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# Book Review: Self-Enforcing Trade by Chad Bown

Dr. Diane A Desierto

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# Recent Publications

*Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice*. By Daniela Piana. Surrey: Ashgate Publishing, 2010. Pp. 196. Price: $114.95 (Hardcover). Reviewed by Grant Bermann.

In *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice*, Daniela Piana investigates the sources of norms and values that influence judicial behavior in Central and Eastern Europe. Although the European Union has recently sought to institute guarantees of judicial independence in future member states, its efforts have come into conflict with the pre-existing judicial systems of these candidate countries. Piana examines several questions arising from this conflict. To what extent have the European Union's efforts been effective? Have they permanently altered the judicial culture of future member states? If changes have occurred, can they be adequately described in terms of judicial independence, or should one look to other features of judicial governance? If so, which features? And how can we reconcile these features with the principle that democratic governments ought to be based on the rule of law? Piana's answers form a rigorous and original contribution to the study of European law and politics. *Judicial Accountabilities in New Europe* is useful to anyone interested in the judicial functioning of an enlarged Europe.

Piana entertains three hypotheses, of varying degrees of persuasiveness, concerning the basis of shifting judicial behavior in Eastern and Central European countries recently admitted to the European Union. The first hypothesis is that domestic judicial institutions, rather than supranational influences, have been the major factor in judicial policymaking and agenda-setting. The "soft" mechanisms of influence exerted by the European Union—for example, socialization, monitoring, and policy transfer—do not drive domestic institutions toward common norms and values. Rather, she argues, domestic institutions use these external inputs as resources and opportunities to reinforce existing domestic allocations of power. These domestic political actors, she concludes, dominate judicial policies, regardless of the level of external pressure exerted.

The second hypothesis is that strategic factors, rather than cultural and historical ones, have been dominant in shaping the judicial governance of certain Central and Eastern European countries. She explores this theory by looking for divergent patterns of judicial reform in countries that share similar cultural and historical backgrounds, but exhibit divergent levels of judicial competence. Here, Piana's data, though rigorous and empirical, fall short of proving her claim. To test her second hypothesis, she examines two sets of states—Poland, the Czech Republic, and Hungary on the one hand, and Bulgaria and Romania on the other. She notes that all five were candidates for EU membership and therefore subject to its admittance requirements, but that the two groups differed in their legal traditions. Whereas the first group of Central European states shared a tradition of Austro-German constitutionalism (defined by Piana as a strong legacy of *Rechststaadt*, or formal coherence as

the main factor in the judicial interpretation of norms), the second group shared a legal tradition akin to French constitutionalism (defined by Piana as systems in which the legislative body representing the majority is the central source of legitimacy). Piana finds divergent patterns of judicial reform in states that shared the same cultural and historical background, even if they allocated judicial competence differently. She concludes that the allocation of judicial competences was a more important factor than cultural and historical background in driving judicial reforms.

Piana's reasoning in this section glosses over a salient complication. Namely, she overlooks the differing demands the European Union imposed on the two sets of countries when they were candidates for accession. She notes in passing that "the EU adopted a stricter and more rigid position in terms of reforms required to reach the membership" (p. 43) for the second set of states because it considered their records on human rights, corruption, and organized crime inadequate—a concern which delayed the two states' accession by three years. However, she underestimates the possible ramifications of this omission, namely, that it obscures the possibility that different patterns of judicial reform were due to divergent accession standards, rather than different domestic allocations of power.

In her third hypothesis, Piana examines with greater nuance the European Union's influence on five types of judicial accountability in New Europe, and concludes that external inputs have had impacts of varying degrees. Legal accountability (defined by mechanisms of appeal, judicial review, and procedural guarantees of a fair trial), she argues, was already in place and merely consolidated as a result of external inputs. Institutional accountability (defined by meritocratic recruitment and promotion mechanisms, and meaningful interaction with political representatives) resisted foreign influence. And managerial, professional, and societal accountabilities (measuring the capacity to deliver a sentence in a reasonable time, ideological diversity, and external trust and transparency, respectively) integrated supranational influences more conspicuously. Piana's contribution in this section is particularly original and fair-minded, as it challenges the prevailing opinion in European scholarship that socialization cannot curb the influences of domestic institutional settings, while also resisting the tendency to overstate socialization's power to create change.

Piana's methods are empirical and rigorous throughout. She studies an enormous collection of primary and secondary materials from Poland, the Czech Republic, Hungary, Bulgaria, and Romania between 1989 and 2007; she also conducts fifty interviews and two original surveys. The disadvantage of this empirical approach, however, is that her book at times resembles a social science study more than an elaboration of a theory. Piana seems to promise something more in her introduction—namely "a *conceptual framework*, which tries to put in innovative terms the relationship that exists between the organization of the judicial system, judicial independence and the enforcement of the right to a fair trial in a multi-level system of governance" (p. 7). A greater focus on theory, rather than data, would have benefited the book.

Perhaps the strongest section of Piana's book, captioned "Judicial Governance as a Mirror of European Constitutionalism," (pp. 159-86) arrives when she moves beyond the statistics and stakes out novel, broader claims. The boldest is that the constitutional designs adopted immediately after the breakdown of communism initiated a process of path-dependence that led to later judicial reforms. Building on her earlier scholarship, *Judicial Policies and European Enlargement*,[1] she argues that institutions empowered during this pre-accession democratic transition maintained or reinforced their positions by exploiting policy opportunities presented by the European Union. In doing so, she challenges the existing view that it was the European Union that exerted a powerful influence on its new member states. Although the book is largely geared toward European legal scholars, these interdisciplinary insights will be of great interest to scholars of European history and politics more generally.

Piana makes a strong contribution to the literature of European law and Central and Eastern European political history with *Judicial Accountabilities in New Europe*. She investigates the sources of norms and values in New Europe, reaching novel results that challenge existing orthodoxy. While her book would have benefited both from a more detailed examination of the influences of divergent EU accession standards on patterns of judicial reform and from a more theoretical approach to her subject, her work remains a valuable resource for those interested in the promotion of the rule of law and judicial and legal reforms around the world.

*Humanitarian Intervention: Confronting the Contradictions*. By Michael Newman. New York: Columbia University Press, 2009. Pp. xiii, 218. Price: $35.00 (Hardcover). Reviewed by Matthew Christiansen.

In *Humanitarian Intervention: Confronting the Contradictions*, Michael Newman examines the theoretical and historical evolution of the use of military force to intervene in a foreign country in the name of that country's citizens. As the title suggests, the concept is riddled with legal, political, and ethical contradictions. Newman offers a valuable contribution to the debate over humanitarian intervention by linking the history of intervention to the primacy of state sovereignty within the international legal system. He successfully demonstrates how even something as unimpeachable as a pronouncement against genocide involves a nexus of economic development, neocolonialism, and the role of international institutions.

Newman begins by showing how a commitment to inviolable state sovereignty formed the foundation of the post-World War II international legal order. Nonetheless, he argues "it would be misleading to suggest that state-sovereignty and non-intervention were the *sole* features of the international legal and normative system established in 1945" (p. 11). Instead, the atrocities committed during the war led the United Nations to enshrine

1. Daniela Piana, *Judicial Policies and European Enlargement: Building the Image of a Rule of Law Promoter*, *in* THE SEARCH FOR A EUROPEAN IDENTITY: VALUES, POLICIES AND LEGITIMACY OF THE EUROPEAN UNION 176 (Furio Cerutti & Sonia Lucarelli eds., 2008).

basic human rights within the international system. This commitment, however, quickly took a back seat to the realities of the Cold War and decolonization, as the United States and the Soviet Union alternatively took up the banner of inviolable state sovereignty to protest the other's interventions in foreign wars. At the same time, the newly independent states stressed the primacy of state sovereignty to prevent future interventions by their former colonizers. Thus, Newman argues that for a period of time, most state actors had an incentive to make inviolable sovereignty the basis of the international system.

