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Book Reviews

Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen and Michael Waibel. ***The Political Economy of the Investment Treaty Regime***. Oxford: Oxford University Press, 2017. Pp. 336. $40.95. ISBN: 9780198719557.

The Political Economy of the Investment Treaty Regime (hereinafter *Political Economy*) is an interdisciplinary and innovative treatment of international investment law and a welcome addition to what is now a crowded field of texts on the subject. Consider some of the competition: Rudolf Dolzer and Christoph Schreuer, *Principles of International Law*; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* and Zachary Douglas, *The International Law of Investment Claims*.[1] These are books by and for practitioners. They are the sorts of volumes one consults to get a sense of conventional wisdom and, in the case of Douglas's volume, a restatement in 19th-century style of what the law should be. But for Muthucumaraswamy Sornarajah's unsettling critique in *The International Law on Foreign Investment*, these volumes are ahistorical and, for the most part, descriptive.[2] This new volume deserves the title 'best in show', at the very least, because of its narrowly cast competition.

Political Economy, by contrast, is a brainy book – it is one for scholars and thinkers. It is a book for those who want to get a sense of what the big debates are and what the scholarly literature has to say about them. Moreover, it is of a different breed than all of the competition. *Political Economy* raises contentious questions from non-legal angles, providing a window on how to think about investment law beyond the cramped confines of lawyer's law. It is the sort of book that instructors will want to consider adopting when teaching courses on investment law and that researchers will want to consult to get a sense of the state of play. It falls short, however, of being a definitive statement of the field, as I explain below.

The objective, according to the authors, is to 'appreciate' both law and political economy: 'Lawyers need to understand the economics and politics of both foreign investment and investment treaties, and those without a legal background need to be familiar with the basic legal features of the regime' (at 260). To this end, the authors describe, over the course of nine chapters, various controversies that continue to preoccupy scholars labouring in the field. Introductory chapters cover the basics of the regime and the economic and legal arguments that have been made both in favour and against (Chapters 1 and 2). Two chapters on legal topics, focusing on investment treaty arbitration (Chapter 3) and standard investment treaty protections (Chapter 4), precede two chapters canvassing some of the economic debates in the literature, asking whether the investment regime promotes efficiency (micro-economics in Chapter 5) and whether the regime attracts new inward investment or promotes good governance (macro-economics in Chapter 6). The 'politics' served by the regime, addressing 'the main factors driving' investment treaty policy-making in developed countries (Chapter 7) and then in developing countries (Chapter 8), are tackled and then followed with a final chapter

1 R. Dolzer and C. Schreuer, *Principles of International Law* (2nd edn, 2012); C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (2017); Z. Douglas, *The International Law of Investment Claims* (2010).

2 M. Sornarajah, *The International Law on Foreign Investment* (4th edn, 2018).

addressing 'Legitimacy and Governance Challenges' (Chapter 9). This last chapter, anticipated in many of the earlier ones, reviews controversies over consistency and transparency in arbitration, arbitrator selection, interaction with other international regimes and the utility of imposing investor obligations.

This brief survey reveals how *Political Economy* tackles many of the important questions facing the investment treaty and arbitration regime. For this reason, the book is an immensely valuable contribution. One can safely predict that, as the regime will continue to attract similar questions both empirical and normative, the book will be a reference point for debates moving forward. In addition to the details and data assembled within, keeping with its tone of academic detachment, *Political Economy* pulses with the drumbeat of scepticism. This, too, is enormously valuable. Much literature in the field too readily accepts commonplace notions promoted by the investment arbitration bar. *Political Economy* tests this conventional thinking, questioning the terrain upon which many of these notions have been constructed. It offers a model of scholarly production that critically evaluates conventional wisdom. To do otherwise would have been both wearisome and intellectually timid.

