ly underlying the analysis of the new governance phenomenon. First, an increase in transparency is not a by-product of new governance. It is a basic requirement of good governance, but is far from being systematically respected. Second, instruments of new governance are not necessarily more consensual and non-hierarchical. REACH shows the exact opposite. Some documents contain an explicit waiver informing of the absence of consensus and a hierarchy exists between the different forms of soft law. Last but not least, seeing new governance as a solution to the limits of traditional EU law might be misleading. REACH post-legislative guidance often mirrors hard law provisions in everything but their binding effect. It does not embed an innovative method of action; it simply ensures that what was not specified by the legislator can be detailed downstream. Steven Vaughan rightly qualifies this as a necessity, but is soft law the best media for this endeavour? This important question becomes essential when looking at the lack of justiciability, of transparency, of public participation and the on-going debate on the legitimacy of soft law. Another question is the legality of the guidance. The author notes that 'one might question whether there is an element of competence creep in ECHA's approach' and 'whether the Agency has overstepped its generic mandate' (p. 232). Unfortunately this question is raised but left unanswered, which seems problematic given that the book evidenced the adoption of guidance contradicting the main regulation. The Treaties have been interpreted by the Court as opposing a fundamental limit to the power of EU Agencies[2]. This question is essential as it comes down to whether EU authorities can escape the procedural and substantive limitations framing the adoption of hard law by simply giving to a very prescriptive document the label of 'guidance'. For the same reasons, the discussion of the legitimacy of REACH post-legislative guidance (p. 243-246) could have been usefully developed further. However, not everything can be done in a reasonably sized volume and these remarks are a compliment: it is only because the analysis is so good that the reader wants more.

Finally, the author suggests avenues for further research (p. 233-234) – which I have no doubt will gain a lot from using this volume as an example of excellent methodology, as a collection of insightful findings and as an ambitious contribution to the new governance scholarship.

Deference in International Courts and Tribunals - Standard of Review and Margin of Appreciation
Edited by Lukasz Gruszczynski and Wouter Werner
Oxford: OUP, 2014, 464 pp.
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States must comply with international obligations. When an international court or tribunal has competence to do so, it reviews State acts to determine their legality under international norms. Reviewing State acts is a delicate affair: international adjudication's effectiveness depends on its legitimacy. Legitimacy, in turn, depends on the perception that international bodies ensure compliance with international norms, rather than interfering with State policies and annulling them at will.

In brief, international tribunals must be concerned to display a respectful stance towards States, lest the latter be tempted to consider withdrawing from their jurisdiction. Since jurisdiction by consent is the rule, the prospect is not merely hypothetical. Venezuela's withdrawal from the ICSID Convention and the ongoing debate about the UK abandoning the European Convention of Human Rights show this much clearly. When States dislike how international justice is administered, exit is a realistic option, alongside voice, loyalty and the unlikely tool of neglect.[1]

The spectacle of international judges tiptoeing deferentially around State sovereignty is understandable. One aphorism illustrates it exhaustively:

> Leopards break into the temple and drink the sacrificial pitchers dry; this repeats over and over again; finally it can be calculated in advance and becomes part of the ceremony.[2]

The priests run the temple, but cannot dare to bother the leopards. The result is a ceremony hardwired with deferential rituals. ***Gruszczynski*** and

2 Case 9/56 Meroni v. High Authority [1957/1958] ECR 133; Case 98/80 Romano v. Inami, [1981] ECR 1241, Case C-270/12 UK v. Parliament and Council EU:C:2014:18.

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1 Albert O. Hirschman, *Exit, voice, and loyalty: Responses to decline in firms, organizations, and states* (Harvard university press, 1970).

2 Franz Kafka, *The Zürau aphorisms* [1946] (2006), 20 (our translation).

Werner edited a comprehensive overview of these rituals in international adjudication and arbitration.

Petersmann provides a majestic overview of the topic. Standards of review in different regimes are a function of different norms, practice and circumstances. For instance, the formulation of certain BIT clauses, inherently subject to balancing constructions, makes the review of State measures in investment arbitration different from that carried out by WTO Panels. Nevertheless, insofar as both investment tribunals and WTO bodies administer a 'cosmopolitan legal system'[3] for the management of public goods, their review should always be informed by higher considerations of justice, and the standard should adjust accordingly. ***Cheyne*** zooms in on the EU, WTO and investment fields, tracing a set of recurring techniques used to review States' invocation of public policy exceptions. Deference, generally, is inversely proportional to the degree of institutionalisation of the legal context (in increasing order: investment arbitration, WTO disputes, EU review of MS acts). However, the tools used to dose deference are similar across the systems. The author lists five of them: a presumption that deference is not unlimited, the merits review of public policy, a *de minimis* control, evidentiary and procedural devices.[4] ***Pirker*** zooms back out, exploring the rationale of the review of State action. He posits that the standard depends on the reviewer's ability 'to monitor and review the reconciliation of values found by a first-level decision-maker'[5] and that the chosen standard requires justification along such lines. When, in the domestic process, all interests are represented adequately, the intrusion of the international level is less justified. The author uses John Ely's doctrine of procedural democracy[6] to suggest that international tribunals look into the measure that is up for review, assess whether it represents adequately the values of the underlying community and opt for more incisive review when that is not the case. ***Mamolea***'s chapter takes issue with a specific element of review, that is, the analysis of a State's good faith. Whereas bad faith is normally not an essential element of wrongfulness, it can assist the tribunal's analysis and therefore is often scrutinised. The author laments the lack of legal tools available to tribunals which tread the area of States' intentions: whereas practice generates deference in certain instances (tribunals normally afford States a presumption of good faith, and pay little attention to propensity evidence and adverse inferences) in other cases the review into the facts establishing States' intent is full. The unregulated review of intentions is liable to displease States, and therefore undermine the tribunals' authority.[7]

