Muthucumaraswamy Sornarajah

(Photograph: David Tan, 2015)
ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT

Essays in Honour of Muthucumaraswamy Sornarajah

Edited by

C. L. LIM

University of Hong Kong and Keating Chambers, London
CONTENTS

List of figures page xi
List of tables xii
List of contributors xiii
Preface xv
Acknowledgements xvii
List of treaties, national legislation, cases and awards xix

PART I 1

1 The worm’s view of history and the twailing machine by C.L. Lim 3
Introduction 3
Muthucumaraswamy Sornarajah 6
Overview of Sornarajah’s works 12
Essays for Muthucumaraswamy Sornarajah 33

2 The liberal vision of the international law on foreign investment by Kenneth J. Vandevelde 43
Introduction 43
US postwar FCN treaties as a reflection of liberal principles 44
Defining liberalism 47
Fashioning a liberal investment regime 51
The emergence of neoliberalism 56
Assessing the liberal vision today 60
Liberalism and its critics 64
Conclusion 67

3 Caveat investors – where do things stand now? by Leon Trakman and David Musayelyan 69

Introduction 69
The new wave of discontent against ISA 70
Arguments for and against ISA 78
Investment agreements of states dissatisfied with ISA 86
Why ISA has retained its resilience 96
Conclusion 98

PART II 101

4 Reforming the system of international investment dispute settlement by Gus Van Harten 103

Introduction 103
Professor Sornarajah’s contribution 104
Flaws in the official reform model 106
European Commission’s adoption of the official reform model 108
Conclusion 129

5 The paranoid style of investment lawyers and arbitrators: investment law norm entrepreneurs and their critics by David Schneiderman 131

Introduction 131
Irreversible? 133
When things fall apart 135
Crisis? What crisis? 145
Conclusion 154

6 The COMESA Common Investment Area: substantive standards and procedural problems in dispute settlement by Peter Muchlinski 156
## CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><strong>Introduction</strong></td>
<td>156</td>
</tr>
<tr>
<td></td>
<td>Current issues in investor-state dispute settlement</td>
<td>159</td>
</tr>
<tr>
<td></td>
<td>Investor-state dispute settlement procedures under the CCIA Agreement</td>
<td>166</td>
</tr>
<tr>
<td></td>
<td>Substantive rights of action under the CCIA Agreement</td>
<td>178</td>
</tr>
<tr>
<td></td>
<td>Concluding remarks</td>
<td>184</td>
</tr>
<tr>
<td></td>
<td>7 Lessons from the negotiations of the United Nations Code of Conduct on Transnational Corporations and related instruments by Karl P. Sauvant</td>
<td>186</td>
</tr>
<tr>
<td><strong>PART III</strong></td>
<td><strong>195</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>8 India and investment protection by Aniruddha Rajput</td>
<td>197</td>
</tr>
<tr>
<td></td>
<td>Introduction</td>
<td>197</td>
</tr>
<tr>
<td></td>
<td>Foreign investment and India</td>
<td>199</td>
</tr>
<tr>
<td></td>
<td>Legal framework for foreign investment</td>
<td>203</td>
</tr>
<tr>
<td></td>
<td>Protection under international law</td>
<td>210</td>
</tr>
<tr>
<td></td>
<td>Protection under municipal law</td>
<td>213</td>
</tr>
<tr>
<td></td>
<td>Recent developments</td>
<td>219</td>
</tr>
<tr>
<td></td>
<td>Conclusion</td>
<td>221</td>
</tr>
<tr>
<td></td>
<td>9 China–US BIT negotiation and the emerging Chinese BIT 4.0 by Wenhua Shan and Hongrui Chen</td>
<td>223</td>
</tr>
<tr>
<td></td>
<td>Introduction</td>
<td>223</td>
</tr>
<tr>
<td></td>
<td>The background: why a BIT 4.0 now?</td>
<td>224</td>
</tr>
<tr>
<td></td>
<td>The issues: what has to be addressed?</td>
<td>232</td>
</tr>
<tr>
<td></td>
<td>The features: a model BIT with “Chinese Characteristics”</td>
<td>247</td>
</tr>
<tr>
<td></td>
<td>Conclusion</td>
<td>251</td>
</tr>
</tbody>
</table>
PART IV

