Host States’ Logic of Balance in Applying the Right to Regulate Foreign Investment Admission*

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Foreign investment admission is concerned with whether foreign investment is admitted or in which manner foreign investment can access host states’ markets. Recent changes of international investment rules focus on the rules of foreign investment admission. Those changes reflect host states’ reconsideration on the way in which they regulate foreign investment admission. It argues that host states, as rational persons, tend to apply the logic of balance in regulating foreign investment admission, with three dimensional implications as to balancing the “quantity” and “quality” of foreign investment, balancing foreign investors’ and host states’ interests, and balancing investment liberalization and government regulation. Nevertheless, some states may break the logic of balance in exceptional cases, such as the US employed the FIRRMA as a tool to contain China’s rising and challenge to its hegemony. Therefore, the logic of balance does not apply to the states with the intention of manipulating the right to regulate foreign investment admission.

Keywords: foreign investment admission, right to regulate, logic of balance, exception

Introduction

From the latest development of international investment treaties, one major change of international investment law is the regulations on foreign investment admission. Since the clause of “national treatment for foreign investment admission” was included in the EU-Canada Comprehensive Economic and Trade Agreement signed in 2017, the EU has started to adopt the similar approach with the US in regulating foreign investment admission. China also employs the US investment treaty model in dealing with the issue of foreign investment admission when negotiating the treaties with the EU and the US. It seems national treatment for foreign investment admission with negative list is prevailing in major economies. How to regulate foreign investment admission is closely related with host states’ regulatory autonomy and reflects the extent of investment liberalization to which host states are committed.

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This paper will analyze the practices of host states’ regulation on foreign investment admission and try to explain the logic of balance that host states may apply in their regulation. Part I digs into the origin of the right to regulate foreign investment admission, followed by Part II that elaborates the features of such right. Part III analyzes host states’ logic of balance in applying the right to regulate foreign investment admission and Part IV offers a case of the US breaking the logic of balance in its new legislation of Foreign Investment Risk Review Modernization Act (FIRRMA). At last, the paper concludes that host states’ may not always practice as rational persons and the logic of balance is compromised by illegitimate considerations.

The Origin of the Right to Regulate Foreign Investment Admission

Host states’ right to regulate foreign investment admission is a sub-branch of host states’ right to regulate foreign investment, which is part of the host states’ application of their sovereignty during the phase of foreign investment admission. The “right to regulate foreign investment” initially appears in the Charter of Economic Rights and Duties of States in 1974 which explicitly stipulates that each state has the right to exercise authority over foreign investment within its jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities, as well as the right to decide whether to grant foreign investors with preferential treatment. There is also the definition given by the scholars who consider the “right to regulate foreign investment” as being divided into two categories: one is the right to regulate foreign investment to promote domestic development and the other one is the right to protect national interests not negatively affected by foreign and domestic investment (Mann, 2002, p. 205).

In theory, Catherine Titi holds the view that the “right to regulate foreign investment” has not been defined in legal dictionaries; nevertheless, it is kind of legal right which exceptionally exempts the host states from honoring their commitments in investment treaties so as to allow them to exercise the authority without incurring compensation obligations (Titi, 2004, p. 33). Catherine Titi emphasizes the “right to regulate foreign investment” is in essence a legal right and concerned with the issue of compensation. If the “right to regulate” is considered as a legal right, it means such right is substantively embedded in law and safeguarded by customary law and general international law, thus there is no need to provide it in investment treaties.

