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INTERNATIONAL INVESTMENT LAW – THE SOURCES OF
***RIGHTS AND OBLIGATIONS*, LEIDEN, BOSTON: MARTINUS**
NIJHOFF, 2012

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**TARSICIO GAZZINI AND ERIC DE BRABANDERE, EDS,
*INTERNATIONAL INVESTMENT LAW – THE SOURCES OF
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*Julien Fouret**

This monograph¹ is what can be called a “choir” textbook: many singers (or authors in this case) attempting to draft a homogeneous and logical legal publication without false notes or conflicting views. This exercise is always a little perilous as the different authors might not necessarily have the same views on some overlapping issues in their various chapters. Furthermore, both academics and practitioners have participated in the drafting but with a vast majority of the former.

This rather short publication – 337 pages – does not intend to cover international investment law in general but rather, as indicated in the second part of the title, only the sources of the rights and obligations of this ever evolving legal discipline. With nine chapters and a conclusion, this book aims at exhausting the rather circumscribed issue of the sources. The book proves to be a very useful resource as it analyzes very specific sources by tackling the most recent issues and controversies that have arisen in recent awards and published articles. It is interesting to note however that the chapters do not follow the classical order of article 38 of the *Statute of the International Court of Justice*² but starts with “International Customary Investment Law”.

This first chapter, authored by Jean d’Aspremont, challenges the relevance and usefulness of customary international law in the international investment law sphere which, according to the author, should be best served by “multilateralization through bilateral investment treaty (BIT)”. However, without engaging in a theoretical counter-argument on these issues, the author might be correct, particularly in the blurry interpretations given by some arbitral tribunals, when it asserts that “customary international law is bound to remain a galactic creation deprived of authority and beset by indeterminacy”³.

The second chapter, drafted by Erik Denters, deals with preferential trade and investment agreements (PTIA), a source often left out by authors. It is the source that links trade and investment, such as under the auspices of the World Trade Organization (“WTO”) where the liberalization of both sectors is the main objective.

* Julien Fouret is a member of the Paris Bar. He is Counsel in the International Arbitration Group of Castaldi Mourre & Partners (Paris) and is a lecturer in international investment law at the Université Panthéon-Assas and Paris Est-Créteil as well as a visiting lecturer at the Université de Sherbrooke.

¹ Tarsicio Gazzini and Eric De Brabandere, eds, *International Investment Law - The Sources of Rights and Obligations*, (Leiden, Boston: Martinus Nijhoff, 2012) [Gazzini and De Brabandère].

² *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7.

³ Jean d’Aspremont, “International Customary Investment Law: Story of Paradox” in Gazzini and De Brabandere, *supra* note 1, at 47.

The authors' point of view is that PTIA are the solution for the fragmented BIT legal environment as they cover broader economic activities and ensure consistency and predictability in the applicable legal norms in more countries as these agreements are more often than not multilateral agreements.

The third chapter deals with only one source, one treaty, the *Energy Charter Treaty*⁴ (*ECT*) and was written by Matthew Happold and Thomas Roe. It is a classical analysis, theme by theme (jurisdiction, applicable law, substantive law, procedure etc.) of the *ECT* and even if the *ECT* is indeed a very important source of international investment law, one cannot but wonder why this treaty was chosen over other ones and not alongside others (such as *North American Free Trade Agreement between the government of Canada, the government of Mexico and the government of the United States*⁵).

The fourth chapter deals with the most prominent source of international investment law, namely BITs. This chapter written by Tarcisio Gazzini, one of the editors of the book, aims to provide the reader with a general overview of these conventional instruments. And that is exactly what this chapter, with its ups and downs, offers: a good typology of the different provisions found in these BITs and the interpretation provided by many arbitral tribunals. However, such an approach does not allow the reader to grasp the many, though sometimes minor differences in drafting that are included in these instruments which sometimes have important consequences.

The fifth chapter, drafted by Stephan W. Schill, is the lengthiest of the monograph (48 pages), and addresses general principles of law and international investment law. The majority of the chapter is devoted to analyzing not a source but a norm of international law, one of its principles, namely fair and equitable treatment. The author attempts, quite successfully, to offer some substance to this very broad and vague standard through general principles. The other idea of this chapter is to explain the coexistence and/or overlapping of some of these principles in international investment law with domestic public law concepts (property rights for example) and the interaction between the two legal systems.

The sixth chapter, drafted by Makane Moïse Mbengue, addresses national legislation and unilateral States acts, and approaches this issue from the angle of public and general international law in order to understand the standing of these unilateral undertakings by a State.

The seventh chapter, authored by Patrick Dumberry, entitled "International Investment Contracts" deals with the traditional State contracts issue. These instruments, which create obligations only for the two parties signing them, have, according to the author, been slowly replaced by BITs as the source of the essential

⁴ *Energy Charter Treaty*, 17 december 1997, 2080 UNTS 95.

⁵ *North American Free Trade Agreement between the government of Canada, the government of Mexico and the government of the United States*, 17 december 1992, CAN TS 1994 No 2, 32 ILM 289 (entered into force 1 january 1994) [*NAFTA*].

protection for private individuals. Nevertheless, it is true that, in the many circumstances detailed in the Chapter, these contracts still have a role to play, when no BITs exist or when the BIT contains an umbrella clause for example. It is thus a logical source of rights and obligations.

The eighth chapter tackles, alongside the fourth chapter, one of the most important sources of international investment law: arbitral decisions. This chapter, authored by one of the editors Eric de Brabandere, could have been entitled more broadly (“International Case Law” or “International Judicial Decisions”) as it is not only arbitral decisions that are the source of rights and obligations in international investment law. This chapter thus attempts, with very thorough analyses, to understand how these decisions have, or have not, become a source of international investment law without a binding rule of precedents and without formally being a source. However, their impact on the development of international investment law and the reliance by tribunals on previously rendered decisions have made it, as the author labelled it, a *de facto* source, even though a subsidiary, of international investment law.

The ninth and final chapter authored by Tony Cole discusses the role of non-binding documents and literature, a much overlooked issue in academic writing. However, tribunals use this source constantly and it has a central role when interpreting unsettled notions in international investment law. The classical “article 38 sources” in public international law should thus be revisited in the light of the development in international investment law. The importance of this source has increased over the years, even before pure public international law tribunals such as the International Court of Justice (ICJ), and this has to be acknowledged.

The conclusion by Christian Tams offers a concise and precise overview of the various issues raised in the monograph and of the specificities of the sources of international investment law, particularly regarding the relevance of certain sources in this context.

This book illustrates the continuing evolution of international investment law, both in terms of substantive norms (and their content) but also in terms of sources and their importance. A continuing “moving target” in the words of C. Tams to which this book offers “no more than a snapshot”⁶. But a necessary snapshot considering the very few writings on this issue. This book will serve as a benchmark which could be revisited with a comparative new snapshot in a few years’ time.

⁶ Christian Tams, “Conclusion: The Sources of International Investment Law: Concluding Thoughts” in Gazzini and De Brabandère, *supra* note 1 at 327.