RECENT BOOKS ON INTERNATIONAL LAW

EDITED BY RICHARD B. BILDER

REVIEW ESSAY

THE SHIFTING LANDSCAPE OF INTERNATIONAL INVESTMENT LAW AND ITS COMMENTARY

Bilateral Investment Treaties: History, Policy, and Interpretation. By Kenneth J. Vandevelde. Oxford, New York: Oxford University Press, 2010. Pp. xii, 562. Index. $200.

The Law of Investment Treaties. By Jeswald W. Salacuse. Oxford, New York: Oxford University Press, 2010. Pp. xxxvi, 517. Index. $209.

International Investment Law and Comparative Public Law. Edited by Stephan W. Schill. Oxford, New York: Oxford University Press, 2010. Pp. lxxxiii, 836. Index. $290.

The complex historiography surrounding modern international law protections for foreign investors has deeply shaped the form, quantity, and quality of secondary literature addressing that field. That history can be sketched chronologically in four principal stages. The "inception," of modern investment norms began in the late 1950s to 1960s with capital-exporting states electing to protect their nationals by constructing treaties in response to downward shifts in customary guarantees. Bilateral investment treaties (BITs) were conceived as a strategic response to waves of expropriation throughout much of the developing world as newly independent states emerged from the strictures of colonialism with a fierce desire to match political autonomy with economic independence. The second distinct shift in the system occurred by the late 1980s with enormous "growth" in the treaty network. Developing states entered into BITs in large numbers, driven by fundamental shifts in economic and development policies. Paradoxically perhaps, despite the change in underlying attitudes of states that would mainly host foreign investment, the classic model BIT (formed during the inception period) was simply rolled out and replicated in large numbers. The third formative stage was the "activation" of dispute settlement within the field from the late 1990s, which was in no small part due to the curious election of Canada and the United States to include investor-state arbitration within the triadic structure of Chapter 11 of the North American Free Trade Agreement[1] (NAFTA). The assumption that the broad NAFTA Chapter 11 provisions would operate largely to protect Canadian and U.S. investors in Mexico has proven to be fundamentally mistaken. Enterprising legal advisers (in Ottawa and Washington, D.C.) have used the undefined language in NAFTA Chapter 11 to advance large numbers of claims against regulatory and even judicial measures in Canada and the United States, rather than against Mexico as many expected. The developed country partners have thus found themselves in the unfamiliar territory of acting as defendants in an extensive range of investment treaty cases. That phenomenon has, in turn, triggered the fourth and contemporary stage of "recalibration." Some of the early investment awards adopted a blunt pro-investor approach, whether methodologically or substantively. These problematic leanings have consequently triggered a concerted push to pare back the extensive protections offered by the classic BIT model. This recalibration has manifested itself in a range of

[1] North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 107 Stat. 2006, 32 ILM 289 & 605 (1993) [hereinafter NAFTA].

ways, most visibly in prospective changes by states parties to newer treaties, whether in the tightening of substantive obligations or the inclusion of general exceptions clauses. Critically, however, this project is not entirely a stable one of merely effecting technical amendments to treaty instruments. Its potentially most damaging manifestation is the exit, in various forms, by states from the investment treaty system, often tracking their episodic experience as respondents in investor-state adjudication.[2]

This thumbnail sketch of these four strata—inception, growth, activation, and recalibration—offers some insight into the deep and often problematic pathologies embedded in the system. Strangely, until very recently, remarkably few books were dedicated to the modern field of international investment law. Throughout the growth period of the early 1990s, a mere handful of key texts emerged that were early portents of a deep division among commentators. In 1994, for example, M. Sornarajah released his magisterial book *The International Law on Foreign Investment* that addressed the birth pains associated with the inception of the BIT network, especially the deep contestation between developed and newly independent states. One year later, Rudolf Dolzer and Margrete Stevens published *Bilateral Investment Treaties*, which was orientated in a fundamentally different manner. Against Sornarajah's withering criticism of the political and economic value of BITs (especially from a developing state perspective), Dolzer and Stevens painted a neutral, almost technocratic, picture of the role of these treaty protections in managing a host state's treatment of foreign investment.

