

Book Review Essay



Rebalancing Investment Treaties and Investor-State Arbitration: Two Approaches

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Lauge N Skovgaard Poulsen

Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries. Cambridge: Cambridge University Press, 2015. Pp. xvi + 247. US\$100. ISBN 978-1-107-11953-6.

Caroline Henckels

Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy. Cambridge: Cambridge University Press, 2015. Pp. xxxii + 225. A\$165. ISBN 9781107087903

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Abstract

This essay reviews two books suggesting how international investment law may be recalibrated to balance the interests of foreign investors and host states. Poulsen's book draws mainly on empirical research to argue that developing states displayed 'bounded rationality' when rushing to sign up to investment treaties incorporating pro-investor protections, such as investor-state arbitration. Although mainly descriptive, it sketches potential reforms of the investment treaty system to achieve a more rational balance in favour of host states. By contrast, drawing on doctrinal analysis but with a keen awareness of the institutional underpinnings of international investment law and arguably analogous fields, the book by Henckels focuses on what arbitrators and commentators can do to extend a tendency to interpret substantive protections even within existing investment treaties in a more balanced way. She urges more consistent application of multi-layered 'proportionality' analysis, combined with principled 'deference' to regulatory decision-making by host states.

Keywords

investment treaties – arbitration – developing countries – proportionality – international law

1 Introduction

The ongoing proliferation of investment treaties and related investor-state dispute settlement (ISDS) proceedings is generating increasing public debate, and a rich variety of reform proposals.¹ The two excellent books covered in this review essay deserve a detailed introduction, as they contribute in quite different ways to current attempts to reassess and rebalance the interests of foreign investors and host states in international investment law. Poulsen's book draws mainly on quantitative and qualitative (archival and interview-based) research to argue that developing states rushed to sign up to investment treaties mainly from the 1980s, incorporating pro-investor protections such as the option of investor-state arbitration, displaying 'bounded rationality' in several respects. They wanted to believe that this would attract cross-border investment, without or discounting empirical evidence; kept signing treaties

¹ See eg Jean Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System* (Brill 2015).

on Western European templates despite contemporaneous US models offering even more provisions favouring foreign investors; and only reassessed risks to regulatory autonomy when subjected to an initial arbitration claim. More normatively, Poulsen concludes by sketching some significant reforms to the investment treaty system that might restore a more rational or at least acceptable balance in favour of host states from the developing world.

By contrast, drawing on doctrinal analysis but with a keen awareness of the institutional underpinnings of international investment law and arguably analogous fields of international law, the book by Henckels focuses on what arbitrators and commentators can do to extend an emerging tendency to interpret existing investment treaties in a more balanced way. Specifically, as an interpretive method, she urges more consistent application of multi-layered 'proportionality' analysis, combined with principled 'deference' to regulatory decision-making by host states.

The two books are worth considering together for several reasons. First, Henckels' approach may be particularly relevant for developing countries, still struggling with problems of institutional incapacity, which are highlighted by Poulsen's research into their history of negotiating investment treaties in the first place. Secondly, although Poulsen indeed marshals powerful arguments and evidence for 'bounded rationality' afflicting developing countries in negotiating past treaties, some doubts can be raised and, in any event, that historical experience need not dictate the future. To the extent that even developing countries have now started to weather ISDS claims and become more aware of associated issues, yet wish to retain a system that allows investors to bring direct claims against host states (as seems generally to be the case in Asia, for example),² the interpretive approach proposed by Henckels may help states as they negotiate future treaties – and even when they appoint arbitrators and counsel to resolve disputes under existing treaties. Overall, both better arbitral reasoning and more careful negotiations of investment treaties are needed to maintain public trust in international investment law.³ In this sense, both

2 Luke Nottage, 'The TPP Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification' Part 2 (2016) Sydney Law School Research Paper No 16/28 <<http://ssrn.com/abstract=2767996>> accessed 11 June 2016. More generally, see also Leon Trakman and David Musaleyan, 'The Reputational of Investor-State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor-State Arbitration' (2016) 30 ICSID Rev 194.

3 See also Joshua Paine, 'The Project of System-Internal Reform in International Investment Law: An Appraisal' (2015) 6 JIDS 332.

books offer differing but potentially also complementary perspectives on how to rebalance the system.

2 Bounded Rationality by Developing Countries in Investment Treaty Negotiations

Poulsen's extensively-researched but succinctly-written book is a tour de force. It should be read by all scholars and practitioners interested in the historical trajectory and ongoing policy issues associated with international investment treaties and arbitration, especially the topical issue of ISDS. The brief Preface is entitled the 'curious case of Pakistan', describing the bemusement of its top two senior legal officers upon receiving notification in 2001 about Pakistan's first treaty-based ISDS claim.⁴ Yet Poulsen emphasises that their experience was not unique: 'only few developing country governments realized that by consenting to investment treaty arbitration, they agreed to offer international investors enforceable protections with the potential for costly and far-reaching implications' (pp. xv–xvi). Chapter 1 on 'unintended consequences' goes on to highlight the key puzzle addressed by the book: 'why did practically all developing countries suddenly rush to sign largely identical treaties, which significantly constrained their sovereignty? Why did they expose themselves to expensive investment claims and give such a remarkable degree of flexibility to private lawyers to determine the scope of their regulatory autonomy?' (p. 5).

Poulsen's response is that this pattern fits with 'expectations from bounded rationality from behavioural psychology and economics' (p. 17). Specifically, he emphasizes three biases commonly observed in decision-making that seem to be at work in the uptake and design of bilateral investment treaties (BITs) (pp. 17–19 and 26–27). First, 'motivated reasoning' meant that policy-makers *wanted* to believe that BITs would lead to more inbound foreign investment. (This seems related to the increasingly well-known 'confirmation bias': we tend to give more weight to data that supports our pre-conceived views.)⁵ Secondly, each host state generally underestimated the risks of being held liable for breaching substantive treaty commitments, such as non-discrimination, expropriation or fair and equitable treatment, until foreign investors brought the first ISDS claim against that state – illustrating 'salience bias'.

4 *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13.

5 See generally eg Richard Thaler, *Misbehaving: The Making of Behavioural Economics* (Penguin 2016) 172.

Thirdly, policy-makers engaged in ‘satisficing’ rather than optimizing treaty drafting, agreeing to and maintaining BITs based on the shorter models developed by major European capital-exporting states rather than the more elaborate US model, due primarily to ‘status quo bias’.

Poulsen argues that this theory provides a better explanation than three other common views on the proliferation of BITs from the 1980s (pp. 9–13). First, contrary to rational ‘credible commitments’ theory, the fastest expansion came in the 1990s, when developing countries were already ‘strongly committed to attracting foreign capital’ (p 6). Foreign investors could also have managed residual risk through joint ventures with local partners, political risks insurance (often supported by home states) and investment contracts negotiated with host state authorities. Poulsen also points to some evidence that foreign investors and political risks insurers did not factor BIT protections into their decision-making. Secondly, the theory that developing countries were ‘coerced’ into signing BITs is gainsaid by such countries typically first unilaterally liberalizing their national foreign investment laws, as well as often initiating BIT negotiations with developed countries. Thirdly, ‘emulation’ to signal a broader commitment to economic liberal values sits uneasily with developing country policy-makers emphasizing the instrumental goal of attracting foreign investment, not publicizing the signing of BITs, and following European rather than US templates.

