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BOOK REVIEW: *HANDBOOK OF INTERNATIONAL  
INVESTMENT LAW AND POLICY*

HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY (Julien  
Chaisse, Leïla Choukroune & Sufian Jusoh eds., 2021)

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The *Handbook of International Investment Law and Policy* (the “*Handbook*”), co-edited by Julien Chaisse, Leïla Choukroune and Sufian Jusoh, is intended as a comprehensive introduction to all facets of international investment law and policy, with emphasis on Global South related issues and developments. This is evident from the structure and content of the *Handbook*.

The *Handbook* contains one hundred and twenty-four (124) chapters, which address an array of issues. Broadly, its content can be classified under the following categories:

- (i) Fundamental Concepts of International Investment Law: The first category includes chapters that familiarize the audience with the vocabulary of international investment law. These include discussions on essential concepts such as the meaning of “investor” and “investment”, and the interpretation of common treaty standards (such as Fair and Equitable Treatment and National Treatment Obligation).
- (ii) Emerging Issues: The second category includes chapters that build upon a foundational understanding of international investment law and delve into issues of relatively recent origin. These include discussions on issues such as counterclaims by host states, human rights and environmental issues in investment law, and protection of cultural heritage.
- (iii) Investor-State Arbitration, Mediation and Conciliation: The third category of chapters steers the discussion towards the procedural framework for enforcement of substantive treaty obligations. While most chapters focus on investor-state arbitration (for instance, Arbitral Procedure: Case Management and Selecting the Place of Arbitration), there is ample discussion on issues relating to mediation and conciliation (for instance, Past and Future of Mediation for Investment Disputes: The Case for the Asia-Pacific Regional Mediation Organization (ARMO)).
- (iv) Issues of Regional Significance: Consistent with its objective of focusing on the Global South, the fourth category includes chapters that discuss issues of regional significance. While the

- primary emphasis remains on Asia (for instance, China's changing attitude towards ISDS and mapping Bangladesh's ISDS regime), there are also discussions on the evolution of international investment agreements in Africa and intra-Latin-America investor-state dispute settlement.
- (v) Intersection of International Investment Law with Other Disciplines: The fifth category includes chapters that refuse to view issues of international investment law as isolated silos. These include discussions on investment law concepts that intersect with taxation law, intellectual property law, and competition law, among other disciplines.
  - (vi) Policy Issues Relating to International Investment Law: The sixth category contains chapters that explore the policy underpinnings of international investment law, and how this field interacts with national and/or regional policy issues. This is exemplified by discussions about the policy role of investment protection agencies, the implications of local content policies on international investment law, and if international investment law can contribute to the development of the rule of law within the European Union.

In a nutshell, the *Handbook* contains something from the ocean and something from the hills. It takes into consideration the potentially differing interests of the community of stakeholders of the international investment law ecosystem; be they students, practitioners, academics, tribunal-secretaries, arbitrators, or policymakers. Further, the analysis in each chapter, though not always extensive, is clear and cogent. While one may disagree with a specific analysis, it nonetheless serves as a valuable starting point for those keen to familiarize themselves with this field. To this extent, the *Handbook* succeeds in accomplishing its objective.

The chapter titled — *Anti-arbitration Injunctions in Investor-State Arbitration: Instruments of "Abuse of Process"* — is a telling example in this regard. On the one hand, the authors' analysis can be critiqued on multiple fronts. For instance, the authors' assertion that an application for grant of anti-arbitration injunctions may, in some cases, qualify as an "abuse of process" is not preceded by serious discussion regarding the exceptionally high threshold of proof to be met for invoking this doctrine successfully. Likewise, the authors appear to assume the application of the New York Convention to investment treaty awards, which diminishes the reliability of their conclusions. The analysis also appears to treat the negative effect of the competence-competence principle infallible and ignores the utility of anti-arbitration injunctions as legitimate tools for combating instances of arbitral overreaching and nullification of domestic law by ISDS tribunals.

Yet, there is equally much to admire. The authors introduce the concept of anti-arbitration injunctions with clarity, make appropriate distinctions between ICSID and non-ICSID arbitrations, succinctly canvass the jurisprudence

emerging from both common law and civil law jurisdictions, and adequately capture the reaction of ISDS tribunals. The idea that a host state's request for grant of anti-arbitration injunction may qualify as an abuse of process, although not fully developed, is admittedly novel and thought-provoking. Thus, despite fierce disagreements with the analysis, this author will not be surprised if this chapter becomes a recommended reading for all international investment law and policy enthusiasts.

