Introduction

Once the domain of elitist scholars and practitioners, international investment law has come to the forefront of legal debate. Under most investment treaties, states have agreed to give arbitrators a comprehensive jurisdiction over what are essentially regulatory disputes. Some scholars and practitioners have expressed concern regarding the magnitude of decision-making power allocated to investment treaty tribunals. Many of the recent arbitral awards have determined the boundary between two conflicting values: the legitimate sphere for state regulation in the pursuit of public goods on the one hand, and the protection of private interests from state interference on the other. Although international investment law is one of the most dynamic and thriving fields of international law, it has been criticized for failing to strike a fair balance between the promotion of foreign direct investments and the regulatory autonomy of host states.

Can constitutional ideas such as proportionality, reasonableness and standards of review help arbitrators in interpreting and applying broad and open-ended treaty provisions? Can they help facilitate the consideration of the commonweal in investment treaty arbitration? Can they contribute to the perceived legitimacy and effectiveness of international investment governance? Are there rules to govern the ‘migration’ of constitutional ideas to other legal fields? What are the limits, if any, of the use of domestic law concepts in the international realm?

This book examines the role of criteria such as proportionality, reasonableness and standards of review in the balancing of private and public interests in investment disputes, and addresses the question as to whether such tools can, and/or do, help arbitral tribunals adjudicate such disputes. Proportionality and reasonableness are legal tools traditionally used in domestic, regional and even some international courts and tribunals for resolving conflicts between private and public interests through a process of balancing. This book analyses the migration of these constitutional ideas from the domestic realm to the international one. It then examines the promises and pitfalls of the use of such concepts in international investment law and arbitration.
While comparative reasoning can play an important role in shaping the field of international investment governance, before importing elements from other fields we should consider whether the given transplant will work well and what its implications will be in the investment law context. This book shows that the use of proportionality and reasonableness in investment arbitration can be appropriate, provided that one adopts appropriate standards of review, that is, appropriate procedural mechanisms indicating the extent to which the adjudicator re-examines state conduct.

While some scholars consider that arbitral tribunals should adopt proportionality analysis as the applicable method of review, others have adopted a more cautious stance. This book adopts a moderate position between the two poles, by not excluding the use of proportionality and/or reasonableness, but providing a reflection on whether it is desirable to use these concepts in the first place and, if so, how best to use them, adopting appropriate standards of review. In short, by adopting appropriate standards of review the use of proportionality and reasonableness in investment arbitration can contribute to the further development of the field in a manner compatible with the more general evolution of public international law.

The book aims to fill a significant gap in the current literature: to date there is no comprehensive study to cover the interplay between proportionality, reasonableness and standards of review in international investment law and arbitration. This study aims to contribute to the ongoing debate as to whether these concepts can help arbitral tribunals contribute to international justice and peaceful and prosperous relations among nations. While the interrelationship between proportionality, reasonableness and standards of review may be studied from a variety of different perspectives and institutional settings, this book adopts an ‘internal’ approach with respect to international investment law and arbitration. The choice of this approach is not meant to imply that the institutional setting of international investment law is to be preferred to others to reconcile

---


Proportionality, reasonableness and standards of review

public and private interests. Instead, looking at the interplay between proportionality, reasonableness and standards of review from an inside view of international investment law allows a reflection on this emerging field of public international law in particular and its contribution to the development of international law more generally.

At the same time, the book presents some lines of continuity with the available literature, which can be placed in five broad categories: (1) literature on international investment law; (2) literature on international investment law and other values; (3) literature on proportionality in various

3 Clearly, arbitral tribunals are not the only available fora, let alone the superior fora for this kind of dispute. Other fora are available such as national courts, human rights courts, regional economic courts and the traditional state-to-state fora such as the International Court of Justice or even inter-state arbitration.


The book complements the existing literature in several ways. First, although there is flourishing literature on international investment law and arbitration, only recently have scholars and practitioners focused on specific theoretical aspects. Second, the book contributes to the existing literature on international investment law and other values, addressing the question as to whether constitutional law benchmarks, such as proportionality, reasonableness and standards of review, can help arbitrators achieve a better balance between public and private interests in investor–state arbitration. Third, while there is a growing amount of literature on proportionality in a variety of fields of law, only in the past decade have investment law scholars started investigating the specific application of proportionality analysis to international investment law and arbitration. Fourth, this study complements the existing literature on reasonableness by offering a critical assessment of the role that this concept can (and does) play in international investment law and arbitration. Although reasonableness plays a significant role in investor–state arbitration it has received limited, if any, attention by international investment law scholars. Fifth, the book contributes to the existing literature on standards of review by exploring the linkage between standards of review and proportionality, on the one hand, and standards of review and reasonableness, on the other, in international investment law and arbitration.

