



ABILA Newsletter

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ILA—Founded 1873

May 2009

PRESIDENT'S MESSAGE

Much about international law and the American Branch of the International Law Association has changed since the Branch was organized in the early twentieth century. International law embodies some entirely new fields, and the practice of international law is today more specialized than in the past. International organizations are more numerous and often more complex than they were eight or nine decades ago. The world, as viewed through the eyes of U.S. international law leaders, appears less Eurocentric than it used to seem. The membership and leadership of the American Branch are far more diverse than when the Branch held its inaugural meeting in January 1922.

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LORD SLYNN OF HADLEY, ILA EXECUTIVE COMMITTEE CHAIRMAN 1930-2009

Gordon Slynn (Lord Slynn of Hadley), the Chairman of the International Law Association's Executive Committee, died on April 7, 2009, after battling cancer. He was 79. Gordon Slynn had served as Chairman of the Executive Committee since 1988, when he succeeded Professor Cecil Olmstead.



Lord Slynn of Hadley

Chilean dictator Augusto Pinochet could be extradited to Spain on charges including torture and genocide. Slynn helped promote procedural reforms at the European Court of Justice and supported incorporation of the European Convention on Human Rights into English law.

The ILA's Executive Committee heard many tributes to Gordon Slynn when it met on May 8-9, 2009, including one from the American Branch's Robert B. von Mehren, who served from 1989-2008 as a Vice-Chairman of the Executive Committee. Tributes stressed Slynn's astute legal mind, his energy, and his charismatic leadership.

CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES

The International Institute for Conflict Prevention Resolution (CPR), the well-known thought leader in alternative dispute resolution, has recently published a protocol for participants in domestic and international arbitration that has the objective of assuring greater predictability in the ways in which arbitration proceedings are conducted. It is CPR's hope that its Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration will be used not only in disputes based on the CPR Arbitration Rules but also in other institutional and non-institutional settings.

One of the principal purposes of the Protocol is to deal with the disappointment experienced by some users of arbitration with how their arbitrations are conducted as compared with how they thought they would be carried out. There are cultural differences with re-

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Educated at Trinity College, Cambridge, Gordon Slynn began his legal career working on commercial and tax cases, both for the British government and in private practice. In 1976 he was appointed as a judge of the High Court, Queen's Bench Division. He became an Advocate General at the European Court of Justice in 1981, and in 1988 was named the British judge on the European Court. He returned to Britain in 1992, becoming a law lord in the House of Lords, a position he held until his retirement in 2002. Gordon Slynn was part of a judicial committee of the Privy Council that, in 1995, commuted to life imprisonment the sentences of Jamaican prisoners who had been held on death row for fourteen years. He was one of the dissenters in the 1998 House of Lords' 3-2 decision finding that former

SELECTION PROCESS FOR NEW CHAIRPERSON OF ILA EXECUTIVE COMMITTEE

The ILA Executive Committee, faced with the vacancy left by the death of its Chairman, Lord Slynn of Hadley, is forming a committee to facilitate the search for a new Chairperson. This new committee is charged with insuring that the search is conducted through an open and transparent process. The ILA's various national branches will be consulted for ideas and nominations.

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CORRECTION:

Printed copies of the January 2009 ABILA Newsletter incorrectly stated on page 2 that Alan Swan died June 8, 2008, "when the car he was driving on a bright summer morning was hit by a drunken driver who fled the scene of the crime." Professor Swan was, in fact, not driving the car when the accident occurred.

**CPR PROTOCOL ON DISCLOSURE
OF DOCUMENTS AND
PRESENTATION OF WITNESSES**

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spect to the conduct of arbitration proceedings, particularly in the areas of disclosure of documents and in the presentation of witness testimony. These cultural differences are seen not only in international cases but also even within the United States. For example, many arbitrators from continental Europe, accustomed as they are to no discovery in court proceedings in their countries, will look askance at requests for document disclosure from one party to the other and will not be amenable to granting requests for such disclosure. On the other hand, there are many American lawyers who regard compelled disclosure of documents from the other side as virtually an uncontested right, both in litigation and arbitration. Similarly, a European arbitrator may regard with horror the notion that the parties ought to be able to examine one another under oath in pre-hearing depositions. On the other hand, many American lawyers, even ones experienced in arbitration in the United States, will consider such depositions as essential for the proper understanding and presentation of the case.

