American Branch *of the International Law Association*

ABILA Newsletter

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MESSAGE FROM THE PRESIDENT:

Given the length of this issue of the Newsletter, the President will be brief. Principally, I want to thank all of those of you who have participated in the work of the American Branch over the past year — our Executive Committee, the chairs of International Law Weekend, the editor of our Proceedings, and all of those of you who put on panels at either International Law Weekend or International Law Weekend — West. We hope to continue and expand the work you have been doing.

This issue lists a number of upcoming events the Branch is planning. Please review them and contact the organizing committees, if you would like to participate.

Lucy Martinez of Freshfields will take over for David P. Stewart, who has done an extraordinary job, as Book review Editor. Her contact information is Freshfields Bruckhaus Deringer LLP, 520 Madison Avenue, 34th floor, New York, NY 10022; lucy.Martinez@Freshfields.com. Please contact her if you would like to write a review.

This year for the first time we are going to try a small experiment with dues. Enclosed herewith is a dues envelope, for those of you who do not like to pay electronically or who do not like to fill out your own envelopes. We are making it as easy as possible and hope that you get your dues in early.

Charles D. Siegal

INTERNATIONAL LAW WEEKEND MIDWEST PLANNING COMMITTEE AND/OR HOST COMMITTEE CHICAGO, ILLINOIS FEBRUARY 15-16, 2008

Persons interested in serving on the planning committee or the host committee for "International Law Weekend Midwest" are invited to contact Professor Mark E. Wojcik at The John Marshall Law School in Chicago. Planning committee and host committee meetings will be held in Chicago on Friday, February 15, and on Saturday, February 16, 2008, during the "Super Midwest Regional" of the Philip C. Jessup International Law Moot Court Competition, which will be co-hosted by The John Marshall Law School and the Chicago Bar Association. To volunteer for the planning committee or host committee of the International Law Weekend Midwest, please send an email message with your contact information to Prof. Mark E. Wojcik, at 7wojcik@jmls.edu.

INTERNATIONAL LAW WEEKEND 2008: CALL FOR PANEL PROPOSALS

The American Branch will again hold its annual International Law Weekend in New York, featuring numerous panels, a distinguished speaker, receptions, and the Branch's annual meeting. International Law Weekend 2008 will take place on October 16-18, 2008, at the Association of the Bar of the City of New York. The Weekend's overall theme is "The United States and International Law: Legal Traditions and Future Possibilities." Co-chairs of ILW 2008 are Catherine Amirfar of Debevoise Plimpton (cmamirfar@debevoise.com), Katarina Grenfell of the United Nations Office of Legal Affairs (grenfell@un.org), and John Noyes of California Western School of Law (jnoyes@cwsl.edu). The co-chairs invite proposals for panels for ILW 2008. Please submit proposals to the co-chairs no later than Friday, April 25, 2008. Proposals should be geared for 90-minute panels and should include a formal title, a brief description of the panel (no more than 75 words), and the names, titles, and affiliations of the panel chair and three or four possible speakers.

FIFTH ANNUAL INTERNATIONAL LAW WEEKEND-WEST SALEM, OREGON MARCH 6-7, 2009

The fifth International Law Weekend-West will be hosted by the Willamette University College of Law. ILW-West offers a particularly convenient opportunity every two years for our western members to convene for panel discussions and other activities, but all members are welcome to attend the conference. Further details will appear in later Newsletters and versions at our website. If you would like to organize a panel, please

send a short proposal to the Chair of our Executive Committee, Prof. James Nafziger, Willamette University College of Law, 245 Winter St. S.E., Salem, OR 97301, or by e-mail to jnafzige@willamette.edu.

