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Book Review: *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* by Valentina Vadi (Elgar International Investment Law, 2018) 316 pp hb £85.50

David Collins\*

Of all the many books and articles written of late on the topic of proportionality and / or standards of review in international investment arbitration, this one is the best. Professor Vadi manages to orchestrate a complex assortment of sources from across a range of sub-disciplines including trade, human rights and general public international law combined with an all-embracing review of the now extensive literature and growing body of caselaw. In so doing, she delivers a fresh perspective on the well-trodden field of methods of interpretation within investment arbitral practice by drawing upon the tension between public and private law adjudication and by challenging constitutional analogies. Her writing style is a study in clarity and deftness of organization, making sense where others would have only worsened the muddled complexity of the jurisprudence, much of which lacks clear reasoning, and which is drawn from thousands of treaty instruments.

The book unfolds by presenting and critiquing two methods of investment arbitral decision-making inspired by constitutional principles, both of which are purportedly designed to balance conflicting values, essentially walking the line between the entitlement of the host state to enact regulatory measures in its economic or social interests and the entitlement of the foreign investor to be protected against any ensuing undue interference with their commercial activities. The first of these is the much-celebrated, extensively-analysed “proportionality,” a concept borrowed largely from EU and human rights law. Rather than simply describe proportionality’s characteristics and usage, which Vadi does at length and with superb cogency, the book confronts the chief criticisms of this exercise in arbitral objectivity, the ubiquity of which, it seems is often exaggerated. While proportionality aims to create a quantifiable, scientific, objective and predictable “test” which arbitrators can apply mechanically to the pressing controversies at the heart in many investment disputes, it often falls short of the mark because it is inherently value-laden and contemplates the weighing of often irreconcilable matters. Vadi acknowledges that much of what is identified as a sophisticated application of this well-established process is underwhelming, in some cases appearing as little more than a carefully signposted form of that other quintessential tool of judicial decision-making, reasonableness. Vadi’s careful devotion to this second standard, which it challenges with equal vigour, gives the book much of its intellectual honesty. Reasonableness, as anyone familiar with the common law knows but may not wish to admit, is an even more far-reaching but sometimes dissatisfying means of judicial (as well as

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legislative) reasoning. Representing quality to proportionality's quantity, reasonableness is vague and uncertain, drawing heavily on the subjective experiences of the adjudicator. In many respects it captures the bias which is inevitable in any process of human reasoning, as Vadi candidly concedes. She writes that both standards are rooted, perhaps excessively so, in a culture of justification, illuminating some of the 20<sup>th</sup> Century's aversion to unbridled authority. In this sense they do not offer practical solutions to intractable problems as much as they do commentary designed to assuage concerns that courts have gone too far.

On occasion it appears as if the author falls into the trap of treating both standards as if they were more than the rather prosaic discretion which informs so much decision-making. It is not always clear that either "proportionality" or "reasonableness" are truly deserving of a capital "p" or "r" as many seem to have argued or at least, wish. Investment arbitration, as with many forms of adjudication, is simply not as formulaic and logical as perhaps it should be, given the importance of its outcomes to the broader public as well as to commerce. Many instances of reasoning based on proportionality or reasonableness, at least in investment arbitration, are inferred from the caselaw rather than evident in the text of the awards or the treaties, much as the steps in proportionality analysis are often created on the spot by arbitrators. To her credit and mindful of these criticisms, Vadi adopts a cautious stance from the beginning. Rather than arguing that either proportionality or reasonableness should be employed more readily as techniques of decision-making in international investment law, she instead reflects upon whether they are desirable and in what contexts.

Vadi's exploration of the classic debate over the "publicness" of international investment law is excellent – again she manages to capture the salient arguments with sophistication and minimalism, supplementing these with her own thoughtful considerations. This aspect of the book, as with the concluding chapters which investigate standards of review from other well-developed disciplines (the WTO which tends to be more focused on facts, and the ECHR with its well-developed doctrine of margin of appreciation) is crucial to her ultimate and satisfying conclusion, which she asserts with some understatement, particularly given the modesty of the book's stated aims. Here Vadi argues that international investment arbitration is a hybrid system, the identity of which shifts depending on the circumstances. As such, the intensity of review (as well as whether it incorporates proportionality or reasonableness) should depend on the "inner quality" of the dispute, meaning whether it is tied to the exercise of police powers or consists of measures which are more commercial in nature. She further suggests that when the exercise is regarded as a species of commercial arbitration the standard of review should accord less deference, with the opposite in circumstances of greater public law relevance. While this approach appears to conflict with the oft-repeated mantra in English contract law that the commercial courts will not re-write contracts for their parties (evidently high deference!) this view offers a useful guidepost as to how arbitrators might better wield techniques like proportionality and more obviously reasonableness. This should be done ideally with some consistency and internal

coherence, as one might expect in a system of growing caselaw and, more problematically, questionable legitimacy.

Some of the ideas presented in the book were deserving of further attention and could have been expanded at the expense of a diminished engagement with the caselaw, although digressions into the facts of disputes are never tedious in the hands of this author. For example, Vadi touches upon the innovative use of concepts drawn from the physical sciences, such as gravity and Euclidean mathematics, to model international investment law, which she urges could be augmented by the institutional setting of a world investment court or through the development of a critical mass of jurisprudence. Much as a straight line is not always the shortest distance between two points in a curved universe, there may be more than one way for an adjudicator to reach the right decision. Her references to cost-benefit analysis in the context of both proportionality and reasonableness begged further commentary on the law and economics movement and its use of various formulae as a direct challenge to the common law's reliance on frustratingly vague standards. Such material could have been fruitfully expanded into a consideration of the psychological dimensions of human reasoning – why is the alleged mathematical elegance of proportionality so intuitively appealing, particularly when it does not reflect how humans actually approach decision-making under conditions of imperfect information? But this would have been a different, if not longer book. True to its title, Vadi also wisely examines the application of the concept of reasonableness to the substantive elements of international investment law, including Fair and Equitable Treatment, Full Protection and Security, compensation and costs. These are vital and often unexplored matters in a field where scholarship tends to focus extensively on the caselaw. Making more of these issues would have further set this book apart as the leading one in its field.

Vadi is one of the world's foremost commentators in the important field of international investment law and this book is among her greatest contributions, offering an insightful and comprehensive overview of a subject which has attracted much attention from the academic world and practitioners alike in recent years. She is also a singularly gifted writer – there is no one, at least in academia, who can explain complex concepts as clearly and who can marshal original arguments as skilfully. *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* is a book which will quickly become a leading resource and will be a source of many references as well as inspiration in others for years to come.