Review of International Investment Law: National, Regional and Global Perspectives by Collins C. Ajibo (Nijmegen, The Netherlands: 2020)

By:

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March 12, 2021

Dr Ajibo's book examines the principles, models and practices of International Investment Law (IIL) and is organised in 22 chapters covering a range of topics. The book provides useful knowledge of aspects of IIL and clearly contributes to the field. It seems to map the field in a way that can generate interest in undertaking a more detailed and rigorous examination of some issues raised in the application of rules and principles of IIL in a variety of settings. Invariably some issues have been covered in more depth than others. In addition to the consideration of regional instruments, there are some comparative references between countries such as Nigeria, United Kingdom and the United States. To understand the book's mission and contributions, it is important to explore the contents of its chapters.

Chapter 1 “Evolution of International Investment Law” appears to focus on the definition of key concepts. It traces the origin of IIL to the notion of state responsibility in Public International Law which projects an obligation on host States to protect the lives and property of aliens within their territorial jurisdiction. The chapter shows that State responsibility has enabled the emergence of IIL as a distinct area of law. It focuses on and details an ongoing debate on the relationship between international minimum standard and fair and equitable treatment in IIL with references to rulings of arbitral tribunals. It links international minimum standard to ‘Western capitalist philosophy’ and notes some long standing challenges that have developed from certain developing and emerging countries as exemplified by the Calvo Doctrine and Drago Doctrine of the Latin American states. While the origins of IIL are clarified, the chapter, however, does not address the meaning of IIL.

In Chapter 2 “Theories of International Business” the book examines theoretical explanations (such as eclectic theory and internalisation theory) for the existence of business activities between different countries. The theoretical discussions the aid understanding of the nature and role of international business.

Chapter 3 “Sources and Nature of International Investment” considers the sources of IIL and its conceptual and regulatory underpinnings. The chapter, firstly, explores the concept and classes of investment and traces the evolution of IIL to the sources of the wider international law. Secondly, the chapter examines home States’ recourse to customary international law for protecting investments in foreign countries before the emergence of bilateral investment treaties (BITs). It then examines BITs as a key contemporary regulatory tool for IIL and highlights debates surrounding their role in the development and governance of host States.

The unfairness of the substantive terms of international investment agreements (IIAs) to the detriment of host States is the main theme of Chapter 4 “Substantive Terms of IIAs: General Outline”. Several regional treaties from different parts of the world are used to show the recognition of a more expansive role for IIL. Nonetheless, it may be helpful to highlight how substantive terms challenged by the treaty provisions are unfair before contextualising them in unfairness of aspects of IIL. Furthermore, while some

definitions of investment in IIAs and BITs are mentioned in Chapter 4, it may be helpful to explore the meaning of investment in the theoretical sense and use it as an analytic framework for the treaty definitions.

Focusing on Nigeria, Chapter 5 “Regulation of Admission and Establishment” shows that national law is the primary framework for the admission of foreign investment and the business activity it entails and, except in cases of full liberalisation, can be restrictive. The chapter notes that the establishment and operation of investment and the rights and obligations associated with them are regulated by both national law and IIL.

Similar to Chapter 5, Chapter “6 Sectorial Regulation of Investment” focuses on Nigeria’s national law. It examines the country’s regulatory frameworks for certain sectors, including the financial services (banking, insurance and securities), food and pharmaceutical, information and communication technology, manufacturing, oil and gas, power generation and distribution and solid minerals sectors.

Chapter 7 “Standards of Protection” examines the standards of protection of foreign investment covered by umbrella clauses and provisions for fair and equitable treatment (FET) and full protection and security. It traces the origins and evolution of the concepts and their meanings and components as discussed in case law and scholarship.

Standards of protection of foreign investment using provisions for national treatment standard, MFN, non-discrimination and arbitrary treatment and non-precluded measure (NPMs) are examined in Chapter 8 “Non-Discrimination, Arbitrary Treatment and NPM”. These are looked at from the perspectives of multilateral IIAs and BITs and detailed in the discussion and application of case law.

Chapter 9 “Investment Contracts” considers the notions of State contract and investment contract in national law and IIL. State contracts are shown as being wider in scope and capable of including investment contracts. Focusing on Nigeria’s oil and gas sector, the chapter traces the evolution and varied use of State contracts. Against the backdrop of a debate on the regulation of State contracts, the chapter takes the position that such contracts are governed by IIL if they are part of BITs.

The role of stabilisation clauses or pacta sunt servanda and their implications in IIL are examined in Chapter 10 “Stability and Renegotiation of Agreement”. The chapter looks at different approaches to the consequences of a breach of stabilisation clauses, including the extent they are limited to provisions in the investment contract or can be expanded to reparation. It also considers practical difficulties associated with renegotiation of contractual clauses.

In Chapter 11 “Expropriation”, the book looks at the notion of expropriation and its consequences alongside the scope of the State power doctrine for host States. It considers the debates concerning the level and standard of compensation triggered by different kinds of expropriation, including national approaches.