In practice, it was the developing countries that firstly claimed the “right to regulate foreign investment”. Recently, developed countries reconsider the theory of the “right to regulate foreign investment” in order to employ this right to regulate foreign investment. In fact, the Charter of Economic Rights and Duties of States (Charter) revealed the wills and requirements of developing countries in the 1970s and some developed countries, such as the United States, Britain, Belgium, and Denmark voted against the Charter. It is recalled that Part IV of the Declaration on Permanent Sovereignty over Natural Resources (the Declaration) also stresses the host states’ right to regulate foreign investment within their jurisdiction. However, a question in point is to what extent the Charter or the Declaration may have binding force on the Members of the United Nations. Most documents regarding the establishment of new international economic order and with the emphasis on host states’ right to regulate foreign investment, in strict legal words, are not binding laws (Wang, 2007, pp. 376-377). However,

1 Article 2 of the Charter of Economic Rights and Duties of States.
considering the recent regulatory measures on foreign investment adopted by the EU and the United States, it seems all the states adhere to claiming and exercising their right to regulate foreign investment.

On 22 March 2011, Kader Arif, representing the Trade Committee, submitted the Report on the Future European International Investment Policy (Report) to the European Parliament (European Parliament, 2011a). The Report stresses that the EU investment legal framework should not negatively affect the investment guarantees and protection under current investment treaties, while realizing that necessary balance between foreign investor protection and regulatory authority should be stricken in future (European Parliament, 2011a). The Report especially proposes to protect host states’ right to regulate and introduces social and environmental standards that foreign investment should respect (European Parliament, 2011a). The European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy (Resolution) has four clauses which explicitly illustrate the EU policy in applying the “right to regulate”. The Resolution emphasizes that the EU would respect the right of public intervention when negotiating investment treaties in future, expresses the EU concerns on international arbitrators’ broad interpretation of the clauses of foreign investment protection which unreasonably excludes host states’ regulatory space, calls on the European Commission to ensure the clarity and precision of the standards of foreign investment protection included in future investment treaties in case the arbitrators make broad interpretations, emphasizes that the European Commission should introduce the clauses of the “right to regulate” into future investment treaties with focus on the protection in the fields of national security, labor and consumer rights, diversity of environmental, industrial and cultural policies, and public health, and calls on the European Commission to take into account each state’s concerns and restrict the openness of foreign investment in sensitive sectors such as public service (European Parliament, 2011b).

International organizations have also discussed host states’ right to regulate foreign investment in their documents. For example, the United States Conference on Trade and Development (UNCTAD) defines the “right to regulate” as part of sovereignty which enables each state to decide the conditions for foreign investment admission and operation (UNCTAD, 2013, p. 10); the Organization for Economic Cooperation and Development (OECD) describes that the members may adopt, maintain, or implement the measures that they consider appropriate to ensure investment activities do not damage national health, security, or environment (OECD, 1998). Attention is paid that the International Institute for Sustainable Development (IISD) refers “the right to regulate’ as a state” capability of pursuing its development objective and priority and adopting regulatory or other measures to safeguard harmonious economic and social development (Mann, Moltke, Peterson & Cosbey, 2006, p. 38). Therefore, it is evident that host states’ rights to regulate foreign investment and foreign investment admission have been admitted and acknowledged.

The Features of the Right to Regulate Foreign Investment Admission

Foreign investment admission and foreign investors’ rights are created by international investment treaties which are usually concluded between home states and host states. Whether the states would like to grant rights to foreign investors is determined by the treaties, not originated from general international law or customary law. Foreign investment admission is just an item included in the “contract” negotiated by sovereign states and the modalities of foreign investment admission correspond to the specific designs of investment treaties. From the perspective of general international law, host states are not naturally obligated to open their investment markets.
Whether host states prohibit or partially restrict foreign investment admission is the exercise of their regulatory authority, which is part of their sovereignty. In other words, whether or the extent to which host states may open their markets for foreign investors depend on the host states’ commitments. Therefore, host states’ right to regulate foreign investment admission is related with sovereignty and investment treaties.

