

José E. Alvarez, Karl P. Sauvant *et al.* (eds). ***The Evolving International Investment Regime. Expectations, Realities, Options.*** Oxford: Oxford University Press, 2011. Pp. 308. \$85. ISBN: 9780199793624.

Jose Alvarez and Karl Sauvant have compiled an interesting and diverse set of 12 essays from authors representing scholarly, NGO, and legal practitioners' perspectives on the international investment regime. The essays are based on papers presented at the second Columbia International Investment Conference of 2007. They are complemented by an insightful introduction from the editors, a sketch of the 'context' (Jeffrey Sachs), and a report on the debates ensuing at the conference (Andrea Bjorklund).

The contributions to this book show how divergent opinions are on questions of fairness concerning the investment regime. At the forefront of the contentions are the current status and the future direction of the regime – the *realities* of investment law. However, other than the general tenet in the current literature this volume does not seek a theoretical framework to understand and evaluate the regime. It takes a pragmatic stance in the sense that it promises to seek understanding of the pressures and failures of the regime from a participants' perspective (what are the *expectations* of the stakeholders) and, commendably, integrate the new global powers and needs like China's rise and African resource-based development as constructive and limiting conditions for the proposals for reform. Unfortunately, these remain little more than promises. Neither the stakeholders' views nor the new power constellation and preferences of the 'South' receive the analytic attention they seemingly deserve given the promises of the introduction and the 'new' context sketched by Jeffrey Sachs.

Without a specific theoretical outlook and given the myriad issues on the table the volume appears at times somewhat haphazard. At the same time there is some considerable overlap between essays, although the individual contributions are mostly informative and some are of high quality.

Two subjects for potential revision form the core of *The Evolving International Investment Regime*: the institutional make-up of investment law and the need for pro-development provisions within the system.

The abrupt development of the investment regime has provoked many negative responses. In particular, a number of developing countries and NGOs see this regime, which has historically developed along a clear-cut North–South division, as expressing the interests of the affluent home states and their investors. Limitations on government regulation and a perceived bias against developing countries have moved some countries to opt out of the system.

Opinions are divided, however, on the validity of this critical reproach. This divide is illustrated by the contributions of Robert Echandi and Howard Mann. While the latter explicates the many reasons for NGO opposition to the investment regime, the former defends it in terms of the positive externalities it delivers to developing countries. Selected as a spokesperson for developing countries, Echandi's account is surprising given the discontents on the side of developing countries like Ecuador and Bolivia, which withdrew from ICSID. However, Echandi upholds that the needs and wants of developing countries have changed and that within the new global political economy they expect to 'derive benefits from a rule-oriented international investment regime' (at 10) that helps to attract investment. More indirectly, investment law can 'lock in' already achieved domestic reform, greater transparency, and enable the establishment of a rule of law. The problem for him does not lie with the regime but with those misinformed who do not recognize these benefits (at 18).<sup>1</sup>

<sup>1</sup> He writes, '[I]mportant segments of civil societies . . . still fail to see the advantages . . . Clearly, more information and education regarding the importance of international regimes to prevent conflict in an increasingly interactive world is needed' . . . 'in order for the international investment regime to work properly, there is homework to be completed by developing countries *ex ante*.'

How differently do NGOs look at the regime according to Mann! He paints a picture of strong opposition to the investment regime, ranging from demands of full abandonment to thorough revision of the system. The notion of the rule of law helpfully captures the difference in perception by different actors. Where Enchandi celebrates investment law as rule of law-enhancement, Mann questions the status of investment law itself. For instance, he points out that investment arbitration is characterized by largely secretive legal proceedings of international tribunals, which are run by a small cadre of unelected private lawyers from large international law firms, while there are few institutional checks and balances in place to ensure accountability within the system. This lack is aggravated by the 'double role' played by lawyers, as arbitrator in one and legal counsel in another case contemporaneously.<sup>2</sup> Consequently, the regime is surely wanting from a rule of law perspective. The book under review demonstrates, however, that the perspectives of two stakeholders, NGOs and developing countries, that are often perceived as aligned may diverge on this question.