With respect to the testimony of witnesses at hearings, a European arbitrator will invariably expect witness testimony to be presented in the form of written witness statements, with hearing time devoted almost exclusively to cross-examination. American lawyers, on the other hand, may believe that this approach denies them the right to make the most effective presentation of their case – through oral direct testimony.

Thus, the parties to arbitrations and their counsel may make assumptions concerning document disclosure and witness testimony that are based on these kinds of cultural influences that may prove, to their surprise, to be unwarranted when it turns out that the arbitrators hearing the case have quite different ideas about how proceedings should be conducted.

The CPR Protocol provides guidelines for arbitrators (and by extension, of course, for counsel appearing before arbitrators) as to the most effective ways to conduct arbitration proceedings fairly and efficiently. But perhaps the most important contribution of the Protocol is the way in which it provides

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PRESIDENT'S MESSAGE

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Yet, when we look back at why the American Branch was formed, we see some themes that still resonate. One concerns the role of the American Branch as part of a truly international enterprise. Activities at the International Law Association's 1921 conference in The Hague inspired several leading U.S. international lawyers to form an American Branch of the Association. These leaders – like earlier U.S. lawyers who had contributed to founding the ILA in Brussels in 1873 and who had formed a relatively short-lived International Code Committee of America with links to the ILA – believed that U.S. international lawyers could promote and build understanding of international law only through regular exchanges with attorneys and leaders from abroad. In his remarks at the first meeting of the American Branch in 1922, Arthur K. Kuhn, who was both a renowned scholar and a leading member of the New York bar, said the work of U.S. international lawyers was “incomplete” unless they could collaborate with “colleagues in other countries, who are likewise imbued with the same desire to promote international peace and good will and to lay the foundations for a profitable and peaceful international trade and commerce” (1922 American Branch *Proceedings*, page 43). Charles Cheyney Hyde of Northwestern University Law School, who in 1923 was to become the Solicitor for the U.S. Department of State (the position superseded by that of the Legal Adviser), thought the new American Branch could usefully present to foreign lawyers “the precise position of the United

States on matters of international law concerning which there is misapprehension or doubt” (page 40).

Speakers at the American Branch's inaugural meeting also stressed another theme: the importance of elaborating or codifying international law, to help address concrete problems. Francis Coudert, a partner in the New York international law firm of Coudert Brothers, was a practical lawyer. He thought that the American Branch could, in reaction to what he saw as the vagueness of many international legal rules, usefully promote “the slow and reasoned development of international law” (page 16). Charles Noble Gregory, a law school dean, urged the Branch to work on codification projects, and Harrington Putnam, a leading admiralty lawyer and a member of the New York Supreme Court, concluded his substantive comments about the problem of government impressment of vessels for commercial use by calling on the American Branch to help address the problem. Many speakers were concerned with private international law matters. They believed that the American Branch – on its own, and particularly in collaboration with the International Law Association as a whole – could help develop international law in order to address those matters. Modern ILA committees and American Branch committees share this goal.

In 1922, Charles Cheyney Hyde also remarked that the American Branch, through its careful studies, could serve as an international law “consulting body

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INTERNATIONAL LAW WEEKEND 2009

On October 22-24, 2009, the American Branch of the International Law Association will hold its annual International Law Weekend in New York, bringing together hundreds of practitioners, members of the governmental and non-governmental sectors, and students. The conference will feature numerous panels, receptions, and the Branch's annual meeting. Ms. Lucy F. Reed, President of the American Society of International Law, will be the luncheon speaker on Friday, October 23. International Law Weekend 2009 will take place at the Association of the Bar of the City of New York on October 22, 2009, and at Fordham University School of Law on October 23 and 24. The Weekend's overall

theme is “Challenges to Transnational Governance.”

The co-chairs of ILW 2009 are Pierre Bodeau-Livinec of the United Nations Office of Legal Affairs (Bodeau-Livinec@un.org), Wil Burns, Editor-in-Chief, *Journal of International Wildlife Law & Policy* (williamcgburns@comcast.net), and Anibal M. Sabater, Partner, Fulbright & Jaworski International LLP (asabater@fulbright.com). Contact them with any questions. The schedule of ILW 2009 panels and registration information will be available soon at <http://www.ila-americanbranch.org/Events.aspx>.

