



ABILA Newsletter

Issue No. 77

ILA—Founded 1873

February 2007

Message from the President:

This issue contains several reports relating to our parent organization, the International Law Association, including a discussion of its governance and a report on the meeting at the Toronto Conference of the Committee on the International Law of Foreign Investments, prepared by Professor Andrea Bjorklund. We also have reviews recent books on environmental issues and on *jus cogens*. We lead off with a brief note from our new Co-Directors of Study, Professor Philip Moremen and Professor Valerie Epps.

I am very pleased to report that International **Law Weekend—West** took place on February 2 and 3, at Santa Clara University Law School. There were a day and a half extraordinarily good panels and a number of other events. We thank the Committee, led by Professor Beth Van Schaack, and thank the law school for its sponsorship and support.

We will hold **International Law Weekend** October 25-27 in New York at the House of the Association of the Bar of the City of New York. The theme of the event is "Toward A New Vision Of International Law." Professors Hari Osofsky and Rebecca Bratspies, and Patrick Reed and Nancy Thevenin are the co-chairs. They are in the process of assembling panels, so I encourage you to contact them if you have ideas.

At our October Executive Committee meeting, Professor John Noyes was elected President Elect. Joining the Executive Committee are Houston Putnam Lowry (our long-time webmaster), and Professors Paul Dubinsky, Louise Ellen Teitz and Peter Yu. Thanks for years of service to Executive Committee members who have recently stepped down, Professors Joel Tractman, Roger Alford and Lee Boyd. And finally, another thanks to Professor Alford and Professor Leila Sadat, for their work as Co-Directors of Studies.

Finally, we have begun to communicate more electronically. We are sending Newsletters and dues messages via e-mail. We have also made it possible to join or to renew memberships on-line at our website. We hope those changes are for the better and would appreciate your feedback. *They do, of course, highlight the need to be sure we have your current e-mail address.*

Charles D. Siegal

Note from the Co-Directors of Studies

Philip Moremen and Valerie Epps

The job of the new ABILA Co-Directors of studies, Valerie Epps (Suffolk University Law School, vepps@suffolk.edu) and Philip Moremen (Seton Hall University, moremeph@shu.edu) is to organize and energize the work of the Branch Committees. The distinctive feature of the International Law Association and the American Branch is that much of their work is carried out by Committees who seek to produce innovative written reports in areas of international law with a view to elucidating a part of the law that requires more attention, or is obscure, or which can in some way contribute to advancing the role of international law in the world community. Committee reports have often been influential in aiding understanding of the law or in contributing to its development. In addition to preparing reports, some American Branch committees have prepared commentary for consideration by policymakers, or have prepared amicus briefs for filing in significant cases. Branch committees have also been involved in developing panels for International Law Weekend.

As the Co-Directors of studies, we seek to encourage the committees to take on new projects and challenges. We also encourage our members to become involved in the committees by contacting the committee chairs, whose information can be found at www.ambranch.org. In addition, we also encourage branch committees to become more engaged in the work of the international ILA committees. The ABILA, through the Co-Directors of Studies, can nominate qualified members to ILA Committees, who can then involve the respective ABILA committees in reviewing ILA committee drafts.

We very much appreciate all the work by committee members and chairs and look forward to hearing from them.

A Brief Note on the Governance of the International Law Association and Report on the Last Executive Council (the governing body of the Association) Meeting on November 11, 2006

Since many American Branch members have been unable to attend one or more of the Biannual Conferences of the ILA or serve on International Committees of the ILA, the President, Charles Siegal, thought perhaps it might be time to give American Branch members a brief update on how the Association is governed. The Association consists of 50 Branches, located in as many countries or regions. The Association's Constitution provides that ten or more persons may come together and apply to Headquarters, located in London, for permission to form a Branch, an application which is usually received with enthu-

siasm. Individuals living where there is no Branch may apply to Headquarters for Headquarters membership. Branches pay a fixed sum (payable in pounds, the currency of HQ expenses) of the dues they charge their members (presently 30) and retain the remainder of their dues for their own activities. The only paid employees of the Association are the Secretary, presently Ms. Juliet Fussell and her Assistant, who perform all the administrative duties out of small office leased from the University of London in Russell Square.

