Mavluda Sattorova, ***The Impact of Investment Treaty Law on Host States: Enabling Good Governance?*** Oxford: Hart Publishing, 2018. Pp. 220. £65. ISBN: 9781849465854

The regimes of public international law can be imagined as adaptively evolving in different ways. One such evolution is the change of narratives in and about these regimes intending to justify and preserve their existence. For Mavluda Sattorova, the regime of international investment law (IIL) exhibits exactly such an evolutionary narrative change. For decades, the predominant justification for international investment agreements (IIAs) was their assumed importance for attracting foreign direct investment into politically and legally risky host states. As the relatively recent surge in empirical evidence has failed to show that IIAs actually do contribute to increased investment flows,[1] Sattorova notes a relatively recent shift of narrative. Instead of being portrayed as drivers of investment flows, IIAs are characterized as '*catalysts* of governance reforms in host States, providing the investment treaty regime with another raison d'etre and justifying its recent strides' (at 9; emphasis in original). The aim of this book, in a way, is to put this newly evolving narrative through a plausibility filter. Can an understanding of IIAs and investment awards as being tools to encourage good governance in host states inject life-preserving legitimacy into IIL? Or does this narrative fail to hold when confronted with reality? With no evidence of a boost in genuine good governance, is the narrative ineffectual in enhancing the legitimacy of IIAs?

For Sattorova, the latter is true. Whether examined in light of its doctrinal basis (Chapter 2), empirically assessed responses of (some) states (Chapter 3), the regime of remedies in investor–state dispute settlement (ISDS) (Chapter 4), IIL's own compliance with good governance precepts (Chapter 5) or the participatory practices in IIL's creation and reform (Chapter 6), the narrative of the international investment protection regime as 'enabling good governance' simply does not hold true. However, the broad deconstruction and critique of whether IIL as currently standing does enhance good governance is, for the most part, not accompanied in the book by an explicit and sufficiently comprehensive normative discussion of whether it could and should do so – something the present reviewer would like to have seen in more detail. The book is thus a very valuable contribution to the ongoing legitimacy debates,[2] but, ultimately, the good governance 'mission' of IIL as a normative question remains open for discussion. The possibility for such further discussion is also recognized by the author when she states that her work 'aims to facilitate a more informed understanding of present contours and the nature of the interplay between international norms and national realities', which is in turn 'a basis for analysing the ways in which such relationship can be optimised' through substantive and institutional reform (at 11–12).

Despite its moderate length, the book tackles many issues and does so with an interesting approach. As Sattorova notes, 'a critique of the good governance narratives provides the opportunity to engage with a broad array of issues underpinning the interaction between

[1] Although somewhat dated, the most comprehensive presentation of this persistently ambiguous issue remains K.P. Sauvant and L.E. Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009).

[2] The heated nature of which is well illustrated by the opinions ranging from descriptions of investment arbitrators as something of a profit-seeking cabal (P. Eberhardt and C. Olivet, *Profiting from Injustice* (2012)) to those describing the criticism of the regime as '*pronunciamentos*' of self-appointed 'neo-NIEO' promoters (C. N. Brower and S. Melikian, '"We Have Met The Enemy And He Is US!" Is the Industrialized North "Going South" on Investor–State Arbitration?', 31 *Arbitration International* (2015) 19, at 23–24.

international investment law and host states' (at 10). Three questions providing the backbone of the discussion are: (i) what propelled good governance from a set of normative ideals to enforceable treaty standards; (ii) how do host states respond to investment treaty norms; and (iii) is the impact of IIL as a regime capable of delivering improved governance (at 9)? To answer these questions, of course, one needs a working definition of the (vague) notion of 'good governance'. Opting to avoid the more commonly invoked 'rule of law', Sattorova eventually and somewhat implicitly adopts the understanding of good governance that is akin to a 'thinner' concept of the rule of law. This understanding, as rightfully identified by the author, seems to be the prevalent one in IIL practice and doctrine; it is an understanding that emphasizes transparency, predictability, stability, procedural fairness and due process (at 25).[3] These are thus the benchmarks – with a particular focus on the 'fair and equitable' treatment (FET) standard – that provide the basis of assessment in *The Impact of Investment Treaty Law on Host States.*

Chapter 2 primarily critiques the origins of good governance requirements in IIL jurisprudence. After noting some of the prominent examples of these requirements in arbitral case law (such as the requirements for stability and predictability found in *Metalclad v. Mexico*,[4] *Tecmed v. Mexico*,[5] *Occidental v. Ecuador*[6] and *PSEG v. Turkey*),[7] Sattorova argues that their introduction and subsequent entrenchment in jurisprudence is an example of arbitral overreach with problematic juridical foundations. The 'pedigree of the good governance standards … is troublingly insufficient' (at 29–30). Neither the customary international minimum standard of treatment nor the texts of IIAs themselves support the imposition of such stringent standards. What actually occurred, argues the author, is a form of 'mission creep' by the arbitrators, with new causes of action and new grounds of state responsibility created in order to promote the continuation and expansion of the IIL regime (at 43).

