This is what renders the *Handbook*, in sum, less than what the editors purport to offer in their Introduction. Despite differences in seniority and diversity of locales from which the authors are drawn, the overall tone of the volume ranges between hesitant embrace and enthusiastic hug. The upshot is that the collection does not raise many 'fundamental conceptual questions' or challenge too many 'preconceptions'. There remains some ground for enthusiasm, however, as there are many valuable individual contributions, rendering the parts of this tome greater than the whole of it.

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Aikaterini Florou. ***Contractual Renegotiations and International Investment Arbitration: A Relational Contract Theory Interpretation of Investment Treaties.*** Leiden: Brill, 2020. Pp. 250. €116. ISBN: 9789004407466

There are two realities in the burgeoning international investment law literature that approximate the certainty of death and taxes. The first is that simplicity is a virtue. The second is that scrutiny breeds disappointment. Embodying the virtue of simplicity and the restraint from scrutiny is a doctoral thesis turned monograph by Aikaterini Florou. Florou makes the compelling claim that foreign investor (mis)conduct in relation to the renegotiation of public service concessions, such as water supply or sewage disposal, impacts the determination of whether the host state has violated the ubiquitous investment treaty obligation of fair and equitable treatment (FET). By highlighting and critiquing the inadequacy and inequity of triangulating the FET threshold with sole reference to host state conduct during contractual renegotiations, when such renegotiations are more akin to a 'two-way street' (at 104) of state *and* investor conduct, Florou's monograph is a timely addition to current literature spotlighting investor accountability in the ongoing reform of international investment law.[1]

Florou makes a case for examining investor conduct in FET claims founded on contractual renegotiations in three chapters. In the first chapter, she explains why public service concessions, the subject of her study, are 'relational contracts'. Leaning heavily on the writings of contract law theorist Ian MacNeil and on economics literature, Florou defines 'relational contracts' as contracts that are 'characterized by extreme

[1] Symposium: *Investor Responsibility: The Next Frontier in International Investment Law*, 113 *American Journal of International Law Unbound* (2019) 1.

uncertainty, long term duration, and transaction-specific investments dependent for their profitability and lasting success on the overall (both contractual and extra-contractual) relationship of the parties' (at 57). She then argues that public service concessions, and especially infrastructure concessions, which 'involve partnerships between the public and the private sectors for the achievement of a common objective' (at 69), 'bear all the characteristics of relational contracts, particularly long-termism, inherent incompleteness, idiosyncratic sunk investments, and changing needs of the parties as the project evolves' (at 72). Another characteristic that public service concessions share with 'relational contracts' is their 'frequent renegotiations' (at 72). According to Florou, the assimilation of public service concessions to 'relational contracts' mandates the adoption of 'relational contract theory' and its twin tenets of mutuality and dynamism, whose articulation and development was MacNeil's life's work. This theory, which is referenced in the subtitle of the monograph, advocates viewing contracts as relationships, and not mere transactions, between the parties (at 63). And since empirical data from the World Bank shows that public service concessions are frequently renegotiated, often at the behest of a foreign investor (at 86–88), the entirety of the contracting parties' relationship, including the investor's operations and motivations for initiating a renegotiation (at 82–85), must be considered when the compatibility of a renegotiation process with the host state's treaty obligation to confer FET on protected investors and investments is challenged.

In the second chapter, Florou submits that 'relational contract theory' should guide the interpretation of investment treaties whenever such treaties are invoked by foreign investors challenging host state conduct in relation to the renegotiation of 'relational contracts'. Hoping to convince investment treaty tribunals to view the entire renegotiation process as a matter of legal, rather than purely factual, relevance when determining the existence of a treaty breach, she envisages the introduction of 'relational contract theory' to the interpretive exercise via three 'entry points' (at 96). The first 'entry point' is umbrella clauses, which, when available, typically oblige host states to respect any commitments made to protected investors and investments, and are often invoked by investors whose dispute with the state is contractual in origin (at 106–11). The second 'entry point' is the 'doctrine of legitimate expectations' which, for those who consider this doctrine a discrete component of FET, directs a tribunal to find a denial of FET when the investor's legitimate expectations have been frustrated (at 111–130). The third 'entry point' is the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts (UPICC). The UPICC are an extensive code of conduct designed for application to contracts between private entities. Florou likens the UPICC to general principles of law, which can be applied directly to an investment dispute governed by international law or to rules of international law relevant to the interpretation of the invoked investment treaty (at 135–143). Since umbrella clauses, legitimate expectations, and the UPICC either specifically address or can be easily adapted for soured contractual relations, Florou believes that they share common ground with 'relational contract theory'. This in turn justifies greater sensitivity by investment treaty tribunals towards the

relationship between the parties, and the conduct of the investor, during the renegotiation of 'relational contracts'.