With a focus on Article 42(1) of ICSID Convention, Chapter 12 “Applicable Law” considers the law rules govern investor-state disputes settlement when a choice of law clause exists. While it acknowledges the orthodox perspective of identifying the law through the interplay of national law and international law, the chapter attempts to show that the latter provides an overarching framework and plays a crucial interpretative role.

Chapter 13 “Risk Insurance and Guarantee” examines how insurance and guarantee schemes address political risks such as currency transfer restriction and inconvertibility, expropriation, breach of contract, hostilities, terrorism and natural disaster. Attention is given to the Multilateral Investment Guarantee Agency (MIGA) of the World Bank, the US Overseas Private Investment Corporation (OPIC) and Nigeria’s national provisions.

Chapter 14 “Fiscal Regimes and Fund Transfers” examines the role of national and international fiscal and fund transfer arrangements such as the United Nations Model Tax Convention, the OECD Model Tax Convention, OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations and the Nigeria’s Regulation 2012. The chapter highlights issues of double taxation, transfer pricing and arm’s length principle and notes disparities in principles and approaches that raise the question of how to resolve conflicting applicable arrangements.

Focusing on Nigeria’s regulatory frameworks, Chapter 15 “Performance Requirements” examines technology transfer, local content, local employment

and other performance requirements particularly in the context of the Agreement on Trade-Related Investment Measures (TRIMs) and IIAs. In acknowledging the divergent interests of developed and developing countries, the chapter makes suggestions for protecting the interests of the latter class of countries, including Nigeria.

In Chapter 16 “Responsible Investment”, the book considers the role of foreign investment in CSR and sustainable development, and suggests ways of embedding responsible investment, including shareholder activism, stakeholder pressure and reporting requirements. The chapter contains case studies of oil companies operating in Nigeria’s Niger Delta region.

Chapter 17 “Regulation of Gas Flaring” examines the economic and environmental impact of gas flaring. It notes the persistence of gas flaring in Nigeria despite contrary national and international rules and institutional structures and provides suggestions on how the country can overcome the problem including through the promotion of alternatives.

Chapter 18 “Regulation of Multinational Corporation” discusses difficulties in the regulation of multinational corporations/enterprises at national (by host and home States) and international levels with the result that victims of the activities of such entities lack access to justice, particularly in the area of human rights. The chapter includes suggestions for plugging regulatory gaps, particularly at the national level.

Chapter 19 “Multilateral Investment Agreement” supports the institution of a multilateral investment agreement (MIA) in a way that balances the interests of the parties to investment. It also provides an historical account of failed attempts at providing an MIA.

Chapter 20 “WTO and Investment” examines the role of the World Trade Organisation (WTO) in trade and investment. In addition to considering key instruments under the WTO system, the chapter provides an account of some multilateral trade negotiations and notes the divergent positions of developed and developing countries.

Chapter 21 “Portfolio Investment” situates portfolio investment within securities regulation and the financial markets. While it notes that portfolio investment is

normally distinguished from foreign direct investment, the chapter shows that the relationship can be more fluid particularly when groups of portfolio investors are organised.

Chapter 22 “Settlement of Investment Disputes” is the final chapter and focuses on the work of the International Centre for the Settlement of Investment Disputes (ICSID) and the legitimacy issues it raises. It supports a more visible role for the remission doctrine that enables ICSID tribunals to defer to national institutions in regulatory matters.

The book therefore provides a useful survey of some topics in IIL and will contribute to their understanding. While the book does not go into depth in some of the accounts, this is understandable since the objective is to provide a textbook. Nonetheless, the selection criteria for the topics discussed in the book are not evident. The roles and impact of the emerging economies multinational enterprises, New Regionalism Approach and the Third World Approaches to International Law (TWAIL) in IIL may be relevant but are not fully discussed in the book.

Another apparent omission is the meaning of IIL though the meaning of international investment is presented; it may be useful to examine the meaning of IIL and the discussions can include the neoliberal foundations of IIL. It may be helpful to investigate also whether, despite its title, IIL can be classified as ‘international’ or ‘transnational’ law in the strict sense.

It may also be useful to acknowledge how IIL has aided global inequalities at regional, national and even individual levels. While the book notes the United Nations (UN) Resolutions: the Declaration on Permanent Sovereignty of the Peoples over their Natural Resources (PSPNR) - Resolution 1803 (XXII) 1962; the Establishment of a New International Economic Order - Resolution 3202 of 1974; and the Resolution of the General Assembly 3281 (XXIX) 1974 - Charter of Economic Rights and Duties of States (p.10-16), the case for challenging neoliberalism can be made in a clearer manner.

It may be helpful to organise the chapters more closely to their themes. Introduction and conclusion chapters may be useful to aid capturing the content of the book without having to read the entire chapters. The introduction and conclusion may encourage the reader to explore the issues discussed in

greater detail in the relevant chapters.

Overall, the book is a timely contribution to the field of IIL. It can certainly be a teaching text at the postgraduate level to introduce students to the different principles and rules underpinning aspects of IIL. The language is accessible even when sophisticated discussions are being undertaken. The book will also be of interest to anyone interested in an introduction to the components of, and debates in, IIL as well as national, regional and transnational approaches to the subject.

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