CAMBRIDGE JOURNALS

Proof Delivery Form

Leiden Journal of International Law

Date of delivery:

Journal and vol/article ref: LJL 1700050

Number of pages (not including this page): 6

This proof is sent to you on behalf of Cambridge University Press.

Authors are strongly advised to read these proofs thoroughly because any errors missed may appear in the final published paper. This will be your ONLY chance to correct your proof. Once published, either online or in print, no further changes can be made.

These proofs should be returned within four working days of receipt.

How to supply your corrections;

Please insert the corrections directly into the pdf proof using the tools incorporated (Adobe Acrobat Reader will be required to complete this task). Using the cursor select the text for correction, right click and use the most appropriate single tool (i.e. 'Replace', 'Cross out' or 'Add note to text'). Please **do not** use the yellow 'sticky note' function as it does not provide an exact location for the correction. Please be aware that corrections supplied in other formats may not be accepted.

Please return the e-proof to;

gleneagleeditorial@shaw.ca

Important information;

*Any queries raised are listed on the next page. **Do not mark corrections on this page**. The text to which the query refers is indicated on the proof by numbers (e.g., Q1) in the margin. Please be sure to answer these queries in full on the relevant page of the proof.*

Only one set of corrections can be supplied. Additional corrections supplied at a later date will not be accepted.

If corrections are required to a figure other than typographical please resupply the file with the corrections incorporated.

For items written by more than one author, a single marked proof should be supplied in consultation with your co-authors.

For clarity please do not supply explanations of the corrections, only the corrections themselves.

The proof is sent to you for the correction of typographical errors only. Corrections will be carried out at the discretion of the Publisher.

The Publisher reserves the right to charge for corrections deemed as excessive. Any corrections marked which are against journal style will not be incorporated.

Please note that this pdf is for proof checking purposes only. It should not be distributed to third parties and may not represent the final published version.

To avoid delays please ensure that a completed transfer of copyright form has been supplied.

For further information about journals production visit: http://journals.cambridge.org/production_faqs

Author queries:

Q1: The distinction between surnames can be ambiguous, therefore to ensure accurate tagging for indexing purposes online (eg for PubMed entries), please check that the highlighted surnames have been correctly identified, that all names are in the correct order and spelt correctly.

Offprint order form

CAMBRIDGE UNIVERSITY PRESS

PLEASE COMPLETE AND RETURN THIS FORM. WE WILL BE UNABLE TO SEND OFFPRINTS UNLESS ALL SECTIONS HAVE BEEN COMPLETED. THE FORM MUST BE RETURNED WITHIN FIVE DAYS OF RECEIPT.

VAT REG NO. GB 823 8476 09

Leiden Journal of International Law (LJL)

Volume: ☐ *no:* ☐

To purchase offprints

The corresponding author will receive free electronic access to their article. To **purchase** paper offprints please complete this form and send it to **the publisher (address below)**. The form must be returned within five working days of receipt. Please give the address to which your offprints should be sent. They will be despatched by surface mail within one month of publication. For an article by more than one author this form is sent to you as the first named. All offprints should be ordered by you in consultation with your co-authors.

Number of offprints required for purchase: ☐

Email: .....

Offprints to be sent to (print in BLOCK CAPITALS): .....

.....

.....

.....

..... *Post/Zip Code:* .....

Telephone: ..... *Date (dd/mm/yy):* ..... / ..... / .....

Author(s): .....

.....

Article Title: .....

.....

All enquiries about offprints should be addressed to **the publisher** *Journals Production Department, Cambridge University Press, University Printing House, Shaftesbury Road, Cambridge CB28BS, UK*

Charges for offprints (excluding VAT) *Please circle the appropriate charge:*

Number of copies	25	50	100	150	200	per 50 extra
1-4 pages	£41	£73	£111	£153	£197	£41
5-8 pages	£73	£105	£154	£206	£254	£73
9-16 pages	£77	£115	£183	£245	£314	£77
17-24 pages	£83	£129	£211	£294	£385	£83
Each Additional 1-8 pages	£14	£18	£31	£53	£64	£14

Methods of payment

If you live in Belgium, France, Germany, Ireland, Italy, Portugal, Spain or Sweden and are not registered for VAT we are required to charge VAT at the rate applicable in your country of residence. If you live in any other country in the EU and are not registered for VAT you will be charged VAT at the UK rate. If registered, please quote your VAT number, or the VAT number of any agency paying on your behalf if it is registered. *VAT Number:* .....