REPORT OF THE UNITED NATIONS OBSERVER

LAW OF THE SEA

By: Martin Glassner

Background

The 17th annual Meeting of States Parties to the 1982 United Nations Convention on the Law of the Sea (MSP) was held at UN Headquarters in New York on 14 and 18-22 June 2007. The Meeting functions as the administering agency of the Convention, which established three institutions: the International Seabed Authority, the International Tribunal for the Law of the Sea (ITLOS) and the Commission on the Limits of the Continental Shelf.

The Law of the Sea "package" includes an addition to the Convention itself, the Agreement Relating to the Implementation of Part XI of the Convention (on seabed mining) and the Agreement for the Implementation of the Provisions of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Currently, 155 states and other entities are parties to one or more of these three instruments.

The MSP receives reports from the three institutions and debates and acts upon budgetary matters, elects members of the institutions and considers other matters which come within its purview. This year, attention was focused chiefly on the Continental Shelf Commission.

The purpose of the Commission on the Limits of the Continental Shelf is to facilitate implementation of the Convention with respect to the delineation of the outer limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Under the Convention, a coastal State establishes the outer limits of its continental shelf where it extends beyond 200 miles on the basis of the Commission's recommendations, which are based on the data submitted by those States concerning their claims. (UN press release SEA/1885, 15 June 2007)

Of the 21 experts who will serve in their personal capacities as commissioners for 5-year terms beginning in June 2007, 20 were elected in early voting through a complex procedure based on the homelands of the candidates. The last commissioner was elected after seven more ballots on the following day. It is already evident that the commissioners and the staffs of the Commission and its five specialized sub commissions will have very heavy workloads. In fact, the Commission's workload was the major issue of the 17th Meeting of States Parties.

The Commission's Workload

In response to a request by the 16th MSP, the United Nations Secretariat prepared a detailed study of the workload issue (SPLOS/157, 30 April 2007), including a series of recommendations for dealing with it. This document served as the basis for a comprehensive decision by the 17th Meeting on the workload question. (SPLOS/162, 26 June 2007) A few highlights:

1. The Division of Ocean Affairs and Law of the Sea (DOALOS) of the United Nations Secretariat serves as the secretariat of the Commission.

2. With reference to article 4 of Annex II of the Law of the Sea Convention, States Parties are not yet agreed on the meaning of the requirement that a State wishing to establish the outer limits of its continental shelf must do so "as soon as possible but in any case within 10 years of the entry into force of this Convention for that State."

3. States Parties are urged to contribute to the two trust funds established in October 2000 and December 2003 to assist developing countries in preparing submissions to the Commission and to meet their costs of participation in the work of the Commission.

4. "...article 77 of the Convention provides that rights of the coastal States over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.. . "

Looking Ahead

At this point, it appears that the 18th Meeting of States Parties in 2008 will look very much like the one recently concluded. Here are some thoughts (NOT predictions!) on next year's agenda:

1. Unless something dramatic and unexpected emerges, the workload of the Commission is likely to dominate the discussions, with the spectre of the Russian expedition to the Arctic Ocean seabed in August 2007 lurking in the background.

2. The allocation of seats on the Commission and ITLOS is likely to be influenced by factors extraneous to the debate on the issue next year, especially if the United States at last becomes a party to the Convention. According to a well informed official of the UN Secretariat,

Namibia decided two years ago that representation should be geographic, even down to the level of secretaries, and regional groups, led by Singapore and Tunisia, began working on this matter in March of 2007. They are taking the matter very seriously. It will be inscribed in the official agenda of the 2008 Meeting.

3. There may well be serious challenges to the very concept of a "deadline" for submitting claims to the Commission despite the seemingly explicit wording of article 4 of Annex II to the 1982 Convention. The argument is already being developed that access to the continental shelf is an inherent right of a coastal State and independent of any treaty.

4. Even if pressures are exerted to redefine certain terms or to obtain special exemptions or to delay implementation of Annex 11, the Russian initiative in the Arctic will probably generate at least a minor shakeup in those provisions of the Law of the Sea that deal with the seabed and continental shelf.

