

chapter on investment and natural resources (which this reader would have liked to be more detailed), Gilbert meticulously catalogues the promises and failings of the existing human rights instruments and bodies in addressing the human rights impacts of commercial activities in the natural resources sector. For its modest size the thematic span of the book is impressive as Gilbert charts the developments of IHRL in relation to various facets of natural resources management: from governance to the protection of life, cultural rights, local community entitlements and protecting the environment. The book is not just a succinct and useful primer on human rights and natural resources but also a timely and thought-provoking exposition prompting the reader to ask bigger overarching questions about the lessons to be drawn from both the historical and ongoing engagement of IHRL with natural resources.

Mavluda Sattorova

Reader, School of Law and Social Justice, University of Liverpool, UK

Email: M.Sattorova@liverpool.ac.uk

doi:10.1093/ejil/chaa098

Markus Krajewski and Rhea Tamara Hoffman (eds). ***Research Handbook on Foreign Direct Investment***. Cheltenham: Edward Elgar, 2019. Pp. 744. £235. ISBN: 9781785369841

I Introduction

Even as research handbooks have been proliferating in English-speaking academic circles, only a handful have addressed the subject of international investment law. This new volume, for this reason, is a welcome addition to burgeoning investment law scholarship. Handbooks are intended to provide a survey of the literature and guide future research in any given field. The editors similarly describe their task as not only achieving these ends but suggesting ‘new ways forward . . . raising fundamental conceptual questions as well as addressing practical problems and challenges by engaging different schools of thought and preconceptions’ (at xiii). They have recruited ‘28 leading scholars and junior scholars from six continents’ (at 3) to complete this task. The volume is structured to deliver chapters on a number of themes, including foreign direct investment (FDI) ‘foundations’, investment agreements, country and regional studies and a section on ‘challenges and contentious issues’. Aside from the chapters on political economy, services and investment contracts, the bulk of the volume does not move much beyond the traditional confines of the legal regime for the protection of foreign investment. But there is still much here for readers to chew on.

A volume this large, and with these outsized ambitions, undoubtedly was an enormous editorial task. Inevitably, there will be an unevenness in tone, style and quality

of contributions. There also arise interesting tensions, even contradictions, between the contributors. A pithy review such as this cannot aim to be comprehensive. Only brief glimpses drawn from selected chapters can be provided, highlighting some interesting questions that arise amongst them. In the discussion that follows, I propose contrasting some of the book's stronger chapters with some of its more problematic assessments of the field.

2 Good Advice Neglected

The volume begins with a valuable interdisciplinary contribution by Danzman that addresses the relationship between signing investment agreements (principally bilateral investment treaties, BITs) and attracting new FDI. Danzman surveys the extant literature and offers this qualified, but for many reassuring, conclusion: 'enough studies . . . have found a relationship that it would be unwise to entirely discount any relationship' (at 26). Several pages later, however, the assessment shifts. The record is now described as generating 'weak and highly conditional evidence that these treaties meaningfully contribute to investment flows' (at 31). Danzman affirms this impression by concluding that, because 'the empirical record provides much weaker evidence of BITs' purported benefits . . . political economists have generally become increasingly concerned that the potential benefits of maintaining BIT obligations are not worth the associated sovereignty trade-offs' (*ibid.*). It is curious that Danzman characterizes civil society opposition to BITs as 'strident' (at 29) when even political economists are expressing doubts about the benefits of signing BITs.

It would have been expected that this helpful review of the empirical evidence would have influenced, or at least shaped, claims made elsewhere in the volume. The verdict of 'weak and highly conditional evidence' (at 31) in support of a correlation between signing BITs and FDI, regrettably, appears not to have made much of an impression. One contributor, for instance, describes developing states' rebellious attitude toward foreign investment protection as 'tantamount to fiscal suicide' (at 73) as they, otherwise, 'stand to benefit significantly from the foreign investment regime' (at 75). This author calls upon these states to, instead, 'improve their positions by adopting strategies that would enhance their participation in the regime and the level of FDI they currently attract' (at 75). It is urged, in another contribution, that EU states not too quickly denounce intra-EU BITs, as this 'could pose threats to inward investment in the EU as foreign investors could be less willing to invest in EU Member States, not knowing the status of their legal rights' (at 445). The correlation is assumed to exist without any empirical evidence offered in support, and despite evidence to the contrary provided at the outset of this volume.