In support of his competing theory, Poulsen deftly combines quantitative analysis (including some econometrics)⁶ and qualitative methods (interviews with officials, archival research into treaty negotiations and country

6 Econometrics applies mathematics and statistical methods to explain economic data. A basic technique is linear regression, which estimates the relationship between possible variables, and which can be visualized (in its most basic form) as fitting a line between paired values of a dependent variable (such as cross-border investment flows) and an independent variable (such as signing an investment treaty). As this example already indicates, such analysis is not straightforward because an independent variable may not in fact be truly independent (instead, for example, greater investment flows may drive the signing of treaties: the problem of ‘endogeneity’ of variables). Other challenges include determining causation (which can be partially addressed by introducing a time lag in the dependent variable) and the possibility of spurious correlation due to omitted (more important) independent variables. For techniques developed by econometricians to grapple with these and other problems, see generally Jeffrey Wooldridge, *Introductory Econometrics: A Modern Approach* (5th edn South-Western Cengage Learning 2013). For issues with data and methodology with respect to modeling investment flows and treaties, see eg ‘OGEMID Seminar: Investment Arbitration and its Critics – Foreign Direct Investment and Bilateral Investment Treaties’ (2014) 11(3) TDM <www.transnational-dispute-management.com/article.asp?key=2113> accessed 11 June 2016.

case studies) throughout the book. He elaborates the theoretical argument in Chapter 2, 'bounded rationality and the spread of investment treaties'. (As such, it will be more relevant to scholars than practitioners reading this book.) It shows how the alternative rationalist model first argues that 'competition' for foreign investment drives the adoption of BITs (pp. 31–5). But testable implications, not expected or found under Poulsen's own bounded rationality theory, are that a host state will carefully consider the strategies adopted by other states competing for foreign direct investment (FDI), and also design treaties with more pro-investor provisions. Secondly, rational models predict effective 'learning' and hence gradual recalibrations of treaty content and signing patterns as risks for host states become apparent from the experiences of other countries (pp. 35–45). By contrast, bounded rationality predicts more sporadic, belated responses, especially after the first and therefore more salient ISDS claim against the particular host state itself.

Poulsen also argues that his model is likely to be particularly apposite for developing countries. First, he suggests that their public officials were more likely to have underestimated risks given that so few had any specialist expertise in international investment law during the 1980s and 1990s. (As mentioned below, however, this could well have been true also of officials in developed countries that had not yet confronted ISDS claims). Secondly, Poulsen contends that salience-inducing bias was exacerbated by 'the high turnover in many developing country bureaucracies' (p. 44). Thirdly, an absence of expertise and experience arguably influenced the status quo bias, with 'generalist bureaucrats . . . much less likely to opt out of default treaty designs' adopted by predecessors (p. 45).

Chapter 3 then turns to 'a difficult beginning' for BIT programs, initiated from around 1960 particularly by Germany and then the United Kingdom ('UK', the largest capital exporter in Europe). These aimed to protect their investments overseas given the unlikely prospects of multilateral treaty protections being achieved through projects initiated through the fledgling Organization for Economic Cooperation and Development (OECD) and the World Bank through its new International Centre for Settlement of Investment Disputes (ICSID). Opposition from South American states (in the tradition of Calvo Doctrine, insisting that foreign investors be limited to remedies through domestic law and courts) resulted in the 1965 ICSID Convention being drafted without including any substantive protections. Instead, it only provided for an ISDS procedure if further consent was separately provided by the host state by way of national law, investment contracts, or further treaties. The UK, as well as the Netherlands, France and Belgium, then began seeking to include consent to ICSID arbitration in their treaties from the late 1960s. However, even for

the UK the ISDS provision was a 'desirable but not essential' element of their model (p. 65). Overall, by the late 1970s only 165 BITs had been successfully concluded, and negotiations were rarely sophisticated. Assertions from developed countries that treaties would promote more inbound investment were rejected or (less often) accepted based on political preferences of the developing country, rather than empirical analysis, and the key ISDS enforcement mechanism was rarely even considered (pp. 69–70).

From the 1980s, however, a new era began for 'promoting investment treaties', as outlined in chapter 4. Sovereign debt crises increasingly led developing countries to reform economies to receive debt relief and foreign aid from international financial institutions, especially the World Bank (as illustrated by a case study of Ghana; pp. 99–102). ICSID encouraged further developed countries to include ISDS clauses in their BITs, and began developing a negotiation handbook and encouraging developing countries to agree to treaties to attract more investment. The new Multilateral Investment Guarantee Agency assisted this effort through general policy advice (directly and then through the Bank's Foreign Investment Advisory Services), rather than withholding political risks insurance to foreign investors in states lacking BITs (pp. 71–81). Western countries also accelerated the promotion of BITs directly, especially the US, as well as via these international organizations. Partly this occurred through numerous (often aid-funded) private consultants dispatched to Central and Eastern Europe after the collapse of the Iron Curtain (pp. 81–7), exemplified by the Czech Republic which then rushed to conclude many BITs (pp. 102–6).

Perhaps the most surprising point for contemporary readers may be the pro-BIT stance adopted by the United Nations Conference on Trade and Development (UNCTAD), especially after negotiations collapsed for a Multilateral Agreement on Investment (MAI) through the OECD. Notably, over 1999–2004 UNCTAD promoted numerous BIT facilitation rounds and signing ceremonies (in Geneva and elsewhere) for groups of countries. As investment treaty arbitrations emerged, UNCTAD turned to assisting developing countries in managing and avoiding disputes, often bringing in private law firms as consultants (pp. 91–99). Zimbabwe is presented as an example of a developing country shifting to signing BITs as part of a program of liberalizing and attracting foreign investment, with UNCTAD assistance (pp. 106–9). As with the other two country studies, however, Zimbabwe accepted at face value the view that BITs led to more investment, did not appreciate risks over the 1990s despite ISDS claims starting to be brought against other countries, and did not significantly adjust BIT wording from European templates (either to limit risks, or become more pro-investor to attract investment compared to neighbouring countries).

Chapter 5 turns from more qualitative analysis to present first some aggregate quantitative evidence for 'a less than rational competition' among states. Re-doing an econometric study by Elkins and others with updated data, Poulsen found that BIT adoption rates by a host state were not in fact statistically significantly related to adoptions by competitor states (even during the 1990s, when developing countries started to initiate BIT negotiations and offer more ISDS protections). Also, contrary to Elkins and others, he found no significant additional adoptions when states signing BITs appeared to generate more FDI (pp. 110–4). More qualitatively, Poulsen could not discern major changes in BIT content overall, to compete for more investment (pp. 114–7), for example by adding pre-establishment rights or prohibitions on performance requirements.⁷ Poulsen then illustrates these patterns by way of case studies from the 1990s across Latin America (focusing on Mexico, Argentina and Chile), Asia (Pakistan, Thailand and – borderline 'Central Asia' – Turkey) and Africa (Ethiopia and Nigeria). However, Poulsen acknowledges that 'if there was no information about the potency of the treaties at the time they spread rapidly, it would not necessarily have been unreasonable to avoid spending time and scarce resources to find out whether they had an impact on investment flows' (p. 134).

