# BOOK REVIEWS

*The Settlement of International Disputes: The Contribution of Australia and New Zealand* by Nii Lante Wallace-Bruce. Martinus Nijhoff Publishers, The Hague/London/Boston, 1998. Legal Aspects of International Organizations, Volume 31. ISBN 90-411-0567-0, 248 pp., USD 83/GBP 49/NGL 145.

Although I have read this book twice, and parts of it more often, I still have doubts as to what its readership might comprise. Even the title gives rise to problems. It is true that it emphasises 'The Settlement of International Disputes' at the expense of 'The Contribution of Australia and New Zealand' and that is a fair reflection of the balance of what is covered. The real criticism is that the title suggests that there is a connection between these two segments whereas there is very little. The first part provides a reasonable outline of the issues that arise in relation to the means of international dispute resolution, but the second is no more than an inadequate summary of the handful of disputes involving Australia or New Zealand in international litigation. There is virtually no consideration of the political commitment of both countries to the peaceful settlement of disputes and hence to the acceptance of the jurisdiction of international tribunals or other adjudicative and investigative bodies like the UN Human Rights Committee. Hitherto, as far as Australia is concerned, this commitment has survived the 'isolationist' elements in the electorate.

The lack of focus is not the only reason for doubting whether the book has 'audience appeal'. It may be that its appeal would lie with students outside of law wanting an introduction to the legal settlement of disputes, in which case the first segment of the work would be helpful. With regard to those studying for a law degree, most postgraduate courses would be too detailed for the level aimed at in this book. For undergraduates, very few courses would require much treatment of such a topic. The Australian National University is unusual in that the Law School has introduced a course entitled 'International Dispute Resolution'. It might be possible to refer students to this book for part of the course, but much of the course (the jurisdiction of various international tribunals, the role of the UN political organs and the rules as to State responsibility) would have a different emphasis from that adopted in this book.

Given the book's rather modest size (the segment on disputes runs from p. 2 to p. 177 and the consideration of the litigation involving Australia and New Zealand from p. 178 to p. 212), it is not to be expected that it would provide a particularly detailed analysis of the topics covered. It is rather unfortunate, therefore, that the author, in his Introduction on page 1, makes a number of claims that, to be frank, is unjustified. For example, the author dismisses the efforts of others in the following passage: "Writers on international dispute set-

tlement tend to focus only on peaceful means, ignoring altogether the other ways by which disputes are handled in the real world".

Despite the assertion that this book "does not follow that path", it is far from obvious how the "focus on countermeasures" (pp. 83-95) makes good the claim. Moreover, it is equally difficult to accept that the author makes good his promise to provide "in-depth treatment of the issues" relating to the International Court of Justice and overall his attempt at "a comprehensive, yet concise, account of the subject-matter; looking at issues in context and providing fresh insights". In many parts one is left with a feeling of disappointment that more explanation was not given of particular matters, partly as a clarification, sometimes because greater substance was required. The following comments will demonstrate these concerns.

At page 3 the author refers to the definition of a dispute in the *Mavrommatis* case (1924 PCIJ (Ser. A), No. 2, at 1), as "a conflict of legal views or of interests." Amongst the other criticisms he makes of this statement is the following (p. 5): "it is not adequate to merely show that the interests of the parties are in conflict. Rather it must be shown that their interests are 'positively opposed' to each other. It is by their 'opposing attitudes' that the dispute is given its essential element. In other words, what would otherwise be a mere conflict transforms into an international dispute when the parties' attitudes collide."

It is not at all clear that there is a useful distinction between being opposed as a sign of a dispute as compared with merely being in conflict. The example given of the significance of this 'opposition' was the *United Nations Headquarters Agreement* case (1988 ICJ Rep., at 12), in which "the Court held that a dispute existed [...] because the attitudes of the two parties was opposed" (p. 5). It would be equally true to say that, if the matter had been debated in the Security Council or the General Assembly, and State A had supported the PLO and State B the American position, States A and B would have been expressing 'opposed' views, but they would not have been parties to the, or any, dispute as such. The problem of defining what constitutes a dispute is not so readily solved as the author seems to be suggesting.

Although a denial of justice is mentioned (p. 13), no explanation is given of what it entails, nor of how it relates to the local remedies rule which is misdescribed as requiring that such remedies must be exhausted "before the matter may be taken to the international arena" (p. 14). The quotation which is then given from the *Interhandel* case (1959 ICJ Rep. 6, at 27), in fact gives a more accurate rendition in using the words "before international proceedings may be instituted". In the *Norwegian Loans* case (1957 ICJ Rep. 9), the dispute had been the subject of protracted negotiations between the French and Norwegian governments before France's unsuccessful attempt to have the dispute resolved by the International Court. In other words the matter had undoubtedly been "taken to the international arena" although one of the contentions subsequently

raised by Norway was that the French creditors had failed to exhaust local remedies.

This issue was not passed upon by the Court as it upheld Norway's entitlement to rely upon the automatic reservation in France's acceptance of the Court's jurisdiction. The local remedies rule was considered by Judge Lauterpacht and the author cites (p. 15) the Judge's statement that it "is not a purely technical or rigid rule", but, rather, one which can be "applied with a considerable degree of elasticity" (1957 ICJ Rep. 9, at 39). While it is true that the rule does not apply where "there are no remedies at all, or when whatever further remedies there might be are ineffective" (p.15), this aspect hardly demonstrates the rule's 'elasticity'. Indeed, as if to contradict himself, Judge Lauterpacht expressed the view on the facts that he was obliged to "hold that, however contingent and theoretical these remedies might be, an attempt ought to have been made to exhaust them" (1957 ICJ Rep. 9, at 39). If there was any flexibility in the rule it was to be found in the Dissenting Opinion of Judge Read who sympathised with the French creditors who had been consistently informed by the Norwegian Government that to bring such an action "would be futile because the matter was governed by the [Norwegian] law of 15th December 1923" which constituted "an insuperable barrier" to a successful action in the local courts (at 98).

A plea that the "principle of the exhaustion of local remedies" should not be "absolute and rigid" but should be "applied flexibly according to the case" was the view of Judge Armaud-Ugon, one of the minority in the *Interhandel* case, (1959 ICJ Rep. 6, at 97). It was the majority of the Court which upheld the United States third preliminary objection based upon this ground without joining it to the merits. The parties' belief that there were no local remedies available turned out to be misplaced when the US Supreme Court granted a writ of *certiorari* enabling the action brought by Interhandel to proceed. In the International Court's view it followed inevitably that local remedies had not been exhausted as the earlier belief of the parties had "proved unfounded" (1959 ICJ Rep. 6, at 27). It could be that, in appropriate circumstances, a respondent State might be estopped from contending that there had been a failure to exhaust local remedies, and this could arise from a silence when a response might be expected, though there would be "obvious difficulties in constructing an estoppel from the mere failure to mention a matter at a particular point in somewhat desultory diplomatic exchanges" (*Elettronica Sicula* case, 1989 ICJ Rep. 15, at 44).

These various authorities do not really support the flexibility claimed by Lauterpacht for the local remedies rule. However, the *Elettronica Sicula* case provided evidence of a more sympathetic approach to an applicant's position (at 46-47). Although this was partly dressed up by the Chamber of the Court as a matter of the burden of proof which Italy had failed to discharge (at 47-48), the true significance of the decision was reflected in the Dissenting Opinion by Judge Schwebel who approved of this aspect of the Chamber's decision as fol-

lows (at 94): "the Judgment makes a contribution to the elucidation of the local remedies rule by indicating that, where the substance of the issues of a case has been definitively litigated in the courts of the State, the rule does not require that those issues also have been litigated by the presentation of every relevant legal argument which any municipal forum might have been able to pass upon, however unlikely in practice the possibilities of reaching another result...[The Chamber's] holding thus confines certain prior constructions of the reach of the rule [...] to a sensible limit".