Supremacy of the Right to Regulate Foreign Investment Admission

Host states’ right to regulate foreign investment is originated from sovereignty, and thus the right to regulate foreign investment admission is the host states’ inherent exercise of regulatory authority over economic matters. Liberal investment treaties usually include the restrictions on host states’ right to regulate foreign investment admission, but host states may make choices between “neoliberal” and “embedded liberal” models of investment treaties in order to balance foreign investors protection and regulatory authority. Both developing and developed countries have recently challenged the legitimacy of investor-state dispute settlement and intend to strengthen their regulation on foreign investment. Therefore, the states are reevaluating the theory of the “right to regulate”.

Given the facts that host states make commitments on foreign investment admission in investment treaties and that the origin of host states’ obligations arises from those commitments are contractual, it is likely to conclude the right to regulate foreign investment admission is not inherently natural. Host states should honor their commitments and international obligations, which is a fundamental principle of international law. However, host states may deviate from their commitments and obligations if an emergency appears. The “emergency” clause usually permits host states to adopt temporary measures to handle economic crisis; otherwise, host states should make compensations if they break their obligations.

Since foreign investment is kind of activity that occurs within the jurisdiction of host states, they have inherent right to make necessary regulation and administration (Sornarajah, 2002, p. 205). From the data of global history and economy, economic liberalization is beneficial for host states’ economic development. Trade liberalization is promoted by the WTO, but investment liberalization is controlled by the states. From the perspective of general international law, host states are not naturally obligated to permit foreign investment admission. Economic sovereignty belongs to the states who are free to decide whether or to what extent their economies are open to foreign investment. Given the circumstances of national economy, host states are justified to reject complete free foreign investment admission, in that foreign enterprises may destroy domestic infant industry or bring about social damages due to the surge of large amounts of foreign capital. In addition, host states also care about the effects of foreign investment on public morality, health, and environment (Dolzer & Schreuer, 2008, p. 80). Keeping alert of negative effects incurred by foreign investment is enshrined in host states’ responsibility for the protection of national interests. Therefore, host states’ right to regulate foreign investment admission is inalienable.

Each state’s foreign investment law, with clauses on foreign investors’ rights and obligations, may specify the state’s regulatory authority which cannot be excluded by the contracts. According to the survey of the International Center for Settlement of Investment Dispute, host states usually reserve their regulatory authority over the following matters: (1) the categories of economic sectors as regards whether they are encouraged, restricted, or prohibited for foreign investment, as well as preferential treatment for different kinds of foreign investment; (2) the power of screening foreign investment to make sure whether the specific foreign investment is
qualified or threatens national security; and (3) the right to regulate foreign invested enterprises’ sales and production. Host states have the power to supervise and regulate foreign invested enterprises’ activities that occur in their jurisdictions. For instance, host states can set up the standards that foreign invested enterprises should comply with, restrict imports, enforce antitrust and competition law (Yu, 2014, p. 30).

In fact, except that host states restrict their regulatory authority in investment treaties or national law, they are qualified to regulate foreign investment admission as they will. Since the right to regulate foreign investment admission is originated in sovereignty, its supremacy is well founded. Even if host states make commitments to restrict their regulatory authority in investment treaties or national law, they may resume the full regulatory authority by withdrawing from treaties or amending national law.

**Limitation of the Right to Regulate Foreign Investment Admission**

Current international investment legal system restricts and infringes host states’ right to regulate foreign investment. On the one hand, host states have made commitments to protect and promote foreign investment, which significantly restricts the states’ regulatory space. On the other hand, the system of investor-state dispute settlement bears commercial features and the arbitrators’ interpretation of investment treaties tends to protect foreign investors, which means host states are at risk to lose the cases and thus results in “chilling effect”.

**Investment treaties locking up host states’ regulation.** The US investment treaty model includes negative list and provides the obligations that host states should bear, with the characteristics of investment liberalization. Negative list simplifies host states’ laws and regulations on foreign investment and presents the areas where foreign investors are prohibited from making investment. Thus it is easy for foreign investors to make clear the extent of openness as regards host states’ foreign investment policy. What is more, negative list requires host states to specify the administrative framework of foreign investment admission and circumscribe the scope of host states’ commitments on foreign investment admission, which lock up host states’ regulatory space on foreign investment.