Yet for much of the 1990s, the universe of international economic law studies came to be dominated by one of its other key subdisciplines. The emergence of the World Trade Organization (WTO) in 1994 launched hundreds of articles, monographs, and doctoral dissertations. But by the early 2000s, the pendulum had begun to slowly shift back towards greater scholarly engagement with investment treaty law. A very distinct reason for that upsurge was the explosion in arbitral case law following the activation stage of the development of investment arbitration.[3] This secondary and more fertile stage of scholarly analysis was, however, marked by curious methodological choices or, even more problematically, substantive absences. For example, some authors failed to examine in any real detail the fascinating historical context surrounding the emergence of the investment treaty system.[4] This field, perhaps more than many others, is a construction based on the revealed preferences of states parties developed against a set of highly contingent historical conditions. This flaw is by no means an outlier in some secondary commentary. Many of these books tend to overweight analysis of specific treaty protections over others. In particular, there is a general absence of any serious examination of national treatment compared to other investment treaty norms.[5] These partialities are in some respects not accidental but instead tied to the sorts of actors

[2] For instance, Australia has recently announced that it will no longer include investor-state arbitration provisions in future bilateral and regional trade agreements. In a similar vein, Bolivia, Ecuador, and Venezuela have employed treaty renunciation and/or withdrawal from the ICSID Convention. For analysis of the former, see Jürgen Kurtz, *Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication*, 27 ICSID REV. (forthcoming 2012).

[3] Up until 1998, only 14 BIT-related cases had been brought before a key arbitral forum in the field, the International Centre for the Settlement of Investment Disputes (ICSID). Since the late 1990s, the growth in cases has been exponential with cumulative numbers rising to 357 by the end of 2009. *See* UNCTAD, INVESTOR-STATE DISPUTE SETTLEMENT AND IMPACT ON INVESTMENT RULEMAKING 7, UN Sales No. E.07.II.D.10 (2007); UNCTAD, LATEST DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT 1–2, UN Doc. UNCTAD/WEB/ITE/IIA/2008/3 (2008), *available at* http://unctad.org/en/docs/iteiia20083_en.pdf; UNCTAD, LATEST DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT 1, UN Doc. UNCTAD/WEB/DIAE/IA/2010/3 (2010), *available at* http://unctad.org/en/docs/webdiaeia20103_en.pdf.

[4] *See, e.g.*, CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2007).

[5] *Id.* at 251–54 (devoting a total of three pages to national treatment protection, in comparison to extended analyses of the fair and equitable standard (*id.* at 226–47) and of expropriation protections (*id.* at 265–313)); *see also* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT

that have been attracted to the system and the natural incentives that many of them have to comment about it.

It is important, in this respect, to consider the institutional structure of the dispute settlement mechanisms within the field. Most modern investment treaties follow the classic public international default of state-to-state dispute settlement but then offer a powerful augmentation. Foreign investors (from a signatory home state) are afforded standing to claim breach of the underlying treaty by the signatory host state. The truly novel feature of this model is not in its procedural variances with other public international law constructs that also extend rights to nonstate actors, such as the absence of any requirement to exhaust local remedies, which is a condition of standing in most human rights regimes. What is more important, but less analyzed, is the curious election to choose arbitration as the adjudicatory model to frame investor-state dispute settlement. The first and immediate consequence of this election is that the legal constituency naturally attracted to the field are those who have worked in commercial arbitration in the past. They come to this new construct with an existing set of habits and practices, without always considering whether those methods are appropriate for resolving a dispute under a broadly worded treaty compared to an individually negotiated contract. The most persistent and troubling adjudicatory flaw is not, as is often claimed by critics, a crude pro-investor bias. The real concern lies in the choice of hermeneutics and especially the stubborn tendency to preference outcome over process in reasoning (as is often naturally the case in commercial arbitration). Those practices are problematic for several reasons, not least the obvious failure of many arbitral tribunals to follow the interpretative taxonomy mandated by the Vienna Convention on the Law of Treaties (VCLT).