Chapter 3 presents the empirical core of the book. It assesses how some host states respond(ed) to IIL and whether the touted virtuous effects of IIAs and ISDS on good governance in the domestic sphere actually happen 'on the ground'. Part of the chapter is formed by the insights from the author's own empirical investigation, conducted via the means of interviews with government officials dealing with foreign investment in five countries: Kazakhstan, Nigeria, Turkey, Ukraine and Uzbekistan. The other part of the chapter complements this information with an analysis of national legislation and policy documents from several other developing states, most notably Peru and Brazil. Based on this relatively small sample (as the author recognizes), the answer to the question of whether IIL helps enhance good governance seems to be largely 'no' or, perhaps, 'sometimes yes but only under very favourable conditions'. This is because, as the book highlights, state officials do not appear to know much, or at times anything, about obligations arising from IIAs. Even where their states have been sued before investment tribunals or been held to account in awards, state officials seem to know relatively little about IIAs. It is thus not surprising that

[3] This is primarily based on an oft-cited analysis by Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law', in S.W. Schill (ed.), *International Investment Law and Comparative Public Law* (2010) 151.

[4] NAFTA (ICSID), *Metalclad Corporation v. United Mexican States – Award*, 30 August 2000, ICSID Case no. ARB(AF)/97/1.

[5] NAFTA (ICSID), *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States – Award*, 29 May 2003, ICSID Case no. ARB(AF)/00/2.

[6] LCIA (UNCITRAL), *Occidental Exploration and Production Company v. Republic of Ecuador – Final Award*, 1 July 2004, LCIA Case no. UN3467.

[7] ICSID, *PSEG Global, Inc., North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey – Award*, 17 Jauary 2007, ICSID Case no. ARB/02/5.

those same officials do not see IIL as a particularly important driver of reform – why should states and their officials be moved to action by something that remains rather obscure?[8] The reforms that sometimes are enacted by such states in connection to foreign investor protection are usually 'narrow' and aimed at preventing future investment disputes as opposed to securing broader good governance. Furthermore, many reforms cannot be attributed to the influence of IIL at all but, rather, to the unrelated pressure of international financing bodies. With some limited positive exceptions (such as Peru), 'the claim that international investment law purportedly transforms governance in host states is belied by the emerging evidence' (at 101).

Chapter 4 takes a look at the regime of remedies in IIL and the potential power of such remedies to induce compliance with good governance standards. As the author notes, awards for damages are the dominant remedy used in ISDS, which is something questioned more generally.[9] But the specific angle adopted by Sattorova is that remedies provided for by IIL are simply not effective for promoting domestic good governance. Their nature is such as to rectify a specific past wrongful act and not to promote prospective compliance. More generally, as illustrated by the author, by using examples from regimes such as the International Monetary Fund and the EU, external pressures and the conditionality of financial assistance do not have sustainable effects (at 109–111). Monetary sanctions through ISDS do not fare better in this regard. Sattorova argues that the primary idea of IIL remedies was (and is) to retroactively (as she puts it) 'rebalance the original economic bargain' and not to prospectively ensure compliance – such compliance is not even a secondary goal (at 115–116). This is to say nothing of the times that states opt for an 'efficient breach' – that is, opt for breaching an IIA obligation when the price for breach is lower than the gain from complying, which also undermines the idea of compliance pressure. What could actually transform IIL remedies into a tool that induces compliance would be the introduction of punitive damages (which are, as the author notes, undesirable due to other policy considerations) or a wider use of 'specific performance' as a remedy – the idea being that the award requires the state at fault to perform a specific act in remedy. At least, Sattorova suggests, tribunals could improve the regime of remedies by ordering multi-tiered remedies that combine specific performance in the first instance with the award of damages in the second should non-compliance occur.

