# Book Reviews

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*Public Health in International Investment Law and Arbitration*

by Valentina Vadi.
London: Routledge, 2012, 224 pp.,
€ 104,00; Hardcover

*Michele Potestà**

Despite the almost torrential literature which has been accumulating on the most diverse investment law and arbitration topics within the last few years,[1] the issue of the relationship between public health and investment law had not received great attention until lately. The recent book by Valentina Vadi is a welcome contribution which fills a significant gap in legal scholarship, and which situates itself within those works aimed at exploring the "investment-and" problematics.[2]

The issues at stake are well-known: The almost 3,000 existing international investment agreements (IIAs) protect foreign investors from, *inter alia*, expropriation and unfair, inequitable, discriminatory or unreasonable treatment by the host state and generally grant those investors the right to initiate investor-state arbitration proceedings before a number of different fora (usually ICSID or *ad hoc* arbitration). A possible claim by a foreign investor against the host state may arise as a result of measures which the host state takes in the pursuance of certain public concerns. For example, in order to address a pressing environmental concern or an issue of public health, the state may adopt regulatory measures which affect the investor's investment and may be considered as tantamount to expropriation. The question that thus arises in those types of scenarios is who should ultimately bear the costs of those regulatory measures – should it be the investor who will have to yield to superior reasons of public interest, or should it be the state (and ultimately the community at large) which is required to honor its commitments under the investment agreements? A related question is the one concerning to the so-called "regulatory chill", i.e., whether the host state will decline to enact regulatory action in the pursuance of a public good out of the concern of being ordered to pay millions of dollars in compensation by an investment treaty tribunal. The issue is made more intricate because the host state may also be a party to international treaties (such as the Framework Convention on Tobacco Control) imposing obligations which may conflict with those under the IIAs. These questions, which are some of the *Leitmotivs* recurring in Valentina Vadi's book, are far from being matters of purely academic debate. Suffice it to recall that tobacco control measures enacted by Uruguay and Australia have recently prompted tobacco manufacturer Philip Morris to initiate two arbitration proceedings, which squarely involve important questions of public health.[3] In this sense, Dr. Vadi's book could not have been more timely, given the attention and debate that those proceedings have been sparking.

The author's thesis is that the investment regime as currently envisaged does not strike an appropriate balance between the different interests involved and that investor-state arbitration has not so far shown a great deal of consideration of public health concerns. To arrive at this conclusion, the author makes a thorough analysis of the legal sources and case law, and suggests a number of methods and approaches to promote greater consideration of public health in international investment law.

The book is divided into three main parts.

Part I serves as a long introduction to the themes that will be developed in the remaining two parts of

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1 See S.W. Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law", 22 *European Journal of International Law* (2011), pp. 875–908.

2 See in particular on the relationship investment/human rights and investment/environment, respectively, P-M. Dupuy, F. Francioni and E-U. Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009); and J. Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge: Cambridge University Press, 2012).

3 Philip Morris Brands Sàrl et al. v. Uruguay, ICSID Case No. ARB/10/7 (pending); Philip Morris Asia Limited v. Australia, PCA Case No. 2012-12 (pending).

the book. It starts with an overview of the main characteristics of the investment treaty system, which probably will be more useful for newcomers to the field of investment law and arbitration, rather than for specialists. It then proceeds by describing the framework under which public health is protected in international law, and concludes by sketching the possible areas of interaction between the two fields, which will be developed further in the book.

In Part II, the author approaches the interplay between investment law and public health law by reference to the practice in three areas or sectors, namely (i) access to medicines; (ii) trademark protection v. tobacco control; and (iii) "environmental health" (a concept which for the author includes both the substantive aspects of environmental protection related to human health, such as air quality or food safety, and their procedural counterpart, such as the mechanisms designed to assess, control and prevent those environmental factors that can affect health). The structure of these three chapters is broadly similar. The author first sets out the legal framework applicable to that particular sector and then proceeds to analyze possible scenarios of "clash" between the investment treaty regime and the particular health considerations at stake. For example, when discussing access to medicines, and in particular pharmaceutical patents, the author speculates as to whether and to what extent state measures involving compulsory licensing or parallel trade may result in a violation of the investment treaty's standards of protection (such as expropriation or the fair and equitable treatment). The analysis is buttressed by a thorough examination of the relevant case law, with a particular focus on investment treaty arbitration case law, but with large incursions also in the jurisprudence of the WTO, the European Court of Human Rights, and human rights bodies. Thereafter, the author suggests ways of reconciling investor rights and public health in investment law.

Finally, in Part III Vadi attempts to take distance from the practical approach taken in the examination of the three case studies. Here, she offers her analysis of the available means to promote consideration of public health in international investment law, and suggests methods and approaches to avoid the risks that investment law is viewed as a self-contained regime, impermeable to non-investment concerns. This part is a complete and accurate account of the most important debates that have engaged the international investment law discourse over the last years – among others, the risk of "clinical isolation" of the investment treaty system, possible ways of addressing conflicts of norms, and the adequacy of investor-state arbitration to tackle non-investment issues. Particular focus is placed on the framework of the Vienna Convention on the Law of Treaties and on its Art. 31(3)(c) (directing the interpreter to take into account "any relevant rules of international law applicable in the relations between the parties") which in Vadi's view provides "the most appropriate framework of analysis to scrutinize the interplay between public health and investment law", as is stated in the conclusions (p. 191), where the author recapitulates some of the main ideas of the book.