The *Handbook* is also an admirable accomplishment for three additional reasons.

Firstly, although conceptualized as a *Handbook*, it is apparent that its chapters are not only meant to inform, but also intrigue and encourage. From the balance attained between the chapters of descriptive and analytical value, one gets a glimpse into the likely intentions of the co-editors. Like Samuel Coleridge's albatross, the *Handbook* aims to assist an unfamiliar reader in navigating the choppy waters of international investment law and policy, and simultaneously also provide her the necessary tools to question the *status quo*.

Equally, the *Handbook* does not portray a motivated account written merely to undermine the legitimate criticisms of international investment law framework and champion the attempts at reform. For every account relating to the potential utility of international investment courts, there is also a critical discussion on issues such as balancing rights and responsibilities of multinational enterprises, effects of investment treaties on attracting foreign direct investment, the role of public interest in international investment law, and resistance to dominance in international investment law. It is the latter category of discussions that primarily enhance the value of the *Handbook* simply because these discussions are relatively rarer in mainstream discourse. Although this may not be the *Handbook*'s dominant objective, it nonetheless warrants appreciation.

Secondly, intersectionality is one of the *Handbook*'s central themes. In conceptualizing the *Handbook*'s content, the co-editors have visibly attempted to promote a coherent and multi-faceted understanding of international investment law and policy issues. For instance, the *Handbook* does not limit itself, and therefore its audience, to legal issues relating to international investment law. It consciously endeavors to assess how these issues interact with other disciplines, and either get influenced by or influence international political and social order.

This is a critical aspect. The field of international investment law, and particularly ISDS, is criticized for being increasingly dominated by super-specialists, whose expertise in international investment law is equally matched by their inability (or unwillingness) to engage with other fields implicated by international investment law issues.<sup>1</sup> Considering the increased frequency of

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<sup>1</sup> For instance, see Moshe Hirsch, *Investment Tribunals and Human Rights: Divergent Paths*, in PIERRE-MARIE DUPUY, FRANCESCO FRACIONI, AND ERNST-ULRICH PETERSMANN (EDS), *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* 112 (Pierre-Marie Dupuy, Ernst-

such intersection, this inability hampers the quality of both international investment law jurisprudence and the outcomes of individual cases, thereby, aggravating the legitimacy concerns. For instance, it is rightly questioned whether investment treaty tribunals are, in fact, competent to even engage with, much less adjudicate, issues relating to protection of human rights and public health in a post-pandemic world, and intellectual property rights protection in a global economy. The *Handbook* appears to acknowledge this predicament, as is evident from the multiple chapters which focus on international investment law's interaction with other disciplines.

Thirdly, the *Handbook's* clear emphasis on Global South related issues and developments is both vital and necessary. The evolution of international investment law jurisprudence is rightly criticized for either ignoring issues relating to, or contradicting the expectations held by, the Global South. Accordingly, the contents of the *Handbook*, and the selection of a diverse set of contributing authors, is an important development in this regard.

The *Handbook* consciously delves into many themes that are relevant to the Global South, by amplifying voices belonging to the Global South. While one chapter revisits the issue of Most-Favored-Nation clause from a developing countries' perspective, another explores the theme of resistance to dominance in international investment law. This is supplemented by several chapters, which discuss several issues of regional significance as indicated above. It is the unfortunate reality of international investment law framework that due to structural and historical inequalities, these issues are yet to find adequate space in international investment law discourse. Thus, irrespective of whether one agrees with the contents of the *Handbook*, it is difficult to not find immense value in the way it has been conceptualized and compiled. The *Handbook* is, thus, as much a manifesto of the Global South as it is a compendium of academic resources.

Yet, despite its triumphs, the *Handbook* remains vulnerable to criticism on two grounds.