10 Regulating foreign investment: Methanex revisited by Kyla Tienhaara and Todd Tucker 255

Introduction 255

The case: Methanex v. United States of America 259

Academic reaction to the decision 268

The legacy of Methanex 272

Beyond Methanex: treaty safeguards 278

Conclusions 287

11 The new frontier: economic rights of foreign investors versus government policy space for economic development by Howard Mann 289

Introduction 289

Sustainable development, economic development and income equity 292

FDI and economic development: from assumptions to policy action 297

Economic development and policy tools 299

Tracking the development of international law in respect to the economic development tools and economic rights of transboundary investors 301

Mapping the development tools and the trends 320

Additional factors in investment treaties 321

Conclusion 322

12 Giving arbitrators carte blanche – fair and equitable treatment in investment treaties by Nathalie Bernasconi-Osterwalder 324

Introduction 324

The fair and equitable treatment standard in treaties, their interpretation and state reaction 326
CONTENTS

Fair and equitable treatment standard explicitly linked to customary international law 330
Looking for new approaches 340
Concluding remarks 344

PART V 347

13 Is the umbrella clause not just another treaty clause? by C.L. Lim 349

Introduction 349
The origin and definition of the umbrella clause 351
Sornarajah’s scepticism 353
Observing the language of the umbrella clause 356
El Paso: the myth of the ‘internationalised’ contract lurks still 363

Distinguishing commercial from investment commitments 365
Acta jure imperii 367
Overlap with fair and equitable treatment and other substantive treaty standards 369

Problems with the contractual forum selection clause 369
The doctrine of privity of contract 372
The problem with elevating or internationalising the contractual terms under an umbrella clause 373

Conclusion 374

14 Internationalisation and State contracts: are State contracts the future or the past? by Jean Ho 377

Introduction 377
State contracts as treaties 378
Stabilisation clauses as tools of internationalisation 396
INDEX

PART VI

15 State capitalism and sovereign wealth funds: finding a "soft" location in international economic law by Jiangyu Wang
Introduction 405
Hard and soft law in international [economic] law 408
State capitalism under “hard” international economic law: WTO regulation of state enterprises 410
The Santiago Principles and their discontents: the developing soft law framework for SWFs 414
Concluding remarks: an “inclusive soft law approach” 425

PART VII

16 The many-headed hydra and laws that rage of gain, a chapter in conclusion by C.L. Lim
The privatisation of international state responsibility 431
Neo-conservatism 438
Need and greed 439
Sociology and legal doctrine 442
Power and justice 445
The many-headed hydra 449
Privateers bearing letters of marque 452
To spurn the rage of gain 455

Index 457
Author Index 493
FIGURES

9.1 Annual inward and outward foreign direct investment flows measured in US dollars at current prices and exchange rates in millions (China and USA 1970–2013) page 227
10.1 Investor success under distinct treaty provisions 277
10.2 Number of treaties signed containing expropriation safeguards 279
TABLES

<table>
<thead>
<tr>
<th>Table</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.1</td>
<td>Approaches to restricting ISA</td>
<td>77</td>
</tr>
<tr>
<td>9.1</td>
<td>MFN and preestablishment under Chinese BITs</td>
<td>234</td>
</tr>
<tr>
<td>11.1</td>
<td>Sample economic development tools</td>
<td>300</td>
</tr>
<tr>
<td>11.2</td>
<td>Development tools versus private economic rights in recent treaties</td>
<td>318</td>
</tr>
</tbody>
</table>
CONTRIBUTORS

NATHALIE BERNASCONI-OSTERWALDER, lic.iur, LLM Georgetown, admitted to the Basel Bar, is Program Leader and Senior International Lawyer, Investment and Sustainable Development Program, International Institute for Sustainable Development (IISD).