INTERNATIONAL LAW WEEKEND — WEST 2009

International Law Weekend – West was held on March 6-7, 2009, at Willamette University College of Law, Salem, Oregon. The well-attended two-day program, chaired by Willamette Professor and ABILA Honorary Vice-President James A.R. Nafziger, brought together legal practitioners, scholars, and students. Panels discussed cutting-edge issues in public and private international law and international transactions.

Co-sponsors of the conference included the American Society of International Law, the International Section of the Oregon State Bar, and the *Willamette Journal of International Law and Dispute Resolution*.

Professor Theodor Meron of New York University and the International Criminal Tribunal for the Former Yugoslavia was the featured dinner speaker on March 6. He spoke on the theme “International Criminal Justice: Does It Work?”



*Professor Theodor Meron
New York University*

Professor George A. Bermann of Columbia Law School and President of the International Academy of Comparative Law spoke on “The American Law Institute Goes Global” at the ILW West 2009 luncheon on March 7.



*Professor George A. Bermann
Courtesy of Columbia Law School*

ILW West 2009 panels addressed the following topics:

- Prosecuting International Core Crimes in the United States: Problems, Prospects, and Solutions;
- Bringing International Law to Bear on the Detention and Treatment of Refugees in the United States;
- Empirical Approaches to the International Law of War;
- Recent Developments in NAFTA;
- The Role of International Law in Immigration Practice;

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NEW AMERICAN BRANCH COMMITTEE PROCEDURES

The ABILA Executive Committee approved the following procedure for the operation of committees at its spring meeting on March 27, 2009: All American Branch committees will have a mandate for their activities and will be subject to a time limit for completing those activities. All committees should develop a proposed mandate and discuss that proposal with the Branch's Co-Directors of Studies, Professors Valerie Epps and Phil Moremen. Mandate topics might include, for example, the preparation of a report or the development of a panel for ILW. The committee and the Co-Directors of

Studies will agree on a time limit within which to complete the mandate. The minimum time limit will be a year and the maximum limit normally will be four years. A committee may continue in operation after the expiration of its mandate, but would need to obtain another mandate. At the end of the time limit and/or completion of the mandate, the chair could step down. Chairs may be re-elected for no more than two consecutive mandate terms, provided, however, that in exceptional circumstances, a chair may be reelected beyond his or her second mandate term.

CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES

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a structure to take much of the guesswork out of how arbitrations will be conducted. The Protocol contains three schedules of “modes,” which can be chosen by the parties to an agreement to arbitrate. With respect to document disclosure, the parties may choose from four options, ranging from no disclosure at all to disclosure roughly as broad as what is afforded by the Federal Rules of Civil Procedure. In between, the parties may select either of two modes that are designed to provide them with a general structure for disclosure that is moderate in its scope.

Similarly, the Protocol takes on the disclosure of electronic information with a schedule also containing four modes, one of them providing no disclosure whatever and the other providing extensive disclosure of such information. The two modes in the middle provide for disclosure limited, as the parties agree, in various ways – by number of computer users, the time period concerning which electronic information is to be disclosed, the type of electronic records to be produced, and the sources of those records. Thus, in this important and often highly disputed area, the parties may agree to defined limitations on the scope of production of electronic information, thereby avoiding disputes in the course of the arbitration proceedings as to the scope of disclosure of records of this type.

Likewise, the Protocol contains a Schedule 3, which provides for choices in the form of three modes with respect to the taking and presentation of testimony. These modes enable the parties to select among depositions and written witness statements, as they see fit.

The parties may select one of the modes in each of the three schedules. They may do so at the time they enter into their agreement to arbitrate, ordinarily when the commercial deal is done, or later, after the dispute arises. The more likely use may be the inclusion of mode selection in the parties' agreement, together with the arbitration clause. The Protocol contains suggested contractual language by which the parties may choose modes by referring to schedules in the Protocol.

