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RECENT BOOKS ON INTERNATIONAL LAW

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BOOK REVIEWS

'Like Products' in International Trade Law: Towards a Consistent GATT/WTO Jurisprudence. By Won-Mog Choi. Oxford: Oxford University Press, 2003. Pp. xxi, 265. Index. $135; £80.

"Like product" is one of the most important topics of international trade law. When two products are "like," then various disciplines of the World Trade Organization (WTO) come into play to govern the treatment that a WTO member government owes to another WTO member with regard to goods, services, and intellectual property. Treatment means the way that one member (typically the importing state) applies domestic regulations, taxes, and tariffs. The core rules involve "national treatment" and "most favored nation" (MFN) treatment.[1] For example, in the General Agreement on Tariffs and Trade (GATT)—which is now a subsidiary agreement within the Agreement Establishing the WTO—the national-treatment rule requires that imported products be accorded regulatory treatment no less favorable than "like" domestic products, and that imported products not be subject to internal taxes in excess of those applied to "like" domestic products.[2] The GATT's MFN rule requires that any treatment accorded to a foreign product be offered immediately and unconditionally to the "like product" from a WTO member.[3] Because these GATT rules apply only to the extent that products are deemed "like," the ascertainment of likeness is central to determining the obligation of an importing member government. In a typical WTO litigation regarding market access, the frustrated exporting member will argue that its product is "like" a domestic product getting better treatment, whereas the importing member may deny that such likeness exists.

When a trade dispute occurs, one member government will inevitably prevail in its view of likeness, and yet both sides may have marshaled good arguments. Likeness is highly contestable because the concept is not defined in WTO rules and because the jurisprudence within the WTO (as well as in the pre-WTO multilateral trading system) has not yet matured into a standard analytical framework. Indeed, international trade law adjudications have emphasized that the inquiry into product likeness is open-ended, and that judgments should be rendered on a case-by-case basis. This individualized approach to determining likeness has not served to promote security and predictability in the trading system. The lack of precision as to the meaning of likeness can lead to economic and social costs if a decision as to product likeness is made so overinclusively as to infringe national regulatory/tax autonomy, or is made so underinclusively as to allow a protectionist import barrier to persist.

The puzzle of what "like products" are, or should be, continues to motivate new trade law scholarship. *"Like Products" in International Trade Law* by Won-Mog Choi, a law professor at Ewha Womans University in Seoul, is a significant contribution to that literature. The goal of Choi's ambitious volume is to propose a systematic way for WTO tribunals to determine product likeness and to harmonize the jurisprudence of the many WTO provisions hinged on whether two products (or two services) are sufficiently alike or similar to each other. The book's most notable achievement is in presenting an economic interpretation of "like products." Building on and seeking to unify recent WTO Appellate Body and panel decisions regarding "like" products, Choi contends that the core inquiry should be an assessment of

[1] Other WTO rules are also linked to the "like product," such as the provisions regarding antidumping, subsidies, safeguards, quantitative restrictions, and customs valuation.

[2] General Agreement on Tariffs and Trade, Apr. 15, 1994, Art. III, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, *in* WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 17 (1999), 33 ILM 1154 (1994) [hereinafter GATT]. The GATT and other WTO Agreements are available at <http://www.wto.org/english/docs_e/legal_e/legal_e.htm>.

[3] GATT, *supra* note 2, Art. I.

the competitive relationship in the marketplace between the two products at issue in the dispute. Choi further suggests that the trading system can fruitfully adapt some of the techniques used in antitrust/competition law to analyze competitive relationships in the market.

Viewing product likeness as being determined by marketplace behavior—and not just physical attributes—is not a new idea in trade law. Both kinds of factors are present in the traditional analysis, and yet the emphasis has often been placed on physical characteristics. Choi contends that an analysis of the market should play a more central role. One excellent feature of Choi's book is the meticulous way in which he dissects various economic issues and then stitches them back together into a coherent framework. He portrays economics as presenting "an excellent common language for international trade law" (p. 1). Using that language, Choi tries to show that judgments about "like products" can be made with more sophistication and exactitude than they are now.

Choi's exploration of the economics of international trade law comes at a time of increasing attention to this economic dimension. For example, in 2003, the American Law Institute launched a project of interdisciplinary commentary on WTO dispute settlement decisions, to be co-authored by a lawyer and an economist.[4] In 2002, this *Journal* ran a symposium on the WTO that contained two contributions with a "law and economics" flavor.[5] So Choi's book will be interesting to readers not only for its contribution to the WTO law on "like products," but also as exemplifying an economic approach to trade law scholarship.

The book does not use an economic method exclusively, however. Another positive feature is Choi's examination of the negotiating history of the various GATT provisions hinged on a "like product" comparison. In addition, the author recognizes the non-economic values involved in the application of WTO rules against discrimination. He calls the "like product" analysis a "tapestry woven from three intermediate pieces of *de jure* . . . discrimination, *de facto* discrimination, and legitimate regulatory autonomy" (pp. 4–5).

The notion that the same term, "like product," has different meanings in various provisions of the GATT has long been enshrined in trade law norms. In the *Japan Alcohol* case, the WTO Appellate Body held that the "concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied."[6] Choi obviously finds this metaphor helpful; he uses "playing the accordion" as a subtitle for his chapter about the interpretation of the various WTO provisions that hinge on product likeness. In addition to the "like product" comparison, the book also focuses on the national-treatment rule for taxes on "directly competitive or substitutable" products, a category that is broader than "like" products.[7] For each of the trade rules hinged on the relationship between two products, Choi develops an interpretation of when likeness exists. The tour through numerous GATT/WTO rules is presented with care and a good use of explanatory charts.

Choi's overall inquiry seems inspired, in part, by the Appellate Body's holding in *Japan Alcohol* that the determination of "like product" has an "unavoidable element of individual, discretionary judgment" and that "[n]o one approach to exercising judgement will be appropriate for all cases."[8] Choi accepts a need for discretion but believes that the use of economic analysis will set limits to "unbridled discretion" (p. 8), thereby permitting more "tailored discretion" (p. 7) based on objective evidence. Such economic analysis would, according to Choi, lead to more transparent, consistent, and predictable adjudications—an outcome that would render WTO decisions more acceptable to governments and the public.

In my view, Choi is justified in seeking greater consistency and coherence in likeness analysis both within each of the relevant WTO rules and across those rules. He is also correct in contending that WTO panels should use economic analysis in assessing the relationship between two products. For those WTO rules in which likeness sets the stage for whether a WTO member may have to justify a national regulation or tax before a tribunal, the likeness analysis needs to be performed in a convincing way. Yet, too often it is not.

[4] THE WTO CASE LAW OF 2001: THE AMERICAN LAW INSTITUTE REPORTERS' STUDIES (Henrik Horn & Petros C. Mavroidis eds., 2003) [hereinafter THE WTO CASE LAW OF 2001].

[5] *Symposium: The Boundaries of the WTO*, 96 AJIL 1 (2002). See, in particular, the articles by Joel Trachtman and by Kyle Bagwell, Petros Mavroidis, and Robert Staiger.

[6] Appellate Body Report, Japan—Taxes on Alcoholic Beverages, WT/DS8, 10, & 11/AB/R, at 21 (Oct. 4, 1996) (adopted Nov. 1, 1996) [hereinafter Japan Alcohol Appellate Body Report].

[7] *See* GATT, *supra* note 2, Art. III:2, Ad Art. III:2.

[8] Japan Alcohol Appellate Body Report, *supra* note 6, at 20–21.

Using GATT case law and economic concepts, Choi expounds the category of "directly competitive or substitutable" as encompassing products that can be used in place of each other for a similar purpose without leading to a significant reduction of user utility. In other words, such products manifest functional interchangeability from the perspective of both consumers and producers. This category subsumes the subcategory of "like products" that display functional interchangeability and share sufficient physical characteristics so as not to be noticeably different.

Choi points out that the analytical framework he proposes is fully consistent with the talismanic *Border Tax Adjustments* report issued by a GATT working party in 1970[9] and, indeed, may be more faithful to it than some of the subsequent GATT/WTO jurisprudence. The1970 report listed several criteria for product similarity, including: the product's end uses in a given market; consumers' tastes and habits, which change from country to country; and the product's nature and quality. Choi divides these criteria into two groups—the market-based factors and the physical factors. Until recently, GATT/WTO panels have emphasized the physical factors (sometimes thought to be the "objective" factors) and have given less attention to the market-based factors, such as consumer taste. Furthermore, as Choi explains, when panels have considered the end use of a product, the panels sometimes look at end use in general rather than in the specific market at issue.