While the author asserts that the *Elettronica Sicula* case "clarified the application of the domestic remedies rule" (p. 16), there is no indication of the divergent applications of the rule, nor of how this divergence might be resolved. The same lack of penetration is present in the discussion of the question of justiciability, which the author, not unreasonably, equates with the distinction between legal (and therefore justiciable) and non-legal (or political) disputes. On two occasions (pp. 19, 22), he asserts that caution "is the guiding principle", yet, as he also admits that "international tribunals tend to lean towards the admissibility of cases rather than rejecting them on the ground that they are not justiciable", it is difficult to see how these tribunals were exercising much caution in deciding whether it was "proper to hear a particular issue arising" in a case (p. 19).

The author refers to the exceptional conclusion reached by the International Court in the *Haya de la Torre* case (1951 ICJ Rep.71, at 74), that it could not provide advice to Colombia and Peru on how its earlier decision in the *Asylum* case (1950 ICJ Rep., at 266), could be implemented because a choice between the various alternatives "could not be based on legal considerations, but only on considerations of practicability or of political expediency", and it was "not part of the Court's judicial function to make such a choice." As the writer then points out, this outcome was in sharp contrast to the Permanent Court's advisory opinion in the *Customs Union* case (1930 PCIJ (Ser. A/B), No. 41).

All members of the Court treated the case as one of treaty interpretation. The joint dissenting opinion expressed the view that, in deciding whether the Union arrangements involved Austria in a breach of the Geneva Protocol of 1922, which required it "to abstain from any act which might directly or indirectly or by any means whatever compromise her independence", the Court was answering an entirely legal question and was "not concerned with political questions nor with political consequences" (at 75). The author is correct in questioning this rather fanciful differentiation between what was legal and what was political. Judge Anzilotti, while agreeing with this conclusion, was at least more honest in admitting that everything pointed "to the fact that the answer depends on considerations which are for the most part, if not entirely, of a political and economic kind" (at 68). He nevertheless justified answering the question by adopting the argument that the Court was only being called upon to decide a prelimi-

nary question as to the Council's jurisdiction under Article 88 of the Treaty of St. Germain.

Judge Anzilotti's opinion would have been worth a mention to reinforce the point the author was making about the process of political and economic prediction which the Court was being called upon to exercise. As to how one could differentiate, on the one hand, between this case and a number of advisory opinions by the present Court which adopted a similar approach and, on the other, the *Haya de la Torre* case, the author offers no real explanation. He does make passing reference (p. 19) to the fact that the *Customs Union* case "went before the Court by way of an advisory opinion requested by the League of Nations rather than as a contentious case", but makes no attempt to elaborate on this as a point of difference. The existence of political support for answering the question (for how else would the relevant organ have requested the opinion in the first place?) was almost certainly an important element in the *Customs Union* case. The Court's approach was a reflection of the view which had been firmly expressed in the Council of the League that the "subject raised important economic and political issues, but that the question now before the Council was essentially a legal one" (M. Benes of Czechoslovakia, PCIJ (Ser. C), No. 53, at 26; *see also* M. Briand of France, *id.*, at 17-128; M. Grandi of Italy, *id.*, at 20; all referring to the similar opinion of Mr Henderson of Great Britain). It is hardly surprising, therefore, that the present Court should take its lead from the principal political organs of the UN. As the Court summarised the position in the *Peace Treaties* case (1950 ICJ Rep. 65, at 71), the reply of the Court to the request for an advisory opinion from that source "represents its participation in the activities of the Organisation, and, in principle, should not be refused."

The treatment of the controversy over whether or not there is an obligation upon States to settle their disputes by peaceful means is not altogether consistent. The lack of precision emerges at the outset when the author identifies the various views as follows (p. 29): "At one end, there are those who attest that there is no duty at all. In the middle are those who limit the duty to what is enshrined in the United Nations Charter. At the other end are those who assert that international law now imposes a duty to settle international disputes".

Presumably the third category encompasses all such disputes. The second category is patently open to the criticism that it is imprecise because, as the author soon reveals (p. 30), the crucial texts in the Charter seem to emphasise the need to settle disputes which otherwise might endanger international peace and security. Indeed, after examining the Declaration on Friendly Relations and the Manila Declaration, the author concludes (p. 33) that the obligation on UN members is limited to disputes of that nature.

Subsequently, however, the writer deduced from various statements by the International Court, culminating in the *Nicaragua* case, (1986 ICJ Rep. 14, at 145), "a general obligation to settle international disputes" which is "placed not only on members of the United Nations, but on all states by virtue of the duty

being part of customary international law" (pp. 34-35). The problem with this deduction is that the majority of the Court's pronouncements concentrate upon the duty to negotiate or employ other peaceful means in seeing a solution to a dispute (see the *Nicaragua* case, (1986 ICJ Rep. 14, at 145); *North Sea Continental Shelf* cases (1969 ICJ Rep. 3, at 47); *Fisheries Jurisdiction* cases (1974 ICJ Rep. 3, at 32-33), dealt with on pp. 33-34). Only in the *Nicaragua* case did the Court, in the paragraph following the above passage, encourage the parties to participate in the Contadina process in order to find a "definitive and lasting peace in Central America, in accordance with the principle of customary international law which prescribes the peaceful settlement of international disputes" (quoted p. 34). Given the nature of the dispute arising out of the Contras' actions within and outside Nicaragua against the government of that state, there is no need to read the Court's statement as applying to all international disputes, including those not involving any threat to international peace and security.

Without any real explanation of why this wide interpretation of the Court's position should be rejected, the author introduces another version of his original stance now proclaiming that it is only disputes "likely to endanger international peace, security and justice" which have to be resolved peacefully (p. 35). The reference to "justice" in this pronouncement is illustrative of the confusion in this whole section. Though it played no part in the earlier material, the author, without warning, referred to paragraph 2 of the Manila Declaration as conforming to "the well-trodden path of limiting the duty to settle international disputes in such a way as not to endanger international peace, security and justice" (p. 32). Yet the subsequent iteration of the position reverts to the earlier version as requiring only the settlement of disputes "likely to endanger international peace and security" (p. 33). There is no adequate explanation of what is meant by international justice, nor how it comes to play a part in the final version despite its absence from most of the earlier assertions of the legal position.

When it comes to the peaceful or amicable means of settling disputes, it may be acceptable enough to deal briefly with the processes identified in Article 33 of the UN Charter (pp. 37-44). It is less easy to provide adequate coverage of the role of the General Assembly, the Security Council and the Secretary-General within six or so pages (pp. 44-50). It is certainly unsatisfactory to end with a quotation from the Agenda for Peace (pp. 49-50) without explanation of what is meant by such expressions as 'peacemaking', 'peace-keeping' and 'peace-building' in that document.

A similar paucity of treatment is evident in the brief segment on regional arrangements (pp. 50-51). There is no hint of the very real tension between the activities of regional institutions and the Security Council in the field of international peace and security. Recent events in the Balkans and NATO actions in relation thereto recall the controversies of the 1960s over the relationship issue under Articles 53 and 54 of the UN Charter.