Schill and Gülay's mapping exercise follows, surveying the variety of research methods and approaches adopted in the literature. Domestic law and international law readings of FDI are contrasted with public law, private law and public international law frames. A typology of research questions is sketched: descriptive, normative

(or reformist) and theoretical are those into which investment law scholars typically will fall. A hard line is drawn between legal and non-legal methods of research. Interviews, Schill and Gülay claim, employ non-legal methods (at 51). My impression after conducting open-ended interviews as elements of both small and large interdisciplinary studies was just the opposite – these could be likened to the common law process of discovery or examination-in-chief. While they distinguish theoretical approaches from descriptive and normative accounts, as if theory does not inform descriptive and normative scholarship, it is refreshing to see an acknowledgment that scholarship ‘is intertwined with politics and ideological underpinnings’ and that these will influence the choice of research questions taken up by scholars. ‘None of this is problematic’, Schill and Gülay write, ‘so long as legal researchers are forthright about their underlying assumptions and do not claim to be value neutral’ (at 70). This call for forthrightness – together with more reflexivity about the place of scholars in the production of investment law – coming early on in the volume, looks like an invitation to the other authors to be more honest about influences and approaches. The invitation too often gets ignored.

3 Methods and Absences

Instead, many of the chapters purport to be neutral and descriptive, adopting methods associated with formal legal rationality.¹ Chapters on ‘Reform Trends’ and ‘Standards of Investor Protection’, for instance, briefly canvass issues with little in the way of an evaluation of their merits. In a chapter on African investment law, an unwieldy amount of detail is presented to readers. This chapter would have benefited from the use of tables, such as those included in the chapter on Australia and New Zealand. Other chapters on Central and Eastern Europe and Latin America are helpful and informative. On occasion, some good questions are asked: for instance, if Australia has agreed to omit investor-state dispute settlement (ISDS) with New Zealand in its side agreement to the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), is it defensible to include ISDS in agreements with Canada and Japan (at 433)? If questions are raised, and sometimes answered, at other times difficult questions are elided entirely. One is prompted to ask, in reading the chapter on Asia, why is Japan opposed to the EU’s investment court? Why does China get so little attention? If ‘nothing stands in the way, in theory, of tribunals taking account of human rights arguments’ (at 645), as is argued in a technically sound chapter on human rights, what extra-legal factors explain their reluctance to do so? Other chapters fail to provide sufficient guidance to the existing literature. In a discussion of consent and applicable law, missing in action is Zachary Douglas’s volume that, among other things, helpfully addresses

¹ Max Weber’s term in his *Economy and Society: An Outline of Interpretive Sociology*, ed. Gunther Roth and Claus Wittich (University of California Press, 1978), at 974. Weber associates ‘legal rationality’ with facilitating capitalist relations of production by providing unambiguous, continuous and efficient administration of justice. It could be said, however, that investment law lacks some of the features Weber assigns to formal legal rationality given its unpredictable and contradictory outcomes.

these questions.² In a useful chapter on services, no mention is made of Jane Kelsey's critical contribution to the field.³ In the chapter on investment contracts, Jean Ho's terrific book on this subject is neglected.⁴ Readers surely would have benefited from being directed to this scholarship.

Contributions with a more normative bent raise other questions. In an assessment of Third World Approaches to International Law (TWAAIL), meant to address 'Foreign Investment Law and Developing Countries', Hyppolite urges these states to reject advice issuing out of this loose scholarly collective.⁵ Developing countries are encouraged, instead, to deepen their engagement with the regime rather than 'seek to upend' it (at 76). They should, in short, aspire to be 'constructive' by seeking improvements (at 77, 119). It is not clear with whom developing countries might negotiate such improvements: experience has shown that most capital-exporting states are reluctant rule takers.⁶ Nor are the expected benefits of seeking 'improvements' as unequivocal as Hyppolite suggests. Johnson's chapter on sustainable development, which follows next, offers quite a different assessment, backed up by abundant research, suggesting that FDI may not yield these assumed economic improvements. These studies indicate that FDI may have cumulative negative effects on natural and human environments (at 128). Protecting investors in countries with poor human rights and environmental records, Johnson concludes, rewards political leadership without the prospect of enhancing the 'rule of law' within these states (at 146).