5. If DOALOS is to serve as the secretariat of the Meeting of States Parties and provide technical assistance to member States, as outlined in SPLOS/157 and elaborated in the information bulletin "Strengthening of the Secretariat capacities to service the Commission on the Limits of the Continental Shelf," 19 June 2007, it must obtain more of nearly everything needed to carry out its responsibilities. This includes staff, hardware, office equipment and software, all mundane but essential items. There will be quite simply a massive amount of material to process.

Regardless of developments in the Law of the Sea in the next 24 months, May 2009 is likely to be very interesting.

AMERICAN BRANCH COMMITTEE REPORTS

INTERNATIONAL HUMAN RIGHTS LAW COMMITTEE SIENA MEETING OF THE ILA

The ILA Committee met at Certosa di Pontignano in Siena from November 9-11, 2007, thanks to Professor Riccardo Pisillo Mazzeschi, who facilitated this beautiful venue outside Siena. The meeting discussed the papers prepared on the subject, “General International Law and International Human Rights Law” and refined the focus. Originally, the Committee started with a fairly open approach to address the “relationship” between human rights law and (other parts of) public international law. At a later stage the discussion focused on the “humanization” of general international law by international human rights law. In Siena, the Committee agreed to drop, or at least reduce, the use of the term “humanization” and instead, focus on the “impact” of international human rights law on “general” international law.

The papers discussed at the Siena meeting were the following:

Martin Scheinin, “Human Rights Treaties and the Vienna Convention on the Law of Treaties”;

Jonas Christofferson, “ECHR, --A Special Caseof Treaty Interpretation?”;

Ineke Boerefijn, “Reservations to Human Rights Treaties”;
Christina Cerna, “The Right to Consular Notification as a Human Right”;

Thilo Rensmann, “State Immunity and Human Rights”;

Elena Sciso, “Article 103 of the UN Charter and Fundamental Human Rights before the community Judge”;

Jan Wouters and Cedric Ryngaert, “The Impact of Human Rights and International Humanitarian Law on the Process of the Formation of Customary International Law”;

Mahulena Hofmann, “The Relationship between General International Law and Human Rights Law in the Area of its Domestic Enforcement”;

Riccardo Pisillo Mazzeschi, “Individual Rights and Human Rights: Their Impact on Diplomatic Protection”;

Robert McCorquodale, “State Responsibility and Human Rights”;

Menno Kamminga, “The Impact of International Human Rights Law on General International Law”.

Oxford University Press is interested in publishing the book and negotiations have been carried out by Martin Scheinin and Menno Kamminga, the President and Rapporteur of the Committee, respectively. The idea is that the book would be published before the Brazil Conference in August so that it would be available there, but of course, that depends on the timely submission of all the chapters.

UPCOMING CONFERENCES

GLOBAL LEGAL STUDIES CONFERENCE MONTERREY, MEXICO FEBRUARY 28-MARCH 1, 2008

The third Global Legal Skills Conference will be held

February 28 to March 1, 2008 in Monterrey, Mexico at the Facultad Libre de Derecho de Monterrey. The first two global skills conferences were held at The John Marshall Law School in Chicago in 2005 and 2007. Information about the conference is available at www.fldm.edu.mx. In 2009, the Global Legal Skills Conference will return to the United States, and is planned to be held at Georgetown University. Information is also available from the Conference Co-Chair, Prof. Mark E. Wojcik, at 7wojcik@jmls.edu.

10TH INTERNATIONAL WILDLIFE LAW CONFERENCE GRANADA, SPAIN MARCH 6-7, 2008

The Environmental Law Committee will co-sponsor the 10th International Wildlife Law Conference, which takes place on March 6 and 7, 2008 in Granada, Spain. There will be panels on marine protected areas, climate change and species, operationalization of the precautionary principle, and cetacean conversation regimes. The program and registration materials can be found at http://www.law.stetson.edu/conferences/IWLC/. Please contact William Burns at williamcgburns@comcast.net for additional details.