Nonetheless, the unrestrained violence of the Cold War demonstrated the limits of a system based on sovereignty. Beginning with the Khmer Rouge genocide in Cambodia and continuing through the wars in the former Yugoslavia and Rwanda, the world witnessed mass killings and persecution on a level unseen since World War II. Simultaneously, Newman argues, the West became convinced that its commitment to political and economic liberalism combined with a muscular defense of these principles was necessary to defeat communist totalitarianism. A consensus emerged quickly in the West that the same combination could be applied in order to defeat the menace of genocide and other crimes against humanity. As Newman put it, "the assumption [was] that the relationship between sovereignty and human rights had changed so fundamentally that there was now a new acceptance of humanitarian intervention" (p. 77). This is the first of the major contradictions identified by Newman. How could a system based on sovereignty be consistent with universal human rights?

The initial answer was to deemphasize sovereignty. The first Gulf War, the British incursion in Sierra Leone, and Tanzania's intervention to unseat Idi Amin's government in Uganda all suggested that military force could end atrocities. Yet as Newman points out, these interventions revealed a second contradiction: intervention in the name of humanitarianism always took place when the intervening power had strong geopolitical interests in the relevant country or region. Respected observers, such as Médecins Sans Frontières, saw Western intervention as "a 'fig leaf theory' of international action, with the fig leaf worn to cover up a real political strategy" (p. 97). This line of argument gained credence when the United States and NATO used humanitarianism to justify intervening in Somalia, Kosovo, and, belatedly, in the 2003 war in Iraq.

The war in Kosovo revealed Newman's final pair of contradictions. To justify intervention, the intervening powers argued that the sovereign (in this case the former Yugoslavia) had failed to uphold its commitment to its citizens. Yet the pre-invasion problems in countries such as Rwanda, Kosovo and Iraq were largely a legacy of Western military and economic intervention. Moreover, although the interventions were supposed to reduce human suffering, Western concerns about casualties resulted in the use of disproportionate force, such as the prolonged aerial campaign in Kosovo, and an emphasis on leaving the country as soon as possible. This led inevitably to massive civilian casualties and minimal attention to post-intervention stability.

For skeptics of humanitarian intervention, it became difficult to believe that these interventions benefited the populations at risk.

Throughout his analysis, Newman admirably weaves together case studies on interventions and critiques by international legal scholars and practitioners. This allows him to argue convincingly that these interventions and the West's military and economic self-confidence created an atmosphere in which the United States and its allies were increasingly prepared to intervene, provided that they faced minimal casualties. Newman simultaneously exposes the increasing global disillusionment with humanitarian intervention as the United States and its allies seemed to co-opt the language of humanitarianism in pursuit of their geopolitical interests.

Newman's solution is to refocus the humanitarian intervention debate on the structural factors that produce emergencies and demand intervention. He argues that our understanding of humanitarian intervention has become too focused on the use of military force and invokes Amartya Sen's concept of human security as a framework for a more holistic intervention doctrine. In explaining his interpretation of human security, Newman focuses on political and economic institutions that could mitigate "downside risks" to the poor from the threats to "human survival and safety of daily life" (p. 187). These threats include disease, famine, and other acute resource shortages that could plunge a region into the state of disarray that often precedes humanitarian catastrophes.

This section is the book's most innovative. Newman argues that a holistic approach focusing on the forces that threaten human security would address his contradictions, restoring legitimacy to the notion of humanitarian intervention. For instance, he argues that intervention will not be seen as neo-imperialism if the intervening power has a history of strengthening human security within the region. Similarly, if more attention is paid to fighting famine and other destabilizing forces, it is more likely that humanitarian intervention will actually benefit the country than if conducted solely through airstrikes once it reaches a state of emergency. In other words, putative interveners are more likely to be viewed as acting in the best interests of the population if they also focus on the structural issues leading to instability rather than only on the noxious political figure in charge at the time.

Although Newman acknowledges that Western countries are frequently among the first to provide various forms of aid in an emergency, he argues that the pursuit of liberal economic policies and support for unpopular leaders frequently contributes to the instability that demands aid. For instance, he argues that poorly executed privatization concentrated resources in the hands of a small group of elites in developing countries, often exacerbating ethnic tensions and preventing governments from using them to mitigate human suffering (pp. 112-13). In this way, Newman addresses the legitimacy deficit facing humanitarian intervention.

Yet Newman's approach fails to explain how to evaluate humanitarian intervention in a world that retains many of his contradictions. Following a major recession and in the face of new challenges such as al-Qaeda and China's ascendency, it is more difficult than ever to expect that the United

States and other potential interveners will make human security the major plank of their foreign policy. Newman hints at this problem in the book's last section by discussing how to establish the authority for, and the limits of, intervention. For instance, he suggests that many of the principles underlying just war theory, such as proportionality, should be applied to humanitarian intervention. These sections, however, do not address how to evaluate a potential intervention that would have many of these contradictions, but might still benefit the country's population.

The United Nations' peacekeeping force in Rwanda faced this situation. The country was a former colony with a history of Western abuse and neglect. Moreover, any intervention by Belgium, France, or the United States might well have been portrayed as neocolonialism and involved a disproportionate military response. Yet many people sympathetic to Newman's critique would also agree with former President Bill Clinton when he called the failure to intervene in Rwanda the biggest regret of his administration.

The question that eludes Newman is how to evaluate a potential intervention that might save tens of thousands of lives, but would avoid many of his contradictions. Arguably, this was the situation in Rwanda and Kosovo. Newman concludes that an intervention in the former might have been justified, but that the actual intervention in the latter was a mistake. Newman enumerates many of the considerations that should have gone into these decisions. However, the book fails to provide a coherent framework for intervention that both addresses his contradictions and accounts for the realities of the international system. Humanitarianism may still require an intervention with contradictions in order to avoid atrocities and preserve innocent lives.

*Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement.* By Chad P. Bown. Washington, DC: The Brookings Institution Press, 2009. Pp. xiv, 245. Price: $28.95 (Paperback). Reviewed by Diane A. Desierto.

Why do developing countries have fewer opportunities to enforce their rights in the international trading system, and what can be done to meaningfully improve their self-enforcement ability? Defining self-enforcement as "the mechanism through which [World Trade Organization (WTO)] market access commitments are maintained across countries in the current system" (p. 109), Chad Bown offers a strongly institutionalist response to these questions, focusing on developing countries' underutilization of WTO dispute settlement processes. Bown rejects the "anti-globalization" narrative prevalent since the Doha Development Round and clarifies that the negotiations behind various General Agreement on Tariffs and Trade (GATT) agreements did not purposely neglect developing country interests (pp. 22-44). If developing countries have not been able to profit from the international trading system's principle of reciprocity in foreign market access, Bown argues that it is mainly due to three factors: (1) relatively weak capacity to undertake WTO-authorized post-litigation retaliation to induce respondent countries to comply with WTO decisions; (2) fear of these respondents' extra-

WTO counterretaliatory measures, such as the elimination of bilateral aid or preferential access to developed economy markets under the Generalized System of Preferences (GSP) or similar programs; and (3) structural costs endemic in the "extended litigation process" in the WTO (p. 111). Assuming that the first two factors best belong to other ongoing dialogues on systemic reform at the WTO, Bown focuses his policy analysis on the third. It is an analytical divide that is difficult to maintain in assessing this book's prescriptions, since structural cost analysis inimitably bears on the first two features of WTO reform. Their omission weakens the feasibility of Bown's policy recommendations.

Drawing on empirical data and anecdotal information from WTO cases such as *EC—Bananas III*, Bown discusses various cost-points that developing countries encounter within the extended litigation process (pp. 45-137). First, he identifies pre-litigation information asymmetries between exporting firms in developing countries. These asymmetries lead to disparate abilities among firms in detecting less observable inconsistencies within WTO policy, such as trade-restrictive measures that would not ordinarily be brought to public scrutiny as a result of the WTO Agreements on Antidumping, Subsidies and Countervailing Measures and Safeguards. Second, Bown explains the actual litigation costs, as well as legal, economic, and political technical expertise, necessary to bring developing country claims (whether in the form of original complaints, co-complaints, or third-party participation) to successful outcomes in the WTO dispute settlement process. Finally, he points to post-litigation costs required to induce respondent countries to comply with WTO decisions, such as international publicity, lobbying within respondent countries, or WTO-authorized trade retaliation measures.