Sándor's instructive chapter on Central and Eastern Europe is one of the few to address the power imbalance that structures the regime. The purported 'grand bargain' – trading sovereignty for economic development – seems 'less justified and more one-sided', Sándor writes (at 469). Despite the proliferation of BITs in the 1990s, rather than economic improvement, the region instead experienced economic decline (at 469). Yet any mention of power is absent in the chapter on North America, where the United States has dominated the region in important respects. Instead, each of the states party to the North American Free Trade Agreement (NAFTA) are portrayed as having entered into trade and investment arrangements on something like a level playing field. Yet, as Magraw admits in passing, it was the United States that demanded the inclusion of NAFTA's investment chapter, consistent with its BIT practice at the time (at 536). Little else is said on the subject. Just as US investment law and policy determined outcomes then, the other state parties have been directed by the Trump administration to severely limit ISDS in NAFTA 2.0 now.⁷

² Z. Douglas, *The International Law of Investment Claims* (2009).

³ J. Kelsey, *Serving Whose Interests? The Political Economy of Trade in Services Agreements* (2008).

⁴ J. Ho, *State Responsibility for Breaches of Investment Contracts* (2018).

⁵ See Eslava, 'TWAAIL Coordinates', *Critical Legal Thinking* (2 April 2019), available at <http://criticallegal-thinking.com/2019/04/02/twail-coordinates/>.

⁶ I have addressed this bargaining asymmetry, as between the United States and South Africa, in Schneiderman, 'Equality Promotion, Black Economic Empowerment, and Investment Rule Flexibilities', *24 South African Journal on Human Rights* (2009) 246.

⁷ Referring to the Agreement between the United States of America, the United Mexican States, and Canada (13 December 2019), c. 14, available et at <https://bit.ly/3fKJlwM>.

4 Paths Forward

By aiming to secure goals associated with sustainable development (SDGs), it is claimed that a ‘better balance’ between investor rights and social and environmental protection can be achieved (at 565, 570). Yet Schacherer and Hoffman are doubtful that ready-to-hand solutions will provide a better balance. They express scepticism about limiting BIT protections to investments that contribute to host state economic development due to the difficulty of interpreting such a limitation (at 572). Limiting the benefits of BITs to investors having a ‘substantial business activity’ in their home state also may not ‘prevent treaty shopping’ due to, again, the lack of clarity around the term ‘substantial’ (at 573).⁸ The addition of annexes on indirect expropriation, incorporating the US Supreme Court multi-factor analysis in *Penn Central*,⁹ allows for ‘better balancing’, they say (at 577). Turning from reform to the regime’s implications for sustainable development, the authors gingerly dance around the implications of the spate of disputes launched against Spain for altering its renewable energy policy. These cases ‘highlight how delicate it can become for states to balance their policies with investor’s interests and to adopt *new* policy and regulation approaches in order to promote energy transition’ (at 583, emphasis in original). Describing as ‘delicate’ the 40 investment claims initiated against Spain and other states for initiating policy changes in renewable energy massively understates their implications.¹⁰ If much of the chapter reads as a defence of the status quo, the authors, to their credit, take a stand against performance requirements (not a common feature in BITs) as these ‘may’ be contrary to sustainable development goals (at 578). Even then, they maintain that ‘further research is still needed as to how to align’ investor protections with SDGs (at 595). ‘Which standards can be avoided and which are absolutely indispensable’, they ask? This prudence is hard to comprehend after 20-plus years of investment treaty and arbitration experience. Moreover, no such caution was on display when the regime was under construction and aggressively promoted by capital exporting states and their allies. Why the hesitation?

This restraint is amplified in the chapter devoted to protection of the environment. The question asked by Robert-Cuendet is whether ISDS is ‘suitable’ for resolving environmental disputes even though the right balance between ‘economic rationality and public policy . . . has not yet been found’ (at 599). Determining suitability is resolved, in part, by characterizing a number of historic disputes as being not about the environment but about rent seeking. The *Ethyl* claim, regarding a ban on the use of the gasoline additive MMT and settled by the Government of Canada with the payment of a sum of damages, is described as concerning a ‘purely protectionist measure’ (at 609).¹¹ It is true that Canadian auto manufacturers were lobbying to have the additive banned because

⁸ The inclusion of criteria may help to improve this situation, they admit.

⁹ *Penn Central Transportation Co. v. New York City*, 438 US 104 124 (1977).