AMERICAN BRANCH COSPONSORS SERIES ON INTERNATIONAL HUMANITARIAN LAW

The ABILA is cosponsoring a speaker series on "The Future of International Humanitarian Law." The speakers look at the roles of the military, non-governmental organizations, international criminal tribunals, the U.S. government's civilian leaders, and private contractors. The series is being held at the University of California, San Diego (UCSD) and at California Western School of Law in San Diego (CWSL). Speakers to date have included: Lt. Cmdr. Charles Swift, now of Emory University Law School; Prof. Harvey Rishikof of the National Defense University; and Gabor Rona, the international legal director of Human Rights First. Upcoming speakers include: Ambassador David Scheffer, now of Northwestern University Law School (Feb. 21, 2008, at UCSD); Prof. Laura Dickinson of the University of Connecticut School of Law (Mar. 27, 2008, at CWSL); and Prof. Diane Amann of the University of California, Davis School of Law (Apr. 24, 2008, at UCSD). For more information, see the American Branch's website.

BOOK REVIEWS

The Making of International Law
Alan Boyle and Christine Chinkin
Oxford University Press, 2007
Pp. 288 (Paperback. $50.00)
ISBN-10: 0199213798 ISBN-13: 978-0199213795

*Reviewed by Prof. Edward Gordon

The Making of International Law is an introduction to the "principal processes and law-making tools through which contemporary international law is made." More than that, it is about "how international law-making responds to the demands of international relations at the beginning of the 21st century."

What these phrases signal is that this is not just a descriptive primer, it is also a determined call to action to individuals who do not represent governments. Both in order of presentation and in the urging itself, pride of place is given to the role played by nonstate actors and, correspondingly, to "soft law." Processes internal to states are scarcely mentioned; traditional processes by which "hard law" is generated and evolve are relegated to second-class status. By implication, authenticity belongs to whoever most actively pursues it - and now is the time to do so.

A short opening section contains a succinct review of theories of international law-making. Its focus is upon contemporary theories, especially ones that emphasize the perceived legitimacy at any given time of contending ways of making international law - in preference, that is, to older, positivist, models that emphasize the legitimacy of consensus among and commitments by states, acting as such. The section that follows identifies, and explains the role of, "participants" in international law-making - this term, too, being a Lasswellian category broad and nonjudgmental enough to be amenable to portraying nonstate actors and their strategies as no less legitimate than those of representatives of states.

Only with this priority established is attention given to the part played by the UN, other intergovernmental organizations and diplomatic conferences in international law-making; to codification (e.g., by the ILC, ICRC and UNIDROIT); and to treaties and Security Council resolutions. The work and - by implication at least - the importance of international tribunals is limned last and least.

In pedagogical terms, emphasizing the role of nonstate actors has the virtue of making it easier for students to identify with international law than they can when the subject is presented solely as the product of state action and attitudes. I am not certain, though, that this consideration has weighed heavily in the authors' game plan. If

I infer correctly, their more imminent motivation is an animus against what they describe as "claims of American exceptionalism, its unique constitutional order and of its global responsibilities" that are raised in such a way as "to weaken the legitimacy of the international system itself."

Even those who share this perspective may find themselves uncomfortable with the authors' tendency to gloss over the implications for the legitimacy of the international system of ascribing so prominent a role to an unelected elite who, in practice, are every bit as self-serving as governments are - more so, in fact, since they are not responsible to a broadly-based political constituency. Even when, as here, this approach bears the imprimatur of two respected scholars, it amounts to a preference for old-fashioned lobbying by special interest groups and for governance by nearly anonymous activists and organizations who not only lack any democratic basis for their power, but who, in addition, are seldom inclined, or well-positioned, to bear responsibility for implementing the norms they promote.

These objections aside, the authors' descriptions and insights are helpful as counterpoints to more conventional treatments. Without such a balance, however, they are apt to mislead persons not already familiar with the subject as to the law-making regime currently in place.