Payment **must** be included with your order, please tick which method you are using:

☐ Cheques should be made out to Cambridge University Press.

☐ Payment by someone else. Please enclose the official order when returning this form and ensure that when the order is sent it mentions the name of the journal and the article title.

☐ Payment may be made by any credit card bearing the Interbank Symbol.

Card Number: ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

Expiry Date (mm/yy): ..... / ..... *Card Verification Number:* ☐☐☐☐

The card verification number is a 3 digit number printed on the **back** of your **Visa** or **Master card**, it appears after and to the right of your card number. For **American Express** the verification number is 4 digits, and printed on the **front** of your card, after and to the right of your card number.

Signature of card holder: ..... *Amount (Including VAT if appropriate):* £.....

Please advise if address registered with card company is different from above

Leiden Journal of International Law (2017), 00, pp. 1–6

BOOK REVIEW

Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy*, Cambridge University Press, 2015, pp. 225, ISBN 9781107087903, £69.99 (hardback).
doi:10.1017/S0922156517000504

This interesting book addresses an important, complex, and relevant topic. It examines the approach taken (or which should be taken) by investment tribunals when balancing competing interests, such as the protection of foreign investments on the one hand and the host state's autonomy on the other, in disputes concerning state liability for the adoption of measures aimed at promoting public welfare.[1] The book deals with several ways in which decisions of investment tribunals may significantly affect states' regulatory autonomy. In light of this the author suggests that a deferential approach should be taken by arbitrators and that proportionality analysis could be the correct method of review to adopt. In order to assess the extent to which the suggested method has thus far been applied, the book makes a thorough and comprehensive analysis of the case law of investment tribunals. This examination, conducted completely according to a review-based approach, provides an innovative perspective on arbitral practice.

It is worth noting in this regard that it is only in recent times that scholars and, to some extent, international courts have developed a particular interest in the standard of review issue, as a recent comprehensive study on the matter shows.[2] Reference to this notion can be found in the case law of certain international tribunals having a longstanding practice in this regard: for example, the European Court of Human Rights (ECHR) which, starting with *Handyside* in 1976, made use of the proportionality and margin of appreciation doctrines in conducting judicial review;[3]

---

1 For another point of view on the book, cf. the review of C.E. Foster, 'Is Investment Treaty Arbitration "Review"? Reviewing Caroline Henckels' Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy' (Cambridge University Press, 2015), available at www.ssrn.com/abstract=2814893 or at dx.doi.org/10.2139/ssrn.2814893 (accessed 26 October 2017).

2 L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals. Standard of Review and Margin of Appreciation* (2014).

3 On the practice of the ECHR in this regard, cf. Y. Ara, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002); Y. Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', (2006) 16 EJIL 907–40.

or the WTO Dispute Settlement Body,[4] which has relied on these concepts since its first cases. However, it is only in the past few years that other international courts have started to refer to questions related to the standard of review. One illustrative example is the International Court of Justice, which had never applied this concept before the recent *Whaling* case.[5] As regards investment tribunals, although several recent studies[6] analyze their practice, none of them specifically focuses on the issue of standard of review. Caroline Henkels' book, for the first time, addresses the topic in a comprehensive, precise, and analytical way, through a rigorous analysis of an impressive number of cases, listed in the table of arbitral awards and cases, which is in itself a very useful tool for the reader.

The study begins by assuming international investment tribunals have not yet adopted uniform standards of judicial review in determining whether states may legitimately exercise their discretion when taking actions aimed at promoting public welfare. Subsequent analysis of the practice, which provides a broad picture of the case law of different bodies, reveals that investment tribunals, even when entrusted with the same question or with almost identical cases – those sharing similar factual situations and circumstances – often reach very different conclusions. This is partly due to the fact that, as noted by the author, investment treaty provisions regarding state obligations towards foreign investors are typically framed in vague terms that need to be clarified, relying on concepts like 'fair and equitable treatment', 'discrimination', and 'necessary' to promote a particular policy objective. The practice shows that, depending upon the tribunal concerned, there may be a range of possible different meanings attributable to identical treaty provisions and, as suggested by the author, also a variety of possible approaches that a tribunal can take in determining the applicable standard of judicial review. As regards this last point, the study reveals that while tribunals often refer to concepts like 'reasonableness', or 'proportionality' when determining state liability, they do not generally provide any legal reasons for choosing one standard over another and their approaches have frequently been incoherent. This attitude may negatively impact the stability and consistency of investor–state arbitrations, which could prejudice their reliability in the long term.