The rule of law debate extends to the discussion on the inconsistencies of arbitral rulings. Although the consensus view seems to be that inconsistencies exist, the topic is still debated. In this volume we find two practitioners taking it up. While Brigitte Stern, an arbitrator, stresses the inconsistency between the rulings in *CMS v. Argentina* and *LG&E v. Argentina*, Stanimir Alexandrov belligerently argues that critiques of inconsistency in the 'Argentina cases'<sup>3</sup> result from a tendency to overstate discrepancies and underplay coherence. Alexandrov supports his claim by pointing out that Article XI of the US–Argentina BIT is read similarly in all cases – an important sign of a developing coherent jurisprudence. All five tribunals read the Article to include severe economic crisis as a 'state of necessity' and to confer on the tribunal the power to determine whether such a state of necessity existed and was appropriately addressed by the government (at 65–66). As a reader one is left somewhat baffled since the alleged coherence still leads to opposing outcomes. Stern provides an explanation by moving the focus from Article XI to the larger context of necessity exceptions. Thus she is able to show that *CMS* reads Article XI only *after* and *in the light of* Article 25 of the International Law Commission's Articles on State Responsibility, while *LG&E* follows the exact opposite sequence. This leads the *CMS* tribunal to the 'restrictive' interpretation that necessity *per se* is no excuse for treaty breaches and *LG&E* to the 'open' reading that treaties as such are no barrier to governmental acts in 'states of necessity'. From a long-term perspective, however, the existence of such inconsistency does not *per se* necessitate reform. As Stern herself says, this might just be a sign of the *crise de croissance* (at 175), a flaw from which the regime will learn.

Susan Franck's account of the potentially negative impacts of the investment regime moves away from legal doctrine to the 'real' effects of the investment system. As in her earlier work,<sup>4</sup> Franck scrutinizes the common claim that the regime unfairly treats developing countries

<sup>2</sup> Gus van Harten has stressed this problematic aspect in much of his writing. See in particular van Harten, 'Five Justifications for Investment Treaties: a Critical Discussion', 2 *Trade L & Development* (2010) 19.

<sup>3</sup> The cases are: *CMS v. Argentina* (ICSID Case No. ARB/01/8), *Enron v. Argentina* (ICSID Case No. ARB/01/3), *Sempra v. Argentina* (ICSID Case No. ARB/02/16), *LG&E v. Argentina* (ICSID Case No. ARB/02/1), and *Continental Casualty v. Argentina* (ARB/03/9). The first 3 cases rejected Argentina's defence of necessity based on the economic crisis; the latter two accepted it.

<sup>4</sup> Franck, 'Development and Outcomes of Investment Treaty Arbitration', 50 *Harvard Int'l L Rev* (2009) 435, is her most famous publication to date on the topic. Strangely enough Franck does not refer to this article while it clearly is a more elaborate account of what is also argued in this chapter. I take it that the essay at hand was written for the 2007 conference and has seen barely any updating in the meantime. Her data run to June 2006 only and the latest publications quoted in the essay are from 2008. Although this does not devalue the article it is somewhat unfortunate that Franck did not update it.

as evidenced by an imbalance in terms of the number of cases filed against developing countries and the difference in compensation that developing and developed country respondents are ordered to pay. Franck provides empirical, quantitative, arguments discarding this critique as unfounded. According to her, the data show no significant imbalance in terms of the win/lose ratio in dispute settlement or in the amount of indemnity awarded to investors. I would like to make two qualifications to Franck's evaluation of the data.<sup>5</sup> First, even if the distribution of proceedings between developed and developing countries is not as out of sync as some like to believe, it seems (quite obvious) that a construction of these data *relative* to FDI inflow would show a large discrepancy. Along the same lines one can argue that although there is no significant difference in indemnities awarded, the picture changes once one reads these data *relative to* a country's GDP. Franck's data selection confirms an assumption of a certain equality of states within the regime that in reality does not exist. An indemnity to be paid weighs differently on different countries, no matter the fact that the absolute value is equal.

The expectations of the stakeholders and the realities of the regime determine the need for reform. Consensus seems to exist among the contributors concerning some issues of accountability within the ICSID framework, the need for more homogeneity in treaty making, and the desirability of a new multilateral approach. Rainer Geiger's contribution provides a systematic outline of the potential of a new multilateral approach.<sup>6</sup> His argument proceeds in two steps. First we are walked through the achievements, and failures and criticisms of the MAI. Subsequently we are provided with an argument on the way forward. He effectively proposes a new MAI but through a much more careful step-by-step process. The advantages of a multilateral regime, like the MAI, are that it provides for more coherence, legal certainty, and accountability than the currently existing patchwork regime. One problem confronting this route is that so far all multilateral approaches have failed miserably and little promise for its political tenability today seems to exist. Improving the current patchwork, possibly through codification of the already highly similar standards in IIAs in a Model BIT to serve as a basis for negotiations is another route. Grieg himself proposes to initiate a multilateral process through a 'plurilateral' approach, i.e., 'bringing together those countries which are willing and able to participate' (at 161). Grieg ignores, however, the resemblance of his 'plurilateral' approach to that of the OECD when creating the MAI. In light of the MAI experience it seems crucial that the reform process be inclusive.