As its title suggests, this book is about political economy, but it is a particular kind of political economy. The authors unselfconsciously adopt an approach to political economy associated with the American school of international political economy (IPE). According to Benjamin Cohen's analytical frame, there are two dominant traditions in the English-speaking world, constituting a 'transatlantic divide'. One is an American tradition and the other a more radical British one.[3] While the field is more complicated than this simple binary suggests,[4] the American school is described as adopting empirical and positivistic methods to research questions. It is an approach that purports to be scientific, value-free and practical. Cohen contrasts this with the British school of IPE, which is more normative and qualitative, with a focus on power. The leading scholar operating within the British tradition, the late Susan Strange, described her method as one that was preoccupied with structural power shaping the international system.[5] As Robert Cox puts it, critical IPE is not about problem solving (a feature associated with the American school) but, rather, about analysing unequal relations of power and assessing how they might be susceptible to transformation.[6]

The adoption of American, as opposed to British, methods is revealed by the number of times the authors of *Political Economy* refrain from taking a stand on some of the contentious questions in international investment law. In standard national treatment analysis, for instance, we are asked to compare whether foreigners are subject to different treatment as compared to nationals. This gives rise to a question common to equality analysis under national constitutions: who is to be compared to whom? Should the comparator chosen be one identical to the foreign investor in every respect but for nationality (for example, *Methanex*[7]) or is it preferable to identify a competitor in the same market (for example, *Pope & Talbot*[8]) or, finally, an actor who is

3 B.J. Cohen, *International Political Economy: An Intellectual History* (2008).

4 See the papers collected in N. Phillips and C.E. Weaver (eds), *International Political Economy: Debating the Past, Present, and Future* (2011).

5 Generally, see S. Strange, *States and Markets* (2nd edn, 1988).

6 Cox, 'Social Forces, States and World Orders: Beyond International Relations Theory', in R. Keohane (ed.), *Neorealism and Its Critics* (1986) 204, at 210–211.

7 *Methanex Corporation v. United States – Final Award on Jurisdiction and Merits, Ad Hoc – Arbitration Rules*, 19 August 2005.

8 *Pope & Talbot v. Canada – Award on the Merits of Phase 2, Ad hoc – UNCITRAL Arbitration Rules*, 10 April 2001, para.78.

participating in markets generally and so defined at a high level of abstraction (for example, the exporters in *Occidental*[9])? We are compelled, therefore, to think about the choice of the comparator group for the purposes of doing national treatment analysis. The authors raise the question but do not firmly answer it (at 102).

Or consider the commonly asked question: do bilateral investment treaties (BITs) confer greater rights than those available to nationals under domestic law (such as US citizens under their Constitution)? The authors raise this question and refer to the relevant studies, but they take no position on the matter. It should hardly be contentious to conclude that the investment treaty regime exceeds US constitutional law. This simply is the case by virtue of the breadth of economic interests that are typically protected under treaty that go well beyond the interests protected by property rights under the Fifth and Fourteenth Amendments to the US Constitution. From another angle, national treatment doctrine in investment law encompasses both intentional and unintentional (or adverse impact) discrimination, while US constitutional law takes no cognizance of the latter conduct (for example, *Washington v. Davis*[10]). Or consider that run-of-the-mill economic cases in US constitutional law attract only the lowest level of scrutiny, called rationality review (for example, *Carolene Products*[11]), while fair-and-equitable-treatment doctrine, for example, is not deferential but attracts scrutiny sometimes at very high levels (for example, *Clayton*[12]). Whether investment law exceeds US constitutional law is no longer an open question.[13] Although they raise the question, the authors choose not to wade in (at 153).

They take a stand on other things, however. They are not neutral about the relationship between signing BITs and attracting foreign direct investment (not surprising from two of these authors[14]), and they describe the evidence (on two occasions) as being 'mixed' (at 166). In the last chapter on 'legitimacy', they make the evaluative statement that in their 'view' investment tribunals make law (rather than simply apply law the parties have chosen). Moreover, they say that investment treaty arbitration '*should be* evaluated in light of the norms of accountability, openness, coherence and independence' comparable to public law systems rather than merely to systems of privatized justice (at 246–247; emphasis added). These evaluations stand apart in a book largely bereft of commitments, other than one that, to its credit, encourages further research in the field.