The analysis of cost-points omits the perceived effectiveness of the WTO dispute settlement process at achieving just and qualitatively correct legal outcomes for developing countries, whether on their closely contested substantive points of GATT law (for example, the Article XX and XXI exceptions, especially in the 2009 reports of the Panel and WTO Appellate Body in *China—Publications and Audiovisual Products*) or on procedural fairness issues (for example, selection of Panel members). The empirical data on "developing country" exporting firms that initiate WTO enforcement (pp. 110-11) also do not account for possible developed country influences on these firms, such as equity ownership, strategic commercial partnerships, actual managerial control, or parent-subsidiary or affiliate linkages. These omissions involve significant issues of WTO systemic reform that are unfortunately avoided in Bown's cost analysis.

For each of the cost-points, Bown either describes mechanisms already extant under the WTO framework, or proposes new mechanisms that supposedly ameliorate the cost for developing countries. He devotes a chapter to the Advisory Centre on WTO Law, which acts as the primary legal assistance institution for mitigating developing countries' actual litigation costs (pp. 138-74), and another chapter to development-focused nongovernmental organizations that could serve as key institutions in helping developing countries implement post-litigation leveraging strategies (pp. 175-

207). Finally, to aid developing countries' exporting firms in identifying possible WTO violations—from readily apparent antidumping measures and safeguards to latent government policies that cause illegal impairment of foreign market access—Bown proposes a privately funded non-WTO institution, the "Institute for Assessing WTO Commitments" (IAWC), to function as an open-source database of all WTO violations (pp. 229-36). Staffed by lawyers, economists, and political scientists, the IAWC would help fill information gaps in the WTO's Trade Policy Review Mechanism, NGO-initiative databases such as the Global Antidumping Database and Global Subsidies Initiative, and national governments' own trade policy databases (such as those of the United States and Japan). IAWC would operate as an "information clearinghouse" (p. 234) from which developing countries could seek legal, political, and economic assessments of the estimated value of litigating each potential violation.

By narrowly focusing on certain institutional costs that affect developing countries' use of the extended litigation process at the WTO, Bown misses certain factors that complicate developing states' access to foreign markets. In trying to map how a developing state would choose its optimal level of engagement with the WTO dispute settlement process, he ignores other cost-endogenous and normative variables that might defy empirical measurement but could also help explain current or future data variances. Some examples include: the multilayered dynamics and hierarchies in developing countries' strategic relationships and alliances at the WTO; the perceived legal quality of WTO decisions; developing states' internal trading contexts and commercial constituencies; and the mobilizing effects of regional clustering among developing countries in the Group of 77, Association of Southeast Asian Nations (ASEAN), Mercado Común del Sur (Mercosur; the South American common market regional trade association), African Union, and South Asian Association for Regional Cooperation (SAARC), among others. Bown acknowledged the importance of many of these variables in his earlier work.[2] Yet inexplicably, he left them out in this book.

Bown's briefly sketched proposal for the IAWC paradoxically undermines his faith in the WTO dispute settlement process and the WTO's nature as a forum for trade liberalization negotiations. Claiming that the WTO's "heightened surveillance role might put into jeopardy some of the benefits that it currently offers on other fronts" (p. 221), Bown does not satisfactorily explain why the information-monitoring process cannot be built into the information design within WTO framework. For instance, why would the problems he identifies not be more easily solved through more frequent, targeted, and expanded trade policy review at the Trade Policy Review Mechanism, or by adding a fact-finding dimension to Advisory Centre on WTO Law's legal advising, case-building, and opinion-rendering functions? It is unclear why a nebulously funded and unaccountable institution such as the IAWC would be the more authoritative and appropriate body to undertake information-monitoring for developing countries. By seeking to externalize

2. *See* Chad P. Bown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT'L ECON. L. 861, 863-67 (2005).

information-monitoring for developing countries' identification of foreign market access violations away from the WTO in favor of a stylized ad hoc nonstate institution, Bown implicitly accedes to the perceived North-South divide within the WTO and to the political impossibility of intergovernmental monitoring and reporting of influential governments' trade violations.

With similarly perilous implications, Bown assumes developing countries' interests are best served through continuous involvement in the WTO dispute settlement process. He concludes that there would be "positive spillovers from more disputes initiated against developing countries" (p. 242), because this would demonstrate "that exporters elsewhere found developing country market access valuable enough that they were willing to spend some . . . resources to ensure its continuance" (p. 245). His consequentialist faith in an institution-led reduction of developing countries' costs in the WTO dispute settlement process impoverishes his discussion of developing countries' self-enforcement strategies to achieve foreign market access.

The underlying *realpolitik* tension affecting developing countries' limited capacity for self-enforcement in the international trading system cautions against trusting perceived achievements of legal formalism in WTO adjudication. Even with reduced costs, the extended litigation process does not always beget positive results for developing countries. Although minimizing pre-litigation, litigation, and post-litigation costs could indeed incentivize developing countries to use the extended litigation process in the WTO dispute settlement process, litigation will not uniformly result in, or improve, foreign market access. Bown's analysis of cost-incentives is valuable for developing countries insofar as they consider different self-enforcement options within the WTO. The analysis falls short when it proposes hermetic "one-size-fits-all" solutions such as the IAWC.

Developing countries encompass differently sized markets, diverse governments, and unique constituencies, all of which weigh in on the eventual policy decision to trigger (or refrain from triggering) the extended litigation process. Bown argues that more information on the costs of the extended litigation process and the detection of losses of foreign market access would incentivize exporting firms' legal advisers to counsel their firms to push their respective home governments toward initiating the extended litigation process. However, developing countries' paths to WTO litigation do not always follow a linear trajectory triggered by exporting firms. Authoritative decisionmakers in developing countries may sparingly resort to the extended litigation process due to retaliatory incapacities, international alliances, and national interests. Bown's failure to attend to such realities, which affect countries' rational choices between litigation and informal approaches to self-enforcement, limits the projective value of his structural cost analysis and policy proposals.

*Contracting States: Sovereign Transfers in International Relations*. By Alexander Cooley & Hendrik Spruyt. Princeton: Princeton University Press, 2009. Pp. xiv, 206. Price: $24.95 (Paperback). Reviewed by Sarah El-Ghazaly.

Many international relations theorists begin from the precept that sovereignty is exclusive and indivisible. Alexander Cooley and Hendrik Spruyt do not. Their new book, *Contracting States: Sovereign Transfers in International Relations*, is concerned, instead, with the divisibility of sovereignty, that is, the processes by which states enter into hybrid governance arrangements to share, rather than monopolize, the rights traditionally associated with sovereignty.

A hybrid governance agreement splits sovereignty rights and allocates partial sovereignty over a state asset, such as territory or decision-making power, outside the host country. Such agreements take two forms. On the one hand, states can choose to create an all-inclusive, complete contract up front. On the other hand, they can choose to defer settling some of the agreement's components through later negotiation. The latter option yields an incomplete contract, which gives the residual rights holder—the state that retains all rights aside from those ceded through the contract—bargaining leverage it can use to renegotiate a more advantageous deal in the future. Incomplete contracting can bring about piecemeal change in governance structures; it meets the immediate needs of both parties while keeping open the possibility of more profitable arrangements in the future.