The third chapter is titled 'Case Law Review' and comprises comments on 15 investment treaty awards, 13 of which involved Argentina as a respondent state. This Review reappears in an Appendix, which further condenses and organizes the comments on the 15 awards in table form (at 208–219). Although Florou purports to 'identify potential interpretive patterns' in the awards she selected as the subject of critique and discussion on whether there is express or implied endorsement of 'relational contract theory' in the tribunals' reasoning (at 155), the awards do not appear to be arranged in any chronological, thematic or other discernible order which would facilitate the presentation of the interpretive patterns. While case comments can illuminate an author's take on what was done wrong or right in a particular award or judgment, and have been employed to such effect in some monographs, I have yet to come across an entire chapter of case comments in a monograph. Case comments are included in monographs to illustrate a point or an argument, and are therefore typically tethered to that point or argument in that same chapter. A third and final chapter comprising case comments unaccompanied by any particular point or argument, and presented in no discernible order, resembles an author's belated note to self to discuss the key awards on contractual renegotiation, just in case any were missed in the earlier chapters. Florou's elaboration of the potential traction of 'relational contract theory' in investment treaty arbitral *jurisprudence* in chapter 3 could have been comfortably integrated into chapter 2, where she already gauges the reception of the theory's twin tenets of mutuality and dynamism in the existing *jurisprudence* on, or tangential to, contractual renegotiations (at 104–106, 109–111, 114–118, 120–128, 153). Therefore, since the rationale for a chapter on 'Case Law Review' is unclear, Florou's monograph is reducible to the key argument in chapter 1, namely that public service concessions are 'relational contracts', and the follow-up argument in chapter 2 that investor (mis)conduct during the renegotiation of 'relational contracts' is relevant to the determination of state responsibility for any renegotiation that violates FET.

The simplicity of the overarching normative claim that Florou makes in her monograph, namely that investment treaty tribunals ought to integrate investor (mis)conduct in their determinations on alleged FET violations by states during the renegotiation of public service concessions, is evident. First and foremost, this is a claim that Florou manages to recommend in two substantive chapters, namely chapters 1 and 2. Secondly, the need to consider investor (mis)conduct in FET determinations follows in chapter 2, without further ado, from the author's persuasive assimilation, in chapter 1, of public service concessions to 'relational contracts'. Florou anchors the recognition of 'relational contracts' to the application of 'relational contract theory' which was developed in the context of private contracts. She then seems to advocate, as the subtitle of her monograph implies, the *application* of 'relational contract theory' to the *interpretation* of investment treaties (at 50). However, it is doubtful if the identification of public service concessions with 'relational contracts' generates a role for

'relational contract theory' in investment treaty interpretation. Once the relational nature of public service concessions is established, tribunals will be motivated to examine investor (mis)conduct in addition to state (mis)conduct by the fact that renegotiation is a 'two-way street' (at 104). Recourse to 'relational contract theory' becomes superfluous. Moreover, a proper application of 'relational contract theory' to investment treaties entails the consideration of the relationship between state signatories of the treaty, rather than the relationship between a state signatory and an investor non-signatory. Recourse to 'relational contract theory' becomes inapposite. The utility of 'relational contract theory' as a lens for viewing public service concessions, and as a source of the guiding criteria of mutuality and dynamism when assessing the propriety of the renegotiation process between states and investors, does not transform it into a theory of investment-treaty interpretation. The inherent adaptability of open-textured investment treaty provisions to different categories of protected investments discourages the theorizing of FET interpretation for the renegotiation of public service concessions. This may explain why, despite asserting 'relational contract theory as the proper interpretive method for determining the content of FET' (at 47) and as the 'analytical framework' in the Introduction (at 45), Florou lapses into a straightforward doctrinal review and analysis of arbitral *jurisprudence* on the renegotiation of mostly public service concessions in chapter 2, with all the earlier promises of theorizing the interpretation of FET either forgotten or abandoned.

Third, and lastly, if the successful assimilation of public service concessions to 'relational contracts' is a basis for tribunals to study investor (mis)conduct during the renegotiation process, and if challenges to the renegotiation process are invariably framed as a violation of FET, there is no need to identify other 'entry points' for 'relational contract theory' in chapter 2. Moreover, umbrella clauses and the UPICC are arguably questionable 'entry points'. Umbrella clauses have never, to the best of my knowledge, been invoked to sanction contractual renegotiations which are not per se a breach of contract. The UPICC rarely feature in investment treaty disputes that are contractual in origin (at 141–143), greatly undermining its ability to broker the integration of 'relational contract theory' into FET. As much as 'relational contract theory' is an unlikely vehicle for the turn to investor (mis)conduct in contractual renegotiations, umbrella clauses and the UPICC are unlikely gateways through which such a vehicle might pass. Therefore, over the course of two substantive chapters, we learn, in simple terms, that public service concessions concluded between states and investors are 'relational contracts', whose renegotiation should be assessed in light of both state and investor conduct in order to determine if the state has violated its treaty obligation to provide FET.

