

BOOK REVIEW*

Regionalism in International Investment Law

Leon E Trakman and Nicola W Ranieri (eds)

(Oxford and New York, Oxford University Press, 2013) xix + 534 pages
(including Introduction and Index)

Retail recommended price hardback: A\$110 (ISBN: 978-0-19-538900-5)

This excellent book is another illustration of the rapid expansion of law into new areas of little or no significance in previous generations. It provides a description and analysis of international investment law, particularly as that law is affected by regional associations that impose obligations on member states to provide protection for overseas investment. Such investment is generally recognised as necessary for economic development and individual wellbeing. These goals, in turn, are prerequisites for fulfilling national and transnational objectives to encourage economic growth, employment and work skills for the population and the attainment of universal human rights. When the United Nations was established in 1945, the *Charter of the United Nations* proclaimed three primary goals of the new world order:

- International peace and security;
- Advancement of economic equity; and
- The attainment of universal human rights.

Proper protection by law of international investment is commonly presented as essential to the attainment of each of these objectives, although that proposition is sometimes questioned, including in this book.

The book is the outcome of a collaboration between authors in a number of countries, with expertise in investment law and practice in particular investment regions or in significant trading nations. The editors of the book are Professor Leon Trakman, Professor of Law and one time Dean of Law at University of New South Wales and Dr Nicola Ranieri. Dr Ranieri is presently in private practice, specialising in advice to clients on the North American Free Trade Agreement (NAFTA). He was formerly director of the Centro Juridico Para el Comercio Inter-Americana in Mexico. Professor Trakman, likewise, has enlarged his academic career in South Africa, United States and Canada with numerous

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appointments as an international commercial arbitrator and an intergovernmental trade adjudicator under NAFTA.

Whilst earlier books have been written on international investment law, the special value of this book is the attention it gives to the impact on investment law of regional groupings of nation states, which typically introduce special incentives for, and legal protections of, international investment. Thus, two chapters concern the law of the European Union (successor to the European Economic Community): Anna De Luca (Chapter 6) and Stephan Schill (Chapter 13). The chapter on NAFTA (Chapter 14) is written by Dr Ranieri and it grew out of his doctorate from Tulane School of Law and his earlier writing on international trade and investment law. A chapter on ASEAN (Chapter 8) is provided by Professor Vivienne Bath, Professor of Chinese and International Business Law at the University of Sydney. The inter-American arrangements of Latin America are reviewed by Professor Gisela Bolívar, who teaches law in Mexico and is a panellist for the World Trade Organisation's DSB panel (Chapter 7). A chapter on the expanding law in China (Chapter 9) is provided by Professor Wenhua Shan, Dean of Xi'an Jiaotong University School of Law in the PRC. Like the other authors, he also has experience of an arbitrator in the China International Economic and Trade Arbitration Commission.

Two chapters of the book examine aspects of the law on international investment in Australia. The first is Chapter 12 by Professor Trakman on 'Australia's rejection of investor–state arbitration'. The author sees that as a 'sign of global change', as developed countries move away from unrestrained enthusiasm for economic liberalism and free trade in investment. The other chapter on Australian law is by Professor Luke Nottage, Professor of Comparative and Transnational Business Law at Sydney University Law School. It addresses 'Consumer product safety regulation and investor–state arbitration policy and practice'. He examines this topic in the light of the litigation, ultimately reaching the High Court of Australia, concerning Australian federal law requiring plain packaging of cigarette products. That law was enacted in pursuance of national policies to reduce or discourage tobacco smoking, with its now established harmful consequences to, and costs for, public health. A majority decision of the High Court in August 2012, confirmed the constitutional validity of the federal law. It denied the argument of Philip Morris that the imposition of plain packaging amounted to an effective confiscation of intellectual property rights of tobacco companies, protected by an international free trade agreements, supportive legislation and the constitutional guarantee in s 51(xxi) of the Australian Constitution.

As would be expected from the editors and authors, all of whom are experienced scholars, mostly with practical engagement in international investment disputes, this new book demonstrates many strengths. It adopts both the conceptual approach appropriate to scholars and the practical approach, sharpened by experience in legal practice. It addresses both bilateral and regional investment treaty practices of nation states. It focuses on the interpretation of applicable treaties, as evidenced in decisions of investor–state tribunals and courts. It sets out to provide accurate and realistic advice to investors whose

primary concern at the outset of their engagement with a foreign jurisdiction will be to make sustainable investment decisions, free of risks of confiscation and ex post statutory alterations of legal rights and entitlements. Investors today will commonly, but not always, undertake their investments in a manner that is socially responsible and respectful of host nations, realising that any other approach is likely to court dangers of retaliation and alterations to their legal positions.