The exponential growth of arbitral case law has fueled a desire among the practicing community with long-standing expertise in commercial arbitration to be the first to enter and establish authority often as a way of building market share in this new lucrative field. This desire often cashes out as an uncritical acceptance of the merits of individual treaty norms across much of the burgeoning literature. Many of these authors engage the case law technically and doctrinally to synthesize and thereby minimize any area of conflict. At times they display little consideration of disciplines other than law in attempting to probe and test the contemporary justifications for particular investment protections. These tendencies stand in stark contrast with scholarly engagement with the WTO where interdisciplinary insights (especially from economics) fuel powerful critiques of legal mechanisms including the right of WTO members to impose antidumping duties. International investment law is instead a field populated almost exclusively by lawyers. And many of those in the practicing community have an understandable (if not justified) interest in resisting or ignoring the most recent recalibration of investment treaties by states parties, not least because it limits the market opportunities offered to them by the strong BIT model characteristic of the inception and growth periods.

The picture painted so far is both static and one-dimensional. This field has *always* attracted a distinct community of public international lawyers, especially those who participated in the negotiations of BITs while working in government.[6] Yet, in the more recent rush of commentary, the insights of such actors remain somewhat of a minority. It is difficult to escape the impression that many view the regime as a self-standing silo rather than one that is deeply embedded in the framework of public international law. The tide, though, seems to be turning. In the last few years, there has been renewed engagement by a range of leading public international lawyers, some of whom—in contrast to the problematic tendencies examined so far—have even made the subject of the recalibration phenomenon their scholarly focus.[7] That scholarly engagement has been

319–27 (2d ed. 2004); RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 179 (2008).

[6] *E.g.*, KENNETH J. VANDEVELDE, U.S. INVESTMENT TREATIES: POLICY AND PRACTICE (1992).

[7] *E.g.*, José E. Alvarez, *The Once and Future Foreign Investment Regime*, *in* LOOKING TO THE FUTURE: ESSAYS IN HONOR OF W. MICHAEL REISMAN 607

matched (or even exceeded) by adjudicatory appointments. Past and present judges from the WTO and the International Court of Justice are now regularly found on arbitral tribunals examining some of the most sensitive cases of claimed breach of investment disciplines. This development, in turn, has led to unique pathologies, not least the cross-fertilization of substantive legal approaches[8] and a commitment to principled hermeneutics.[9] The attraction of investment arbitration to these actors is not simply that it is exceptionally well remunerated, at least in comparison to, for example, the WTO. Holding judicial office is classically regarded as the epitome of high achievement in the law, and yet when it comes to international law, relatively few judicial opportunities exist for scholars and practitioners. Investment arbitration then offers a prominent and visible avenue for these actors to display their professional wares and perhaps even to counter the often tedious critique that "international law isn't really law."

In short, the field is both complex and unstable, presenting difficult challenges for prospective authors. It is, first and foremost, deeply heterogeneous, given variances in form and substance of investment treaties. Commentators also face a Sisyphean task in marshalling the expanse of arbitral case law and locating a rigorous proxy for qualitative assessment given the absence of an appellate organ to supply such guidance. States parties too are increasingly questioning the contemporary justification for select disciplines as revealed in their push to recalibrate investment treaty norms. This development, of course, raises the fundamental question of what justifications can be found in disciplines other than law for constraints on host state action vis-à-vis foreign investment. Yet the willingness of authors to address that obvious need would seem to be influenced by which side of a sociological divide on which they sit within the investment law community. Against this unsettled backdrop, three recent books have emerged, which, for the most part, represent a welcome shift in the quality and rigor of the burgeoning literature in the field.

