

BOOK REVIEW

Leïla Choukroune (ed.), *Judging the State in International Trade and Investment Law: Sovereignty Modern, the Law and the Economics*, Springer, 2016, xix-222pp, ISBN 978-981-10-2358-3, Hb €128.39
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This small volume contains a collection of contributions of academics and practitioners, the majority of which were presented at one of the panels of the 2015 World Congress on International Law, organized in New Delhi by the Indian Society of International Law. Under the general title ‘Judging the State in International Trade and Investment Law’, the panel in question adopted a state-centric approach, focusing on ‘the State as a special entity in trade and investment law and economics’.¹ The contributions revolve around the reasons for, the methods applied, and the aims pursued in judging states for breaches of their international trade and investment obligations. Aside from the introduction and the conclusion, written by Professor L. Choukroune, president of the panel and editor of this volume, the collection is structured in three parts. The first (*International Trade: The WTO and Beyond*) is dedicated to international trade law issues. The relevant contributions analyze the appointment process of the World Trade Organization (WTO) Appellate Body members (A.E. Appleton), the trade-related legal capacity-building by the Indian state (J.J. Nedumpara) and the Appellate Body’s interpretation of Article 2.1 of the Agreement on Technical Barriers to Trade so as to cover public policy’ exceptions (D. Prévost). The second (*Investment Litigation at a Crossroad*) contains an equal number of contributions dedicated to aspects of international investment law. They examine, in particular, the claims of state-controlled entities against host countries (J. Chaisse and D. Sejko), the claims and counter-claims under the Asian multilateral investment treaties (T. Mitra and R. Donde), and the role of the police powers doctrine in claims of indirect expropriation (P. Ranjan and P. Anand). The third (*International Law’s Local Experiments and Global Challenges*), focuses on two special issues: the role of the Indian judiciary in respect of India’s international commitments (A.K. Ganguli) and the treatment of human rights in international investment disputes (L. Choukroune).

The editor should be praised for managing to collect these contributions and publish the book a year after the 2015 World Congress on International Law. As is often the case with collective works, the different contributions to this volume do not necessarily follow an identical approach and some of them may be more relevant to the central topic than others. The contributions, particularly those coming from Indian scholars, offer useful insights into the special problems and views of developing countries in relation to international trade and investment law. Aside from

¹L. Choukroune (ed.), *Judging the State in International Trade and Investment Law: Sovereignty Modern, the Law and the Economics* (2016), ix.

being a timely addition to the growing body of literature on the new generation of Third World Approaches to International Law (TWAAIL),² the book constitutes useful reading for international economic law academics and practitioners alike.

In her conclusion on 'Sovereignty Modern', Choukroune relies on Baudelaire's definition of modernity to wonder '[w]hat is modernity in international trade and investment law when confronted with a never-ending inflation of norms and proliferation of dispute settlement mechanisms whose decisions are, if only known, sometimes incoherent and inconsistent'.³ The author observes, in relation to modern international economic law, that it is 'also driven by successive developments hence always on the move towards the integration (or not) of new protagonists and potential subjects'. In this ever-changing and consequently unstable environment, she claims:

the rediscovery of sovereignty in the light of the emergence of a new State capitalism and the better voiced and framed expectations of an interrelated civil society contributes to a form of stabilization, if not reunification of international law now ritually denounced as fragmented.⁴

She, therefore, defends a 'sovereign revival' to conclude that 'it is time for the State to reshape its approach of international trade and investment law-making so that it is eventually judged according to the standards set on the basis of the very significance of sovereignty that is independence'.⁵

Relying on the same definition of modernity, Harvey explains that while both modernity and postmodernity involve the 'total acceptance of the ephemerality, fragmentation, discontinuity, and the chaotic', postmodernity:

does not try to transcend it, counteract it, or even define the "eternal and immutable" elements that might lie within it. Postmodernism swims, even wallows, in the fragmentary and the chaotic currents of change as if that is all there is.⁶

Indeed, one of the central problems of modernity is how to curtail fragmentation. Advocates of the universalistic concept of the international legal order consider the establishment of a cosmopolitan law 'to be the ultimate normative objective of modernity'.⁷ They therefore approach the fragmentation of international law as a problem in need of a solution that would re-establish its unity and find the solution to this problem in the intensification of international co-operation.⁸ The main alternative approach is that of the particularistic concept of the international legal order which sees international law 'as the aggregate of different regimes, co-existing without any pre-defined hierarchy'.⁹ The primary concern of its advocates is 'the protection of and the return to the political supremacy of national democratic institutions, i.e. the protection of State

²On TWAAIL and the development of TWAAIL scholarship see, respectively, M. Mutua, 'What is TWAAIL?', (2000) *ASIL Proc.* 31; J.T. Gathii, 'TWAAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography', (2011) 3 *Trade, Law and Development* 26.