Of considerable importance is that the election of one or more modes is to be binding on the parties and the arbitrators. Of course, the parties may subsequently choose to change what they have agreed with respect to disclosure or witness testi-

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ILA COMMITTEE DEVELOPMENTS

**DEAN HAROLD KOH
NOMINATED AS STATE
DEPARTMENT LEGAL ADVISER**

Several American Branch members have been named to serve on International Law Association committees. The ILA formally established several new committees in November 2008, and the ILA Executive Committee approved the nominations of the new committee members at its May 9, 2009, meeting in London. The new American Branch members of these committees are:

International Protection of Consumers:

James P. Nehf, Cleon H. Foust Fellow, Professor, and Associate Dean for Graduate Studies at Indiana University School of Law, Indianapolis

Legal Principles Relating to Climate Change:

Daniel M. Bodansky, Associate Dean for Faculty Development and Emily and Ernest Woodruff Professor of International Law at the University of Georgia School of Law

William C. G. Burns, Editor-in-Chief of the *Journal of International Wildlife Law & Policy* and Co-Chair of the International Environmental Law Committee of the American Branch

Hari M. Osofsky, Associate Professor at Washington and Lee University School of Law

Jacob D. Werksman, Program Director of Institutions and Governance at the World Resources Institute

Maxine A. Burkett (alternate), Associate Professor and Director of the Center for Island Climate Adaptation and Policy at the William S. Richardson School of Law, University of Hawaii

Howard S. Schiffman (alternate), a faculty member at the New York University Environmental Conservation Education Program

Baselines under the International Law of the Sea:

Coalter G. Lathrop, President, Sovereign Geographic, Inc.

Michael W. Reed, U.S. Department of Justice (retired) and member of the National Security Council's Committee on the Delimitation of the United States Coastline (retired)

J. Ashley Roach, JAG Corps, United States Navy (retired), and Office of the Legal Adviser, U.S. Department of State (retired)

George K. Walker, Professor at Wake Forest University School of Law, member of the Executive Committee of the American Branch, and Chair of the Law of the Sea Committee of the American Branch

John E. Noyes (alternate), Roger J. Traynor Professor of Law at California Western School of Law and President of the American Branch

International Human Rights Law

(chaired by Christina M. Cerna, Principal Human Rights Specialist at the Inter-American Commission on Human Rights, member of the Executive Committee of the American Branch, and Co-Chair of the International Human Rights Committee of the American Branch):

John P. Cerone, Associate Professor and Director of the Center for International Law and Policy at New England School of Law

Mark W. Janis, William F. Starr Professor of Law at the University of Connecticut School of Law

Charles D. Siegal, Partner, Munger Tolles & Olson, Los Angeles, and Chair of the Executive Committee of the American Branch

The ILA Executive Committee also named a few American Branch members as members of existing ILA committees and study groups. Jonathan F. Galloway, the Irwin L. & Fern D. Young Presidential Professor Emeritus at Lake Forest College and Chair of the American Branch's Space Law Committee, was selected for a position on the ILA's Space Law Committee. Linda J. Silberman, the Martin Lipton Professor at New York University School of Law, was confirmed as a member of the ILA's Committee on International Civil Litigation and the Interests of the Public.

Jeremiah Pam, a Visiting Research Scholar at the Center for Sustainable Economies, U.S. Institute of Peace, became an alternate member of the Study Group on Sovereign Insolvency.

In addition, Professor Joel P. Trachtman of The Fletcher School of Law and Diplomacy at Tufts University moved from alternate to regular member of the ILA's International Trade Law Committee.

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The following letter, which was signed by many American Branch officers and members in their individual capacities, recognizes the contributions of the Branch in studying the role of the Legal Adviser to the U.S. Department of State:

Senator John F. Kerry, Chairman
Senator Richard G. Lugar, Ranking
Minority Member
Committee on Foreign Relations
United States Senate
Dirksen Senate Office Building
Washington, D.C. 20510

Re: Confirmation of Dean Harold Hongju Koh as Legal Adviser, Department of State

Dear Chairman Kerry and Senator Lugar:

We write to express our strong support for President Obama's nomination of Harold Hongju Koh, Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law at the Yale Law School, to serve as Legal Adviser of the Department of State and urge a favorable report by your Committee on Senate confirmation of Dean Koh. While we have listed our professional affiliations for identification, each of us speaks only in a personal capacity.

Each of us has personal knowledge of Dean Koh's ability, accomplishments and reputation through our professional activities as government officials, international civil servants, practitioners, law professors, and active participants in the real-world application and scholarship of international law. We are joined together in our belief that Dean Koh has the integrity, intellect, professional experience and personal commitment to excellence that are required to advise Secretary of State Clinton on the challenging legal issues that she will face over the next several years. We share a deep respect for his talent and character, which we believe admirably equip him to fulfill with distinction the responsibilities of Legal Adviser.