If host states accept liberal rules of foreign investment admission, they need to publicize inconsistent measures and the reserved sectors unopen to foreign investors. The liberalization of foreign investment admission is usually followed by host states’ reform of their investment legal regime with a series of legislative amendments. Since China joined the WTO, China has amended foreign investment law in order to comply with the requirements of Article 16.4 of the Marrakesh Agreement Establishing the World Trade Organization. In particular, China tremendously revised a series of laws and regulations by referring to WTO law and tried to establish a foreign law framework on the basis of WTO principles (Yu, 2004). Although there are no multilateral arrangements in international investment law, bilateral investment treaties may also require the parties to revise existing laws or set down new rules to realize the objective and purpose of the Bilateral Investment Treaties (BITs). Take China for example. When China negotiated the BIT with the US, it agreed that China would liberalize its foreign investment admission regulation. Therefore, China committed to providing national treatment for foreign investment admission and would reform its foreign investment regulatory framework.

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2 Article 16.4 of the Marrakesh Agreement Establishing the World Trade Organization provides that “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.”
Negative list is part of international investment treaties and the sectors within the list are unopen to foreign investment. Once host states provide the negative list, they seldom go back to narrow the sectors that are open to foreign investment. Negative list may in fact lock up host states’ obligations to open investment markets for foreign investors (Han, 2014, pp. 105-106). Although the BITs are only binding on the parties, most-favored-nation clauses in the BITs function as a generalization tool which may generalize the parties’ obligations under negative list. Therefore, host states’ negative list is possible to be applicable to the states who are not the parties to the above-mentioned BITs.

**Chilling effect of investor-state dispute settlement.** The development of international investment law is currently at the crossroad. Given the imbalance arising from investment dispute settlement system, international investment law is suffering the crisis of legitimacy (Franck, 2005, pp. 1521-1625). It is accused that the arbitrators tend to interpret BITs in favor of foreign investors and ignore host states’ regulatory authority. The commercialization of investment dispute mechanism is posing a challenge for host states.

It is evidenced that investment treaties’ granting the rights for foreign investors has restricted host states’ exercise of their regulatory authority and reduced host states’ flexible application of economic sovereignty. Sometimes, host states are unwilling to take administrative measures on foreign investment due to the fear of going against the obligations under investment treaties subject to foreign investors’ initiation of claims (Brown, 2013, p. 9). For example, Indonesian government, in order to protect natural resources and environment, forbade the operation of open coal mine by issuing Foreign Law in 1999; however, foreign investors considered the Forest Law as an indirect expropriation and claimed that they would lodge a claim against Indonesia; Indonesian government withdrew the Foreign Law due to foreign investors’ threatening of lodging the claim (Tienhaara, 2006, pp. 73-100). Another case in point is *Ethyl vs. Canada* in 2006; Ethyl initiated a claim against Canada’s prohibitive use of gas addictive. Canada, due to fear of large amounts of compensation, withdrew the measure of prohibition and agreed to pay 13 million dollars to Ethyl before the tribunal delivered the award.

The chilling effect of investment arbitration has inhibited host states from taking necessary measures to protect environment, labor rights, and so on. As for developing countries, due to the vulnerability of their economies, they are more likely to be affected by the chilling effect of investment arbitration in that they are indeed entangled in more investment disputes than developed countries.

Host states need to respond to the chilling effect and legitimacy crisis arising from investment arbitrations by taking measures such as reforming their approaches to investment treaties and domestic administration. In particular, they should ensure that the design of investment treaties balances foreign investors’ rights and their regulatory space, reform the investor-state dispute settlement system, and restrict foreign investors’ recourse to investment arbitrations in terms of arbitrability, treaty interpretation, and application, and employ comprehensive measures on foreign investment admission to harmonize foreign investment approval and national security review so as to streamline before-and-after supervision on foreign investment.