Florou's preferred adjective for her compelling normative claim is 'novel' (at 30ff.), rather than 'simple'. She declares the novelty of her arguments repeatedly throughout her monograph. And this is where indulgent readers may wish to refrain from scrutiny, since the surfeit of international investment law literature nuances any declaration of novelty. The broader normative point that public service concessions between investors and states should reflect the reality of a dynamic and evolving relationship, and should be renegotiated when contractual non-performance is occasioned by changed circumstances such as hardship, was thoroughly explored by M. Sornarajah in a

seminal monograph published three decades ago.[2] Florou cites Sornarajah (though not his monograph), but stops short of crediting him as a predecessor for the bigger ideas, such as hardship as a trigger for renegotiation (at 94, 147–153), that she unpacks in her monograph. Similarly, the important clarification that renegotiations of public service concessions usually take place 'outside of the framework of the contract's terms' (at 78) appears to track the language used by Jeswald Salacuse when differentiating intra-contractual from extra-contractual renegotiations and the implications of each type.[3] And yet, Florou does not cite Salacuse, who has written one of the more recent and comprehensive monographs examining contractual renegotiations, at all. That said, Florou is probably the first person to publish a monograph that relies specifically on 'relational contract theory' to encourage investment treaty tribunals to consider investor (mis)conduct when the renegotiation process for public service concessions is challenged for violating FET. So her emphatic declaration of novelty stands, albeit in a very specific and limited way.

Indulgent readers may also wish to refrain from scrutinizing Florou's faith in the current system of investment treaty arbitration as a sound 'governance structure' for investor–state relations (at 46, 61). Florou hopes that the widespread adoption of 'relational contract theory' by treaty tribunals tasked with assessing the compliance of a contractual renegotiation process with FET will disincentivize opportunistic behaviour by investors (at 124). She makes the unsettling observation that a large number of public service concessions in Latin America and the Caribbean are renegotiated shortly after they are awarded, most likely on the initiative of investors who 'low-ball[ed]' the state during open tenders for the concessions (at 80–82). And yet, among the dozens of arbitral awards addressing the compatibility of the renegotiation process with FET, fewer than a handful looked at investor (mis)conduct during the renegotiation process.[4] If no serious objection can be raised to the assimilation of public service concessions to 'relational contracts', and if investor (mis)conduct in the renegotiation of 'relational contracts' is pertinent to the determination of a state's legal liability for an FET violation, then existing arbitral *jurisprudence*, which largely reflects the choice of disputing parties to appoint arbitrators who will rule in their favour than on what is right, signals that the current 'governance structure' is broken. Without investigating and interrogating the structural and substantive biases in investment treaties, and the considerations steering arbitrator appointments to investment treaty tribunals, both of which played a decisive role in the marginalization of investor (mis)conduct in FET content determination, Florou may have misjudged how much the current 'governance structure' needs to change in order for the prevailing mindset on FET content to change.

[2] M. Sornarajah, *The Problem of State Contracts* (1990), at 429–442.

[3] J. Salacuse, *The Three Laws of International Investment* (2013), at 281–288 (Part III, comprising chapters 8–12, is titled 'The Contractual Legal Framework').

[4] According to Florou, these awards are *Total S.A. v. Argentine Republic – Decision on Liability*, 27 December 2010, ICSID Case No. ARB/04/1, ¶¶ 172–176; *El Paso Energy International Company v. The Argentine Republic – Award*, 31 October 2011, ICSID Case No. ARB/03/15, ¶¶ 187–189; and *Ampal American Israel Corporation and others v. Arab Republic of Egypt – Decision on Liability and Heads of Loss*, 21 February 2017, ICSID Case No. ARB/12/11, ¶¶ 105.

Florou is surely right that investor opportunism, when tendering for public service concessions with the intent of renegotiating more favourable terms, matters in the determination of a FET claim launched against the state when renegotiations fail. She is also right that one way to curb investor opportunism is by recognizing the relational nature of public service concessions, where the propriety of one contracting party's conduct cannot be understood in isolation from the other contracting party's conduct. But Florou rests her case before showing us how the current system of investment treaty arbitration and all its deficiencies allow her ideas to endure. And I rest mine before I desecrate the virtue of simplicity with excessive scrutiny.

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1 Introduction

Investment treaties and investor–state arbitration have both been subject to sustained criticism and calls for reform in recent years. Critics have called, inter alia, for a 'rebalancing' of treaties to address perceived asymmetries between states and investors,[1] and for a reconnection of investment law to other bodies of law.[2] As reform discussions have matured, analysis of how to address these asymmetries and fragmentations in investment law has become increasingly nuanced. Contributing to this line of scholarship, Martin Jarrett's book tackles difficult questions concerning how an investor's 'faultworthy' conduct should impact the analysis of a host state's responsibility for internationally wrongful conduct under an investment treaty. Jarrett's book introduces and examines three defences to investor–state arbitration claims, which are each based on an investor's contribution to investment damage and/or an investor's misconduct

[1] See, e.g., Cotula and B. Guven, 'Investor–State Arbitration: An Opportunity for Real Reform?', International Institute for Environment and Development Blog (7 December 2019), available at www.iied.org/investor-state-arbitration-opportunity-for-real-reform (referring to investment protection as a 'one-way street'); R. Peels et al., 'Corporate Social Responsibility in International Trade and Investment Agreements: Implications for States, Business, and Workers' (ILO Research Paper No. 13, 2016).

[2] See, e.g., Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law', in P.-M. Dupuy, E.-U. Petersmann and F. Francioni (eds), *Human Rights in International Investment Law and Arbitration* (2009) 45.