Incomplete contracting allows parties to leverage their present positions into more advantageous future positions. This, according to Cooley and Spruyt's incomplete contracting theory, presents two significant consequences. First, bargaining power can change and frequently shifts in the direction of the residual rights holder. Consequently, a state that lacks military, political, or economic clout might nevertheless be in a position to secure a better deal even if renegotiating with a more conventionally powerful state. The Philippines, for one, gained its independence from the United States through a 1946 agreement that stipulated continued unrestricted U.S. control over military installations there. Gradually, and most prominently during the Ferdinand Marcos presidency, however, renegotiations increased both Philippine control over those bases and the compensation payments it received from the United States (pp. 115-20). When the Philippines gained sovereignty over the military bases, its power was initially just symbolic. Over time, however, the Philippines was able to use its status as a residual rights holder to secure a more favorable agreement whenever it and the United States came to the negotiating table anew.

Second, the potential for renegotiation calls attention to the parties' credibility. The residual rights holder, in particular, carries the burden of "credible commitment" insofar as the other party will (presumably) require some form of assurance against capricious breach (p. 39). Largely because of these two features of incomplete contracts, Cooley and Spruyt contend that the theory of incomplete contracts, as applied to hybrid governance arrangements,

can further understanding of why states will enter into incomplete contracts to share sovereignty rights and which of those contracts will endure. According to Cooley and Spruyt, neither of the two primary international relations theories—realism and constructivism—can provide as consistent an account for how states choose to share sovereignty. Realism encompasses the view that powerful states, in order to advance their own interests, influence the behavior of the weaker ones. Constructivism is the paradigm that states derive their interests from membership in an international community. For Cooley and Spruyt, incomplete contracting theory complicates international bargaining in ways that neither realism's focus on power nor constructivism's emphasis of norms and identities can.

Cooley and Spruyt do not deny that realism and constructivism hold some explanatory power in distinguishing between shared sovereignty arrangements of varying levels of success. However, neither can provide a systematic explanation. Realism cannot explain how powerful states frequently resign to the demands of conventionally powerless ones. Likewise, constructivism cannot explain why some hybrid governance agreements succeed and others do not when international norms remain constant. Alternatively, Cooley and Spruyt argue that shared sovereignty agreements emerge when states realize that such governance arrangements are feasible and preferable to the alternatives of complete control or total relinquishment. Neither realism nor constructivism can account, for instance, for how a state hosting a U.S. military base is able to enhance its leverage so effectively during negotiations of those basing agreements (p. 103). Since World War II, the leasing contracts for these U.S. bases overseas have required renewal every few years and have thus given host countries the opportunity both to limit American use of the bases and to request more compensation for those use rights. In response to an increasing loss of bargaining power, the United States instituted a Global Defense Posture Review in 2003 that seeks to create a "network of smaller, bare-bones bases" with the consequence that no one base will be indispensable to U.S. operations (p. 137). Because the United States will have the flexibility of negotiating with alternative host sites, it can significantly limit the bargaining power of all potential host states. Cooley and Spruyt suggest, however, that incomplete contracting theory should present some "cautions" for the United States. Host states will likely return to harder bargaining because military threats tend to be geographically specific, and therefore, not all U.S. bases are equally expendable (p. 138).

Cooley and Spruyt turn to their theory of incomplete contracts to explain the difference between NAFTA's limited scope and the European Union's comparatively broader one. According to Cooley and Spruyt, the relevant difference between these agreements stems from their foundational documents. NAFTA, as a complete contract, is exclusively a free trade agreement because the parties resolved all specifics of the contract ex ante. Conversely, the European Union is a credit to incomplete contracting because the parties—the member states—decided to reconcile many issues through subsequent legislation or adjudication. To signal their credible commitment, the stronger EU states had to yield significant control rights, which meant that

regional institutions, such as the European Court of Justice, would play a larger role.

Cooley and Spruyt argue that although realism and constructivism can explain why NAFTA and the European Union materialized, neither theory can competently describe why NAFTA resulted in less regional integration than the European Union. That difference, the authors suggest, is penetrable only by reference to the substance of each contract; only a theory of contractual incompleteness can explain why NAFTA did not result in the same level of regional integration as the European Union (p. 181). Cooley and Spruyt propose, furthermore, that their theory holds predictive power for other regional organizations, including ASEAN and Mercosur (p. 185). Unfortunately, this proposition remains unelaborated, leaving the reader to wonder about its particulars. Cooley and Spruyt offer no resources to determine whether the members of either organization—ASEAN or Mercosur—appear to be moving in the direction of incomplete contracting, or, furthermore, whether doing so be to the respective members' advantage.

Likewise, while the authors intend to inform international policymakers on flexible, durable solutions for states with competing interests, the guidance they provide lacks sufficient precision to be of much practical help. Cooley and Spruyt do list their propositions (p. 40) and further define them through their case studies. But those propositions do not provide much direction, being either too vague in general, or too tied up with a specific case study. For instance, the reader knows that parties must show credible commitment, but what can policymakers do to effectively demonstrate that commitment? Each case study presented is grounded in a unique set of historical circumstances; extrapolation from one case to another is very imperfect. Policymakers might be able to observe patterns from Cooley and Spruyt's case studies, but the value of applying such patterns to future cases is limited at best.

Furthermore, although the authors aim to distinguish their theory from realism—and they are generally successful at that—the distinction is not entirely convincing. Indeed, the notion of incomplete contracting seems to sometimes fit comfortably within realism's bounds. In the decolonization of Algeria, for instance, France was supposed to give Algeria independence but retain use rights to military bases and oil reserves within its territory. Changes in France's military needs undermined the state's incomplete contract. Simultaneously, Algeria turned its back on the agreement when it was able to find other economic partners. These changes in the dynamics of the French-Algerian relationship led to the agreement's unraveling. But one imagines that realism would have predicted the same end result. Despite Cooley and Spruyt's language of "incomplete contracting," their reliance on variables like relative military strength and economic benefit insinuates a disguised form of realism.

Even so, the realist shadings do not subtract from the interest of Cooley and Spruyt's approach to the question of hybrid sovereignty. By viewing international governance in terms of contracts, their theory illustrates the divisibility and exchangeability of sovereign rights. Cooley and Spruyt also draw attention to the long-term consequences of contractual completeness and

incompleteness. Although the prescriptive elements of *Contracting States* are sometimes hazy, Cooley and Spruyt have compiled an impressive and instructive list of case studies on the diversity of contracting between and among states. Policymakers—especially those interested in making incomplete governance contracts work proficiently—would do well to take note.

*Means to an End: The U.S. Interest in the International Criminal Court.* By Lee Feinstein & Tod Lindberg. Washington, DC: The Brookings Institution Press, 2009. Pp. ix, 158. Price: $24.95 (Hardcover). Reviewed by Aline Flodr.

From open hostility to measured acquiescence, the United States has had at best a tentative relationship with the International Criminal Court (ICC) since the court's inception on July 17, 1998. At the time of the signing of the Rome Statute, the domestic debates on U.S. participation in the ICC turned on a key ideological disagreement as to whether the international institution would erode U.S. sovereignty and freedom of action in its efforts to combat the most serious crimes of concern to the international community. In their new book, *Means to an End: The U.S. Interest in the International Criminal Court*, Lee Feinstein and Tod Lindberg have presented a refreshingly dispassionate, yet ultimately disappointing examination of the United States's past relationship with the ICC as well as recommendations for the United States's future policy toward the court. With the 2008 election of President Obama and the currently underway 2010 ICC Review Conference concerning the court's future direction, this reevaluation of U.S. policy toward the court could not be more timely. After reviewing the history of the U.S. interest in preventing war crimes and promoting accountability—along with the evolution of its critical, even hostile, attitude toward the ICC—the authors conclude that the United States "should end a policy of opposition or hostility toward the court and adopt instead a policy of cooperation" (p. 8), which should be publicly announced and concretized through a series of recommendations supporting the court's efforts.

The authors begin their reassessment by reframing the discussion of the U.S. relationship with the ICC in two ways: (1) broadening the framework of the discussion to include U.S. policy toward international justice generally; and (2) focusing the review on the foreign policy, national security and moral interests of the United States in actively supporting the ICC. Although Feinstein and Lindberg argue that the United States has more often than not demonstrated a commitment to promoting international justice, human rights, and political freedom, their inquiry into the United States's historical commitment to these principles avoids discussing striking counterexamples and cabins "international justice" as concerned only with war criminals. In doing so, the authors fail to convincingly justify and support such a broad claim.

