THOMAS POLLAN, *LEGAL FRAMEWORK FOR THE ADMISSION OF FDI* (UTRECHT: ELEVEN INTERNATIONAL PUBLISHING, 2006)

By Julien Fouret[*]

This book by Thomas Pollan is in fact a publication derived from the PhD thesis he submitted to the University of Vienna under the supervision of Professor Christoph Schreuer. Having as a supervisor one of the (if not the) top specialist of the International Centre for Settlement of Investment Disputes (ICSID) Convention[1] would make one stop and pick up this publication from amidst the recent multiplication of monographs in the field of international investment law. Thomas Pollan is presently a lawyer and a policy analyst at the United Nations Conference on Trade and Development (UNCTAD). Along with the Organization for Economic Co-operation and Development (OECD), the UNCTAD is one of the two main international organizations heavily working on issues of international investment law.

The book, 321 pages long, is divided into nine different chapters, balancing between theoretical analysis and practical examples on the issue of admission of foreign direct investment (FDI). It aims at providing the necessary analysis of the framework for the admission of FDI by presenting as much the side of the investor as that of the host state. It also intends to offer an analytical view of the admission models currently in place in order to highlight the most efficient instruments already implemented.

The first chapter begins with an odd introduction: a sentence about the execution of the former communist leader of Romania, Nicolai Ceausescu. The purpose of this would-be awkward example is to illustrate the rapid and positive changes happening in a given country, Romania for instance, due to newly admitted foreign investors. Indeed, this chapter serves as an introduction to the monograph by explaining what factors determine states' admission policies. The author situates the admission process into the broader scheme of investment promotion and tries to highlight the historical, economical and political factors that are decisive in order to characterize a

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[1] See the masterpiece, as well as the only real commentary of the *Washington Convention* creating the International Centre for Settlement of Investment Disputes in Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2001).

precise admission policy. In helping the reader to dive into the tumultuous sea of investment law, and particularly of FDI admission, Thomas Pollan concludes the chapter with a necessary, useful and practical application presenting how the negotiations to regulate FDI take place on both a multilateral and bilateral level.

The second chapter can be assimilated to the *rationae materiae* part of an arbitral award in investment law. It is probably one of the most useful parts of the book. It deals with the scope of the admission provisions, mainly in bilateral investment treaties (BITs). The definitions of an investment, and its inextricable complexity, of an investor and of its nationality are interestingly presented, trying to draw general rules, or even a typology, from the diversity of provisions in BITs, national investment codes and arbitral awards. The balance between theory and practice is again cautiously respected here, providing the reader with a large number of illustrations from investment treaties.

The third chapter focuses on the sources of the obligation of admission. The author therefore analyzes in turn national investment codes, general international law, BITs, free trade agreements (FTAs), regional agreements and finally multilateral treaties and soft law (which should have been entitled, in our sense, "multilateral treaties and other international instruments" as soft law may not be the perfect terminology in the present case). The 80 pages analysis, a fourth of the book, is extremely precise and almost exhaustive on the subject matter. Treaty law is given the central part as it is evidently "the most important source"[2] for FDI and customary law retains therefore only a residual part. Even though we might not share the small place given to the influence of customary norms, or customary drafting of BITs, this chapter is indeed very useful, particularly for the practitioner willing to have an in-depth overview of FDI admission in conventional agreements.

The fourth chapter is a typology of model clauses found in the different sources of FDI admission. Using the "model" method, which is not far from an analysis in economics, the author lists six models, from the less to most open to admission. In doing so, he uses the same instruments as in chapter three. The different models, most of them with a newly invented terminology (to the best

[2] Thomas Pollan, *Legal Framework for the Admission of FDI* (Utrecht: Eleven International Publishing, 2006) at 55.

of our knowledge), will probably be important re-usable tools for future analysis of sources of international investment law.

Chapter five is a must-read section when dealing with a legal subject matter: the exceptions to the general rule. Thomas Pollan deals with two main issues, the exempted sectors and the public policy exceptions. As said by the author, these are "two common forms of exceptions".[3] An analysis of public policy exemptions are an important asset to this book given the fact that it is at the center of some of the latest ICSID decisions against Argentina where economic emergency is sometimes subsumed in the public order.[4] In fact, it is rarely addressed in doctrinal analysis as it had, until recently, never really been applied or used before international investment tribunals.

Chapter six tackles the issue of conditions and incentives used by the state during the admission process. The author demonstrates that the power remains in the hands of the state which can, at its will, decide what investment it wishes to host or not. Again, the author analyzes the issue before giving illustrative examples through treaty and national investment codes' provisions.

Chapter seven is only eight pages long. It deals with the very precise issue of procedure and of mechanisms such as licenses or conditions placed before the admission of the investment. It only takes a quick glance at these issues through models contained in conventional provisions.

Chapter eight attempts to link admission to "related issues" such as competition, environmental concerns and corporate social responsibility. We find it difficult to study these interrelated issues in only 15 pages but exhaustiveness is most likely not the purpose here. The author is rather trying to cover all the possible analytical angles of the issue of admission. Mentioning these "related issues" was therefore a necessity.

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[3] *Ibid*. at 199.

[4] See the recent use of these exceptions: *CMS Gas v. Republic of Argentina* (12 May 2005) Case No. ARB/01/8 (ICSID), online: ICSID <http://www.worldbank.org/icsid/cases/awards.htm> and our comments in Julien Fouret & Dany Khayat, "Centre International pour le règlement des différends relatifs aux investissements (CIRDI)" in Julien Fouret & Mario Prost, eds., "Chronique de règlement pacifique des différends internationaux" (2005) 18.2 R.Q.D.I. [Forthcoming]; *LG&E v. Republic of Argentina* (3 October 2006) Case No. ARB/02/1, Decision on Liability, (ICSID), online: ICSID <www.investmentclaims.com>.

The final chapter consists of concluding remarks. We must say that this conclusion appears to be more policy and economics than law. Even though the author encourages the broad definition of investments in recent BITs,[5] and sums up its findings on the different legal instruments studied,[6] the final conclusion focuses mainly on the openness of the markets, democracy and economic development from a political and economic standpoint. It is far from inaccurate but it does seem a little odd to conclude a legal demonstration on such a note.

Before our concluding and general comment on the book, there is a negative point that should be brought up. Unfortunately we found that there were quite a few printing errors, which can at times be damaging to the book. These errors do occur, of course, in all publications of this type. Nevertheless, we believe that such monographs should be cite-checked more carefully as, for example, 2 of the 19 arbitral awards cited were continuously spelled wrong throughout the book.[7] However, the monograph is, as a whole, well articulated, interestingly linking theoretical schemes to practical examples and it gives a sharp and precise legal analysis. Finally, the annexes that reproduce the relevant treaty and codes' provisions are an excellent and easy source of reference for practitioners and law students.

[5] Pollan, *supra* note 2 at 257.
[6] *Ibid*. at 255-260.
[7] Notably, *Plama v. Bulgaria* becomes Plasma. This mistake can seem harmless to the specialist of investment law but not for the neophyte using the book and quoting such major investment case law [*Plama* being moreover the first ICSID case based on the Energy Charter Treaty].