HONGRUI CHEN, PhD (Xi’an Jiaotong University), is Lecturer at the School of Law, Xi’an Jiaotong University, China.

JEAN HO, PhD (Cambridge), LLM (Panthéon-Sorbonne), LLM (NYU), is Assistant Professor at the Faculty of Law, National University of Singapore.

CHIN LENG LIM of Keating Chambers, London, is Professor of Law at Hong Kong University; a member of CPEC, tasked to advise Hong Kong’s commerce secretary; Lionel A. Sheridan Visiting Professor at NUS and Visiting Professor at King’s College London.

HOWARD MANN is Associate and Senior International Law Advisor at the International Institute for Sustainable Development and is the lead author of IISD’s Model International Agreement on Investment for Sustainable Development. He represented IISD in the amicus curiae intervention in Methanex Corp. v. United States.

PETER MUCHLINSKI is Professor of International Commercial Law, SOAS, University of London.

DAVID MUSAYELYAN, LLM (Taiwan National University), is Research Associate to Professor Trakman.

ANIRUDDHA RAJPUT is Advocate at the Supreme Court of India; Research Associate, Center for International Law; and Member of the Expert Group constituted to comment on the Model Bilateral Investment Treaty of 2015 by the Law Commission of India.
xiv

LIST OF CONTRIBUTORS

KARL P. SAUVANT is Resident Senior Fellow, Columbia Center on Sustainable Investment, a joint centre of Columbia Law School and the Earth Institute at Columbia University, New York. He was formerly Director of UNCTAD’s Investment Division.

DAVID SCHNEIDERMAN is Professor of Law and Political Science at the University of Toronto. He is the author of “Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise” and “Resisting Economic Globalization: Critical Theory and International Investment Law”.

WENHUA SHAN, PhD (Xiamen), PhD (Cambridge), attended Trinity College, Cambridge, and is the Ministry of Education Changjiang Chair Professor of International Economic Law and Dean at Xi’an Jiaotong University. He is Senior Fellow at the Lauterpacht Centre at Cambridge and Professor of Law at the University of New South Wales.

KYLA TIENHAARA is Research Fellow at the Regulatory Institutions Network (RegNet), Australian National University.

LEON TRAKMAN, LLM, SJD (Harvard), is Professor of Law and formerly Dean at the University of New South Wales.

TODD TUCKER is a Gates Scholar at the University of Cambridge’s Centre of Development Studies.

GUS VAN HARTEN is Associate Professor at Osgoode Hall Law School. He is the author of “Investment Treaty Arbitration and Public Law”, “Sovereign Choices and Sovereign Constraints” and “Sold Down the Yangtze: Canada’s Lopsided Investment Deal With China”.

KENNETH J. VANDEVELDE, JD (Harvard), PhD (California), is Professor of Law at, and the former Dean of, the Thomas Jefferson School of Law in San Diego.

JIANGYU WANG is Associate Professor at the Faculty of Law, National University of Singapore.
PREFACE

International economic law is a branch of public international law. Its subfields, however, have taken on the appearance of disconnected specialist subjects over the years, not least in the world of international legal practice with its Gattologists, Bitologists and sovereign debt workout specialists. In recent decades, the international law on foreign investment especially risked becoming unmoored from sovereign legal relations. Sornarajah, however, always took the classical view of a subject rooted in the sources and systems of public international law. Without being sovereign-centric he views the law as being as much a product of sovereign will as it is the result of economic change. His conclusions sometimes appeared incongruous with economic globalisation, transnational legal innovation, the explosion since the 1990s of private claims before investment tribunals and even the practice of these tribunals. But as Gus van Harten says here, Sornarajah “has pursued independent critical scholarship in international investment law for a longer time than any other living specialist in the field and has done so with patience and grace”, and the current backlash against investor-state arbitration is a tribute to the viewpoint which he has long held.