Accordingly, Chapter 6 on 'narcissistic learning' considers whether sufficient information was indeed available, by tracking the rise of investment treaty arbitration. The first treaty-based ICSID claim came in 1987, followed by two more in the late 1990s, after a few others under other arbitration rules that were not made public. Poulsen also points to the contemporaneous North American Free Trade Agreement (NAFTA) claim by the US Ethyl Corporation against Canada's restrictions on a fuel additive. This resulted in a settlement that became highly politicized, as impeding regulatory autonomy (although it might be added that the measure discriminated in favour of local suppliers). Poulsen concludes, rather ambitiously from these few examples, that by then 'the potency of the [ISDS] regime should have been crystal clear for anyone caring to seek relevant information' (p. 141). Yet he argues, from a further

7 The latter may not be such a good test, however, given some were introduced for all World Trade Organization members particularly under the Trade-Related Investment Measures Agreement of 1994, albeit enforced through inter-state dispute settlement. Nonetheless, performance requirements remain pervasive and arguably have not yet been effectively disciplined under that multilateral regime: Holger Hestermeyer and Laura Neilsen, 'The Legality of Local Content Measures under WTO Law' (2014) 48 *JWT* 553.

econometric analysis (updating data from work with Emma Aisbett),⁸ that it was only when each state was subjected to its own first ISDS claim that risks seem to have significant impact – specifically, a reduction of BIT signings by 35 percent (pp. 141–6).⁹ Such impact, and other mostly incremental responses including somewhat less pro-investor wording in subsequent BITs, are then illustrated again by multiple brief country studies across Latin America (adding Ecuador), Asia (adding India) and Africa (adding Kenya).

Nonetheless, Poulsen is careful to acknowledge some exceptions to ‘narcissistic learning’ only after ISDS claims (pp. 156–60). For example, Costa Rica did not agree to BITs haphazardly, to demonstrate some ‘achievement’ from high-level diplomatic missions. Instead, Costa Rica had a small but highly skilled team for negotiating BITs, which pressed for more restrictive provisions in light of the growing number of claims against Argentina. The latter was aware of the potential potency of ISDS clauses in the 1990s, even if surprised by the extent of claims. Lebanon’s key negotiator had experience in international arbitration and also concluded BITs more carefully. And China’s treaty practice evolved to accept more scope for ISDS as it emerged as a major outbound investor.

By contrast, chapter 7 (entitled ‘letting down the guard: a case study’) focuses exclusively on bounded rationality in South Africa. The post-apartheid regime strongly encouraged foreign investment and concluded many BITs over the 1990s. South Africa was hit by a small ISDS claim for land expropriation from a Swiss investor in 2001, but a much larger claim in 2004 from an Italian mining company. The latter was under the ICSID Additional Facility Rules (and therefore more public) and objected to national legislation favouring indigenous people (not carved out from South Africa’s European-style BITs). Officials tried to tighten negotiating criteria (not always effectively) and then recommended (in 2010, after losing the high-profile second claim) that South

8 Lauge Poulsen and Emma Aisbett, ‘When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning’ (2013) 65(2) *World Politics* 273–313.

9 It could also be instructive to assess the impact of ISDS claims based on consent contained in investment contracts (or, much more rarely, domestic laws) rather than just treaties. Host states (including developing countries in Asia: Nottage (n 2) Part 2 Table 1) were quite often subject to the former categories of claims before the latter. Other empirical studies into ISDS patterns tend to combine both categories (eg Thomas Schultz and Cedric Dupont, ‘Investment Arbitration: Promoting the Rule of Law or over-Empowering Investors? A Quantitative Empirical Study’ (2014) 25 *EJIL* 1147). Admittedly, experiences with contract-based arbitrations may be even more unlikely to have impacted on BIT signing; but they could have led to (rational) changes in investment contract drafting – although this would need to be tested instead by qualitative research, likely also to be constrained by confidentiality provisions.

Africa should not conclude future treaties containing ISDS protections. Like Ecuador and a few other countries where ISDS has become sufficiently politicised, South Africa has begun to terminate BITs, developing instead a national law with standards more closely following its constitution and no longer committing to ISDS.

Chapter 8, a more normative discussion about 'expanding the bounds of rationality in the investment regime', revisits this strategy – replacing BITs with national legislation – as one way that developing countries might promote reform of the current treaty-based ISDS regime. Poulsen concedes that the immediate practical impact may be limited due to 'survival' or sunset clauses that extend protection for existing investors. However, he argues that 'as long as they make it painstakingly clear that their exit is not opportunistic and they still protect property rights of foreign investors, it is questionable just how harshly international markets would react' (p. 202). (Nonetheless, for example, World Bank data on annual net inbound FDI into South Africa shows a considerable drop over 2010–14 compared to 2007–9.)¹⁰ Poulsen reiterates that foreign investors may still seek protection in other ways, for example by negotiating individual investment contracts with host states. (However, it should also be added that the transaction costs will be high compared to even a careful treaty negotiation, especially for smaller developing countries).

As a less extreme alternative than outright 'exit' from the treaty-based ISDS regime, Poulsen further argues that developing should not underestimate their 'voice' to promote reform. As well as joining coalitions with stakeholders in developed countries, such as NGOs, they might 'consider exploiting the salience bias by mounting campaigns in international media' in relation to cases such as *Ethyl* (which helped scuttle the MAI) and recently the '*Phillip [sic] Morris* claim [against Australia over tobacco plain packaging law, which has] contributed to growing European resistance' towards ISA in agreements with Canada and the US (p. 201). Poulsen also suggests that a broader lesson from this book is to 'be careful of the status quo bias', although again without expressing any strong normative view. Governments might go 'beyond incrementalism' by considering treaty wording that allows for counterclaims by host states and inter-state interpretations binding on tribunals, requires exhaustion of domestic remedies before ISDS, innovations such as a permanent investment court for arbitration claims by investors, or perhaps even just inter-state arbitration (pp. 196–200). In addition, Poulsen briefly canvases practical measures to improve expertise and experience of treaty negotiators

10 See The World Bank, 'Foreign direct investment, net inflows' <<http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD>> accessed 11 June 2016.

from developing countries, such as more specialization and an advisory centre on international investment law (pp. 194–5). He also acknowledges that past lapses in rational decision-making do not excuse developing countries from existing treaty commitments, but suggests that this history may influence tribunals required to interpret the treaties (pp. 192–3).

In general, the book's arguments are mostly persuasive and certainly thought-provoking. The combination of quantitative and qualitative methods is admirable and well-executed, and usually only achieved by entire teams of researchers.¹¹ In addition, bounded rationality paradigms have been deployed effectively to explain developments in other legal fields too, including other aspects of international law.¹² However, some biases can cut both ways. For example, some earlier work on the Philip Morris arbitration suggested that 'availability bias' (similar to 'salience bias') may result in over-estimating risks, to the detriment of sound policy-making.¹³ Indeed, even though that tobacco company's claim was subsequently dismissed on jurisdictional grounds in 2015,¹⁴ it is now indelibly imprinted on the public discourse over ISDS in Australia – and perhaps beyond.¹⁵

In addition, the book's country studies appear convincing, but a few doubts arise from a closer analysis of Thailand (which the Index refers to several times,

11 See eg Shiro Armstrong and others, 'The Fundamental Importance of Foreign Direct Investment to Australia in the 21st Century: Reforming Treaty and Dispute Resolution Practice' (2014) Sydney Law School Research Paper No 13/90 <<http://ssrn.com/abstract=2362122>> accessed 11 June 2016; and related project publications so far, available at <http://blogs.usyd.edu.au/japaneselaw/2016/02/publications_listing_arc2.html> accessed 11 June 2016.