The section on arbitration is just over 30 pages in length (pp. 52-83). This is in stark contrast with the space devoted to the diplomatic means which seems to be at variance with the criticism in the introduction about writers who ignore those "other ways by which disputes are handled in the real world" (p. 1). This is obviously more familiar ground for the author, so that the criticisms of the section relate more to editorial matters. Thus, on page 62, the first sentence uses the expression "judges of their own choice", though there are no "parties" or "states" to which the "their" refers. Nor, on the same page, is it clear whether the writer really means to say that in "international law today" arbitration "may be over a purely commercial matter between private individuals"? On page 65, the reference in note 214 is presumably to 92 ILR, not therefore to *id.* On the same page, it is curious to give as the only examples of a sole arbitrator the appointment of a head of state in that capacity. On more of a substantive note, it is open to question whether the well-known exposition of the textual approach by the International Court in the *Competence* case (1950 ICJ Rep. 4, at 8), is the best statement today of the basis for "interpreting the instruments which govern" a tribunal's jurisdiction (p. 67).

When the author comes to the remedies based upon self-help, there is a continuing absence of adequate explanation. Having pointed to the requirement of proportionality based upon a degree of approximation between the breach and the reaction, posited by the tribunal in the *Air Services Agreement* case (54 ILR 304, at 338 (1979)), the writer then refers to the need to take into account "not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach" (*id.* quoted on p. 89). No attempt is made to identify the "principles" which neither might be relevant, nor is there any explanation of why the pronouncements by the tribunal should be described as "remarkable general statements" (p. 90), a designation which is hardly informative. Similarly, it would have been helpful to have included some discussion, beyond the brief mention on page 92, of the interconnection between recourse to adjudication, the granting of interim measures and the possible continuation of a right to take countermeasures by a State claiming to be the victim of a breach of an international obligation. The matter is referred to again on pages 93-94 when discussing the work of the International Law Commission, but this consideration could usefully have been linked to the relationship issue.

Chapter 3 on "The International Court of Justice and its Recently Found 'Popularity'" commences with a background briefing on the origins and history of the Permanent Court of International Justice (pp. 96-102). Given the paucity of treatment of more important contemporary aspects of dispute settlement already noted, this section is over-long, and the same could be said of the treatment of access to the Court (pp. 112-116) when an entire page (p. 14) is given over to the text of Security Council Resolution 9 (1946).

Despite its title, Chapter 3 comprises principally a relatively concise summary of the issues arising in relation to various aspects of the Court's jurisdic-

tion, contentions advisory and incidental (pp. 116-167). For the most part, the survey gives rise to few reasons for doubting its accuracy, though there remain a number of grounds for objection.

The treatment (p. 117) of the *Corfu Channel* case (Preliminary Objection, 1948 ICJ Rep. 15), is misleading. It is true that "the United Kingdom argued that the reference to Article 36(1) of the Statute of the Court to 'all matters specifically provided for in the Charter of the United Nations' gave the Court compulsory jurisdiction." It is quite wrong to go on to say that the Court "did not find it necessary to decide the point, but the weight of the opinions expressed would seem to go against that interpretation", without identifying the substance of the argument. This was identified by the United Kingdom (*see* at 17) as being a combination of (a) the Council's recommendation to the parties to submit the dispute to the Court; (b) Albania's acceptance, being a non-member of the UN, of all the obligations to which a member would be subject for the purposes of the case; and (c) the effect of Article 25 of the Charter. Although this question was not addressed by the Court (*see* at 26), it was considered in a Joint Separate Opinion by seven members of the Court and in a Dissenting Opinion by the Judge *ad hoc* appointed by Albania. The principal reasons advanced by the former Opinion were: (1) the use by the Security Council of the word 'recommends' and not 'decides' in the relevant resolution; (2) "the general structure of the Charter and of the Statute which founds the jurisdiction of the Court on the consent of States"; and (3) the terms of Article 36(3) of the Charter which was no more than a reminder to the Council that legal disputes should normally be decided by judicial methods and could not be regarded as establishing "a new basis of compulsory jurisdiction" (at 32). This approach does not rule out the possibility that a 'decision' of the Council could bestow jurisdiction upon the Court in accordance with Article 25, a possibility which seems implicit in the Opinion of the *ad hoc* judge (at 33-35). Though doubts may have existed in 1948 as to such a basis of jurisdiction, today the Council's power to establish as well as to grant jurisdiction to international tribunals would seem to suggest that Article 25 could also be employed in an appropriate case to establish the Court's jurisdiction in a contentious case.

On page118 there is a curious passage in which the author writes that "the giving of consent by a State is not necessarily determinative of jurisdiction" because an "issue may still arise as to whether a particular case or an aspect of it falls within the exact scope of the Court's jurisdiction." While this is true in the sense that the Court's jurisdiction depends upon the consent of both parties to a dispute between them, it is unhelpful in that it gives the impression of some amorphous concept of jurisdiction existing outside and beyond the consent of States. This is especially so as the paragraph in question continues with an assertion of the principle that, both under Article 36(6) of its Statute, and under 'general international law', it is for the Court to determine whether it has jurisdiction in a particular case. If the issue of consent and of its relationship to juris-

diction were to have been raised at this stage, it would have been preferable to have included a discussion of the relevance of reciprocity (dealt with on pp. 133-135).

Among the matters which could have been better explained were those of seising (p. 119) and the question which arose in the *Nicaragua* case (1984 ICJ Rep. 392), of why the United States was bound by the six months' period of notice of withdrawal of its declaration accepting the Court's jurisdiction and could not take advantage of the fact that Nicaragua's acceptance contained no time restriction (pp. 134-135). While it may be that the issue of automatic reservations has become less significant with the withdrawal of both France and the United States from the Court's compulsory jurisdiction, the discussion of such reservations (pp. 139-141) is rather flimsy. It is also rather unsatisfactory to limit the possibilities for dealing with them to those of invalidity of the declaration or separation of the offending reservation to leave the rest of the declaration standing. The first of these two possibilities was that favoured by Judge Lauterpacht in the *Norwegian Loans* case (1957 ICJ Rep. 9, at 52-53). However, given the fact that the French (in the above case) and the United States declarations (in the *Interhandel* case (1959 ICJ Rep. 6) and the *Nicaragua* case, (1984 ICJ Rep. 392) were before the Court without the Court doubting their validity, it would be difficult to imagine the Court now rejecting the effectiveness of the remaining declarations containing automatic reservations. And it is certainly not accurate to suggest, as does the author (p. 141), that Judge Schwebel "made it abundantly clear that he regards such reservations as not only invalid, but as rendering the whole declaration invalid as well." Judge Schwebel in fact was more ambivalent in expressing his views as follows (1984 ICJ Rep. 392, at 601-602): "In testimony before the Senate Committee on Foreign Relations in 1960, I agreed with Judge Lauterpacht's position. I continue to see great force in it, while appreciating the argument that, since declarations incorporating self-judging provisions apparently have been treated as valid, certainly by the declarants, for many years, the passage of time may have rendered Judge Lauterpacht's analysis less compelling today than it was when made".

Indeed, if one does accept the validity of such reservations, their application would depend on a matter of interpretation, whether or not incorporating an additional element of good faith into how they might be relied upon (*see generally*, Greig, *Nicaragua and the United States: Confrontation over the Jurisdiction of the International Court,* 1991 BYIL 119, at 181-213).