**The Logic of Balance in Host States’ Application of the Right to Regulate Foreign Investment Admission**

Although host states’ right to regulate foreign investment is supreme in theory, they relinquish part of regulatory authority in order to attract foreign investment, either by concluding investment treaties or making
self-restriction in national investment law. Aiming to maximize regulatory interests, host states may follow the logic of balancing foreign investors’ and host states’ interests.

**Logic of Balancing the “Quantity” and “Quality” of Foreign Investment**

Foreign investment brings about both positive and negative effects on host states (Yu, 2014, pp. 4-5). In general, it is a way for host states to get capital and projects by introducing foreign investment, which will in turn provide jobs for local residents and enrich social products. Meanwhile, foreign investment, by bringing advanced technologies and management ideas, is beneficial for host states’ long-term economic development and modernization of enterprise governance. Nevertheless, foreign investment may also frustrate host states’ economic and social development.

The nature of capital is to pursue profits, so is foreign investment. Whether foreign investors can get profits is determinative in their foreign investment decision. In theory, foreign investors may ignore host states’ economic and social development when pursuing high capital returns. It is dangerous if foreign investment controls host states’ economy. How to curb negative effect of foreign investment on host states’ environment, labor rights, and national security is the issue that host states cannot ignore. No matter whether host states are developed countries or developing countries, capital export, or import countries, they never accept foreign investment without any limitation or requirement. Although host states are committed to protecting foreign investment and providing preferential treatments, they also require foreign investors to comply with laws and requirements to reduce negative effects. How to optimally make use of foreign investment is a big concern of host states.

Due to the dual effects of foreign investment on host states, more foreign investment does not necessarily result in better effects. Host states should guide foreign investment to serve social and economic development. On one hand, they should provide stable and predictable investment environment for foreign investors by making necessary commitments in investment treaties; on the other hand, they should reserve the regulatory space to ensure healthy development of foreign investment. Therefore, it is a golden rule for host states to balance the “quantity” and “quality” of foreign investment.

**Logic of Balancing the Design of Investment Treaty Clauses**

Investment treaties are designed as a stable mechanism to secure host states’ commitments to foreign investors and realize mutual benefits. By promising not to infringe foreign investors’ property rights in investment treaties, host states would like to attract foreign investment to promote economic development. In other words, host states relinquish part of their sovereignty as trade consideration to restrict their regulatory authority and accept the jurisdiction of international investment dispute settlement mechanism. Investment treaties are deemed as the contracts concluded between the states. From the perspective of contract theory, the parties to investment treaties are unable to maximize mutual benefits from foreign investment or properly respond to the changes that occur after the conclusion of treaties, since the doctrine of *rebus sic stantibus* does not fit the operation of investment treaties which usually include long-term commitments and seriously restrict the states’ flexibility to take timely and appropriate counter-measures. Investment treaties, as strict and inflexible “contracts” in this context, damage mutual interests of the parties. Only if the states’ giving up part of sovereign in investment treaties does not exceed the expected interest, shall the states participate in the
practice of concluding investment treaties. In the long run, it is not beneficial for the development of international investment law system, if there are too many restrictions and limitations on host states’ right to regulate foreign investment.

Should the states consider they do not have discourse in drafting investment treaties or investor-state dispute settlement, they may selectively or completely withdraw from international investment law system. For example, Australia announced to repeal investor-state dispute settlement mechanism (Kurtz, 2012, pp. 65-86); Bolivia, Venezuela, and Ecuador have withdrawn from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Peterson, 2012). As for Argentina, against whom foreign investors initiated a large amount of claims after economic crisis, Argentine political and academic circles have severely criticized investor-state dispute settlement mechanism.

Therefore, to safeguard host states’ regulatory space and flexibility subject to the provisions of investment treaties and investment arbitral tribunals’ interpretation is helpful for the stability of international law system (Aaken, 2014, p. 830). The exercise of the right to regulate foreign investment admission should be oriented to balance foreign investors’ and host states’ interests, redress illegitimate design of international investment law, and prevent systematic imbalance.

