Samantha Besson, Moral Philosophy and International Law;
Jörg Kammerhofer, International Legal Positivism;
Hengameh Saberi, Yale's Policy Science and International Law: Between Legal Formalism and the Policy Conceptualism;
Dan Danielsen, International Law and Economics: Letting Go of 'The Normal' in Pursuit of an Ever-Elusive Real;
Daniel Joyce, Liberal Internationalism;
Dianne Otto, Feminist Approaches to International Law;
Wouter Werner and Geoff Gordon, Kant, Cosmopolitanism, and International Law;
Benedict Kingsbury, Megan Donaldson and Rodrigo Vallejo, Global Administrative Law and Deliberative Democracy;
Jean d'Aspremont, Towards a New Theory of Sources in International Law;
Gerry Simpson, Something to Do with States;
Rose Parfitt, Theorizing Recognition and International Personality;
Gregor Noll, Theorizing Jurisdiction;
Jan Klabbers, Theorizing International Organizations;
Fleur Johns, Theorizing The Corporation in International Law;
Dino Kritsiotis, Theorizing International Law on Force and Intervention;
Ben Golder, Theorizing Human Rights;
Anne Orford, Theorizing Free Trade;
Sarah Nouwen, International Criminal Law: Theory All Over the Place;
Frédéric Mégret, Theorizing the Laws of War;
Vasuki Nesiah, Theorizing Transitional Justice: Cashing in the Blue Chips;
Stephen Humphreys and Yoriko Otomo, Theorizing International Environmental Law;
Kerry Rittich, Theorizing International Law and Development;
Outi Korhonen and Toni Selkälä, Theorizing Responsibility;
Horatia Muir Watt, Theorizing Private International Law;
Chantal Thomas, Transnational Migration, Globalization, and Governance: Theorizing a Crisis;
Reut Paz, Religion, Secularism, and International Law;
Thomas Skouteris, The Idea of Progress;
Florian Hoffmann, International Legalism and International Politics;
Jason Beckett, Creating Poverty;
Anne Peters, Fragmentation and Constitutionalization

Lauge N. Skovegaard Poulsen. ***Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries***. Cambridge: Cambridge University Press, 2015. Pp. xvi + 247. £67. ISBN: 9781107119536.

The speed at which bilateral investment treaties (BITs) multiplied through the 1990s and into the 2000s takes one's breath away. Senior government officials in the developing world, without much apparent objection, signed onto standards of protection long promoted as representing customary international law by those in the developed North. How can one explain the rapidity with which investment treaty norms were embraced? One standard response is that treaties served to signal openness to foreign investment. Despite the costs to sovereignty, BITs were signed in the competition for scarce capital. Treaties both created conditions for the attraction of new capital and raised the 'reputational stakes' of poor countries.[1] Yet, as Lauge

[1] Elkins, Guzman and Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000', 60 *International Organization* (2006) 811, at 841.

Poulsen notes in his excellent book, there were a variety of less drastic means available with which to attract new inward investment (at 9).[2] How could this behaviour be characterized, then, as comprehensively rational?

Most explanations assume that developing country negotiators knew what they were doing.[3] Any contrary assumption is described as 'paternalistic'. 'With respect', chides arbitrator Jan Paulsson, 'lawyers from developing countries are not dummies'.[4] They were, however, enticed by not much more than wishful thinking.[5] Investment treaties, Poulsen advises, 'were repeatedly justified by their capacity to attract investment by both promoters of the treaties as well as developing country governments themselves' (at 14). That this was in the realm of the mythical is borne out by the United Nations (UN) Conference on Trade and Development's (UNCTAD) finding that there is an annual 'investment gap' of $2.5 trillion in order for developing countries to meet development goals set out in the 2030 Agenda for Sustainable Development.[6] Least developed countries are in even worse shape. According to UNCTAD's Least Developed Countries Report 2016, 'the proportion of extreme poverty' in least developed countries 'doubled from less than 20 per cent to nearly 40 per cent'.[7]

Had developing country officials sought out expertise or more information, they may have decided against signing and then ratifying BITs. What helps to explain their reluctance to be better informed? Poulsen seeks an answer by adopting a bounded rationality approach, drawn from behavioural psychology and economics. Rather than assuming comprehensive rationality of developing state actors,[8] bounded rationality assumes them to be 'constrained, not just by the complexity of their environment but also by limitations to their own problem-solving capabilities' (at 26). Bringing the insights of bounded rationality into the domain of international investment diplomacy enables Poulsen to hypothesize that, even if policy makers believed that they were acting rationally in the pursuit of their preferences, they engaged in 'predictably irrational behaviour' (at 45).

