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Steffen Hindelang and Markus Krajewski (eds). ***Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified***. Oxford: Oxford University Press, 2016. Pp. 496. £80. ISBN: 9780198738428.

International investment law grows increasingly controversial by the hour. Discussions of the 'backlash' against investment arbitration and growing distrust in a regime perceived as systematically biased, favouring investors over host state governments, are no longer confined to academic literature or the reports of government agencies, and daily find their way into mainstream media.¹ Much of the debate, however, has remained anchored to old models and, until recently, few volumes have adopted a forward-looking approach to the most critical issues in the field. Originating from a conference held in Berlin in 2013 and strengthened with additional contributions, *Shifting Paradigms in International Investment Law* is one such work. As the editors note in the introductory essay, the aim of this collection is to consider the current state and possible future developments of international investment law, and to assess the emergence of a paradigm shift 'from a strong emphasis on interests of private property protection towards a more comprehensive approach'.² The book starts by considering the current state of affairs of international investment law, acknowledging and assessing both the unparalleled success of the regime and the controversy afflicting it. It then goes on to examine to what extent lines of evolution – and 'recalibration' – have appeared, along with their potential in making investment law more balanced.

The editors chose the UNCTAD Investment Policy Framework for Sustainable Development (IPFSD) and its emphasis on 'sustainable development' as a backdrop against which to assess problems and potential solutions.³ This is not the first work to deal with the difficulties of promoting sustainable development in the framework of international investment law, let alone in

¹ M. Waibel, *The Backlash Against Investment Arbitration: Perceptions and Reality* (2010).

² Hindelang and Krajewski, 'Towards a More Comprehensive Approach in International Investment Law', in S. Hindelang and M. Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016) 1, at 5.

³ UNCTAD, *World Investment Report 2015–Reforming International Investment Governance* (2015).

international law at large.⁴ However, its approach is largely distinctive in that the individual contributions consider a number of critical areas and employ particular articulations of the concept of sustainable development in specific policy frameworks as a yardstick with which to measure the evolution of the field and, to an extent, the reconfiguration of its position within international law.

The volume is divided into four parts. The first is foundational, devoted to articulating the notion of sustainable development and introducing its interaction with international investment law. The opening contribution, penned by Giorgio Sacerdoti, serves as an advanced primer on the topic. After briefly tracing the history of both investment protection and sustainable development, the author points out the weaknesses of the investment regime and concludes that, in light of the importance of foreign investment, the primary responsibility for sustainable development rests on host states. Accordingly, host state governments should try to establish frameworks conducive to positive investments, but avoid derogating from accepted international standards. Further, Sacerdoti argues that, while there is in principle no conflict between investment protection and sustainable development, bilateral investment treaties (BITs) remain distinct from development cooperation instruments. Yet, some wiggle room exists in that BITs too should be interpreted with sustainable development in mind, so as to reconcile opposing interests, though good governance concerns counsel towards caution in frustrating investors' legitimate expectations.

The second chapter, by Peter Muchlinski, focuses on the need for a reassessment of current international investment agreements (IIAs), discussing the concerns relating to systemic bias in the treaties and the unaccountability and excessive power in investor-state dispute settlement (ISDS). The author compares the approaches adopted by the IPFSD and the study published by the Commonwealth Secretariat to incorporating sustainable development in treaty design. He focuses on the renewed emphasis on treaty preambles and pre-establishment rights, as well as the interpretation of fair and equitable treatment (FET) and most favoured nation (MFN) clauses. He also discusses proposals for the inclusion of a sustainable development-oriented provision, the most interesting being perhaps the Commonwealth Secretariat's bold proposal to include an obligation of the investor to conduct a sustainability assessment (and a parallel obligation of the state to pass legislation regulating such assessment). Finally, Muchlinski considers the reform of ISDS, discussing ways to increase its legitimacy and efficiency, such as the creation of appellate mechanisms and greater accessibility of proceedings.

Part II considers the significance of sustainable development in the context of the evolution of investment treaty regimes. The third chapter, by Roland Kläger, focuses on treatment standards, discussing the evolution of FET and its vagueness and then assessing whether the policy options suggested in the IPFSD would constitute an improvement. He finds unqualified FET clauses to be problematic and unpredictable, yet remains doubtful as to whether a reference to the minimum treatment standard or customary international law would entail a higher threshold than current unqualified provisions. No agreement exists as to the consequences of adopting an exhaustive list of FET obligations; it is also not clear what consequences, if any, would follow from a violation of interpretive guidelines for arbitral tribunals; finally, omitting the provision altogether does not appear to provide a solution, as it is quite possible that claims falling under it will be brought under a different cause of action. No one simple solution can be found, and the author suggests that a proportionality analysis would be the best way for an arbitral tribunal

⁴ See, *inter alia*, M.-C. Cordonier Segger, M. W. Gehring and A. P. Newcombe (eds), *Sustainable Development in World Investment Law* (2011); S. W. Schill, C. J. Tams and R. Hofmann (eds), *International Investment Law and Development: Bridging the Gap* (2015); M.-C. Cordonier Segger and A. Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (2004).

to integrate sustainable development into the FET standard, as it would provide a framework to assess the impact of the host state's regulatory measures and its potential liability.

