Book Review

Title : **The International Law on Foreign Investment**
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Professor M. Sornarajah, prominent scholar in the field of investment law and C. J Koh Professor at Faculty of Law of the National University of Singapore presents his ambitious work on the contemporary issues on foreign investment in the context of public international law. Whatever criticism might land on Sornarajah's ears in regard to this work, The International Law on Foreign Investment is undoubtedly an excellent work and one of the most remarkable publication.

Although there are many books analyzing similar issues, the author attempts to demonstrate his stance rather than just standing in the neutrality, while still elaborating the opposing view, which makes this a very decent reference that needs to be read by international law scholars and students particularly those interesting in international economic law. He has clearly written this book from the perspective of development, which is in line with the nature of foreign investment as the law being dynamic and in constant change. Therefore this book is suitable for those wanting to explore the dynamic of foreign investment in up to date development.

Though the book has been substantially rewritten and expanded by including recent development in this area as to embedding mega-regional trade agreements such as TPP and TTIP, its structure remains the same with previous edition. In the first chapter, the author makes a decent step by firstly elaborating the distinction and clear boundaries between the two existing forms of foreign investment namely the portfolio investment and foreign direct investment. There has been indeed one view in which the portfolio and foreign direct investment are seen as not to be distinguished from one another since there is no distinction between the risks taken by either type of investor, both being voluntarily assumed. However, the author is being very clear in asserting his position by stating that only foreign direct investment alone is subject to the protection by customary international law.

Second chapter of this book describes the shaping factor of foreign investment. Firstly the author introduces the nature of international law particularly regarding the dispute settlement mechanism. In contrast with national law which poses central power to conduct litigation independently, international law does not have such power. When dispute arises, there are several mechanisms that can be such as negotiation and other method recognized by customary international law. In so doing, the attentive readers will recall how international legal system works and can guide them to understand the content of the book accurately.

On the discipline of foreign investment law, there are two conflicting economic theories. In the author's point of view, such conflict has definite consequences on the articulation of legal principle and urged to have comprehensive understanding on it. The first theory, the classical theory, is theory stipulating that foreign investment could be beneficial for capital-importing state because it brings positive effect on development. The second theory, the dependency theory, which is popularized by Latin American economist and political philosopher, stipulates that foreign investment keeps developing countries in a state of permanent dependency on economy of developed countries and cannot achieve such development because of detrimental effect arising from the activity of Multinational Corporations. In addition to the classical and dependency theories, there is theory adopting neutral or middle course view, the newer theory. According to the theory, even though Multinational Corporations can be both beneficial and detrimental to capital importing state, it would be easy to them to adopt position that foreign investment should be harnessed to the economic development objective and must be carefully regulated to achieve these goals by enacting national legislation.

After depicting the opposing view on economic theory on foreign investment, the author then emphasizes the concept of state responsibility for injury to aliens. Historically, this concept harnessed from international relation among Latin America states precisely regarding diplomatic protection. Then this concept began to be developed externally through the introduction the concept of international minimum standard. Various doctrines then emerged, one of which is the Cordell Hull's Doctrine stating that compensation for foreign investors against acts of expropriation should be done based on "Prompt, Effective & Adequate". However, Cordell Hull's Doctrine in its development was later opposed by the birth of Calvo's Doctrine which stated that because foreign investors invested their capital voluntarily, they must be subjected to the provision of the host state's law. Calvo's Doctrine was then supported by EU and developing countries from Asia and Africa.

The author then expands the content of this chapter much deeper on actors involving in the foreign investment activity. In term of actor in the sphere of foreign investment, there are six main actors examined in this book including Multinational Corporations, international organizations (ranging from those representing developed countries aspiration such as World Bank, IMF, and OECD to those supporting developing countries interest such as UNCTAD and other international institution including MIGA, ICSID and WTO), NGOs promoting specific issue related to investment activity as to human right and environment protection, private chamber of commerce bolstering the view of MNCs and sovereign wealth funds owned by developing countries respectively.

Further, the author discusses the risk arising from foreign investment. Typically, both developed or developing countries imposed restrictive policy on the ground of national economic interest and state sovereignty. With regard to risk which poses a threat to foreign investment, the author classifies the risk of into 9 (nine) categories.

It includes ideological hostility, nationalism, ethnicity, change in industry pattern, contract made by previous regimes, onerous contract, regulation of the economy, human right and environment concern and the law and other consideration respectively. The last topic discusses in this chapter is the source of international law on investment. It is quite similar with the source of public international law in general as stipulated in the article 38 (2) Statute of International Court of Justice.