¹⁰ See Freya Baetens, ‘Renewable Energy Incentives: Reconciling Investment, EU State Aid and Climate Change Law’, *EJIL: Talk!* (18 December 2019), available at <https://bit.ly/2VcmZuD>.

¹¹ *Ethyl Corporation v Canada*, Decision on Jurisdiction, Ad Hoc Tribunal (UNCITRAL) 7 ICSID Rep 12 (24 June 1998).

it gummed up on-board technology but there were, in addition, legitimate worries about harms to the human and natural environment. There was so much documented concern that the use of the additive was banned by numerous developed economies.¹² These facts entirely escape Robert-Cuendet's analysis. Nor is any mention made of the precautionary principle, which calls for restraint in the opposite direction and upon which the Government of Canada relied in the *Ethyl* dispute. To similar effect, the author claims that the 'real reason' why Mexico chose to shut down Metalclad's hazardous waste operation was because the 'local population was hostile to the plant' (at 609).¹³ Yet the author never asks why the local population was hostile. Was it because peasants were duped into protecting Metalclad's principal competitor, as the investor alleged? Or was it because the local populace was mobilized to oppose reopening of the site because it had previously leaked dangerous waste into local water supplies? If so (and the research reveals this to be the case), then the 'real reason' for local opposition was genuine public health concerns.¹⁴ Yet Robert-Cuendet issues the verdict that in these disputes states invoked the environment as an 'alibi' (at 618). This author, like many others in this field, prefers to rely on simplified and self-justifying characterizations promoted by the regime's norm entrepreneurs (investment lawyers, arbitrators and scholars).¹⁵ Robert-Cuendet, as do many others, appears reluctant to dig beneath the surface of things. Even if Robert-Cuendet expresses worries about the limits that investment law places on state environmental policy,¹⁶ she concludes that ISDS is 'not unsuitable' for resolving environmental disputes (at 615). It is hard to reconcile this diagnosis (muddled by the double negative) with Robert-Cuendet's conclusion that the 'very demanding character of investment standards, with their vagueness, can jeopardize the enactment of environmental policies'. Matters are made no clearer by calling for a 'total reinvention' of investment law (at 618). The author of this chapter appears to want to have it both ways – she wants to both issue verdicts supportive of the regime but also flag investment law's threats to legitimate measures that protect the environment.

Why this wobbly stance vis-à-vis investment law's 'demanding' disciplines? Is the record, by now, not yet clear? Are the priorities of the regime's norm entrepreneurs not already self-evident? Why not issue more decisive verdicts about this experience? Hand in glove with this penchant to defend the regime is the need to disparage those who take a more oppositional stance. Many authors implicitly issue verdicts regarding the merits

¹² The *Ethyl* dispute together with the scientific evidence in support of the ban are discussed in detail in D. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (2008), at 130–133.

¹³ *Metalclad Corp v. Mexico* (Award), Ad hoc—ICSID Additional Facility Rules, ICSID Case No ARB(AF)/97/1 (25 August 2000).

¹⁴ The *Metalclad* dispute and local opposition to the investment are discussed in detail in Schneiderman, *supra* note 12, at 82–86.

¹⁵ On my characterization of investment law's norm entrepreneurs, see Schneiderman, 'The Paranoid Style of Investment Lawyers and Arbitrators: Investment Law Norm Entrepreneurs and their Critics', in C. L. Lin (ed.), *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* (2016) 131, at 149–152.

¹⁶ For this purpose, the negative example of *Clayton and Bilcon of Delaware Inc. v. Government of Canada – Award*, 17 March 2015, PCA Case No. 2009-04, is used to good effect.

of those critiques. There is only the ‘current perception’ that ISDS is for the ‘most part negative’ (at 580). States have responded to “‘flaws” of the traditional system of investment arbitration’ (at 587) – the scare quotes reducing this to mere allegation. In a footnote accompanying this sentence, it is claimed that ‘these concerns include the (perceived) need for systemic reform’ (at 587 n.172). Does the author mean to say that these concerns are only perceptions and, therefore, not real? What could otherwise be meant? Critiques of the regime, it is said, are ‘not at all well founded’ (at 614). Nothing more is said on the matter. The dispute settlement machinery is described as ‘mechanisms that appear, from the outside, to be exorbitant privileges’ (at 616). Presumably, those inside the machine have a better, more objective, perspective? It is curious that critical accounts get derided yet there is much evidence at hand to evaluate them. As Schill and Gülay insist, there should be more forthrightness from authors about their preferences. And they should not issue simplistic verdicts without further effort on their part.