Professor Kenneth J. Vandevelde of Thomas Jefferson School of Law has released a new book, *Bilateral Investment Treaties: History, Policy, and Interpretation*, which builds on his rich and long-standing work across the field. Vandevelde elects, in line with his previous books,[10] to concentrate almost exclusively on BITs, rather than the broader universe of investment commitments, including those embedded within free trade agreements (FTAs). Consequently, this approach offers the reader a necessarily partial picture of separate treaty silos, which may not fully capture the complexity of the contemporary investment treaty network. For one thing, the early arbitral case law was largely a product of the discovery of investment disciplines within a particular FTA—the NAFTA—by enterprising legal advisers in Canada and the United States. Further, the recalibration of investment disciplines in light of the growing arbitral case law reaches its highest and most creative embodiment across the rapidly expanding number of FTAs, which is especially evident in the use of WTO-based ideas to guide reform of investment commitments.[11] The fertilization of those ideas is not surprising in the FTA context given the intermingling of different government actors and departments under a common negotiating umbrella.

Vandevelde's election to limit the scope of his inquiry may account for his repeated attempts to

(Mahnoush H. Arsanjani , Jacob Katz Cogan, Robert D. Sloane & Siegfried Wiessner eds., 2010); José E. Alvarez, *The Return of the State,* 20 MINN. J. INT'L L. 223 (2011).

[8] *See, e.g.*, Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, paras. 166–99 (Sept. 5, 2008). For analysis of the use of WTO law in the *Continental* award, see Jürgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, 59 INT'L. COMP. L.Q. 325, 359–70 (2010).

[9] *See, e.g.*, Fraport AG Frankfurt Airport Services Worldwide v. Philippines, ICSID Case No. ARB/03/25, Annulment, paras. 73–118 (Dec. 17, 2010). In part, the decision criticized the arbitral tribunal's reasoning in *Fraport* as, inter alia, "not well founded in the rules of interpretation binding upon the Tribunal." *Id.*, para. 107.

[10] *E.g.*, VANDEVELDE, *supra* note 6; KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009).

[11] *See infra* note 27 and accompanying text.

minimize differences across the field. For Vandevelde, "the network of twenty-six-hundred BITs is characterized by an essential coherence" (p. 1), and "[s]imilar provisions appear in more or less the same order in nearly every BIT" (p. 5). He claims that "while some BITs contain provision[s] that may be unique to BITs of a particular country[,] [t]hese differences to date have been of relatively little consequence" (p. 7).

Vandevelde's assumption of homogeneity is troubling on several fronts. Where tribunals have crudely ignored core differences between investment treaties, this disregard has prompted a swift and furious response by states parties.[12] Moreover, the treaty practice of some key states within the system shows a deliberate attempt to vary treaty protections (including questions of admission and extension of investor-state arbitration) depending on the underlying stage of economic reform within a state.[13]

Conceptually, Vandevelde has structured his book into three constituent parts: history, policy justifications, and individual treaty protections. Following the introductory chapter, chapter 2 presents a comprehensive and insightful analysis of the complex history of the field, as would be perhaps naturally expected from such a well-established commentator. Despite the general excellence of this account, it contains one or two troubling assumptions. In particular, the arbitral case law is introduced summarily and as epiphenomenal to the recalibration of investment treaties. The reality though, as indicated earlier, is of a clear and causative feedback loop whereby substantive and methodological flaws in the arbitral case law have deeply influenced the content of newer investment treaties. Next, chapter 3 examines the policy justifications for state entry into BITs. Drawing on his past research, Vandevelde unpacks the complex political and economic case for investment treaty disciplines. This approach offers a genuine and sophisticated point of contrast to many books, especially given Vandevelde's notable (and for the most part comprehensive) attempt to consider economic insights, including those drawn from the school of development economics.

The remainder of the book, chapters 4 to 10, is devoted to a discussion of the typical types of investment treaty disciplines and their interpretation by arbitral tribunals. Interestingly, Vandevelde departs from orthodoxy and elects to categorize those disciplines in a conceptual rather than descriptive manner. He sees value in sorting and allocating BIT disciplines in a taxonomy that encompasses six overarching principles: reasonableness, security, nondiscrimination, transparency, access, and due process. Vandevelde appears to present this taxonomy (at least in part) as reflecting a normative claim that five of these six principles are elements of the rule of law and that "[p]romoting the rule of law with respect to foreign investment may be regarded as the primary function of a BIT" (p. 3). Regardless of the position that one takes on this normative claim, the taxonomy presents certain difficulties for the reader. Particular investment treaty obligations can and do fit into more than one of Vandevelde's core principles, and, on occasion, he has had to slice and dice various subcomponents across different parts of the book.