12 See eg Souichirou Kozuka, 'The Myth of the Careful Consumer: Law, Culture, Economics and Politics in the Rise and Fall of Unsecured Lending in Japan' in Johanna Niemi-Kiesilainen, Iain Ramsay and William Whitford (eds), *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (Hart 2009) 199; Tomer Broude, 'Behavioural Economic Law' (2015) 163 U Penn L Rev 1099.

13 Luke Nottage, 'Investor-State Arbitration Policy and Practice after *Philip Morris Asia V Australia*' in Leon Trakman and Nicola Ranieri (eds), *Regionalism in International Investment Law* (OUP 2013) 452 (shorter version at <<http://ssrn.com/abstract=2041680>> accessed 11 June 2016).

14 *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012–12 (Karl-Heinz Böckstiegel (presiding arbitrator), Gabrielle Kaufmann-Kohler and Donald McRae), Award on Jurisdiction and Admissibility (17 December 2015).

15 Luke Nottage, 'Investment Treaty Arbitration Policy in Australia, New Zealand – and Korea?' (2015) 25 J Arb Stud 185 (manuscript at <<http://ssrn.com/abstract=2643926>> accessed 11 June 2016).

but not comprehensively).¹⁶ Its first BIT was signed with Germany in 1961 (not 1963: p. 126), then with the Netherlands (1972) and UK (1978), all excluding ISDS (despite the general British preference for including ISDS provisions from around that time, as noted by Poulsen). But from the 1980s through until 1993 (in a BIT with Romania), Thailand either excluded ISDS altogether in its BITs, or allowed for it only if both parties were party to the ICSID Convention – which Thailand signed in 1985, but has never ratified. The latter wording persisted in some BITs signed through to 1997 (with Switzerland) and 2000 (BIT with Egypt), meaning that ISDS was effectively unavailable with such states. It is at least plausible that someone within the Thai government intentionally negotiated such wording to limit liability exposure.¹⁷

More consistently with Poulsen's thesis, from 1993 most BITs allowed also the option of ISDS under ad hoc arbitration rules. On 18 February 2000, Thailand even signed seven BITs (with Egypt and six others – some represented at UNCTAD 'BIT facilitation rounds', although no round is listed by Poulsen for that date, or otherwise as formally involving Thailand). However, some within the Thai government may have considered that liability exposure was still limited by the requirement for covered investments to be specifically approved in writing. This remained a feature even of Thailand's Free Trade Agreements' (FTA) practice from 2004 (which further incorporated various pro-host-state provisions, influenced indirectly by US treaty practice).¹⁸ After all, the issue had come up in the first (and only) ISDS claim against Myanmar under the 1987 Association of Southeast Asian Nations (ASEAN) Agreement for the Promotion and Protection of Investments, as well as the first ICSID claim against Malaysia.¹⁹

16 The following paragraphs summarise a detailed analysis in Luke Nottage and Sakda Thanitcul, 'The Past, Present and Future of Investment Arbitration in Thailand' (2016) Sydney Law School Research Paper No 16/31 <<http://ssrn.com/abstract=2770889>> accessed 11 June 2016.

17 Of course, it is also possible that (a) the wording that limited scope for ISDS claims (by requiring both states to be party to the ICSID Convention) was derived from an early counterparty's template and then replicated in Thailand's subsequent treaties without appreciating the consequence, and (b) the implication of signing the ICSID Convention without then ratifying it was not considered either. This alternative seems more implausible, but further qualitative research should be addressed to this question.

18 The texts of almost all of Thailand's investment treaties are available at <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/207>> accessed 11 June 2016.

19 Muthucumaraswamy Sornarajah, 'Review of Asian Views on Foreign Investment Law' in Vivienne Bath and Luke Nottage (eds), *Investment Law and Dispute Resolution Law and Practice in Asia* (Routledge 2011) 242, 246–7, discussing respectively *Yaung Chi Oo*

Thailand also raised this point in contesting jurisdiction after being subjected to its first-ever claim, lodged in 2005 by Walter Bau's liquidator under a revised 2002 BIT with Germany (which, unlike the original treaty, allowed for ISDS). That BIT, plus earlier UK-influenced Thai BITs, also impacted on Thailand's Model BIT of 2002. It was developed in the wake of greater parliamentary scrutiny of executive action under the People's Constitution of 1997, but did remain quite pro-investor. After Thailand lost the Walter Bau case in 2009,²⁰ however, it developed a less pro-investor Model BIT in 2012, drawing partly on FTA practice – although anyway without signing any further BITs (as opposed to FTAs) since 2008. In parallel, across multiple jurisdictions, Thailand continues to vigorously resist enforcement of the ad hoc arbitration award in favour of Walter Bau.²¹ In this strategy, it can draw on longer experience in resisting contract-based arbitration claims by foreign investors (although Cabinet Resolutions since 2004 have required prior approval before public authorities can enter into certain contracts).²² Thailand's (indeed 'incremental') approach nowadays to improving its ISDS and investment treaty practice, for the future, also seems more rational (or at least 'intended rational') given that it became a net FDI exporter from 2012, while losing attractiveness for foreign businesses compared to the other major Southeast Asian economies.

Contrary to expectations, Poulsen's theory may better fit a developed country like Australia. A recent ICSID tribunal decided that its early BIT with Indonesia was intended (like several other Australian BITs) not to provide advance consent to ICSID arbitration, although it upheld jurisdiction instead on basis of a mining license from Indonesian authorities. More likely, this severe limitation on access to ISDS was an irrational drafting error from the Australian

Trading Pte Ltd v Government of the Union of Myanmar, ASEAN ID Case No ARB/01/1 (Sompong Sucharitkul (presiding arbitrator), James Crawford, Francis Delon) 30 ILM 577, and *Philippe Gruslin v Malaysia*, ICSID Case No ARB/99/3 (originally decided by Gavan Griffith QC) <<https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/99/3>> accessed 11 June 2016.

20 *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v The Kingdom of Thailand*, UNCITRAL (Sir Ian Barker (presiding arbitrator), Marc Lalonde QC, Jayavadh Bunnag), Award (1 July 2009) <<http://www.italaw.com/cases/123>> accessed 11 June 2016.

21 See eg Robert Klager, 'Werner Schneider (Liquidator of Walter Bau Ag) v Kingdom of Thailand: Sovereign Immunity in Recognition and Enforcement Proceedings under German Law' (2014) 29(1) ICSID Rev 142.

