Rethinking International Investment Governance: Principles for the 21st Century (2018) A Summary of Key Conclusions and Recommendations

Praise for Rethinking International Investment Governance

"*Makes a compelling case for revamping the current international investment regime*"[1]
"The 'go-to' work for academics and policy-makers"[2]
"Incredibly creative in suggesting an alternative formulation of governance standards… provid[ing] guidance on the subject for many years to come"[3]
"A key reference point for scholars, development practitioners, international organizations, and civil society activists around the world"[4]

Introduction

Increasing numbers of states and their citizens have serious concerns about how international investment agreements currently operate. This book has been produced by a group of thirteen eminent academics - lawyers, economists and political scientists.[5] It identifies key principles and priorities for redesigning current international investment law so that it serves wider societal purposes, most importantly the promotion of sustainable development.

Current Problems with the International Investment Law Regime

Key Criticisms: Today, thousands of international investment agreements (IIAs) allow foreign investors to use troubling arbitration processes (known as Investor-State Dispute Settlement (ISDS)) to claim compensation for a wide range of government action and inaction. These claims can run into billions of dollars. At the same time, IIAs can undermine a state's ability to pursue legitimate public policy aims (chapter 6).

The economic case: A key rationale for IIAs is that they are important for supporting foreign direct investment (FDI). Yet, decades after the first such treaty was concluded, there is no conclusive evidence that IIAs increase flows of such investment. In any case, the fact that proponents of IIAs focus on FDI flows is misguided. They should be measuring the contribution of IIAs to sustainable development and the costs, for example, in terms of compromising national policy space (chapter 7).

Impact on sustainable development: FDI can potentially have both positive and negative impacts on the economic, social and environmental dimensions of sustainable development. Whether those outcomes are positive or negative depends, in significant part, on the laws and policies that govern that FDI. In this sense, IIAs are problematic because:

- They pose a number of challenges to governments seeking to harness FDI to support sustainable development objectives.
- Various provisions in IIAs which seek to explicitly protect and promote social and environmental goals are not effective.
- Significant decisions by international investment tribunals do not appropriately balance investor rights with broader sustainable development objectives (chapter 8).

Collectively, the extent of these problems suggests the need to re-orient the international investment law regime towards addressing broader economic, environmental and social objectives.

Rethinking the International Investment Regime as a Form of Governance (chapter 9)

Instead of thinking about IIAs primarily as international treaties for protecting private property rights, they should be viewed as one part of a complex international governance system for managing the role of transnational capital in development.

Such a governance system requires:

(1) procedural principles to balance competing interests, which the authors identify as transparency, participation, reciprocity, accountability, and subsidiarity.
(2) Substantive priorities to orient the international investment regime towards broader sustainable development objectives, including reduction of poverty and economic inequality and protection of human dignity, the environment and the planet.

Applying these procedural principles and substantive priorities, the book identifies three sets of reforms which should be implemented concurrently:

1. Rebalancing investor rights and duties in IIAs (chapter 10)

This involves two aspects. First, returning international investment law norms to their original, and more limited, purpose of compensating foreign investors for wrongful expropriation and ensuring they are treated consistently with customary international law rules on the treatment of aliens. This could be done by:

- Tightening definitions of (1) an investment and (2) an investor who is eligible for protection.
- Narrowing and/or excluding key protections such as national treatment, fair and equitable treatment, indirect expropriation and MFN clauses.
- Ensuring that IIAs do not limit the scope of legitimate policy-making for governments by (1) removing restrictions on performance requirements and exchange controls and (2) creating effective policy carve-outs for priorities including protection of public health and the environment.
- Limiting the amount of damages and making them more consistent.

Second it means imposing obligations on investors to respect key national and international laws, including those that promote and protect sustainable development and human rights. One way of achieving this would be for IIAs to require state parties to adopt legislation to achieve these ends.

2. Rebalancing the dispute settlement process (chapter 11)

The current ISDS system is widely criticized on a number of grounds including that it (1) privileges foreign investors over all other stakeholders (2) marginalizes domestic courts and institutions (3) provides expansive interpretations of IIA obligations (4) generates uncertainty in

the law (5) lacks rule of law features, and (6) enlists private arbitrators to adjudicate public concerns and interests.

Responding to these concerns could involve, most ambitiously, eliminating ISDS altogether, which would be justified on a number of grounds. Short of that, such rebalancing requires a number of reforms including:

- Strengthening the current exhaustion of local remedies doctrine
- Strengthening transparency and third-party participation rules
- Regulating or prohibiting third-party funding
- Restoring state-to-state arbitration as the primary non-domestic dispute settlement forum for investment claims.

The current focus of reform efforts (e.g. by the European Union) is more narrow. It focuses on addressing rule-of-law deficits in the ISDS process. To tackle such rule-of-law deficits, reforms could include:

- Increasing review of ISDS decisions by creating an appellate body and/or establishing stronger domestic review mechanisms.
- Constructing a permanent arbitral court-style mechanism.
- Strengthening the independence and impartiality of adjudicators in other ways.

These latter reforms would not resolve more fundamental concerns regarding ISDS. But they could improve certain aspects of the mechanism.

3. Realigning international investment law towards 21st century priorities (chapter 12)

Many of the proposals set out in the first two sets of reforms aim to *reduce* the power of international investment law so it does not constrain action by states. But it is also recognised that states cannot always act alone. Certain aspects of foreign investment governance would best be addressed multilaterally; for instance tackling problems associated with the mobility of capital, using FDI to effectively address global issues like climate change, and addressing the fragmentation of international law.

Successful multilateral action on global priorities such as intellectual property, public health and taxation policies point to the feasibility and desirability of **a Framework Convention on Investment and Sustainable Development.**

This Framework Convention could establish broad principles for the regulation of foreign investors/ investment and could require participating governments to:

- coordinate policy on issues like climate change
- refrain from tax and subsidy competition to attract foreign investment
- hold transnational corporations accountable for harms in host countries
- conduct sustainability impact assessments before approving significant foreign investments in sensitive sectors (such as extractive industries, infrastructure, and essential services).

The Convention could also provide a mechanism for modifying the terms of all current IIAs in order to implement many of the first two sets of reforms set out above.

A Paradigm Shift in Debates About International Investment Law (Chapter 13)

The book concludes by looking at the bigger picture. It argues for the importance of changing the terms of the whole debate, rather than seeing each individual reform process separately. In order to achieve this, the book advocates three crucial steps:

(1) Making the kind of values and goals elaborated within the book central to policy debates throughout the international investment field.
(2) Changing the institutional actors who formulate, implement and enforce investment law.
(3) Facilitating a more consistent public engagement with the current international investment regime.

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