In addition, the recalibration stage of investment treaty evolution seems somehow to have gone missing in the author's desire to "contribute toward the development of a general theory of the BITs" (p. 12). Consider, in this respect, the obligation found in some older investment treaties (including those based on the 1994 U.S. Model

[12] *Compare* Pope & Talbot, Inc. v. Canada, Merits, Phase 2, para. 115 (NAFTA Ch. 11 Arb. Trib. Apr. 10, 2001) (ignoring the textual construction of the fair and equitable standard in NAFTA Article 1105 that the standard of treatment be "in accordance with international law" and instead "interpreting the language of Article 1105 consistently with the language in the BITs" with the result that fairness is a free-standing obligation, independent of the requirements of international law), *with* NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, para. 2(1)–(2) (July 31, 2001) (ruling that Article 1105 "prescribes the customary international law minimum standard of treatment" and that its underlying concepts "do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens").

[13] *See, e.g.*, Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73, 78–97 (2007).

BIT) that host states refrain from engaging in unreasonable and/or discriminatory measures. For Vandevelde, this provision is key evidence affirming a reasonableness principle underlying BITs. But one can just as easily argue that this type of provision is merely symptomatic of the problems of early treaty framing and that this provision is redundant given the probable overlap with the obligation of national treatment and/or the fair and equitable standard. Vandevelde anticipates this response by offering a set of sophisticated arguments that the type of discrimination disciplined under national treatment could well be different from that other treaty standard. The problem, though, is that some states parties have cast their vote in a very different direction. The United States, for instance, cut the separate protection on unreasonable and discriminatory measures entirely from its 2004 U.S. Model BIT,[14] suggesting, at the very least, a different degree of state commitment to reasonableness than that presented by Vandevelde.

More broadly, the book has a tendency to view the case law largely uncritically. The reader is often presented with the impression that jurisprudential evolution is incremental, justified, and monodirectional. The strongest example of this tendency can be found in the discussion of the infamous *Loewen v. United States* award.[15] Here we are offered a very brief description of the outcome without any real attempt to uncover the deeply flawed arguments relied on by the *Loewen* tribunal in declining relief to the aggrieved investor. One need only contrast this summary treatment with earlier texts that devote pages of careful analysis to this important award and point out its methodological flaws, not least the unconvincing transplant of separate parts of customary law.[16] Of course, one can take the view that poorly reasoned awards will eventually disappear in some Darwinian process of jurisprudential competition. But this optimistic prediction ignores the continuing and stubborn influence of flawed awards in controlling future jurisprudence. Accordingly, some type of mechanism of sorting, evaluating, and weighting the different strands of arbitral case law is an essential component of any comprehensive text addressing this fast-moving field.

Like Vandevelde, Professor Jeswald W. Salacuse of the Fletcher School of Law and Diplomacy at Tufts University is a long-standing scholar in the field of international investment law. Indeed, Salacuse's past work has addressed some of the most complex issues implicated by the field, including the empirical question of whether entry into investment treaties leads to increased investment flows to developing states.[17] Yet some intriguing differences exist between Vandevelde's text and Salacuse's recent book, *The Law of Investment Treaties.* Salacuse has elected to go beyond BITs and to encompass all forms of investment treaties in his scholarly review, including investment disciplines embedded within bilateral and regional FTAs. Indeed, the reader is provided with a helpful selection of actual investment treaties in the appendices, including representative examples that go beyond the usual suspects (such as the NAFTA and European treaties) to also cover Asian treaty practice.