Chapters 5 and 6 look at the IIL regime itself – as opposed to neat aspects of it such as remedies – through the lens of good governance. In Chapter 5, Sattorova sets herself the task of assessing whether IIL 'possess[es] the necessary characteristics that would enable it to export … good governance standards into the domestic realm' (at 125). The answer is again largely 'no', according to the author, due to the still predominant lack of transparency in ISDS and the overall lack of coherence and certainty in its jurisprudence (at 164–165).[10] Furthermore, ISDS procedures could be viewed as acting in substitute to these cases being heard in domestic courts, effectively 'outsourcing' the resolution of sensitive and complex disputes. While this is

[8] This part thus further builds upon the previous work of the same author, notably Sattorova, 'The Impact of Investment Treaty Law on Host State Behavior: Some Doctrinal, Empirical and Interdisciplinary Insights', in S. Lalani and R. Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (2015) 162.

[9] As noted by Sattorova, the prevalence of damages as a remedy is, for example, questioned by a recent study by the Organisation for Economic Co-operation and Development (at 105). Gaukrodger and Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community', OECD Working Papers on International Investment no. 2012/3 (2012), at 26.

[10] This is a common line of criticism, perhaps first explicitly analysed in connection with legitimacy concerns by Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions', 73 *Fordham Law Review* (2004–2005) 1521.

usually welcomed by the investors, it can also mean that domestic institutions are not given an opportunity to deal with IIL and, by dealing more intimately with complex IIL cases, potentially help reform domestic governance. This lack of familiarity with the regime can lower the demand for domestic reform more generally. Finally, Sattorova argues that the way investor misconduct is treated by both IIAs and the investment jurisprudence is unsatisfactory. In particular, according to the author, there are troubling examples in the jurisprudence where the act of bribery by a claimant investor was not sufficiently sanctioned by the tribunal in question. Referring specifically to the 2000 award in *Wena Hotels v. Egypt*, she notes that the claimant was allowed to obtain redress despite alleged corruption in obtaining the investment. Equally worrying, according to the author, are certain calls against 'zero tolerance' for acts of investor misconduct in IIL literature (discussed at 157–158). As an overall conclusion, 'the [IIL] regime continues to fall short of the requirements of transparency, coherence, and fairness' (at 164).

Finally, Chapter 6 deals with what is termed the 'Anti-participatory Animus' of IIL. It covers a somewhat heterogeneous list of examples through which the investment regime, as suggested by Sattorova and summarized here by the present author, can be perceived as a well-guarded and powerful anti-democratic fortress of neo-liberal hegemony. The main arguments in this chapter are formulated by Sattorova as a criticism of the regime's 'lack of commitment to democracy, accountability and openness' (at 168), lack of 'processes for consultation, deliberation and dialogue' (at 173), overrepresentation of arbitrators from developed states (at 179–182) and the 'symbolic rather than real input' of representative institutions such as the EU Parliament in the process of IIL reform (at 192). This chapter points to a number of very real issues with the way in which IIL is created and shaped, although it feels at certain points as though it takes too broad a sweep over significantly different subject matters.

To conclude this overview, and as suggested by the author in her conclusion, the considerable and wide-reaching deficiencies of the investment regime make its (chameleonic) characterization as a vehicle of good governance reform at best questionable and at worst cynical, despite its attempt to blend in and 'evolve' pragmatically (at 195–198). To have a future in the global legal habitat, Sattorova hints at the need for a deep rethinking of the way in which IIL is created, interpreted and applied. This rethinking, at the very least, should give full recognition to the plurality of interests that legitimately seek representation in investor–state relations.

It is worth noting first the features that make this book a very valuable contribution to the debates about the legitimacy of ISDS. It is certainly the most comprehensive analysis of the emerging narrative of 'good governance' or 'rule-of-law promotion' being made about IIL – something that acquires special relevance in light of the ongoing reform (and contestation) efforts.[11] Equally, the importance of the empirical research presented in Chapter 3 can hardly be overestimated. Empirical studies that look at the actual effects of the investment protection regime 'on the ground' are scarce.[12] Yet this scarcity is something that one might not necessarily conclude from the ubiquitous use of terms such as 'regulatory chill' in the IIL discourse – terms that one might assume are not used without some empirical basis. The author's empirical work that involves those who engage with the effects of IIAs and ISDS complements well the emerging

[11] Reading the legal headlines in the morning indeed seems to be a trepidation-laden moment for investment lawyers these days. Currently, investment regime stakeholders are still reeling from the March 2018 judgment by the Court of Justice of the European Union in *Achmea* that likely spells the end of intra-European Union (EU) investor–state dispute settlement (ISDS), while simultaneously observing its uncertain future in a number of other contexts. Case C-284/16, *Slovak Republic v. Achmea BV* (EU:C:2018:158).