The Association is governed by an Executive Council, meeting in London twice a year. Branches choose their own representatives to the Executive Council (the exact number of voting Representatives depending upon the size of the particular Branch.) The American Branch, as the largest Branch (with the British Branch presently a close second), is entitled to three voting Members of the Executive Council, although as a general rule, only the President (presently Charles Siegal) and/or the Chairman of the Branch's Executive Committee (presently James Nafziger) attend. As a past President of the Branch and active participant in the affairs of the Association and its International Committees, Cynthia Lichtenstein is a "Co-opted Member" of the Executive Council.

The Officers of the Association, who are elected by the Executive Council, are the Chairman, several Vice-Chairman, the President (who by tradition is the President of the Branch that last hosted the Bi-Annual Conference, presently Milos Barutciski of the Canadian Branch), the Treasurer, the Secretary-General (presently a British Barrister who ensures that the Association operates in accordance with its Constitution) and the Director of Studies. The Director of Studies oversees the intellectual work of the Association and presents to the Executive Council at its meetings his or her proposed mandates for new Committees or Study Groups. The scheme of appointment to International Committees or Study Groups is relatively complicated, but essentially Branches have the right to have nominees of the Branches participate in the work. The present Director of Studies is Prof Christine Chinkin of the London School of Economics. In addition to these officers, Prof Cecil Olmstead, of the American Branch, former Chairman of the Association, is a Patron with the right to attend Executive Council Meetings.

The Constitution was amended in the near past to provide for limited terms for Officers, but grandfathered those Officers sitting at the time of the amendment. The Director of Studies has stepped down since then as has a former Vice Chairman, but otherwise the present Officers have been long time participants in the governance and the running of the Bi-Annual Conferences.

Cynthia Lichtenstein was the only member of the American Branch able to attend the November 11, 2006 Executive Council Meeting. That meeting was fairly typical of Executive Council Meetings in between Bi-Annual Conferences. (At Bi-Annual Conferences the "Full Council" — the Executive Council plus the Secretaries of the Branches — meets and a Steering Committee made up of Officers and certain Executive Council Members appointed by the Chairman oversees the process of the adoption of ILA Resolutions). Nineteen representatives from Branches were present, as were five Co-opted Members. Apologies were received from thirty-nine

members or officers who were unable to attend. The Treasurer presented his Report. The Chairman noted that the Treasurer would step down at the end of his current term of office in May 2007 and that the Secretary General would write to all Branches to request nominations in due course.

The Director of Studies presented her Report, primarily consisting of news concerning Committees, including resignations of Chairs, and a proposed mandate for a new Committee on Nuclear Weapons, Non-proliferation and Contemporary International Law. Among other Committee changes, Professor Barbara Stark (American Branch) upon nomination by the DOS was approved by the Executive Council as the new Chair of the Family Law Committee. The mandate of the new Committee was approved after discussion.

At the November 11 meeting, the Director of Studies prepared a summary of various questions concerning the workings of the Committee system which she had presented the day before the Meeting to the Association's Policy and Finance Committee. (This Committee consists of the officers and some Executive Council members chosen by the Chairman.) Professor Chinkin informed the Executive Council of the paper and that the Policy and Finance Committee had suggested the formation of a Sub-Committee (of Policy and Finance to be appointed by the officers) to discuss "the various issues which should be addressed". (Minutes of the November 11, 2007 Executive Council Meeting.) The Executive Council agreed that the Officers should appoint such a committee as soon as possible, using Prof. Chinkin's paper as a starting point. Jim Nafziger of the American Branch has been named to the Committee. A draft of recommendations from this Committee is to be available for the May meeting of the Executive Council, which Charles Siegal, Jim Nafziger and Cynthia Lichtenstein are planning to attend.

In conclusion, it should be noted that the third member of the American Branch presently nominated by the American Branch to attend Executive Council meetings is former President and Chairman of the Executive Committee, Prof Alfred Rubin. However, it has been the custom for many years for the President of the Branch to authorize any member of the Branch who is able to attend a meeting to do so, since it is very rare for all three American Branch delegates to be in London at the same time. The next meeting is scheduled for Saturday, May 19, 2007 and the subsequent one for November 17, 2007, both at 10 am in the Council Room of the Institute of Advanced Legal Studies on Russell Square. Any member of the Branch interested in attending should contact Charles Siegal (Charles.Siegal@mto.com).