Salacuse's methodology in framing his inquiry is largely interdisciplinary by drawing on the work of international relations scholars (especially Stephen Krasner) so as to present investment treaties as an embodiment of regime theory. Using this approach, Salacuse is able to identify with some precision the sorts of factors that render the regime deeply unstable with many states parties choosing to reassess their engagement with investment law. This assessment is a more modest and, in my view, a more accurate picture of the evolving nature of the investment treaty network than the claim offered by Vandevelde that BITs embed a static and idealized rule of law. At times, however, occasional lapses exist in the subtlety that Salacuse

[14] See generally José E. Alvarez, *Comparison U.S. Model BIT (1984) and U.S. Model BIT (2004)*, 7 TRANSNAT'L DISP. MGMT. 1 (2010).

[15] Loewen Group, Inc. v. United States, Award, ICSID Case No. ARB(AF)/98/3 (NAFTA Ch. 11 Arb. Trib. June 26, 2003).

[16] *See, e.g.,* MCLACHLAN, SHORE & WEINIGER, *supra* note 4, at 229–33.

[17] Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L. J. 67 (2005).

brings to his introduction. For instance, in isolating core regime principles, he draws on Raymond Vernon's famous thesis of an obsolescing bargain between a foreign investor and a host state in identifying how investment treaties might contribute to the creation of a stable legal environment.[18] The problem though is that Vernon's original claim of deep vulnerability of foreign investment to changing host state tactics was confined to the natural resources sector, which is a point missing in Salacuse's otherwise insightful analysis. The deep ex post immobility of foreign direct investment (FDI) in the resources sector—due to its long duration and high, up-front capital costs—certainly creates strong potential for host governments to raise demands on foreign investment, which can extend from readjustment of production shares or royalty rates to full-blown expropriation. But political scientists have shown that with other types of FDI (including efficiency and market-seeking) foreign investors retain substantial ex post bargaining power and so are much less vulnerable to changing host country tactics.[19]

Salacuse has structured his substantive analysis in a logical fashion by beginning with an economic overview of different forms of foreign investment (chapter 2), shifting to the different legal sources of international investment law (chapter 3), offering a review of the history of the field (chapter 4), and then assessing each of the major treatment standards in turn. The quality and rigor of the scholarly inquiry is impeccable, with Salacuse methodically breaking down the complex components of subject areas and being prudently mindful of underlying variances across different treaties. This approach is particularly on exhibit in his excellent analysis on the scope of application (chapter 7) and establishment conditions (chapter 8). Interestingly, Salacuse also presents the reader with an entire chapter on interpretation of investment treaties (chapter 6), where he unpacks the hermeneutic schools mandated by the VCLT. Unfortunately, however, that logical baseline for critically assessing the quality of the arbitral case law is not employed by Salacuse as often as this reviewer would hope in later chapters. For example, Salacuse explores the fair and equitable treatment standard, which he describes vividly as "maddeningly vague, frustratingly general, and treacherously elastic" (p. 221). He then moves to the various principles relied upon by tribunals in giving content to that indeterminate standard, including the failure of a host state to act transparently towards a foreign investor, which, as Salacuse points out, is primarily based on the *Metalclad v. Mexico* award.[20] Yet we find no discussion whatsoever of the deep interpretative flaws inherent in that award (including the conversion of a general objective in the NAFTA into a stringent operative obligation), despite the targeted criticism of those very flaws by a judge of the Supreme Court of British Columbia (as the seat of arbitration under ICSID Additional Facility Rules) following Mexico's petition to set aside the award.[21]

The final book under review, *International Investment Law and Comparative Public Law*, is a collection edited by Stephan W. Schill, a senior research fellow at the Max Planck Institute for Comparative Public Law and International Law.[22] The book's starting premise is that international investment law has a fundamentally public law character and that valuable lessons can be drawn from a careful comparative analysis with other public law regimes. One of the notable strengths of this book, especially in contrast to other edited collections across the field, is the obvious care that Schill has taken in preparing an extensive introduction to the motivating ideas behind the collection and in using a helpful organizing structure. Indeed, he presents a powerful case for the public

[18] For the original account, see RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES 46–59 (1971); see also Robert Grosse, *The Bargaining View of Government–Business Relations*, *in* INTERNATIONAL BUSINESS AND GOVERNMENT RELATIONS IN THE 21ST CENTURY 273 (Robert Grosse ed., 2005).