[12] With some notable but rare exceptions, such as K. Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (2009).

empirical work on the conclusion of IIAs.[13] Chapter 3 provides (notwithstanding the relatively small size of the sample evidence) a very important insight into the perception and effects of IIL among state officials in developing countries. These particular officials are those who are largely expected to be engaging intensely with the investment regime; at the same time, they are in a position to affect domestic good governance. Thus, the author's analysis of the ambiguous, muted or, at best, heterogeneous responses to IIL not only sheds additional light on the challenges of the investment regime but also is a worthy contribution to the literature on the impact of international law on national legal systems and/or administration more generally.[14] For anyone even remotely interested in enhancing the way in which a state could or should react to investment law obligations, this part of the book presents mandatory reading.

More generally, the plethora of issues that Sattorova identifies concerning good governance and IIL should give pause both to those deeply involved (and content) with the regime as it stands and to those proposing its reform. The arguments put forward rightfully counter the self-congratulatory and fiercely optimistic narratives that sometimes emerge from those who feel that the regime is (unjustifiably) 'under siege'.[15] Sattorova's book is another call to recognize that the issues are numerous and that the reality is complex. However, it is exactly this attempt at an all-encompassing treatment of good governance issues (in addition to some more isolated problematic points, which are addressed below) that invites the main critique of Sattorova's assessment. For this reviewer at least, the approach of analysing the investment regime in its broadest possible understanding can at points be both too general and also not comprehensive enough, with examples that seem overly scattered at times. This may leave the reader seeking more focus and longing for a more structured answer to 'what is to be done' and by whom.

The term 'regime', as it is used in the book, includes everything from IIA conclusion and arbitral decision-making to involvement with IIL at the national level. The good governance 'narrative' in this book, in parallel, covers not only the understanding and role of good governance requirements in IIAs and jurisprudence but also domestic and supranational (EU) governance problems. Since so much is covered, it is not always easy to identify whether a particular governance problem (such as a lack of transparency or democratic involvement) has really been caused by the IIL regime or whether it is the consequence of other failures. To illustrate by reference to a popular critique, one can very well discuss whether the investment regime should be blamed for the lack of transparency during treaty negotiations; if the European Commission negotiates IIAs in a secretive or authoritarian manner, how is this specifically the fault of the structure of IIL? Perhaps, instead, it is due to the EU's own deeply embedded transparency and participation problems. While IIL might sometimes serve as a convenient scapegoat, it is unfair to add these deep-reaching claims to the already considerable list of anti-IIL objections.

Another set of questions, which were highlighted earlier, are the normative questions raised as a result of this study. Saying that an investment award does not in practice visibly enhance good governance in a given case does not mean that investment arbitrators should not decide cases in a way that could improve good governance. Sattorova herself hints at this in her discussion of the usefulness of specific performance as a remedy. To take a fictitious example, three investment arbitrators sitting in a Paris hotel room cannot necessarily know whether the Turkish

[13] L.N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (2015).

[14] In particular, along the lines of what can be termed 'behavioural international law' – on which, see, in particular, Broude, 'Behavioral International Law', 163 *University of Pennsylvania Law Review* (2015) 1099.

[15] In that sense, see, e.g., Brower and Melikian, *supra* note 2; Schwebel, 'The Overwhelming Merits of Bilateral Investment Treaties', 32 *Suffolk Transnational Law Review* (2009) 263.

governmental structure has sufficiently good mechanisms in place to learn from an investment award nor can they impact these structures directly. What is not beyond their reach, however, is the reasoning of the investment award. This reasoning could allow a proactive host state to identify and rectify good governance flaws identified in an award.[16] To borrow the language of the continental law of obligations, investment arbitrators can hardly have an obligation of result (to enhance good governance), but it is far from inconceivable that they might have an obligation of effort to do their part in making it possible.

It is at this point that the question mark ending the book's subtitle is particularly appropriate. It is far from certain that promoting good governance can be (incisively) described as a legally groundless 'mission creep'. As much as Sattorova insists on the lack of a legal basis for imputing good governance requirements into (primarily) the interpretation of fair and equitable treatment (FET), the fact remains that investment arbitrators initially have faced (and still face) remarkably cursory provisions that need to be concretized through interpretation. There is certainly plenty of room to debate the way in which the provisions of the Vienna Convention on the Law of Treaties (VCLT) are used in the interpretation of IIAs or if Articles 31–33 of the VCLT provide satisfactory guidance for this task. However, to simply dismiss as 'startlingly insufficient' those readings that refine 'fair and equitable' into a series of good governance requirements seems unduly harsh (at 57).[17]