The "new trend" (p. 26) in trade law jurisprudence, according to Choi, is to supplement the physical factors by placing more emphasis on a market-based analysis. Choi traces this legal development through a handful of recent WTO panel and Appellate Body decisions. For example, in the *Asbestos* case, the Appellate Body stated that "a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products."[10] Choi's book makes detailed recommendations as to the methodologies that panels might use to collect and analyze data on the competitive relationship in the relevant market.

The competitive relationship between two products will be shaped by both *demand* substitutability (that is, whether consumers perceive the imported and domestic products as interchangeable) and *supply* substitutability (that is, the ability or willingness of foreign producers to adapt to regulatory/tax distinctions in the user country). If both types of substitutability are low, then two products are not "like." If both types are high, then two products are "like." These cases are the easy ones. Choi's book provides a comprehensive analysis of the various combinations of supply and demand substitutability with detailed consideration of potential long-run effects and of origin-based versus origin-neutral regulation.

Choi would not give the producer's perspective as much weight as the consumer's perspective. Nevertheless, the book's attention to the producer/supplier component makes an important contribution to the debate about product likeness—one that heretofore has been largely overlooked. As Choi explains, high supply substitutability can mitigate the distorting effect of a national regulation/tax on foreign producers. As an example, he considers the issue of whether foreign luxury automobiles are so "like" domestic nonluxury autos that a luxury tax may amount to discrimination against the imported product. Choi would have WTO panelists look first to consumer behavior to determine product similarity, but if that fails to yield a clear result, he would have panels consider whether foreign producers have a flexibility to switch to the lower-taxed category. Choi sees this analytical approach reflected in the GATT *Automobile Taxes* case of 1994,[11] although he properly notes that this decision is not a legal precedent since that panel report was not adopted by GATT contracting parties.

In seeking a market-based determination of "like product," Choi wants WTO adjudicators to reject completely any consideration of the policy aim of the tax or regulation under scrutiny. He perceives economic analysis as "independent" of an inquiry as to a government's regulatory motivation, and wants panels to pay no attention to "extraneous factors" (p. 83) such as purpose. He offers two reasons to avoid the "anti-economic approach" (p. 82) of considering policy aims. First, he claims that GATT/WTO "like product"

[9] Border Tax Adjustments, Dec. 2, 1970, GATT B.I.S.D. (18th Supp.) at 97, para. 18.

[10] Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, para. 99 (March 12, 2001) (adopted Apr. 5, 2001) [hereinafter Asbestos Appellate Body Report]; *see also id.*, para. 103 (discussing competitive relationship in marketplace). GATT Article III:4 requires national treatment with respect to regulations. One anonymous member of the Appellate Body issued a concurring statement reserving his opinion on the necessity or appropriateness of adopting a fundamentally economic interpretation of the likeness of products under that article. Asbestos Appellate Body Report, *supra*, para. 154.

[11] United States—Taxes on Automobiles, GATT Doc. DS31/R (Oct. 11, 1994), *reprinted in* 33 ILM 1397 (1994).

disciplines lack a textual basis for such an assessment. Second, he argues that considering the policy aim in the context of the national-treatment discipline (GATT Article III) circumvents the General Exceptions in GATT Article XX.[12]

Choi admits that the consideration of a policy's aim may potentially serve the useful function of avoiding interference with the regulatory autonomy of states,[13] but he believes that regulatory autonomy can be preserved in other ways without contaminating the "like product" analysis with an unpredictable balancing of competing objectives. He uses the example of meat produced with growth hormones to show how his approach can provide space for panels to give deference to states. A complete analysis, he suggests—one that took into account consumer preferences and producer capabilities—might well lead to the conclusion that meat from cattle raised with hormones and meat from other cattle are *not* "like products." Thus, Choi's perspective differs from the typical trade analyst, who would probably say that there is no way to avoid a finding of product likeness between these two meat products.[14]

As suggested earlier, this book was published contemporaneously with a flowering of new analysis about the meaning of "like product," particularly in the context of GATT Article III, the national-treatment discipline. The most recent scholarship appeared in the *Journal of World Trade,* in an issue featuring essays collected as "A Tribute to Robert E. Hudec."[15] In 1998, Hudec had authored an influential article about the "aims and effects" test in GATT Article III, a test that, in the view of many international trade analysts writing at the time, had recently been rejected by the WTO Appellate Body.[16] Under this test for deciding whether a disfavored foreign product was "like" a domestic product, a few GATT panels had considered whether a tax had a protective purpose and a protective effect. Following the ostensible rejection of the test by the WTO Appellate Body, Hudec predicted that panels would continue to consider the issues just the same, even if they had to do so "underground."[17]

While these new articles honoring Hudec cover a broad range of issues concerning WTO law, they do offer, too, the latest thinking in the debate about whether regulatory purpose should be an explicit part of the "like product" analysis in GATT's nondiscrimination rules. Donald Regan champions the position that a finding that two products are "like" should be based not only upon the existence of a competitive relationship between these products, but also upon the absence of a nonprotectionist government policy that actually underlies the government regulation distinguishing the two products.[18] Frieder Roessler expresses a worry that a solely market-oriented approach compels likeness determinations that are completely detached from the rationale for GATT Article III.[19] Amelia Porges and Joel Trachtman examine the recent Article III jurisprudence and conclude that regulatory aim and effect are not being used as a way to decide when products are "like," but are being used, instead, as an aid to comparing a government's treatment of imported versus domestic products.[20] This new scholarship emerged after Choi's book was published, but it is nevertheless fair to say that his study gives short shrift to the longtime debate about whether a government's aim should be a factor in product likeness.

[12] GATT Article XX lists several policy purposes that could warrant an exception from regular GATT rules. In invoking one of Article XX's exceptions, the defending state has the burden of proof under GATT/WTO case law. Thus, in Choi's view, giving weight to purpose in adjudicating Article III circumvents both the agreed list of policy purposes in Article XX and that Article's difficult burden of proof. For the counterargument see Henrik Horn & Joseph H. H. Weiler, *EC—Asbestos, in* THE WTO CASE LAW OF 2001, *supra* note 4, at 14, 28–29.

[13] The regulatory autonomy at issue concerns a state's ability to use a tax or regulation to achieve a policy purpose that is distinct from anticompetitive protection. For example, if there is a nonprotectionist policy reason to treat a foreign product A_1 differently from a domestic product A_2, then A_1 and A_2 should arguably not be deemed "like" products despite whatever similarities exist between them.

[14] This example assumes that the hormone-based meat is not known to be unsafe for human consumption. On matters of food safety, the WTO has many additional disciplines besides national treatment.

[15] *A Tribute to Robert E. Hudec,* 37 J. WORLD TRADE 699 (2003); *see* Joel P. Trachtman, *Robert E. Hudec (1934–2003),* 97 AJIL 311 (2003).

[16] Robert E. Hudec, *GATT/WTO Restraints on National Regulation: Requiem for an "Aims and Effects" Test,* 32 INT'L LAW. 619 (1998).

[17] *Id.* at 634–35.

[18] Donald H. Regan, *Further Thoughts on the Role of Regulatory Purpose Under Article III of the General Agreement on Tariffs and Trade,* 37 J. WORLD TRADE 737, 752 (2003). Regan's careful analysis posits that his view has never been rejected by the WTO Appellate Body and that regulatory purpose continues to be considered by panels in GATT Article III cases.

[19] Frieder Roessler, *Beyond the Ostensible: A Tribute to Professor Robert Hudec's Insights on the Determination of the Likeness of Products Under the National Treatment Provisions of the General Agreement on Tariffs and Trade,* 37 J. WORLD TRADE 771, 773–74, 779–80 (2003).

[20] Amelia Porges & Joel P. Trachtman, *Robert Hudec and Domestic Regulation: The Resurrection of Aim and Effects,* 37 J. WORLD TRADE 783, 786, 795–96 (2003). Thus, even if the products *are* "like," a legitimate regulatory purpose may prevent a violation of Article III.

Although Choi intends his framework to be respectful of regulatory/tax autonomy, this reviewer is doubtful that Choi's largely economic approach to "like product" would be as successful as he hopes. In my view, product likeness is just a categorization invented and rendered important by trade law rules. When disputes arise, the two products at issue are inevitably going to be "like" in some ways and unlike in others. Yet "like/not like" boils away the nuance to a binary decision. Of course, making that decision is an important task that WTO adjudicators ought to perform on a systematic and principled, rather than ad hoc, basis. Although it sometimes seems as if Choi perceives product likeness as a market condition detectable with an economist's empirical scanner, no one should be under an illusion that the placement of the line between "like" and unlike products is a scientific judgment.

