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Editorial: Towards a Normative Framework for Investment Law Reform

Debates about the reform of international investment law and investor-state arbitration are omnipresent. They are also at the center of interest of this Special Issue of JWIT, which is guest-edited by Andreas Ziegler and emblematically entitled “Towards Better BITs? – Making International Investment Law Responsive to Sustainable Development Objectives.” It contains contributions by Anne-Juliette Bonzon, Anne van Aaken, Laurence Boisson de Chazournes and Brian McGarry, Faraz Rojid and Maria del Carmen Vasquez, Krista Nadakavukaren Schefer, and Tarcisio Gazzini. In addition, this issue contains an article by Jonathan Bonnitcha on “Investment Treaties and Transition from Authoritarian Rule,” which equally addresses aspects that are relevant for the debate on investment law reform, namely how investment law can complicate or facilitate transition to democratic rule.

The Need for a Debate About the Normative Foundations of Investment Law Reform

Reform debates are often reactions to interpretations of arbitral tribunals and take shape in negotiations and renegotiations of international investment agreements. The ongoing discussions on the conclusion of so-called mega-regionals, such as the Trans-Pacific Partnership (TPP) or the Transatlantic Trade and Investment Partnership (TTIP), are most salient in this context. The aim of reform debates is often two-fold: to strike a better balance between the protection of foreign investments and competing private and public interests, both abroad and at home, and to make investment dispute settlement more transparent, predictable and acceptable to all stakeholders involved. What is more, reforming international investment law is not only on the policy agendas of future contracting parties,¹ it also plays an important role for international organizations that are active in the field

¹ These include states and regional integration organizations, such as the European Union or the Association of Southeast Asian Nations.

of investment law, including the United Nations Conference on Trade and Development (UNCTAD),² the Organisation for Economic Co-operation and Development (OECD),³ or the Southern African Development Community (SADC),⁴ to name but a few examples.

The reform proposals that result from these multipolar initiatives reflect and react to the political pressure international investment law is facing since its development from a little noticed area of specialized expertise into an area capable of making headline news and bringing non-governmental organizations and ordinary citizens in protest to the streets and to internet platforms.⁵ At the same time, the considerable number of reform proposals and diverging practical suggestions made by different institutions not only add to the complexity of the field, but risk fragmenting investment law even further. This can be counterproductive if the stated aim is to arrive at an investment law regime that is both balanced and predictable and that successfully manages to depoliticize international investment relations by providing a system that furthers the rule of law. In addition, reform proposals are themselves a reflection of underlying (conscious as well as unconscious) political and ideological preferences that may not be globally shared.

What is needed therefore is a debate about these preferences and their impact on investment law design and reform. To which extent should property be protected against adverse interferences? When should competing concerns

2 See UNCTAD, *World Investment Report 2012—Towards a New Generation of Investment Policies* 97 et seq. (2012) <www.unctad-docs.org/UNCTAD-WIR2012-Full-en.pdf> (8 August 2014); UNCTAD, *World Investment Report 2013—Global Value Chains: Investment and Trade for Development* 110 et seq. (2013) <unctad.org/en/PublicationsLibrary/wir2013_en.pdf> (12 August 2014); UNCTAD, *World Investment Report 2014—Towards a New Generation of Investment Policies* 126 et seq. (2014) <unctad.org/en/PublicationsLibrary/wir2014_en.pdf> (12 August 2014).

3 See, e.g., David Gaukrodger and Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community' OECD Working Papers on International Investment 2012/3 (2012) <dx.doi.org/10.1787/5k46b1r85j6f-en> (15 August 2014). For further information on the OECD's activities in international investment law see <www.oecd.org/daf/inv/investment-policy/oecdworkoninternationalinvestmentlaw.htm> (15 August 2014).

4 SADC recently developed a new model investment treaty. See South African Development Community, *SADC Model Bilateral Investment Treaty Template with Commentary* (2012) <www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (12 August 2014).

5 Recently, protest by civil society led to the European Commission opening the TTIP to an online public consultation which received almost 150,000 responses; see <trade.ec.europa.eu/consultations/index.cfm?consul_id=179> (15 August 2014).

enjoy preference? What institutional structures are adequate in governing investment relations and resolving investment disputes? Who should determine what the right balance is between investment and non-investment concerns? These are some of the questions relevant to engage with the normative foundations of the current reform debate.

Constitutional Law Approaches to Investment Law Reform

The answer to the above questions is often one of economic and social policy that may change depending on whether the wind blows more from one political ideology or another. Yet, given how quickly even fundamental economic and social policy can change – in some places from one election to the next – investment law reforms should be cast (and evaluated!) not in view of short term benefits, but on the basis of long term considerations. It is not so important whether and how investment treaties influence foreign investment flows in the short term – even if we had the right tools to measure and forecast this reliably – but rather whether they help countries to enact a framework of law and policy that is conducive to long term growth and development.

Similarly, we do not need to ask whether investment treaties in a specific situation prevent or permit concrete host state conduct that is justified as being in the public interest, whether it be the way Germany phased out nuclear power or how Australia gears up against tobacco. Instead, we need to inquire more generally about the impact investment treaties have on the “rights-mix” in a global society; that is, whether and how investment law interacts with competing rights and what impact it has on policy space more generally.

