Zachary Douglas, Joost Pauwelyn and Jorge E. Viñuales (eds.)

*The Foundations of International Investment Law: Bringing Theory into Practice.*


The growth of investment treaty arbitration has led to rapid developments in investment treaty practice, and to the emergence of a ‘sectoral regime’ of international investment law with burgeoning practice and theoretical commentary. It has also led, of late, to a backlash against investment arbitration,¹ which has included withdrawals from or termination of relevant treaties, the adoption of new treaties with substantial changes precipitated by arbitral practice (and its discontents), and to significant debates about the nature of international investment law.

This book is about whether the growth in academic engagement with the subject of international investment law can in fact influence arbitral and treaty practice: the subtitle says so clearly, and so do the editors in their introduction. After setting out the many ‘conceptual lenses’ used in the literature to observe (and critique) international investment law, they highlight the ‘precious little purchase’ that these efforts have had ‘on the reasoning employed by arbitrators ... or on the practices of negotiators responsible for drafting treaty texts’ (p. 2). And that, of course, is not good. So, the editors ask, ‘what is to be done?’ (ibid).

The subtle irony of asking a question best known as the title of the English translation of Lenin’s iconic 1902 pamphlet is not lost on this reviewer—unless of course he is imagining things, which is also entirely possible.² In the briefest and most basic terms, in *What Is To Be Done?*, Lenin called for the formation of a political vanguard that would educate the workers on Marxist political ideas. This was because workers themselves, enmeshed as they were in the toils of daily life, and despite having to fight some economic battles with their employers, for example over wages or working conditions, would not spontaneously become political. They needed the help of someone with ‘overview’, of someone who understood all of society, not just their own little corner in it. Class political consciousness had to be brought to the workers from without.

In a way, this is what this book aspires to do: to find a way to educate arbitrators and States from without, to bring to them the insights of public international

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law, or even law in general, which they may otherwise fail to see, enmeshed as they are in their own little corner of investment law. The editors themselves seem to confirm that this is the goal of the book when they say in their introduction that ‘it is time for theoreticians to reflect upon their modus operandi for the presentation of their ideas’ (p. 2).

How is it then that (these) theoreticians will change the world (of international investment law)? Pauwelyn argues for ‘small change’ over top-down reform in his contribution (‘Rational Design or Accidental Evolution? The Emergence of International Investment Law’), which opens the volume. This is because international investment law has developed through accretion, through the decentralized interactions between a myriad of components (such as States, arbitrators, investors, treaties, academics, and NGOs), rather than being the product of some deliberate design (p. 43). For such a regime, centralised reform and the ‘battle for the analogy’ may have little to offer. The insight is significant. However, the power disparities between the actors referred to above are evident, while the ‘public’ as an actor is conspicuous in its absence, despite it assuming an increasingly important role in the context of investment agreement negotiations, such as the investment chapters of the CETA and the TTIP, among others. There is no engagement with the fact that decentralised interactions between unequal components will necessarily produce an unequal regime. And so the question remains: how is this to be dealt with? Are we to trust the ‘invisible hand’ to somehow produce equity?

Paparinskis on the other hand does take up the battle for the analogy in his contribution to the volume, and quite explicitly so (‘Analogies and Other Regimes of International Law’). He treats the regime of international investment law as nothing particularly special but as a mere expression of the international legal order over a specific subject matter. Isn’t, after all, customary international law developed through relatively random accretion rather than some sort of ‘intelligent design’? In so doing, Paparinskis demonstrates how appropriate analogies (and thus insights) may be drawn to (from) international human rights law, the law of treaties regarding third parties, and the law of diplomatic protection, and

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3 Small changes can indeed have (disproportionately) positive (or at least significant) effects in all walks of life: for an example of the argument with respect to city planning, see Nabeel Hamdi, Small Change: About the Art of Practice and the Limits of Planning in Cities (Earthscan 2004).

4 For the expression (and idea that the development of international law is a constant battle for control of the analogy) see Vaughan Lowe, ‘Can the European Community Bind the Member States on Questions of Customary International Law?’ in Martti Koskenniemi (ed), International Law Aspects of the European Union (Martinus Nijhoff 1998) 149, 166.