According to Henckels, in situations, like those described, of epistemic and normative uncertainty, a deferential approach should be preferred to a more intrusive one. This argument finds strong support in the reasoning of the philosopher Robert Alexy.[7] According to Alexy, deference to national authorities has the practical advantage of relying on the decisions of actors that, given their proximity to the state or national polity, have greater institutional competence or expertise on the matters concerned, or are better-placed to assess national public interests and conditions. According to Henckels, investment tribunals, cognisant of the desirability of deference

---

4 On the matter, see M. Oesch, *Standards of Review in WTO Dispute Resolution* (2004); R. Becroft, *The Standard of Review in WTO Dispute Settlement, Critique and Development* (2012).

5 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Merits, Judgment of 31 March 2014, [2014] ICJ Rep. 226.

6 For a recent critical and analytical collection of cases, see, for example, A. Tanzi and F. Cristiani, *International Investment Law and Arbitration. An Introductory Casebook* (2013).

7 R. Alexy, *A Theory of Constitutional Rights* (2002), 388–425.

in certain circumstances, should exercise restraint as regards the determination of issues that fall more appropriately within the province of national authorities.

Informed by the above considerations, the main argument made in the book is that 'investment tribunals should adopt proportionality analysis as the applicable method of review and take an appropriately deferential approach to the standard of review in the determination of regulatory disputes', in order to assess whether an interference with a right or interest is justifiable, or whether the government, when adopting a public measure aimed at protecting imperative public concerns, has overstepped the bounds of its discretion. A proportionality analysis, which implies an assessment of the legitimacy of the goal pursued, an examination of the measure's suitability to achieve the goal, a determination of the necessity of the measure in light of available alternatives, and a balancing of all the competing interests, actually gives due consideration to investors' rights while at the same time promoting deference to host states.[8] The consistent use of this methodology as an institutionalized means of judicial review would have the advantage of promoting transparency and coherence in tribunal practice, thereby guaranteeing greater predictability for states and investors. Moreover, it has the benefit of allowing the intensity of review to vary among proportionality *strictu sensu*, suitability, and the necessity (or last resort) test, depending on the specific circumstances of the case, the weight of the interests, the values concerned and the level of vagueness or uncertainty of the contested clauses. Adjudicators may therefore select the most suitable standard of proportionality review according to the circumstances of the case.

Once proportionality analysis is identified as the methodology that should be adopted by arbitrators, the author examines the different stages, dimensions, and levels of this technique in a comparative way, by looking at the practice of other international tribunals entrusted with deciding cases involving competing public and private interests, such as the ECHR or the WTO Dispute Settlement Body. In practice, these tribunals each applied proportionality standards in determining whether a given derogation was nonetheless admitted, by way of exception, being consistent with the international legal regime in question.

The study then focuses in Chapter 4 on the investment tribunals' different approaches to the method and standard of review in regulatory disputes, with particular emphasis on cases regarding fair and equitable treatment and arbitrary measures clauses, indirect expropriation, non-discrimination, and treaty exceptions. Notwithstanding that arbitrators do not make express reference to the concepts of 'standard of review' or 'method of review', it is the opinion of the author that they implicitly made use of them when determining state liability (or even expressly, as in *Tecmed*, where the Tribunal performed a proportionality analysis to assess if the impugned Mexican government's measures amounted to a compensable

[8] On the different steps and standards of proportionality analysis, see B. Kingsbury and S. Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality', in S. Schill (ed.), *International Investment Law and Comparative Public Law* (2010), 75; and, more recently P. Ranjan, 'Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law: A Critical Appraisal', (2014) 3 *Cambridge Journal of International and Comparative Law* 853.

expropriation).[9] The detailed and comprehensive examination of this aspect of the practice of investment tribunals, included in Chapters 4 and 5 of the book, moreover reveals that in many cases, although still lacking explicit reference to this technique, arbitrators moved toward a proportionality-based methodology (albeit inconsistently and somewhat incoherently), employing different levels of proportionality analysis. Finally, in Chapter 6 the author discusses the circumstances under which the suggested technique could be an appropriate method of review in regulatory disputes. This study accounts for other elements that could influence the desirability of a deferential approach, addressing criticisms of the impact of the proportionality analysis on the remedies afforded to investors and of the strategic approach taken by NAFTA Tribunals in departing from deference in cases like *GAMI* v. *Mexico*[10] where national authorities held that it was permissible for governments to pursue initiatives designed to assist the state's economy.