The authors attempt to compensate for this failure by focusing on the United States's arguably consistent track record in promoting the rule of law

in war, particularly by describing its critical role in the creation of the international military tribunals at Nuremberg and in Japan, as well as the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda. For example, while arguing that the role of the ICC in U.S. foreign policy should be evaluated according to the degree to which it helps bring *génocidaires* to justice, the authors gloss over the fact that the United States took over three years to ratify the Genocide Convention, which at least begs the question of whether there has been a simple, unblemished commitment to larger international justice principles. While it is clear that the authors attempt to establish "the deeply ingrained [U.S. value and] principle of justice for all" (p. 124), they undercut the power of their argument in taking an overly bold position and failing to address the instances where the United States has seemingly betrayed its "fidelity" to the core principle of international justice—eradicating impunity for atrocities of international concern.

Despite painting a relatively flawless picture of the U.S. commitment to international human rights and justice, Feinstein and Lindberg provide a balanced account of the evolution of the U.S. policy toward the ICC. The authors explain that although the United States quite certainly was a leader in the initial theoretical discussions on the creation of a permanent international criminal tribunal, support quickly deteriorated as negotiations toward a viable, concrete institution progressed. The final Rome Statute contained provisions that the United States had strongly opposed, and President Clinton signed the Statute apprehensively only so that the United States could "remain in a position to influence the evolution of the court" (p. 39). According to the authors, the critiques from within the government and independent outsiders coalesced into six main objections to the treaty: "(1) the Court's assertion of jurisdiction over some nationals of nonparty states; (2) the prosecutor's ability to initiate cases on his own; (3) the lack of external oversight by or accountability to the international community; (4) deficiencies in the due process protections afforded to defendants; (5) . . . technical problems, including the inability of states to lodge reservations with the treaty;" and (6) ideological concerns about U.S. sovereignty (p. 39).

Armed with these critiques, President Bush's new administration and Congress collectively began a "diplomatic and legislative effort to discredit and undermine the [ICC]" (p. 46), ranging from un-signing the Rome Statute to enacting a series of anti-ICC statutes, such as the American Service Members' Protection Act of 2002, which required suspension of military aid to any ICC state party that did not enter into a bilateral immunity agreement with the United States (p. 51). The authors then outline the domestic pressures that led the Bush administration to scale back its anti-ICC policies, and powerfully combat previous criticisms of the court not by advancing their own ideological arguments but by allowing the positive track record of the court and its utility in dealing with gross violations of human rights speak for itself. Contrary to the parade of horribles raised by opponents to the ICC, the court has in practice protected the rights of defendants, embraced its place as a "court of last resort," rejected frivolous referrals for prosecutions, avoided extending jurisdiction to nationals of nonparty states except at the request of

the U.N. Security Council, and maintained a friendly relationship with the United States. Although the court has also endured criticism and controversy, such as being too focused on crimes in Africa, on balance, "many of the concerns that most worried American critics have been allayed in practice, if not put to rest" (p. 62).

Having quelled initial doubts about the ICC, Feinstein and Lindberg promote a new chapter in U.S. relations with the ICC—an explicit policy of cooperation. Disclaiming ideological perspectives in order to answer the question of whether a policy of cooperation would serve U.S. interests, the authors posit that if the United States's ultimate goal is to ensure that perpetrators of mass atrocities are held accountable, then a policy of cooperation will better serve that end than the alternatives of: (1) open hostility toward the court; (2) benign neglect of the court; or (3) swift ratification of the Rome Statute. Having previously addressed the serious domestic and international setbacks of the United States's anti-ICC policies, the authors next focus primarily on the comparative advantage of a policy of cooperation relative to benign neglect and swift ratification. They contend that a policy of cooperation would increase the court's legitimacy, while giving the United States the flexibility to reassess its policy in response to future events, such as the 2010 Review Conference, the advent of a new prosecutor, and domestic political agitation for or against the court.

Feinstein and Lindberg argue that a policy of cooperation would directly further the U.S. interest in holding perpetrators of mass atrocities accountable and would indirectly benefit U.S. interests by restoring international faith in the United States in light of its detainee policies. As true as their assertions may be, the authors barely engage in a discussion of why benign neglect and swift ratification would fail to generate similar, if not better, results. What are the insurmountable drawbacks of supporting the court on an ad hoc basis, if in situations where impunity is at issue, such as in Darfur, the United States demonstrates willingness to support ICC efforts? Similarly, would ratification of the Rome Statute not further U.S. interests, if the main metric is ensuring that perpetrators of mass atrocities are held accountable?

Feinstein and Lindberg's inability to truly distinguish their policy from others, save the previous U.S. policy of open hostility, leads to latent ambiguities in their recommendations for Washington. Although the authors claim that a way exists for the United States to actively cooperate with the court through implementing changes, such as openly supporting the court's investigations without ratifying the Rome Statute, the collective weight of their recommendations would leave a thin, almost nonexistent line between the United States and states parties to the ICC. Whether this would be a worthy or politically tenable position remains disappointingly unanswered. In light of their previous evidence, their recommendations would more convincingly map onto their broader argument about the U.S. commitment to international justice if these were steps toward the ultimate goal of recommending to Congress that the Unites States become a party to the Rome Statute. While the message of this book is ripe in the current foreign policy environment, its argument leaves readers wanting.

*The Art and Craft of International Environmental Law*. By Daniel Bodansky. Cambridge: Harvard University Press, 2010. Pp. xv, 271. Price: $39.95 (Hardcover). Reviewed by Aileen E. Nowlan.

From seals, to ships, to $CO_2$, Professor Daniel Bodansky's book *The Art and Craft of International Environmental Law* examines the power of international environmental law to address increasingly complex global dangers, and concludes that this nascent form of law is the "'thirty-percent' solution" and no more: a mechanism for states to achieve mutually beneficial results without relying on supranational institutions (p. 15). Bodansky states his assumptions and ambitions clearly and provides a detailed survey for the uninitiated. Always the pragmatist, Bodansky offers precise choices on legal regime design. His answer to the critiques of international environmental law, particularly the perceived dearth of enforcement mechanisms, is bold and timely. However, scholars hoping to resolve the theoretical underpinnings of international environmental law will probably be disappointed.

Lest the "'thirty-percent' solution" discourage, Bodansky begins with an optimistic history of international environmental law. He describes a flurry of treaty-making activity after the 1992 Rio Summit, which brought together 13,000 participants from 176 states and 1400 nongovernmental groups, and addressed such topics as desertification, pesticides, and Antarctica (p. 34). He reminds us that the Montreal Protocol of 1987 dramatically reduced the use of ozone-depleting substances and that multilateral agreements successfully curbed oil pollution from tankers (p. 77). In keeping with Bodansky's argument about the importance of intrastate action, he notes that the number of states with national environmental agencies rose from eleven to 102 in the decade after the Stockholm Conference in 1972, a movement Bodansky asserts redefined "what it means to be a modern nation-state" (p. 29).

The book's most significant contributions are in the analysis of policy choices and in the framework of "sovereignty cost" as a limit on multilateral coordination. Although Bodansky does not trumpet his experience as a government negotiator, he hits his stride when he lays out precise tradeoffs. His "policy toolkit" prompts consideration of the design choices that would need to be made as environmental law moves forward. For example, he explains that specification standards, such as double hulls for tankers, are easy to implement but put an end to innovation; performance standards such as discharge quantities are hard to monitor but give actors flexibility. On a regime level, standards are easier to negotiate, but rules "make compliance more likely by making violations more clear-cut, with higher reputation costs" (p. 106). Bodansky's experience is evident in his priorities; he asserts and defends in less than a page that free-riding is not a problem, preferring to spend his time on why states commit, the scope of treaty ambition, and the costs and benefits of treaty participation. A reader grappling with possible international environmental law regimes may find his framework of "sovereignty cost" useful. "Sovereignty cost" is the degree to which the freedom of action of a state is limited by an international agreement. It is determined by stringency (how much the terms depart from business as usual)

and strength (the cost of noncompliance) (pp. 161, 177). For example, a state that commits to actions to reduce greenhouse gas emissions and then sees domestic support for this reduction evaporate has less freedom to changes its policies than one that has not made an international commitment. "Sovereignty cost" can therefore be described as the risk of error a state anticipates arising from an international agreement. This may be the best justification for the "'thirty-percent' solution"; any more strength and stringency would press up against states' reluctance to relinquish sovereign freedom of action.