When Choi says that a consideration of regulatory purpose is "anti-economic," he seems to be claiming that one can separate the economic issue of whether two products are "like" from the legal issue of a WTO member's obligations concerning the treatment of two "like" products. Likeness, however, is just a legal construct employed in trade rules in order to manage the tension between forbidding unjustified discrimination and not forbidding legitimate national regulatory autonomy. Thus, I believe that Choi is wrong to dismiss the "aims and effects" test as anti-economic, although he may be justified in largely sidestepping those difficult issues, given how much new he has to say about the rigorous measurement of the market relationship between two products.

In pointing out this area of incompleteness in the book, I am not necessarily agreeing with those who contend that regulatory purpose needs to be a factor in WTO likeness analysis. There may be other equally workable ways to safeguard legitimate national autonomy, including through a closer examination of the supplier's capacities, as the book avers. The WTO will need to work its way through many economic and non-economic considerations before deciding how product likeness should be defined and applied in trade law adjudications. In other words, the *identification* of "like" products cannot be cleanly separated from what WTO rules dictate about the *treatment* of "like" products. Ultimately, those rules will need to be acceptable to regulators and consumers "in the real world where people live and work and die."[21]

To summarize, Choi's study makes an important contribution to the task of ascertaining the likeness of two products under trade law and is a valuable addition to the emerging literature of economic analysis of international trade law.

STEVE CHARNOVITZ
Of the Board of Editors

Völkerrecht (2d ed.). By Georg Dahm, Jost Delbrück, and Rüdiger Wolfrum. Vol. I/1 (1989): Pp. xliv, 572. Index. €128. Vol. I/2 (2002): Pp. lxxix, 510. €128. Vol. I/3 (2002): Pp. xviii, 662 (511–1172). Index. €128. Berlin: de Gruyter.

As I write this review, I sense messages from beyond, sent by my late friend and member of this *Journal*'s editorial board, Keith Highet. They come, indeed, from a review he wrote of the first volume of the ninth edition of *Oppenheim's International Law*.[1] He explained his departure from the norm against reviews of standard works beyond the first edition. The new *Oppenheim* followed the eighth edition by many years and was largely rewritten by two distinguished scholars, Sir Robert Jennings and Sir Arthur Watts. Likewise, the first edition of *Dahm* dates back more than forty years,[2] and the second comes from two distinguished German scholars. Another factor concerned the ever-increasing mass of international law material. Highet echoed the laments of Jennings and Watts that the sheer volume of material was overwhelming the ability of treatise writers to cope. That anxiety was borne out by the fact that the promised second and third volumes of *Oppenheim* have not yet appeared. By comparison, this new version of *Dahm* (written in German, as was the first edition) is three-fourths completed, with the three-book first volume (the subject of this review) already completed and the single-book third volume yet to come. Somehow, Teutonic persistence has brought them further than any Anglo-American endeavor.[3] They have been helped, of course, by their corps of assistants; the authors, unlike too

[21] I borrow this phrase from the Appellate Body's report in *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26 & 48/AB/R, para. 187 (Jan. 16, 1998) (adopted Feb. 13, 1998).

[1] 88 AJIL 383 (1994).

[2] See the favorable reviews by Josef L. Kunz at 53 AJIL 976 (1959) and 56 AJIL 858 (1962).

[3] The last American multivolume treatise was Charles Cheney Hyde's *International Law Chiefly as Interpreted by the United States* (2d ed. 1945); the *Restatement (Third) of the Foreign Relations Law of the United States* (1987) does have two volumes. Curiously, I do not find the latter cited in the book under review, even when it covers the relationship of U.S. law and international law (I/1, pp.110–12).

many German professors, acknowledge the elves by name. Their only rival in comprehensiveness is an equally large, but very different, work, the *Encyclopedia of Public International Law,* edited by Rudolf Bernhardt.[4]

Like all treatises this new edition of *Dahm* labors under an obligation to be comprehensive and cover even topics that are quiescent. The first of the three books in the first volume deals with the basis of international law and with states, including state succession and territorial matters. The second covers states in their relation to individuals and organizations; it also covers parts of the world and space not under national sovereignty. The third deals with treaties and other interstate obligations. The second volume will deal with particular regimes such as the law of war, human rights, economic law, and the environment; it will also cover international organizations. Faced with such an ocean of material, a reviewer must be selective. I have chosen, somewhat arbitrarily, four treatments to review.

We will look first at the portion on the underlying bases of international law (I/1, pp. 2–76). We find it heavily historical, reviewing works from Hegel to Kelsen. It then moves into an exposition of the sources of international law as laid out in Article 38 of the Statute of the International Court of Justice (ICJ). The standard issues about customary law, such as the persistent-objector problem and the status of resolutions of international organizations, are covered. There's nothing very new here; perhaps a treatise is not the place in which to develop new philosophical approaches to the foundations of international law. The fact that the first volume was finished in 1989 means that it antedates provocative theoretical work such as that of Martti Koskenniemi.

An odd corner of the law of treaties is the concept of *rebus sic stantibus,* the idea that a state may be excused from performance of a treaty obligation by virtue of an unforeseen change of circumstances. The cataloguing of international cases and especially of state practice is exhaustive and up-to-date (I/3, pp. 742–53); it goes far beyond the presentation in any comparable works. One action that does not appear in other sources is Great Britain's declaration during the Falkland-Malvinas war that the prohibition against housing prisoners of war on ships had been set aside by the impossibility of finding land-based shelter for the island captives. (The same comprehensiveness holds true of its bibliographical references.) The authors conclude that after the Vienna Convention on the Law of Treaties entered into force, the "objective" theory of *rebus* had prevailed—that is, one that holds that its basis is the objective judgment as to the unfairness of holding a party in light of the circumstances now prevailing. They thus reject the "subjective" theory that, as the name suggests, rooted the doctrine in a tacit agreement of the parties. The only thing scanted is exploration of the extent to which national rules of contract law afford a basis for saying that there is a general practice under Article 38(1)(c) of the ICJ Statute. Again, one would say that the analysis does not go very far beyond the positivistic recounting. Does *rebus* really represent customary law if there has never been a successful assertion of it in a court case and if there is no clear example of its successful use in diplomatic exchanges?

Multinational enterprises are covered as subjects of international law alongside international organizations (I/2, pp. 243–58). The treatment is full and takes account of the nonlegal aspects of such institutions, describing the attempts to provide guidelines for channeling their behavior. The historical treatment is new for Americans since it brings into focus European antecedents such as the Hansa, the Netherlands East Indies Company, and other non-Anglo-American antecedents. The authors wrestle with issues involved in defining a multinational enterprise—issues that have been evaded in various codes. There are compact treatments of such topics as agreements between states and foreign investors, and dispute resolution mechanisms and guidelines. The authors' consideration of these issues leads them to conclude that multinationals are to some extent subjects of international law.

Finally, we look at the discussion of the International Criminal Court, a sharply debated topic. The authors are, in general, positive about the institution, regarding the safeguards against arbitrary use as adequate. They carefully compare its provisions with those of the ad hoc international criminal courts. They regret the actions of the United States to obtain immunity from its jurisdiction, which they regard as a blow to the purposes of the ICC. The treatment leaves one with a sense that the extensive intellectual efforts invested in the ICC project and the international frictions generated by it are not likely to be compensated by future practical results.

Overall, this book is one that every library should have, first of all because it affords a comprehensive bibliography (including many American works), a generous presentation of state practice,

[4] Reviewed at 95 AJIL 726 (2001).

and a great deal of historical depth. It also provides the considered opinions of distinguished European lawyers—which differ from time to time from the American consensus. For example, the authors go further (I/3, p. 909) than Americans in recognizing the international status of the Taliban regime. They also solidly support the ICJ ruling, in a dispute between Germany and the United States, that the Court's indication of provisional measures is binding (I/3, pp. 653–54). It is unfortunate that its being published in German limits its availability to American scholars, in contrast to such works as the *Encyclopedia of Public International Law.*

DETLEV F. VAGTS
Of the Board of Editors

Rethinking Refugee Law. By Niraj Nathwani. The Hague, London, New York: Martinus Nijhoff Publishers, 2003. Pp. xi, 165. Index. $75, €75.