In October 1990, a Joint Committee of the American Branch of the International Law Association and the American Society of International Law completed a two-year study titled "The Role of the Legal Adviser of the Department of State" (85 *Am. J. Int'l L.* 358 (1991)). The thirty-four members of the Joint Committee included nine former Legal Advisers and a former counsel to the President. An Advisory Group that as-

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- Discretion to Decline Jurisdiction in International Cases;
- Shared Fresh Water and Sustainable Development in an Era of Water Scarcity;
- International Technology Transfers—Challenges and Outcomes
- World Peace Through Human Rights, Law of the Sea, and the United Nations: A Tribute to Louis B. Sohn;
- Taming the International Capital Markets: The Emerging Regime;
- The Alien Tort Statute in the Post-Sosa World; and
- Transnational Intellectual Property Law and Enforcement Within a TRIPS Framework.

Speakers' papers will be published in upcoming issues of the *Willamette Journal of International Law and Dispute Resolution*.

The next International Law Weekend – West will be early in 2011. Watch <http://www.ila-americanbranch.org> for details.

ILA COMMITTEE DEVELOPMENTS

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At its May 2009 London meeting, the ILA Executive Committee also created a new Committee on Recognition/Non-recognition in International Law, and a new Study Group on the Use of Private Law Principles for the Development of International Law. The ILA Executive Committee will elect members to these new bodies at an upcoming meeting. The American Branch is entitled to nominate a few Branch members to join the Committee on Recognition/Non-recognition in International Law; please contact John Noyes at President@ila-americanbranch.org with your recommendations.

For a complete listing of all ILA committees and of American Branch members of those committees, see http://www.ila-americanbranch.org/London_Comm.aspx. More information about the ILA's committees and study groups is available at <http://www.ila-hq.org/en/committees/index.cfm>.

International Commercial Arbitration

Gary B. Born
Wolters Kluwer, 2009
Pp. 3,303 (Hardcover, \$455.00), available through www.aspenpublishers.com
ISBN: 9789041127594

Reviewed by Elliot Friedman, Associate, Freshfields Bruckhaus Deringer US LLP (New York)

Gary B. Born's *International Commercial Arbitration* is arguably the most comprehensive book on the law of international commercial arbitration on the market, and makes a strong claim to be the pre-eminent work in its field.

The book, presented in two volumes, runs to over 3000 pages. It is split into three sections: section one deals with international arbitration agreements; section two covers international arbitral procedures and proceedings; and section three discusses international arbitral awards. The breadth of the work is remarkable. Mr. Born begins with the formation of arbitration agreements — including the key concepts of separability, choice of law, and competence-competence — ends with the recognition and enforcement of arbitral awards, and covers all conceivable issues in between. The book benefits greatly from Mr. Born's scholarly approach to the subject, as well as his considerable practical experience in the field, both as arbitrator and counsel.

Two key changes to this edition make it an even more valuable reference work. First, while previous editions presented the reader initially with the relevant primary sources on a subject (such as extracts of judicial decisions and arbitral legislation) and then with the author's commentary, this edition is presented as a pure commentary, with the author's points meticulously and comprehensively referenced in footnotes. This explicit change of style, from a case-book to a commentary, makes the new edition of even greater use to practitioners.

Second, this edition builds on the author's comparative and international law approach, dealing in detail not just with arbitral statutes and case law from a wide range of jurisdictions, but also with a multitude of arbitral rules and conventions. This approach is informed by the

author's belief "that the treatments of international commercial arbitration in different national legal systems are not diverse, unrelated phenomena, but rather form a common corpus of international arbitration law which has global application." (p. 4)

Another valuable aspect of the book is Mr. Born's willingness to take firm positions on controversial issues of law. For example, while presciently acknowledging that the European Court of Justice would likely reject the availability of intra-EU anti-suit injunctions in support of arbitrations (the book was written before the ECJ's *West Tankers* decision), Mr. Born nevertheless contends that such a rejection "would remove a potentially valuable mechanism for enforcing international arbitration agreements from the disposal of European (particularly English) courts." (p. 1044)

Yet another example is Mr. Born's discussion of judicial review of the merits of arbitral awards, a topic of enduring significance, and especially so in the U.S. following the Supreme Court's recent decision in *Hall St. Associates LLC v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). After an illuminating discussion, Mr. Born concludes that "[i]f properly cabined, in the manner of most U.S. and English decisions, the possibility of very limited substantive review of legal conclusions in arbitral awards is, on balance, desirable." (p. 2654)

As the title of the book suggests, it is a treatise on international commercial arbitration, and treatment of international investment arbitration under bilateral investment treaties is expressly beyond the scope of the work. Occasionally, however, the author usefully draws parallels to investment treaty jurisprudence, such as in the section on provisional measures.

