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### Reconceptualizing international investment law from the Global South" by Fabio Morosini and Michelle Ratton Sanchez Badin

Han-wei LIU

Singapore Management University, hanweiliu@smu.edu.sg

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#### Citation

LIU, Han-wei. Reconceptualizing international investment law from the Global South" by Fabio Morosini and Michelle Ratton Sanchez Badin. (2018). *Chinese (Taiwan) Yearbook of International Law and Affairs*. 36, (1), 194-198.

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**Reconceptualizing International Investment Law  
from the Global South**  
**Edited by Fabio Morosini & Michelle Rattón**  
**Sanchez Badin, Cambridge University Press (2018),  
pp 305**

*Han-Wei Liu\**

This volume, edited by Fabio Morosini and Michelle Rattón Sanchez Badin, the leading legal academics from Brazil, features nine chapters written by highly regarded scholars in the area of international economic law. This book distinguishes itself from the existing scholarship in several important ways. First, it makes a timely contribution to the policy debates on the future of the international investment agreements (IIAs) and the investor-state dispute settlement (ISDS) from a different angle. Since the first bilateral investment treaty (BIT) was concluded in 1959 between Germany and Pakistan,<sup>1</sup> as of this writing, there have been 2,358 BITs and 310 treaties with investment protection in force.<sup>2</sup> The explosive growth of these BITs over the past decades reflects the conventional wisdom that these arrangements can attract flows of foreign direct investment by stabilizing the investment environment and creating an investor-friendly dispute resolution mechanism. Yet, mixed evidence challenges such a working assumption.<sup>3</sup> Setting aside the debates on the correlation between economic development and the BITs, the shirking policy space and the eroded right to regulate is an immediate trade-off for a host State, as shown in various cases like the controversies surrounding Australia's Tobacco

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\* Lecturer, Monash University. The author can be reached via [hanwei.liu@monash.edu](mailto:hanwei.liu@monash.edu).

1 Before Germany-Pakistan BIT, there were certain "Friendship, Commerce, and Navigation" (FCN) treaties also containing investment-related provisions. For a history of the FCN, see, e.g., Kenneth J. Vandervelde, *The First Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties* (2017).

2 See UN Conference on Trade & Development, Investment Policy Hub, <<http://investmentpolicyhub.unctad.org/>> (last visited May 1, 2019).

3 See, e.g., Jason Webb Yackee, "Bilateral Investment Treaties, Credit Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?", 42 *L. & Soc'y Rev.* 805 (2008).

Packaging Act. The design of the BITS and ISDS, in their current forms, is far from satisfactory. Reform proposals have been tabled and debated extensively among academics, civil societies, practitioners, and policymakers in the context of mega-regionalism.

The Trans-Pacific Partnership (TPP), once led by the U.S., which has now been rebranded as the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) following President Trump's withdrawal, for instance, has narrowed the scope of the ISDS to secure the host State's right to regulate in the public interest and to prevent unwarranted claims.<sup>4</sup> Likewise, the European Union (EU) has committed to reshape the ISDS in a way consistent with "democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings"<sup>5</sup> and introduced the new "Investment Court System" in recent trade pacts such as the Comprehensive Economic and Trade Agreement (CETA).<sup>6</sup> As promising as these new developments are, however, much of the discourse on the legitimacy crisis and the reconfiguration of the IIAs regime seems to focus on the developed world. One may wonder, then, what is the view of the rest of the world in relation to the reforms of the IIAs: to what extent are they content with the existing regime? Are they also embarking on similar reform processes? If so, in what direction? Would they be oriented towards either the model championed by the U.S. or the EU? Alternatively, are they exploring a different path that serves their own interests?

As Morosini and Sanchez Badin aptly remark in the opening chapter, these mega-regional pacts represent the "latest formulation of neo-liberal regulation, designed to bypass developing country resistance within the World Trade Organization."<sup>7</sup> While the U.S. and EU are reshaping the international economic order, the questions posed above are of significant importance from a normative perspective: the way in which developing countries engage in this

4 New Zealand Foreign Affairs & Trade, CPTPP vs. TPP, <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/tpp-and-cptpp-the-differences-explained/>> (last visited May 1, 2019).