This undue harshness is also visible in light of some alternative normative considerations. Sattorova's arguments in Chapter 2 (in which she criticizes attempts to derive good governance standards from IIA provisions) would seem to suggest that it would be appropriate now to abandon the good governance mission in favour of a return to a narrow minimum standard of treatment/denial of justice understanding of the FET standard. However, one considerable issue is whether such a turn would be feasible after the existing jurisprudence had accumulated to the extent it has – by which the present reviewer suggests that it would now be difficult to pick apart the layers of legal doctrines, principles and precedents. But, among other potential counter-arguments,[18] it would also be at normative odds with the consistently professed desire of states worldwide to constantly strive towards good governance and the rule of law at international and national levels.[19] If IIL is understood to be part of the global international rule of law more broadly, or even if no more than an honest attempt is made to eventually situate it therein, investment arbitrators should not in principle refrain from progressively demanding good governance from host states. It is that same good governance, after all, that those states vocally support elsewhere. Why should these states not be made to put their money where their mouths are?

However, regardless of whether the question is should, or how should, investment arbitrators help enhance domestic good governance, Sattorova's book is a comprehensive contribution that can serve those approaching the topic from radically different angles. It is clear that the author is critical of IIL and its good governance mission. To return briefly to the adaptive evolution mentioned in the beginning of this review, for Sattorova this new narrative is an

[16] This is something I argue in Živković, 'International Investment Protection and the National Rule of Law: A Normative Framework for a New Approach', (2017) (PhD thesis on file at London School of Economics and Political Science), available at http://etheses.lse.ac.uk/3694/.

[17] Undue harshness is arguable at some other points as well, notably regarding a broad assertion of ISDS being unacceptably tolerant of investor corruption, assertion itself supported in the book by a reference to only one final award (in addition to a single instance of academic commentary) (at 156–157).

[18] For some of these, see Schill, 'Fair and Equitable Treatment', *supra* note 3, at 152–159 and materials cited therein.

[19] See most prominently GA Res. 60/1, 16 September 2005, paras 11, 21, 24 (a), (b), 39, 119, 134; GA Res. 64/116, 16 December 2009, preamble, para 3; and generally GA Res. 67/1, 24 September 2012.

evolutionary dead-end – a point especially pertinent given the *Achmea*-shaped asteroids hitting the IIL regime.[20] But many others arguing for deconstruction, evolution or revolution in IIL can find in her book much to feed their thoughts and proposals. As the vast majority of those involved with the regime seem to fall into one of these three camps, Sattorova's book is likely to find its place on many bookshelves – and rightfully so.

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Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit (ed.). ***System, Order, and International Law. The Early History of International Legal Thought from Machiavelli to Hegel***. Oxford: Oxford University Press, 2017. Pp. 544. £80. ISBN: 9780198768586

Ever since Ernest Nys published his *Les origines du droit international* in 1894, there has been a lively discussion of the question of who is to be considered the father (or fathers) of modern international law, with Vitoria and Grotius as the main candidates for this honour. The volume presented here successfully enlarges the scope of the history of the doctrines of international law by presenting and analysing the contributions of authors writing between the 16th and 19th centuries, who are thought to be of foremost importance in this history. About two thirds of the book deal, in 17 chapters, with 18 historical authors, from Machiavelli to Hegel (strangely enough, Hobbes and Rousseau are the only authors who have to share a chapter), while the remaining third of the book, consisting of six chapters, deals with some central topics of the discipline, including 'power and law' or 'universalism and particularism', to which is added a chapter on state practice during the early phase of the European expansion as well as a special, second chapter on Vitoria. This partly explains the title of the book: the newly developing regime provided a system, which in its turn ensured order under the umbrella of the international community; the whole turning out to be a system of international law.

The editors and authors have produced an important extension of their subject both systematically and chronologically, presenting an impressive number of historical scholars who are often not, or only marginally, dealt with in modern studies. This particularly holds for the two scholars highlighted in the sub-title of the book. Neither Machiavelli nor Hegel is usually considered among the classics of international law, and both are supplemented to some extent by a comparable contemporary: Bodin and Fichte respectively. Their treatment in the book, in turn, is followed by chapters on scholars mainly engaged in non-legal, often political, disciplines: Suarez, Althusius, Montesquieu, Hobbes and Rousseau, and, interestingly enough, Adam Smith and Spinoza. The traditional founders of the discipline are duly represented as well, in the chapters on Vitoria and Grotius in the first place and supported by Gentili, Pufendorf, Wolff, Vattel and Kant.

The result is an important broadening of the doctrinal history of international law. What at first glance looks like a mere legal perspective becomes a deeply-rooted multi-disciplinary history. This allows for a balanced answer to the question of system and order: as it seems, for the

[20] *Achmea*, *supra* note 11.