The discussion of the legal and normative power of international environmental law is the most problematic part of the book. It will provide ammunition for those who do not believe in the legal or normative force of international environmental law and may be frustrating for those who want to believe. The former may find strength in phrases such as "[i]nternational law lacks any general enforcement mechanisms to sanction violations" (p. 100). The latter may wish for firmer resolve to batten down the hatches against such attacks. Bodansky notes that, in discussions of customary law, "the relative importance of state practice and *opinio juris* has been a . . . source of controversy" (p. 194) but does not arrive at an account of how valid custom is generated.

Despite such holes, Bodansky is firmly in the camp that international legal norms are powerful and goes to some length to defend this position. He explains that states more often than not follow them: norms "do not merely regulate playing . . . they create the very possibility of playing" through a constitutive function as well as a regulatory one (p. 88). States may start to follow a norm because the norm articulates a good idea and continue to do so because law provides an independent reason for action—a "logic of appropriateness" when actors "experience norms as constraints" (p. 91). In addition, states may follow norms due to a "logic of consequences," a strategic calculation that the incentives of compliance are greater than the costs and risks noncompliance (p. 91). Bodansky urges us to look to what states do rather than what they say, and perhaps by extension, look to states' actions (which he argues are largely in compliance) rather than the lack of enforcement mechanisms in the documents they sign on to. If states believe actions to uphold a treaty norm are required, states are "more likely" to take these actions (p. 102). Similarly, a non-treaty norm should be accepted as a social fact, if "significant behavioral regularity has emerged" (p. 196). As a final salvo to critics of international law, Bodansky points to "special domestic procedures that must be fulfilled in order to enter into a treaty—procedures that would seem unnecessary if international law were, in fact, a fiction" (p. 101). After all this, Bodansky concludes that "the question 'what is law?' . . . has lost its preeminence" (p. 107). Given that his book begins with this very question, and that controversies continue to rage in our conversations on international environmental law, this claim is rooted in hope rather than reality.

If Bodansky side-steps some critiques, he faces head-on the perceived lack of enforcement. He argues forcefully and at some length that there is

more bite in international environmental law than it is given credit for and that a binding agreement is not the only worthwhile goal. First, Bodansky explains that "national reporting requirements" (p. 239) provide information that domestic actors and international partners may use to bring political pressure, and create significant reputational costs. Second, he challenges the skeptics and the faithful by arguing that "non-binding agreements do not necessarily represent a second-best outcome" (p. 156). Here Bodansky's intimate knowledge of a variety of environmental regimes serves him well. Using the example of the International Whaling Convention, he argues that legal compliance is "neither a necessary nor a sufficient condition for behavioral or problem-solving effectiveness" (p. 254). A high level of legal compliance could be a sign of lack of ambition in the regime. Similarly, if whales are now endangered due to collisions with ships, legal compliance with an anti-hunting convention has little problem-solving effectiveness. We are left in a middle zone: with something more than "no enforcement," aiming for something with less strength and stringency than binding agreements. If this resolution feels unsatisfying, it is more due to the evolving nature of international environmental law than a lack of effort on Bodansky's part.

*The Art and Craft of International Environmental Law* will prompt strong feelings throughout. If it is not the discussion of policy choices or international legal theory, it may be the few unsupported prescriptive recommendations sprinkled throughout the otherwise restrained chapters. Bodansky provides grounds for optimism, such as his statement that the 1990 Clean Air Act reduced sulfur dioxide emissions "for about one-quarter of the original cost estimates" (p. 80), but then pulls back the scope of his recommendations perhaps more than is necessary. Are trade restrictions, financial penalties, or criminal prosecutions really off the table? If a country's decision to join an international agreement hinges on "the distribution of costs and benefits domestically" (p. 165), whatever happened to distribution of costs and benefits between countries? However, even as it side-steps some questions, *The Art and Craft of International Environmental Law* is a valuable base from which scholar and practitioner alike can debate, disagree, and make decisions about international environmental law.

*The Justiciability of International Disputes: The Advisory Opinion on Israel's Security Fence as a Case Study*. By Solon Solomon. Nijmegen, the Netherlands: Wolf Legal Publishers, 2009. Pp. 212. Price: $70.00 (Paperback). Reviewed by Jariel Rendell.

Five years after the International Court of Justice (ICJ) issued its advisory opinion on the legality of Israel's West Bank barrier,[3] Solon Solomon has added *The Justiciability of International Disputes* to legal shelves already filled with discussion of the opinion. Solomon argues that the ICJ should decline to hear broad categories of cases he deems inherently unsuited to international legal adjudication—in his terminology, cases that are

3. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

*sensu stricto* nonjusticiable—including the West Bank barrier case. The ICJ, he argues, should have left it entirely to the Israeli Supreme Court, which heard two cases related to the barrier,[4] to protect Palestinian rights. Although Solomon's impassioned, densely written analysis tackles an important subject, it does not succeed in introducing new material to the scholarship already addressing international justiciability and the ICJ's barrier opinion.

Solomon initially casts his focus in *The Justiciability of International Disputes* as the international adjudication of "legal issues that are non justiciable stricto sensu and questions which, albeit legal can not be resolved in international courts [sic]" (pp. 3-4). Yet he quickly pivots to his real focus, the "advisory opinion on Israel's security fence" (p. 4), with only a cursory glance at the history of the non-justiciability doctrine in the context of ICJ disputes (pp. 64-74). Because he can offer little in the way of ICJ precedent for his notion of *sensu stricto* non-justiciability, he instead turns to national precedents: the U.S. Supreme Court's articulation of the political question doctrine in *Baker v. Carr*[5] and the Canadian Supreme Court's designation of certain constitutional obligations as legally unenforceable in *Reference re Secession of Quebec*.[6] Canadian and U.S. courts can use these legal principles to avoid deciding cases that turn on political rather than legal considerations, and Solomon contends that these same principles "could have been followed also by the International Court of Justice in the advisory opinion on the security fence" (p. 74). But Solomon never successfully establishes that the question posed to the ICJ in the barrier case was political rather than legal.

One gets the sense, not only from Solomon's tone—for example, his persistent use of the Israeli-preferred term "security fence" in the face of an ICJ opinion that used "wall"[7]—but also from the scope of his analysis, that his support for an aggressive ICJ non-justiciability doctrine flows from his disagreement with the barrier decision rather than vice versa. Despite his avowed focus on inherent non-justiciability, he dedicates more space to already well-known arguments that the barrier case was nonjusticiable for reasons extrinsic to the case (pp. 81-116) than to his argument that the case was inherently nonjusticiable (pp. 116-44). Many of those arguments the ICJ considered and rejected; Solomon fails to advance any forceful new argument demonstrating that the ICJ erred when it did so. Especially troubling is his decision to rehash Israel's claim that the participation of an Egyptian ICJ judge, Judge Elaraby, "constituted an unacceptable appearance of bias"

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4. HCJ 3239/02 Mara'abe v. Prime Minister of Israel [2005] IsrSC 38(2) 393; HCJ 2056/04 Beit Sourik Village Council v. Israel [2004] IsrSC 58(5) 807.

5. 369 U.S. 186 (1962).

6. [1998] S.C.R. 217.