It is a wonderful thing when a work of scholarship is published just as policymakers are struggling with the issues that it seeks to address. Niraj Nathwani, presently a legal adviser on racism and xenophobia to the European Union (EU), had the good fortune to release his concise book, *Rethinking Refugee Law,* just as governments and international organizations are seriously reconsidering basic questions about how refugee protection is to be accomplished. Indeed, current efforts are likely to yield the most far-reaching revision of the way in which refugee law is implemented since the decision in 1967 to extend the reach of the 1951 Convention Relating to the Status of Refugees (Refugee Convention) to the full range of modern refugee predicaments around the world.[1]

During the 1980s and 1990s, asylum systems in both the developed and less-developed worlds came under unprecedented stress. The causes were many, including larger numbers of refugees fleeing more broadly based and frequently protracted situations of risk; the unwillingness or inability of countries in most regions of origin to cope with the demands placed upon them by refugees, coupled with the lack of dependable support from richer countries to share their burdens and responsibilities; and the movement of a small, but nonetheless visible, minority of refugees from their regions of origin to enter asylum systems in developed states, where administrative and judicial decision makers were increasingly prone to recognize the validity of their claims.

With the disappearance in the early 1990s of Cold War, apartheid-era, and other forms of political solidarity between refugees and the states to which they traveled, most governments took an increasingly dim view of the practical implications of their legal obligations to protect refugees. States with the economic and geographical wherewithal generally enacted *non-entrée* measures to stymie the arrival of refugees at their borders; poorer and more exposed countries often sought to deter the arrival or continued presence of refugees by treating them shabbily, including by condemning them to long-term isolation and denying them the means by which to earn a livelihood. By the time of the Bosnian refugee crisis, even the UN High Commissioner for Refugees (UNHCR) had retreated from much of its duty to promote the legal rights of refugees. The agency effectively transformed itself into a more politically palatable organization for the delivery of humanitarian relief, working both inside and outside countries of origin. There was therefore a genuine risk that the specificity of refugee law—namely, its ability to deliver solid and unconditional rights of protection to involuntary migrants able to leave truly risky situations—would be lost.

Despite the real stress endured by asylum systems and, in particular, by refugees seeking to avail themselves of the protection of those systems, concrete and principled proposals for fundamental reform of the regime were few. Two academic contributions of the late 1990s—a comprehensive model that I developed with a team of collaborators from around the world,[2] and a more succinct, but comparably oriented, contribution shortly thereafter from Yale's Peter Schuck[3]—seemed to attract little interest on the part of states or international organizations, and elicited fairly blunt antagonism from some scholars and advocates.[4]

[1] The Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 UST 6223, 606 UNTS 267, prospectively eliminated temporal and geographical restrictions authorized by the Convention Relating to the Status of Refugees, July 28, 1951, 19 UST 6259, 189 UNTS 150. These restrictions had allowed governments to limit the recognition of refugee status to persons whose claims were based on a pre-1951 event in Europe.

[2] James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection,* 10 HARV. HUM. RTS. J. 115 (1997). Background social science studies were published in *Reconceiving International Refugee Law* (James C. Hathaway ed., 1997).

[3] Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal,* 22 YALE J. INT'L L. 243 (1997).

[4] Among the more blunt responses were Michael Byers, Book Review, 47 INT'L & COMP. L.Q. 729 (1998);

There appeared to be no appetite for making the sorts of compromises required to reconcile the rights of refugees with the social and political preoccupations of governments. Many of us believed that the refugee protection system was destined to limp along, serving fewer and fewer people, less and less well.

In the new millennium, however, there is clear official interest in rethinking the ways in which refugee protection is done. Spurred on by a change of leadership and the impending fiftieth anniversary of the 1951 Refugee Convention, UNHCR sponsored a series of consultations in 2000–02 intended to allow the agency "to rise to modern challenges confronting refugee protection, to shore up support for the international framework of protection principles, and to explore the scope for enhancing protection through new approaches, which nevertheless respect the concerns and constraints of States and other actors."[5] As part of that exercise, UNHCR indirectly took up the possibility of systemic reform by focusing on "various specific or thematic refugee protection concerns not directly, or not adequately, covered by the Convention and Protocol,"[6] including discussion of mass influx, the continued viability of individuated asylum systems, and the search for protection-based solutions.[7]

The net results of the UNHCR exercise, codified in the agency's *Agenda for Protection*,[8] helpfully emphasize the importance of strengthened capacity in regions of origin, the need to share burdens and responsibilities, and the potential value of both renewed reliance on resettlement and the development of modes of protection complementary to formal refugee status. But UNHCR did not go as far as earlier academic proposals. For example, it failed to confront what has come to be known as the "asylum-migration nexus": that is, the fact that in a world in which there are fewer and fewer legitimate avenues to immigrate for all but the wealthiest and most talented, would-be economic migrants will inevitably seek to enter developed states by making fabricated claims to refugee status. Most specifically, UNHCR failed to recognize that the logic of such fraud could be largely undermined by shifting from the equation of refugee status with a right of permanent residence, and toward granting refugees only what the Convention actually requires: rights-regarding protection, for the duration of risk in the country of origin. By limiting its endorsement of protection for the duration of risk to the realm of the "exceptional and interim," UNHCR regrettably failed to recognize a source of real operational flexibility within the bounds of Convention requirements.[9] Much less did the agency provide a clear proposal for how best to collectivize the process of protection, or to make protection an empowering experience for refugees and the communities that host them.

Since mid-2001, most efforts to rethink refugee protection have been the product of governmental initiative. Most well known is Australia's adoption of the so-called Pacific Solution after arrival at its Christmas Island of the MV *Tampa* carrying some four hundred persons seeking recognition of refugee status.[10] In order to deter the smuggling of refugees and other migrants into its territory, the government determined that processing of claims made in parts of the country deemed not part of Australia's self-declared migration zone (mainly some thirty-five hundred islands off the coast of mainland Australia) would occur offshore in Australian-funded centers (originally in Nauru, subsequently in other states of the region). Those persons recognized as refugees would be resettled to Australia (or elsewhere, since Canada, Denmark, New Zealand, Norway, and Sweden made places available), with rejected applicants returned to their countries of origin. By way of quid pro quo for the effective reduction of its domestic asylum efforts, Australia upped its commitment to the resettlement of refugees from abroad, and made additional funds available for UNHCR work in regions of origin.

Satvinder Juss, *Toward a Morally Legitimate Reform of Refugee Law: The Uses of Cultural Jurisprudence*, 11 HARV. HUM. RTS. J. 311 (1998); and, in particular, Deborah Anker, Joan Fitzpatrick, and Andrew Shacknove, *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295 (1998). A thoughtful review of these and other critiques is provided in Colin Harvey, *Talking About Refugee Law*, 12 J. REFUGEE STUD. 101 (1990).

[5] Erika Feller, *Preface*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, at xvii, xvii (Erika Feller, Volker Türk, & Frances Nicholson eds., 2003).

[6] *Id.* at xviii.

[7] UNHCR Executive Committee, Global Consultations on International Protection: Report of the Meetings Within the Framework of the Standing Committee (Third Track), UN Doc. A/AC.96/961 (June 27, 2002).

[8] UN Doc. A/AC.96/965/Add.1 (June 26, 2002) (endorsed by the UNHCR Executive Committee in October 2002).

[9] Chairman's Summary, Global Consultations: Protection of Refugees in Situations of Mass Influx (8–9 March 2001), at 2, *in* REFUGEE SURVEY Q., Oct. 2003, at 84, 85.

[10] For a discussion of the legality of this exercise, see James C. Hathaway, *Refugee Law Is Not Immigration Law*, *in* CANADIAN COUNCIL ON INTERNATIONAL LAW, GLOBALISM: PEOPLE, PROFITS AND PROGRESS 134 (2002), an edited version of which appears in the *World Refugee Survey 2002*, published by the U.S. Committee for Refugees.