One, despite purporting to be based on a "truly global vision", particularly on Global South related issues and developments, one must question the underlying understanding of this "global vision". Indeed, while the *Handbook* must be lauded for amplifying expertise from Asian states, it must also be criticized for seemingly reducing the Global South to the Asian region. A preliminary analysis by this author reveals that while the *Handbook* contains contributions from about forty-five (45) authors with Asian-nationalities, there are about seven (7) authors from Africa and Latin-America respectively. These figures are tentative and subject to minor corrections. However, even with these caveats, they paint a bleak picture. They reveal that barring few

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Ulrich Petersmann & Francesco Francioni eds, 2009) ("The predominantly private character of investment tribunals, and their emphasis on the private-commercial aspects of disputes between sovereign states and private investors, may well explain those tribunals' ingrained inclination to overlook public policy issues (such as human rights obligations) that are involved in investment disputes...").

notable exceptions, the *Handbook* does not include adequate contributions from African and Latin-American authors. This lacuna not only contradicts the *Handbook*'s claim of presenting a "global vision" of issues relating to the Global South, but also contextualizes its utility.

This criticism is not only of theoretical relevance. In the post-colonial context, the content of international investment law was developed through disproportionate contributions made by the Global North participants, including academics. It, therefore, reflects a Euro-centric, or a Global North-centric, understanding of international investment law. Critically, the enforcement of this understanding through issuance of binding arbitration awards, which impose significant monetary liability, can severely impact the award-debtor states. Indeed, one rightly wonders whether a more inclusive development of issues of international investment law may have resulted in different outcomes in the cases involving Global South states. The recent award of compensation exceeding USD 4 Billion against Pakistan by an arbitral tribunal comprising three European nationals,<sup>2</sup> and a series of awards that deemed Argentina's emergency measures in 2002 to address its burgeoning financial crisis as violating its treaty obligations,<sup>3</sup> provide telling examples. In such circumstances, the creation of a "global vision" becomes a moral responsibility, with the realm of academia being no exception. From this perspective, while the *Handbook* is a step in the right direction, it is equally guilty of overpromising and underdelivering.

Two, the international investment law and policy community is criticized for its patriarchal underpinnings. A series of empirical studies<sup>4</sup> coupled with anecdotal experiences shared by female stakeholders<sup>5</sup> confirm its exclusionary nature. The *Handbook* attempts to make encouraging strides in this regard, which warrants appreciation. A preliminary analysis by this author reveals that about forty-four (44) contributors to the *Handbook* are female, while around eighty (80) contributors are male. These figures are far from appalling, and likely reflect a better gender-ratio than some other comparable academic works. However, when viewed objectively, they also reflect the amount of progress yet to be made. A gender ratio of almost 2:1 in favor of male contributors continues to bolster an inherently flawed ecosystem where a

<sup>2</sup> Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/21, Award (12 July 2019).

<sup>3</sup> For instance, see *Enron Corporation Ponderosa Assets, L. P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (May 22, 2007). This award was annulled by the ICSID ad hoc Committee in *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (July 30, 2010).

<sup>4</sup> Justin Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. OF GENDER LAW & POLICY 1 (2010); *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings*, THE ICCA REPORTS NOS. 8, 16–42 (2020).

<sup>5</sup> Nayla Comair-Obeid, *The 13th Geneva Global Arbitration Forum — Women in Arbitration*, 9 THE J. OF WORLD INVESTMENT & TRADE 87 (2008) ("It was not an easy task to gain the trust of the professional environment and be recognized. I remember when my name was once proposed as Chairman in a domestic arbitration, an arbitrator refused to be chaired by a woman...").

leading female arbitrator may be challenged due to her husband's unrelated professional engagement by a respondent state, on the grounds that her household has "significant financial interest" in the outcome of the dispute she must decide independently. It also remains a far cry from Justice Ginsburg's vision that the Supreme Court of the United States would have enough women only when it has nine (9) female judges.

This is not to say that the *Handbook's* above shortcomings are the cause for the patriarchal, or Global North-centric, underpinnings of international investment law structures. This is a historic imperfection that comfortably predates the *Handbook's* publication. However, its inadequacies do reinforce the existing structures of international investment law, even if with minor improvements. Accordingly, despite noble intentions, the *Handbook* ultimately aids the consolidation of a regime that continues to lack legitimacy, for its authors do not adequately resemble the "global" audience that it caters to.

In summary, the *Handbook* is comprehensive compendium of academic resources that not only introduces its audience to the fundamental notions of international investment law and policy, but also encourages them to continue their engagement with this field. It will likely hold a special appeal for those interested in issues concerning Asian states. However, those hoping to delve into a global vision of international investment law and policy issues are likely to be disappointed, even if only slightly.