Finally, the book complements the existing literature providing the reader with a useful analytical framework of the role proportionality, reasonableness and standards of review play in investor–state arbitration. The author has explored this interplay in earlier contributions but this has been done in a piecemeal fashion; to date there is no comprehensive study to cover the interplay between proportionality, reasonableness and

---

6 On proportionality in investor–state arbitration, see e.g. G. Bücheler, *Proportionality in Investor–State Arbitration*; C. Henckels, *Proportionality and Deferece in Investor–State Arbitration*. For additional references, see Chapter 3 below.

7 On reasonableness in different fields of law and legal theory, see e.g. G. Bongiovanni, G. Sartor and C. Valentini (eds), *Reasonableness and Law* (Springer 2009). For additional references see Chapter 4 below.

8 On standards of review in international law, see e.g. L. Gruszczynski and W. Werner (eds), *Deference in International Courts and Tribunals* (OUP 2014). For additional references see Chapter 5 below.

standards of review in international investment law and arbitration. Therefore, such theoretical framework offered by the book may be of help to both practitioners and scholars alike, who are interested in the legitimacy, effectiveness and justice of international investment law and arbitration.

The book adopts an interdisciplinary approach, principally relying on the international law literature, but also taking into account the existing literature on legal theory and comparative constitutional law. The use of interdisciplinary sources is not aimed at diluting the quality of the classical types of public international law analysis, or integrating the logic of public law into international investment law.\(^\text{10}\) Rather, the adoption of an interdisciplinary approach aims at deepening the public international law analysis, making it more nuanced and responsive to current debates.\(^\text{11}\) The book does not suggest reading international investment law as a constitutional system; rather, it highlights that international investment law is part and parcel of international law.

The intended readership for this book is that of specialists in the field of international investment law, international economic law and public international law. The book will also appeal to policy makers, arbitrators and practitioners. In order to make the analysis relevant to the different targeted audiences, the language will deliberately be kept technical, but efforts will be taken to achieve clarity and cohesion. As a result, this study will be of relevance for a wide audience, including but not limited to: international (investment) law scholars, arbitrators and practitioners, government departments, as well as other interested audiences.

The book is structured into three parts. The first part has a general/introductory character and sets out the overall legal and analytical foundations upon which to build an original study of the concepts of proportionality, reasonableness and standards of review in international investment law and arbitration. In this first part, Chapter 1 examines the international regime governing foreign direct investments. Chapter 2

\(^{10}\) For a different approach, see, among others, J. Kleinheisterkamp, ‘Investment Treaty Law and the Fear of Sovereignty: Transnational Challenges and Solution’ (2015) 78 MLR 793–825, 795 (arguing that ‘the perceived clash between investment treaty law and sovereignty can and must be resolved by integrating the logic of public law, as a proxy for sovereignty, into investment treaty law’).

\(^{11}\) In this sense, see V. Lowe, ‘The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?’, in M. Byers (ed.), The Role of Law in International Politics: Essays in International Relations and International Law (OUP 2000) 207–226, 218.
explores the phenomenon of the migration of constitutional ideas from domestic law to international (investment) law, its promises and pitfalls. The second part analyses and critically assesses the use and/or eventual desirability of the notions of proportionality, reasonableness and standards of review in international investment law and arbitration. This starts with Chapter 3, which explores the notion, origins and structure of proportionality, and its successful migration from constitutional law to different fields of domestic and international law. After discussing the successful migration of proportionality from domestic law to EU law and international trade law, the chapter investigates whether and, if so, to what extent, proportionality has migrated to international investment law and arbitration, analysing the relevant jurisprudence. Chapter 4 investigates the notion of reasonableness and its pros and cons, as well as its application in various areas of domestic and international law. It then examines its use in international investment law and arbitration. Chapter 5 discusses the concept of standards of review and examines the standards that have been adopted by international courts and tribunals and investment arbitration tribunals respectively. The final part concludes by examining the interactions between proportionality, reasonableness and standards of review. Here, Chapter 6 proposes a more critical use of proportionality and reasonableness in conjunction with appropriate standards of review. The conclusions sum up the key findings of the study.