Lukas Stifter and August Reinisch discuss the interaction between foreign investment and (sustainable) development in the fourth chapter by focusing on expropriation. After considering the central role of the concept of expropriation in investment law, as well as the distinction between direct and indirect expropriation and the weight assigned to the public interest, the authors assess pre-modern and modern expropriation clauses and the regulatory flexibility they allow, concluding with an analysis of the expropriation clause and annex thereto in the Comprehensive Economic and Trade Agreement with Canada (CETA).⁵ They conclude that different approaches to the drafting of expropriation clauses may have significant implications for a state's regulatory space, though it falls to the state to employ the discretion responsibly.

In a long fifth chapter, Jonathan Ketcheson addresses the implications sustainable development may have for the design of ISDS systems. Starting with the regulatory constraints that might prevent a state from pursuing a public interest, the author considers the legal status of sustainable development as a principle. He goes on to discuss its potential impact on ISDS, such as the questionable independence of arbitrators and inconsistency in arbitral decisions, which might import bias into the decision-making process and cause uncertainty as to the extent of obligations arising under investment treaties. While arbitration may be flawed, Ketcheson observes that the creation of a permanent court presents risks too (an ever-expanding jurisdiction being a main concern). He then recommends the adoption of the UNCITRAL transparency rules, but concedes that they can be further improved, for example by allowing wider participation in arbitral proceedings. Finally, he argues that the creation of an appellate body may increase consistency, but with the drawback of a concentration of interpretive power.

Gus Van Harten's contribution compares the approaches to ISDS reform embraced by the UNCTAD and the European Commission in tackling – or, as the author argues, failing to tackle – issues such as the lack of institutionalized independence, openness and procedural fairness. Both institutions are found to do little to address the bias that seems embedded in the system by design, which, to the author, undermines both reform agendas. While there are some commendable improvements (for example, the requirement of public hearings in the CETA⁶), serious structural problems remain unaddressed: for instance, attempts to improve the procedural fairness of ISDS do not consider substantive fairness, which would, according to the author, require granting standing to affected parties. In conclusion, the reform attempts still appear to foster the continuation of a structurally biased system.

Anthony VanDuzer asks whether new BITs could benefit from the experience of preferential trade and investment treaties (PTIAs), which normally show a more systematic approach to issues of sustainable development. In particular, PTIAs tend to include provisions directed specifically at fostering sustainable development. Focusing on labour and environmental protection, the author shows that only BITs negotiated by a few states address these goals. Conversely, provisions aimed at attaining sustainable development goals are more frequent and comprehensive in PTIAs, which may even include dispute settlement provisions to ensure their implementation. The reason for this discrepancy is that BITs reflect a narrow gamut of interests, while PTIAs normally aim at establishing broader economic relationships. As PTIAs may soon become more common than BITs, it is possible that the latter will borrow from the former. Yet, strong pledges to sustainable development goals requiring the parties to commit substantial resources are unlikely.

⁵ Revised CETA Text, 29 February 2016, available at: http://trade.ec.europa.eu/doclib/docs/2014/sepember/tradoc_152806.pdf (last visited May 2016).

⁶ CETA, *supra* note 5, Art. 8.36. The author refers to Article X.33 of the 2014 Consolidated CETA Text, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>. The provision remains unchanged.

Part III then takes a more systemic approach. The essays contained in this section address the interrelation of sustainable development and international investment law by resituating the latter within the broader context of public international law. This is a fashionable perspective,⁷ as it promises to reconcile investment law with general international law. The contributions in this section, however, do not restrict themselves to a rote discussion of the implications of a fistful of ICJ decisions.⁸ They demonstrate a higher degree of originality, though some of the conclusions are perhaps not entirely pragmatic. Katharina Berner, frames the desirability of a greater focus on sustainable development as a political issue, and goes on to suggest that reconciliation of the principle with investment law should not be achieved by reshaping ‘the substance’ of the latter, but rather by interpreting IIAs according to the Vienna Convention on the Law of Treaties rules. The author first argues that the circumstance that investment arbitration is a product of party consent is no obstacle to the application of these rules.⁹ Thereafter, she proceeds to a review of arbitral jurisprudence and recommends a wider use of teleological and contextual interpretation, which tribunals have so far only employed with some reluctance. This interpretive approach, her conclusion suggests, would serve the regime’s flexibility.

