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978-1-107-09331-7 - Analogies in International Investment Law and Arbitration

Valentina Vadi

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ANALOGIES IN INTERNATIONAL
INVESTMENT LAW AND
ARBITRATION

Although investment treaty arbitration has become the most common method for settling investor–state 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 foreign investments from state interference on the other. Can comparative reasoning help adjudicators in interpreting and applying broad and open-ended investment treaty provisions? Can the use of analogies contribute to the current debate over the legitimacy of investor–state arbitration, facilitating the consideration of the commonweal in the same? How should comparisons be made? What are the limits, if any, of comparative approaches to investment treaty law and arbitration? This book scrutinises the impact a comparative approach can have on investment law, and identifies methods for drawing sound analogies.

VALENTINA VADI is Professor of International Economic Law at Lancaster University. She is the author of *Public Health in International Investment Law and Arbitration* (Routledge, 2012) and *Cultural Heritage in International Investment Law and Arbitration* (Cambridge University Press, 2014).

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To the memory of my beloved grandmother, Lora

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Frontmatter

[More information](#)

CONTENTS

<i>Preface</i>	page xi
<i>Acknowledgements</i>	xii
Introduction	1
PART I Comparative reasoning and international investment law	11
Introductory note	13
1 Comparative law, methods and reasoning	16
Introduction	16
Comparative law	19
Comparative methods	28
Analogies as a tool of legal interpretation	35
<i>Analogia legis</i>	38
<i>Analogia juris</i>	39
Analogies in international law	41
Conclusions	43
2 International investment law and arbitration	45
Introduction	45
Multilateral failures and bilateral successes	47
Substantive standards of protection	51
The settlement of disputes between foreign investors and states	55

	Main characteristics of investor–state arbitration	57
	The different conceptualisations of investment treaty arbitration	60
	International investment law and its discontents	64
	Final remarks	67
3	Comparative reasoning and international investment law	69
	Introduction	69
	Comparative investment law	78
	Comparative arbitration law	81
	Legal doctrine	84
	Judicial borrowing	88
	Reference to previous arbitral awards	92
	Reference to the jurisprudence of other international courts and tribunals	97
	Reference to the jurisprudence of national courts	104
	Treaty interpretation	110
	The emergence of general principles of law	119
	Conclusions	127
	PART II Analogies in investment treaty arbitration	133
	Introductory note	135
4	Micro-comparisons in investment treaty arbitration	137
	Introduction	137
	Analogies in arbitral awards as subsidiary means for the determination of rules of law	138
	Reference to previous arbitral awards	141
	Reference to the jurisprudence of other international courts	144
	The jurisprudence of the ICJ	145
	The WTO jurisprudence	148

CONTENTS

ix

Reference to the jurisprudence of regional courts	159
Reference to the jurisprudence of national courts	162
Analogies in doctrinal writings as subsidiary means for the determination of rules of law	164
Comparative surveys as a legitimating factor of policy measures and as evidence of state practice	166
Critical assessment	172
Conclusions	174
5 Macro-comparisons in investment treaty arbitration	175
Introduction	175
The commercial law paradigm	182
The rise of the public law paradigm	188
The migration of constitutional ideas: proportionality as a case study	195
Proportionality in investment treaty arbitration	198
The promises and pitfalls of proportionality analysis	203
The international public law paradigm	207
WTO law	209
Human rights law	217
Critical assessment	219
Conclusions	225
6 Comparative reasoning in international investment law and arbitration: challenges and prospects	227
Introduction	227
The merit of using analogies in international investment law and arbitration	229
Analogies and the coalescence of general principles of law	231
Analogies, legal transplants and their perils	235
Why a public international law paradigm should be preferred	239

What can comparative lawyers and international investment lawyers learn from each other?	243
A comparative practice in search of a methodology	246
Final remarks	254
Conclusions	256
<i>Bibliography</i>	261
<i>Index</i>	295

PREFACE

The original idea for this book came about in 2009 when I was completing my doctoral thesis at the European University Institute, Florence. Coming across a large number of comparisons and instances of judicial borrowing in investment treaty arbitrations, I began to wonder *why*, *when*, *how* and *what* kind of analogies are made by investment treaty tribunals. Finding no conclusive answers to these questions in the available literature, I started investigating the matter. Comparisons may play a crucial role in legitimising (and/or increasing the perception of legitimacy of) the investment treaty system. At the same time, critical analysis is needed to provide a sound theoretical framework to comparative analysis. It is my belief that a study of this kind may contribute to making investment treaty arbitration more consistent, fair and predictable.

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Parts of this book were presented at conferences and seminars held in: Beijing, Bristol, Granada, Keele, Leiden, London, Maastricht, New York, Rome, Sevilla and Warwick. Convening an international conference on international economic law at the University of Edinburgh also helped me to frame the discourse. I greatly benefitted from the comments received on these occasions. In particular, I thank the anonymous reviewers, John Bell, Andrea Bjorklund, Judith Carter, Claire Cutler, Emily Den, Paula Gilliker, Sead Kadic, Fabrizio Sanna, Stephan W. Schill, Fiona Smith, M. Sornarajah, Vito Velluzzi and the late Thomas Wälde for their comments on earlier parts of my research.

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xiii

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V.V.

Florence, August 2015