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Book Review

Lex Petrolea and International Investment Law: Law and practice in the Persian Gulf

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Nima Mersadi Tabari, *Lex Petrolea and International Investment Law*, Routledge, New York, 2017; ISBN No.: 13:9781138656499

International Investment law owes its dynamic character to the pluralism of its sources. It has evolved through centuries keeping intact its roots in *lex mercatoria*—the general principles of trade that adopted various forms, suited to the specificity of the subject matter involved in the dispute. The critical comments and debates on the sources of international investment dispute mechanism adopted by the international arbitrators reveal the complexity of the international investment regime. Nima Mersadi Tabari, in his book, *Lex Petrolea and International Investment Law: Law and practice in the Persian Gulf*, made sincere efforts to untangle and unravel one such source of International Investment law from the web of *lex mercatoria* – the *Lex Petrolea*. The book is a valuable contribution to all the researchers on International Investment Law as it traces the evolution of *Lex Petrolea*, a legal dimension that forms an intricate component in the hydrocarbon agreements made between the foreign investors with the States of Persian Gulf.

This book is an expanded version of the PhD thesis of the author. It is well written and meticulously drafted under the supervision of Professor Terence Daintith, the director of IALS (Institute of Advanced Legal Study) from 1988 to 1994. At first glance, the book appears to be brief, however, every word is loaded with clarity and

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composure and hence gives a detailed explanation. The most interesting part of the book is its extensive bibliography that has recorded in detail the various sources of *lex petrolea*. *Lex Petrolea* is described in detail in the third chapter of the book. The structure of the book is well organized with seven chapters. The first chapter is the Introduction that begins with a quotation by Oliver Wendell Homes. Jr from his article 'The path of the Law'¹- "The prophecies of what the Court will do in fact, and nothing more pretentious are what I mean by the Law". This pithy statement says it all - the sources of law are varied. It is the judge (and herein the arbitrator) that has the discretion to pick the sources relevant to the subject matter.

The first chapter refers to Foreign Direct Investment (hereinafter FDI) as the transnational flow of capital instigated and managed by a national of one State (Home State) with the purpose of establishing a lasting interest in an enterprise in the territory of another State (Host State). The words - 'lasting interest' is of significance as it is a distinguishing factor of FDI. The author moves on to state that the FDI produces social, economic and political consequences for the States involved, beyond the immediate effects of trans-border transfer of capital. The synergy of economic liberalization, capitalism and free markets has led to global means of production on one hand, and the global markets on the other, that has resulted in the interdependence of Nations and imposition of identical cycles of economic boom and bust worldwide. The author concentrates his study exclusively on the exploitation and production of hydrocarbons. He claims that the hydrocarbon reserves are required for man's prosperity, progress, mobility and well-being and oil is the most important commodity in international trade. The demand for oil is bound to increase despite efforts for renewable energy. Hydrocarbons have become a strategic commodity of utmost political importance. The oil supplies are mostly from the Persian Gulf as it has huge reserves, low costs, established infrastructure, geographical proximity to the markets, easy access to the international highways and experienced

¹ Oliver Wendell Holmes, Jr., The path of the Law, 457, 10 Harvard Law Review (1897)

local work force that ensure sustainability to the increasing demand. The States of the Persian Gulf have a common thread that binds them together- the Shariah Law. The contracts drawn in these States are in accordance with Shariah and its dispute settlement mechanism, which includes arbitration on international obligations have an Islamic version of *pactasuntseroanda* (agreements must be honored). Several international organizations have emerged in the Persian Gulf -the OPEC (Organization of the petroleum exporting countries); GCC (Gulf cooperation council); OIC (Organization of Islamic cooperation); and The Arab League, guided by the principles of Islamic fraternity and solidarity.

In this backdrop, exploitation and production of hydrocarbons remains a risky business for foreign investors. While international investment law emerged as a supranational law for FDI, the sources of investment law include the 'general principles of law' that cover the customary international law.² The author is of the view that there is a common law of investment protection. This common law runs concurrent with the emerging *lex petrolea* in order to shape the international investment law. Both laws together form the blue print for appropriate FDI protection norms in the upstream hydrocarbon industry.

The second chapter is devoted to the emergence of the modern international investment law. It is described as an attempt to codify laws, formulate procedures and depoliticize disputes between foreign investors and the host states. The dominance of the foreign investor is attributed to the economic liberalization and promotion policies of the States in general. While FDI is not a new concept, it is the substantive principles of investment protection and the direct access by the investor to the international arbitration that sets a new trend in arbitration, without privity.