In third chapter of the book, Control by Host State, the author from the outset examines the very nature concept in international law, state sovereignty. It is widely accepted that every sovereign entities has the right to control its territory including right to control foreign investment activities. This right can only be restricted by the existence of treaty regulating foreign investment. Such restriction is only limited to what have been agreed in the treaties. This proposition has been supported by code of conduct on transnational corporation and doctrine proposed by Judge Oda in the ELSI case.

Due to the development in the area of foreign investment, some states have shifted their stance. United State for example, previously US was stalwart of economic liberalization. Then, US had changed its position by imposing protectionist policy after being capital importing state. Such policy can be seen in the Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act which gave the right to President to restrict foreign investment. From the introduction of chapter three, it is safe to conclude that there is conflict between proponent and opponent of foreign investment.

Moving to the next chapter, the author begins this chapter with thought provoking analysis on Multinational Corporations (hereinafter "MNC"). The author illustrates how in its earlier development the debut of MNC had intimidated the host developing states considering the power of its home state that stands behind it where the fear was that the MNCs may influence the political course of the state in which it seeks to invest. In order to solve this problem, many institutions had felt the need of a hard-law instrument in regard to the obligations of MNCs. The OECD, for instance, wanted a binding multilateral agreement on investment, and had drafted a voluntary code of conduct for multinational corporations. Still, there is a certain inconsistency in such trends where there was a reluctance to impose duties on multinational corporations. Another instrument is the United Nations Commission on Transnational Corporations (UNCTC), which had attempted to establish a binding Code of Conduct on Transnational Corporations yet due to the divisions among the member states, the code remained in draft form only. The author organizes four obligation rendered on MNCs including the obligation not to interfere in domestic politics, the obligations relating to human rights, liability for violations of environmental norms and the obligation to promote economic development.

Following the chapter on the liability of MNCs, the author attempts to address issues relating Bilateral Investment Treaty (BIT). History recorded that the formation of BITs initially was carried out between Germany and Pakistan in 1959. Since that time, BITs had been proliferating drastically. It is commonly believed that the main objective of BITs is to promote foreign investment. Not only does BITs use as instrument to regulate foreign investment, there are other instruments beside BITs such as in the free trade agreement (including mega treaties like TPP and TTIP) and sectorial investment treaty such as The Energy Charter Treaty. Despite the development of BITs, the author insisted that such development could not be used as a basis to claim that BITs could create customary international law.

After explaining historical background of BITs, the author fittingly complements discussion by analyzing the feature of BITs. Generally, BITs has basic similarity as to its aims, type of protection, standard of treatment, right of repatriation of profit, standard of compensation and dispute settlement mechanism that is widely known as Investor-State Dispute Settlement (ISDS) including arbitration. In the end of this chapter, the author sheds light on the most controversial issues of BITs regarding termination of BITs. Most BITs contains termination clause either by consent or unilateral termination.

Chapter six of this book is mainly aimed to discuss the effort to establish multilateral agreement on investment (MAI). Although it has never been achieved due to the existence of conflicting approach relating to foreign investment protection and contending system relating to treatment of foreign investment, several attempts have been made but still resulted in failure (ex. Havana Charter). Such failure is not only caused by the undesired from states to enter into MAI, but also by the objection from non-state actor (especially NGOs). They objected MAI because it did not address issues relating to protection of environment and human right violation. Given that MAI cannot come about, efforts have been made to create regional treaties (more recently like Trans Pacific Partnership that has yet to ratify and Transatlantic Trade and Investment Partnership).

In Chapter seven, Settlement of Investment Dispute: Contract-Based Arbitration, the author elaborates the dispute settlement mechanism that has been evolved from traditional to modern one. Before the first investment treaty come to the existence in 1959 (Between German and Pakistan), the available method for the protection of foreign investment was made through contract made between Multinational Corporations and host state. This system worked on contractual-based structures of protection made and negotiated between the investors and the host state or its agency prior to the entry of investment. In order to ensure that such protection could operate effectively, there was a requirement for using a law other that the law of host state. By the time, contractual protection was tied up with the use of arbitration as a method in solving investment dispute. In this chapter, the author only discusses arbitration derives from contract rather than the arbitration under investment treaty. What are the differences between them? The arbitration clause in the contract only creates contractual right to arbitration which is quite distinct from the right arise under investment treaty. In addition, in term of jurisdiction, arbitration clause in contract is only confined to dispute arising from contract and does not create jurisdiction to deal with the violation of treatment standard in investment treaty.