This is a provocative thesis that Poulsen pursues with great skill and success. The effort goes to show that a combination of qualitative and quantitative techniques, fusing both 'problem-solving' and critical methods, contributes a great deal to our understanding of this complex field.[9] It

2 I should declare that I provided comments on an early version of one of the book's chapters and so am mentioned by name in the acknowledgements.

3 By 'developing' countries, Poulsen is referring to all of those states not defined by the World Bank as 'high income' (at 16, n. 65).

4 Paulsson, 'The Power of States to Make Meaningful Promises to Foreigners', 1 *Journal of International Dispute Settlement* (2010) 341, at 344 (quoted at 20).

5 Muthucumaraswamy Sornarajah, for this reason, describes the system as 'fraudulent'. See Sornarajah, 'International Investment Law as Development Law: The Obsolescence of a Fraudulent System', in M. Bungenberg *et al.* (eds), *European Yearbook of International Economic Law* (2016) 209.

6 Developing Countries Face $2.5 Trillion Annual Investment Gap in Key Sustainable Development Sectors, UNCTAD Report Estimates, Press Release (2014).

7 The share of those in least developed countries without access to electricity 'increased by two thirds, from 31.8 per cent to 53.4 per cent', while 'the share of people without access to water … more than doubled, from 20.0 per cent to 43.5 per cent'. See UN Conference on Trade and Development (UNCTAD), Least Developing Countries Report 2016 – The Path to Graduation and Beyond: Making the Most of the Process (2016), at 32, available at http://unctad.org/en/PublicationsLibrary/ldc2016_en.pdf?utm_source=UNCTAD+Civil+Society+Newsletter&utm_campaign=910f7034d1-UNCTAD+CSO+e-alert+15+December&utm_medium=email&utm_term=0_2e2035bdbc-910f7034d1-70274933 (last visited 15 December 2016).

8 Poulsen's model assumes developed states behave in a perfectly rational manner, leaving it to others to apply the model to capital-exporting states (at 28–29).

9 On these competing methods, see Cox, 'Social Forces, States and World Orders: Beyond International Relations Theory', in R. Keohane (ed.), *Neorealism and Its Critics* (1986) 204, at 210–11.

also is disruptive of numerous efforts, both scholarly and arbitral, claiming that treaty standards of protection, such as contemporary understandings of fair and equitable treatment, have risen to the level of customary international law.[10] It requires many to rethink their presuppositions.

Poulsen shows how developing countries were encouraged to believe in the inflated expectations about the benefits of signing investment treaties. State representatives were not merely 'motivated optimists', wanting to believe that investment benefits would flow (at 109). They were also persuaded by the regime's entrepreneurs – lawyers (in and out of government) and developed state officials – that signing treaties would have this positive effect. Poulsen reports, in a valuable chapter on early negotiation history, that British diplomatic missions would deliver letters, intended to initiate negotiations, stating that a BIT with the United Kingdom 'could assist significantly in the creation of a climate of confidence, which would encourage further substantial investment in the Third World' (at 67). Yet, behind the scenes, the British Foreign and Commonwealth Office also knew that, if a BIT was 'very much in our interests, it might not serve the interests of developing countries very well' (at 68). Investment law entrepreneurs wilfully spread the 'causal belief' that BITs would attract foreign investment, knowing that this was a 'simplistic and misleading' portrayal (at 71).[11] This account also helps to explain the proliferation of South–South BITs, which were signed on the assumption that similar benefits would flow (at 35).