³Choukroune, *supra* note 1, at 220.

⁴*Ibid.*

⁵*Ibid.*, at 222.

⁶D. Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (1989), 44.

⁷A. Von Bogdandy and S. Dellavalle, *Universalism and Particularism as Paradigms of International Law*, IILJ Working Paper 2008/3, 22.

⁸Cf. *Ibid.*, at 24.

⁹Cf. D. Pulkowski, 'Narratives of Fragmentation: International Law between Unity and Multiplicity' 4, available at www.esil-sedi.eu/sites/default/files/Pulkowski_0.PDF.

sovereignty in its traditional meaning'.¹⁰ Accordingly, they resist 'the transnationalisation of societal spheres and the autonomisation of international political decision-making and international law-making' and reject the development of international law.¹¹

Read in the light of the dispute between universalists and particularists, Choukroune's solution of 'rediscovery of sovereignty' and 'sovereign revival' seems to endorse a particularistic concept of the international legal order, accommodating developing countries' concerns over the asymmetries of current international trade and investment law. This solution matches an older proposal of Webb Yackee for a 'minimalist system of international investment law', inspired by the Calvo doctrine favoured by developing countries. In this system 'individual states, in conjunction with specific investors, would be given the primary responsibility for defining the rules that will govern a given investment relationship', while 'individual host states would, by default, be given primary (but not necessarily final) authority to define the content of their obligations toward investors, and to judge whether those obligations have been violated'.¹² Such proposals echo the approach of numerous TWAIL scholars. For, TWAIL-ers opposed 'to the existing world order',¹³ seek to 'deconstruct the use of international law for creating and perpetuating Western hegemony; and . . . construct the bases for a post-hegemonic global order'¹⁴ and their demands for the creation of 'a world order based on social justice'¹⁵ often involve the re-enforcement of sovereignty¹⁶ and, presumably, the corresponding weakening of international law.

One may wonder, however, whether a universalistic concept would not serve the interests of developing countries better, particularly in the areas of international trade and investment law. For, these areas of law were shaped as autonomous, self-contained regimes under the influence of a particularistic concept of the international legal order. Adopted largely through the multilateralization of rules resulting from independent bilateral negotiations between individual developed and developing countries, international law on trade and investment bears the mark of pressure of the first towards the second to agree to the liberalization of trade and investment, more often than not to the detriment of their national interests.¹⁷ These origins of international trade and investment law account for the regime bias that Gathii rightly traces in 'the way in which rules of international trade, commerce and investment are crafted, applied and adjudicated between Third World and developed countries or between Third World countries and the interests of international capital'.¹⁸

Reform of international trade and investment law may, therefore, have to begin from the equilibration of the relations of power that shaped its original content. Consequently, rather than negotiating individually on the basis of sovereign equality and consenting to rules dictated, in reality, by the developed countries and their investors abroad, developing countries may find it easier to adapt the content of international trade and investment law to their particularities and introduce exceptional regimes when negotiating as a group. Developing countries may, thus, succeed in countervailing developed countries' power, particularly in the framework of international institutions in which they can profit from their numerical advantage.

¹⁰Von Bogdandy and Dellavalle, *supra* note 7, at 20.

¹¹*Ibid.*

¹²J. Webb Yackee, 'Toward a Minimalist System of International Investment Law', (2009) 32 *Suffolk Transnational Law Review* 303, at 321.

¹³D.P. Fidler, 'Revolt Against or From Within the West?: TWAIL, the Developing World, and the Future Direction of International Law', (2003) 2 *Chinese Journal of International Law* 29, at 30.

¹⁴*Ibid.*, at 31.

¹⁵B.S. Chimni, 'Third World Approaches to International Law: A Manifesto', (2006) 8 *International Community Law Review* 3, at 4.

¹⁶*Ibid.*, at 7, 14.

¹⁷See, for example, P.M. Protopsaltis, 'The Development of US and EU Preferential Trade Agreements Networks: A Tale of Power and Prestige', (2017) 48 *Netherlands Yearbook of International Law* 3.