7. International news organizations generally use the neutral term "barrier." *See, e.g.*, BBC News, Israel and the Palestinians: Key Terms (Nov. 23, 2009), http://news.bbc.co.uk/newswatch/ukfs/hi/newsid_8370000/newsid_8374000/8374013.stm ("The BBC uses the terms 'barrier', 'separation barrier' or 'West Bank barrier' as acceptable generic descriptions to avoid the political connotations of 'security fence' (preferred by the Israeli government) or 'apartheid wall' (preferred by the Palestinians)."). Legal scholars generally use the terms "wall" or "barrier." See Daphne Barak-Erez, *Israel: The Security Barrier—Between International Law, Constitutional Law, and Domestic Judicial Review*, 4 INT'L J. CONST. L. 540, 541 (2006), which uses the term "barrier," after noting that "[t]he official term of the Israeli authorities is 'security fence' . . . . Critics, however, more often refer to it as the 'wall,' . . . . the term used by the United Nations General Assembly . . . ."

(p. 99).[8] Only the U.S. judge, Judge Buergenthal, agreed with Israel.[9] Every other ICJ judge rejected the bias allegation,[10] and even Judge Buergenthal could not agree with Solomon's radical claim that Judge Elaraby's participation "gave the Palestinian side the advantage of having in the panel a de facto ad hoc judge" (p. 104).

That Solomon revisits Israel's motion to remove Judge Elaraby is especially surprising given that remediable judicial bias hardly makes a case nonjusticiable, especially when the case is decided almost unanimously. The ICJ voted by fourteen votes to one that Israel's construction of the West Bank barrier was "contrary to international law."[11] The near unanimity of the opinion stands in sharp contrast to a recent U.S. case tainted by allegations of judicial impartiality: *Caperton v. A.T. Massey Coal Company.*[12] In that case, the U.S. Supreme Court overturned a lower court decision because of an impermissible appearance of bias. The decisive vote in the lower court had been cast by a judge in favor of a company whose owner spent several million dollars in order to get the judge elected. But this did not in itself place the justiciability—intrinsic or extrinsic—of the *Caperton* case in doubt. After finding an appearance of judicial bias, the U.S. Supreme Court tasked the lower court with rendering a new opinion in the case without the participation of the compromised judge. Solomon, by contrast, treats Judge Elaraby's alleged bias as a reason for every judge on the panel to refuse to hear the case. This troubling claim is unsupported by precedent or by legal analysis. Indeed, in the context of scholarly work on justiciability, the extended discussion of Judge Elaraby's alleged bias is an unnecessary foray outside the realm of legal analysis into the arena of political commentary. It also adds nothing to the reader's understanding of the concept of inherent non-justiciability or its application to the West Bank barrier case.

When Solomon finally moves on from well-known arguments related to extrinsic non-justiciability to inherent non-justiciability, his arguments still lack novelty. The crux of his argument is that in the barrier case the ICJ chose between two competing narratives, Palestinian and Israeli, and thus caused "serious damage to the Court's moral legitimization both in the eyes of part of the academic world as well as the State of Israel" (p. 142). That Israel chose to ignore the opinion dealt a blow, Solomon believes, to "the prestige of the Court . . . [and to] the advancement of international law" (p. 142). The probability of this outcome "should be taken into account by the judges in their decision to render the requested opinion" (p. 142). But it is unclear how this inherent justiciability approach would differ in practice from the extrinsic non-justiciability approach. Indeed, his point seems to be precisely that

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8. Judge Elaraby had previously served as a diplomatic representative for Egypt; he also said in a newspaper interview that the Israeli occupation of the West Bank and Gaza Strip violated international law.

9. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Order, 2004 I.C.J. 3, 7 (Jan. 30) (Buergenthal, J., dissenting).

10. *Id.* at 5 (majority opinion) (finding, by a vote of thirteen to one, that Judge Elaraby "could not be regarded as having 'previously taken part' in the case in any capacity").

11. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 201 (July 9).

12. 129 S. Ct. 2252 (2009).

extrinsic, pragmatic considerations should guide the court's decisions. This harkens back to his discussion of extrinsic justiciability, in which he argues that the ICJ should have "pronounce[d] the issue as non justiciable" because Israel refused to appear in the oral pleadings and refused to provide any evidence to the court (p. 116). The lone dissenter in the barrier case advanced essentially the same argument: Judge Buergenthal wrote in his dissent that the ICJ ought to have declined to decide the case because it "did not have before it the requisite factual bases for its sweeping claims."[13] Thus, these arguments are not only about primarily extrinsic considerations, but they are also as old as the barrier case itself.

Moreover, the remaining ICJ judges had already essentially rejected Solomon's robust inherent and extrinsic non-justiciability doctrines when they agreed to decide the case despite Israel's refusal to provide evidence. The ICJ's decision in the barrier case is consistent with its tradition of declining to mute its legal voice because a state refuses to participate in its proceedings or accept its decisions.[14] The ICJ's responsibility in the barrier case was not to Israel or Palestine but to the U.N. General Assembly, which referred the legal question. Thus, as Richard Falk aptly noted, Israel's decision not to participate in the oral arguments, not to provide evidence, and not to accept the ICJ opinion "should not be allowed to paralyze the [ICJ] in exercising its responsibilities to assist the General Assembly."[15]

Given the multifaceted importance of the ICJ's barrier decision to the international rule of law, to the Middle East peace process, and to the ICJ itself as an institution, it is unfortunate that Solomon's analysis goes no further than to retrace a multitude of well-trodden paths. His work is especially disappointing because there are aspects of the ICJ barrier decision left to critique. Rather than seeking a new lens through which to explore them, however, Solomon pursues an essentially purpose-driven analysis that leads him to criticize the ICJ's current justiciability doctrine for the same reasons he criticizes the ICJ's barrier decision. The result is a text that ultimately fails to illuminate either topic.

*The Multilateralization of International Investment Law*. By Stephan W. Schill. Cambridge: Cambridge University Press, 2009. Pp. xxxvii, 378. $99.00 (Hardcover). Reviewed by Paul Slattery.

In *The Multilateralization of International Investment Law*, Stephan W. Schill argues that transnational investment law can and should be understood as a coherent and multilateral subsystem of international law. Schill describes sixty years of thwarted multilateral proposals, myriad nonprecedential arbitral decisions, and the proliferation of over two thousand five hundred bilateral, regional, and sectoral investment treaties. The result is delightfully persuasive. Schill claims that, despite their diffuse form, bilateral investment treaties

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13. *Construction of a Wall*, Advisory Opinion, 2004 I.C.J. at 240 (Buergenthal, J., dissenting).

14. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 392 (June 27).

15. Richard A. Falk, *Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall*, 99 AM. J. INT'L L. 42, 46 (2005).

(BITs) are substantively convergent. Moreover, nearly all BITs contain most-favored-nation (MFN) clauses and capacious definitions of investors, two vehicles that de facto multilateralize investment law. Finally, arbitral tribunals increasingly construe BITs within an overarching, multilateral legal system. In concert, these forces have generated what the United Nations, World Trade Organization (WTO), and Organisation for Economic Co-operation and Development (OECD) could not: an international legal system "based on uniform principles of investment protection" that "applies rather independently of the sources and targets of foreign investment flows" (p. xiv).

The book addresses "counsels and arbitrators," "students and scholars," and officials in NGOs and governing bodies (p. xii). Schill believes that if these constituencies see the latticework of BITs as a coherent, evolving, and multilateral system, it will increasingly be one. Accordingly, Schill advances detailed and meticulously sourced arguments. Yet the book is not a dissertation for the initiated. Schill offers an accessible overview of investment law, provides definitions and diagrams, and cites explanatory sources. In sum, while the book will engage experienced practitioners, it could also introduce international investment law to a classroom.

Schill's descriptive and normative projects for the book are intertwined. He posits that international investment law is de facto multilateral and encourages readers to embrace this structure. His arguments are convincing. Schill adeptly toggles between theory and primary source quotations, and places the explosion of BITs within a compelling historical narrative. In fact, Schill's chronicle of how diffuse bargaining achieved multilateral outcomes where express agreements faltered is itself a highlight of the book.