22 Vanina Sucharitkul, 'From *Walter Bau* to *Hopewell*: Pathways to Bangkok Don Muang Airport' (2015) (1) APAR 309.

side.²³ The mistake was repeated in several subsequent treaties due to status quo bias, exacerbated by the Australian government never making public its Cabinet-approved BIT template. The government still resists calls from stakeholders and parliamentary committees to develop Model provisions after public consultations, which might highlight other drafting issues or options for Australia's ongoing (now only FTA) program. Lastly, although there was a little public discussion about the potential risks of ISDS provisions (drawing on North American experience) before it was left out of the Australia-US FTA of 2004, the analysis was cursory. It was only from 2011 when a few earlier fears about ISDS were confirmed by Philip Morris initiating its ISDS claim about tobacco packaging law, that the then Gillard Government departed from long-standing policy by eschewing ISDS in all future treaties – even with developing countries. Since 2014, however, the Coalition Government has reverted to agreeing to ISDS after case-by-case assessments.²⁴

Nonetheless, Poulsen's theory cannot really be faulted for possibly applying also to the historical experience of at least some developed countries. Nor is it fatal that it may not fit too well for a developing country like Thailand, as some aspects of his theory remain applicable, and anyway Poulsen is careful to acknowledge other examples (such as Lebanon and Costa Rica) where negotiators appeared less susceptible to bounded rationality. Rather, these queries highlight the need for further country-specific studies into the evolution of investment treaty negotiations and ISDS claims.²⁵

23 For a critique of *Churchill Mining PLC v Republic of Indonesia*, ICSID Case No ARB/1214 and 12/40 (Gabrielle Kaufmann-Kohler (presiding arbitrator), Albert Jan van den Berg, Michael Hwang SC), Decision on Jurisdiction (24 February 2014), see Luke Nottage, 'Do Many of Australia's Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration? Analysis of *Planet Mining v Indonesia* and Regional Implications' (2015) 12(1) TDM; updated and elaborated in Luke Nottage, 'The Limits of Legalisation in Asia-Pacific Investment Treaty Arbitration' in Julien Chaisse and Tsai-Yu Lin (eds), *Liber Americorum, Mitsuo Matsushita: A Critical Assessment of International Economic Law and Governance* (OUP 2016) (forthcoming). Why would the Australian government have wanted to curtail ISDS with respect to Indonesia but not Hong Kong, with a contemporaneous BIT using different wording to clearly indicate advance consent to ISDS, even though Hong Kong had the much more reliable and familiar local legal system for protecting Australian out-bound investors?

24 Jürgen Kurtz and Luke Nottage, 'Investment Treaty Arbitration "Down Under": Policy and Politics in Australia' (2015) 30 ICSID Rev 465.

25 Hence, for example, both treaty- and contract-based arbitration will be compared across all ten ASEAN member states at a conference hosted by Chulalongkorn University in Bangkok on 18 July 2016: see Luke Nottage, 'The TPP Investment Chapter and Investor-

Overall, therefore, policy-makers and stakeholders in both developing and developed countries should carefully review their own trajectories and assumptions relating to investment treaties, in light of the many insights from Poulsen's rich and engaging book. However, his work mainly focuses on the past, with only a few suggestions in chapter 8 regarding possible future reforms to the international investment law system. Those are also directed particularly on procedural reforms, whereas much treaty redrafting and commentary over the last decade has focused on the substantive obligations contained in investment treaties.²⁶

3 Balancing Investment Protection and Regulatory Autonomy Through Proportionality and Deference

Henckels' book therefore complements Poulsen's analysis by focusing on what might be done particularly through more compelling and balanced interpretations of existing substantive treaty commitments, as well as hinting at better ways to draft future treaties to achieve such a balance. She recommends recalibration of the interests of foreign investors and host states under investment treaties by urging investor-state arbitration tribunals to consistently apply proportionality analysis, combined with principled deference to regulatory decision-making by host states. Indeed, her overarching approach to interpreting more specific substantive treaty commitments may be particularly attractive to developing countries, which are now engaged or interested in other ways of building in more host state deference into contemporary investment treaties.²⁷

Henckels' introductory chapter argues that her approach to rebalancing is both necessary and feasible. It is needed because the treaty-based ISDS is

State Arbitration in Asia and Oceania' (22 April 2016) <http://blogs.usyd.edu.au/japanese-law/2016/04/the_tpp_investment_chapter_and.html> accessed 11 June 2016.

26 See generally eg Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer 2009); Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (OUP 2014); and more specifically eg Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2014).

27 Cf eg the range of more specific measures incorporated into the ASEAN(+) treaties entered into recently by the (mostly developing) countries of Southeast Asia: Diane Desierto, 'Regulatory Freedom and Control in the New ASEAN Regional Investment Treaties' (2015) 16 JWIT 1018. For Vietnam, eg, see also Thanh Tu Nguyen and Thi Chau Quynh Vu, 'Investor-State Dispute Settlement from the Perspective of Vietnam: Looking for a "Post-Honeymoon" Reform' (2014) 11(1) TDM.

attracting growing public concern and scrutiny world-wide, yet tribunal decisions remain inconsistent and unpredictable (pp. 3–7). This is despite some recent tendency of arbitrators to refer already to proportionality or similar concepts (as a potential ‘method of review’), and indeed to deference to host state regulatory autonomy (in determining the ‘standard of review’; p. 31).²⁸ Developing this approach in a more principled and detailed manner is feasible because although general principles of treaty interpretation do not really assist (even when taking more nuanced views of treaty preambles, for example), useful guidance can be obtained by analyzing how other (especially international) legal regimes deal with the functionally similar issue of reviewing a state’s exercise of public power (pp. 7–20).

Chapter 2 then succinctly explains ‘proportionality and deference in theoretical perspective’. The proportionality test, derived from administrative law in Germany, has since influenced public law in many other countries as well as various areas of public international law (pp. 23–6). It involves scrutinizing a government measure in terms of (i) the legitimacy of its objective, (ii) its suitability (or effectiveness) in achieving the object, (iii) its necessity in light of available alternatives, and (iv) the importance of the objective balanced against the harm caused to the protected right or interest (‘proportionality *stricto sensu*’). The first and especially last stages are often more controversial, because they implicate value judgements, compared to the fact-oriented inquiries into suitability and necessity of impugned measures (pp. 27–9).

As for the standard of review that might be applied at each of these four stages, this is rarely detailed in treaty texts, but Henckels argues that tribunals can set it based on inherent powers (and perhaps rules on evidence, given the impact on the burden and standard of proof). The main theoretical ground for tribunals deferring to the host state as primary decision-maker is normative and/or empirical (factual) uncertainty, combined with the ‘the desirability of regulatory autonomy and decision-making by actors that are proximate to or embedded in the national polity, and the practical advantages of relying on the decisions of actors with greater institutional competence or expertise’ (p. 36). However, that desirability is arguably less convincing, outside the field of normative uncertainty over value judgments, than the practical advantages.

28 For a collection of essays (including one by Henckels) focusing primarily on the latter aspect, mostly in international economic law but also across other fields, cf Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (OUP 2014), reviewed in Andrew Legg, ‘Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation’ 17(1) JWIT 166–69.

Henckels also acknowledges that in principle tribunals might apply more deference where the host state had less institutional capacity or (more controversially) democratic legitimacy (pp. 41–3), which might make her approach more attractive particularly to the developing countries.

From this theoretical foundation, chapter 3 turns to ‘operationalising deference in the context of proportionality analysis’. In general, adjudicators can do this: ‘(1) by relying on or attaching weight to the decision of the primary decision-maker, such as [its] conclusion that a measure was suitable or necessary to achieve its objective; (2) by undertaking proportionality analysis less stringently, such as by modifying the concept or one or more of its component stages so that a measure would be regarded as proportionate so long as it is not ‘manifestly disproportionate’; or (3) by lowering the standard of proof required to satisfy factual matters’ (p. 46). The chapter examines such operations by the Court of Justice of the European Union (CJEU) (often dealing with alleged discrimination against cross-border trade or investment within Europe), tribunals under the World Trade Organization (WTO) (dealing primarily with trade disputes, but world-wide),²⁹ and the European Court of Human Rights (ECtHR) (applying a Convention outlawing discrimination and protecting property rights).