¹⁸J.T. Gathii, 'Third World Approaches to International Economic Governance', in R. Falk, J. Stevens and B. Rajagopal (eds.) *International Law and the Third World: Reshaping Justice* (2008), 261.

TWAIL-ers who argue that the project of the New International Economic Order has ‘failed completely to leave its mark on international law’,¹⁹ will readily predict the failure of such attempts. Perhaps, however, they should mind today’s very different international economic and political environment. Indeed, in recent years, major parts of the South ‘moved from what appeared to be thorough defeat and marginalisation to the increasingly central position it now occupies in the world political economy’.²⁰ The increasing influence of developing countries in the WTO, exemplified by the replacement of the old Quad nations (the EU, the US, Japan and Canada) ‘by the G4, a new quartet of old and new powers (the EU, the US, Brazil and India)’²¹ as well as by the success of the BRICS (Brazil, Russia, India, China and South Africa) in preventing ‘further liberalization in the WTO on Western terms’,²² point to a new balance in North-South trade relations. In addition, having abandoned the polarizing rhetoric of the NIEO and the scepticism towards international law, a number of developing countries are now trying to re-shape the rules of international trade and investment using the depoliticized framework of the existing international institutions, particularly the WTO dispute settlement mechanism.²³ The participation of India as a third party in WTO disputes in order to influence ‘the interpretative outcome and the WTO jurisprudence’, contemplated by Nedumpara in his contribution on the trade-related legal capacity-building by the Indian state,²⁴ offers a good example of this new approach.

Aside from these developments, some developed countries are becoming increasingly reluctant to further the liberalization of trade and investment, a trend that found its expression in the failure of the Transatlantic Trade and Investment Partnership, and even more are currently trying to reverse the traditional asymmetry of rights and duties of foreign investors. Examples of these latter efforts include the recent discussions for a reform of arbitral proceedings²⁵ along with the ever-increasing support for the public law approach to international investment law.²⁶ These developments may show that the ideological gap between developed and developing countries is narrowing. Amidst concerns over the legitimacy of the WTO and the International Centre for Settlement of Investment Disputes’ systems shared by developing and developed countries alike, now is perhaps the proper moment for the initiation of further multilateral negotiations in order to reform the current international trade and investment framework from within.

If our analysis is correct then, rather than re-enforcing sovereignty at the expense of international law, as TWAIL-ers currently advocate, developing countries may wish to use their influence in the existing international institutions in order to address the asymmetries of the current international trade and investment rules with the establishment of a new global order. We can only hope that the order to emerge from this exercise will not be a mere reflection of the conjuncture of

¹⁹Fidler, *supra* note 13, at 55.

²⁰P.S. Golub, ‘From the New International Economic Order to the G20: how the “global South” is restructuring world capitalism from within’, (2013) 34 *Third World Quarterly* 1000, at 1007.

²¹A. Sapir, ‘Europe and the Global Economy’, in A. Sapir (ed.), *Fragmented Power: Europe and the Global Economy* (2007), 1, at 7.

²²M.K. Griffith, R.H. Steinberg and J. Zysman, ‘From Great Power Politics to a Strategic Vacuum: Origins and Consequences of the TPP and TTIP’, (2017) 19 *Business and Politics* 1, at 4.


²³On the judicialization – and the consequent depoliticization – of the multilateral trading system through the WTO dispute settlement mechanism see, for example, R. Howse, ‘The World Trade Organization 20 Years On: Global Governance by Judiciary’, (2016) 27 *EJIL* 9, at 19.

²⁴J.J. Nedumpara, ‘WTO, State and Legal Capacity Building’, in Choukroune, *supra* note 1, at 34.

²⁵B. Kingsbury and S.W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, New York University Public Law and Legal Theory Working Papers, paper 146/2009, 1–7, *passim*; cf. A. Von Bogdandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014).

²⁶B. Kingsbury and S.W. Schill, ‘Public Law Concepts to Balance Investor’s Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality’, in S.W. Schill (ed.), *International Investment Law and Comparative Public Law* (2010), 75, at 77.

inter-state power relations but will rely on the principles of cosmopolitanism, distributive justice and international solidarity. Hence, the new order will neither perpetuate the hegemony of the North over the South nor reproduce a similar pattern of hegemony in the relations between the countries of the South.

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