5 Conclusion

The editors are not to be blamed for these defects. They did, however, choose to recruit authors, the majority of whom do not hold a university teaching position. Of the 29 contributors, almost one third (nine) are self-described (a number of them full-time university instructors) as participating in some aspect of the arbitration industry. Amongst all of the chapters in this very large volume, I can identify only a handful that express scepticism about the merits of the regime. This is not to say that those involved in arbitration should be disqualified from contributing to such a handbook – far from it. It is only to acknowledge that they are likely to issue verdicts that favour, if not the status quo, reform efforts that do not upset too much expectations for professional enrichment. It makes sense, after all, that many of those writing in the field of investment arbitration seek recognition and reward from those practising within it. Should they wish to be invited to conferences convened in glamorous locales, contribute to *festschriften* in honour of this or that investment law notable and, ultimately, serve as counsel or arbitrator, how can they be expected to behave otherwise? Whatever their motivation, those who are professionally engaged with the regime are inclined to be more supportive of it and less inclined to think there are significant problems that need remedying. There are fewer¹⁷ (but, nonetheless, gratifying) rewards for those who choose to remove themselves from the intimate embrace of practice. In a field as politically fraught as this one, this is an unfortunate state of scholarly affairs, especially as there is little likelihood of things changing any time soon. It will remain, for the most part, dominated by the regime’s defenders – its norm entrepreneurs – rather than more independently minded scholars who have no stake, other than an intellectual one, in the regime’s future.

¹⁷ As Brecht so aptly observed, to ‘displease the possessors is to become one of the dispossessed’, in Brecht, ‘Writing the Truth: Five Difficulties’, in B. Brecht, *Galileo* (Eric Bentley, ed.) (New York: Grove Press, 1966) pp. 133–150 at 134.

This is what renders the *Handbook*, in sum, less than what the editors purport to offer in their Introduction. Despite differences in seniority and diversity of locales from which the authors are drawn, the overall tone of the volume ranges between hesitant embrace and enthusiastic hug. The upshot is that the collection does not raise many 'fundamental conceptual questions' or challenge too many 'preconceptions'. There remains some ground for enthusiasm, however, as there are many valuable individual contributions, rendering the parts of this tome greater than the whole of it.

David Schneiderman

Professor of Law and Political Science, University of Toronto, Canada
 Torgny Segerstedt Visiting Professor, Department of Law, University of Gothenburg,
 Sweden; Affiliated Professor of Law, University of Stockholm, Sweden
 Email: david.schneiderman@utoronto.ca

doi:10.1093/ejil/chaa099

Aikaterini Florou. ***Contractual Renegotiations and International Investment Arbitration: A Relational Contract Theory Interpretation of Investment Treaties***. Leiden: Brill, 2020. Pp. 250. €116. ISBN: 9789004407466

There are two realities in the burgeoning international investment law literature that approximate the certainty of death and taxes. The first is that simplicity is a virtue. The second is that scrutiny breeds disappointment. Embodying the virtue of simplicity and the restraint from scrutiny is a doctoral thesis turned monograph by Aikaterini Florou. Florou makes the compelling claim that foreign investor (mis)conduct in relation to the renegotiation of public service concessions, such as water supply or sewage disposal, impacts the determination of whether the host state has violated the ubiquitous investment treaty obligation of fair and equitable treatment (FET). By highlighting and critiquing the inadequacy and inequity of triangulating the FET threshold with sole reference to host state conduct during contractual renegotiations, when such renegotiations are more akin to a 'two-way street' (at 104) of state *and* investor conduct, Florou's monograph is a timely addition to current literature spotlighting investor accountability in the ongoing reform of international investment law.¹

Florou makes a case for examining investor conduct in FET claims founded on contractual renegotiations in three chapters. In the first chapter, she explains why public service concessions, the subject of her study, are 'relational contracts'. Leaning heavily on the writings of contract law theorist Ian MacNeil and on economics literature, Florou defines 'relational contracts' as contracts that are 'characterized by extreme

¹ Symposium: *Investor Responsibility: The Next Frontier in International Investment Law*, 113 *American Journal of International Law Unbound* (2019) 1.