The analysis across all four stages of proportionality testing, although not always clearly maintained by these three bodies, confirms that this testing does not necessarily lead to overly stringent review of measures or unrestrained value judgements. Overall, these bodies apply a high level of deference in reviewing the legitimacy of the measure’s objective (while still being alert to discriminatory intention); set an undemanding standard at the suitability stage (e.g. by allowing the measure to pass muster even if only partially effective); and very rarely engage directly in review based on proportionality *stricto sensu*. Even the CJEU, applying instruments aimed at comprehensive economic and social integration, tends to conflate that last stage with the necessity analysis, while the ECtHR will only find an unfair balance where the impact on property rights is ‘manifestly disproportionate’ (pp. 63–5).

Chapter 4 contrasts ‘methods of review employed by tribunals in regulatory disputes’. It concludes that while they have made more use of proportionality

29 For a detailed more recent analysis focusing on the interaction of WTO and international investment law, compare also Jurgen Kurtz, *The WTO and International Investment Law: Converging Systems* (CUP 2016). See also Stephan Schill, ‘Editorial: US Versus EU Leadership in Global Investment Governance’ (2016) 17(1) *JWIT* 1, 3–5.

and/or deference concepts, there remains much inconsistency.³⁰ Sometimes tribunals refer to proportionality but then do not apply it across the theoretical stages. Others make no reference but in fact engage in some proportionality analysis (such as *Glamis v US*).³¹ Some state they will give deference but then do not (such as *Tecmed v Mexico*).³² Overall, most tribunals dealing with national and/or most favoured nation treatment obligations have only tested for suitability of the measure compared to the non-discriminatory measure, whereas no indirect expropriation case explicitly refers to the necessity test:

30 See also eg Esme Shirlow, 'Deference and Indirect Expropriation Analysis in International Investment Law: Observations on Current Approaches and Future Analysis' (2014) 29 ICSID Rev 595, 621 (noting 'a wide range of standards of review at the prioritizing or balancing phase', but also that applying 'a more deferential standard of review at the balancing stage may not . . . automatically lead to success for a State').

31 *Glamis Gold Ltd v United States of America*, UNCITRAL (Michael Young (presiding arbitrator), David Caron, Kenneth Hubbard), Award (8 June 2009).

32 *Technicas Medioambientales Tecmed SA v Mexico*, ICSID Case No ARB(AF)/00/2 (Horacio Grigera Naon (presiding arbitrator), José Carlos Fernandez Rosas, Carlos Bernal Vereá), Award (29 May 2003). In a submission to the tribunal in a subsequent pending case against Canada, the United States also objected to the majority decision favouring the American investor in *Clayton/Bilcon v Canada*, on the basis that it did not accord the host state the 'high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their town borders' (cited in Lise Johnson, 'As Decision in Mesa v. Canada Looms, Investor and All Three NAFTA Parties Weigh in on Significance of Bilcon' (*Investment Arbitration Reporter*, 10 August 2015) <<https://www.iareporter.com/articles/as-decision-in-mesa-v-canada-looms-investor-and-all-three-nafta-parties-weigh-in-on-significance-of-bilcon/>> accessed 11 June 2016. However, in *Mesa Power Group LLC v Government of Canada*, UNCITRAL, PCA Case No 2012-7 (Gabrielle Kaufmann-Kohler (presiding arbitrator), Charles N Brower, Toby Landau QC), Award (24 March 2016) para 501, all tribunal members adopted the earlier *Waste Management II* interpretation of the minimum standard of treatment, noting it had also been adopted in the *Bilcon* award. They also sided with a majority of earlier NAFTA tribunals holding that a violation of the investors' legitimate expectations was not itself enough to establish a violation, but only a factor to consider (at para 502); and that international law required 'a good level of deference to the manner in which a state regulates its internal affairs' (at para 505). The majority went on to find no violation of this minimum standard, but the investor's nominee (Charles N Brower) dissented, on the facts. Meanwhile, the *Bilcon* award is still being challenged in the Federal Court of Canada: see Global Affairs Canada, 'Cases Filed Against the Government of Canada' <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/clayton.aspx?lang=eng>> accessed 11 June 2016.

Outside of the context of the Argentina-US BIT, which mandates the consideration of alternative measures, tribunals appear to have conducted least-restrictive means analysis or referred to the concept of necessity only in response to the parties' pleadings, in circumstances where the relevant treaty or domestic regulatory regime required authorities to consider alternative measures or stipulated such measures, or in cases where there was evidence that the authorities had undertaken this type of analysis on their own motion. Tribunals have been more inclined to rely on the concept of reasonableness as the applicable method of substantive review in relation to fair and equitable treatment claims (p. 125).

As the longest chapter in this book, summarizing and criticizing key points from dozens of investment treaty awards after outlining four key areas (fair and equitable treatment, indirect expropriation, non-discrimination and treaty exceptions: pp. 70–82), it will be particularly useful for arbitrators and legal advisors seeking to apply or distinguish a growing corpus of *de facto* precedents in concrete disputes. Unfortunately, the cited awards do not record who the arbitrators were, which may be useful in determining their persuasiveness, especially given the now well-documented existence of 'core' arbitrators who are more frequently appointed³³ and therefore arguably more influential in international investment law. This is not a criticism of the author, but rather of the Cambridge University Press style. Its other problem is that footnote citations do not indicate when decisions were reached, which would offer a much more efficient means of gauging recent trends than looking up each one in the preliminary Table. Helpfully, however, the author does sometimes provide a chronological overview in the main text (such as for awards involving Argentina; pp. 87–96).

The shorter chapter 5 is the intellectual core of the book – helpful for treaty negotiators and academics, as well as practitioners – because it combines the theory and emerging case law to advocate 'the development of an institutionally sensitive approach to proportionality analysis in investor-state arbitration'. When assessing legitimate objective, suitability and necessity, Henckels notes but is critical of 'strict approaches' taken by some (often earlier) tribunals in favour of investors, and then identifies and proposes more nuanced alternatives. Regarding legitimate objectives, for example, she argues that some tribunals seem to have been overly deferential in approving measures with discriminatory motivations, contrary to the treaty. However, Henckels supports tribunals that do vary the standard of review based on how

33 Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25(2) *EJIL* 387.

widespread the measure is, apart from using common practice across countries to confirm the legitimacy of the measure (pp. 133–8). At the suitability stage, by contrast, she concedes that greater international consensus or harmonisation can be seen as illustrating less normative or empirical uncertainty, so the argument for deference being accorded to significantly divergent states is arguably weaker. However, Henckels argues that this factor should still not be decisive (pp. 144–5), which may provide some comfort for example to developing states that are still out of step with global standards for a variety of possible reasons. For necessity testing, Henckels approves recent tribunals that have required an alternative measure to be equally effective and/or acknowledges the actual possibility of the government adopting it, and some that permit more discretion to states by allowing them to show that alternatives had in fact been considered. In short, under her approach:

... tribunals would afford a measure of deference on the basis of regulatory autonomy and proximity concerns when evaluating the legitimacy of a measure's objective, and would use this stage of proportionality analysis only to identify cases whether states were acting with discriminatory or other impermissible objectives. They would apply the suitability test in a way that takes account of any empirical uncertainty, and would permit states to adduce evidence to demonstrate that a measure would be expected to achieve its objective in future. They might afford a measure of deference even where states have, acting in good faith, made mistakes. Tribunals would also permit states to rely upon any relevant institutional competence and expertise in demonstrating the necessity of the challenged measure in light of possible alternatives, and would approach the burden of proof in a way that accords with the character of the relevant treaty provision (a positive obligation or an exception). Tribunals might also afford deference on the basis that states have thoroughly investigated alternative options before promulgating the measure in question or carefully balanced the interests at stake. Finally, investment tribunals would refrain from employing the proportionality *stricto sensu* stage of proportionality analysis in light of the significant legitimacy implications that this form of analysis causes for both certainty and regulatory autonomy (p. 171).