The section on transferred jurisdiction presents another example of the author's lack of critical discussion. Thus, he accepts unreservedly the decision of the International Court in the *Aerial Incident* case (1959 ICJ Rep. 127), that Bulgaria's declaration of 1921 accepting the jurisdiction of the Permanent Court could not be invoked in 1955 by virtue of Article 36(5) of the new Statute because Bulgaria had only been admitted to membership of the UN and become a party to the Statute in 1955. Such a declaration could not remain 'in force' with-

out a State being a party to the Statute from the outset to maintain the declaration's effectiveness. Similarly, the writer sees nothing incongruous with the decision in the *Barcelona Traction* case (1964 ICJ Rep. 6) that Article 37 could reactivate a provision in a treaty granting jurisdiction to the Permanent Court because the clause remained 'in force' by virtue of the treaty even though the clause did not become effective to bestow jurisdiction on the present Court until the state concerned became a member of the UN and a party to the Statute.

The author ignores the apparent discordance between these two cases. In the *Aerial Incident* case, the Court rejected the possibility that admission to membership could resurrect the declaration because such admission would be subject to different legal consequences from the admission of States which had made no potentially continuing declaration accepting the jurisdiction of the Permanent Court, a circumstance which the Court seemed to regard as unacceptable. On the other hand, in the *Barcelona Traction* case (1964 ICJ Rep. 6, at 36), the Court saw no such difficulty: "States joining the United Nations or otherwise becoming parties to the Statute, at whatever date, know in advance (or must be taken to have known) that, by reason of Article 37, one of the results of doing so would, as between themselves and other parties to the Statute, be the reactivation in relation to the present Court, of any jurisdictional clauses referring to the Permanent Court in treaties still in force, by which they are bound". Prior to the *Aerial Incident* decision, the same could equally well have been said of Article 36(5).

A similar tension exists between the *Aerial Incident* case and the *Nicaragua* case (1984 ICJ Rep. 393). Although Nicaragua had been a UN member from the outset, its problem was that its acceptance of the jurisdiction of the Permanent Court had not taken effect because it had never ratified the Protocol of Signature of the Statute of that Court. The author accepts (p. 143) the Court's judgment that, as the Nicaraguan declaration had potential effect, it could be perfected under Article 36(5) by Nicaragua becoming a party to the present Statute. In other words, even in relation to that provision, membership of the United Nations could have different consequences for different States. The contrast or conflict with the *Aerial Incident* case was masked by the Court's observation that "whatever may be its relevance in other respects", it did not provide "any pointers to precise conclusions on the limited point now in issue" (1984 ICJ Rep. 393, at 405). However, the tension is clear from the fact that it was judges among the dissenting minority who referred for support to the *Aerial Incident* case (*see, e.g.*, 1991 BYIL 119, at 136-138).

The final parts of chapter 3 dealing with "Incidental Jurisdiction", "Advisory Opinions" and "The Role of the Court and its Recently Found 'Popularity'" are well presented considerations of relevant issues, though there is a continuing reluctance to admit to difficulties and uncertainties in the Court's jurisprudence. For example, the application of Article 62, whereby a state having "an interest of a legal nature which may be affected by the decision in a case" may be permitted to intervene, had been reduced almost to vanishing point as a result of the

decisions of the Court in the *Tunisia/Libya* (Application by Malta) case (1981 ICJ Rep. 3) and the *Libya/Malta* (Application by Italy) case (1984 ICJ Rep. 3). It is true that the privilege has been resurrected by a Chamber of the Court in the *El Salvador/Honduras* (Application of Nicaragua) case (1990 ICJ Rep. 92) but the scope of this decision remains severely limited by the legacy of the earlier cases (*see* Greig, *Third Party Rights and Intervention before the International Court,* 32 Virginia JIL 285 (1992)). A similar lack of analysis occurs in the section on provisional measures which, by virtue of Article 41 of the Statute, can be granted by the Court "to preserve the respective rights of either party" to a case. The *Nuclear Test* cases (1973 ICJ Rep. 99), are given perfunctory treatment (p. 155). The writer explains the outcome in a manner which conceals rather than reveals the significance of the decision: "[t]he Court took the view that it was not in a position to decide at that stage of the proceedings whether Article 33 of the General Act of 1928 for the Pacific Settlement of International Disputes could afford a basis of jurisdiction. The Court, therefore, confined itself to its Statute. It indicated provisional measures [to] both Applicants and the Respondent." This obscure pronouncement is no adequate explanation of a case which formulated a test for establishing a relationship between the granting of protection and the existence of jurisdiction on the merits (at 101), provided evidence of the need to balance between the likelihood of such jurisdiction existing and the seriousness of the threat to the state seeking protection and drew a distinction between the issue of jurisdiction and that of competence to deal with a situation which might not be regulated by international law (*see, generally*, Greig *The Balance of Interests and the Granting of Interim Protection by the International Court*, 11 Australian YBIL 108 (1991)).

The second part of the book commences with a chapter on "Australia and New Zealand as Applicants in International Disputes", which purports to "examine the specific contributions made by Australia and New Zealand in the development" of the "general principles relating to international dispute settlement" (p. 178). It cannot be said that the author keeps very much to his designated aim.

Following the outline of the facts of the dispute, the discussion of the *Nuclear Test* cases commences with a discussion of the problem of the non-appearance of the respondent state, and proceeds to consider how it was dealt with in this and certain other cases heard by the Court (pp. 180-182). While the *Nuclear Test* cases involved Australia and New Zealand, there is nothing to show that either state contributed to the development of the Court's jurisprudence on the matter, and the same could be said of the law with regard to the binding nature of unilateral declarations in certain circumstances (pp. 182-183). It is true to a limited extent that the actions of Australia and New Zealand in bringing the cases against France enabled the Court to deal with the matters raised. But many of those matters concerned substantive law (hence the emphasis on principles of environmental law in the Conclusion to the chapter, pp. 195-197). The only di-

rect contribution would have been through the persuasiveness of the applicants' arguments on matters relating to the settlement of disputes, but the author makes no attempt to deal with the Pleadings in the case.

The protracted wranglings and their settlement concerning the Rainbow Warrior give greater opportunity for considering the processes of settlement agreed upon. However, the treatment of the decision of the arbitral tribunal which ultimately led to the resolution of the dispute is scant to say the least. The arbitration was arranged to deal with the alleged premature release by France of the two French officers who had committed the offence of blowing up the vessel but had been allowed to serve their sentence on a French Island in the Pacific Ocean. The author recites the use by France of various defences to state responsibility (pp. 193-194) without questioning whether *force majeure* or distress have a role in excusing a breach of a treaty (that is whether Article 42(2) of the Vien-na Convention is largely undermined by Article 73). There is also a brief discussion of the appropriate remedies (pp. 194-195), ending with the rather pointless summation (p. 195): "It is clear, then, that this case presented the Arbitral Tribunal with the opportunity to discuss a number of difficult areas of the law of state responsibility. The work of the International Law Commission proved of much assistance to the Tribunal. There is no doubt that the Tribunal has made an important contribution to the development of the law in a number of respects. The case further demonstrates the importance of arbitration as a mode of international dispute settlement".

The decision in the case is not so acceptable as the author suggests (*see, for example*, the discussion of it in Greig, *Reciprocity, Proportionality and the Law of Treaties,* 34 Virginia JIL 295, at 374-379 (1994)). Moreover, given that this segment of the book is supposed to be dealing with matters from an Australian and New Zealand perspective, it is surprising that some space was not devoted to the opinion of the New Zealand arbitrator in the case, Sir Kenneth Keith, whose views on the application of the relevant law to the facts with regard to the issues on which he dissented were much more persuasive than those adopted by the other two members of the tribunal.