It remains to be determined, however, on what basis we reach a consensus on the right “rights-mix” and balance between policy space and government control. These questions are deeply normative and require suitable consensus-building processes about underlying normative assumptions before comprehensive and broadly consented reform agendas in international investment law can be successful.⁶

My own view on ways to develop consensus on the normative foundations of investment law reform is built on an analogy between investment treaties

6 Such consensus-building processes rightly are called for as a strategy for investment law reform by Karl Sauvant and Federico Ortino, ‘Improving the International Investment Law and Policy Regime: Options for the Future’ (2013) <formin.finland.fi/public/download.aspx?ID=113259&GUID={1202781B-0D9B-4E9C-9621-FCA4DA87881E}> (15 August 2014).

and constitutional law.⁷ This analogy draws on the observation that investment law and constitutional law are functionally equivalent in guiding politics to achieve certain overarching aims and in creating spheres of freedom for the exercise of rights. These constitutional legal dimensions are present both at the domestic level and in the international context, where international law, including investment law, is used to program the behavior of states to pursue certain policies and to create rights, including for individuals. Against the background of these functional parallels, it is beneficial to explore constitutional legal arguments for guiding investment law reform in achieving an acceptable balance between private rights and public interests.

In order to serve as a basis for global consensus, constitutional analysis cannot draw on specific national constitutional traditions. Instead, a broader and more comprehensive constitutional framework is necessary. Two sources of constitutional norms and values are particularly apposite: first, principles and values of comparative constitutional law and, second, multilaterally consented principles of United Nations law.

Comparative Constitutional Law

The first set of principles would originate in a comparative analysis of how domestic constitutional law, as well as other regimes of regional and global governance, envision the relationship between the state and private economic actors and circumscribe the proper role of dispute settlement institutions that review the legality of government conduct. These principles could be used not only to provide a more balanced interpretation of investment treaties (as I have suggested elsewhere),⁸ but also to structure a broadly recognized investment law reform agenda for the negotiation of new investment treaties. Without dwelling on the details, the fundamental constitutional principles that are broadly recognized in domestic constitutional law in a large variety of countries across all regions of the world encompass the principles of democracy, the rule of law, and human rights.⁹ These principles can be brought to

7 How investment law and constitutional law interact and are moving closer together is also explored by Laurence Boisson de Chazournes and Brian McGarry, 'What Roles Can Constitutional Law Play in Investment Arbitration?', in this issue, pp. 862–888.

8 See Stephan W. Schill, 'The Sixth Path: Reforming Investment Law From Within' (2014) 11(1) *Transnat'l Disp. Mgmt.*

9 See Armin von Bogdandy, 'Grundprinzipien von Staat, supranationalen und internationalen Organisationen' in Paul Kirchhof and Josef Isensee (eds.), *Handbuch des Staatsrechts*, Vol. 11 (3rd ed.

bear on international investment law and militate for ensuring policy space, transparent procedures for dispute settlement, the protection of human rights of affected populations and foreign investors, but also a system of investment protection that ensures the accountability of host states to the concept of the rule of law.

Principles of UN Constitutional Law

The second set of constitutional principles that should inform investment law reform are principles of UN constitutional law.¹⁰ I will dwell on these a bit more in detail. These principles include: 1) international peace and security and the peaceful settlement of disputes;¹¹ 2) the protection of self-determination;¹² 3) the principle of sovereign equality;¹³ 4) the protection of human rights;¹⁴ and 5) development and social progress.¹⁵ All of these principles are enshrined in a norm of UN constitutional law that should be placed at the center of investment law reform debates and the consensus-building processes that are needed. This norm is Art. 55 of the UN Charter, which provides:

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

1. higher standards of living, full employment, and conditions of economic and social progress and development;
2. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

C.F. Müller 2013) 275; *see also* Armin von Bogdandy, 'Common Principles for a Plurality of Orders: A Study on Public Authority in the European Legal Area' *Jean Monnet Working Paper* 16/14 (2014) <www.jeanmonnetprogram.org/papers/14/documents/JMWP16Bogdandy.pdf> (15 August 2014).

10 These principles are so important because existing or future investment rules are not allowed to run counter to these principles. *See* UN Charter, Art. 103.

11 *See* UN Charter, Preamble, Art. 1(1), Art. 2(3), (4), Arts. 33 *et seq.*

12 *See* UN Charter Art. 1(2), Art. 2(7) (non-interference in matter of "domestic jurisdiction").

13 UN Charter, Art. 2(1).

14 UN Charter, Preamble, Recital 2, Art. 55(c).

15 UN Charter, Preamble, Recital 3 ("social progress"), Arts. 55 *et seq.*

3. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Although this provision is addressed to the UN, it can be read, together with Art. 56 of the UN Charter, as setting out broader global constitutional principles, which must also influence international investment law and investor-state dispute settlement. In this light, investment law needs to be conceptualized as a tool for states to achieve “peaceful and friendly relations” that “respect ... the principle of equal rights and self-determination” in order to work towards “higher standards of living ..., economic and social progress and development,” while “respect[ing] ... human rights and fundamental freedoms.”