The third chapter is the *raison d'etre* of the book. It describes *Lex Petrolea* as a specialized branch of the universal *lex mercatoria*. It is drawn from the published arbitral awards relating to the petroleum industry. It is an autonomous transnational legal order which is utilized by petroleum tribunals in a gap filling capacity, to find

² §38(1), Statute of the International Court of Justice, 1946

solutions to problems not expressly foreseen by the parties in their agreements. It is a distinct subset of the transnational law governing hydrocarbon disputes. The author refers to Moore's definition of 'law'. Moore defines law 'as a self-regulation of every social field'.³ While *lex mercatoria* was a product of the self-regulation of the *societasmercatorum* or the community of merchants in western and central Europe, *lex petrolea* covers the transnational community of the hydrocarbon industry players or *societaspetroleatorum* as an autonomous 'social field' to provide solutions to challenges resulting from the inherent commercial risks associated with hydrocarbon agreements. Moore was of the opinion that making of rules and maintaining social order, encounter situational pressure to manipulate, circumvent, remake or replace existing laws. It is this societal pressure that produces *lex mercatoria* (the law of merchants) evolved by *societasmercatorum* consisting of community of merchants in Western and Central Europe. *Lex Petrolea* emerged from the consensus of the hydrocarbon industry players - the *societaspetroleatorum*. It has created an autonomous 'social field' to provide solutions to challenges resulting from the inherent commercial risks associated with hydrocarbon agreements.

Chapters four, five and six give a detailed insight into the legal regimes of Iran, Iraq and Saudi Arabia. Chapter seven is the Conclusion. After comparing the political and legal structures of Iran, Iraq and the Kingdom of Saudi Arabia on petrochemicals and gas industries, the author concludes that due to the historical experience of the subject countries, the position of the State as the trustee of the people's rights over natural resources, the view of the political class of oil and gas resources as their nation's most important national patrimony, the over reliance of the subjects economies on hydrocarbon revenues and finally the strategic value of oil and gas in an increasingly unsettled world, the hydrocarbon industry is not considered as a normal sector for attracting foreign investors. Accordingly, despite the increasing need for transfer of capital, technology and knowhow, the sector remains artificially

³ Sally Falk Moore, *Law and process an anthropological approach* 56 Routledge and K.Paul(1978)

isolated from otherwise surprisingly liberal approach adopted by the subject countries towards encouragement of foreign investments and protection of foreign investors.

The book ends on a diffident note:

It follows that there is no claim to *lex petrolea* as an independent body of law, which alone governs or even shall govern hydrocarbon agreements and disputes. Rather, the idea is that *lex petrolea* is an essential and still emergent, but largely distinct part of the transnational body of law utilized by *societaspetroleatorum* and relied upon by petroleum tribunals. This transnational law is derived from a plurality of sources that, in addition to *lex petrolea*, also include international investment law and relevant municipal laws. This subject is still relatively young and much room for exploration remains.⁴

In this backdrop, exploitation and production of hydrocarbons has remained a risky business for foreign investors. It is pertinent to note that the foreigner investors rely on the precarious international investment laws that depend on varied sources. The International Investment Tribunals refer to Article 38 of the International court of Justice for the sources of International Investment Laws. The International Court of Justice is a precursor to all international judicial forums that adjudicate on international wrongdoings. It was established in 1945 by the Charter of the United Nations, which provides that all member states of the United Nations are *ipso facto* party to the Court's statute. It began work in April, 1946. All matters concerning the interpretation of a Treaty; any question of international law; the existence of any fact which if established would constitute a breach of an international obligation, are referred to this Court under Article 36. Article 38 specifically mentions that the Court shall apply international conventions, international customs, general principles of law recognized by civilized nations, judicial decisions and the teachings

⁴ NimaMersadi Tabari, *Lex Petrolea and International Investment Law* 241 Routledge, New York (2017)

of the most highly qualified publicist of various nations, as subsidiary means for the determination of the rules of law.

The most common insecurities that foreign investors of hydrocarbon face relate to the following – project specific security, stability and alleviation of barriers due to unilateral or internal sanctions. This statement summarizes the nascent regime of International Investment law, specifically the *lex petrolea*. Law evolves in a cyclic pattern. It begins with regularization, moves on to social adjustments, which further leads to indeterminacy. In this situation, law and custom are bound to merge. The international judicial forums and the international arbitrary tribunals have considered the varied sources of law relating to international investments and made efforts to retain the distinct customs that are specifically applicable to certain sectors. *Lex Petrolea* being an offshoot of customary law strives to retain its identity in the large canvas of international investment laws. The unholy hold over natural resources by the sovereign states especially in the Persian Gulf has added to the woes of the foreign investors in the area of hydrocarbons. The time is ripe to recognize *lex petrolea* as an authentic source of law in a consistent manner and use it for the settlement of disputes. This customary law has the potency to circumvent any barrier or unilateral sanctions imposed by the host States upon the foreign investors.