Review of The BRIC States and Outward Foreign Direct Investment

Ming Du
Book Reviews

David Collins


For decades, foreign direct investment (FDI) has meant investment from developed countries going to developing countries. More recently, a new stream of FDI flowing in the opposite direction has begun to emerge. In 2012, developed economies saw their FDI outflows fall close to the lows experienced during 2009. By contrast, FDI flows from developing economies actually rose slightly. As a result, their share in global outward FDI rose to a record 31 per cent.\(^1\) The global FDI between developed and developing countries has become a two-way street and this is an integral part of the globalization process. This relatively recent phenomenon has posed an array of interesting questions to international investment lawyers. What explains the surge of outbound FDI from developing countries? What challenges do entrepreneurs from developing countries face when they venture out into the global market? Do domestic laws of home states, the laws and regulations of host states, and the international investment legal framework at bilateral, regional, and multilateral levels, provide sufficient incentives and adequate protection to outward FDI from developing countries? To what extent has the recent shift in investment direction influenced the content of international investment law? As countries that were formerly capital-importing become aggressive capital exporters, will we witness a growing global consensus between developed and developing countries on how some of the long-standing controversies present in international investment law should be resolved? Will this increased consensus make a multilateral investment agreement a more realistic possibility? Surprisingly, few international investment lawyers have delved deeply into

---

these clearly important questions. Against this background, Prof David Collins’ book fills a much-needed gap in the existing literature.

The book is clearly structured into four parts. In the first part (chapter 1), Collins offers an overall background introduction to the issues covered in the book. According to Collins, the increasing percentage of outward FDI from firms operating in the services sector in emerging markets represents a defining characteristic of twenty-first century globalization. Collins continues by making it clear that the focus of his book is on the regulation of outward FDI in services from the BRIC (Brazil, Russia, India, and China) states at the international level. This will primarily involve an analysis of these states’ international treaty obligations on FDI under the GATS, TRIPS Agreement, and TRIMs Agreement within the WTO legal framework; the ICSID Convention and the New York Convention; and the regional and bilateral agreements that contain provisions relating to the protection of investment.

In the second part, the three chapters (chapters 2, 3, and 4) follow a largely similar structure: a brief overview of outward FDI from a particular BRIC state including the trend, scale, and the underlying rationale, followed by a rather detailed description of the international commitments that the BRIC state has made in relation to FDI. Collins’ research has revealed some interesting findings. For instance, identical reasons partly explain the recent surge of outward FDI from all BRIC states. First, in a competitive global market, the firms in BRIC states feel the need to shift their strategy from one of competing on low cost and aggressive pricing to one of competing on innovation, brand image, and services with higher profit margins. By targeting distribution networks, retail, management, state-of-the-art technologies, and foreign brands, these firms from the BRIC states can leapfrog several stages of development. Second, firms in the BRIC states face fierce competition in domestic markets. In the face of a saturated domestic market and falling profit margins, these firms have been forced to turn to overseas markets and establish production bases outside of their home jurisdictions. Finally, outward FDI has the benefit of helping firms from the BRIC states circumvent international trade barriers erected by foreign countries. However, notwithstanding the strong motivations to engage in outward FDI discussed above, there are significant variations among the attitudes of BRIC states towards outward FDI and the scope of legal obligations to which they have agreed to be bound at the multilateral, regional and bilateral level. Importantly, not all the BRIC states actively encourage outward FDI, and many commitments they have made at international level still strongly reflect their traditional status as capital importers.

In the third part (chapters 6, 7, and 8), Collins discusses his proposal for establishing the Multilateral Agreement on Investment in Services (MAIS).
Clearly an optimist and a strong supporter of the MAIS, Collins outlines the major obligations that should be covered by the MAIS. In proposing the MAIS, Collins discusses almost all the key issues in international investment law: pre-establishment and post-establishment national treatment, fair and equitable treatment, free transfer of capital, guarantee against expropriation, the conflict between investment liberalization and other legitimate social objectives, the inclusion of public interest exceptions including environment protection, labor and human rights, culture, economic crisis management and national security, the investor-state arbitration system, etc. When outlining the major obligations that the MAIS should cover, Collins has tried to adopt a balanced view by taking account of the interests of developing countries. For example, he proposes that MAIS should contain not only, as it were, negative obligations (prohibiting particular kinds of mistreatment of investment), but also some positive obligations, such as the obligation to promote investment and the obligation to promote economic development of the host developing countries. The last part (chapter 9) of the book summarizes the previous chapters and provides readers with some conclusions.

To summarize, Collins’ book covers the wide and fertile ground of international investment law with special reference to outward FDI from BRIC states. In the book Collins has showcased his encyclopedic knowledge of general international investment law as well as BRIC states’ particular international commitments in the field of FDI. The book will be of particular interest to scholars, students, and practitioners interested in the surge of outward FDI from the BRIC states and the relevant international investment legal framework governing this recent phenomenon. Moreover, if readers find the current fragmented international investment legal system excessively overlapping, inconsistent, and complicated, Collins’ proposal for the MAIS and the major provisions that it should contain certainly provide an essential reference point for further discussions. His arguments in relation to MAIS will provide, in any event, food for thought.