Committee on the International Law of Foreign Investment By Andrea Bjorklund

The Committee met in open session on June 6, 2006, with Karl-Heinz Böckstiegel presiding. This was the fourth meeting of the committee since its formation in 2003. Committee Chairman Christoph Schreuer introduced the work of the committee, which has two main components. One is the preparation of a report to be presented at the ILA meeting in Rio de Janeiro in 2008, and the other is the preparation of papers by individual committee members on the major aspects of the international law of foreign investment. Those individuals papers will be used in the composition of the Committee's final report and will also be published as the Oxford Handbook of International Invest-

ment Law (Oxford University Press, Forthcoming 2007).

Co-rapporteur Peter Muchlinski presented the Committee's interim report, the main objective of which is to set a context for the international law of foreign investment. It thus examines in detail the policy issues surrounding the law of foreign investment, with a description of the law's historical development and an in-depth analysis of significant current issues, including the status of private actors such as corporations and NGO's and the development of norm formation through both soft and hard law.

Certain individual members of the committee then made reports on their areas of expertise. Andrea Bjorklund discussed emergency exceptions and safeguards, and placed particular emphasis on the state of necessity defense raised by Argentina in many of the cases brought in the aftermath of the Argentine financial crisis in the early 2000s. She illustrated the current state of the law by reference to the International Law Commission's Articles on State Responsibility, to the International Court of Justice case *Gabčíkovo-Nagymaros*, and to the ICSID case *CMS v. Argentina*. August Reinisch then covered the topic of expropriation. He discussed with particular reference to the *Methanex* case the importance of the definition of investment in determining whether or not there has been a compensable expropriation of a particular bundle of rights. In the realm of regulatory expropriation, he noted the difficulty in distinguishing compensable from non-compensable expropriation and accurately determining when a state is acting within its police powers, with particular reference to *Methanex*, *Saluka*, and *Santa Elena* cases.

Moshe Hirsch introduced his paper on the interaction between investment and non-investment obligations in international law. He considered the potential for overlapping obligations derived from different international law regimes, such as environmental and human rights law, and discussed the existing mechanisms, such as the Vienna Convention on the Law of Treaties, that investment tribunals could use to interpret the obligations of the investors and the States before them. Finally, Loretta Malintoppi presented her work on independence, impartiality, and the duty of disclosure on the part of arbitrators in investment arbitration. She addressed the patchwork of rules that currently govern arbitrator conduct, which include specific arbitral rules (e.g. UNCITRAL, ICSID, LCIA), national laws, and codes of conduct of various professional associations. She discussed the advisability of the adoption of a uniform set of rules under the auspices of a well-respected organization such as ICSID to ensure the integrity of investment arbitration.

The committee met in closed session the following day to discuss several papers submitted by its members. The committee will meet next in Vienna in Fall 2007, and will then reconvene at the ILA meeting in Rio de Janeiro in 2008. The Committee expects to conclude its work with the publication of its final report in Rio.



Differential Treatment in International Environmental Law By Lavanya Rajamani

Oxford University Press, 255pp., 2006

ISBN 13: 9780199280704 ISBN 10: 0199280703

Reviewed by: Friedrich Soltau

This book aims to introduce the concept of differential treatment as a means of integrating states with divergent interests and historical backgrounds into the global environmental dialogue. The focus is on the origins, history and manifestations of differential treatment in environmental treaties, its doctrinal basis and boundaries, and its particular application in the climate change regime.

The book usefully explores the evolution of the fault lines over environmental issues from the Stockholm Conference on the Human Environment in 1972, the United Nations Conference on Environment and Development (UNCED) of 1992, to the World Summit on Sustainable Development in 2002. According to the author, the tensions in international negotiations over burden-sharing arrangements stem from the competing ideological premises of industrialized and developing countries. The former view the international environmental discourse in terms of voluntary consideration of developing countries' needs, while the latter take as their point of departure the responsibility of industrializing countries for global environmental problems and the entitlement of developing countries to less stringent commitments and assistance, such as technology transfer.

