International Investment Law and Development: Bridging the Gap
Edited by Stephan W. Schill, Christian J. Tams and Rainer Hofmann (Cheltenham: Edward Elgar, 2015), vii+473 pages

Conceptual issues underpinning the thorny relationship between international investment law and development can be grouped into a number of key themes. At the core of one such theme are questions pertaining to substantive and procedural investment protection rules. Are these rules development-friendly? Do they reflect the evolving views on development and the changing role of foreign investors who are now expected to not only create economic growth but also do so in environmentally and socially-friendly manner?[1] And, do international investment norms provide sufficient room for host states to retain their right to pursue public policy objectives, including policies fostering sustainable development?

Another key area of legal discourse straddling international investment law and development studies concerns the making and change of international investment norms. Does the international investment regime sufficiently enable developing countries to make a tangible input in the process of formation, reform and application of investment rules? Were the views and concerns of developing countries taken into account when international investment law was conceived – was development ever the driving force behind it?

The volume reviewed in this essay tackles these key themes from various perspectives. Schill, Tams and Hoffman's edited collection comprises an array of essays exploring numerous problems presented by the investment versus development conundrum. As the editors observe in the opening chapter, "the relationship between international investment law and international development law has long been a history of ignorance and mistrust" (p. 3). For decades, the fostering of economic development has been one of the key justifications for the existence of international investment treaties and of their investor-state arbitration mechanism. Yet the actual capacity of the international investment regime to promote development – the very question of whether concrete investment treaty rules and their application are development-friendly – continues to generate divided views. Both the doctrine and scholarship of international investment law had long persisted in either ignoring or dismissing the need to engage with the law of international development. The edited collection seeks to bring together these hitherto autonomous strands of scholarship.

At one end of the spectrum is Muthucumaraswamy Sornarajah with his ever fierce and unwavering criticism of international investment law. He draws on recent empirical

[1] UNCTAD (2015, p. 127).

studies questioning the correlation between investment treaties and the flow of FDI and economic development. The true purpose of investment treaties, he argues, was to legitimize "plunder under the cloak of a law made through instrumentality of power" (p. 47). As the very proliferation of investment treaties in the 1980s is often seen as a direct consequence of diminished development assistance, Sornarajah argues that "investment treaty law lied when it stated that it is fashioned to promote economic development in the poorer world…Over three thousand treaties resulted from the pressures to conform to the lies or otherwise access to loans and other facilities would be denied" (p. 50). Similar skepticism can also be discerned in Celine Tan's exposition of newly proliferating narratives proclaiming investment treaties to be vehicles of both economic development and good governance. As she insightfully notes, "the language of good governance, its associated rule of law narrative and their relationship to development outcomes have been used to justify the normative and institutional evolution of law and policy in this area" (p. 147). Tan cautions "against the ahistorical import of the good governance agenda into the international investment law and policy unless accompanied by broader systemic review and reform of the regime" (p. 148).

In a stark contrast, Yannick Radi advances a narrative of international investment law as a regime that has been created to, and is driven by, the development rationale. He argues that despite the fact that some arbitrators have applied investment treaties in a way that "fails to adequately take into account the public interests attached to the concept of the right to development and sustainable development" (p. 72), development still constitutes the teleological focus of international investment law. Regrettably, however, Radi's claim that international investment law "has always aimed primarily at the promotion of economic development, with the protection of foreign investors being only instrumental to it" (p. 75) is not borne out by other constitutive features of the regime. On the contrary, as Krista Nadakavukaren Schefer argues in her chapter on investment treaty law and poverty reduction, international rules on investment protection "did not originate from any development impulses" (p. 379). International investment law may well proclaim wealth creation to be one of its key objectives, but to understand the regime's capacity to promote development, we need to examine concrete rules on investment protection which are first and foremost concerned with property rights of investors. Once we look beyond the preambles and analyse the way substantive investment protections have been framed and construed – including provisions (or lack thereof) on investor misconduct, on contributory negligence and the calculation of damages awards – the development promise of international investment law and its feasibility become highly questionable. Consider, for example, the investor's right to claim damages. Ever since its inception in early investment treaties, the right to damages has been justified by reference to the need to lower risks associated with investing in a foreign country and reducing the cost of capital for host states, which would arguably accelerate their economic development. If investment treaties are aimed at attracting low-cost capital for development, this objective appears to be countered by the extent of the host states' actual and potential exposure to staggering damages awards – with the amounts claimed by investors at times exceeding the foreign exchange reserves of a respondent state.[2] As the number of investment arbitration cases brought against developing countries and the amount of compensation sought by claimant investors have risen sharply,[3] the question arises whether the development rationale at the heart of investment treaty protection should "innately extend to a willingness to attract any kind of foreign capital, at all costs" (García-Bolívar, 2011, p. 587).