The penultimate chapter is entitled "Australia and New Zealand as Respondents in International Disputes", though the two cases examined concern only Australia as defendant. There was New Zealand involvement in the first, the *Phosphate Lands of Nauru* case (1992 ICJ Rep. 240), in that, although not a party to the case before the International Court, New Zealand, along with the United Kingdom, had been joint administering powers with Australia of the mandate and trusteeship over Nauru. The author chooses to describe Nauru's case by quoting a statement by the Head Chief of Nauru (p. 199). This is a somewhat strange choice as the statement in question was relied upon by Australia in support of its contention that Nauru had waived its claims concerning rehabilitation of the island. The last sentence of the passage that the "revenue which Nauru had received in the past and would receive during the next twenty-

five years would [...] make it possible to solve the problem" (cited 1992 ICJ Rep. 240, at 249) was hardly part of Nauru's case, quite the contrary.

The author's treatment of delay in instituting proceedings is also open to question. Part of page 200 reads as follows: "The Court enunciated the principle that delay on the part of an applicant may render its case inadmissible. But international law does not lay down any specific time limit regarding when an application is to be commenced against a violator state. That leaves the Court to use its discretion to determine in each case whether an application should be held inadmissible on the ground of passage of time. The Court has now clarified an area of international law that was at best vague. States considering instituting proceedings in the Court will now be mindful of the consequences of inordinate delay on their part".

The first two sentences of this passage paraphrase the first two sentences of paragraph 32 of the Court's judgment (1992 ICJ Rep. 240, at 253-254). But is it accurate to then say that it is left to the Court to determine at its discretion whether an application should be held to be inadmissible on the ground of passage of time? It is certainly "for the Court to determine [...] whether the passage of time renders an application inadmissible" (at 254), but such determination must be made "in the light of the circumstances of each case", which is to suggest that some form of objective assessment of whether this has occurred must be made by the Court. That the Court perceived the test as objective rather than purely discretionary is also evidenced by the fact that, in the previous paragraph of its judgement, the Court had referred to Australia's contention that "Nauru's claim is inadmissible on the ground that it has not been submitted within a reasonable time" (at 253). In the opening words of the following paragraph the Court "recognise[d] that [...] delay on the part of the claimant State may render an application inadmissible" (at 253). This makes it even clearer that the reference to "in the light of the circumstances of each case" should be read as an objective limitation on the Court's discretion. Only if the author had made clear this limitation would it have been possible for the author to have substantiated his claim that the Court had "clarified this area of international law". If this reading of the Court's intention is correct, the appropriate test would be not that an "inordinate delay" would be necessary to render an application inadmissible but only a delay that was unreasonable in the circumstances.

The final decision considered by the author is that in the *East Timor* case (1995 ICJ Rep. 9). Australia escaped somewhat lightly from this encounter with Portugal before the Court. Only two members of the Court, Judge Weeramantry and Judge *ad hoc* Skubiszewski, were highly critical of Australia's conduct towards the East Timor independence issue. Wider criticism might have been expected given that Australia had regarded the opening of the negotiations for the Timor boundary treaty as constituting *de jure* recognition of Indonesian sovereignty over the territory, but nevertheless felt obliged in presenting its case to the Court to affirm the right of the East Timorese to self-determination.

The author raises the issue of Portugal's standing to bring the claim as it had been argued by Australia that Portugal had no right to represent the people of East Timor, nor had it any rights of its own in the matter. Apart from acknowledging that the Court did not regard it as necessary to deal with the issue, his rather tame comment was that Portugal "surely also had some rights of its own as the recognised Administering Power" (p. 204).

Although not mentioned by the author, it was certainly the view taken by Judge Weeramantry that Portugal was an administrator "duly recognised by the United Nations" (at 192). Judge *ad hoc* Skubiszewski also alluded to Portugal's position in similarly general terms (at 256). "Portugal has standing because, in spite of all the factual changes in the area, it still remains the State which has responsibility for East Timor. This standing follows from the competence Portugal has in its capacity as Administering Power. One of the basic elements of that competence is the maintenance and defence of the status of East Timor as a non-self-governing territory; this is the Administering Power's duty. Portugal has the capacity to sue in defence of the right of the East Timorese people to self-determination. Portugal could also rely generally on the remaining attributes of its sovereignty, such attributes being conducive to the fulfillment of the task under Chapter XI of the Charter".

It is true that the General Assembly had regularly referred to Portugal as the 'Administering Power' in relation to East Timor. This Australia never denied. However, it was Australia's view that Portugal had abandoned the territory. Its administration had made no attempt to halt the civil conflict that broke out between pro-Indonesian and pro-independence groups before the Indonesian intervention. Furthermore, in the early years of the Indonesian takeover, Portugal had shown no concern for the territory or its inhabitants. Hence the UN resolutions treated Portugal as administering power only in a very limited sense. They referred principally to the role for Portugal in negotiations with Indonesia as to the future of East Timor and to the need for those discussions to take account of the wishes of the territory's inhabitants. The right thus granted to Portugal to participate in those talks certainly did not encompass the taking of international legal proceedings whether on its own behalf or on behalf of the East Timorese.

The conclusion to Chapter 5 (pp. 205-208) is taken up with a discussion of the application of the principle of the *Monetary Gold* case (1954 ICJ Rep. 19), to the situation in the *Nauru* case (1992 ICJ Rep. 240), and in the *East Timor* case (1955 ICJ Rep. 90). Viewed from a purely political perspective the outcome of the last two cases on this point could easily have been foreseen. The legal reasons provided by the Court in the last mentioned case are summarised by the author on pages 207-208. It would have been very difficult to have found against Australia without initially considering the lawfulness of Indonesia's conduct in East Timor. On the other hand, Australia could have been held accountable to Nauru whatever the co-responsibility of New Zealand and the United Kingdom might have been as joint administrators of the territory under the mandate and

trusteeship agreements. As the author points out (p. 206), in distinguishing the *Monetary Gold* case, in the *Nauru* case the Court "was not called upon to determine their responsibility as a prerequisite for the determination of the claim against Australia." He also refers to the Court's somewhat enigmatic statement, summed up by the author as the decision on this aspect of the case not affecting "the issue whether Australia was to be held responsible wholly for liability for rehabilitation of the island or whether it was to be held partly responsible", an issue which would have to be "considered at the merits stage" (*id*). Although it is not altogether clear on the point, the Court's decision would seem to be that, whatever the nature of the responsibility of the three administering powers, it did not affect the proceedings continuing against Australia to an ultimate determination of Australia's responsibility (*see* the separate opinion of Judge Shahabuddeen, 1992 ICJ Rep. 240, at 273, that, by "implication the Court has agreed with Australia's contention that the objection did have an exclusively preliminary character").

The Court would therefore have had to decide whether Australia was liable for all the reparations claimed (and thus entitled to a contribution of part of those damages from New Zealand and the United Kingdom), or for only a proportion (calculated on the basis of the amount of the costs of rehabilitation to be borne by the other two states). This, in the view of other members of the Court, would inevitably involve an infraction of the Monetary Gold principle as those third states' "legal interests would not only be affected by a decision, but would form the very subject-matter of the decision" (1954 ICJ Rep. 19, at 32, quoted 1992 ICJ Rep. 240, at 301 by President Sir Robert Jennings; *see also* at 328 by Judge Ago; at 331 by Judge Schwebel). As the last mentioned observed (*id.*): "The fact that the timing of the finding of the responsibility of the absent party precedes such a finding in respect of the present party, or that the finding of the responsibility of the absent party is a logical prerequisite to the finding of the responsibility of the present party, is not significant. What is dispositive is whether the determination of the legal rights of the present party effectively determine the legal rights of the absent party."