Helmut Aust’s contribution is devoted to the problem of state responsibility in the context of sustainable development. Aust starts by considering the approach to remedies adopted in the IPFSD and goes on to consider the current status of the international law of state responsibility and its applicability in the context of breaches of investment treaties. While general international law posits the primacy of restitution, compensation remains the rule *de facto* and the same approach is espoused in the IPFSD. According to Aust, however, restitution, as it is currently understood in general international law, only requires restoration of the status quo ante and does not, in itself, conflict with the pursuit of sustainable development, while enormous compensation awards might. The author concludes that the current approach springs from an intuitively appropriate respect for the state’s regulatory space, which would not be as intuitive if human rights were at issue.

Karsten Nowrot brings this part of the book to a close, discussing the termination and renegotiation of treaties. The author discusses the significance of the topic in an age of both transition (to the ‘third generation’ of investment agreements), daring change (the withdrawal from the ICSID convention and several BITs by some developing countries), and stronger regional integration (bringing with it the termination of BITs between EU member states). The chapter offers a comprehensive treatment of these issues and considers the importance of resorting to the underlying public international law framework for a number of practical and theoretical issues arising from these increasingly common occurrences.

Part IV is devoted to regional approaches. Sean Woolfrey’s contribution starts with an analysis of the approach recently espoused by South Africa, which has chosen to terminate (or not renew) the BITs it had contracted. Instead, the country is developing legislation meant to ensure protection to investors, at the same time protecting the state’s regulatory space. Woolfrey evaluates this approach and the simultaneous development of a new model BIT, concluding that having two parallel systems in place would allow the country to deal differently with capital-importing states – relying on domestic law and standards that, the author acknowledges, may well fall short of international ones – and states to which it exports capital, where BITs would remain the best instrument to ensure protection to South African investors.

⁷ See *inter alia* F. Baetens, *Investment Law within International Law: Integrationist Perspectives* (2013); E. De Brabandere, *Investment Treaty Arbitration as Public International Law* (2014).

⁸ *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Reports (1997) 7; *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, ICJ Reports (2010) 14.

⁹ But see Bartels, ‘Jurisdictions and Applicable Law Clauses: Where Does a Tribunal Find the Principal Norms Applicable to the Case before It?’, in T. Broude and Y. Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (2011) 115.

Increased reliance on national laws and instruments is the topic of Maria Luque's chapter, which deals with the policies of Latin American states. After discussing the discontent with investment arbitration that has brought a number of states in the area to abandon the regime by denouncing the ICSID Convention, the author observes that states in the region remain nonetheless amenable overall towards IIAs. Yet, the perceived weaknesses in the current investment regime have prompted Latin American countries to search for alternatives. Accordingly, Luque discusses the increased reliance on domestic laws and investment contracts to regulate investment and its potential for the pursuit of development objectives, as well as the debate on the establishment of a regional ISDS dispute settlement centre and the potential ill-effects of its potentially extensive jurisdiction.

Investment disputes, however, can also be resolved by domestic courts: this is the subject of Leon Trakman and Kumal Sharma's contribution, which focuses on the significance of the choice between domestic or international dispute settlement systems within the Asia-Pacific region. Starting with a discussion of Australia's signature aversion to the system, which has only recently softened, and the apparently similar attitudes of key players such as Indonesia, the authors go on to discuss the implications of the ISDS provisions in the TPP, arguing that even if securing an exemption from them would be possible for a prospective party, the cost of doing so would greatly outweigh the benefits. Finally, a general analysis of the consequences of resorting to domestic courts or ISDS tribunals is offered, revealing that, while the former do tend to privilege the public interest, they are hardly guaranteed to do so. As the authors argue in their conclusion, ISDS has some comparative advantage in terms of extensive jurisprudence, available rules, and experienced arbitrators. It is open to question whether the special and isolated status of investment law, is still tenable: in fact, Peter Stoll and Till Holterhus discuss its 'generalization', taking the CETA, TTIP, and TTP as starting points. One effect is that developed economies now willingly submit to the disciplines of investment law. According to the authors, this shift encourages the adoption of a constitutional perspective to discuss the impact of the investment protection framework on sovereignty, democracy and legitimacy. The analysis carried out in this chapter is a complex one, dealing with issues that are constitutional in many senses, ranging from the tension between arbitration and the exercise to public authority to a human rights approach and to the protection of property. The authors conclude that the investment regime does exhibit shortcomings, which become all the more apparent when it is to be applied in legal systems where the rule of law is not in question. To be sure, certain actors have greater bargaining power and thus greater impact on negotiations.