**Logic of Balancing Investment Liberalization and Government Regulation**

Government intervention is not compatible with market economy in theory and the extreme of market liberalization requires non-government intervention. However, a free market without any government intervention is not perfect. A healthy market requires appropriate government regulation and institutional guarantee. Market economy is kind of legal economy and the long-term development of international investment requires proper supervision on market of investors. The administrative supervision should ensure that market is operated in the environment of rule of law and investors are equal in competition.

Investment liberalization requires not only the removal of restrictive and discriminatory measures, but also the adoption of positive measures that are necessary to safeguard sound market operation. For example, the measures that ensure equal competition and strike antitrust practice are part of liberalized investment legal system. International investment liberalization does not mean that government function should be reduced, or government should not take any measure. To adjust government function, including taking both positive actions and inactions, is aimed to better serve market operation. International investment liberalization needs strong support of rules and laws, and the progress of foreign direct investment liberalization is, to some extent, dependent on whether there is a reasonable and appropriate legal system that is able to provide a stable and predictable environment. Governments should undertake a series of functions to safeguard sound market operation, such as repairing market distortions (Su, 2005, pp. 20-21). Investment liberalization requires host states to relax the control of foreign investment admission and grant national treatment to foreign investors. Thus, host states should reform their administrative system to reduce the barriers to foreign investment admission, while strengthening before-and-after supervision on foreign investment.

When host states take regulatory measures, they should pay attention to the problems of regulation failure and delayed regulatory effect. After-admission regulation over foreign investment is not always effective. Once foreign investment damages host states’ national security, environment, or infant industries, compensations
cannot reconvert the damages. Therefore, before-admission regulation is necessary for host states to prevent potential damages of foreign investment. This is why Canada and Australia, although insisting on the spirits of investment liberalization, maintain approval procedures on foreign investment that is not within the list of national treatment for foreign investment admission. The practices of keeping close screening of foreign investment in sensitive industries and the investment made by foreign state-owned enterprises are prevailing in major economies. The regulation over foreign investment admission seems irreplaceable.

**Breaking the Logic of Balance in Exceptional Cases**

Host states, due to the supremacy of sovereignty, may abuse their regulatory authority over foreign investment admission to maintain its monopoly or hegemony in world economies. A visible case is the Foreign Investment Risk Review Modernization Act (FIRRMA) issued by the US in 2018, which includes protective and discriminatory provisions to establish legal foundations for the US abusive use of its review power on foreign investment admission.

As regards the legislative purpose of the FIRRMA, it includes the threatening of the US leadership in areas related to national security as an element to exclude foreign investment.\(^3\) Given the expression of “leadership” in the clause, it is not the usual threatening of national security that will be taken into account, but the competition from foreign investment that threatens the US leadership shall be counted. In addition, the FIRRMA particularly requires the Secretary of Commerce to submit the Report of Chinese Investment to Congress and the Committee on Foreign Investment every two years,\(^4\) which means Chinese investment is under stricter review and thus discriminated. It is noted that the FIRRMA also lists foreign investment’s influence on human resources whose knowledge or skills are critical to national security, as one consideration in foreign investment review.\(^5\) It is possible that the US may prohibit high-tech talents from working at foreign invested enterprises and thus restrict their freedom in choosing jobs. Therefore, the FIRRMA deviates the spirits of rule of law that the US used to respect.

It seems unusual for the US to issue such an act as the FIRRMA with protective and discriminatory provisions, since the US has promoted investment liberalization in the past decades. Nevertheless, with the progress of technology, national security is no longer only concerned with traditional areas of military and defense. The security in new areas, such as infrastructure, network, and personal information is also noteworthy. The competition among states has transferred its focus on arm race to comprehensive competition in multiple areas such as technology, talented human resources, and natural resources. With the rising of China, the US hegemony has been challenged, which intensifies the US feeling of insecurity. Under this circumstance, the US is motivated to use the FIRRMA as a tool to restrict Chinese investment in the US, in case Chinese investors would obtain advanced technologies from Chinese invested enterprises in the US. It seems to contain the advancement of Chinese technology and the rising of Chinese in global supply chain is also the concerns of the US enaction of the FIRRMA (Rose, 2018, p. 8).