The second main reform topic concerns the implications of the investment regime for government regulatory powers and development. This is mainly a question of the appropriate power balance between the relevant actors. Two ways forward here are the recalibration of investors' rights and state regulatory power and the integration of the principle of sustainable development. The debate on the development implications and regulatory space of states within

<sup>5</sup> My comments add to Gus van Harten's forceful critique of Franck's 2009 piece on both the construction of data and her deduction of conclusions from the data. See: Van Harten, 'Fairness and Independence in Investment Arbitration: A Critique of Susan Franck's "Development and Outcomes of Investment Treaty Arbitration"', IISD, Dec. 2010, available at: [www.iisd.org/itn/wp-content/uploads/2010/12/iisd\\_itn\\_dec\\_2010\\_en.pdf](http://www.iisd.org/itn/wp-content/uploads/2010/12/iisd_itn_dec_2010_en.pdf).

<sup>6</sup> His account has a clear overlap topically with the essays of Mavroidis and Zhan, and Weber and Karl, all in the vol. under review. For brevity's sake I focus only on Geiger.

<sup>7</sup> The collection contains an article devoted to the policies of the US to use a 'national security' standard to limit the free inward movement of FDI. See Cobau, 'Legal Developments in U.S. National Security Reviews of Foreign Direct Investment (2006–2008)', in the vol. under review, at 104–119. The article is somewhat of an oddball in the collection since it fully focuses on US domestic policy and not, as one would expect, the interrelationship of this policy with the main topic of the book, *international investment*.

the investment regime has mushroomed for two reasons. First, the legitimizing claim of FDI's contribution to development turns out to be hard to sustain. Secondly, countries that traditionally had been capital exporters and were little impacted upon by the investment regime are increasingly becoming capital importers and are facing arbitral claims themselves. The US and Canada are two core examples of this. Dissatisfied with these trends host states of investment have set out to regain regulatory power – the affluent countries having been much more successful in dictating the 'return of the state' in investment law, even though the current crisis has put new pressures on these countries.<sup>7</sup> The topics mostly on the agenda for developing countries, like the linkage between investment and development and the inclusion of investor responsibilities, have received much less academic attention.

Two improvements to the regime in this respect are proposed in the volume. The more laborious option is the inclusion of development and investor responsibilities in re-written IIAs, which would make these standards an integral part of arbitration. The International Institute for Sustainable Development (IISD) 2004 Model BIT serves as an example. Annexing or referencing 'soft law' principles and guidelines, of which many, like the OECD Guidelines, exist, is a less contested, second, option.<sup>8</sup>

Focusing on the IISD Model BIT Peter Muchlinski provides a superb articulation of the intricacies of establishing a more balanced and inclusive regime. His contribution importantly shows that such commendable models can run into political and institutional difficulties. The IISD Model BIT for instance attempts to strengthen regulatory freedom to pursue development aims. However, one should not forget for what reasons capital exporting states become parties to investment treaties: investment protections and risk mitigation. A Model BIT containing articles effectively allowing a 'right to regulate' to trump investor rights will find little support from capital exporting states. Even though fear of a potential 'backlash' to the whole regime, as Muchlinski registers, can motivate home states to revise their current IIAs, the *scope* of such revisions will be dependent on their own preferences. In the end it comes down to a simple cost-benefit analysis. At the same time, in the event that such a BIT would be put into force, investors themselves could move to seek their protection through negotiated contracts instead.

Muchlinski further addresses challenges of institutional overlap. Thus he points to the many values expressed under corporate social responsibility (CSR) that 'are already being dealt with by specialized intergovernmental organizations or other specialist bodies' (at 47). In effect, a dream of a constitution-like model covering all relations between state and investor coherently and in a sustainable way might be a dream for a future world but not one that finds application in the fragmented arrangements that make up international law today.

Are we then left with only good intentions? Muchlinski himself does not provide much of a vision towards reconciling these fragmented arrangements. The reader finds such vision, however, in the contribution of John Dunning and Sarianna Lundan. They outline the role of CSR norms and institutions and their relation to the laws of investment in the current international political economy. Their contribution is of crucial importance, I would argue, to further the somewhat rigid 'internal' debate within investment law. According to them the regime governing investment is two-pronged, consisting of 'hard' law governing the physical domain of resources, market access, etc., and 'soft' law governing the human environment of labour rights, consumer protections, and possibly human rights. The most promising way forward, given this fragmented regime then, is not a translation of the 'soft' law of the human environment into 'hard' law but an integrative approach that seeks complementarity and support between the 'market of virtue' and the need for strong public institutions that makes 'soft' law work effectively. According to Dunning and Lundan this should not be taken as a defeat of

<sup>8</sup> Muchlinski, Dunning and Lundan, Mann, Zhan, Weber and Karl and Stern are all on this train of thought.

strong regulation of corporate behaviour but instead as a realistic way forward on the social and ethical dimensions of the market, given the reality of a very meagre political will to come to a comprehensive and holistic multilateral framework for investment and development.