Schill begins with historical attempts at multilateral investment treaties. He argues that early treaties were doomed by both North-South capital disparities and East-West conflicts over private property and sovereignty. His core example is the 1967 OECD Draft Convention on the Protection of Foreign Property, which was open to non-OECD signatories. The draft entitled foreign investors to fair and equitable treatment, most constant protection and security, protection against direct and indirect expropriation, and investor-state dispute settlement (p. 36). Developing and socialist countries rejected the proposal. The only success of the period was the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which provided for consensual arbitration enforced by all signatories.

More recent attempts at multilateral investment treaties have also floundered, but Schill argues that they have failed despite a shared desire for investment protections. The 1998 OECD Multilateral Agreement on Investment, which differed only marginally from existing BITs, collapsed due to controversial industry exceptions, the exclusion of non-OECD countries from negotiations, and campaigns by environmental and labor NGOs. Negotiations resumed within the WTO, but stalled due to developing countries' concern with "the lack of sustainable and comprehensive development perspective in international trade relations" (p. 60), rather than opposition to investment protections.

Schill's best evidence of the consensual desire for investment protections is the explosion of BITs and their regional analogs. By 1989, only 386 existed, but by 2006, 2500 were in force (p. 41). Nearly all BITs mimic the 1967 OECD Draft and add nondiscrimination, national treatment, MFN, and capital transfer clauses. Schill denies that these agreements represent developed-country bargaining power, arguing instead that they reflect a common desire for investment protections. First, the BITs do not reflect preferential treatment but are instead uniform and reciprocal agreements. Second, South-South BITs generally correspond to the OECD draft and to North-South BITs.

Still, the proliferation of convergent BITs does not necessarily add up to a system of international law. Differences in treaty language persist, and ad hoc interpretation could create fragmentation. Schill argues that four additional forces weave BITs into a de facto multilateral system.

First, BITs overwhelmingly include expansive MFN clauses. These clauses effectively incorporate the strongest investor protections found in any of a state's BITs into all of its BITs. Schill explores arbitral disagreements over applying MFN clauses to controversial areas like tribunal jurisdiction, but "the use of MFN clauses to import more favorable conditions from third-country BITs is largely uncontested" (p. 140). As MFN clauses incorporate only benefits, and not obligations, from third-party BITs, they unify states' obligations to all investors at maximum protection.

Second, BITs define investors broadly, permitting corporate structuring to capitalize on favorable BITs. Generally, shareholders in state *A* who invest in a company in state *C* through an intermediary in state *B* can take advantage of any BITs between *A* and *C* and between *B* and *C*. More importantly, countries rarely know the nationality of all direct and indirect shareholders in a domestic company. As a result, countries honor their strongest BIT commitments, benefiting all local and foreign investors. In short, the global labyrinth of corporate ownership extends BITs' coverage to scores of otherwise unprotected investors.

Third, the ICSID Convention, combined with the consent to arbitration in the International Centre for Settlement of Investment Disputes (ICSID) provided by many BITs, creates a legal rather than diplomatic enforcement framework. The Convention gives the investor a direct right of action, limits the influence of interested states, and provides multilateral enforcement. Arbitral tribunals, ICSID and otherwise, thus serve a legal norm-generating function and "increasingly displace States as the primary rule makers in international [investment] law" (p. 268).

Finally, arbitral tribunals increasingly understand BITs within a multilateral system of investment law. First, tribunals often rely on other BITs penned by the parties (or even third parties) to construe a BIT. Second, tribunals use functional interpretation to "level differences in the wording of BITs as long as the wording does not clearly mandate a departure from the commonly adopted approach to investment protection" (p. 314). Third, a de facto system of precedent has emerged as tribunals rely on other tribunals' decisions to combat the "extreme terminological vagueness" of BITs (p. 332).

Consequently, arbitral tribunals are now active agents in the multilateralization and development of international investment law.

Despite its scope, Schill's book barely considers the incentives for leaders of developing nations to prefer bilateral negotiating frameworks. If, as Schill argues, the principles of investment protection are now uncontroversial, the bilateral impulse of investment law deserves exploration. In fact, there may still be strong diplomatic and domestic political incentives for developing-nation leaders to prefer a bilateral framework to multilateral negotiations or domestic policy change.

First, the relatively rapid, party-to-party negotiating process of a BIT offers immediate diplomatic and political benefits to participating countries and leaders. A leader looking to improve a relationship or gain political capital with a neighbor or powerful developed country could benefit from penning a BIT. The BIT could provide leverage in other negotiations or simply smooth over a rocky relationship. Agreeing to a BIT could serve as a negotiating chip when courting a specific multinational corporation considering investing in a country. A leader seeking to appear active in the face of an economic crisis may also gain press coverage by finalizing a standard BIT. Whatever the motivation, successive BITs can respond to diplomatic or political contingencies in ways that multilateral negotiation cannot.

Second, committing to a BIT may be easier than changing domestic policy. The treaty process may be more centralized than the domestic political process. Regardless, BITs provide rule of law protection for foreign investors without difficult changes to domestic institutions. Moreover, BITs offer a commitment mechanism against domestic political turmoil that could disfavor foreign investors. BITs may be selectively concluded with politically palatable partners without appearing to benefit foreign corporations that serve as condensation symbols for populist angst. While those unpopular corporations may establish shell intermediaries in the partner country and gain the BIT's protection, it is not likely to make the headlines.

Third, committing to a BIT may be easier than committing to a multilateral agreement. WTO negotiations, as noted by Schill, serve as a stage for developing countries to air general grievances with trade policy. This phenomenon is driven in part by domestic political preferences, and bucking the trend may prove a poor electoral strategy. Moreover, multilateral negotiations may not be well-timed for election cycles or domestic public sentiment.

BITs offer developing-country leaders access to FDI incentives and diplomatic gains without evoking politically unpopular countries, corporations, or multinational organizations. These incentives may explain the persistence of bilateral negotiations in the face of apparent agreement on the principles of investment protection. If de facto multilateralization does persist, Schill suggests that the difficulty will be maintaining the legitimacy of arbitration panels while they displace states as rulemakers. Regardless of a reader's position on this political challenge, Schill's book is worth a read for

the coherent form it gives to literally thousands of seemingly disparate investment treaties.

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Federal Reserve Bank of Chicago. Self-Enforcing Trade Agreements: Evidence from Time-Varying Trade Policy. Chad P. Bown and Meredith A. Crowley. REVISED May 2012 WP 2009-17. Self-Enforcing Trade Agreements: Evidence from Time-Varying Trade Policy. Chad P. Bown The World Bank. Meredith A. Crowleyâˆ— Federal Reserve Bank of Chicago. This version: May 2012.Â  The rest of this paper proceeds as follows. Section 1 briey reviews the Bagwell and Staiger (1990) theory before introducing our empirical model of US antidumping and safeguard tari determination. In Self-Enforcing Trade, Chad P. Bown explains why the answer is an emphatic "yes."Bown argues that as poor countries look to the benefits promised by globalization as part of their overall development strategy, they increasingly require access to the WTO dispute settlement process to protect their trading interests.Â  Self-Enforcing Trade examines the WTO's "extended litigation process," highlighting the tangle of international economics, law, and politics that participants must master.Â  You can write a book review and share your experiences. Other readers will always be interested in your opinion of the books you've read. Whether you've loved the book or not, if you give your honest and detailed thoughts then people will find new books that are right for them. Forex Trading Using Intermarket Analysis - Forex Strategies. 138 PagesÂ·2008Â·1.29 MBÂ·53,460 Downloads. internationally, you may already know some-thing about the forex Forex Trading Using Intermarket Forex : The Ultimate Guide To Price Action Trading âˆšPDF. 129 PagesÂ·2014Â·3.87 MBÂ·138,459 Downloads. forex fundamental news release: This is one experience I will never forget.