5 European Parliament, TTIP Negotiations on Investment Protection: Investor-State Dispute Settlement (ISDS), <[http://www.europarl.europa.eu/legislative-train/theme-reasonable-and-balanced-trade-agreement-with-the-united-states/file-ttip-investment-protection-investor-state-dispute-settlement-\(isds\)](http://www.europarl.europa.eu/legislative-train/theme-reasonable-and-balanced-trade-agreement-with-the-united-states/file-ttip-investment-protection-investor-state-dispute-settlement-(isds))> (last visited May 1, 2019).

6 European Comm'n, CETA Explained, <[http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/index\\_en.htm](http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/index_en.htm)> (last visited May 1, 2019).

7 Fabio Morosini & Michelle Rattón Sanchez Badin, "Reconceptualizing International Investment Law from the Global South", in *Reconceptualizing International Investment Law from the Global South* 1, 13 (Fabio Morosini & Michelle Rattón Sanchez Badin eds., 2017) [hereinafter *Reconceptualizing International Investment Law*].

dynamic process determines the contour of the IIAs for the next generation. In fact, many countries—including those from the developing world—have begun to review the existing arrangements or even implemented the reforms of the IIA regime since the UNCTAD in 2012 launched the Investment Policy Framework for Sustainable Development and later in 2015 the Roadmap for IIA Reform. Although there is, indeed, a growing body of literature related to such reforms, there has been little research offering a systemic account by focusing on the role of selected countries from the Global South.

This point segues to another unique feature of this book. In reference to the Global South, this edited volume addresses those emerging economies not only in Africa, Asia, and Latin America, but also in Australia, a developed country that barely fits into “the same category as a Southern developing country.”<sup>8</sup> Despite this seemingly anomaly, Australia features certain interesting issues when it comes to the North-South and South-South investment. For years, Australia has been a net recipient country, attracting a substantial amount of foreign investment. Such inbound investment, however, comes from both developed and developing worlds. Five Asian emerging economies—Hong Kong, China, Singapore, South Korea, and Malaysia—have established themselves among the top 20 inward investors. In particular, Hong Kong and China have become Australia's fifth and ninth largest investors.<sup>9</sup> The Australian approach to the IIAs reforms, as detailed in Chapter 4, presents a vantage point from which to observe the underlying dynamics for this medium-sized economy with a relatively small population that traditionally follows the lead of its West allies to strategically integrate into the Asia-Pacific region that it maintains a closer tie, geographically and economically.

Besides the addition of Australia to this volume, the depth and the breath of the selected case studies is yet another, more profound contribution. Built upon the theoretical framework laid down in opening chapter by Morosini and Sanchez Badin, Bath's chapter highlights China's crucial role amid the IIAs reforms in the making. China manages both inward and outward foreign investment in a rather sophisticated manner. In some contexts, it maintains a certain number of past-generation BITs. In others, it engages its trading partners by negotiating the investment policy as part of the overall economic strategy. Still others reveal a certain flexibility to accommodate the concerns and interests of its counterparties. Interestingly though, China appears satisfied with the

8 Vivienne Bath, “Australia and the Asia-Pacific: The Regulation of Investment Flows into Australia and the Role of Free Trade Agreements”, in *Reconceptualizing International Investment Law*, *supra* note 7, at 146.

9 Dep't of Foreign Affairs & Trade (Austl.), Statistics on Who Invests in Australia, <<https://dfat.gov.au/trade/resources/investment-statistics/Pages/statistics-on-who-invests-in-australia.aspx>> (last visited May 1, 2019).

current IIA regime, and its approach does not seem to be similar with the reforms taken by other regions of the Global South.