One aspect is largely missing from the volume under review, namely the impact of the new powerful players in international investment, like China and Brazil, and the importance of the role of Africa in the discussion on investment for development. There is ample evidence of awareness on the part of the authors concerning these topics. As Zhan, Weber, and Karl show in their contribution, developing states have become much more active in signing treaties amongst themselves. By June 2008, 690 or 26 per cent of all BITs had been concluded between developing countries (at 196). Echandi shows that developing and transition economies are initiating arbitrations (at 8–9) and the editors, Sachs and Dunning and Lundan stress the paradigm shifts in the landscape of the global political economy away from a ‘North–South’ model. The reader would expect this collection to integrate these changes in the contributions. In the end he is left, however, with the unfortunate feeling that little has been learned about the actual perspectives of these new and formerly ‘passive’ actors within the field.<sup>9</sup>

*The Evolving International Investment Regime* has missed an opportunity truly to further the debate on the investment regime. It has chosen the right strategy by stressing the new power constellations and showing attentiveness to the needs of African countries. It could, however, have offered a much more forceful complement to the current literature that often either focuses attention on ‘homogenizing’ investment law on a still ‘Northern’ based model or addresses the developmental implications either from a purely technical (i.e., capacity-building) perspective or a rhetoric of Western NGOs. These perspectives are not mistaken but shifting powers and needs demand for more inclusive approaches.

As a compilation of conference contributions this book benefits significantly from the inclusion of the highly illuminating conference report by Andrea Bjorklund. Reflecting a lively debate, the report is organized around eight core themes – lack of legitimacy, rethinking the functions of the regime, responsibility and accountability for MNCs, heterogeneity of actors in the regime, capacity building, the changing global power balance, international norm-integration and the inclusion of non-Western legal traditions, and, lastly, multilateral solutions. It provides both a summary and an enrichment of the topics dealt with in the individual contributions. For any student of the field of international investment law the debates represented in this report will open up new avenues of research.

## Individual Contributions

*Karl P. Sauvant and Jose E. Alvarez*, Introduction: International Investment Law in Transition;

*Jeffrey D. Sachs*, The Context: Foreign Investment and the Changing Global Economic Reality;

*Roberto Echandi*, What Do Developing Countries Expect from the International Investment Regime?;

*Howard Mann*, Civil Society Perspectives: What Do Key Stakeholders Expect from the International Investment Regime?;

<sup>9</sup> It is ironic that Petros Mavroidis argues in his subtle contribution that the crucial failure of the MAI is to be found in the failure to ask what capital importing countries actually expect of the regime. This flaw is largely repeated in this volume. See Mavroidis, ‘All Clear on the Investment Front: A Plea for a Restatement’, in the vol. under review, at 103.

*Peter T. Muchlinski*, *Regulating Multinationals: Foreign Investment, Development, and the Balance of Corporate and Home Country Rights and Responsibilities in a Globalizing World*;  
*Stanimir A. Alexandrov*, *On the Perceived Inconsistency in Investor-State Jurisprudence*;  
*Susan D. Franck*, *Considering Recalibration of International Investment Agreements: Empirical Insights*;

*Petros C. Mavroidis*, *All Clear on the Investment Front: A Plea for a Restatement*;

*John Cobau*, *Legal Developments in U.S. National Security Reviews of Foreign Direct Investment (2006–2008)*;

*Nassib G. Ziade*, *Challenges and Prospects Facing the International Centre for Settlement of Investment Disputes*;

*John H. Dunning and Sarianna M. Lundan*, *The Changing Political Economy of Foreign Investment: Finding a Balance Between Hard and Soft Forms of Regulation*;

*Rainer Geiger*, *Multilateral Approaches to Investment: The Way Forward*;

*Brigitte Stern*, *The Future of International Investment Law: A Balance Between the Protection of Investors and the States' Capacity to Regulate*;

*James Zhan, Jorg Weber, and Joachim Karl*, *International Investment Rulemaking at the Beginning of the Twenty-First Century: Stocktaking and Options for the Way Forward*;

*Andrea K. Bjorklund*, *Improving the International Investment Law and Policy System*

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