International Law
Vaughan Lowe
Oxford University Press 2007
Pp. 250 (Paperback $36.00)
ISBN-10: 0199268843 ISBN-13: 978-0199268849

* Reviewed by Prof. Edward Gordon

Vaughn Lowe's International Law lays claim to a right of succession to James T. Brierly's The Law of Nations. For over half a century, beginning with its first edition in 1928, "Brierly" was the most popular English language introduction to international law. Its popularity owed a great deal to its style, which made the somewhat other-worldly subject of international law easy for students to grasp: clear, precise de-

clarative sentences, unencumbered by footnotes, personal asides and commentary, as well as – or so its critics contended – not so much as a shred of subtlety, self-doubt or political realism.

In contrast, Lowe's text is realistic, perhaps excessively so for a work aimed principally at students, and it is fairly riddled with his own take on political events and policies. His style of writing differs from Brierly's, too - deliberately so, in that he explicitly rejects a "lapidary style of literary writing" - that is, Brierly's - in favor of "a first-person narrative" which, truth to tell, is more than a tad self-indulgent, occasionally even slipping over the unprotected border into neighboring glib.

Brierly's order of presentation was conventional for positivist treatises of its day. International law was portrayed as a more or less stable feature of international life and sovereign states were what the system was all about. Its first main section dealt with the sources – or what others called evidence – of international law. Almost half the book was devoted to territorial and other aspects of national jurisdiction. Dispute settlement was accorded secondary importance, with legal constraints on national resort to armed force accorded only a dozen or so pages, even in the sixth edition, edited by Sir Humphrey Waldock, published in 1963.

The framework of Lowe's International Law is not altogether dissimilar. In substance, though, it is from another universe. After a brief introduction, it sets forth and assigns priority among certain principles it presents as fundamental to the international legal order. Prominent among these are ones that forbid the use of force by states, require them to cooperate with the rest of the international community and refrain from intervening in the affairs of other states, as well as to respect, inter alia, the right of self-determination of peoples. Subject to these basic norms, the jurisdiction of states is presented in an order befitting Brierly, except that state responsibility and the enforcement of international norms are given conspicuously short shrift. Concluding chapters are devoted to specific subjects that drew little attention from Brierly: that is, international institutions and emerging principles relating to the global economy and environment, respectively.

The final chapter, which appears to have been an afterthought, but which perhaps inadvertently reflects misgivings about what were earlier presented as fundamental norms, deals with the use of force by states. What catches my eye is Lowe's acknowledgement that the use of force represents "one body of rules among many which regulate relations between States". I have no quarrel with this assessment, except to wonder why it makes its appearance so late in the book and how one can flatteringly square it with the needlessly sarcastic observation, early in the book, that "the tendency to suppose that states only obey rules of international law when they choose, and that the hard calculations of realpolitik give little weight to the law" is "particularly widespread among those whose vision is unsullied by any knowledge or experience in the matter [and] is hopelessly wrong."

To me, the most unwelcome departure from Brierly's style lies in Lowe's fondness for editorial asides, which affect not only the light in which specific state actions are

presented, but also the choice of which actions to mention at all. Even in Brierly's third edition, published during Britain's do-or-die war with Germany, and its fourth, which appeared in the late forties just as an iron curtain was descending over Europe, Brierly kept his own opinions of certain states to himself. Lowe does not. At very least, I will be surprised if his views do not strike readers on this side of the Atlantic as chauvinistic. Britain, suffice to say, is never, never, never presented in a disagreeable light.

The United States, on the other hand, is. I mean, is it ever. Not only is the assertiveness of the Bush Administration given what-for, but even what I had supposed to be the good guys, like Presidents Truman and Carter, get the back of Lowe's hand. In truth, the presentation is so one-sided, and its tone so self-righteous, one could be forgiven for feeling that they are listening to Mary Poppins after her all-nighter on Varadero Beach with Che.