Developing country agents contributed to this wishful thinking by neglecting to inquire into the resulting diminution of state policy space.[12] As Poulsen's numerous informants attest, they 'did not have a clue' (at xiii). 'We didn't really study this in any way' (at 101), they advise, 'negotiators really didn't know that the treaties had any bite' (at 105). Government officials mostly were unaware, in other words, that signing treaties would result in the shrinkage of regulatory space. The problem was compounded by the incapacity of state bureaucracies to interrogate investment treaty terms. Even if they did have an interest in the subject, few staff had sufficient expertise in international investment law (at 44). Embassy officials and investment promotion agencies had pretty much a 'free hand' in signing onto treaties that were offered up to them or initiating the adoption of new treaties using 'European templates' (at 45–46).[13] Ethiopian officials describe post-1994 BITs as 'signed and ratified as a matter of routine practice without due deliberation on their merits' (at 132). A Mexican official describes negotiations as being completed by 'a couple of guys; they sent it to parliament with no real discussion' (at 147). No one negotiates and '[n]o one really cares', advised another official from Africa (at 153, 154). This helps to explain, Poulsen surmises, why 'diplomatic links have been such strong predictors of investment treaty adoption in quantitative studies' (at 41). It also helps to explain why 'rational' developing country officials adopted the default rules of capital-exporting states (at 44). From a

[10] E.g., UNCITRAL, *Glamis Gold Ltd v. United States*, Award, 8 June 2009, at para. 210; McLachlan, 'Is There an Evolving Customary International Law on Investment?', 31 *ICSID Review* (2016) 257, at 266.

[11] Echandi chastizes critics as being 'simplistic and misleading' for arguing that bilateral investment treaties (BITs) have not delivered on their promise of investment. The argument is not 'serious,' he maintains. Yet, he takes no account of the fact that, as Poulsen shows, developed country negotiators were marketing BITs upon these 'simplistic, misleading, and factually inaccurate' premises. See Echandi, 'Be Careful with What You Wish: Saving Developing Countries from Development and the Risk of Overlooking the Importance of a Multilateral Rule-Based System on Investment in the Twenty-First Century', in M. Bungenberg *et al.* (eds), *European Yearbook of International Economic Law* (2016) 233, at 252–253.

[12] There should be no doubt that this is the intended effect of the treaties, whatever one thinks about win-loss records. See, e.g., UNCTAD, World Investment Report 2015: Reforming International Investment Governance (2015), at 125.

[13] Many of these observations regarding developed country supremacy are confirmed by empirical analysis in Alschner and Skougaerskiy, 'Mapping the Universe of International Investment Agreements', 19 *Journal of International Economic Law* (2016) 561, at 574.

'public law' perspective, Poulsen's book is not only a treasure trove of information, but it is also a catalogue of horrors.

It was not the case, however, that no information was available to developing country negotiators, if they had sought it out. As the regime was taking off in the mid-1990s, investment tribunals began issuing rulings in disputes launched under the North American Free Trade Agreement's Chapter 11 against Mexico and Canada. These decisions, if taken note of, would have given developing country officials pause. At the end of the decade, Poulsen declares, 'the potency of the regime should have been crystal clear for anyone caring to seek relevant information' (at 141). Developing country negotiators mostly ignored these developments. They only were alerted to the negative restraints on policy space after they were 'hit' by a claim. 'No one cares until the dispute comes,' notes one Mexican official (at 148). Several chapters are devoted to the 'learning' that occurs once countries are hit by a claim. The empirical data generated by Poulsen supports the hypothesis that states slowed down their rates of BIT adoption only after they became the subject of an investment dispute. Poulsen undertakes several qualitative country studies in Chapter 6, together with an in-depth country study of South Africa in Chapter 7, to underscore the prevalence of this 'narcissistic learning'.