The author's conclusion on the matter of the application of the standard of review by investor-state arbitral tribunals is a very intriguing one and the desirability of a proportionality analysis is supported by a convincing legal reasoning. What is, in our opinion, controversial is whether assessing state liability in regulatory disputes is always a question of the standard or method of review, or whether it should also be analyzed as a matter of treaty interpretation. Applying standards of review in deciding the consistency of a national measure with an international rule implies that the rule can be derogated from or implemented in different ways when it conflicts with a state's fundamental concerns and therefore, that states enjoy a certain margin of discretion when applying it. This situation may occur, as correctly noted by the author of the book, when an international norm resorts to concepts like 'fair and equitable treatment' and 'necessity' that need to be clarified and when states are expressly entrusted by a norm with a certain level of discretion as to the fulfilment of its international obligations. Provisions having these features are generally included in exceptions or derogation clauses, or in ends-oriented norms. But the question of whether a rule of international investment law belongs to such categories is a matter of treaty interpretation, and, as such, should be regulated by the 1969 Vienna Convention regime.

The author's reasoning also seems to imply that the public interests which enter into the determination of state liability are only those that are relevant at a national level. If so, the problem would in principle be assessing whether national measures are legitimate, comparing the sacrifice imposed on the private interests of investors with the weight and need for protection of the interest concerned, and finally determining whether any less intrusive means of achieving the same result exist. This perspective does not adequately take into account that the public needs invoked by a state to justify the adoption of the contested measure may find support in values and interests that are also relevant at an international level (for example: the

---

[9] See *Técnicas Medioambientales (Tecmed) SA v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Final Award, 29 May 2003.

[10] *GAMI Investments, Inc. v. Mexico*, UNCITRAL (NAFTA), Final Award, 15 November 2004.

protection of the environment, of human rights, or of cultural values) and that these values could be included and taken into consideration in the arbitrators' reasoning.[11]

The reasoning advanced by Henckels seems, on the contrary, to be based on an idea of the investment system as an isolated one and on the conceptualization of investment law as an 'internationalized discipline of public law', where investment arbitration is almost seen as a form of internationalized judicial review of state conduct. Although this perspective could, in principle, justify the use, in analyzing investment tribunals' practice, of concepts and doctrines like standard or method of review, which are drawn from administrative and constitutional national legal systems,[12] the assumption on which it is based is less persuasive, and may be called into question on two grounds. First, it does not adequately take into account the differences between domestic and international perspectives. Deference in a domestic setting occurs in the context of the separation of powers doctrine and other constitutional legal principles which underpin cross-competence deference, whereby the judicial power defers to the executive and legislative powers:

> Deference in an international setting is related to the interpretative powers of adjudicating bodies vis-à-vis the legislative authority of states in their role as masters of the treaties, and the margin of appreciation they are granted in the exercise of their governmental authority.[13]

Second, it takes for granted that the standard of review should *per se* be an appropriate device for determining state liability in regulatory disputes, without adequately accounting for the importance of other legal tools provided by international law, like legal interpretation, particularly systemic interpretation. This last concept suggests that, in cases of normative uncertainty, open-textured concepts included in investment treaties should be read in light of their place within the more general framework of international law, especially where the interests invoked in order to justify public measures which injure investors' claims are also the effect of a state implementing its obligations under international law. Relevant sources may be found, not only in the law on the treatment of aliens, but also in other obligations in the fields of human rights and protection of the environment.[14] When balancing different interests and competing international obligations, investment tribunals

---

[11] For an analysis of elements of international case law and practice offering interpretative tools which may be applied by investment tribunals with a view to best promoting compatibility and balancing of the relevant rules from different international normative regimes, see A. Tanzi, 'On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector', (2012) 11 *The Law and Practice of International Courts and Tribunals* 47–76.