The Australian three-part strategy—enhanced efforts to deal with refugee problems where they arise, disruption of people-smuggling, and external processing arrangements for those who nonetheless arrive at its territory[11]—has effectively set the pace for the current refugee protection debate. The month after Australia implemented its Pacific Solution, for example, UNHCR declared itself committed to the negotiation of a "Convention Plus" regime under which the secondary movement of refugees beyond their regions of origin would be discouraged in exchange for the agreement of developed countries to provide resettlement and development assistance.[12]

The next wave of debate about the reform of refugee law began with the leaking in early 2003 of confidential British cabinet and Home Office documents proposing a "pro-refugee but anti-asylum seeking strategy,"[13] clearly inspired by Australia's "Pacific Solution." The gist of the proposal was to constrain access to asylum in Britain to the absolute minimum required by the Refugee Convention, with the focus of protection efforts shifting to "regional protection areas." Under this approach, all claims received in the United Kingdom would be processed in internationally funded and administered centers in regions of origin, and only "those most in need" would be resettled to Britain or another developed state.[14] A commitment would also be made both to undertake intervention (including possible military action) in source countries as a means of stemming refugee flows, and to facilitate repatriation. While anxious not to be seen to be "'dumping' asylum seekers on the poorer nations,"[15] the United Kingdom's proposal did not—in contrast to the Australian initiative—make a firm commitment to enhanced development assistance for states agreeing to operate regional protection areas.[16]

In March 2003, Prime Minister Tony Blair invited the European Council to consider adopting the British approach, which was designed "to achieve better management of the asylum process globally through improved regional management and transit processing centres."[17] The first step toward realization of the long-term vision of shifting protection efforts to the regions of origin would be for EU member states to establish common processing centers outside the EU—to which persons seeking recognition of refugee status in any member state would be sent. Once there, they would be detained with minimal procedural rights during the time required for assessment of their claims. Those found to be refugees would be admitted to a member state, whereas others would be repatriated to their places of origin.

No doubt recognizing that the British overture to the EU amounted to the first proposal to "internationalize" what had previously been purely unilateral reform ideas, the UNHCR responded within days with a "three-pronged strategy" for refugee reform in Europe.[18] Under the first prong, through efforts to upgrade protection possibilities in their regions of origin, refugees would be discouraged from traveling to Europe. Such efforts would include an emphasis on development assistance as originally advocated by the Australian version of the reform model. Under the second prong, EU states—in cooperation with UNHCR—would operate closed reception centers for applicants arriving at their borders from states deemed unlikely to produce genuine refugees. Those found not to be in need of protection would be promptly returned to their countries of origin, while genuine refugees would be resettled in Europe. Third and finally, Europe would commit itself to continue operating domestic asylum systems—though with UNHCR participation—for persons arriving from states thought capable of producing true refugees.

Despite its value as a means of softening the harsher aspects of the British initiative, the UNHCR proposal was also a blatant bid to prove the agency's relevance to the policy directions of interest to developed states—and, in particular, to secure a role for itself in a revised protection model. But UNHCR wanted to have its cake and eat it, too. Whereas the Australian and British proposals would

[11] AUSTRALIA DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AFFAIRS, REFUGEE AND HUMANITARIAN ISSUES: AUSTRALIA'S RESPONSE 5 (Oct. 2001).

[12] UNHCR Press Release, Lubbers Proposes "Convention Plus" Approach (Sept. 13, 2002).

[13] UNITED KINGDOM, A NEW VISION FOR REFUGEES 1 (Mar. 7, 2003).

[14] *Id.* at 11.

[15] *Id.* at 30.

[16] The commitment is vague, at best. "Countries would be persuaded to host a Regional Protection Area largely because they are probably dealing with a large refugee population already. The international community would therefore offer to support that refugee population in a better way." *Id.* at 13.

[17] Letter from Tony Blair, UK Prime Minister, to Costas Simitis, European Council President (Mar. 10, 2003).

[18] The proposal was first presented by High Commissioner Lubbers at a meeting in London on March 17, 2003. A slightly revised version was formally presented later that month: UNHCR, Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at an Informal Meeting of the European Union Justice and Home Affairs Council (Mar. 28, 2003). The proposal was further refined in the UNHCR working paper, *UNHCR's Three-Pronged Proposal* (June 2003).

have funded the revamping of regional protection efforts by rechanneling funds now used to operate extensive domestic asylum systems in developed countries, UNHCR insisted that there could be no reduction in the developed world's traditional asylum efforts. Yet the agency gave no alternative suggestion as to how to finance the major investment needed to upgrade protection systems in regions of origin. Moreover, as the European Commission was quick to point out, the British and UNHCR reform proposals paid insufficient attention to the establishment of meaningful partnerships among countries of origin, transit, first asylum, and destination; and most fundamentally, to the unequivocal safeguarding of international legal obligations owed to refugees.[19]

As of 2004, the locus of reform seems to have shifted once again—this time, to the Inter-governmental Consultations on Refugees, Asylum and Migration Policies (IGC), an informal grouping of core members of the EU in addition to Australia, Canada, Norway, Switzerland, and the United States. The IGC is developing what it describes as a proposal for "effective protection" predicated on reducing demand for secondary and tertiary movement out of regions of origin and on enhancing the capacity of countries in regions of origin to protect genuine refugees. In many ways, the thrust of the IGC's agenda reasserts the commitments to universality, meaningful partnerships, creative redirection of monetary resources, empowering modes of protection, and clear respect for legal rights originally posited in the academic proposals of the late 1990s. But there is also a helpful recognition that those earlier models need retooling, especially in order to address concerns that the search for extra-regional asylum today is in many cases next to impossible without reliance on those who smuggle and traffic in human beings—a critical human rights challenge in its own right.

This, then, is the legal and political landscape onto which Niraj Nathwani's *Rethinking Refugee Law* arrived.

In many ways, the single most striking thing about Nathwani's book is just how little it engages with the real world in which refugee law is conceived and implemented. This is not to suggest that the author should necessarily have taken into account the whole landscape of refugee law reform, much less that he ought to have anticipated the reform initiatives that took place in the months after his book's publication. But the fact remains that Nathwani's optic on how refugee law should be understood and implemented is decidedly otherworldly.[20]

Nathwani's essential thesis is that prevailing theories that explain who is entitled to refugee status are insufficient and should be replaced by a necessity-based understanding of refugee law. Specifically:

> [R]efugee law revolves around the question as to whether an individual could realistically have chosen to stay home or somewhere else where the possibility posed itself. In other words, a refugee could not have chosen to stay away. The distinction between a normal immigrant and a refugee is ultimately a degree of choice. Whereas an immigrant can choose to stay away even if this means enduring hardship, a refugee cannot realistically choose to do so. This difference in the level of choice is captured by the concept of necessity. (Pp. 28–29, footnote omitted)

Nathwani forthrightly defines his assertion of a necessity-based view of refugee law as integral to his goal of "achiev[ing] an interpretation of the refugee concept that is stringent and convincing, and supports the advocates of a generous refugee policy in the rich West" (p. 85).

In considering his thesis, this reviewer was struck by Nathwani's failure to recognize that most of the refugee protection theories he seeks to replace are, at core, inspired by the very notion of necessity that he champions. The philosophical perspectives with which he takes issue—Michael Walzer's theory of mutual aid,[21] and Joseph Carens's theory of refugee protection as requisite to validation of the state system[22]—proceed from the view that, in at least some circumstances, there is a necessity-based claim by noncitizens to enter the territory of another country. In the legal realm, Atle Grahl-Madsen's understanding of refugees as persons who are de facto stateless,[23] as well as my

[19] Communication to the Council and the European Parliament: Towards More Accessible, Equitable and Managed Asylum Systems, COM(03)315 final (June 3).

[20] Interestingly, though Nathwani does open his study by conceding the general view that "refugee law faces a severe crisis" (p. 1), the only authority that he cites in support of this position is Gil Loescher's edited 1992 volume, *Refugees and the Asylum Dilemma in the West.* More recent concerns, as well as the proposals to address them, are essentially absent from the book.

[21] MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 33–35 (1983).

[22] Joseph H. Carens, *Nationalism and the Exclusion of Immigrants: Lessons from Australian Immigration Policy, in* OPEN BORDERS? CLOSED SOCIETIES? THE ETHICAL AND POLITICAL ISSUES (Mark Gibney ed., 1988).

[23] ATLE GRAHL-MADSEN, 1 THE STATUS OF REFUGEES IN INTERNATIONAL LAW 78 (1966).

own theory of refugee law as a system for the substitute or surrogate protection of basic human rights,[24] also starts from a recognition that refugees are people whose need for entry is driven by necessity. While it may well be that the details of these approaches mean that they amount to only a partial validation of the necessity principle espoused by Nathwani, his purpose would have been better served by building upon the earlier necessity-based approaches and by showing which protection gaps remain, and how his own theory could fill them.

Nor does Nathwani really give us any concrete sense of just how his preferred notions of "choice" and "necessity"—without refinements of the kind that legal scholars have traditionally insisted upon—could be implemented as the litmus test of refugee status. To the contrary, while Nathwani creatively outlines an understanding of necessity as a general principle of international law (pp. 32–37), he quickly concedes its operational inadequacy.[25] He is probably wise to do so. Social scientists, including Anthony Richmond,[26] long ago demonstrated that most people migrate for a combination of push and pull factors. As such, refugee jurisprudence now accepts as genuine refugees those who have mixed motives for departure—that is, they seek to avoid the risk of being persecuted, but also aspire to a better life for themselves and their children. How exactly would such cases fare under Nathwani's paradigm? More generally, is it really accurate to say that migration driven by what Nathwarni describes as "enduring hardship" is in any meaningful sense the product of "choice" rather than the result of "necessity"?