Frank Hoffmeister's piece examines how the European Union has contributed to the development of investment law through its trade agreements. Indeed, EU free trade agreements include extensive sustainable development chapters, directly addressing environmental and labour issues. The author also briefly examines European investment agreements and the potential for reform, discussing how the EU seeks to tackle the tension between the right to regulate and investment protection standards. Finally, Hoffmeister considers the specific choices made in the context of enforcement mechanisms in European agreements and, more in depth, the CETA. All of this, the author contends, will no doubt contribute to influencing the development of investment law, although he concedes that more can be done to achieve a more satisfactory balance between investors' rights and public interest, for example, by reformulating investment protection standards.

The book under review is a well-conceived and thought-provoking collection, which grapples with important questions and provides the reader with invaluable insight. As the editors acknowledge in their conclusive piece, answering the question 'Where do we go from here?' remains problematic. Such verdicts, one is regularly reminded, are often issued to ward off criticism when no clear conclusion seems within reach: here, however, this is by no means the editors' fault, nor is it the contributors'. Rather, the impossibility to provide articulate predictions is due to the inherent difficulties in assessing the evolution and the capacity to change of the international investment regime. Indeed, the collection's most significant merit is that of addressing

the implications of the concept of sustainable development for the choices that will be made in the future: in this regard, it explores a number of issues (such as the relation between investment protection and domestic remedies and the experience of PTIAs) that expose the potential of the notion to re-adjust a regime inherently skewed to favour a certain class of actors. In this regard, the editors' conclusions fully support the title of the collection: the paradigms are shifting, but have by no means shifted yet. The process is slow and the revolutions, where they have occurred, are hardly Copernican. In fact, among the latter, a few seem to have encased the machinery within a different shell, the cogs and gears – and the structural unfairness – having largely remained the same. The discussions of regional development in this collection seem to support this view; there are only some minor improvements, for example in the CETA. The role to be played by ISDS too remains problematic, being sometimes hailed as only capable of playing 'a very marginal, or even a nonexistent role, in making investments foster sustainable development', or seen as a burgeoning political system with the potential to promote change.¹⁰

Hindelang and Krajewski's collection masterfully guides the reader through the intricate maze of the interaction between investment law and sustainable development from a variety of perspectives – ranging from regional outlooks to theoretical analyses of the implications involving general international law. Accordingly, it is expected that the collection will be of great help to those researching the topic – now a classic in its own right, though, as the collection demonstrates, a multi-faceted and unsettled one – in academia, policy, and private practice.

Niccolò Ridi

*PhD Candidate, The Dickson Poon School of Law, King's College London;
Research Assistant, Graduate Institute of International and
Development Studies, Geneva
Email: niccolo.ridi@kcl.ac.uk*

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Individual contributions

- Steffen Hindelang and Markus Krajewski, Introductory Observations;*
Giorgio Sacerdoti, Investment Protection and Sustainable Development: Key Issues;
Peter Muchlinski, Negotiating New Generation International Investment Agreements: New Sustainable Development Oriented Initiatives;
Roland Kläßer, Revising Treatment Standards: Fair and Equitable Treatment in Light of Sustainable Development;
Lukas Stifter and August Reinisch, Expropriation in the Light of the UNCTAD Investment Policy Framework for Sustainable Development;
Jonathan Ketcheson, Investor-State Dispute Settlement and Sustainable Development: Modest Reform;
Gus Van Harten, The EC and UNCTAD Reform Agendas: Do They Ensure Independence, Openness, and Fairness in Investor-State Arbitration;
J. Anthony VanDuzer, Sustainable Development Provisions in International Trade Treaties: What Lessons for International Investment Agreements?;
Katharina Berner, Reconciling Investment Protection and Sustainable Development: A Plea for an Interpretative U-Turn;

¹⁰ Stern, 'The Future of International Investment Law: A Balance Between the Protection of Investors and the States' Capacity to Regulate', in J. E. Alvarez, K. P. Sauvant and K. G. Ahmed (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (2011) 175; Dupont and Schultz, 'Towards a New Heuristic Model: Investment Arbitration as a Political System', 7 *Journal of International Dispute Settlement* (2016) 3.

Helmut Philipp Aust, Investment Protection and Sustainable Development: What Role for the Law of State Responsibility;

Karsten Nowrot Termination and Renegotiation of International Investment Agreements;

Sean Woolfrey, The Emergence of a New Approach to Investment Protection in South Africa;

Maria Luque, Reliance on Alternative Methods for Investment Protection through National Laws, Investment Contracts, and Regional Institutions in Latin America;

Leon E. Trakman and Kunal Sharma, Jumping Back and Forth between Domestic Courts and ISDS: Mixed Signals from the Asia-Pacific Region;

Peter-Tobias Stoll and Till Holterhus, The 'Generalization' of International Investment Law in Constitutional Perspective;

Frank Hoffmeister, The Contribution of EU Trade Agreements to the Development of International Investment Law;

Steffen Hindelang and Markus Krajewski, Concluding Remarks.