Ioannidis discusses the deference displayed by WTO panels and Appellate Body. He correctly starts by saying that, outside the field of antidumping, all review of WTO-legality is carried out according to the generic standard centred on the 'objective assessment of facts'.[8] This under-defined standard harbours several techniques of deference (or lack thereof), which are singled out and analysed. The author praises the review of the procedural quality of national decisions, mainly in terms of participation and due process.[9] He goes as far as suggesting that national measures that take into account foreign interests should typically resist review, even if it is acknowledged that the selection of the relevant interests would be arduous. ***Henckels*** embarks on a similar analysis of a different regime, that of investor-State arbitration. In the absence of statutory instructions, only casuistry accounts can illustrate the relevance of deference. NAFTA tribunals appear on average to afford more deference, possibly for systemic reasons, whereas the record of non-NAFTA tribunals is mixed, as the diverse approach towards Argentina's conduct during the financial crisis shows. The author engages in a comparative study of international judiciaries to identify some trends of deference. The overview reveals certain recurring rationales for deference to State authorities, hinging on considerations of regulatory autonomy, proximity and expertise.[10]

Leonhardsen discusses the treaty-change that States undertake to react to intrusive standards of review. By inserting exceptions and narrowly worded obligations in their investment treaties, States increasingly seek to reduce the intensity of the review

3 37.

4 41.

5 59.

6 John Hart Ely, *Democracy and distrust: A theory of judicial review* (Harvard University Press, 1980).

7 87.

8 *Appellate Body Report, United States* – Continued Suspension of Obligations in the EC – Hormones Dispute, WT/DS320/AB/R, adopted 14 November 2008, para 177.

9 110.

10 134.

exercised by tribunals. States, through these clauses, try to benefit from the epistemic deference[11] that, for instance, the European Court of Human Rights affords to domestic decisions reached through responsible decision-making procedures. Interestingly, how these provisions should operate is shown through past arbitral decisions (issued applying old-style investment instruments), which seems to suggest that the changes might be redundant, or inserted just for greater certainty. In their chapter, ***Gruszczynski*** and ***Vadi*** address the international review of scientific determinations of domestic actors. The authors negotiate the terminological limbo evinced in the previous chapters: WTO bodies and investment tribunals use undefined degrees of deference. The difficulty increases when the authors challenge the express characterisation of the reviewers: in the WTO *Apples* cases (against Japan and Australia), for example, the authors claim that *de novo* review was carried out,[12] despite panels and AB's express reassurances to the contrary. This divergence creates terminological fuzziness: whereas the AB is said to endorse a 'relative intrusive'[13] review, it is then stated that the WTO rejects 'the idea of an intrusive *de novo* review'.[14] Only experienced readers can grasp the relevance of the various shades of review mentioned and appreciate the authors' findings. The chapter concludes that investment tribunals, which focus their review on the procedural integrity of decision-making, do a better job than WTO bodies, which scrutinise its correctness. **Dąbrowska-Kłosińska** picks up the baton and analyses the same topic, but from the Luxembourg's perspective. She explains that the Court of Justice of the EU claims to limit its review to the plausibility of the evidence presented by domestic authorities and to its procedural integrity. However, this limited review often encroaches on the factual findings, therefore intruding on the determinations made by domestic authorities.[15]

Van Cleynenbreugel's chapter observes the standard of review used by the Court of Justice of the EU to assess whether domestic procedural rules (which States can design autonomously) breach EU law. Four degrees of review intensity are identified,[16] each with a different structure and widely different implications, which accurately illustrate how the Court modulates its mandate to override domestic law when States fail to sustain 'the process of European integration'.[17] As the conclusion notes,[18] however, nothing in the different standards allows predicting which applies in a given case. ***Herwig*** and ***Serdarevic*** draw a comparison between the use of necessity and proportionality in WTO law and in EU law, limitedly to the application the exceptions to free trade provisions. The Court of Justice declines these devices with different intensity when reviewing domestic measures (more stringent) or EU measures (more deferent). The analysis of WTO case law is conscientious if restricted to a handful of Art. XX GATT cases. The authors' conclusion is that the deference afforded to EU acts should extend to State acts, especially over questions of factual and normative uncertainty.