[12] As has been suggested by Caroline E. Foster in her review of the book, the most negative effect of a purely 'review' based thinking is that it 'may reduce international law by taking the focus away from these negotiated balances of interest between sovereigns. In focusing instead on the relationship between the private entity that has experienced damage and the State alleged to have caused this, it externalises broader international law. Principles and rules from flanking subfields of international law are more likely to be perceived as irrelevant, rather than being integrated into tribunals' reasoning', see Foster, *supra* note 1.

[13] For this distinction, cf. A. Asteriti, 'Regulatory Expropriation Claims in International Investment Arbitration: A Bridge Too Far?', in A.K. Bjorklund (ed.), *Yearbook on International Investment Law and Policy* (2012–2013), 451.

[14] In the same vein, see, for example, A. Tanzi, 'Recent Trends in International Investment Arbitration and the Protection of Human Rights in the Public Services Sector', in N. Boschiero et al. (eds.), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (2013), 587–98.

should, in principle, be guided by proportionality considerations. The author of the book suggests as much, although with reference only to balancing private and public interests.[15] Proportionality should, therefore, be applied not only as a judicial review standard, but also as a legal tool to determine whether the public measure has gone too far in law or in fact, in light of all the interests under consideration and the rights and obligations concerned.

This last point deserves further consideration. One of the undeniable merits of the book lies in stimulating debate on the issue and drawing the attention of scholars and arbitrators to the need for arbitrators to adopt a shared legal approach to similar questions. However, the study only focuses on determining a consistent method of review which would permit investment tribunals to take a consistent approach when balancing competing interests. A further criticism that could be raised is that, in conceiving of the investment system as akin to internationalized judicial review of state conduct, it seems to underestimate the relevance of basic principles of international law in the investment tribunals' assessment of relevant interests and the legitimacy of a national measure aimed at protecting them. Although the conclusion that a proportionality-based approach should be followed by arbitrators balancing competing concerns is persuasive, and the thorough and rigorous examination of international practice in this regard is remarkable, it is our opinion that international standards should also be taken into account in deciding international legal disputes and not just when applying the proportionality test. This would have the advantage, rightly identified as fundamental by the author, of promoting coherence, and the long-term benefit of avoiding fragmentation and addressing some of the criticisms of insularity and one-sidedness which have been, with some cause, levelled against investment treaties and investment case law.[16]

*Chiara Ragni**

[15] J. Krommendijk and J. Morijn, '"Proportional" by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration', in P.M. Dupuy, E.U. Petersmann, and F. Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (2009), 422–50.

[16] C. McLachlan, 'Investment Treaties and General International Law', (2008) 57(2) *The International and Comparative Law Quarterly* 361–401.

* Professor of International Law at the University of Milan [chiara.ragni@unimi.it].

Caroline Henckels , Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy, Cambridge University Press, 2015, pp. 225, ISBN 9781107087903, Â£69.99 (hardback). Chiara Ragni. Published: 27 November 2017. by Cambridge University Press (CUP). in Leiden Journal of International Law. Leiden Journal of International Law , Volume 31, pp 202-208; doi:10.1017/s0922156517000504. Publisher Website. Balancing Investment Protection and Regulatory Autonomy. by Caroline Henckels.Â In this study, Caroline Henckels examines how investment tribunals have balanced the competing interests of host states and foreign investors in determining state liability in disputes concerning the exercise of public power. Analyzing the concepts of proportionality and deference in investment tribunals' decision-making in comparative perspective, the book proposes a new methodology for investment tribunals to adopt in regulatory disputes, which combines proportionality analysis with an institutionally sensitive approach to the standard of review.Â Books related to Proportionality and Deference in Investor-State Arbitration. Skip this list. Start by marking â€œProportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomyâ€ as Want to Read: Want to Read savingâ€¦Â In this study, Caroline Henckels examines how investment tribunals have balanced the competing interests of host states and foreign investors in determining state liability in disputes concerning the exercise of public power. Analyzing the concepts of proportionality and deference in investment tribunals' decision-making in comparative perspective, the book proposes a new In this study, Caroline Henckels examines how investment tribunals have balanced the competing interests of host states and foreign investors in determining state liability in disputes concerning the exercise of public p