Book Reviews

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The Right to Regulate in International Investment Law
by Aikaterini Titi
Baden-Baden: Nomos, 2014, 376 pp.,
€ 94; Hardback

*Federica Cristani**

The concept of the right to regulate has become a critical element in the development of international investment law and policy. The growing body of cases where public welfare legislation has been challenged under international investment agreements - i.e. the arbitration case law arising out of the grave financial and economic crisis of Argentina in 2001; the on-going arbitration cases brought by Philipp Morris against Uruguay in 2010 and against Australia in 2011 following the introduction of innovative tobacco packaging regulations to reduce smoking and prevent non-communicable diseases in those countries and, in the EU area, the *Vattenfall* case involving Germany and dealing with host State's environmental restrictions on a coal-fired power plant in Hamburg - raises the question on where to find the right balance between the need to protect foreign investments and the need to preserve the host State's right to regulate. Moreover, the fear that international investment regulation could constraint the host State's right to regulate has been (one of the elements) at the heart of decision of Bolivia, Ecuador, Venezuela to withdraw from the International Centre for the Settlement of Investment Disputes (ICSID) Convention, as well as of the denunciation of bilateral investment treaties by Ecuador and South Africa.

All these instances highlight the importance the issue of the right to regulate has acquired in international investment law, even though the topic has remained quite unexplored among investment legal scholars. This is why Dr. Titi's book is to welcomed, in that it contributes to a better understanding of the right to regulate, which "drives into the heart of the international system of investment protection"[1].

The book is organized in ten Chapters, together with an Introduction and Concluding Remarks, dealing with ten core issues relating to the right to regulate within international investment law.

After an Introduction to the topic (Chapter I), Chapter II focuses on the definition of the right to regulate, "a legal right that permits a departure from specific investment commitments assumed by a State on the international plane without incurring a duty to compensate"[2]. Chapter III deals with the historical and systemic framework of the right to regulate, along with current developments at the bilateral and multilateral level. Particular attention is devoted, on the one hand, to the Trans-Pacific Partnership Agreement (TPP), a trade agreement including also investment provisions, which is currently under negotiations between twelve states (Australia, Canada, Brunei Darussalam, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the US and Vietnam) and, on the other hand, to the negotiations involving the European Union (EU), now more involved in investment protection issues after the exclusive competence in foreign direct investments provided for by the Lisbon Treaty. In both cases, the available public announcements and press releases reveal the attention devoted by the negotiating parties to the need to "protect the rights of the TPP countries to regulate in the public interest"[3] and to find the "necessary balance between investor protection and the protection of the right to regulate", as stated by the European

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1 Aikaterini Titi, *The Right to Regulate in International Investment Law* (Baden-Baden: Nomos, 2014), at p. 22.

2 *Ibid.* at p. 52.

3 Outlines of the Trans-Pacific Partnership Agreement of 12 November 2011, under the section Legal Text.

Parliament[4], which called on the European Commission to include the right to regulate in all future investment agreements[5]. Also the European Council's negotiating directives of September 2011[6] and of June 2013[7] have reiterated the relevance of the right to regulate.

Dr. Titi rightly affirms that by inserting an express right to regulate in international investment agreements (IIAs), investment arbitrators would have a means to balance the opposing interests at stake (Chapter IV). This is why it is of paramount importance how the above mentioned on-going negotiations and future negotiations of international investment agreements will deal with the issue at hand.

Chapter V on "Types of regulatory interests" queries into the content of particular types of regulatory interests protected under treaty exceptions (that most commonly are found in IIAs) or under general international law. Indeed, regulatory interests are often generic in terms (essential security interests, public order and public interest), which leads to the proposal in Chapter VI to favor and support the insertion of positive language on regulatory interests in IIAs, so that regulatory interests would be more explicitly "spelt out".

Chapter VII - Chapter IX focus on the modalities of incorporation of regulatory interests in investment treaties. Chapter VII deals with the exceptions (more often termed non-precluded measures clauses) which can be found in international investment agreements. Normally, exceptions are introduced with reference to specific standards of treatment (i.e. the most-favoured-nation treatment and the national treatment). However, it may also happen to find exception clauses which apply to the entire treaty. They are typically formulated to the effect that "nothing in the agreement" shall be construed to prevent the parties from adopting the measures specified therein. Exception clauses are made of two structural elements, namely the nexus requirement and their self-judging nature (Chapter VIII). The question is whether "the State adopting (...) [regulatory] measures (...) is the sole arbiter of the scope and application of that rule, or whether the invocation of necessity, emergency or other essential security interests is subject to some form of judicial review"[8]. The State is indeed subject to a residual level of arbitral review (namely a determination of good faith), even in the presence of a self-judging clause, as testified also by the recent Argentine awards.

After a survey on the occurrence and drafting mode of three particular types of regulatory interests, namely essential security interests, tax matters and cultural diversity (Chapter IX), Chapter X turns to general international law to examine whether a right to regulate may be found beyond investment treaties. Taking into consideration the International Law Commission's Articles on Responsibility of States for International Wrongful Acts' circumstances precluding wrongfulness, the focus is on the necessity defence, which has been the most important and most widely-invoked defence in investment dispute settlement, as witnessed by the arbitral awards against Argentina. After a detailed examination of the relevant case law, the Chapter concludes by affirming that it does not appear that general international law provides a right to regulate *in abstracto*.