[19] Stephen J. Kobrin, *Testing the Bargaining Hypothesis in the Manufacturing Sector in Developing Countries*, 41 INT'L ORG. 609 (1987).

[20] Metalclad Corp. v. Mexico, ICSID No. ARB(AF)/97/1 (NAFTA Ch. 11 Arb. Trib. Aug. 30, 2000), 40 ILM 36 (2001).

[21] Mexico v. Metalclad Corp., 2001 BCSC 664, paras. 68–70 (B.C. Sup. Ct. May 2, 2001) (Tysoe, J.).

[22] As a point of disclosure, this reviewer contributed a chapter to the book, but that chapter is not discussed here.

law foundations of the investment treaty system. Yet even here are echoes of some of the problematic tendencies raised earlier, especially a clear underweighting of the many ways in which states themselves elect to recalibrate investment treaties. Schill's preference is for "system-internal adaptation" (p. 7) with the lessons drawn from a comparative public law analysis seemingly intended for consumption by adjudicators rather than states parties. Thus, in his chapter with Benedict Kingsbury, Schill openly advocates for greater use of proportionality review by arbitral tribunals despite the fact that the important institutional checks on this significant grant of judicial power that commonly exist within domestic public law regimes are almost entirely absent in the investment treaty regime.

This collection also raises broader questions as to how to properly structure a methodology of identifying, sorting, and weighting comparative sources. To a large part, Schill's vision seems to prioritize domestic public law regimes over public international law. The wisdom of this choice is open to question. Domestic public law concepts are often embedded in a sociopolitical and economic context. Without a sensitive understanding of those factors, thin comparativism can very quickly fade into crude transplant with all its attendant problems. As a matter of fact, that phenomenon is *already* present in the complex universe of investment treaties. Famously, the United States in a post-NAFTA amendment elected to reorientate its protections against indirect expropriation by reference to U.S. constitutional law,[23] specifically the U.S. Supreme Court's decision in *Penn Central Transportation Co. v. New York City*.[24] This strategy, though forced on the U.S. executive branch by the 2002 mandate conferred on it by the U.S. Congress, is arguably sensible as it reflects the United States' likely risk tolerance on the meta-question of compensation for general regulation that interferes with the profitability of foreign investment. Yet strangely, other states often simply replicate this American treaty innovation without any amendment or tailoring.[25] This duplication is particularly puzzling from a country like Australia whose constitutional position on compensation for government takings is much more conservative than that of the United States.[26] Within the collection, the chapter by Markus Perkams generally distills core approaches on state takings of private property by U.S., German, and other legal orders (including the European Convention on Human Rights) but is strangely silent on the troubling manner in which U.S. law is automatically used as a gold standard by a range of countries in their investment treaty negotiations.

Moving from domestic to international law, Schill's collection offers a rich set of comparative insights. One of the strongest and most incisive is that of Abba Kolo, who examines the interaction between the Articles of Agreement of the International Monetary Fund (IMF) and modern investment treaties. This issue is critical given that the capital transfer provisions of many BITs *expressly* require particular measures to comply with IMF strictures. Yet other express connections between

[23] 2004 U.S. Model BIT, Annex B(4), *in* MCLACHLAN, SHORE & WEINIGER, *supra* note 4, at 415 (requiring an adjudicator to consider the "character of the government action" along with its "economic impact" and interference with "reasonable investment-backed expectations" in determining whether a regulatory measure could constitute indirect expropriation).

[24] 438 U.S. 104, 124 (1978) ("In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct reasonable investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action."(Citation omitted)).

[25] *E.g.*, Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, Annex on Expropriation and Compensation, Feb. 27, 2009, *available at* http://www.asean.fta.govt.nz/assets/Agreement-Establishing-the-ASEAN-Australia-New-Zealand-Free-Trade-Area.pdf [hereinafter ASEAN-Australia-New Zealand Free Trade Area Agreement].