The book recognises that, to some extent, disputes between foreign investors and host states are unavoidable in contemporary global and regional investment practice. In consequence, the book focuses on the typical recurrent controversies of the kind that lead to state-to-state conflicts or state-to-transnational corporation conflicts. In many chapters, there is a close scrutiny of the handling and outcome of claims by foreign investors against host states based upon international and local law and on investment treaties and free trade agreements.

Various controversies are described in the chapters of the book. These include disputes related to 'foreign direct investment'; various techniques of 'indirect expropriation'; the purported imposition of limits upon compensation for investors for changes in the circumstances of investment; the various techniques for treaty protection of investors and their comparative utility and enforceability; and the typical circumstances in which loss of investor protection can arise (for example, alleged grounds of national security, public health, environmental protection and changing national economic and investment policies).

The chapters of the book contain many examples and illustrations that offer practical insight into the ways in which typical investment difficulties have arisen in identified countries and regions:

- They explain the influence of the differing conceptions of 'state sovereignty' and 'investment regulation' on the one hand and 'national', 'most favoured nation' and 'fair and equitable' treatment of investors on the other;
- They canvas the differing views that exist about the legitimacy and efficacy of state initiatives invoking 'sovereignty' defences against investor claims and the significance of former colonial states raising such defences against the metropolitan power (especially the contributions of Muthucumaraswamy Sornarajah (Chapter 16) and the debate in the Appendix by Professors Sornarajah and Trakman);
- They illustrate the development of regional variations in regulating foreign direct investment, including the protection accorded to investors under the treaty law of the EU (de Luca, Chapter 6; Schill, Chapter 13); NAFTA (Ranieri, Chapter 14) and ASEAN (Bath, Chapter 8);
- They examine the efficacy and reliability of investor-state arbitrations under the rules of the *Convention on International Centre for Settlement*

*of Investment Disputes between States and Nationals of Other States*¹. Some observers identify that the *ICSID Convention*, operating within facilities provided by the World Bank in Washington DC, as overattentive to the interests of developed investing states. However, other writers defend the ICSID procedures as comparatively transparent, even-handed and efficient as a venue for the resolution for investor-state disputes with host countries (Trakman, Chapter 10); and

- They consider recent ‘flash points’ affecting investor-state relations with host states, both in regional and domestic investor practice, describing where this leads to conflict. The 2008 Global Financial Crisis is clearly relevant here as it profoundly affected investor-state and host-state governmental relations in several countries.

The book also focuses on a number of immediate issues, including the development of efficient and ethical investment laws and investor and state practices. The contributors affirm the necessity of an historical perspective in the development of such laws and practices. Thus, different chapters highlight:

- The changing nature of international investment law following the establishment of the United Nations and its agencies in 1945 (Trakman and Ranieri, Chapter 2);
- The ongoing significance of the United States – Iran expropriation practice upon the development of modern international investment law (Professor Romesh Weeramantry, Chapter 11);
- The recurring tensions arising in particular investment environments, such as the tensions between transnational corporations and Latin-American states which have led to attempted denunciations of the *ICSID Convention*, allegedly for being too favourable, in practice, to investors or occasionally inconsistent in its operation;
- An important and original contribution to the book that affects all of the regions described is Chapter 3 by Associate Professor Colin Picker (UNSW). He describes the suggested influence of differing legal cultures upon the formulation of investment policies; the interpretation of bilateral and international investment agreements; and their interpretation in both judicial and arbitral proceedings; and
- Four Australians have contributed distinctive chapters (Professors Bath, Nottage, Picker and Trakman). Their chapters sit comfortably in the midst of others dealing with other regions of the world. The commonalities of the emerging problems and the challenges they bring for lawyers are such as to permit the remaining chapters to cast light on the chapters dealing specifically with the Australian experience in international investment disputes.

1 Opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) (*'ICSID Convention'*).

The overall conclusion that emerges from the reading of this book is that the notion that one size fits all for international investment law and practice is unlikely to be accepted by nation states, in part because of the differing societal, cultural and economic imperatives in particular regions and in different nation states themselves. In part (even within such regions) differences arise because of the distinct legal traditions operating there. In particular, the differing ways in which lawyers in common law countries and civil law countries go about resolving disputes, and the differing expectations of timeliness, efficiency and professional experience as between these traditions, make it perilous to assume that a single global investment law has yet emerged, with the objectivity that many investors and investor-states demand or expect.

Another recurring theme of the book is the realisation that reconciliation of protecting foreign investors, and the reasonable promotion of national interest by host states, is overall a worthwhile ideal. However, in practice, such protections commonly diverge. A divergence is itself sometimes the source of conflict between foreign investors and most states or between investor states and host states.