In Chapter eight the author addresses the jurisdictional issues on treaty-based investment arbitration. In contrast to contract-based arbitration in which the jurisdiction derives from expressed consent in the arbitration clause, treaty based-arbitration requires consent of the state in determining jurisdiction of arbitral tribunal. Usually, some treaties require recourse to arbitration should be preceded by negotiation and also require that domestic remedies be exhausted prior to recourse to arbitration. Moreover, few treaties also remove issues such as taxation and prudential measures from the scope of arbitration.

Similar to any legal claim, in the case of treaty-based dispute, it must involve a claim based on violation of the right created in the foreign investor by treaty against host state. Otherwise, a tribunal cannot have jurisdiction under an investment treaties involving measures taken by a state affecting a foreign investor (look at UPS v. Canada). It must be noted that, a dispute that could be characterized as a dispute between two private actors engaged in commercial rivalries cannot be the subject of the investment arbitration based on treaty right. Based on ICSID experience, jurisdictional issues are classified as follow: (i) jurisdiction rationae materie (subject matter of the dispute), (ii) jurisdiction rationae personae (on the basis of standing of the claimant to sue), (iii) jurisdiction voluntatis (on the basis of consent of the parties) and (iv) jurisdiction temporis (on the basis of the time limit in the treaties).

In the Chapter nine, the author, begins the chapter by briefly analyzing breach of treatment standard. It cannot be denied that the minimum standard of treatment of a foreign investor constitutes as the essential element for a sustainable foreign investment. Hence, the failure to provide treatment according to standards prescribed in investment treaties has become important, as can especially be seen on the case of NAFTA. It is established that developed states seldom engage in direct takings, but do employ discriminatory and protectionist practices against foreign investors. The litigation that has emerged against Canada and the United States has largely focused on the provisions in NAFTA which makes arguments possible that such practices are tantamount to takings or violate treatment standards. It is after years that finally in many ICSID cases there have been increasing references to violations of treatment standards. But, such references are used to bolster findings relating to taking. Often, the claims relating to takings fail but the claims relating to taking standards succeed. Takings and the issue of compensation for such takings remain the principal cause of action.

Chapter ten, the taking of foreign property, this chapter pays more attention on the issues as to what act of the state may be characterized as amounting to taking, and what circumstances in which such taking would be considered lawful. It is generally accepted that a lawful taking creates an obligation to pay compensation, whereas unlawful nationalization creates an obligation to pay restitutionary damage where the compensation should be calculated as for any other illegality in international law.

Afterward, the author explains the differentiation among interchangeable terms (confiscation, expropriation and nationalization). Confiscation is a capricious taking of property by the ruler of the ruling coterie of state for personal gain, commonly by states ruled by dictators and oligarchies and only to enrich the ruling elite and should be regarded as unlawful. Nowadays, rarely such kind of taking is used. The second term, nationalization, refers to situation in which a state embarks on a wholesale taking of property of foreigners to end their economic domination of the whole economy or sector of economy. Whereas expropriation is specific term that could be used to describe the targeting individual business for interference for specific economic or other reasons and involves the uses of existing regulatory mechanism.

In Chapter eleven, the author neatly describes the concept of compensation for nationalization of foreign investment. Compensation is a topic that raises controversy and remains hotly debated issues because there is no acceptable principle and uniformity practice regarding this issue in international law at the present time. It is commonly accepted that the nationalization must be conducted lawfully. There are two competing norms existed namely the norm reflected the view of capital-exporting state and capital-importing states.

The former stipulates that compensation should be paid upon nationalization of foreign property though this promise in its development has been divided. It includes compensation must be paid based on Prompt, Adequate and Effective. Due to the absence of firm definition of full compensation, its limitation could be found in several instruments as to in the treaty, customary practice, general principle of law such as unjust enrichment, doctrine (such as acquired rights and right to property), foreign investment code of host state, decision of domestic or international court/ tribunal, award of arbitral tribunal and national court. All instruments mentioned above do not accept uniformly norm of full compensation. In contrast to the former, the latter rejected to accept the norm of full compensation.

The last chapter, defense to responsibility, it consists of defences stipulated in the treaties and defences arising from customary international law. However, both have been seen as affecting one another, creating only one common category of defences. The defence provided in the treaties is basically facing a double edged sword as it is deemed as necessary by states yet some scholars believe that the original purpose of investment protection could be severely undermined as a result. It is observed that the continuance within the system would require statements of defences that exclude liability in circumstances where there is an overwhelming public interest that needs protection. There are a few defences being mostly held by states, namely national security, economic crises, necessity, and force majeure.