Nathwani effectively avoids engagement with the ramifications of his preferred approach by asserting that only national law can decide how to implement the necessity principle. In his words, "International law can serve to guide this quest, but only national law can provide a rich and precise understanding of the refugee concept" (p. 35). In taking this tack, however, Nathwani seems content to allow a single definition of "refugee," not subject to reservation or derogation by states, to be applied in even radically different ways. He is in this sense very much out of step with the growing determination of senior courts to interpret the Refugee Convention as elaborating a genuinely universal obligation. For example, the House of Lords has recently affirmed the duty to construe the Refugee Convention in a way that ensures a common understanding across states of the standard of entitlement to protection:

> [A]s in the case of other multilateral treaties, the [Refugee] Convention must be given an independent meaning . . . without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty. . . . In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so, [they] must search, untrammelled by notions of [their] national legal culture, for the true autonomous and international meaning of the treaty.[27]

Of even greater concern, Nathwani's analysis of the inadequacies of prevailing understandings of refugee status—that is, the basis for his assertion of the need for conceptual reform—is often flawed. This problem is apparent, for example, in his discussion of the alleged weaknesses of conceiving refugee protection as a surrogate or substitute protection of basic human rights (pp. 49–83). Nathwani correctly notes that reliance on human rights standards to define the risk of "being persecuted" will narrow the class of potential beneficiaries relative to all those who face the risk of some form of harm, but he critiques the human rights paradigm on the basis of false assumptions. He inaccurately assumes, in particular, that a person's refugee status is to be recognized only when the country of origin can actually be held liable for breach of a binding obligation; and he inexplicably constrains the notion of a failure of state protection to circumstances in which a government itself deprives an individual of rights (rather than acknowledging that there is also a failure of

[24] James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 J. REFUGEE STUD. 113 (1991).

[25] He analysis proceeds as follows:

> General principles in international law are usually vague. These principles can be considered only within the framework of a national legal culture, whereas international law needs to accommodate vastly different national traditions. Thus, general principles in international law will be "thin" in the sense that they only contain the minimal common denominator. . . .
>
> Within the context of refugee law, it is pertinent to point out that the 1951 Refugee Convention provides for decentralised decision making. . . . Thus, international law can only play the role of directing attention to the applicable legal principles and leaving the concrete shape of the principle to national law. (P. 35)

[26] ANTHONY H. RICHMOND, GLOBAL APARTHEID: REFUGEES, RACISM, AND THE NEW WORLD ORDER (1994).

[27] R. v. Sec'y of State for the Home Dep't, *ex parte* Adan, [2001] 1 All E.R. 593, 605 (H.L. 2000) (Steyn, L.J) .

protection when a government does not ensure the implementation of rights). Similarly, in discussing the Refugee Convention's requirement that the risk of persecution be "for reasons of " a Convention ground, he rightly notes that the requirement was designed to limit the class of persons entitled to refugee status, but he fails to explain why the human rights theory's commitment to interpreting the five Convention grounds—race, religion, nationality, political opinion, and membership of a particular social group—in line with norms of nondiscrimination law is inappropriate. Perhaps most of concern, Nathwani argues against the human rights view of the "well-founded fear" test for refugee status as requiring an objective assessment of risk. Taking no account of the judicial evolution of the objective standard to require only a "real chance" or "serious possibility" of being persecuted, Nathwani insists that "the measurement of probability that matters is subjective and not objective. What matters is the refugee's own assessment of the probability of detection and punishment and not an objective view of these. The subjective element is essentially linked to emotions" (p. 41).

This last critique helpfully clarifies the real goal being pursued by Nathwani's effort to rethink refugee law. In essence, he proposes nearly complete deference to the perspective of the person seeking recognition of refugee status. His central thesis seems to be that individuals who believe that they have no real choice but to leave their own country *should* be entitled to be protected abroad as refugees. Indeed, at times this thesis is presented not as a normative proposition, but as a descriptive matter. Thus, in Nathwani's view a refugee under the Refugee Convention *is* a person who is unable to avoid serious forms of intentionally inflicted harm, at least insofar as he or she subjectively perceives the risk to be genuine and to be causally connected to one of the five Convention grounds.

It would be an extreme understatement to observe that this approach is fundamentally at odds with the thrust of current refugee reform efforts. While Nathwani would see governments obligated to grant protection on the basis of subjective perceptions of need, all reform proposals now on the table presume that the challenge is to manage more effectively the protection of those persons who cannot, as an objective matter, reasonably be expected to return to their own states. It is difficult to imagine that states might be persuaded to commit themselves to the protection of an essentially self-defining category of refugees.

Despite the apparent dissonance between his views and the political and legal environment within which the reform of refugee protection must occur, Nathwani boldly insists that his approach will "avoid a conflict with policies of immigration control and . . . demonstrate that refugee law is compatible, even complementary, with a policy of strict immigration control" (p. 7). The book hints at a number of reinterpretations that the author believes could be employed to persuade states to embrace his approach. For example, Nathwani seems content to limit the concept of "being persecuted" only to circumstances characterized by the intentional infliction of harm (p. 90); to accept the view that refugees have a duty to avoid known risks, even at the cost of basic rights (pp. 92, 100); and to require refugees to entrust their welfare even to nonstate entities with little, if any, accountability under international law (pp. 93–95). In these and other respects, Nathwani's views amount to a clear retreat from the prevailing human rights framework for interpretation of refugee law obligations, and may to that extent be attractive to states inclined to minimize the scope of their protection obligations. Yet I have difficulty imagining that even these fundamental compromises would come close to persuading governments to abandon their quest for greater management of the refugee protection regime in favor of the highly individuated and subjectively determined approach to asylum that Nathwani endorses.

In the end, Nathwani provides little explanation of why sacrificing a variety of hard-won conceptual gains on the scope of refugee status would actually induce states to embrace a subjectively conceived notion of necessity as the basis for the imposition of binding legal duties of protection. The intellectual challenge neatly set by Nathwani—to devise means by which "refugee law [can] be immunised from the vagaries of the immigration debate" (p. 3)—is, in my view, precisely the right goal. But as theoretically attractive as many of the ideas proposed in *Rethinking Refugee Law* are, refugee law will not be saved by a radical conceptual broadening of the definition of "refugee." What is needed now is creative thinking on how to ensure that the duties already formally in place are, in fact, dependably and universally implemented on the ground.

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The Competing Jurisdictions of International Courts and Tribunals. By Yuval Shany. Oxford, New York: Oxford University Press, 2003. Pp. lxix, 348. Index. $95, £60.00.

The notion of *jurisdictio* in the international legal order is currently undergoing some dramatic changes. Because of a sharp increase in the number of international courts and tribunals—frequently termed a "proliferation"—the power to state what is lawful *(jus dicere)* at the international level is increasingly fragmented. This proliferation has resulted mainly from the extension of international law into new areas previously subordinated to states' sovereignty (for example, criminal justice) or to those areas that were basically not regulated multilaterally at all (for example, international trade in services). Since the early 1990s, the following mechanisms have been established: the Appellate Body of the World Trade Organization (WTO), the International Tribunal for the Law of the Sea (ITLOS), the two ad hoc international criminal tribunals, the UN Compensation Commission, the World Bank Inspection Panel and its counterparts at the Asian Development Bank and the Inter-American Development Bank, the North American Free Trade Agreement (NAFTA) dispute settlement mechanisms, the Andean and Mercosur dispute settlement systems, and several other regional economic tribunals. In addition, the International Criminal Court (ICC) and the African Court on Human and Peoples' Rights were recently established. What is also noticeable is that in addition to the multiplication of dispute settlement procedures, more permanent tribunals have been established and, perhaps, there has been lesser use of ad hoc tribunals.

These recent developments, especially in view of their uncoordinated nature, inherently carry the danger of overlaps in jurisdictional scope. Thus, a given dispute might be brought before more than one dispute settlement mechanism. By way of example, the International Court of Justice (ICJ), which has jurisdiction to adjudicate any legal dispute between states, may have concurrent jurisdiction with other international tribunals like ITLOS or the WTO dispute settlement mechanisms.