This book will doubtless be the "go to" reference work on international commercial arbitration for many years to come. It should, therefore, be an essential purchase for academics and practitioners alike.

Should you wish to submit a book review, please contact Lucy Martinez at lucy.martinez@freshfields.com.

BOOK REVIEWS

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Sovereignty Over Natural Resources: Balancing Rights and Duties

Nico Schrijver
Cambridge University Press, 2008
Pp. 452 (Paperback, \$80.00)
ISBN-13: 9780521047449

Reviewed by Daina Bray

Sovereignty Over Natural Resources: Balancing Rights and Duties by Dr. Nico Schrijver, originally published in 1997 and recently reissued in a paperback edition, is all the more relevant today than when first printed. Dr. Schrijver describes two fundamental characteristics of sovereignty as it relates to natural resources: that states have rights over their natural resources that are recognized under international law, and that these rights are accompanied by obligations. In this well-referenced and accessible text, Dr. Schrijver describes the evolution of the principle of permanent sovereignty over natural resources, outlining both its controversiality and relevance to today's global problems, such as economic and energy crises, speculation in international money markets, deforestation, climate change, depletion of fisheries and pollution in international waters.

The book is divided into three parts: (i) the birth and development of the principle of permanent sovereignty, with the UN General Assembly as midwife; (ii) natural resource law in practice, from creeping national jurisdiction toward international cooperation; and (iii) balancing rights and duties in an increasingly interdependent world. The first part summarizes and assesses the evolution of the principle of permanent sovereignty by the political organs of the United Nations (1945–1995). In the second part, Dr. Schrijver posits that permanent sovereignty is rooted in international law and has not evolved in isolation but rather as part of other modern trends in international law. In the third part, Dr. Schrijver presents the thesis that, apart from rights, duties relating to resource management can also be inferred and that such duties are being given increasing significance under modern international law.

Since the book's original publication, the growth in foreign investment and resulting investor-state disputes has

also cast the principle of permanent sovereignty into the limelight, highlighting its dual acknowledgment of the importance of foreign investment in promoting economic development and the rights of states to non-interference in their internal affairs and domestic policies. Recent years have witnessed a revival of direct expropriation in parts of Latin America (by instances of what could be referred to as "old-fashioned expropriation" or "expropriation *simpliciter*"), as well as the on-going trend under which States expropriate foreign investment by indirect or regulatory measures. These developments emphasize the tension between the principle of *pacta sunt servanda* – as embodied in the contractual and regulatory undertakings of states – and permanent sovereignty. Writing in 1997, Dr. Schrijver presciently commented that, while "the impressive body of [bilateral investment treaties] may not in itself be able to reflect or generate customary international law including an *opinio iuris comunis*, [they] can certainly serve to clarify and consolidate widely accepted principles of international investment law as well as to identify new trends" (p. 193). A related and very current question is the relationship, posited by some, between norms emerging through the growing number of public international investment arbitration decisions and norms of international law.

In the preface to the new edition, Schrijver writes: "Although my work over the years has often followed different paths, I have frequently returned to consider the successes and failures of the UN's contribution to promoting development of developing countries, to preserving the environment, and to developing and consolidating international law." The reissuance of this still timely work gives readers the opportunity to do the same.

SELECTION PROCESS FOR NEW CHAIRPERSON OF ILA EXECUTIVE COMMITTEE

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The Chairperson of the ILA's Executive Committee chairs meetings of the Executive Committee and of ILA officers, plays a prominent role at the biennial conferences of the Association (the next one scheduled for The Hague in 2010), promotes ILA membership and the establishment of new national branches, and

addresses other issues in his or her role of having overall charge of the affairs of the Association. The hope is that selection of a new Chairperson, for a four-year term, may be made at the ILA's next Executive Committee meeting in London on November 21, 2009.