According to Nedumpara, for instance, the increasing number of investment disputes after the cancellation of the telecom licenses by the Supreme Court in 2012 has prompted the Indian government to revisit its BITS.<sup>10</sup> In its 2015 Model BIT, India not only tightens the definition of investment and introduces various exceptions to the substantive obligations in the name of public policy but also includes the exhaustion of local remedies for up to five years.<sup>11</sup> As Forere explains, South Africa has taken a similar yet more radical move by introducing the State-to-State, rather than the investor-State international arbitration that is subject to exhaustion of local remedies.<sup>12</sup> The most innovative institutional (re)design, however, is perhaps from Brazil, which focuses more on risk mitigation and dispute prevention, rather than resolution.<sup>13</sup> To this end, as Morosini and Sanchez Badin detailed, the Brazilian government introduced certain elements, such as constant inter-governmental cooperation, mediation by diplomatic action, deference by domestic legislation, and better balanced obligations between foreign and domestic investors.<sup>14</sup> In contrast to the above-mentioned Global South countries, Chile has taken a more modest position, as Rodrigo Polanco Lazo suggests. By and large, the Chilean government follows a model of trade and investment agreement influenced by the treaties previously signed with Northern developed countries, and conceivably, the CPTPP would be a key factor that implicates its trade and investment policies.

The last two chapters by Lang and Perrone as well as Trubek serve as a nice ending episode by engaging the debates with other contributors in a broader context. Reflecting upon the opportunity for the Global South to reshape the IIAS, Lang and Perrone rested their analysis on the role of China, the standard of investment protection, and dispute settlement and institutional design amid the trend of mega-regionalism and cautioned that such window can be

10 James J. Nedumpara, "India's Trade and Investment Agreements Striking a Balance between Investor Protection Rights and Development Concerns", in *Reconceptualizing International Investment Law*, *supra* note 7, at 188, 190.

11 *Id.* at 210.

12 Malebakeng Agnes Forere, "The New South African Protection of Investment Act Striking a Balance between Attraction of FDI and Redressing the Apartheid Legacies", in *Reconceptualizing International Investment Law*, *supra* note 7, at 251, 280-81.

13 Michelle Ratton Sanchez Badin & Fabio Morosini, "Navigating between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs)", in *Reconceptualizing International Investment Law*, *supra* note 7, at 218, 223.

14 *Id.* at 224.

“rapidly closing.”<sup>15</sup> Likely, Trubek sketched out the historical trajectory of the IIAs and explained the underpinnings that drove the Global South to reconsider the IIAs over the past few decades. As Trubek suggests, it is crucial to think beyond the technical legal issues while engaging the debates on the BITs, as the approaches taken by these emerging countries reflect their different development strategies and therefore their perceptions of foreign investment.<sup>16</sup> Looking at the uncertainty of the CPTPP and the Transatlantic Trade and Investment Partnership (TTIP) Agreement due to political dynamics, Trubek pointed to the Regional Comprehensive Economic Partnership (RCEP) as one crucial forum for the construction of international investment law.<sup>17</sup>

Overall, this book demonstrates great cohesiveness. The chapters knit together so well that each contributor engages extensively with one another’s arguments. The result is that this book appears to take the shape of a debate, rather than a collection of isolated essays. Such cohesiveness throughout all chapters also allows a variety of interrelated themes to emerge from the edited volume as a whole. This book makes an excellent contribution to our understanding of the ever-evolving IIAs system and some modest, well thought out proposals for future directions. It proves itself as an invaluable tool for those who are concerned with the emerging contour of international investment laws.

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15 Andrew Lang & Nicolás M. Perrone, “Experimenting with International Investment Law Initiatives from the Global South”, in *Reconceptualizing International Investment Law*, *supra* note 7, at 284.

16 David M. Trubek, “Foreign Investment, Development Strategies, and New Era in International Economic Law: An Afterword”, in *Reconceptualizing International Investment Law*, *supra* note 7, at 293, 293-95.

17 *Id.* at 297.