Even when I was a graduate student in England in the early 1960s, gratuitous digs at America's power and influence were never much farther away than the next raindrop. In those days, they could be dismissed as leftover resentment of the twentieth century's unreasonable realignment of political power and status. They fell out of fashion for a while, when Margaret Thatcher gave Oxbridge a good swift kick in the entitlements. If they are back in vogue, they are yet no more professionally becoming now than they were then. They're no more effective, either: no matter how often it is repeated, meow is just not that persuasive.

Conflict of Laws in a Globalized World
Eckhart Gottschalk, Ralf Michaels, Giesela Rühl, Jan von Hein, eds.
Cambridge Univ. Press 2007
318 pp. $85.00
ISBN 978-0-521-87130-3

* Reviewed by David P. Stewart

The late Arthur von Mehren's many contributions to the development and harmonization of private international law are rightly and richly extolled in this collection of essays by his former Story Fellows at the Harvard Law School. Admiration for the man and his life's work shines throughout the volume. Not only was he "a great scholar of the old school" (as one contributor phrases it), but (in the words of another) he "helped to build strong and enduring bridges between legal systems" and indeed "personified comparative law in the United States."

One can imagine how proud Prof. von Mehren would have been of the ten substantive essays presented here, which are grouped under two headings: "Transnational Litigation and Judicial Cooperation in Civil and Commercial Matters" and "Choice of Law in Transatlantic Relationships."

The first offers a Hohfeldian reconception of the issues involved in the failed Hague Judgments Convention, suggesting that lack of analytical clarity on the part of negotiators may have contributed to its failure. It argues that the traditional categorization of such conventions as single, double or "mixed" should be replaced by a new typology articulating required-permitted-excluded bases of jurisdiction, both direct and indirect. A companion essay addresses the Choice of Court Agreements Convention which emerged in 2005 from the failure of the larger negotiations. Despite drawing some negative comparisons to EC Regulation 44/2001, this descriptive piece is cautiously optimistic about the Convention's prospects ("[it] may very well be a helpful tool in promoting legal certainty and predictability"). Regrettably, this essay was written before the final report of the Hague diplomatic conference became available.

There follows a short but theoretical exploration of the means for dealing parallel proceedings, in particular through application of the *lis (alibi) pendens* approach reflected in Art. 27 of the EC Regulation to cases involving "negative declaratory-judgment actions," for example under § 256 of the German *Zivilprozessordnung* (ZPO) as amended. Prof. von Mehren, it is noted, strongly advocated the virtues of the "displacement rule" reflected in this provision as a method of resolving international controversies.

The fourth essay discusses refusals of service of process under the Hague Service Convention, in particular issues arising from the *Bertlesmann* (Napster) litigation (2003) and the *Boehringer* case (2005) in German courts, concluding that "refusing service of process in transatlantic litigation is a completely useless strategy for German defendants." A discussion of collective litigation under the 2005 German act on model proceedings in capital market disputes (*Kapitalanleger-Musterverfahrensgesetz*) concludes the first part of the book.

The remaining five contributions generally concern comparative and economic dimensions of party autonomy in international contracts. In the first, a case is made (with the help of economic theory) for the proposition that, after years of vigorous debate, American and European concepts of party autonomy have converged in recent years (viz. Art. 3(1) of the Rome Convention, Restatement (Second) Conflicts of Laws § 187, and UCC § 1-105) and in fact "the trend of convergence [now] reaches business reality." The next argues that "the *lex loci protectionis* is a pertinent choice-of-law approach for intel-

lectual property rights" but requires "an escape clause to the country with the closest connection to the infringement dispute."
Extraterritorial application of U.S. antitrust law and the Supreme Court's 2004 *Empagran* decision offer a platform for a critical treatment of the notion of prescriptive comity. Arguing that the Court "falsely identified [this doctrine] as public international law," the essay suggests that in the end "only a truly global antitrust regime can effectively deal with international competition restraints."