Conflicts affecting foreign investment are not confined to unstable developing nations. They can arise, as well, in developed countries, simply because governments or the courts intervene with economically significant decisions that have an impact either on the safety or the content of legal rights regarded valuable by investors. The Philip Morris litigation, over plain packaging of cigarettes, propounded for public health purposes, is an instance of such a conflict in Australia. Another arguable instance was the decision of the High Court in Australia in *Mabo v Queensland [No.2]*.² That decision reversed 150 years of settled land law in Australia, which had denied recognition of the title to land of Australia's indigenous peoples. The state of that law rested upon 19th century decisions of the Judicial Committee of the Privy Council (then the highest court in the Australian legal hierarchy) and an early 20th century decision of the High Court of Australia. Despite the existence of representative and responsible government in Australia after 1856, the principle of law, sometimes described as *terra nullius*, was never altered by legislation. The rejection of the principle in 1992 clearly affected the value, to some extent, of local and international investments in land in Australia. Suddenly, at least for some non-freehold title, land claims by indigenous people and their communities became possible. Such claims became an economic burden on the previously unencumbered title to land, acquired by settlers and other investors, including investors from overseas. This change in the law was ultimately accepted by the Australian Parliament. Self-evidently *Mabo* was a decision with very large economic consequences. Yet, equally clearly, it was a decision reached by an independent organ of Australia's government for reasons of high national and moral objectives. These included the removal of a discriminatory disadvantage to

² (1992) 175 CLR 1 ('*Mabo*').

one section of the Australian community based upon no better reason than the race and assumed nomadic proclivities of its members.

Every country has challenges of this kind. Most arise by reason of legislation or by actions of the executive government. Some changes to the law are introduced by the courts, including under the common law or statutory or constitutional charters. Necessarily, such decisions have an impact on international investment. Indeed, such investments themselves sometimes stimulate demands for education in the workforce; improvements in the standards of living; establishment of effective democratic institutions; and substantive protections against corruption and the rule of sheer power. The fluid nature of the societies that are emerging from the significant shifts the global capital can bring about is, to some degree, the cause of legal instability and change. That instability and change can sometimes undermine the protection for international investments and the stability of their returns to investors. It is against such risks, even where arguably justifiable and understandable, that foreign investors seek protection and reassurance.

This feature of global instability is the topic of a most interesting Appendix annexed to this book. It recounts what is described as a ‘Polemic: The Cases For and Against Investment Liberalization’. The opposing points of view are expressed respectively by Professor Trakman (who gives ‘The Case for Investment Liberalization’) and by Professor Sornarajah (who gives ‘The Case against Investment Liberalization’).

This Appendix is readable, intelligent, and a vigorous clash between two of the central ideas of modern legal culture. The one, advanced by Leon Trakman, proposes that ‘foreign investment ought to be subject to regulation not only by, but also from, nation states.’³ The viewpoint of Professor Sornarajah is that ‘law cannot be viewed in the present context alone. Its rules were fashioned at a time when investments were exploitative and were designed in the context of Africa and Asia existing as providers of raw materials and markets for products. In that sense, the states that emerge from colonialism have had little opportunity to reframe the laws that had been devised from colonial times. If these rules continue to frame the regulatory structure that transcends sovereign authority of the developing states, they would have to be in continuing subservience to the interests of the developed states.’⁴

Of course, neither proponent adopts an intolerant or absolute position. Professor Trakman acknowledges the legitimacy of some exceptions to, and changes affecting, foreign investments and their returns. Similarly, Professor Sornarajah acknowledges that foreign investment will dry up, or damagingly slow down, unless there is appropriate protection against arbitrary and unpredictable ex post demands based upon state sovereignty or special interest of the host country.

3 Leon E Trakman and Muthucumaraswamy Sornarajah, ‘Polemic: The Cases For and Against Investment Liberalization’ in Leon E Trakman and Nicola W Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press, 2013) 499, 499.

4 Ibid 500.

The interesting feature of this Appendix, which gathers together some of the main themes that run through the book, is that it allows plain speaking by the participants to the 'Polemic' concerning the deep undercurrents that affect both the legal and economic perspectives that exist on the topics dealt with in this book.

The book is excellently produced by Oxford University Press. As befits a book with chapters written by differing authors, there is a substantial index of subject matters to permit the reader to trace common themes dealt with in different chapters. There are appropriate notes on the careers of the contributors and editors. There is also a fine Introduction written by the editors.

At a time when opportunities for young lawyers are, in some regards, declining and the number of students entering United States law schools dropping significantly, a prescient young lawyer will look for doors that are opening and new opportunities that are presenting themselves. If they look carefully, they will find many new prospects for law and lawyers in the rapid expansion of international trade and investment. With that expansion, as the authors explain, come conflicts, disputes and the need for law and lawyers. The resulting law may be less certain and more unpredictable than much domestic law. But the opportunities are great. And as this book shows, the intellectual challenges and legal puzzles are worthy of talent, training and fresh thinking. At the recommended price, the book is value for money. It is strongly commended.