlantic Treaty Organization

NGO - nongovernmental organization

OECD - Organisation for Economic Co-operation and Development

R&D - research and development

SWF - sovereign wealth fund

TRIPS - The Agreement on Trade Related Aspects of Intellectual Property Rights

UNCTAD - United Nations Conference on Trade and Development

WTO - World Trade Organization

PART IV

INTERNATIONAL INVESTMENT TREATIES AND ARBITRATION

Chapter 25

International investment arbitration: winning, losing and why

*Susan D. Franck**

We know several things about foreign investment. First, foreign investment matters, reaching US\$ 1.7 trillion in 2008. Second, we know that foreign investors have new international law rights to protect their economic interests. Third, we know that those rights are now being used. So since we now know that the international legal risk is not illusory, the real questions are: who wins, who loses and why? While various commentators have asserted a variety of answers to those questions, many have done so without reference to valid and reliable data.⁸⁹ In its most benign form, these observations create misinformation, but perhaps more troublingly, might also lead to policy choices based upon unrepresentative anecdotal evidence, supposition or political rhetoric. To help alleviate these possible outcomes, this Chapter reviews recent empirical research⁹⁰ in order to provide basic information to fundamental questions about investment treaty arbitration (ITA) to create a more accurate framework for policy choices and dispute-resolution strategies.

So who does win and lose international investment treaty arbitration? The answer is: both foreign investors and host states win and lose.⁹¹ The data suggest, however, that they lose in reasonably equivalent proportions. Not including the disputes that ended with an award embodying a settlement, respondent governments, for example, won approximately 58% of the time. Meanwhile, investors won 39% of the cases.⁹²

* The author thanks Andrea Bjorklund, Christopher Drahozal, Mark Drumbl, Ian Laird, Clint Peinhardt, Andrea Schneider, Jason Yackee and David Zaring for their comments on an earlier draft. This chapter was first published as a *Perspective* on June 15, 2009.

⁸⁹ See, e.g., Press Release, Food and Water Watch, World Bank Court Grants Power to Corporations (April 30, 2007), available at: <http://www.foodandwaterwatch.org/press/releases/world-bank-court-grants-power-to-corporations-article12302007>.

⁹⁰ See Susan D. Franck, "Empirically Evaluating Claims about Investment Treaty Arbitration," *North Carolina Law Review*, vol. 86 (2007) 1, pp. 16-23 [hereinafter *Evaluating Claims*] (describing the method of gathering data from publicly available arbitration award to identify 102 public awards from 82 disputes that resulted in 52 final determinations); Susan D. Franck, "Development and Outcomes of Investment Arbitration Awards," *Harvard International Law Review*, 50 (2009) 2, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406714 [hereinafter *Development and Outcomes*] (conducting chi-square and analyses of variance tests at significance levels of $\alpha = .05$).

⁹¹ This Chapter defines "winning" and "losing" using quantitative measures: (a) a binary yes/no answer about whether a government breached a treaty, or (b) a scaled quantitative variable of damages awarded. Qualitative approaches might assess experiences with ITA and measure "success" differently. Subjective approaches could consider how parties, with varying levels of familiarity with ITA, and other situational differences understand success.

⁹² Approximately 4% of the cases were settlement agreements. Figures do not add up to 100% due to rounding.

Winning and losing, however, is not just about whether there is a breach of the underlying investment treaty. The amount awarded is also critical. Despite the fact that investors claimed US\$ 343 million in damages on average, that is not what they received. Rather, tribunals awarded investors only US\$ 10 million on average. This US\$ 333 million difference is not insubstantial, and it may give investors a basis for some reflection about the value of arbitration – particularly given the need to pay the arbitral tribunal and the other legal costs associated with bringing a claim.⁹³

Knowing which parties actually win and lose begs a further question – namely: why are parties successful? This question is critical given suggestions that ITA is potentially biased.⁹⁴ There has been some debate about whether respondents' development status or whether arbitrators come from the developing world improperly affects outcome. If these development variables cause particular results, this would raise issues about the integrity of investment treaties and arbitration.

To address this critical issue, recent research considered whether there was a reliable statistical link between the level of development and ITA outcomes. The results suggest that development variables did not generally cause particular outcomes. One study found that there was no relationship between a government's level of development and the outcome of ITA.⁹⁵ A second study then showed that – at a general level – outcome was not reliably associated with the development status of the respondent, the development status of the presiding arbitrator, or some interaction between those two variables. This held true for both: (1) winning or losing investment treaty arbitration, and (2) amounts tribunals awarded against governments. Follow-up tests in the same study showed, however, that there were two statistically significant effects – found in one sub-set of potentially non-representative cases – that suggest arbitration must be used carefully in certain situations. Only where the presiding arbitrator was from a middle income country, the data showed that high income countries received statistically lower awards than: (1) upper-middle income respondents, and (2) low income respondents. Nevertheless, in other circumstances involving middle income presiding arbitrators or all cases involving presiding arbitrators from high-income countries, the amounts awarded were statistically equivalent.⁹⁶ In other words, in limited circumstances, tribunals with presiding arbitrators from middle-income countries made awards that tended to favor developed countries and were different than one might expect from chance alone.

⁹³ Franck, *Empirically Evaluating Claims*, op. cit., pp. 49-50, 64.

⁹⁴ See e.g., Third World Network, *Finance: Bias Seen in International Dispute Arbiters*, June 22, 2007 (JUN07/02), available at: <http://www.twinside.org.sg/title2/finance/twninfofinance060702.htm> (“A little-known entity closely affiliated with the World Bank that mediates disputes between sovereign nations and foreign investors appears to be skewed toward corporations in Northern countries”); Gus van Harten and Martin Loughlin, “Investment Treaty Arbitration as a Species of Global Administrative Law,” *European Journal of International Law*, 17 (2006). (“No matter how well arbitrators do their job, an award will always be open to an apprehension of an institutional bias against the respondent state”).

⁹⁵ Susan D. Franck, “Considering Recalibration of International Investment Agreements: Empirical Insights,” in José E. Alvarez, Karl P. Sauvant and Kamil Gerard Ahmed, eds., *The Evolving International Investment Regime: Expectations, Realities, Options* (New York: Oxford University Press, 2009).

⁹⁶ Franck, *Development and Outcomes*, op. cit.

The overall results cast doubt on the arguments that: (1) ITA is the equivalent of tossing a two-headed coin to decide disputes, (2) the developing world is treated unfairly in ITA, and (3) arbitrators from the developed and developing world decide cases differently. The evidence creates a basis for cautious optimism about the integrity of ITA and suggests radical overhaul, rejection or rebalancing of these procedural rights is not necessarily warranted. While the follow-up tests and limitations of the data suggest optimism must be tempered properly, a sensible approach would involve creating targeted solutions to address particularized problems and enacting targeted reforms to redress perceived concerns about the international investment regime.

Ultimately, the data suggest that investors and governments won and lost in relatively equal measure, but governments won a bit more. While the data show also that, when they did win, investors ended up with substantially less than they requested. Moreover, the data do not establish that a respondent's development status was a reason why investors or governments were successful in pursuing arbitration. This suggests that why a party wins or loses arbitration may ultimately have more to do with factors other than development, such as the merits of a particular claim or defense. Other factors may also be linked with outcome, such as the business sector involved, the amounts claimed or the type of host state government, but they may not necessarily cause particular results. This suggests that although there are risks in pursuing arbitration, there will be times when it is warranted and, ultimately, parties should think carefully about why arbitration is in their interests.