Radi's argument is also confounded by multiple instances of arbitral tribunals dismissing the relevance of express references to development featuring in the ICSID Convention and investment treaties.[4] As the opening chapter of the volume concedes, arbitration practice and scholarship are divided over "whether the inclusion of the reference to economic development in the preamble of the ICSID Convention should inform the interpretation of the term investment" (pp. 24–25) and whether economic development should be regarded as a relevant criterion in determining the level of protection investors can enjoy under substantive standards such as fair and equitable treatment.

Radi is certainly correct that investment arbitration jurisprudence is not pro-investor in its entirety, yet this alone does not change the fact that currently the regime has limited capacity to accommodate development concerns. As acknowledged in a recent UNCTAD report, far from being development-orientated, traditional investment treaties – with their silence on investor responsibilities and lack of safeguards for the right to regulate – need to be reformed to maximize the positive contribution investment can make and to avoid negative impacts on the host communities. To Radi, however, such gaps in investment treaty rules are precisely the opposite: instead of seeing them as an impediment to development-friendly interpretation, he argues that the indeterminacy of the early treaties have created considerable space for arbitral law-making. Yet Radi's claim that arbitrators have harnessed that space to construe investment treaties in a development-friendly manner is belied by incontrovertible evidence from investment arbitration awards. Efforts by some tribunals to deploy proportionality and other such legal devices to achieve a more balanced interpretation of treaty provisions does not change the fact that a series of arbitration awards – including those against Argentina – have been largely inimical to development concerns. While Radi claims that civil society critiques of investment law are "misled by deficiencies of legal reasoning", his call to pierce the veil of awards

2 See Sornarajah (2011, p. 640).
3 UNCTAD (2015, p. 124).
4 See for example Fakes v Turkey, Award, 12 July 2010 (ICSID Case No ARB/07/20) para 11.

and uncover their *ratio decidendi*, if applied to his own narrative, might render the latter unconvincing.

Christina Binder's analysis of international investment law and its implications for indigenous people also falls within the more optimistic end of the spectrum: whilst acknowledging the potential for conflict, she argues that there are ways in which the existing regime can accommodate the protection of indigenous people's rights, thus promoting a more inclusive concept of development alongside safeguarding economic interests of foreign investors. Such solutions range from provisions on jurisdiction and applicable law in investment arbitration to the greater use of the principle of systemic integration under Article 31(3) (c) of the Vienna Convention on the Law of Treaties and the use of provisions on third party participation in arbitral proceedings. Binder also concurs with other contributors to the volume in highlighting the importance of treaty reform and the use of impact assessments.

Markus W. Gehring and Marie-Claire Cordonier Segger are cautious in their evaluation of international investment law's capacity to facilitate development. They point out that FDI may "directly promote sustainable investments, for instance generating capital for renewable energy technologies and infrastructure which help mitigate climate change" (p. 95). However, the authors are also cognizant of empirical evidence showing that FDI "can also adversely affect the global environment particularly ill-considered new investments relying on obsolete technologies in the extractives etc." (p. 96). They suggest enhancing sustainability of investment treaties by increasing the opportunities for public participation, building negotiation and drafting capacity for developing countries, and the use of impact assessments, and recalibrating investment treaty provisions. A contribution by Andrea Saldarriaga and Kendra Magraw is similarly forward-looking in engaging with the question of how substantive and procedural norms of international investment law could be reinvented in a more development-friendly key. They highlight a crucial part UNCTAD has come to play in fostering development-friendly investment policies, including through its Investment Policy Framework for Sustainable Development, which comprises guidelines for national investment policies and options for international investment agreement negotiators. These are designed to help policymakers to harness investment rules supportive of sustainable development. The importance of an innovative approach to treaty-making – to mainstream sustainable development and in particular to reconcile investment protection with labour rights—is further explored by Vid Prislan and Ruben Zandvliet. They note that although the imposition of higher labour standards has not yet been challenged in investment arbitration, there is a string of arbitral cases where the disputed legislation concerned labour regulations.