International organizations were complicit in this deception. Developing states were advised early on by International Centre for Settlement of Investment Disputes' (ICSID) General Counsel, Aaron Broches, that BITs with ICSID clauses would provide an 'incentive' for new investment (at 58, 73). The World Bank aggressively promoted the signing of BITs through its technical assistance program (at 72). With the UN Centre for Transnational Corporations declining to encourage BITs, under American pressure, the UN Conference on Trade and Development (UNCTAD) took over the functions of promotion and protection for foreign development investment (FDI) and began encouraging BIT proliferation (at 91). UNCTAD stressed that BITs promoted economic development by 'stimulat[ing] investors' confidence, and boost[ing] FDI flows' (at 94). UNCTAD's notorious mega BIT-signing ceremonies were a direct consequence of this boosterism. Poulsen documents 12 such 'facilitation rounds' that resulted in '160 BITs [being] signed between 60 developed and developing countries' (at 94). As Poulsen advises, 'UNCTAD kept spreading the message, ... "sign BITs to get FDI"' (at 96). When UNCTAD turned to emphasizing the prevention and management of investment disputes, they chose leading members of the investment arbitration bar to advise developing countries, reinforcing the message that BITs 'are necessary to attract investment'. Poulsen describes this relationship as an 'informal alliance' between UNCTAD and the arbitration community (at 96, 98). UNCTAD might be seen as having had a change of heart. In its 2015 World Investment Report, UNCTAD acknowledges that the investment treaty regime 'suffers from a legitimacy crisis'.[14] Although the 2015 report appears to evince some regret for UNCTAD's past salesmanship, this impression is dispelled when one learns from UNCTAD that investment agreements can 'help facilitate cross-border investment'.[15] UNCTAD does acknowledge, however, that 'determining the impact of IIAs [international investment agreements] on FDI flows is not a straight forward exercise'.[16]

Others like the American Bar Association's Central and Eastern European Law Initiative were 'aware of the pitfalls of simply exporting American investment laws and regulations but, nevertheless, routinely supported US BIT investment promotion' (84–85). They provided convenient cover for State Department investment treaty initiatives that refrained from selling BITs on the

[14] UNCTAD, *supra* note 12, at 128.

[15] *Ibid.*, at 125, 126.

[16] *Ibid.*, at 126.

basis that they would attract new investment. The US government, Kenneth Vandevelde admits, had 'no evidence' that BITs would stimulate US-based inward investment.[17]

Poulsen reflects, by way of conclusion, on the implications of his analysis on the future of the investment law regime. Among the suggestions for developing countries is that they encourage in-house expertise, renegotiate treaty texts, seek alternatives to ICSID via an investment court with tenured judges or return to an emphasis on state-to-state dispute settlement.[18] As for arbitrators, they should not assume that a treaty text is an expression of government will and, instead, may have been the product of 'superficial' negotiations. Arbitrators might want to relax assumptions about the 'specific intent behind the scope of a vague' treaty provision. '[N]egligence could be a legitimate factor', Poulsen advises, in which case, tribunals might have regard to inequality of bargaining power in treaty interpretation (at 193). More controversial, for some, will be the suggestion that developing countries withdraw entirely from the regime, given the 'often blind acceptance of default rules' (at 203). The negative effects of withdrawal may be highly exaggerated. '[I]t is questionable', Poulsen remarks, 'just how harshly international markets would react' (at 202). Investors, after all, have numerous other means available to them to protect themselves from political risk.[19] This is borne out by events subsequent to South Africa abandoning investor–state dispute settlement. According to the minister of trade and industry, Rob Davies, South Africa has been able to attract new investment using a variety of techniques, such as sectoral charters, rather than investment treaty guarantees against expropriation that are inconsistent with South Africa's constitutional settlement.[20]

Poulsen has not exhausted all of the possible candidates that would help to explain (or better understand) the spread of investment treaties in the 1990s. He dismisses 'coercion' as an explanation, yet, as his evidence shows, 'power' had something to do with it (at 12). Might a structural argument, premised on notions of hegemony, with its mix of coercion and consent, help to explain their spread?[21] Might not state theory, with its understanding of the state as fragmented and a site of competition, help to explain these outcomes?[22] Having conducted his series of 'elite interviews', might Poulsen have knitted together, in Bourdieusian fashion, a 'collective biography' of the 'relatively autonomous' field of investment law?[23] Each approach helps to paint a more complete picture of this impressive, if deceptive, achievement by investment lawyers and their allies.[24]

[17] 'U.S. Policy Makers', Vandevelde advises, 'at least in the beginning, always disclaimed investment promotion as a goal of the BITs.' See Vandevelde, 'The BIT Program: A Fifteen-Year Appraisal', 86 *American Society of International Law Proceedings* (1992) 532, at 535.

[18] These will be familiar to readers of UNCTAD's 2015 Investment Report. UNCTAD, *supra* note 12, which Poulsen would not have had available to him while writing his book.