Rather than drawing attention in his text to the dubious logic of the distinction drawn by the Court in the *Nauru* case, the author's last sentence of the chapter is that the results in the *Nauru* and *East Timor* cases "have been a clarification of the exact scope of the Monetary Gold doctrine." To this is appended a footnote raising the sole doubt by reference to Klein, *Multilateral Disputes and the Doctrine of Necessary Parties in the East Time Case,* 21 Yale JIL 305 (1996), "who argues that the Court has not been consistent, but rather, has oscillated between an expansionist UN model to cater for equity considerations and a restrictive Westphalian model to protect the sovereignty of states." More should surely have been made of the political dynamic behind the Court's decisions even on matters on jurisdiction.

Perhaps I might end with two slight apologies. The first concerns the use I have made of various articles written by myself. The reason for doing so is that I found it rather strange that the author should have referred to one of my articles, *Reservations: Equity as a Balancing Factor?*, 16 Australian YBIL 21 (1995), and ignored those mentioned in this review, all of which are more pertinent to the subject matter of this book. The second is for the rather harsh nature of this review. In my opinion, the fault in this respect lies with the exaggerated claims made at the outset by the author. If the goals had been set at a more modest level, no reviewer could reasonably have complained at the reluctance or failure to provide an in-depth discussion of many of the issues and problems which the text largely glosses over. Nevertheless, the absence of such treatment would still have detracted from the value of the book and have made any reviewer hesitate in recommending it for library acquisition.

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*The Paradox of Consensualism in International Law*, by O.A. Elias & C.L. Lim. Kluwer Law International, The Hague/London/Boston, 1998. Developments in International Law, Volume 31. ISBN 90-411-0516-6, xix and 322 pp., incl. Index and Bibliography, USD 114/GBP 68/NGL 200.

A latest wave of literature on the sources of international law has made its way to publishers' lists since the beginning of the nineties.[1] Although by any account interest in the topic has greatly fluctuated during the last decades, the doctrine of the sources has always exercised a powerful allure over the international legal profession. Nearly every course or textbook of public international law began (and begins) with a disquisition on treaties, custom, and Article 38 of the Statute of the International Court of Justice; and nearly every generation of scholars found it necessary to turn its attention to the sources in doctoral theses, monographs, law review articles and conferences. There are some obvious reasons for the spell of the doctrine. To begin with, sources engage fundamental questions of international law's existence: what is the basis of obligation in international law? What is 'law' and how do we tell it when we see it? and so forth. Furthermore, together with other doctrines, sources are seen to carry the potential and the hope for change and progress in international law. The idea has generally been that if we improve our understanding of the sources in the light of recent

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1. For some recent book-length publications *see*, *a.o.*, M. Byers, Custom, Power and the Power of Rules (1999); M.E. Villiger, Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources (1997); V.D. Degan, Sources of International Law (1997); J. Klabbers, The Concept of Treaty in International Law (1996); G.M. Danilenko, Law Making in the International Community (1993); K. Wolfke, Custom in Present International Law (1993).

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developments, we will be able to create more certainty and predictability in international legal relations, and thereby facilitate the peaceful resolution of international disputes. Sources discourse in some of its manifestations also appears to create a more tangible, solid ground for the resolution of disputes. Determinations of whether norm x is customary or not, or the relationship between treaty y and custom z, seem to relocate dispute resolution from the domain of politics, philosophy, or morals to a more 'technically' ascertainable legal domain, where 'scientific' debate is possible. Finally, publishing on the sources has always constituted (and still does) a safe professional choice: classic and trendy at the same time, sources allow solid international law writing on the foundations of the discipline combined with *à la mode* review of fashionable recent developments.

One of the great testing grounds of the doctrine in every generation, its promise and its defeat, has been its task to explain the possibility of an international legal order simultaneously based on the will of states (at the stage of norm creation), and on non-consensual elements (at the stage of norm ascertainment/dispute settlement). Explanations of the basis of obligation in international law and of international law-making falter in their inability to credibly achieve the double promise of rendering international law simultaneously concrete and normative.[2] The longing to break the vicious circle and to postulate a coherent solution to the problem has led to continuous attention to the sources, reaching our day. In this sense the book at hand, *The Paradox of Consensualism in International Law* by O.A. Elias and C.L. Lim, comes as the latest episode in a long tradition of sources writing. At the same time, the book stands out in this tradition for reasons which I will explain. Its overall argument and objectives, however, raise serious questions regarding the international lawyer's personal and professional responsibilities at century's end.

The book is devoted to demonstrating one main thesis: the consensualist basis of international law (the idea that the fundamental regulatory principle in the creation of international law and in its binding force is the consent of a sovereign state) still remains the best available explanation of international law, endorsed by contemporary theory and practice. The authors' defense of the consensualist/voluntarist/positivist theory seems to emanate from three alternative arguments. First, that consensualism is a 'practical inevitability': for good or for bad, and despite its shortcomings, it is *generally* endorsed by both state practice and academic opinion. Second, that non-consensualist explanations of international law are flawed and impractical: there is still no better evidence of international law doctrine than that which is expressed by states as a reflection of their

2. Recent work has demonstrated this tension in the doctrine of the sources. *See, e.g.*, David Kennedy, International Legal Structures 11-108 (1987), especially Chapter 1; M. Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 264-341 (1989), especially Chapter 5 on the sources of international law; *see also* D. Kennedy, *The Sources of International Law*, 2 American University Journal of International Law and Policy 1-96 (1987).

legal expectations. Third, that it is possible (or at least plausible) to present a logically coherent consensualist explanation, even on the face of recent developments in international society and organization. In sum, the book constructs the 'strongest version' of the positivist argument and defends it as an imperfect, second-best explanation of international law, possessing a comparative advantage over other solutions on account of its ability to better explain a larger array of legal phenomena.

In this acknowledgment the book seems aware of the major critiques of the consensualist approach, old and new. It recognizes from the outset the fundamental positivist contradiction: while consent provides a credible basis for norm-creation, it encounters difficulties when explaining norm-ascertainment in a claim-conflict situation, where it has to rely on non-consensualist bases. In this latter stage, the one of the ascertainment of the content of the norm, the authors argue, the consent of the states is no longer necessary: the application of the law must remain divorced from the will which created it. And this is the *paradox of consensualism* in international law.

The book is divided into three parts. Part One (Chapters I-VIII), by far the longest, explores the significance attributed to state consent in the formation of customary international law, as evidenced in the jurisprudence of tribunals, state practice, and juristic opinion. It maintains that consent is still *generally* (although by far not exclusively) accepted as a fundamental regulatory principle. In particular, Chapter I (pp. 3-28) argues that consent can be functionally equated with *opinio iuris*: the declarative theory of *opinio iuris* (the idea that *opinio iuris* does not declare a pre-existing customary law but that it is taken to be the source of the law) has gained prominence in international legal discourse. This consideration paves the way for Chapters II-VIII, which investigate the extent to which the importance of consent/*opinio iuris* in the formation of customary law is endorsed by international law literature and practice. The examination of judgments of the International Court of Justice (including Dissenting and Separate Opinions), decisions of other Tribunals, state practice, and juristic opinion is thorough and often exhaustive. Chapters II to V (pp. 29-113) appraise the role of *individual* consent in the formation of international custom in case law, literature and practice. Chapter VI (pp. 115-134) denies the typological distinction drawn between particular and general custom, by demonstrating that consent is central to the formation of both. While Chapter VII (pp. 135-152) confirms that the importance of consent is also not controverted by the literature debating the relationship between new states and pre-existing customary international law, the final chapter of Part One (Chapter VIII, pp. 153-169) turns to academic literature on the issue. The overall conclusion reached by Part One is a defensive one. Even if the indispensable role of consent has not been proven conclusively thus far, the various attempts to exclude consent in international law theory and practice are not conclusive either: "there is no rule based on practice and on principle which says that consent is not required, and [...] since we cannot con-

clusively pronounce one way or another upon the question of the necessity of consent, *all we are left with is the principle that the consent of States is sufficient to create obligations for them*" (p.169; emphasis added).

