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María José Luque Macías, *Re-Politicising International Investment Law in Latin America through the Duty to Regulate Paradigm*. Cham: Springer. xv + 285 pp. Hardcover. ISBN: 978-3-030-73271-4.

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Like all fields of international law, investment law is no exception in presenting aspects that appear to be of political rather than legal nature. Even though investment arbitral awards appear *prima facie* to be solidly and fundamentally based on the mere interpretation of the applicable law (be it bilateral investment treaties (BITs), investment chapters in free trade agreements (FTAs), other rules of public international law or the occasional provision of the host state's domestic law), the foundations of the said applicable law are to be found in matters the nature of which is much more political than legal. Indeed, the very origins of international investment law are to be found in the quest for de-politicisation that led to the establishment of the ICSID and the emergence of investment arbitration as the most prominent method for the settlement of disputes between investors and host states.[1]

De-politicisation, intended as the process of removing disputes between investors and host states from the influence of political activities, was indeed seen as the most appropriate method to firmly place the said disputes in the realm of the rule of law:[2] and coming from a pre-ICSID era in which disputes between investors and host states were to be handled by means of diplomatic protection – thus leaving the matter at the whim of investors home states' and their political interests in terms of relationships with host states.

To consider an actual de-politicization of investment disputes as a truly achievable goal, however, appears rather utopistic: as underscored in the scholarship, 'there often seems to be a mismatch between the promise of depoliticisation through investor-State arbitration, and the actual practice that brings different political perspectives back into the picture.'[3] Even though the investment arbitral case-law clearly shows the reliance (and perhaps the over-reliance) of tribunals on the applicable law,[4] it is hardly questionable that arbitrators are routinely faced with considerations of matters of public interest (such as public health, environmental

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[1] Ursula Kriebaum, "Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes", 33(1) ICSID Review - Foreign Investment Law Journal 14-28 (2018), at 16.

[2] Aron Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States", Collected Courses of the Hague Academy of International Law, vol. 136 (1972), at 343.

[3] Martins Paparinskis, 'The Limits of Depoliticisation in Contemporary Investor State Arbitration', in James Crawford, Sarah Nouwen (eds.), *Select Proceedings of the European Society of International Law*, Volume 3, 2010, 271-282, at 273.

[4] See generally Fabio Bortolotti, Pierre Mayer (eds.), *The Application of Substantive Law by International Arbitrators*, ICC Institute of Business Law, 2013; Niki Nozari, *Applicable Law in International Arbitration: the Experience of ICSID and Iran-United States Claims Tribunal*, Peter Lang, 2018.

protection, or labour standards)[5] that are of paramount political significance and, especially when older generation BITs are applicable,[6] have little to do with the law. Moreover, states do not passively accept arbitrators interpretations of the applicable law, and often they care to seek reinterpretations of the law and annulments of inconvenient awards.[7] Finally, one should consider the fact that investors are not necessarily private corporations: state-owned companies have long been active in investing abroad, and to believe that political considerations remain out of the disputes in which these companies may find themselves with host states would be naïve at best.

Indeed, María José Luque Macías' *Re-Politicising International Investment Law in Latin America through the Duty to Regulate Paradigm* is based on the premise that excluding politics from the realm of investment disputes would be neither feasible nor desirable. As its title clearly explains, the book focuses on investment relationships in a specific region, but nonetheless offers insights that would be applicable, *mutatis mutandis*, in any part of the world characterised by the presence of a majority of capital-importing states and where foreign investors tend to come from Western countries. The assumption behind the study is that international investment law, and its treaty regime in particular, has negatively affected the possibility for Latin American states to protect human rights by means of domestic law.[8] While investment arbitral tribunals have generally attempted at excluding (at least in theory, as stated beforehand) political considerations from their interpretive efforts, Latin American countries have in fact traditionally pushed for the politicisation of investment disputes.[9] The book,

[5] See *ex multis* Areta Jez, "Environmental Policy-Making and Tribunal Decision-Making : Assessing the Scope of Regulatory Power in International Investment Arbitration", 40(4) University of Pennsylvania Journal of International Law 989-1016 (2019); Tamara L. Slater, "Investor-State Arbitration and Domestic Environmental Protection", 14(1) Washington University Global Studies Review 131-154 (2015); Valentina Vadi, "The environmental health spillovers of foreign direct investment in international investment arbitration", in Stefania Negri (ed.), *Environmental Health in International and EU Law*, Routledge, 2020, at 43; Valentina Cagnin, "Investor-State Dispute Settlement (ISDS) from a Labour Law Perspective", 8(3) European Labour Law Journal 217-231 (2017); International Labour Organization, "Assessment of Labour Provisions in Trade and Investment Arrangements" (Report, International Labour Organization, 13 July 2016).

