

Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing, Oxford and Portland, Oregon 2008, ISBN 9781841138794, £35.00, 244 pages)

REVIEWED BY KATE MILES*

There has been a raft of books recently brought out on the subject of international investment law. Not only does this indicate a surge in activity in this area of law, but also a marked increase in interest. Bilateral investment treaties have proliferated, free trade agreements now regularly include investor protection provisions, and international arbitration is habitually utilised to settle investment disputes. Recent arbitral awards in investor-state disputes have generated a great deal of controversy, largely because they can impact upon the policy space of host states. And it is this aspect of international investment law, together with the tension between investment rules and principles from other areas of international law, which provides an underlying theme for Subedi's *International Investment Law: Reconciling Policy and Principle*. This is also the key reason why this book stands out from many of the others currently addressing the topic of international investment law — it goes beyond stating what the law is and focuses on controversies occurring within this area of the law.

Subedi does not, however, ignore the basics of international investment law. He also combines his analysis of the controversial aspects of foreign investment protection law with more generalised discussion on the substantive principles and standards of treatment for investors. As such, the first chapter of the book covers the evolution of foreign investment law. It touches on important elements from the 19th and early 20th centuries, such as, the era of gunboat diplomacy, the attempts to assert the Calvo Doctrine, the development of investment principles within the doctrine of diplomatic protection of alien property, and the creation of the Hull Formula.

Chapters 2–4 then continue the focus on the substantive protections for investors and the historical modes of structuring international investment law. In chapter 2, Subedi examines the numerous attempts to create a multilateral legal framework for the protection of foreign investment and to regulate the activities of foreign investors. He covers a range of instruments, traversing the investor protection proposals for the Havana Charter of 1948,¹ the initiatives of the New International Economic Order,² the

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1 *Havana Charter for an International Trade Organization* (1948) UN Conference on Trade and Employment, UN Doc E/CONF.2/78, Sales No 1948.II.D.4.

2 See, for example *Declaration on Permanent Sovereignty Over Natural Resources*, GA Res 1803 (XVII), 17 GAOR, Supp 17, UN Doc A/5217, 15 (1962); see also *Charter of Economic Rights and Duties of States*, GA Res 3281 (XXIX), UN Doc A/RES/3281 (XXIX) (1974); see also *Declaration on the Establishment of a New International Economic Order*, GA Res 3201 (S–VI), UN Doc A/Res/S–6/3201 (1974).

conclusion of the International Convention on the Settlement of Investment Disputes between States and Nationals of other States,³ the failed Multilateral Agreement on Investment,⁴ the suggestions of an investment treaty within the World Trade Organisation, and several voluntary codes of responsible corporate conduct.

Subedi takes an interesting approach in chapters 3 and 4, dividing up a discussion of substantive investor protections into principles available under customary international law and those set out under bilateral investment treaties. As such, chapter 3 examines minimum standards of treatment at customary international law. However, this analysis is also tied into the way in which recent tribunal decisions on protections under bilateral investment treaties have considered these customary law standards. In this way, Subedi brings a contemporary approach to the discussion on customary rules.

Chapter 4 examines the phenomenon of the bilateral investment treaty. There are now more than 2,800 international investment agreements in existence, creating a global network for foreign investment protection. And key themes running through this book involve the implications of this global web of high-level investor protection for domestic policy space and for their interaction with principles from other areas of international law. As such, the bilateral treaty mechanism is central to the book's analysis of investment law. Subedi traverses a large number of issues, covering the content of bilateral investment treaties, their rationale as an instrument for investment insurance and liberalisation, the settlement of disputes, and compensation issues. This introduction to standards of treatment for investment is then extended in chapter 5 through a discussion on the developing jurisprudence on principles of international investment law. This is, perhaps, one of the most interesting sections of the book. It discusses the way in which investor protections have been expanded through the decisions of courts and tribunals, examines the problems created by inconsistent application of principles and protections contained in treaties, and considers the extension of treaty protection to contractual obligations.

The direct examination of controversy undertaken in chapter 5 continues into the final 2 chapters of the book. Chapter 6 is entitled 'Current Issues in Foreign Investment Law' and the title of chapter 7 is 'Addressing Current Challenges in Foreign Investment Law'. As such, they are inter-linked and forward-looking in their perspective. Again, Subedi addresses an impressive range of topics, referring to almost all possible areas of contention. For example, he includes sections on the environment, human rights, anti-corruption, the doctrine of necessity, forum-shopping, and the impact of cross-fertilisation of competing principles. As potential avenues for reform, Subedi explores models for a global treaty on foreign investment, an appeals mechanism, interpretative notes, the creation of an international investment court, and revision of bilateral investment treaties through the use of protocols. In bringing together such an array of

3 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, signed 18 March 1965, (1966) 575 UNTS 159 (entered into force 14 October 1966).

4 See the text of the draft Multilateral Agreement on Investment at OECD Negotiating Group on the Multilateral Agreement on Investment, Draft Consolidated Text, 22 April 1998, <<http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>> at 6 March 2009.

reform measures in the one section, Subedi has collated a particularly useful list of potential mechanisms to encourage a more balanced consideration of public policy issues in investor-state disputes.

One of the disappointing aspects of this book is the surface treatment given to some topics. At times, this tendency leaves the impression that a survey-like or overly simplistic approach to important issues in international investment law has been adopted. However, *International Investment Law: Reconciling Policy and Principle* does make a valuable contribution to the discourse on 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. It will also serve as an excellent introduction to this complex area of international law for newcomers to the subject, whether legal scholars, policy-makers, or students.