Part Two (Chapters IX-XI) moves on to assess the role of consent in the formation of the remaining sources of international law, written and unwritten. Chapter IX (pp. 173-192) reviews international treaties. Chapter XI (pp. 205-234) discusses general principles and soft-law, while an interjected Chapter X (pp. 193-204) introduces the idea of the *paradox of consensualism*, as presented above. The general conclusion of Part Two is that treaties, general principles, and soft-law are "just as unproblematic, or just as problematic" as customary law when it comes to issues of ascertainment of consent and content, and when trying to achieve the double objective of being concrete and normative at the same time (p. 233). In consequence, the conclusion of Part One is not contradicted by the findings of the role of consent in the remaining sources of international law.

Part Three (Chapters XII-XIV) explains the possibility of a consensualist international law. It argues that the consensual explanation can be defended even in the light of challenging events such as the proliferation of non-state actors in the international legal order (Chapter XII, pp. 237-253). Chapter XIII (pp. 255-275) pleads that, despite the anarchical image of international law presented in the rest of the book, in which no conclusive answer can be provided in nearly any problem, "international law as a system remains a complete and coherent whole" (p. 255). The answer to the basis of obligation comes again as a modest conclusion: although the concept of sovereignty/sovereign consent is not comprehensive in its capacity to explain all the jural relations that take place in the international legal order today; and although state sovereignty is not in itself sufficient to explain the nature of contemporary international law, "the concept [of sovereignty/sovereign consent] remains sufficient as regards its traditional role of explaining a plethora of legal phenomena in the international plane" (p. 275). Due to this insufficiency, any *general* theory which seeks exposition in substantive terms on the basis of obligation must fail. Once disavowing the possibility of a grand theory, the solution comes as follows: "the proper technique is to attend to the circumstances of each case and to extract transactional justice, the kind which comes closer to the legal expectations of the disputants" (p. 277).

Chapter XIV (pp. 279-296) closes the book by presenting a summary of the argument as well as brief reflections in the relationship between the postulated generally-consensualist international law and morals. In this final Section (p. 293-296) the authors raise the question of whether international law promotes any global values. At this point Doctors Elias and Lim claim moral agnosticism: "[i]t need hardly be repeated that our concern is not with the substantiation of the moral-political attraction of our claims, it is with the ability of such a view to explain both the logic of what began as law of, and between nations, as well as its significance to the contemporary world" (p. 293). Their consensualist

international law can only promote procedural and utility-related ideals, such as pragmatism and open-mindedness. It should steer away from the shoals of normativism, contingent moral values, or ideology: "there is really no supreme measure in the cases where dispute breaks, quite apart from consent to participation in the exchange of self-perceived legal claims coupled with the expression of (further) consent to the particular rules, thus constituting itself as the framework within which disagreements over the law work" (p. 294).

Compared to other books of its genre, the *Paradox of Consensualism* stands out in taking a clear and unequivocal position in favour of a consensualist/positivist conception of international law. The authors tried to expose what they believe to be "the strongest version of a positivist theory of international law" (p. 295). Unlike past efforts, this book does not aspire to break the vicious circle by compromising the consensualist and non-consensualist positions in yet another 'new' middle way. It is concerned with the ability of such a view to explain "the logic of what began as law" and not to a theory of international law that can provide the answer to all questions. The defense of consensualism is an informed one. It is aware of old and new critiques of positivism and of contemporary international law in general. The authors express their gratitude, for example, to Professor Martti Koskenniemi for his critique, and often refer to his writings and especially his 1989 book *From Apology to Utopia — The Structure of International Legal Argument* (1989). The recognition of consensualism's paradoxes could be attributed to such influences. At the same time, the *Paradox of Consensualism* solidly belongs to a long tradition of sources writing, which tries to assimilate and regularize 'change' in international law by passing it through the grind-mill of the classical understanding of the doctrine of the sources and the nature of international law. Sources writing, starting from the inception of the doctrine in the interwar period, and extending all the way to the discussions on soft-law, the binding force of General Assembly resolutions or other law-making phenomena in our times, has strived to explain how 'developments' challenge but do not defeat international law. In this sense, the book presents a comprehensive defense of international law, first as a rational structure, and then on grounds of utility.

The entire book, Parts One to Three, can be seen indeed as a collection of evidence confirming the possibility and coherence of public international law. This is done by a thorough and systematic organization of new and old material into a logical schema where everything fits, an updated map of international law in the nineties. New evidence is proven not to controvert the old categories and distinctions: despite momentous change, the foundations of the discipline have remained the same. To this effect all kinds of evidence is adduced. The authors sometimes seek positive evidence for the endorsement of the consensualist theory (*e.g.*, Chapter III). Other times they satisfy themselves with evidence which does not permit the rejection of the consensualist explanation of law creation (p. xii); other times that the principle [of consent] cannot be controverted on the

basis of practice (*e.g.*, p. 151); finally, with *a contrario* argumentation, support is produced by the failure of the opposite theory, the normative or transcendental one, to produce itself a satisfactory account. Aside from this mapping exercise, the consensualist theory is defended also on grounds of utility. As it is stated already in the *Preface*, "there is no better evidence of international law doctrine than that which is expressed by states as a reflection of their legal expectations" while "the transcendental conception of international law does not properly serve at least one of the purposes of law, namely to secure some agreement based on principle where two or more parties radically disagree as regards their legal entitlements" (p. xi).

This is a well researched book whose defense of the possibility of international law intuitively appeals to international professional consciousness. But what does it mean to defend positivism at the century's end? First of all, the authors dismiss the possibility of a 'first-best' explanation of international law. With it they also dismiss the lawyer's responsibility to breach the vicious circle, graphically described as the perpetual oscillation from apology to utopia, from consensualism to non-consensualism. In this, they decide to defend an imperfect castle, not for its morals, but on grounds of reason and utility. It is the noble defense of the castle in spite of its frail foundations, as an ethical professional choice in favor of international law.[3] While the authors borrow the idea of the inherent contradictions of any grand theory from the insights of the New Approaches to International Law movement,[4] they decide to align themselves with positivism, despite its shortcomings. By doing so they also accept consensualism's blind spots and prejudices, as a means of constructing legal discourse. Their consensualism is one of moral agnosticism (save their commitment to 'pragmatism' and 'open-minded-ness') and functional reason, reminiscent of successive generations of international lawyers who opted for the 'certainty' of a relatively coherent argument against naive utopianism.

While its price makes it unattractive for the shelf of the individual reader or the student, the *Paradox of Consensualism* is a book that should be read by anyone interested in a competent articulation of contemporary liberalist explanation of international law or in a comprehensive survey to sources material to date. Its argument for the consensual basis of international law, in spite of all protests voiced above, is a serious, well argumented effort, exhibiting great command of

3. For the metaphor of the defense of the castle I am indebted to Outi Korhonen; *see* O. Korhonen, *New International Law: Silence, Defense or Deliverance*, 7 European Journal of International Law 1 (1996).