[6] John Beechey, Antony Crockett, "New Generation of Bilateral Investment Treaties: Consensus or Divergence?", in Arthur W. Rovine, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2008)*, Brill, 2009, at 5; Catharine Titi, "International Investment Law and the European Union: Towards a New Generation of International Investment Agreements", 26(3) European Journal of International Law 639-6631 (2015); Barton Legum, "Lessons learned from the NAFTA: the New Generation of U. S. Investment Treaty Arbitrations Provisions", 19(2) ICSID Review - Foreign Investment Law Journal 344-358 (2004).

[7] Dmitri Evseev, "Living with Indeterminacy: a Practical Approach to ICSID Annulment Reasoning", in Ian A. Laird, Todd J. Weiler, *Investment Treaty Arbitration and International Law - Volume 2*, Juris, 2009, at 177; Ieva Kalnina, Domenico Di Pietro, "The Scope of ICSID Review: Remarks on Selected problematic Issues of ICSID Decisions", in Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford University Press (2009), at 221; Gaëtan Verhoosel, "Annulment and Enforcement Review of Treaty Awards: to ICSID or not to ICSID", in Albert Jan van den Berg (ed.), *50 Years of the New York Convention (ICCA Congress Series)*, Kluwer Law International, 2009, at 285.

[8] Maria José Luque Macías, *Re-Politicising International Investment Law in Latin America through the Duty to Regulate Paradigm*, Springer, 2021, at 1-11. See also Stéphanie Gervais, "Investment Treaties and Human Rights: Reflections from Mining in Latin America, in A. Andreassen Bard, Khanh Vinh Vo, *Duties Across Borders - Advancing Human Rights in Transnational Business*, Intersentia, 2016, at 253.

[9] Maria José Luque Macías, above n 8 at 23-71.

however, strongly questions whether such push has been effective, or the efforts may have gone in the wrong direction.[10] Indeed, most of such efforts have been aimed at challenging the application of investment treaties by means of the right to regulate – namely, the right of the state to act in the public interest.[11] María José Luque Macías, instead, maintains that the paradigm of the right to regulate is inadequate from the perspective of the protection of human rights, and argues that the most appropriate path passes through a re-politicization of investment law that puts human rights at the centre of the discourse.

The central thesis of the book is that regulation is not to be seen as a right but as an obligation, in accordance with the structure of international human rights law. The duty to regulate is a topic discussed at large in the book, with particular reference to the right to water and the rights to land of indigenous people. It is particularly interesting how Maria José Luque Macías analyzes the re-politicization of international investment law procedure carried out by Latin American countries through a specific and precise definition of the duty to regulate, and the reactions of the arbitral tribunals to these matters.[12]

The fundamental contribution of the book, however, is not in its analytical part but in its propositional one. In an era in which the revision and reform of BITs, through their denunciation and re-drafting, characterizes the investment activity of those developing countries that are most active and aware of their role as actors in international investment matters, the book recommends anchoring the paradigm of the duty to regulate in treaties and other rules of international investment law.[13] The consequence of this anchoring would be revolutionary, as it would finally lead arbitral tribunals to really expand their jurisdiction *ratione materiae* towards that public international law that, although it forms part of the applicable law in investment disputes, is often overlooked on the basis of the fact that the BIT is the chief source of law regulating the relationship between an investor and the host state: and this expansion would necessarily cover human rights law not because it is "morally" appropriate, but because it is actually part of the applicable law.

Although the theme of the book is quite specific, and the approach adopted by the author is particularly technical, *Re-Politicising International Investment Law in Latin America through the Duty to Regulate Paradigm* is a very pleasant reading, which makes the volume appropriate for academics as well as practitioners (to whom the book is not too covertly addressed); moreover, parts of the book would not be out of place even in the reading lists of postgraduate courses in international investment law precisely because of its accessible, extremely detailed and particularly flowing style. The debate on the relevance of human rights in investment law is as lively as ever, and Maria José Luque Macías contributes to the exchange with a volume from which to draw lessons on a global level.

[10] Ibid. at 59.
[11] Ibid. at 83-98. See also James Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, 2012, at 624.
[12] See in particular Maria José Luque Macías, above n 8 at 171-203.
[13] Ibid., Chapter 5.