Introduction

Karl Sauvant and Federico Ortino are two of the most articulate voices on international investment law and policy matters. With their book, *Improving the International Investment Law and Policy Regime: Options for the Future*, Helsinki: Ministry for Foreign Affairs of Finland, 2013, Pp. 152. ISBN 978-952-281-217-9, they make another important contribution to the ongoing transnational discussion regarding the appropriate content and contours of international investment agreements (IIAs). They helpfully review the broad and complex legal terrain covered by IIAs, and they illuminate the increasing soul-searching being done among governments, civil society organizations, and the public. They rigorously dissect the procedural and political issues raised by investor-State dispute settlement mechanisms, situating those issues helpfully in the context of national governments’ regulatory preferences and constraints. The authors offer interesting ideas regarding the future of international investment law and policy, including the potential development of a ‘restatement’ of investment law and negotiation of a multilateral investment agreement.

Yet despite the authors’ prodigious experience and valuable insights, the book suffers from a weakness common to the analyses of many practitioners and commentators, namely a significant disregard for the fact that it is sovereign States, and only sovereign States, that determine the scope and contents of IIAs. The problem with ignoring this core reality is that it puts the authors in the position of analyzing a state of affairs as they wish it existed, rather than the one that actually exists; the obvious product of this flaw is that many of the authors’ policy prescriptions seem, at best, off point and, at worst, not credible.

The implications of having national governments in the driver’s seat of treaty design are often unattractive; the main problems flow from the fact that there are virtually as many sets of rules – written and unwritten – for negotiating agreements as there are states themselves. Economies at the authoritarian end of the governance continuum will frequently take decisive, dissent-free decisions to enter agreements, disregarding their institutional readiness to take on the legal obligations that those agreements contain. More pluralistic states, in contrast, often import into their treaties a range of domestic policy preferences less clearly related to the protection of foreign investment – such
as labor rights, consumer protection, and public health – that make the negotiation of agreements anything but decisive. In all cases, domestic politics is the fundamental driving force for the development of international rules governing foreign investment.

The following discussion lays out, in the form of assertions, various arguments that one might advance to challenge certain subsidiary assumptions that flow from the aforementioned major assumption. It is hoped that this analysis may open a vibrant discussion of the issues contained herein and that such a discussion benefits from both the authors’ deep knowledge of the subject matter, as well as the shortcomings present in the way they frame it.

**Argument No. 1: There Is No Such Thing as an International Investment Law and Policy ‘Regime’**

The most significant shortcoming in the authors’ analysis is the assumption that there is, in fact, an international investment law and policy ‘regime’. The term ‘regime’, of course, connotes a system, an enclosed set of norms, a framework, or an internally (if not effectively) regulated structure for a specified set of activities. The collection of more than 3,000 international agreements between sovereign states governing the treatment of foreign investment does not satisfy that definition. Even within a single economy over the period of a handful of years, the principles and policies driving investment treaty design may lack a single conceptual thread or purpose. There is a reason for this – sovereign states have to date not wanted a ‘regime’.

One could argue, of course, that the similarities among agreements across time and geography suggest the existence of a ‘regime’. Most agreements, for example, contain similar approaches to scope and coverage, substantive investment protections, and investor-State arbitration procedures. Yet in the case of international investment rules, the differences matter substantially more than the similarities. Whether or not they seem desirable, rational, or even internally inconsistent, the slight wording variations among treaties are in virtually all cases intentional. Moreover they are intentional in ways that reflect the objectives of the basic source of legitimacy available for these agreements, namely domestic policy preferences reflected in the decisions of legislators or executives. In other words, it is very much intended that the world’s IIAIs do not constitute a ‘regime’.

It would be nice if one could impute to the collection of IIAs the kinds of planning, coordination, and vision associated with the idea of a ‘regime’.