

***Kenneth J. Vandavelde, Bilateral Investment Treaties.
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Economic liberalism and the rule of law are pillars of bilateral investment treaties. This is the key message of Professor Kenneth J. Vandavelde's *Bilateral Investment Treaties, History, Policy, and Interpretation*.

In his book, Professor Vandavelde analyses bilateral investment treaties (BITs) as instruments of liberal economic policy. He identifies the core principles of BITs: access, reasonableness, security, non-discrimination, transparency and due process. All of these principles, but access, form part of the concept of the rule of law. The analysis of the content of BITs in the book is organised around these principles (Chapters 5-10).

Chapter 2 of the book introduces the history of bilateral investment protection treaties, which started with treaties of friendship, commerce and navigation (FNCs) in the late 18th century. It guides the reader through subsequent changes in the global economy and underlying international legal developments, which are divided into the Colonial Era (1820-1944), the Cold War Era (1944-1989) and the Global Era (since 1990).

Chapter 3 explores the proposition that BITs are instruments of liberal economic policy. It outlines the theory and its empirical application and presents the main points raised by the critics of the liberal economic policy. This chapter points out that BITs, which are conceptually based on the liberal economic theory, are not very effective instruments of liberal economic policy. It shows that of the three principles of liberal economics: investment security, investment neutrality and market facilitation by the States, BITs concentrate mainly on the first one. The Chapter also addresses the issue of inconsistent evidence as to whether BITs attract foreign investments. The conclusion, and Professor Vandavelde's key argument in this book, is that the BITs are more effective instruments of liberal legalism (i.e. promoting the rule of law) than liberal economics (i.e. promoting a liberal investment regime).

This key conclusion informs the structure of the remainder of the book, which analyses the content of BITs. Chapter 4 addresses application of the BITs *ratione personae*, *ratione materiae* and *ratione temporis* (definition of an investor, definition of an investment, temporal application, exceptions). Chapters 5-10 abandon this classic approach to provision-based analysis of BITs. They are organised around the core principles of BITs identified in Chapter 1: access, reasona-

bleness, security, non-discrimination, transparency and due process. The Chapters analyse the structure and policy of a given core principle, moving then to the analysis of arbitral practice.

The principle of reasonableness (Chapter 5) includes the issues of fair and equitable treatment, unreasonable and discriminatory treatment and international minimum standard. The principle of security (Chapter 6) covers the principles of fair and equitable treatment and full protection and security, as well as issues related to observance of obligations, expropriation, war and civil disturbance, currency transfers and preservation of rights. The principle of non-discrimination (Chapter 7) covers most-favoured-nation treatment, national treatment, fair and equitable treatment, the international minimum standard, as well as the issues of war and civil disturbance and unreasonable or discriminatory measures. The bulk of the chapter addressing due process (Chapter 10) is devoted to investor-state arbitration. The approach proposed by Professor Vandeveldel makes various classic BIT principles, based in standard BIT provisions, surface under more than one core principle identified in the book.¹ Since the tribunals and commentators have been struggling for years to define concepts such as fair and equitable treatment or the international minimum standard, the approach proposed by Professor Vandeveldel offers new insights into the analysis of BITs.

This definitely is not just “yet another book about BITs”. Professor Vandeveldel’s approach moves the analysis of the BITs to a different level. Its starting point is the BITs’ underlying policy, not their textual analysis. The identification of this underlying policy is based on general reading of the BITs and an assumption derived from historical circumstances surrounding their inception and development. It is not based on express policy pronouncements of individual States or the international community. This illustrates a more general problem of BIT analysis – they are not administered or coordinated on an international level and thus difficult to conceptualise as a coherent whole. Professor Vandeveldel’s proposition is to analyse them through the prism of liberal economics and liberal legalism, which is a new vantage point of scholarly analysis of BITs.

It remains to be seen whether this approach will be helpful in the BITs’ practical application. Each investment treaty dispute is based on the wording of an individual treaty and on the circumstances of a particular case. In this perspective, it could at times be difficult to assume that a particular BIT is an expression of

¹ A reverse approach is offered in Professor Vandeveldel’s new article *A Unified Theory of Fair and Equitable Treatment* (43 NYU J Int’l Law & Politics 43 (2010)), where he analyses the fair and equitable treatment principle, applying the core principles of the rule of law (and BITs): reasonableness, consistency, non-discrimination, transparency and due process.

a host State policy of economic liberalism and liberal legalism. An arbitral tribunal accepting such an approach would also see itself as an enforcer of such a policy.

Professor Vandeveldel's approach also reinforces the point that investment treaty disputes are not purely commercial disputes. The role of investment treaties is to safeguard good governance standards applied by the host States. By linking economic liberalism with the rule of law and good governance in the context of investment treaties, Professor Vandeveldel makes an important contribution in reconciling the commercial arbitration approach to investment treaty disputes, which underlines commercial interests of investors, with the global administrative law approach, which stresses the importance of good governance and the host State's right to regulate.

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