The penultimate contribution addresses the choice of law process in international commercial arbitration, focusing on the issue of mandatory elements in light of Gunther Teubner's theory of "autopoietic law" and Hans Kelsen's General Theory of Law and State. The final essay uses the *In re Air Crash at Belle Harbor* decision (SDNY, 2006 WL 1288298) to examine the choice of law rules which arise with respect to a foreign entity's liability for punitive damages in U.S. courts, concluding that the "decision's emphasis on dépeçage to identify, distinguish, and refine issues justly highlights one instrument apt to carefully develop criteria that might ultimately contribute to the mitigation of international judicial conflicts."

These are well-written and thoughtful essays which specialists in the conflicts and private international law fields will find both interesting and useful.

Arbitration of International Business Disputes: Studies in Law and Practice
By William W. Park
Oxford Univ. Press 2006
776 pp. $260
ISBN 978-0-19-928690-4

* Reviewed by David P. Stewart

Few write about international commercial arbitration with the insight and clarity of Prof. "Rusty" Park of Boston University. This collection of twenty-five previously published essays (all revised and updated) was completed in late 2005. A large volume, it examines principles, practices and recent developments in cross-border business dispute settlement mechanisms with wit and skill. It's a rich contribution to understanding this rapidly evolving field, not a book to be read at one sitting but anyone practicing or professing in the field will want to work through it.

The introductory essay, written especially for this book, builds on three "case studies in change" to highlight trends and themes that repeat throughout the book. The first describes the emergence of a "laissez-faire model of judicial review," under which the purpose of court supervision and oversight is limited to preserving the basic procedural integrity of the arbitral process. At various points in the book, Park endorses a limited application of *lex loci arbitri* but is doubtful about entirely delocalized procedures and denationalized awards, seeing judicial scrutiny of awards as a safeguard against bias, arbitrariness, and incompetence. At the same time, he is critical of the U.S. rule permitting courts to vacate

awards for "manifest disregard of the law" and suggests the Federal Arbitration Act needs to be amended to provide greater clarity in international commercial arbitration.

The second case study concerns the emergence of new forms of arbitration under free trade and investment agreements, including NAFTA, ICSID and bilateral investment treaties. These pose new challenges, since "[t]he private flavor of arbitration begins to erode when states relinquish sovereignty to adjudicate matters directly implicating vital societal interests." He rightly notes that the trend toward "transparency" has both costs and benefits. Moreover, while these new processes can play an important role in safeguarding cross-border investment, political reaction to adverse decisions can alter perceptions of their usefulness. In this regard, Park comments dryly, "[c]hanging hats from a capital exporter's fedora to a host state's sombrero, the United States has come to a new appreciation of the predicaments experienced by capital importers."

The third focuses on guidelines for the actual conduct of arbitral proceedings, with particular emphasis on the developing "soft law" governing how evidence and argument are presented and how conflicts of interest are resolved. Managing these issues, he observes, "implicates a delicate counterpoise between efficiency and fairness." One illustration of the difficulties in achieving the right balance was the debate over interim measures of protection and *ex parte* "preliminary orders" in the context of the recent amendments to UNCITRAL's Model Law on Arbitration. Ultimately, Park notes, "the tension between judicialization and flexibility" inevitably comes back to the necessity of giving effect to the expectation of the parties that their disputes will be settled in an orderly and "reasonably foreseeable" manner.

Park is a strong proponent of arbitration as an institution and a champion of party autonomy, neutrality and predictability as an efficient and effective element of cross-border commerce. Still, he readily agrees that it may not be as appropriate for certain kinds of cases (consumer and employment disputes raise different considerations than typical transnational commercial contracts), and he notes that acceptance of the new (2005) Hague Convention on exclusive choice of court agreements "would constitute a significant step toward harmonizing the legal

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