[19] For a discussion of measures that can mitigate political risk, see Schneiderman, 'Investing in Democracy? Political Process and International Investment Law', 60 *University of Toronto Law Journal* (2010) 909.

[20] Presentation at Trading Inequalities: The impact of Preferential Trade and Investment Agreements on Inequality and Development Justice, Civil Society Forum, Nairobi, Kenya, 20 July 2016. For an analysis of the incompatibility of the South African Constitution with investment law disciplines on expropriation, see Schneiderman, 'Investment Rules and the New Constitutionalism: Interlinkages and Disciplinary Effects', 25 *Law and Social Inquiry* (2000) 757.

[21] See, e.g., Cox, *supra* note 9, at 231–232.

[22] See, e.g., B. Jessop, *State Theory: Putting Capitalist States in Their Place* (1990), at 268.

[23] See, e.g., Y. Dezalay and B.G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (2002), at 10.

[24] On the sort of intellectual eclecticism I have in mind, see Max Weber: '[I]t is impossible to conceive of a *description* of even the smallest section of reality that could ever be exhaustive. The causes that have determined any individual event are always *infinite* in number and *infinitely* varied in character.' Weber 'The "Objectivity" of Knowledge in Social Science and Social Policy', in H.H. Bruun and S. Whimster (eds), *Max Weber: Complete Methodological Writings* (2012) 100, at 117.

Poulsen's book is an immense contribution to a more fulsome portrait of investment law. It will become the standard account of why developing states bound themselves to a worldwide web of investor protections and, by implication, why it is a problem that they are so bound. It is now time to rationally consider whether to unbind states from these constitution-like commitments. This might seems like an implausible feat. However, there are paths to adopt alternative strategies (as borne out in South Africa), which are not out of proportion to the benefits to be gained and based upon better information.

David Schneiderman

Professor of Law
University of Toronto
Toronto, ON, Canada
Email: david.schneiderman@utoronto.ca

doi:10.1093/ejil/chx017

Marco Arnone and Leonardo S. Borlini. ***Corruption: Economic Analysis and International Law***. Cheltenham, UK: Edward Elgar Publishing, 2014. Pp. 630. £112.50. ISBN: 9781849802666.

In the last 20 years, there has been a veritable explosion of academic literature on issues of corruption from a variety of disciplines including economics, law, political science and sociology. Our collective academic understanding of corruption has been greatly enriched, and this knowledge has opened new pathways to experimenting with various anti-corruption reform measures. But, in some respects, we are still at a nascent stage in finding effective ways to control corruption globally. The book under review, *Corruption: Economic Analysis and International Law*, by the late Marco Arnone and Leonardo Borlini is an important step in helping to advance our understanding, in particular, of the complex adverse economic effects of corruption and the challenges and limitations of international law in helping to reduce corruption.

Early in their book, the authors introduce us to the reality that corruption is 'a multi-faceted phenomenon' that is so deeply rooted in all modern societies that parts of it are often considered 'normal' (at 1).[1] Along with many other commentators, the authors correctly assert that 'corruption is one of the most serious challenges to modern economic systems and societies' (at 19). But the authors also point out that the claim that corruption is one of the world's most serious challenges is frequently made but seldom illustrated and documented, and, as a result, it lacks power 'to evoke interest because of overuse' (*ibid.*). This book sets out to correct that problem.

While legal experts largely tend to rely on prohibitions and sanctions as primary instruments to combat corruption and, thus, often are 'at a loss in dealing with [corruption's multi-disciplinary] complexity', the authors (an economist and a law professor) decided to investigate corruption by focusing on the relationship between the economic aspects of corruption and the applicable rules of international law (at 8). The book is thus built on the premise that the combination of legal and economic analysis may shed light on the challenges corruption poses to the rule of law and good governance in a democratic society and, at the same time, assist in the assessment as to what extent various international legal instruments may help in the fight against corruption. The authors demonstrate how, over time, the rationale of the anti-corruption movement gradually expanded from safeguarding fair competition to an agenda focused on development and good governance.

1 A good example is the extent to which large-scale political campaign funding is lawful in many countries, although it is an inherently corrupting influence.