[26] Under Australian constitutional doctrine, more is required than simple deprival of economic value in grounding a claim for breach of section 51(xxxi) of the Commonwealth Constitution. Recently, the High Court of Australia ruled that an identifiable and clear "acquisition" of property (normally by the state) is a necessary condition of violation. *See* ICM Agriculture Pty Ltd. v. Commonwealth, [2009] HCA 51, 81–86 (French, C.J., Gummow & Crennan, JJ.); *id.* at 142–54 (Hayne, Kiefel & Bell, JJ.).

BITs and the broader universe of public international law regimes are inexplicably ignored, especially, once again, those whose genesis lies in the recalibration movement. Consider in this respect the tendency in many newer investment treaties to incorporate general exception provisions for the protection of the environment or public health modeled on parts of WTO law, especially Article XX of the General Agreement on Tariffs and Trade 1994 and Article XIV of the General Agreement on Trade in Services. Sometimes the investment exceptions are simply inspired by the WTO model,[27] but direct incorporation of WTO law by reference has already occurred.[28] States parties then have chosen to confine the outer contours of BIT protections by deciding ex ante on a treaty architecture that separates obligations and exceptions, rather than—as proponents of proportionality review might have it—conferring even greater discretionary authority on arbitral tribunals.

On the whole though, the strengths of Schill's collection easily outweigh these few omissions. In particular, some contributions genuinely break new and innovative ground. Gus Van Harten's penetrating analysis of the procedural deficiencies of investment arbitration brings a welcome balance to the overall collection. William Burke-White and Andreas von Staden address the vital issue of standards of review in investor-state arbitration, with a thoughtful call for the incorporation of margin of appreciation in investment arbitration. Anne van Aaken is typically rigorous in her insightful inquiry as to the relative neglect of primary remedies in investment law compared to the default of secondary responses (such as compensation). This work is clearly ahead of the curve, measured by the very fact that highly sensitive ongoing claims (including Philip Morris's ongoing investment treaty challenge against Australian law mandating plain packaging for cigarettes) are characterized by a request for primary remedies such as cessation and discontinuance. Space constraints limit a full treatment of the many other informative contributions across this very large collection. Needless to say, this book deserves and repays serious consideration and attention.

In conclusion, as a collective grouping, these three texts herald a welcome and overdue shift in the quality and rigor of scholarship directed at international investment law. They all seek to probe and test the various (although usually legal) justifications for entry into investment treaties and the role of arbitral tribunals in ruling on broad and often undefined treaty obligations. What is missing, on occasion, is a clear focus on the shifting nature of the landscape of international investment law. Yet we are witnessing an overdue and hugely important reassessment by a broad range of states of their optimal level of investment treaty exposure, measured by hard evidence of changing state practice. That practice tells us that fundamental doctrinal and philosophical variances have arisen in the manner in which a significant number of states approach the investment treaty system. This development is not to say that those changes are necessarily desirable or even rational. Ultimately, however, they cannot be ignored or marginalized. The challenge now is for the next crop of talented scholars to build on the strong foundation offered by the reviewed texts when engaging directly with and guiding that recalibration phenomenon.

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[27] *E.g.*, Céline Lévesque, *Influences on the Canadian FIPA Model and the U.S. Model BIT: NAFTA Chapter 11 and Beyond*, 44 CAN. Y.B. INT'L L. 249, 271 (2006) (showing that Canada has included a GATT Article XX-type exception in every investment treaties it has signed since the adoption of the NAFTA).

[28] "For the purposes of Chapter 8 (Trade in Services), Chapter 9 (Movement of Natural Persons) and Chapter 11 (Investment), Article XIV of GATS including its footnotes shall be incorporated into and shall form part of this Agreement, *mutatis mutandis*." ASEAN-Australia-New Zealand Free Trade Area Agreement, *supra* note 25, ch. 15, Art. 1(2).

The Making of International Criminal Justice: A View from the Bench: Selected Speeches. By Theodor Meron. Oxford, New York: Oxford University Press, 2011. Pp. xiii, 320. Index. $120.

Judge Theodor Meron is one of a remarkable generation of jurists and practitioners (including Thomas Buergenthal and Shabtai Rosenne) whose experiences during the Holocaust and

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