*Public Health in International Investment Law and Arbitration* is an original, well-researched and engagingly written book, in which the author challenges conventional wisdoms within the investment law field. One of the strengths of the book is its multidisciplinary approach. Rather than confining herself to a purely investment law analysis, Vadi looks also at the international law on public health and the relating literature, as well as at works from other social sciences, including economics, political science, sociology and behavioral studies. Within the international legal field, she shows to be at great ease in traversing different legal regimes (trade, public health, human rights). The critical analysis and thorough comparison of the jurisprudence of the dispute settlement bodies in the different fields is of particular interest and evinces the author's fresh and sometimes unconventional views.

However, the book presents certain problematic aspects. With regard to the structure of the work, the treatment of certain issues is fragmented in different sections of the book, with the consequence that the reader will find certain chapters repeating what has already been dealt with in previous parts. This may probably be accounted for by the fact that certain chapters build on reflections appeared separately in previous articles by the author, as is particularly evident in Part II of the book. Here, each of the sub-issues chosen (access to medicines, tobacco control and environmental health) present of course their specific features that warrant separate examination, but the larger problems behind those issues as well as the international law instruments that the author uses to reconcile the competing interests at

stake are broadly similar irrespective of the particular sector. Thus, the notion of expropriation that an arbitrator or scholar will adopt (the contours of which are accurately recounted in the book) will be relevant no matter if one is dealing with the violation of a patent right or with issues relating to environmental spillovers, and there is therefore little benefit in repeating their treatment several times. Similarly, with regard to the interpretive techniques centered around systemic integration and Art. 31(3)(c) of the Vienna Convention, which are taken up several times in the book, one may wonder whether a single discussion would not have been more incisive.

Also the juxtaposition of the subjects discussed is sometimes not entirely convincing. For example, in Part III, issues such as systemic integration, the role of precedent in investment arbitration, or the analysis of the contours of the fair and equitable treatment standard are all discussed under the umbrella heading of reconciling conflicting interest. Yet, these issues raise conceptually very different problems (and the same could be said for "negotiation and mediation" which follows "interpretation" and precedes the analysis of exception clauses in Part II), and setting them side by side would have warranted further justification than is currently provided. Finally, certain issues discussed in the book could have benefitted from more lengthy treatment. This is the case for the possible role for "mutual supportiveness", only briefly hinted at, or for the impact of exception clauses in investment treaties, to the complexity of which the few pages of the book do not entirely do justice.

Despite these problematic aspects, Valentina Vadi's book provides a comprehensive analysis of the interplay between international investment law and public health and will thus become a valuable reference in the investment law literature, enriching the now growing scholarship which explores the "investment-and" problematics. It will also provide a most useful tool for practitioners and arbitrators involved in investment disputes having a public health dimension. In an area where the risk of falling in excessive specialism and of drowning in technicalities is high, Vadi achieves to always discuss the issues at stake against their wider international law background, with a solid mastery of the wealth of topics discussed and a firm vision of the broader picture.

*International Organizations in WTO Dispute Settlement – How Much Institutional Sensitivity?*
by Marina Foltea
Cambridge: Cambridge University Press, 2012, 352 p.,
£ 70.00, Paperback

*Carlo Maria Cantore**

The book under review is one of the latest publications in the "International Trade and Economic Law" series published by Cambridge University Press. The aim of the volume is to understand the degree of sensitivity WTO adjudicators have with regards to the law of other international organizations. The author (currently researcher at Bocconi University in Milan and Senior Research Fellow at the WTI in Bern) looks at the issue against the background of the literature on the so-called "fragmentation of international law" and provides an overview of the way WTO Panels and Appellate Body (AB) have dealt so far with the rules set up in other international organizations. The subject of the analysis, hence, is the case law related to the interplay between the WTO and, respectively, IMF, WIPO, WCO, WHO and the Codex Alimentarius.

The structure of the book is as follows: Part I ('The Institutional Sensitivity of the WTO') clarifies the terms of the debate and analyses the different linking techniques WTO Agreements provide towards other international organizations (deference, incorporation, co-operation and observership, right to seek information). The last chapter of the section reads these phenomena under the rules on interpretation set up in the VCLT and advances some criticism regarding the lack of a coherent approach by WTO judges *vis-à-vis* the laws of other international organizations and their interplay with WTO Agreements. Part II ('The constraints on Institutional Sensitivity') highlights the internal and external constraints for the interplay with other international organizations and the issue of legitimacy in light of the different techniques adopted by WTO treaties in relation with other forums. Part III ('International Organizations in the WTO disputes settlement procedures') overviews the case law of the WTO Panels and AB that has dealt so far with the law of the internation-

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