Should the authors be applauded for mostly, though not uniformly, refusing to take sides on divisive questions in a field as fraught as this one? I am less enthusiastic than the late David Caron, who describes the book as refreshingly 'fair'.[15] It is not sufficient merely to take note of 'both sides' to a debate. Max Weber provides some guidance here. Weber serves both as a model of the 'value-free' scholar and as one who insists that scholars have an obligation to assess the consequences of their 'scientific' inquiries. Weber maintained that inquiries into means

[9] LCIA, *Occidental Exploration and Production Company v. Ecuador – Award*, 1 July 2004, LCIA Case no. UN 3467.

[10] *Washington v. Davis*, 426 US 229 (1976).

[11] *United States v. Carolene Products Co.*, 304 US 144 (1938).

[12] PCA, *Clayton v. Canada – Award on Jurisdiction and Liability*, 17 March 2015, PCA Case No. 2009-04.

[13] I consider this question, and answer it, in Schneiderman, '"Writing the Rules of the Global Economy": How America Defines the Contours of International Investment Law?', *London Review of International Law* (forthcoming).

[14] E.g., Poulsen, Bonnitcha and Yackee, 'Transatlantic Investment Treaty Protection', in D. Hamilton and J. Pelkmans (eds), *Rule-Makers or Rule-Takers? Exploring the Transatlantic Trade and Investment Partnership* (2015) 173.

[15] His comment appears on the back cover of *Political Economy*.

– but not in regard to ends (or 'ultimate values') – can be tested by social scientific analysis. An assessment of means encourages one to be '*conscious* of the fact that *any* action … will have consequences that imply *taking sides*'.[16] Those who act 'responsibly', Weber wrote, must weigh 'the goal of his action against its consequences'. The question for social scientific judgment, then, is whether the ends justify the 'ultimate' means.[17] The social scientist assumes the 'duty of creating clarity and a sense of responsibility' about the consequences that follow from prescribed actions.[18] It follows that there is a scholarly responsibility to evaluate the contending sides to an argument and, where evidence leans clearly in one direction and not in another, to say as much.

It is not enough, then, merely to describe debates when the contending sides have better or worse arguments. The authors appeal to the fact that there are (to borrow from Weber again) gods forever warring over the terms of investment law that are irreconcilable and, therefore, incapable of being placated by scholarly research. They dutifully, if inconsistently, decline to choose which, among those gods, to serve.[19] Yet the authors also have a responsibility to clarify, rather than relativize, these clashing positions in so far as they have empirically verifiable evidence in their support. If *Political Economy* admirably succeeds at acknowledging those contending views, the book sometimes falls short of providing guidance about which arguments, in support of those views, is more compelling than others.

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José E. Alvarez, ***The Impact of International Organizations on International Law***. Leiden: Brill/Nijhoff, 2017. Pp. 479. ISBN: 9789004328457.

Any book authored by José E. Alvarez is a must-read for an international lawyer interested not only in international organizations (IOs) but also in the way international law works today. And this one is no different. *The Impact of International Organizations on International Law* may be read as an updated and refined restatement of Alvarez's position on 'how institutionalization has affected the making, the interpretation, the contents, and the effect of international law' (at vii). It is a topic he first explored in his 2005 book *International Organizations as*

[16] Weber, 'The "Objectivity" of Knowledge in Social Science and Social Policy', in H.H. Bruun and S. Whimster (eds), *Max Weber: Complete Methodological Writings* (2010) 100, at 102 (emphasis in original).

[17] Weber, 'Science as a Profession and Vocation', in Bruun and Whimster, *supra* note 16, 335, at 350. Those ultimate values were, however, 'cultural questions' that were 'less amenable' to 'unambiguous solution' in Weber, *supra* note 16, at 104.

[18] Weber, *supra* note 17, at 350. On the ethic of responsibility in scholarly pursuits, see the fleeting reference in Weber 'The Profession and Vocation of Politics', in P. Lassman and R. Speirs (eds), *Weber: Political Writings* (1994) 309, at 360, and discussion about the responsibility of all 'human action' in K. Löwith, *Max Weber and Karl Marx*, translated by Hans Fantel (1982), at 46–47.

[19] Weber, *supra* note 17; Weber, 'Between Two Laws', in Lassman and Speirs, *supra* note 18, 75, at 79.