Finally, chapter 6 considers 'other issues affecting the method and standard of review in investor-state arbitration'. For example, Henckels concedes that proportionality analysis will not be permitted in the (so far rare) situations where the treaty text, customary international law or an investor-state contract requires a different method of review. She also argues that analysis

of proportionality or the state's reasons for adopting measures should be generally conducted in the context of the primary norm (such as non-discrimination or fair and equitable treatment) rather than any exception clause (pp. 173–7). Regarding the standard of review, Henckels also notes that approaches of some arbitrators in NAFTA cases seem to have been influenced by strategic considerations – in particular, by the perceived need for them to sustain the investor-state arbitration system under that treaty – albeit with inconsistent results. She speculates that such considerations may also become important in other regional treaties, as well as for arbitrators concerned about future appointments as a few states have started to exit the system (pp. 184–5).

In the brief 'Conclusion', Henckels reiterates that combining more structured proportionality analysis (albeit only at the first three stages) with appropriate deference would provide greater predictability and transparency to the decisions of ad hoc investment tribunals. It would also acknowledge 'the circumstances in which the characteristics of host state decision-makers render them better placed to have primary responsibility for deciding the matter' (p. 194). She concedes that this approach is impeded by the absence of appellate review mechanisms or a standing court, but hopes that consensus may continue to build in this field – as it has arguably done in other fields of investment treaty arbitration. Henckels also acknowledges views that it might be preferable for treaty drafters to provide further guidance to arbitrators with respect to the method and standard of review.³⁴

Overall, this book is an incisive and important contribution to the burgeoning literature on international investment law, and indeed other fields of international law as well as jurisprudence. In some respects, however, it may be somewhat too ambitious. Compared to deference in the standard of review, proportionality testing may not be so easily transplanted, as it lacks many specific 'hooks' in current treaty wording. Indeed, one commentator now argues that the potential for enhanced proportionality testing with respect to fair and equitable treatment is constrained by a tendency for states to constrain arbitrator discretion by spelling out more specific obligations with respect to transparency of laws, administrative decision-making, access to courts and anti-corruption.³⁵ Nor can it easily filter in from national law via state practice, as an element of customary international law, or as an identifiable general

34 For some helpful recent suggestions, see Caroline Henckels, 'Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA and TTIP' (2016) 19(1) *JIEL* 27.

35 Mitchell Moranis, 'Between Power and Procedure: The Changing Balance of Investment Treaty Protections' (2015) 31 *Arb Int'l* 81, 107–8 (with references to the earlier work by Kingsbury and Schill).

principle of law. Thus, for now, proportionality testing mostly relies on arbitrators drawing broader analogies from other legal regimes.³⁶

Admittedly, investment treaty arbitrators often refer to other tribunal decisions, as well as academic writings,³⁷ so the emergent case law and its detailed analysis presented in this book may gather momentum. However, state parties are now paying closer attention to the development of arbitral case law.³⁸ Further, arbitrators appointed on an ad hoc basis still mostly come from a background in commercial law rather than public (international) law,³⁹ where broad standards and balancing tests are arguably more common. By contrast, chapter 3 reveals that more robust applications of proportionality and deference instead have emerged – even without much textual foundation – in fields of international law where adjudicators can gain greater confidence and legitimacy by serving on permanent courts.⁴⁰

36 See generally Valentina Vadi, 'The Migration of Constitutional Ideas: The Strange Case of Proportionality in International Investment Law and Arbitration' [2013–4] *Ybk Intl Inv L & Poly* 337.

37 See eg Kathryn Gordon and Joachim Pohl, 'Investment Treaties Over Time – Treaty Practice and Interpretation in a Changing World' OECD Working Papers on International Investment, 2015/2, pp 13–14 <http://www.oecd-ilibrary.org/finance-and-investment/investment-treaties-over-time-treaty-practice-and-interpretation-in-a-changing-world_5js7rhd8sq7h-en> accessed 11 June 2016.

38 In submissions on the *Bilcon* award, for example, all three member states also objected to the majority arbitrators relying on decisions by other NAFTA tribunals to define the scope of the fair and equitable treatment obligation, rather than requiring the investor to establish (based on evidence of state practice and *opinio juris*) the content of customary international law: Johnson (n 32). The latter is now linked to that obligation, moreover, by inter-state commission decisions. On the resurgence of states in investment treaty arbitration, see generally Anthea Roberts, 'Subsequent Agreements and Practice: The Battle Over Interpretive Power' in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 95; Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2013) 55 *Harv ILJ* 1.

39 Joost Pauwelyn, 'The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators Are from Venus' (2015) *AJIL* 761. See also Moshe Hirsch, *Invitation to the Sociology of International Law* (OUP 2015) 136–53.

40 Cf also generally Schill (n 29) 3, warning that: 'A permanent [EU-style investment] court could, much more than [ad hoc investor-state] arbitration, develop its own institutional dynamics and become even more independent from government influence than is currently the case with arbitration. The courts in Luxembourg and Strasbourg are perfect examples for the unexpected dynamics permanent international courts can develop.' Generally, on the EU's proposals for a permanent investment court and broader developments in its evolving treaty practice, see Catharine Titi, 'International Investment Law and the European Union: Towards a New Generation of International Investment

In other respects, this book may prove to be not ambitious enough. As Henckels acknowledges (pp. 166–8), various commentators have argued quite convincingly that proportionality *stricto sensu* may be permissible – at least in exceptional circumstances – and there are a few applications by the ECtHR and CJEU (as opposed to the WTO). For example, Kingsbury and Schill are interpreted as allowing such review to be discharged procedurally or with a ‘margin of appreciation’ (p. 166).⁴¹ In my view, it may also become more readily justifiable as investment treaty provisions are increasingly folded into mega-regional FTAs, even if not yet as institutionalized as the EU system, especially if adjudicators start to become permanently appointed judges rather than ad hoc arbitrators.

In addition, empirical research from social psychology tends to confirm the jurists’ intuition that ‘procedural justice’ matters; parties are more likely to accept the result, even if having lost the case, if the preceding procedure is perceived as fair.⁴² Where a tribunal has already upheld the host state’s arguments at the first three posited stages of proportionality testing, if it extends significant deference at the fourth stage of proportionality *stricto sensu* but nonetheless rules in favour of the investor who is exceptionally disadvantaged, it will be hard for the host state to complain too vociferously.