The section on human rights opens with ***Ambrus***'s analysis of the ECtHR's case-law on the margin of appreciation and the attending evidentiary standards. She notes that the Court's review is consistently strict when assessing State's attempts to justify a restriction of Articles 2 and 3 (which contain no express exception). Instead, in cases hinging on Articles 8 to 11, the case-law is difficult to navigate and different standards apply. The author contends that the relative precision of the applicable norms is a plausible predictor of the intensity of the scrutiny in specific cases,[19] but finds that the inconsistencies prejudice the fairness of the Court's jurisprudence. ***Belavusau***'s study assesses the relative deference that the ECtHR pays to domestic judgments in hate speech cases, and the opinions of the experts retained by the domestic tribunals. He notes that only once did the ECtHR question the domestic court's reliance on an expert opinion (case *Balsytė-Lideikienė v. Lithuania*), and that, in general, the Court uses a 'low-to-intermediary' standard of proof for States[20] in these cases, hence offering them a considerable margin of action. The doctrine of equivalent protection (cfr the *Solange* cases, or *Bosphorus*) is explored by ***Bílková***. She gives a diligent account of the emergence of this doctrine

11 146.
12 158.
13 165.
14 169.
15 205.
16 185.
17 191.
18 Ibid.
19 252.
20 268.

up to the *Bosphorus* and *MSS* cases before the Strasbourg court, to then assess the applicable standard of review in the ECtHR's determination of whether other international systems, and the EU in particular, guarantee a 'comparable' level of protection of human rights. The chapter also asks whether the *Bosphorus* presumption could be maintained after the EU's accession to the ECHR. The chapter's timing is unfortunate not just because it cannot discuss the implications of Opinion 2/13, but also because it misses the chance to analyse those cases in which the *Bosphorus* presumption was lifted (e.g., *Nada, Al Dulimi, Michaud, Dhahbi*). ***Duhaime*** shifts the focus on the Inter-American system, and notes that the Inter-American Court has been hesitant to afford deference to domestic authorities. Whereas it has refrained from serving as 'fourth instance' chamber (therefore granting deference to the determinations of impartial domestic courts),[21] it has generally applied the Convention with rigour. This relative intrusiveness, it is argued, depends on the context of systemic violations occurring in the region, which hardly aligns with the notion of appreciation and its link with consensus.

Ragni's analysis delves on the International Court of Justice. After a detour on the reviewability of the acts of the Security Council, she focuses on the review of State acts. A discussion of the cases *Nicaragua*, *Oil Platforms* and *Gabčíkovo–Nagymaros* leads to conclude that the Court affords some deference to States invoking exceptions to escape their obligations, but will review the existence of the attending conditions.[22] This review allows an inquiry into the good faith of the State and prevents abuses of self-judging clauses. ***Rayfuse*** tackles instead the judicial review of the International Tribunal for the Law of the Sea in prompt release cases. Under review can only be the reasonableness of the bond required for release by domestic authorities, which shall be attested against international standards, using domestic rules and findings only as relevant facts. The Tribunal's practice to lower the bond requested by coastal States has raised doubts to the appropriateness of the intrusive standard adopted.[23] The International Criminal Court's approach to admissibility challenges is discussed by ***Wirczynska***. Admissibility of cases to the Court requires a determination of States' inability or unwillingness to carry out prosecutions (under the complementarity paradigm). Up for review are the identity of the prosecuted persons, conduct and charges across the domestic and international level, and the genuineness of the domestic proceedings. The author praised the Court's tendency to loosen some admissibility criteria over time,[24] to afford more deference to State action (for instance, shifting from a 'same conduct' test to one of 'substantially same conduct'). ***Bernard***'s chapter expands on the application of complementarity, with specific attention to the standards of due process that domestic proceedings must satisfy to fall under Art. 17 ICC and stop the ICC from hearing a case. These requirements interact with the conditions of unwillingness and inability, and present the ICC with the delicate question of whether the interest of combating impunity can supersede the deference towards procedurally imperfect domestic decisions.

The format of this collection, inevitably, lends itself to repetition and perhaps this book is best consumed in targeted chapter-reading than cover to cover. What is striking is less the occurrence of repetitions than the relative lack thereof. With many authors engaging into the treatment of topics that are often identical, at least in part, it is revealing and somewhat frustrating that a unitary approach eludes these competent attempts. Therefore, this book might be disorienting for the non-experts, faced with different but equally plausible approaches to the same ideas – which diverge also in their outcomes without falsifying each other. Conversely, those with some knowledge of the WTO, EU, ECHR and investment legal regimes are in for a real treat, and will find here a veritable banquet of food for thought. Even if this collection cannot benefit from the substantive and methodologic cohesion of a monograph, it serves its readers well, providing a disciplined and learned brain-storming over an intrinsically volatile subject of inquiry. The chapters on ICJ, ITLOS and ICC are a bit out of context but are certainly valid if taken on their own merits.

The editors are to praise for taming, to the extent practicable, an intractable topic. The predictable effect of this effort is that, at times, the chapters highlight the fuzziness of the tantalizing notions studied, instead of clarifying their nature.

21 291.

22 326.

23 353.

24 365.