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.

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To the memory of my beloved grandmother, Lora

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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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V.V.
Florence, August 2015