Given the wide scope of the book and the ambitious nature of the project, it is inevitable that any reviewer, including this one, will disagree with Collins on a number of issues. To begin with, Collins may have overestimated the willingness and readiness of the BRIC states to embrace the MAIS. Indeed, Collins’ optimism does not seem to be well supported by his mapping of the BRIC states’ commitments under the various international regulatory frameworks for outward FDI in the second part of the book. Despite the surge of outward FDI over the past few years, the total amount of outward FDI from the BRIC states remains relatively small when compared with inward FDI into the BRIC states. Although outward FDI from the BRIC states in the services
industry is on the increase, the vast majority of outward FDI from the BRIC states remains concentrated in manufacturing and extractive industry. The picture may change in the future, but, at this stage, it is not clear what benefits the BRIC states will really acquire by entering into the MAIS. The negotiations on services in the WTO demonstrate that the BRIC states are still reluctant to take on significant obligations. This reluctance is further evidenced by the BRICS’ reaction to the EU’s proposal to conclude a plurilateral agreement on services. The group of “Really Good Friends to Services” is made up of some 20 WTO members with a mix of developed and developing countries representing around two thirds of global trade in cross-border services.2 Revealingly, none of the BRIC states participated in the initiative.

Furthermore, Collins explicitly states that his book focuses on the regulation of outward FDI in services from the BRIC states at the international level. Admittedly, it is not possible for a single monograph to cover all the relevant issues relating to outward FDI from the BRIC states. Nevertheless, one wonders whether such a narrow focus has not diluted the significance of the book in a number of ways. For example, in the second part (chapters 2, 3, and 4) of the book, Collins discusses extensively the commitments that the BRIC states have made under various international treaties. From a reader’s perspective, these commitments seem to be more relevant when answering the question of how the BRIC states regulate inward FDI from other states, rather than how outward FDI from the BRIC states is regulated. Of course, one may argue that the reciprocal nature of many of these obligations also impacts outward FDI from the BRICs, and that the BRICs’ international commitments reflect their positions on the regulation outward FDI at an international level. Still, one is left questioning the extent to which the book offers readers an overall picture of the legal framework governing the BRICs’ outward FDI in services.

Similarly, in the third part of the book (chapters 6, 7, and 8), there is little discussion specifically related to the BRIC states when Collins describes the proposed MAIS. This part, probably the most important part of the book, discusses what an ideal MAIS would look like. It is difficult to disagree with Collins on the proposed obligations and exceptions at the general level. For example, no serious international investment lawyer would realistically argue against the inclusion of exceptions in the MAIS which would entitle host states to deviate from investment liberalization obligations on legitimate public

---

interest grounds. Of course, opinions on the details of those exceptions may differ. In connection with this point, little is said about the BRIC states’ positions on these issues, the reasons why they take a particular stance, and how the proposed provisions of the MAIS will accommodate their concerns. Since the proposed MAIS will apply to outward FDI from both developed countries and the BRICs, and little is said on the proposed obligations and exceptions from the BRICs’ perspective, one may argue that the book essentially adopts the developed countries’ perspective. If this is the case, then the viability of the proposed MAIS may be doubtful.

Finally, as the book is intended to discuss the regulation of outward FDI from the BRICs, one underlying assumption may be that outward FDI from the BRICs presents some unique problems to international investment law. Regrettably, some thorny issues arising from precisely this point -- the BRICs’ outward FDI -- are only mentioned in passing in the book. For example, both China and Russia, and to some extent Brazil, practice state capitalism as opposed to market capitalism. As a consequence, the major players from the BRICs engaging in outward FDI are entities affiliated to states, such as state-owned enterprises (SOEs) and sovereign wealth funds. Outward FDI from SOEs in the BRIC states has raised some challenging issues to international investment law. For instance, SOEs may choose to make investment and corporate decisions on political and strategic grounds rather than on commercial and market considerations. SOEs may enjoy government-created subsidies, privileges, and immunities that give them a competitive advantage over their rivals. SOEs’ outward FDI may cause reciprocity concerns since the BRICs still tend to run more restrictive FDI regimes than many developed countries. These concerns have the potential to fuel economic nationalism and draw states into a downward spiral of protectionism. Such a scenario would have disastrous consequences for the global economy. In response, in recent years, states have strived to formulate legal rules to regulate SOEs’ outward FDI within various international fora. The basic argument made in this review is that it would have been useful for the book to identify the unique problems that outward FDI from the BRICs may face in the global market, the challenges that outward FDI from the BRICs has posed to the laws of host states, as well as to try to decipher how international investment law should respond to these unique problems. The overall conclusion, then, is a qualified

one: the analysis in the book is excellent and sophisticated, even if one might have hoped for a greater focus on certain genuinely peculiar challenges of outward FDI from the perspective of BRICs.

*Ming Du*
Lancaster University Law School, UK
*Michael.mingdu@gmail.com*