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3 Article 1702(c)(1) of Foreign Investment Risk Review Modernization Act.
4 Article 1719(b) of Foreign Investment Risk Review Modernization Act.
5 Article 1702(b)(6) of Foreign Investment Risk Review Modernization Act.
Note is taken that the US, as a world leader, used to be endeavored to propel the development of international rule of law in the context of globalization. However, the movement of globalization, which is damaging the US leadership in the world, is now out of the US control. Compared with developing countries, the US is especially disadvantaged in the cost of labor and losing its edge in traditional industries, which exposes the challenges for the US to further the progress of globalization and international rule of law. In contrast, China has achieved a high speed of economic development in the past 40 years since China’s reform and opening up. Made in China 2025 revealed China’s ambition to improve its economic power and global influence. Given the fact that China has become the second largest economy in the world, China is challenging the US position of world leadership, which results in Thucydides Trap. What is more, quite a few US citizens believe it was the US that opened the world market for China and stimulated China’s high-speed economic development, and quite a few US officials figure that current international legal order cannot effectively regulate China’s unfair competition. Therefore, the US may employ the FIRRMA as a tool to contain China’s future development.

In fact, the FIRRMA’s containing effect on Chinese investment in the US is not all-round good for the US, since Chinese investment also provides capital and jobs for the US. The EU, aiming to strengthen foreign investment review at the EU level, also promulgated a framework for the screening of foreign direct investments in the EU in 2018, without any explicit discriminatory provisions. In fact, not every country is so powerful as the US who can afford to adopt apparent discriminatory measures against China. Except the US concern of China’s challenge to its world leadership position, there are also accidental elements that led to the formulation of the FIRRMA. Trump, as the US President, is full of commercial personality, who is not the member of pro-establishment camp. Trump government’s withdrawal from the Transpacific Partnership Agreement (TPP) seems not a wise decision, because the US participation in the TPP was in accordance with the US interests in the long run, since the TPP could function as an avenue for the US to shape international economic rules and establish its geo-economical position in Asia. The design of the FIRRMA has deviated from usual considerations of the logic of balance. To defense the US hegemony is a major concern embedded in the FIRRMA. In the context that rule of law has spread globally, it might be only the US who is so endeavored to promulgate such a law with explicit discriminatory provisions and this legislative practice is exceptional.

Conclusion

Host states’ right to regulate foreign investment admission is embedded in their sovereignty and thus supreme in theory. However, most states are committed to providing a stable and predictable environment for foreign investment and quite a few states have agreed to grant national treatment for foreign investment admission, no matter whether they make commitments in investment treaties or national law. Therefore, host states’ right to regulate has never been unlimited in practice. With the surge of investor-state dispute settlement cases as of 2010s, the states have recalibrated the relationship between investment protection and host states’ regulatory space and tended to adopt the balancing approach to international investment law (Berger, 2015, pp. 6-8). The logic of balance has three dimensional implications: first, balancing the “quantity” and “quality” of foreign investment and selectively promoting the foreign investment which is more beneficial for national economic development, second, balancing the design of investment treaties to protect both foreign investors’ and host states’ interests, and third, balancing investment liberalization and government regulation. However, states
may break the logic of balance due to irrational or illegitimate considerations, such as the US employed the FIRRMA to contain China’s rising and challenge to its hegemony. The logic of balance does not apply to the states with the intention of manipulating the right to regulate foreign investment admission. Without multilateral governance of global investment, it deserves further research on how to design international investment law system to balance the interests between super economies and least developed economies.

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