Yuval Shany, a full-time lecturer at the Academic College of Management in Israel, has conducted an important new study on the proliferation of dispute settlement mechanisms and on its legal and policy implications for the international legal order.[1] *The Competing Jurisdictions of International Courts and Tribunals,* an edited version of the author's Ph.D. dissertation, was published as part of Oxford University Press's newly launched "International Courts and Tribunals Series." It was awarded an ASIL Certificate of Merit in March 2004 for its "preeminent contribution to creative legal scholarship." Facilitating reader access to the materials in the book are various tables of cases, treaties, domestic law, and authorities, as well as a thorough index.

The goal of Shany's book is to search for possible methods of regulating the problem of competing jurisdictions in international law, as jurisdictional conflicts, be they partial or total, "are not only possible, but are a real and inevitable phenomenon" (p. 73). The first part of the book deals with the jurisdiction of the principal international courts and tribunals, and delineates overlapping domains. The book describes cases and situations that have indeed caused multiple proceedings. In the second part of the book, the author discusses some of the potential systemic and practical problems that may be generated by this jurisdictional rivalry. He then discusses possible ways of mitigating these problems. In the third part of his study, Shany analyzes existing rules of international law that regulate interjurisdictional competition, and he also suggests possible additional norms or legal arrangements. One of the book's most significant legal contributions is that it is the first major work to consider the application in public international law of doctrines developed and applied traditionally as part of domestic law and private international law—for example, *forum non conveniens, lis alibi pendens, res judicata,* and *electa una via.*

Shany's book convincingly demonstrates that the proliferation of dispute settlement forums raises complex questions. There are, in fact, several types of proliferation, and they all have an impact on the issue of competing jurisdictions. For the sake of clarity, one can distinguish the multiplication of forums (which can be named proliferation *ratione fori*) that encompasses the constellation of courts and tribunals, from the multiplication of actors (proliferation *ratione personae*)

[1] For previous work on this issue, see Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?* 271 RECUEIL DES COURS 101 (1998); Symposium, *The Proliferation of International Tribunals: Piecing Together the Puzzle,* 31 N.Y.U. J. INT'L L. & POL. 679 (1999); Panel: *The "Horizontal" Growth of International Courts and Tribunals: Challenges or Opportunities?* 96 ASIL PROC. 369 (2002).

and the expansion both of specific areas of law (proliferation *ratione materiae*) and of spatial jurisdiction (proliferation *ratione loci*). They are all various facets of the same problem and are linked to one another.

The notion of proliferation *ratione loci* refers both to the enlargement and fragmentation of the spatial aspect of dispute settlement jurisdiction through the intermingling of national and international courts, and to the sharp increase of regional dispute settlement forums. The notion of proliferation *ratione materiae* reveals the possible pitfall created by the issue of *lex specialis*. There is a risk of competition between various sets of rules as they have emerged, and consequently between the relevant dispute settlement forums. Proliferation *ratione personae* refers to an interesting situation: in addition to the institutionalization of dispute settlement, a significant development has been its gradual opening to all international actors, be they sovereign states, international organizations, or nonstate actors. Shany shows that the international judicial process has changed from a method developed by states to serve their own interests to a tool increasingly available to all entities to obtain justice and further the international rule of law. International organizations have *locus standi* before several forums. Nonstate actors, such as individuals, nongovernmental organizations, and private firms, have gained *locus standi* before various dispute settlement mechanisms (for example, human rights bodies and the Permanent Court of Arbitration). In other contexts (for example, the World Trade Organization and the North America Free Trade Agreement), they have been granted the right to submit amicus curiae briefs.

One cannot but note the exponential "demand" for dispute settlement and, as a consequence, an elastic "supply" of mechanisms and procedures. As revealed in Shany's book, this proliferation, in its various guises, is generating concern and is seen by some as a threat to the international system. "Forum shopping," "parallel litigation," "lack of finality," "incompatible judgments," and "accelerated fragmentation of the law" are some of the notions used to characterize the potential risks. Shany shares this concern and argues that jurisdictional competition might "introduce deharmonizing tensions" (p. 94). He also observes that "the lack of binding precedent under international law . . . , combined with the poor level of jurisdictional co-ordination . . . , threatens the coherence of international law" (p. 111, footnote omitted).

The discrepancies between courts' and tribunals' rulings on international issues have, so far, not been significant enough to challenge either the coherence or the legitimacy of international law in a systemic sense. Nevertheless, one cannot ignore the potential for such problems to emerge in the future. Shany thinks that the various international tribunals do, in fact, have their own specific agendas. They were arguably created to serve the interests of those states that cooperated in their establishment. The tribunals' allegiance to the particular treaty regimes that incorporate them may actually supersede, however, their allegiance to the international legal system as a whole. There is a risk that these specialized tribunals may be driven away from the core of international law through their own centrifugal forces, consequently damaging the coherence of the international legal system. There is no reason to think, however, that these developments will go so far as to create completely autonomous subsystems, each with its own judicial system (or other legal means of control and enforcement) that would operate as if it were independent from the general international legal order.

The fragmentation of international law is undoubtedly due, in part, to the absence of hierarchy among courts and tribunals, and also to the absence of any requirement to refer to previous decisions. The International Law Commission, in *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*,[2] has noted the possibility of conflicts emerging as a result of dispute settlement institutions that interpret and apply international law. The scenario in the *Tadić* case[3] is often quoted as a likely illustration of such fragmentation. In its appellate judgment, the International Criminal Tribunal for the Former Yugoslavia deviated from the test of "effective control" used in the *Nicaragua* case[4] in relation to de facto organs, retaining a looser "overall control" test. It remains to be seen, however, whether this interpretation conflicts with the one given by the ICJ. The respective contexts appear to be quite different.

If, within the broader perspective of the expanding international legal order, the development of

[2] Report of the International Law Commission on the Work of Its Fifty-fifth Session, UN GAOR, 58th Sess., Supp. No. 10, ch. X, UN Doc. A/58/10 (2003), *at* <http://www.un.org/law/ilc/>.

[3] Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment (July 15, 1999), *at* <http://ww.un.org/icty/>.

[4] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, para. 109 (June 27), at <http://www.icj-cij.org>.

new frameworks of obligations spawns new bodies to implement them, it is reasonable to assume that, in the long term, the development of this new generation of dispute settlement institutions will contribute to the reduction, or even elimination, of separate international legal domains that remain outside any legal control by third-party entities. In this context, one might well ask whether it might be possible to establish a hierarchy among the various available options for third-party settlement of international disputes. There is currently no political will to establish such a hierarchy of international tribunals—one that would impose the preeminence of the ICJ or, indeed, of any other tribunal. Shany emphasizes that this situation is linked to the absence of hierarchy that is inherent to the international system. Unlike a domestic legal system, which is fairly unified, the international system is characterized by interconnected and nonhierarchical relations:

> [T]here is no real international judicial system comparable to those found under domestic legal systems. As a result, rules harmonizing domestic jurisdictional competition (the 'intra-systematic model'), which are premised upon the existence of a coherent system of adjudicative institutions, are *prima facie* inapplicable to international courts and tribunals, where one finds looser forms of jurisdictional coordination and harmonization. (P. 126)

In the absence of an *ipso jure* and ex officio hierarchy in the international legal system, the book attempts to identify the rules that govern jurisdictional conflicts. From the network of treaty obligations currently in place (essentially the constitutive instruments of international courts and tribunals), it is not possible to deduce established principles of international law that can be implemented to address jurisdictional conflicts. Given the wide range of forum-selection provisions (which may or may not establish exclusive jurisdiction) and the scarcity of jurisdiction-regulating norms addressing multiple proceedings (such as *lis alibi pendens, electa una via,* or *res judicata*), Shany concludes that there are no clear and common jurisdictional-regulating rules. This conclusion reflects his extensive exploration of the statutes, practices, and case law of international courts and tribunals.

Insofar as parallel proceedings are concerned, no coherent principle has emerged from the case law. According to Shany, however, it is plausible that *lis alibi pendens* has indeed become a general principle of law that has been developed in most national legal systems in order to govern such proceedings. Considerations of comity and the doctrine of abuse of rights may also regulate parallel proceedings. The status of the res judicata rule seems to be clearer since it is both a rule of customary international law and a general principle of law. Nevertheless, the question of its application deserves more attention. Different courts and tribunals have issued inconsistent rulings on the scope of the "same dispute" and also on the question of whether to allow exceptions to res judicata. The current rules that serve to regulate overlapping jurisdiction between forums are not really adequate. New rules are needed, both for the protection and improvement of the international legal system and for more effective harmonization. As wisely stated by Shany:

> [I]in the future, given the need to strengthen the coherence of the international legal system, new methods ought to be explored in order to unify further the international judiciary and to alleviate procedural problems associated with jurisdictional overlaps, *inter alia,* by introducing additional jurisdiction-regulating rules capable of providing greater levels of co-ordination and harmonization to the relations between the various international courts and tribunals. It is submitted that the combined effect of more organized jurisdictional inter-fora relations and a higher degree of jurisprudential consistency could transform international courts and tribunals into a judicial system, enjoying meaningful levels of inner-coherence, and thus result in the strengthening of the unity of international law. (P. 127).