The fact that development concerns are currently far from being fully operationalized in investment treaty law and arbitration is clearly demonstrated in two contributions which explore, through meticulous analysis of treaty rules and arbitral awards, problems arising in countries in transition from authoritarian to democratic rule. Jonathan Bonnitcha argues that currently international investment law is indifferent to changes in the form of government in a host state. The fact that an investment was made during a period of authoritarian rule does not change its eligibility for treaty protection. Investment treaty law, as it stands today, in particular rules on protected investment and principles of compensation, delimits the capacity of incoming democratic governments to reorganize their economies in pursuit of new development priorities. In his examination of the cognate issue of international protection of contracts concluded with non-democratic governments, Walid Ben Hamida shows that international investment law does not distinguish such contracts as a separate category and thus protects them in the same manner as any other foreign investment contracts. Although many scholars argue that democracy and good governance have a positive impact on economic growth, Ben Hamida insightfully points to evidence which counters this view. Investors do not necessarily value democracy (and, one could argue, export democratic values in their operations); indeed, "for a commercial company trying to make investments, you need a stable environment. Dictatorships can give you that" (p. 314).[5] This, however, may change if the new generation of treaties follows some of the recent models, such as that set by the Cotonou Partnership Agreement where the promotion of peace, security, stability and democracy features as one of the key treaty objectives. The inclusion of express references to democracy in investment treaties may necessitate tribunals to take into account the impact of an investment on the promotion of stable and democratic political environment.

The emergence of new and arguably more progressive models of treaties raises the question about the sites where such progressive drafting originates and the factors driving the process of renewal and change. Do these new treaty models reflect the nationally-felt rather than internationally-imposed approaches to investment protection? Do developing countries have a say in shaping the evolving landscape of investment treaty law?

These questions are alluded to in Diane A. Desierto's exploration of how the right to development could be mainstreamed into international investment law. One way to achieve this would be for states to reconfigure their own internal decision-making structures relating to investment. For instance, a host state should, prior to approving investment projects, put in place adequate regulatory safeguards to ensure environmental and social compliance and to design the investment projects so that it enables the participation of affected communities and allows fair distribution of benefits among the relevant constituencies. To establish a process of economic, social, cultural and political development, it is crucial that an architecture

[5] Quoting from Avery (2000).

for compliance with the host state's human rights obligations is built directly into "the contractual, administrative, and regulatory infrastructure of the international investment project, operationalized under current corporate social responsibility mechanisms, human rights due diligence processes, environmental and social impact assessments accompanying the contract planning, formation and monitoring processes" (p. 351).

While this proposal indeed goes a step further by bridging the gap between calls for a more development friendly international investment law and the reality of investment decision-making at a national level, it also highlights the problem with shifting the burden of creating a more development-friendly investment framework onto developing states which frequently lack the requisite human, institutional and economic capacity. Likewise, the unresolved issue here is whether the creation of domestic mechanisms fostering more development-friendly investments can be reconciled with the bulk of investment treaties and arbitration jurisprudence that remain open to criticism for a failure to adequately accommodate development concerns. There is a need to align domestic investment protection rules with states' investment treaty commitments: these two frameworks often evolve under disparate influences and do not always reinforce and replicate one another. One manifestation of such discrepancy was highlighted in my recent study of investment law-making in Central Asia where instances of progressive and innovative rules on socially responsible investment can be found in national legislation of Kazakhstan but not in its investment treaties.[6] This brings into a spotlight the fact that many developing states continue to be rule-takers and their national law and international commitments are often the product of distinct international influences, including donor-sponsored legal reform initiatives and pressures to sign international investment treaties.

The fact that developing countries are frequently rule-takers and have thus been able to make a limited input in the shaping of international investment norms is explored in Antonius R. Hippolyte's contribution which focuses among other things on regime bias which can manifest itself in the interpretation and application of international investment law in ways that are biased systematically against developing countries' interests. "Regime bias illustrates how international law commonly serves as an agent of First World interests and overwhelmingly reflects continental legal thought shaped during colonialism" (p. 195). Hippolyte claims that "nowhere is regime bias clearer than in international investment law and the manner in which developing countries have engaged with this regime" (p. 197). He also draws attention to the lack of real participation of developing countries in international investment law-making: in addition to having very limited input into drafting and negotiation of investment treaty norms, developing countries are also minimally involved in the current recalibration

[6] See Sattorova (2015).

of investment treaties the process which resulted largely due to dissatisfaction by developed states with the invocation of investment treaties against them. One could also add to this the comparatively low number of arbitrators from developing countries that could influence the formation of investment jurisprudence by being appointed to panels and partaking in shaping investment jurisprudence. Whilst offering a useful conceptual framework for problematizing the thorny relationship between investment protection and development, the chapter would have been even more valuable if it had offered more concrete examples of such bias.

To conclude, the edited volume offers a rich and varied array of contributions all of which go some way towards bridging the long-standing divide between international investment law and development studies. It most certainly provides further food for thought about international investment law, its *raison d'être* and consequences. The importance of the volume for contemporary legal discourse on investment protection and development stems from its timeliness, far-reaching scope and the fact that it highlights new areas and problems on which future scholarship should focus its attention. The volume is likely to become an important point of reference for academics, policy-makers as well as students of international investment law and development.

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