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*Substantive Protection under Investment Treaties: A Legal and Economic Analysis.*


The discussion of whether international investment agreements (IIAs) are good or bad for States is now in full swing. In seeking to tap into the aforementioned contemporary discourse, Dr Bonnitcha’s book begins by usefully sketching a normative framework for evaluating the optimal level of protection that States should grant to foreign investors (Chapters 2 and 3). Such a normative framework fills something of a lacuna in the international-investment-law literature; authors on the subject have, hitherto, failed to adopt a normative framework made up of a coherent collection of (primary) normative criteria, preferring instead to approach the normative evaluation by considering only a subset of these criteria.¹ The book then discusses in detail the way in which adjudicative bodies have interpreted the ‘fair and equitable treatment-clause’ and the ‘indirect expropriation-clause’ contained in many contemporary IIAs (Chapters 4 and 5). In light of the fact that most claims brought against States under IIAs rely on one of these two clauses, this exposition is amongst the most detailed accounts that the current literature on the subject has to offer and hence amounts to a valuable contribution to international-investment-law scholarship.

The normative framework is then applied in evaluating which of the distinct ways in which adjudicative bodies have interpreted these two clauses yields the optimal level of protection (Chapter 6). Along with other writers on the subject, it concludes that interpretations yielding lower levels of protection for foreign investors are generally preferable, and that tribunals should adopt a standard of review that gives more deference to States than would be the case under a proportionality based approach. The book specifically argues in favor of a margin of appreciation approach.²

This review will focus on the normative framework suggested, rather than on its application to the two aforementioned clauses, because the normative

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¹ Such an ad hoc approach is insufficient for general normative statements, such as a statement about the optimal level of protection under international investment law.

² Bonnitcha explains the difference between margin of appreciation and proportionality in the following terms: ‘Under the margin of appreciation approach, it is enough that the conduct in question has a rational connection with the objective pursued. The question of whether other, more effective or less intrusive means of achieving the objective does not arise. In contrast, under the proportionality approach, the interference with the claimant’s investment must be proportionate in light of the objective pursued’ (p 304).
framework offers broad transferrable insights for assessing international investment law more generally. The breadth and depth of the normative framework constructed in the book is impressive. The following exposition of the normative framework mirrors the book’s structure.

The normative framework starts off, as one might expect, by identifying the overarching normative criteria according to which the optimal level of protection is to be evaluated (Chapter 2). The book identifies the primary normative criteria as: economic efficiency; FDI attraction; environmental conservation; human-rights realization; property-rights protection; distributive justice; and governance. Unfortunately, the book offers no objective reasons for selecting those criteria, instead it drily observes that ‘critics and supporters appear to agree that the same set of objectives is desirable’ (p. 11). However, as has already been alluded to, if the identification of those criteria is subjective, why should they be readily adopted? The author fails to discuss the issue, and the book largely ignores the question, giving the impression that, for some unsaid reason, those criteria are so obvious as to require no objective justification. Furthermore, ‘FDI attraction’ is not an end in itself, but rather a means for achieving other objectives, because there is no point for a State to attract FDI just for its own sake. Rather, the State views FDI attraction as desirable because it expects FDI to lead to other positive externalities, for instance, to further its economic development.3

The book continues with a systematic discussion of IIAs’ impact on the primary normative criteria as set out in the preceding chapter. It addresses in turn economic efficiency consequences, distributive consequences, increased FDI flows, regulatory chill, and rule of law spillovers, which the review will consider in the same order. The author (Section 3.4) adopts a definition of economic efficiency as a state of the world wherein economic resources are allocated to those valuing them the most (this is the ‘Kaldor-Hicks efficiency’). The book deftly exhibits how the relationship between the reduction of discrimination by IIAs between foreign investors and domestic investors increases the efficiency of the host State’s economy. It also concludes that efficiency consequences of clauses beyond non-discrimination raise difficult empirical

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3 Arguing in this sense Anne van Aaken and Tobias A Lehmann, ‘Sustainable Development and International Investment Law: A Harmonious View from Economics’ in Roberto Echandi and Pierre Sauvé (eds), Prospects in International Investment Law and Policy (CUP 2013) 332 (‘Investment promotion [i.e., FDI attraction] does not equal development and therefore cannot be taken as a “proxy” purpose. Rather, the first layer, investment promotion, is the object of the treaty, investment promotion an intermediary purpose, and development the ultimate purpose of an IIA.’).