American Branch members who want more information about the search process or who have suggestions concerning a new Chairperson are urged to contact the Branch's President, John Noyes, at President@ila-americanbranch.org, the Chair of the Branch's Executive Committee, Charles Siegal, at ExCommChair@ila-americanbranch.org, or ILA Vice Chairperson Cynthia Lichtenstein at lichtens@bc.edu.

2009 Membership

Please renew your membership in the American Branch or join us as a new member. A membership form is available at <http://www.ila-americanbranch.org/Membership.aspx>.

Individual annual membership dues are \$70 (for each of the first two years of membership), \$100 (for regular members), or \$200 (for sustaining members). Organization annual dues are \$175 (for academic institutions, libraries, and not-for-profit organizations), or \$500 (corporate rate). Student Associates may join the Branch for free.

Here are some benefits of membership:

- Support for the activities of the ILA headquarters (see www.ila-hq.org)
- Participation in ABILA and ILA committees (Student Associates may be observers or have internship opportunities with ABILA committees)
- Free receipt of the ILA *Newsletter*, the biennial ILA *Report*, the American Branch *Newsletter*, the *International Practitioner's Notebook* (published as an issue of the *ILSA Journal of International and Comparative Law*), and the biennial American Branch *Proceedings* (Student Associates receive the American Branch *Newsletter*)
- Free attendance at the annual International Law Weekend in New York, regional ILWs, and selected programs

Individuals who support the American Branch at the level of a one-time payment of \$5,000 will be prominently recognized as Patrons of the American Branch of the International Law Association. Patrons are life members of the Branch and do not pay annual dues.

ABILA Career Panel, Cosponsored Events, and Upcoming Programs

**DEAN HAROLD KOH
NOMINATED AS STATE
DEPARTMENT LEGAL ADVISER**

On April 12, 2009, the American Branch held a successful International Law Career Panel at George Washington University Law School in Washington, DC. The panelists were: Christina Cerna, Principal Specialist at the Inter-American Commission on Human Rights of the Organization of American States; Gary Horlick, of the Law Offices of Gary Horlick (an international trade practice); David Stewart, Former Assistant Legal Adviser to the U.S. Department of State, and currently a Visiting Professor at Georgetown University Law Center; and Mary Greer, Senior Criminal Law Adviser to the ABA's Rule of Law Initiative. The American Society of International Law's New Professionals Interest Group arranged for Ms. Greer's participation on the panel and generously provided boxed lunches for the event. ABILA's Program Director, Rachel Smith, organized and moderated the panel. Nearly fifty law students and new professionals learned about the panelists' careers and received advice on securing employment in their respective fields. The panelists answered audience and individual questions, staying well after the event officially concluded to talk with students one-on-one. The success of the event prompted GW's Career Development Office to offer to host a similar event each semester.

The American Branch also cosponsored numerous events during the first four months of 2009, in California, Missouri, Nebraska, New York, and Washington, D.C. The American Branch is cosponsoring several more events in the near future.

In addition, the Branch is planning several events of its own. Upcoming ABILA events include an ABILA International Law Career Panel in the fall at the Washington College of Law, American University, in Washington, DC (details to be posted at www.ila-americanbranch.org once the event has been scheduled), International Law Weekend in New York on October 23-24, 2009, and a regional International Law Weekend in Denver, Colorado in

2010. Contact the American Branch's Program Director, Rachel Smith, at programdirector@ila-americanbranch.org, with your ideas for programs.

ABILA/ASIL Transparency Initiative

The American Branch continues its efforts, in conjunction with the American Society of International Law (ASIL), to study the implementation of transparency norms in international investment and commercial arbitration.

Principles of transparency have already been applied to a variety of arbitration contexts involving investment treaty disputes, and UNCITRAL is scheduled within the next year or so to take up the question of extending those principles into the international commercial arbitration arena. However, there is little empirical information about how tribunals have actually applied principles of transparency, the problems they have encountered, and the refinements that may (or may not) be required. This joint ASIL-ABILA project is aimed at filling the gaps.