Moving away from the right to regulate as included in investment agreements, Chapter XI takes account of arbitral case law on host State's legitimate regulatory interests and asks the question whether there exists an *implicit* right to regulate. Dr. Titi argues that no evidence confirms that host Stats may rely on tribunals alone for their right to regulate.

The final chapter (Conclusions) sums up the main outcomes of the book. Indeed, looking beyond the current state of play, the book suggests that the right to regulate will feature more prominently in future disputes and treaty negotiations. In particular, the on-going negotiations at the regional level that involve as treaty partners the EU, US, Canada (to name a few) evidence a sensibility to the need to take into consideration the host State's right to regulate. Thus "it is perhaps reasonable to assume that we stand at the threshold of a new generation of investment treaties that will be more balanced and will safeguard

4 Resolution of 6 April 2011 on the future of European international investment policy, 2010/2203(INI), P7_TA(2011)0141 at para 15.

5 *Ibid.* at para 6.

6 Council Negotiating Directives (Canada, India and Singapore), 12 September 2011, under the heading Objective, available at http://www.bilaterals.org/spip.php?article20272&lang=en.

7 Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, 17 June 2013 at para 23, available at http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf.

8 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005 at para. 366.

a modicum of policy space, thus marking a break with the grand old tradition of asymmetric investment protection"[9].

Dr. Titi has succeeded in exposing with great clarity and precision a highly technical and controversial legal topic and the book will definitively constitute a relevant reference for both academics and practitioners on the interpretation and revision of the right to regulate in international investment law.

Nudge and the Law: A European Perspective
by Alberto Alemanno and Anne-Lise Sibony (Eds)
Oxford: Hart Publishing, 2015, 336 pp.
€ 50; Hardcover

*Fabrizio Esposito**

In *Nudge and the Law*[1] Alemanno and Sibony have gathered together an important set of contributions to the debate about "behaviourally informed regulation".[2] The volume is divided in four parts,[3] with a foreword by Cass Sunstein (that it is fair to say could have been presented as another chapter of the book). Alemanno and Sibony introduce the reader to the themes of *Nudge and the Law* in chapter 1 and also take stock in a final chapter.

Nudge and European Law would have arguably been another appropriate title for the volume. The main thrust of the volume is in fact the (successful) attempt to offer a European perspective on what "law can learn from behavioural science".[4] Accordingly, all chapters have joined in the two-fold effort of moving from an up-to-date selection of the literature, which is then applied specifically to EU sources, institutions and problems. The book is therefore a valuable reference point for European scholars interested in the interplay between legal systems and behavioural sciences. First, for those already interested in the subject, the volume is surely a worthy contribution to the ongoing debate. Second, for those desiring to broaden the scope of their research by integrating it with behavioural insights, *Nudge and the Law* presents itself as a credible access source.

This result is achieved in two ways. On the one hand, Alemanno and Sibony focus on 'labelling issues' in chapters 1 – that is "definitional issues aimed at characterising the precise boundaries of behavioural action and its relationship with the nudge movement". These labels regard mainly the name of the discipline and a taxonomy of nudges along the dimension of the relation between public and private intervention. In chapter 14 the Editors then offer an original contribution to the behavioural discussion about the concept of autonomy and make salient the major results of the essays collected in the volume. On the other hand, the collected papers discuss the "legitimacy and practicability" of behaviourally informed regulation[5] as well as its "impact (...) on specific EU policies".[6] This makes the volume a valuable source also for scholars and practitioners not (yet) interested in interdisciplinary approaches. In *Nudge and the Law* they will find a wealth of normative claims regarding the interpretation and reform of existing (mainly, but not necessarily only) EU sources in several branches of the law.

In what follows, I highlight and discuss (what I consider) the main themes of the book. In the pursuit of this goal, the review is structured as follows: Sections I-IV comment on the core insights of *Nudge and the Law* while Section V criticises two specific claims; finally, Section VI focuses on research topics suggested by the volume.

9 Aikaterini Titi, *The Right to Regulate in International Investment Law* (Baden-Baden: Nomos, 2014), at p. 303.

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1 To date *Nudge and the Law* has not been published and I am thankful to the Editors and the publisher for allowing me to read it in preview. The shortcoming of this privilege is that page numbers are not confirmed yet. Therefore when quoting or referring to an essay in the volume, I refer only to the name of the Author(s) and to the chapter.

2 Alberto Alemanno and Anne-Lise Sibony, "The Emergence of Law and Behavioural Sciences: A European Perspective", in Alberto Alemanno and Anne-Lise Sibony (eds.), *Nudge and the Law* (Oxford: Hart Publishing, 2015), chapter 1.

3 The volume is structured as follows: foreword and chapter 1; Part I: Integrating Behavioural Sciences Into EU Lawmaking, chapters 2-4; Part II: Debiasing Through EU Law and Beyond, chapters 5 and 6; Part III: The Impact of Behavioural Sciences and EU Policies, chapters 7-11; Part IV: Problems with Behavioural Informed Regulation, chapters 12-14.

4 Alberto Alemanno and Anne-Lise Sibony, "Epilogue: The Legitimacy and Practicability of EU Behavioural Policymaking", in Alemanno and Sibony (eds.), *Nudge and the Law*, *supra* note 2, chapter 14.

5 These two lines of inquiry answer the following two questions formulated by the Editors: "when is it legitimate for States to use psychology to inform policy? … how can behavioural insights in practice be incorporated in the decision making processes?".

6 Alemanno and Sibony, "The Emergence of Law and Behavioural Sciences", *supra* note 2.