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Andrea K. Bjorklund & August Reinisch (eds), *International Investment Law and Soft Law*,

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The development of international investment law over the past two decades has been frenetic. Such development has provided opportunities and insights into the functioning of specialised regimes in international law. As international investment law has expanded in scope, arbitrators have responded to the increasing reach and application of bilateral and regional investment treaties with innovative and, often, nuanced ways to reconcile numerous treaty and customary obligations within single disputes. The system for settling international investment disputes has also led to confusion, characterised by strong decentralisation and a lack of a permanent oversight body comparable to the WTO's Appellate Body or the Court of Justice of the European Union. It is in response to these challenges that the authors of *International Investment Law and Soft Law* have sought to examine the feasibility of using soft law instruments to help clarify and guide the development of international investment law, hoping to make progress where more formal attempts at multilateral agreement have failed.

International Investment Law and Soft Law has to be understood within the context of the work of the International Law Association Study Group on the role of soft law instruments in international investment law. Andrea Bjorklund and August Reinisch introduce the book by explaining its place within the ILA's work in this field. In essence, it is a feasibility study: what scope is there for using a soft law instrument such as an ILA document (such as Draft Articles or commentary) to attempt to codify areas of international investment law? The challenge of such a task is not concealed and the contributors engage with the difficulties from their own fields (many of which are outside of international investment law).

Authors' contributions to *International Investment Law and Soft Law* fall into four broad categories: conceptual difficulties facing the use of soft law instruments generally and in international investment law specifically; insights that might be drawn from exercises in soft codification; analyses of prior attempts to codify international investment law; and potential areas of international investment law that may be amenable to codification.

The first three substantive chapters examine the conceptual issues involved with soft law and their relationship to international investment law. The overview given of the literature on soft law in international law by Melaku Geboye Desta is particularly clear and incisive. Moshe Hirsch's chapter on the sources of international investment law is similarly lucid using the traditional division from Art 38(1) Statute of the ICJ and linking each category to their relevance in investment law. Bjorklund evaluates the effectiveness of different types of soft law instrument, from draft treaties and model laws to resolutions of International Organizations or respected treatises or commentaries. As international investment law comprises of a wide range of treaties with similar though different rights and obligations (including differing dispute settlement mechanisms), Bjorklund accepts that there is unlikely to be a single soft law instrument that will be most effective in all circumstances. Instead of attempting to offer a generalised prescription, Bjorklund reframes the discussion to focus on the identity of the 'user' of the soft law instrument and the capabilities and status of the drafters. It is a cautious approach that suggests a potentially broader and less prescriptive instrument from the ILA such as a commentary or treatise not only aimed at States but at all actors within the international investment system.

A common, though understandable, problem through these first chapters relates to a lack of any set definition of soft law for the purposes of the book. Clearly, a definition is hard to nail down by a single scholar, let alone a group. However, the lack of at least a general framework of how soft law is to be understood leads to many of the chapters starting with a general discussion on the nature and issues involved with soft law. At times this feels like repetition, though in fairness each contributor has a slightly different perspective. The frustration lies with the reader wanting to have more space dedicated to the insightful work later in each chapter (of which there is much) and less of the more introductory passages at the outset.

The next section of the book examines the potential insights to be drawn from three separate areas of international regulation: international environmental law, transnational commercial law, and World Trade Organization ('WTO') law. Each of these studies is careful to flag the dangers of comparing such diverse systems and in Kate Miles' chapter on international environmental she concludes by cautioning on the potential inapplicability of the international environmental approach to international investment law. Perhaps surprisingly, given its fundamentally different sources, Giuditta Cordero-Moss sees a greater likelihood of applying the lessons learnt from transnational commercial law to international investment law, albeit in resolving disputes rather than a possible progressive development aspect of a codification project. The WTO is the focus of Desta's chapter, an especially well-researched and interesting study. The importance of standards in the WTO system via the Technical Barriers to Trade ('TBT') and Sanitary and Phytosanitary ('SPS') Agreements give plenty of material to examine though, as Desta points out, the processes by which the WTO legal texts incorporate international standards do not exist in a comparable form in international investment law. Rather than concluding the impracticability of soft law in investment law, Desta instead highlights possible methods whereby such standards might be included (though the provisions do not yet exist). Each of these studies offers careful and thoughtful insights into what lessons might be taken from a disparate range of international regimes.

The focus of the book shifts back onto international investment law as Christian Tietje and Emily Sipiorski outline the development of investment protection through treaties. As an overview of the evolution of investment protection it is interesting, though it is the lessons drawn from the process that is of particularly relevance in the context of the book: accepting the largely piecemeal and bilateral nature of international investment protection, Tietje and Sipiorski maintain that there exists considerable common ground that can offer a starting point for attempts to codify international investment law via a soft law instrument.

The following two chapters examine the potential viability of codifying substantive elements of international investment law: the Most Favoured Nation ('MFN') principle and rules on expropriation. Andreas Ziegler's chapter on MFN clauses gives a clear account of their ubiquity in international investment agreements though suggests that while the inclusion of such a provision is widely accepted, its wording and scope (in particular with relation to jurisdiction or procedure) is still highly contentious. Reinisch's chapter on the rules covering expropriation is meticulous in its detail, scrutinising the content of the rules on expropriation and their subsequent interpretation. Identifying a 'core' of common principles, the variance in interpretation is sufficient that caution is given over the possibility of any easy route to codification.

The editors conclude the book by accepting that a form of soft codification is already taking place through international decisions, with all the problems that such a process entails. A soft law instrument (presumably to be developed by the ILA) is offered as a potential guide to all actors involved in international investment protection, and at all stages (from negotiations to interpretation). The care the authors have taken throughout the book not to make overly bold claims or to push their suggested prescriptions. Instead, by routing their analysis in a sober view of what may be viable leaves one hopeful that such an instrument of soft codification could be of profound help. It is exactly because of the authors' caution and care in their analysis, that an instrument that could contribute to the consistency of international investment law seems feasible.