To conclude, one is surely tempted to share Shany's view that better-coordinated relationships between courts and tribunals will contribute to the reinforcement of the international legal order and to the emergence of an international judicial system. The number of international disputes capable of being decided by third-party techniques is constantly growing, a factor that is decisive for assessing the value, if not—as maintained by some scholars—the very existence, of any legal order. Even though we are far from having what could be considered an international judicial system, it can be said that the increasing number of international courts and tribunals, together with the numerous diplomatic mechanisms of control and compliance, represent a key element in the development of a real judicial function within the international order. This nonhierarchical proliferation certainly has certain weaknesses, but it seems to be the only way to improve third-party settlement of international disputes in law-based forums. The international legal

order is not some kind of chaotic bazaar; dispute-settlement mechanisms and procedures are important machinery for ensuring its well-ordered functioning. The great majority of courts and tribunals have developed an increased awareness of their possible contribution to this end.

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International Organizations Before National Courts. By August Reinisch. Cambridge, New York: Cambridge University Press, 2000. Pp. lxviii, 443. Index. £80, $110.

If one were asked to identify a single dramatic change in the structure of international law since the end of World War II, the prime candidate would likely be the rise of international organizations. Without the United Nations, the process of peaceful settlement, the reconciliation of competing differences, and the task of promoting respect for human rights would be, if not seriously weakened, at least very different. Without numerous specialized agencies and other similar intergovernmental organizations, the business of running the international system in areas as diverse and critical as world trade, the law of the sea, and environmental protection would be equally hard to visualize. It has become clear that no state, however powerful, can conduct international relations without taking into account the existence and functioning of international organizations.

Such institutions have not only significantly shifted the focus and orientation of international law at the international level, they have also begun to impact more and more upon domestic political systems. In so doing they have raised questions that challenge our vision of the place and role of international law—both horizontally and vertically. Contemporary activity on such issues ranges from the current consideration of the responsibility of international organizations by the International Law Commission under Special Rapporteur Professor Gaja[1] to the work of the International Law Association's Committee on the Accountability of International Organizations, whose final report was presented to the Berlin Conference in August 2004.[2]

August Reinisch, professor of public international law at the University of Vienna, has produced a book that takes our understanding of the impact of international organizations one step further. It is not a general work describing the nature and scope of these organizations such as the volumes of Schermers and Blokker[3] or Amerasinghe[4] or Klabbers;[5] nor is it a book that takes as its subject one particular aspect of the work of international organizations.[6] Reinisch's book discusses the nature of international organizations in relation to domestic legal systems and thus raises a host of critical and fascinating issues.

Reinisch approaches his task from a practical and practice-oriented point of view. His methodologically empirical perspective, termed "phenomenological" (p. 1), has many advantages, for it enables the reader to see exactly how domestic courts deal with problems involving international organizations and thus illuminates in a comparative manner the area of interaction or overlap between domestic and international law. It is an invaluable and instructive lesson in the advantages that the "practical" approach may bring to international law, since theory in the absence of an examination of actual dilemmas faced by those individuals or institutions that must make decisions can never be more than part of the story. However, this volume is more than simply an exposition of practice. It addresses various themes, dominant among them the relationship between the protection of the independence of international organizations and the need for accountability (referred to as the debate between "functionalists" and "constitutionalists"). Reinisch believes that this balance is currently weighted in favor of the former to the detriment of the latter (p. 319), a situation that he seeks to redress.

The heart of the book is contained in the analysis of practice in part I. Here the author seeks to explain on the basis of a thorough and avowedly descriptive case-by-case examination how domestic judges actually tackle issues where international organizations are involved. This analysis is divided into two sections which deal with "avoidance techniques" and "strategies of judicial involvement,"

[1] *See, e.g.*, Report of the International Law Commission on the Work of Its Fifty-fourth Session, UN GAOR, 57th Sess., Supp. No. 10, at 228, UN Doc. A/57/10 (2002), *available at* <http://www.un.org/law/ilc/>.

[2] It should be noted for the sake of completeness that the reviewer is co-rapporteur of this committee, of which Reinisch is a member.

[3] HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY (3d rev. ed. 1995).

[4] CHITTHARANJAN FELIX AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS (1996).

[5] JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW (2002).

[6] *E.g.*, KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANISATIONS (2002).

that is, respectively, the grounds upon which national courts either refrain from exercising jurisdiction over international organizations or proceed to exercise such jurisdiction. In many ways the two sections constitute a mirror image of the problems at issue, and these focus on the legal or juridical personality of such organizations and immunity. The policy issues underpinning such approaches are discussed in part II, with particular focus upon the functional need for immunity and the position of third parties. The practice and the policy come together in part III, which raises broad issues of principle to which reference will be made later.

A national court may avoid adjudication most radically by treating the international organization in question as a legal or juridical nonentity thus unable to sue or be sued. This refusal to recognize the organization as a legal person under domestic law, although dramatic, is as Reinisch shows, rare in case law (p. 38). However, the question of legal personality relies on the incorporation and applicability of international rules within the national legal order and thus raises the issue of the relationship between international and domestic law as seen from the perspective of the domestic court. Reinisch takes the position that the declaratory theory, according to which the domestic system simply accepts the international legal personality of the organization and applies it internally, is probably not correct and that it is the constitutive approach, which posits the need for a domestic legal act in order for domestic legal personality to exist, that "rest[s] on firm ground" (p. 62). This analysis is correct on the basis of current case law, although one should note that, for example, national courts are willing to accept that, in relevant instances concerning the nature and structure of the international organization, the applicable law is public international law.[7] One of the consequences of the current globalization trend covering not only trade but also environmental, human rights, and international criminal law issues is the problem posed to domestic courts of how to reconfigure the executive/judicial relationship faced with the acceptance of increasing jurisdiction over extraterritorial events. Reinisch discusses this important and topical question of nonjusticiability and similar claims made with regard to international organizations. Although concluding that such claims have not apparently been successful as a ground for refusal of jurisdiction, Reinisch does intriguingly point to hints of the doctrine in the case law and suggests that further developments may take place in this area (pp. 90–92 and 99).

While it is argued that immunity is only one of a variety of sophisticated techniques used by domestic courts in deciding whether or not to take jurisdiction with regard to an international organization, it is clear that immunity is the most frequently used avoidance technique in this sense (p. 127). Reinisch helpfully points out that immunity from jurisdiction possesses a dual international and domestic nature and stresses that a failure by the national courts to comply with the rules of international law in this respect (irrespective of domestic law) will entail the responsibility of the state concerned on the international level. Immunity under international law will depend upon relevant treaty provisions as well as customary law. However, Reinisch concludes on the basis of state practice that no customary obligation of states to accord immunity to organizations to which they are not members has yet emerged (p. 157).

The techniques used by national courts for asserting jurisdiction reflect the main themes developed earlier, ranging from nonqualification as an international organization to the personality issue (recognition of the organization as a legal person under domestic law), the denial or restriction of the scope of immunity, and the broad interpretation of waivers. In each case, Reinisch deploys his materials persuasively and skillfully. One should particularly note the valuable section on human rights concerns and the balance that must be struck between the right of access to a court and immunity (pp. 278–313, and discussion at pp. 324–327). Some of this has been presented before organs of the European Convention on Human Rights,[8] and it is unlikely that we have heard the last of this particular problem.

The book concludes with a section on future developments, bringing together practice and policy. The key issue explored here is the value of national courts in providing an appropriate forum for disputes involving international organizations. In this analysis Reinisch moves beyond the descriptive and explanatory to concentrate upon the necessity for an acceptable balance between the need to maintain the independence and proper functioning of international organizations on the one hand, and the right of access to a court for individuals seeking redress against the organization on the other hand. Reinisch seeks to redress

[7] *See, e.g.*, Westland Helicopters Ltd. v. Arab Org. for Industrialisation, [1995] 2 All ER 387.

[8] *See, e.g.*, Waite v. Germany (Eur. Ct. H.R. Feb. 18, 1999), *at* <http://www.echr.coe.int/Eng/Judgments.htm>.