Whichever side one takes in the current debates, it is the right time for a book which explores Sornarajah’s views. This book attempts to do so in light of recent withdrawals from the Washington Convention, and a growing epidemic of ongoing national “reforms” of investment treaties and the institution of investor-state dispute settlement as it is currently understood. The backlash against investor-state arbitration, appearing in different shades in different places, is now no longer confined to a number of Latin American nations. Large economies – Indonesia, India and the European Union among them – are taking a broadly similar turn. From Kuala Lumpur to K Street, from Potsdamer Platz to the Palais d’Egmont, protests have taken place around the globe against ongoing mega-regional investment treaty negotiations.
A critical introduction to these complex, contemporary developments is also required, and it is hoped that this book will be of interest and use to students and scholars, government international law counsel and policy-makers, private legal counsel and arbitrators alike. The contributors come from varied backgrounds in the making, implementation, evaluation and contestation of treaty policies and from the worlds of treaty-making, professional law teaching, public interest lawyering, international law litigation and arbitration practice. Many, though not all, have been Sornarajah’s fellow-travellers. Nonetheless, we have put these writings together to honour a friend and colleague whose life’s work foreshadowed, and was in any case devoted to explaining, the philosophy cementing the latest turn of events.

While scholars as eminent as Yale’s Michael Reisman counsel continuing global economic integration, and reject a return to the old days of the New International Economic Order or outright reversion to protectionism and mercantilism, Sornarajah rejects depictions of the law as a part of the unbreakable march of economic globalisation. Here is the kind of modern contest between alternative visions of the law which this book also tries to explain.

Muthucumaraswamy Sornarajah might sometimes have seemed out of place, dancing to the beat of a different drummer. Yet he was always taken seriously, and his time has come. This book is an attempt to recreate the drumbeats he heard, reveal the subject he sees and show the paths to which his drums lead.

C.L. Lim
Typhoon Season, 2015
HKSAR, China
ACKNOWLEDGEMENTS

My principal debt is to the authors of this volume who selflessly and so enthusiastically set other urgent matters aside to meet a harsh writing schedule. The chapters arrived quickly and fell equally swiftly into place. They have inspired me with their professionalism, camaraderie and good cheer.

Joel Lee, sometime Vice-Dean of the law school at the National University of Singapore, first alerted me to Professor Sornarajah’s coming statutory retirement. The idea for the book was conceived in one evening. It would have remained no more than an evening’s conversation without the enthusiasm and support of Simon Chesterman, Dean of the NUS law school. Professor Sornarajah made his papers available to me, and the University of Hong Kong’s Human Research Ethics Committee granted timely approval to work on them. I thank Simon Young, Associate Dean at HKU, for his advice on the ethical issues, and Michael Hor, our Dean in Hong Kong, for his constant encouragement.

Still, we would not have come this far without Finola O’Sullivan, whose capacity to digest lengthy correspondence while travelling and whose decisiveness in setting an immediate course of action meant that while our project came together with great intensity of purpose, the proposal itself received the early attention of Cambridge University Press. There followed thoughtful and helpful comments and suggestions from two perceptive and careful anonymous referees. They improved upon the original scheme. Joe Ng at the Press steered our project on its onward journey with consummate navigational skill and thoughtfulness.

I have been a fortunate law teacher. Zachary Korman, a native Texan and Lord President Cooper Memorial Prize Scholar at Edinburgh, devoted long hours over many months as my assistant. He kept a weather eye open in respect of every detail from six thousand miles, joined me in reading through the manuscript and making corrections. Zack prepared the table of treaties, legislation and cases. Justine So, now in practice, perhaps suspecting that ideas quickly dreamt up are liable to evaporate,
ACKNOWLEDGEMENTS

ensured that I could commence the whole project armed only with a phone.

There were other well wishers. Sornarajah’s portrait which appears in this book was taken by David Tan, Vice-Dean at NUS, following arrangements made by Jean Ho.

My wife, Lyn, bore a lost holiday with her usual aplomb. Work for this book was completed while I was Lionel A. Sheridan Visiting Professor at NUS, for which I am indebted to the Class of ’61.