This perspective would stress the following objectives for investment law: peacefully governing of international investment relations, including the settlement of disputes; the need to give sufficient policy space to states to set their development strategies independently and implement them accordingly; the application of investment rules to both capital-importing and capital-exporting countries; the vision to regulate not only states in their relations to foreign investors, but also investors in relation to the state’s population and other affected communities; and the importance for human rights norms to inform international investment relations and investment law reform.¹⁶

Furthermore, it can be argued that among the constitutional principles of UN law, the principle of (sustainable) development, understood as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs,”¹⁷ assumes a prominent position in

16 Human rights ideas can work in two ways. On the one hand, they can lend support to certain investment disciplines because of the parallels that exist in substantive protection, for example in respect of the protection of property, due process, or access to justice. On the other hand, the protection of human rights is an argument for ensuring policy space for host states, but it also stresses states’ responsibility to regulate foreign investors effectively in order to protect the human rights of its populations, including the right to a safe environment, drinking water, public health, etc. On these different ways of interaction between human rights and investment law see Ursula Kriebaum, ‘Privatizing Human Rights: The Interface between International Investment Protection and Human Rights’ in August Reinisch and Ursula Kriebaum (eds.), *The Law of International Relations: Liber Amicorum Hanspeter Neuhold* (Eleven 2007) 165; Pierre-Marie Dupuy, ‘Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law’ in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 45.

17 *Report of the World Commission on Environment and Development: Our Common Future* (1987) 43 <www.un-documents.net/our-common-future.pdf> (8 August 2014).

international investment law reform. It is rightly reflected in UNCTAD's Investment Policy Framework for Sustainable Development,¹⁸ which emphasizes the need for strengthening the “development dimensions of international investment agreements.”¹⁹ International investment law and investment treaty arbitration are certainly seen by many as an obstacle to the implementation of development strategies. Yet, this perspective provides a far too limited and one-sided view. Instead, investment law and investment law reform should be placed in the broader perspective of helping sustainable development. Even more, international investment law itself should be understood as part of an international law of development and an integrated component of sustainable development.²⁰

Building on the widely recognized importance of investment—including foreign investment—for development within the UN system,²¹ and as a means to achieve the UN Millennium Development Goals,²² the role of investment law would consist in this context in reducing political risk and in fostering the

18 UNCTAD, *World Investment Report 2012*, *supra* note 2, pp. 97 *et seq.*

19 *Ibid.*, p. xii.

20 See extensively Stephan W. Schill, ‘International Investment Law and International Development Law’ in A. K. Bjorklund (ed.), *Yearbook on International Investment Law and Policy 2012–2013* 327 (2014).

21 This is reflected, for example, in the Agenda 21 of the UN Conference on Environment and Development, the Monterrey Consensus of 2002, the Doha Declaration on Financing for Development, and the Rio+20 Conference on “The Future We Want”. See UNCED, ‘Agenda 21: Programme of Action for Sustainable Development’ UN GAOR, 46th Sessions, Agenda Item 21, UN Doc A/Conf.151/6/Rev.1 (1992) para. 2.23 (“Sustainable development requires increased investment, for which domestic and external financial resources are needed. Foreign private investment [...] is an important source of financial resources”); United Nations, ‘Monterrey Consensus of the International Conference on Financing for Development’ (22 March 2002) para. 22. <www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf> (8 August 2014) (stating that “there is the need for the relevant international and regional institutions as well as appropriate institutions in source countries to increase their support for private foreign investment in infrastructure development and other priority areas, including projects to bridge the digital divide, in developing countries and countries with economies in transition”); United Nations, ‘Doha Declaration on Financing for Development’ UN Doc. No. A/CONF.212/L.1/Rev.1 (2008) 23 (“We recognize that private international capital flows, particularly foreign direct investment, are vital complements to national and international development efforts.”); United Nations General Assembly Resolution No. 66/288, Doc. No. A/Res/66/288, Annex (11 September 2012) paras. 110, 123, 127, 131, 149, 154, 188, 201, 232, 271.

22 See United Nations Development Program, ‘Investing in Development: A Practical Plan to Achieve the Millennium Development Goals’ (2005) <www.unmillenniumproject.org/documents/overviewEngLowRes.pdf> (8 August 2014).

stability that is necessary for domestic and foreign investors to engage in growth-oriented economic activity.²³ At the same time, one must take into account that (foreign) investments are not always beneficial, but may adversely affect sustainable development. In this respect, the constitutional principle of development also makes the case for better and more effective regulation of investment in order to avoid environmental and social harm.

In sum, all of this shows that constitutional analysis (at a domestic, comparative and international level) can serve as the normative basis for a comprehensive, balanced, predictable, and broadly consented regime governing international investment relations and guide the reform process leading to this goal.

Stephan W. Schill

23 See also Monterrey Consensus, *supra* note 21, para. 21 (stating that “[a] transparent, stable and predictable investment climate, with proper contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions that allow businesses, both domestic and international, to operate efficiently and profitably and with maximum development impact”).