Reviewing the differential treatment provisions in a handful of major environmental agreements, in particular the UN Framework Convention on Climate Change (UNFCCC), the author posits three helpful categories: differentiation with respect to the central obligations of the agreement, such as the emissions reduction and limitation targets of the Kyoto Protocol; differentiation with respect to implementation, such as delayed compliance and reporting; and the granting of financial assistance or capacity building.

Perhaps the heart of the book is its analysis of the principle of common but differentiated responsibility (CBDR). Articulated in Principle 7 of the Rio Declaration, that principle provides that: "In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. Developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and the technologies and financial resources they command."

Rajamani points out that CBDR identifies contribution and capacity as the two markers of differentiation. She notes that legal scholars disagree about whether the differentiation is based on the contribution to environmental degradation (the position taken by the ILA Committee on Legal Aspects of Sustainable Development) or the relative capacities and levels of development of industrialized and developing countries. She sides with those who consider that CBDR has not attained the status of customary international law. She is surely right in asserting that, quite apart from the principle's precise legal status, it "forms the basis for the interpretation of existing obligations and the elaboration of future international obligations" within the climate change regime.

Rajamani's analysis brings both practical and theoretical insights to bear in a clear, logical and systematic exposition. While differential treatment in international environmental law has attracted some scholarly attention, the only other book-length contribution on the topic is a volume by Philippe Cullet. This book makes fruitful reading for students, scholars and practitioners interested in international environmental law, particularly with respect to developments in the area of climate change.

Peremptory Norms in International Law

By Alexander Orakhelashvili

Publisher, Date

ISBN

Reviewed by: Arnold N. Pronto, Legal Officer, United Nations Office of Legal Affairs

Orakhelashvili's accounting of the concept of *jus cogens* focuses on recent developments in doctrine and international practice. He provides a comprehensive treatment of the concept, ranging from theoretical underpinnings to effects on general international law as well as national law, with ample consideration of its interaction with the powers of international organizations and international tribunals. Written in dense, "doctoral thesis" prose, this book is not for the faint at heart.

In over 600 pages, the author undertakes a sweeping analysis, in the process drawing conclusions ranging from the convincing to the heroic. Along the way, he provides some useful clarifications as to the nature of peremptory norms. For example, he notes that it is a misconception to classify the maxim *pacta sunt servanda* as a peremptory norm of international law, since *jus cogens* norms operate "within" the system of international law by setting the boundaries of legality, while *pacta sunt servanda* is the basis of the system itself. In his view, the category of non-derogable human rights obligations is not necessarily synonymous with *jus cogens*, since derogable norms might also enjoy a peremptory status.

A central conception of the book is that the international legal order is anchored in a generalized system of *jus cogens* constituting an international public order, existing simultaneously as a constriction upon international law and beyond the will of States (since, if the peremptory status of norms were based on State consent or judicial decision, then States or judges could later agree to amend or disregard such norms). Deference is thus given to the views of particular scholars, jurists and other practitioners, at the expense of those of States, which are hardly canvassed at all. That approach is not always convincing, since it is precisely the practice of States (and of tribunals and other expert bodies) that is often alluded to as proof of the peremptory nature of particular norms. This shortcoming is exacerbated by the fact that the author is not always discerning in his treatment of claims of the peremptory nature of particular norms, nor does he propose a theory of authority to assist the reader in evaluating such claims.

The concept of *jus cogens* is thus analyzed largely from a "pure" theory perspective, based on the premise that it is robust enough to provide the solutions to all questions about

the fundamental role it plays in public international law. Criticisms of the concept, when acknowledged, are largely brushed aside as either misguided or based on a superficial understanding of international law. What emerges, therefore, is a full-blown theory of the international legal order, premised on a sort of "faith-based" international law, where the reader is required to take assertions as to the effect of peremptory norms on the superstructure of international law at face value, with little by way of critical reflection.

Regardless of one's views on some of the positions taken and conclusions drawn, the systematic approach and sheer comprehensiveness of the treatment of the topic justifies the book's place on the reading list of the international lawyer serious about peremptory norms.