Two well-attended events have already taken place: an open panel discussion at International Law Weekend 2008 and a moderated discussion of invited experts at ASIL's Tillar House in Washington in December 2008. Eventually, these will result in a published volume of best practices designed to serve as a practical guide for navigating the implementation of transparency norms. Another open panel discussion is tentatively planned for mid-summer in Washington, in conjunction with the D.C. Bar's International Law Section. In addition, a panel will be held at International Law Weekend, October 22-24, 2009, in New York.

The project is guided by a Joint Study Panel consisting of Betsy Andersen and Chip Brower (for ASIL), Louise Ellen Teitz and David Stewart (for the ABILA), as well as David Caron, Paolo Di Rosa, Andrea Menaker and Rusty Park.

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sisted the Joint Committee included two former Secretaries of State, a former U.S. Attorney General and other former U.S. and foreign government officials. The Joint Committee's final report analyzes in depth the complex responsibilities of the Legal Adviser. It discusses the many difficulties – legal, bureaucratic, and practical – that even the most qualified occupant of that office faces. The 1990 report recommends that the President and Secretary of State, “in considering the qualifications of candidates for Legal Adviser of the Department of State, should give substantial weight to the desirability of prior experience and standing in the field of international law.”

We believe that Dean Koh's career exemplifies the experience that the Committee had in mind in making this recommendation and that he enjoys the high standing in our profession that the Joint Committee emphasized. In particular, we believe that Dean Koh would admirably fulfill what the 1990 report called the “first responsibility” of the Legal Adviser – “to tell the Secretary of State and Administration candidly and objectively what existing law is or requires in a given situation” and to ensure that they receive “competent, objective and honest advice as to the legal consequences of proposed courses of action and decisions” so that they can make “informed and intelligent foreign policy judgments or properly balance the national interests involved.” We are confident that Dean Koh would support and advance United States foreign policy options that would respect not only our national interests and values but also our Nation's legal obligations and international standing.

Each of us appreciates this opportunity to present our views to your Committee and would be happy to speak further with you or your staff about our enthusiastic support for Dean Koh's confirmation by the Senate.

PRESIDENT'S MESSAGE

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which our Government would be bound to recognize and cheerfully utilize" (pages 38-39). Over the years, the American Branch of the International Law Association has shared its views about a wide range of international law issues with the U.S. government. The letter (reproduced in this issue) concerning the nomination of Dean Harold Koh as State Department Legal Adviser shows that the American Branch has contributed its analysis and recommendations concerning the role of the Legal Adviser. Today, the American Branch also provides advice, solicited by the U.S. government, concerning nominations to the International Court of Justice. Branch committees develop useful and timely studies about U.S. positions on international law issues; our Human Rights Committee, for example, was one of the first organizations to weigh in on the international law implications of President Bush's military order of November 2001 concerning the detention and treatment of non-citizens in the "war on terror." Branch members have numerous exchanges with the Legal Adviser and other U.S. government international lawyers at our annual International Law Weekend and elsewhere.

No organization develops exactly as its founders anticipate. But it is worth recalling the goals of those who started the American Branch. They saw the Branch contributing to international understanding through its exchanges with members of other ILA branches, working to develop international law solutions for concrete problems, and interacting with the U.S. government. These goals still deserve our attention.

John E. Noyes

CALENDAR OF EVENTS

FOR INFORMATION ABOUT INTERNATIONAL LAW WEEKEND 2009 AND OTHER ABILA EVENTS, PLEASE SEE:

WWW.ILA-AMERICANBRANCH.ORG/EVENTS.ASPX

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CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES

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mony, but the arbitrators, even though they may not feel totally comfortable with the parties' arrangements, are obliged to abide by them, unless, upon application of one of the parties, the arbitrators find that there are exigent circumstances that permit deviation from them ("a compelling need for disclosure different from that which is provided for ...").

Thus, reference by parties to modes in the CPR Protocol will enable them to select arbitration procedures that are in accordance with their expectations. To the extent that the modes of the Protocol are adopted, parties to commercial agreements will be afforded greater predictability as to how their disputes will be resolved in arbitration proceedings.

Lawrence W. Newman

Lawrence W. Newman is a Partner in the Litigation Department of Baker & McKenzie LLP. Mr. Newman is the Chairman of the CPR Arbitration Committee, which prepared the Protocol, and Chairman of the American Branch's International Judicial Integrity Committee. Mr. Newman may be contacted at lwn@bakernet.com.