Nonetheless, these ruminations on how the book might go further on this point, but may have gone somewhat too far in assessing the potential for arbitrators to incorporate more deference and other aspects of proportionality analysis when interpreting existing treaties, do not significantly detract from its core value. Instead, befitting its topic, the book proves itself to be well-balanced.

Agreements’ (2015) 26 EJIL 639; August Reinisch, ‘The European Union and Investor-State Dispute Resolution: From Investor-State Arbitration to a Permanent Investment Court’ (March 2016) CIGI Investor-State Arbitration Series, Paper No 2 <<https://www.cigionline.org/publications/european-union-and-investor-state-dispute-settlement-investor-state-arbitration-permane>> accessed 11 June 2016.

41 Benedict Kingsbury and Stephan W Schill, ‘Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law’ in Albert Jan van den Berg (ed), *50 Years of the New York Convention* (Kluwer 2009) 5; Benedict Kingsbury and Stephan W Schill, ‘Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality’ in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 75. However, considering that this aspect of proportionality analysis may inflame rather than address investment treaty law’s legitimacy crisis, Paine (n 3) 11–12, still tends towards Henckels’ preference not to allow proportionality *stricto sensu*.

42 See eg Tom Tyler, *Why People Obey the Law* (Princeton UP 2006).

4 Conclusion

Poulsen's book is decidedly ambitious, and hence has been the scope of more attention in this review essay. He presents plausible arguments and evidence to show 'bounded rationality' on the part of developing countries generally in their rush to sign up to mostly standard-form investment treaties particularly from the 1990s, until tempered by direct exposure to treaty-based ISDS claims. However, there may have been more – at least partial – exceptions to this pattern (such as Thailand), whereas the analysis might be applicable to at least some developed countries (such as Australia) despite their ostensibly greater expertise and expertise in international economic law.

Poulsen's analysis also squares quite well with other emerging quantitative research. For example, one recent econometric study focusing on *renegotiated* treaties finds that a significant trigger was a state's direct experience of ISDS claims, rather than a generalized increase in claims world-wide.⁴³ Related work shows that overall, renegotiations have so far led to *more* access to ISDS (except if one or more states are from the Americas),⁴⁴ which does not seem very rational. A separate quantitative project counters earlier research by concluding that, overall, being hit by an ISDS claim does not lead to significant innovations in treaty design.⁴⁵ Other preliminary qualitative research finds it hard to discern rational patterns among (developing and middle-income) countries in terms of implementing dispute management or prevention strategies in the wake of investment claims.⁴⁶

43 Yoram Haftel and Alexander Thompson, 'When Do States Renegotiate International Agreements: The Case of Bilateral Investment Treaties' (2015) (unpublished manuscript on file with the author).

44 Tomer Broude, Yoram Haftel and Alexander Thompson, 'Who Cares About Regulatory Space in BITs? A Comparative International Approach' in Anthea Roberts (ed), *Comparative International Law* (OUP 2016) (forthcoming). However, their ongoing research will examine whether this greater exposure to claims may be tempered by renegotiated substantive provisions that are less pro-investor.

45 Wolfgang Alschner and Dmitriy Skougarevskiy, 'Consistency and Legal Innovation in the BIT Universe' (2015) Stanford Public Law Working Paper No 2595288 <<http://ssrn.com/abstract=2595288>> (last accessed 11 June 2016).

46 Mavluda Sattorova, 'Reassertion of Control and Contracting Parties' Domestic Law Responses to Investment Treaty Arbitration: Between Reform, Reticence and Resistance' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016) (forthcoming) (discussing the possibility that responses may be due to an assessment that the experience in defending claims was quite successful, and/or support from international organisations like UNCTAD).

However, although such behaviour may not seem optimal in retrospect, we should take another leaf out of the social psychologists' books and beware also of 'hindsight bias'.⁴⁷ In addition, even if 'bounded rationality' has been pervasive in the past, there can be the possibility of better learning – reinforced by better information – with respect to future design and application of investment treaties, ironically thanks to the growing volume of ISDS claims. In any event, both developed and developing countries are now more likely to enjoy more scope for regulatory autonomy thanks to the diffusion especially of US-style treaty drafting over the last decade, at least across many parts of the Asia-Pacific region,⁴⁸ as the US updated its Model BIT in 2004 in the light of experiences with claims under NAFTA and then used that template also for negotiating FTA investment chapters. Of course, whether this illustration of a new 'status quo bias'⁴⁹ is good or bad will depend on the observer, and the possible alternatives – including the emerging EU model, which may well still to be prove an attractive compromise in the wider Asia-Pacific region.⁵⁰ At the very least, since quantitative research shows that arbitral case law has a more pronounced influence on treaty drafting,⁵¹ it seems worth taking fuller advantage of that mechanism to seek further improvements in international investment treaty law, before abandoning ISDS altogether or adopting some of the other more radical proposals sketched in chapter 8 of Poulsen's book.⁵²

After all, ISDS patterns have also been shifting since the late 1990s, including more claims against developed countries. This has paralleled a move away from ISDS claims seeking primarily to impose an international standard for the rule of law in developing countries in individual cases (although there are still some examples of this), towards ISDS claims serving to enhance overall predictability for cross-border investments.⁵³ It is also possible that ratifying investment treaties or (more likely) being exposed to treaty-based ISDS claims

47 Cf generally eg Thaler (n 5) 21–22.

48 See eg Wolfgang Alschner and Dmitriy Skougarevskiy, 'The New Gold Standard? Empirically Situating the Trans-Pacific-Partnership in the Investment Treaty Universe' (2016) 17(3) JWIT 339.

49 Wolfgang Alschner, 'The Impact of Investment Arbitration on Investment Design: Myth Versus Reality' (2016) Yale JIL (forthcoming).

50 Nottage (n 2) Part 4; Luke Nottage, 'US vs EU vs Other Models for Investment Treaties in the Asia Region' (10 June 2016) <http://blogs.usyd.edu.au/japaneselaw/2016/06/us_vs_eu_vs_other_models.html> accessed 11 June 2016.

51 Alschner (n 49).

52 Cf also eg Christian Campbell, Sophie Nappert and Luke Nottage, 'Assessing Treaty-Based Investor-State Dispute Settlement: Abandon, Retain or Reform?' (2014) 11(1) TDM.

53 Schultz and Dupont (n 9).

may trigger improvements in overall governance within host states, especially developing countries. However, this remains a 'complex empirical question',⁵⁴ dependent on domestic political and institutional dynamics.

The overarching methodological approach advocated in Henckels' book therefore becomes important. Reforms in that direction may usefully jolt the path-dependency highlighted by Poulsen and other recent commentators. Her approach is potentially far-reaching because it can impact on a variety of substantive commitments. In addition, it can be pursued already by counsel, arbitrators and states under the thousands of existing treaties. However, if this strategy does prove to be overly constrained by existing treaty wording or the dynamics of existing ad hoc ISDS tribunals, it will need to be supplemented specific new wording and/or a move towards a permanent investment court in future treaties. The path ahead still looks to be long and hard.

54 Kathryn Gordon and David Gaukrodger, 'Investor-State Dispute Settlement: Public Consultation 16 May – July 2012' Scoping Paper, 12 <<http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf>> accessed 11 June 2016. See also eg Mavluda Sattorova, 'International Investment Treaties and the Promise of Good Governance' European Society of International Law Conference Paper Series No 11/2014 <<http://ssrn.com/abstract=2546404>> accessed 11 June 2016.