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International Investment Law: Reconciling Policy and Principle

INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE

by

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The importance of the field of international investment law could be judged by the fact that, within the past decade, there has been a raft of books brought out on the subject. This is mainly because of the proliferation of bilateral investment treaties and the growing number of dispute between the investors and the host state. Arbitral awards in the investor-state disputes have led to huge controversy, especially amongst the academicians working in this area. The main reason for this controversy is because investor-state award directly impacts the regulatory power of the state and shrinks its policy space. Due to these challenges, regime of international investment law is always seen from the lens of 'developed-developing country tension', and it is this constriction which provides a fundamental theme of Dr. Surya P. Subedi's book *International Investment Law: Reconciling Policy and Principle*. Apart from focusing on the fundamentals of the international investment law, this book also deals with the controversies occurring within this field.

Spread over seven chapter (excluding concluding observations) this book deals with both substantive and procedural aspects of the law relating to international investment. The first chapter of the book sketches the evolution of the international investment law. The author discusses international minimum standard, *Calvo* doctrine and *Hull* formula while highlighting the issue of diplomatic protection and treatment of aliens (and their property) under international law in this chapter.

While discussing the history of international investment law, one cannot ignore the events which unfolded post decolonisation. Subedi, in chapter 2 of this book, highlights the efforts made at the international level to regulate foreign investment. This chapter underline the efforts made by international institutions like UN, OECD, WTO and World Bank in codifying



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and developing the rules of investment protection. He also discusses the efforts made by the developing countries through UN General Assembly Resolution on PSNR, NIEO and CERDS. Author in particular notes the unsuccessful attempt made under the banner of UN to adopt an international code of conduct for transnational corporation, by OECD to bring into existence a Multilateral Agreement on Investment and by WTO to conclude an agreement on foreign investment. He mentions the successful attempt made by the World Bank in concluding International Convention on the Settlement of Investment Disputes between States and Nationals of other States.

Interestingly, Subedi divides the protection available to the investors into three different parts: protection under customary international law, protection under bilateral investment treaties and the development of investment law principles through arbitral awards. All these issues have been discussed in three different

chapters. He starts by sketching out the protection available to the investors under customary international law in the third chapter of the book. This chapter highlights the shift from the customary notions which previously governed the protection of foreign investment in international law towards a rather liberal interpretation of the standards of investment treatment by arbitral tribunals. This chapter outlines the definition of investor and investment; the relationship between fair and equitable treatment to the international minimum standard; most favoured nation and national treatment; full protection and security and protection against expropriation. On the issue of indirect expropriation, author notes that it is dangerous to encourage foreign investors to ask for preventative measures under arbitration well before expropriation has actually taken place.

Chapters 4 and 5 of the book deals with the protection of foreign investors through bilateral investment treaties and the interpretation of these treaties by the tribunals. Throughout in these chapters, Subedi has highlighted the implications of the international investment treaties on the policy space of the host state. Chapter 5 discusses the way in which investor protection have been enlarged through inconsistent decisions of the tribunals. It also examines the issues created by the changing and conflicting application of the international investment law principles contained in a BIT. One interesting opinion advanced by the author in the book relates to the reverse trend in the practise of the US, which seek to curtail extensive investment protection. Author notes that the real reason behind this shift is the realisation of the fact that the very (high) standard of treatment once advocated by the US to protect its investors in foreign countries were now invoked against the US by investors from other countries.

Chapters 6 and 7 of the book is titled entitled 'Current Issues in Foreign Investment Law' and Addressing Current Challenges in Foreign



Investment Law' respectively. Chapter 6 highlights the issues like absence of Guidelines on the Standard of Compensation, problems posed by expansive interpretation of the BIT standards, concept of police powers of host state and its relationship with regulatory expropriation, regulatory power of state and its relationship with the foreign investor's legitimate expectation, foreign investment and its linkage with environment and human rights, nature of tribunals while solving a public dispute, reverse discrimination between domestic and foreign Investors, issues relating to treaty shopping and nationality shopping, problem of multiplication of proceedings and investment tribunals, etc.

The last chapter of the book advances suggestions for solving the current problems faced in the international investment law. Subedi argues that a comprehensive global instrument remains the best solution to solve the current problems in the foreign investment law. He opines that it will ensure the uniform formulation, interpretation, and application of investment protection standards. Importantly, he believes that this task should be entrusted to the UN, WTO, or the World Bank, rather than being left entirely to market forces. Answering to the opposition of developing country's to a multilateral treaty on investment author argues that through the decisions of the ICSID and other investment tribunals, these countries are forced to accept pro-investment standards. Therefore, it would be better for them to have a negotiated treaty than to accept the often biased and investor friendly awards of such tribunals.

Overall the author covers a number of substantive and procedural issues within the ambit of international investment law. This book provides a useful insight into the

implications of foreign investment protection rules for domestic policy space and on their interaction with principles from other areas of international law, such as human rights law or international environmental law. This book maintains the simplicity of language with its critical approach and provides a useful source of literature for the students of international investment law.

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