4. *See, e.g.*, D. Kennedy, *A New Stream of International Legal Scholarship*, 7 Wisconsin International Law Journal 1-49 (1988-1989); D.J. Cass, *Navigating the Newstream: Recent Critical Scholarship in International Law*, 65 Nordic Journal of International Law 1996. For a selective bibliography of newstream writing and some reflections on the movement's relationship with international law's mainstream, *see* T. Skouteris & O. Korhonen, *Under Rhodes' Eyes: The 'Old' and the 'New' International Law at Looking Distance*, 11 LJIL 429-440 (1998).

analytical philosophy, logic, and classical international law doctrinal analysis. The argument is dense and the treatment of the available material thorough. The book greatly benefits from a prescient *Foreword* by Martti Koskenniemi and a bibliography primarily concerned with sources literature.

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*The Settlement of Disputes in Deep Seabed Mining. Access, Jurisdiction and Procedure before the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea* by Niels-J. Seeberg-Elverfeldt. Nomos Verlagsgesellschaft, Baden-Baden, 1998. ISBN: 3-7890-5522-0, 166 pp., DM 98.

This book is the English updated translation of the author's German doctoral thesis published in 1986. It is devoted to the settlement of disputes in deep seabed mining according to the 1982 United Nations Convention on the Law of the Sea (UNCLOS). This treaty, which was opened for signature on 10 December 1982 in Montego Bay (Jamaica), is the most important convention in existence dealing with almost all aspects of the international law of the sea. Negotiations between 1973 and 1982 resulted in a text of 320 articles, divided in 17 chapters plus 9 annexes. Today, UNCLOS can be considered as being universally accepted, given the number of signatures (158 on 1 June 1999) and ratifications (130 on 1 June 1999) so far.

This publication deals with the problems arising from the exploration and exploitation of the deep seabed in general, and with the Seabed Disputes Chamber (SDC) in particular. The SDC was established in 1997 as a special chamber of the International Tribunal for the Law of the Sea (ITLOS), which was set up in Hamburg the previous year. This institutional construction is prescribed by UNCLOS and forms one of the many novelties in international law. Indeed, for the first time, a comprehensive dispute settlement mechanism was prescribed in an international convention itself. As an illustration, the example can be given of the choice parties are given in presenting a dispute for an international tribunal: next to ITLOS, the International Court of Justice and two arbitration procedures can be used to settle a dispute before a bench of impartial judges. In this respect, it is moreover important to mention that this system leaves the competence of specialised chambers and tribunals, such as the SDC, untouched.

The author has divided his work in five different chapters, each dealing with an important aspect of the functioning of the SDC.

The first chapter gives an introduction into the settlement of disputes in deep seabed mining according to UNCLOS. The drafting history of UNCLOS and of

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those articles dealing with the SDC is described in detail. The author also gives a systematic overview of all relevant provisions for this specific form of dispute settlement. This is not so evident, given the large amount of overlapping, cross-references and very specialised rules due to the very difficult negotiations leading to the creation of this system.

The second chapter focuses on the constitution and structure of the SDC. Next to the principles ruling the establishment, seat and functions of the chamber, the composition of the bench is emphasised and described in full. Principles such as the judges' technical qualifications and material and personal independence, are explained as well as the rules for the nomination, election, terms of office and possible exclusion, challenge and disqualification of the members of the SDC. Reference is also made to judges ad hoc, experts and the administration of this chamber.

The third chapter analyses the general requirements for access to the SDC. Important to mention here is the fact that, next to states and international organisations (with special attention to the 'International Seabed Authority' and the 'Enterprise', two organs created in UNCLOS and responsible for the exploration and exploitation of the deep seabed), private persons are also allowed to start proceedings before this chamber. This aspect is closely studied, distinguishing state enterprises, natural and juridical persons, and explaining important principles such as 'effective control' and 'state sponsorship'.

The fourth chapter examines the jurisdiction of the SDC. This chapter investigates possible restrictions as to the authority of the chamber to adjudicate and the question if and when access to the SDC is possible for disputes which could arise in the context of deep seabed mining activities. This part forms the bulk of this book and describes in every detail all grounds for jurisdiction, as well as all exceptions to these rules. The relevant articles in UNCLOS are cited where necessary and ensure a complete and clear analysis of this important aspect in the description of this chamber.

Finally, the fifth chapter discusses the essential procedural aspects of the proceedings before the SDC, one of them being the participation of third parties (sponsoring states and private persons). Also discussed are the various existing time limits and the bases for a decision of the judges of the chamber.

In the annex, a detailed bibliography (with works in English, French, German, Italian and Spanish) invites the reader to continue his study of the SDC. References are also given to the several drafts of UNCLOS, enabling readers to quickly find the documents relevant for the illustration of the drafting history of this UNCLOS chapter dealing with the settlement of disputes in deep seabed mining.

It is clear that the author has written a book that does what the title promises to do: giving an overall and very complete picture of the SDC, its history, procedures and jurisdiction. Most issues are discussed, leaving not much untouched in this field. In doing so, the author has made a considerable effort to use the ba-

sic treaties, texts, negotiation documents and other *travaux préparatoires*. As a result, the large amount of references in footnotes makes it possible for the reader to trace the information back to the original documents.

The author has broadened the discussion in making well-founded comparisons between the SDC and ITLOS, the International Court of Justice and even the European Court of Justice. In this comparison, both material and procedural elements are discussed. Links are also made to other international organisations and institutions. It is also worth mentioning that a successful effort was made to lighten the sometimes heavy and 'tedious' issues, such as the subject of procedure, jurisdiction, by referring to the names of negotiators, places, judges, thus personalising the whole issue.

However, this does not mean that this book is perfect in every way. Like most publications dealing with institutions or specific organs of an international organisation, the detailed description sometimes results in a long enumeration of rules, specifications and exceptions. But this is a problem related to the subject, which is not easy to overcome at all.

A final remark is more fundamental. Even though the author studies the SDC with the necessary criticism, it sometimes feels as if there was a bit too much credit given to this organ. It is true that some critical remarks are given in the conclusions, but it would have been appropriate to pronounce these remarks in the body of the book as well. This also refers to the insufficient presence of prospects for the future of the chamber. It would have been an extra asset to this book if the author had added an extra chapter giving his point of view regarding the development and future of this new tribunal. This is an important missing aspect in the discussion of the SDC.

This publication gives a rather complete overview of all aspects concerning the SDC. The author has succeeded in producing a work that, by its clear language and extensive explanations of sometimes very specialised areas of law, is accessible for both legal practitioners and non-lawyers.

It might be unfortunate that this book, as recent as it may be, is not fully up to date. As a result, some important issues such as the ratification of UNCLOS by the European Community and the first judgements of ITLOS, are not mentioned.[1] Hopefully, this will be added in a future edition.

As a conclusion, this book is essential material for those interested in learning more about the international law of the sea in general and the exploration and exploitation of the deep seabed and the problems arising out of it, in particular. In the first place, practitioners and lawyers will find this work very helpful in finding their way in the procedures of this new organ. But also legal

1. ITLOS has issued two judgements (4 December 1997 and 1 July 1999) and one order (11 March 1998) since its installation in 1996. All three deal with the so-called *M/V Saïga* case. Relevant information can be found on http://www.un.org/Depts/los/index.htm.

scholars and other interested persons will conclude that this book is a valuable addition to their library.

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