

## Book Reviews

Surabhi Ranganathan, ***Strategically Created Treaty Conflicts and the Politics of International Law***. Cambridge: Cambridge University Press, 2014. Pp. 484. £75. ISBN: 9781107043305.

Treaty conflicts may be inevitable, but what do we make of conflict by design? In *Strategically Created Treaty Conflicts and the Politics of International Law*, Surabhi Ranganathan thoughtfully explores nations' purposeful creation of conflicts between treaties to advance their political goals and to restrict the impact of treaties to which they object. Essentially, states fight legal fire with legal fire. If they object to a multilateral treaty regime, they create another regime that effectively conflicts with, or cabins, the treaty regime that they object to rather than simply walking away.

Ranganathan considers purposefully created treaty conflicts to reveal 'the fragility of treaties' (at 17). That states can with relative ease 'create conflicting bilateral or small-group treaties with non-identical parties, which are amenable to few legal solutions, seems', in Ranganathan's view, 'to reinforce one of two' sceptical views of international law (at 17). The first, advanced by Jack Goldsmith and Eric Posner, regards international law as purely the product of state interests and power, largely devoid of independent normative pull.<sup>1</sup> The second, suggested by David Kennedy, finds 'that States (and other actors) seek to co-opt the authority of international law to advance their interests' such that 'international law is not just a product of politics but also its tool' (at 17, 23).<sup>2</sup> Ranganathan offers strategically created treaty conflicts as a Petri dish where we can examine whether politics subordinates international law or whether international law serves as an important constraint on raw political power. As elaborated below, she concludes that international law lies between these two poles – it constrains political power while simultaneously being shaped by it.

That states might strategically create treaty conflicts is neither new nor surprising. Building upon the work of scholars who have studied treaty conflicts and the history of the Vienna Convention on the Law of Treaties (VCLT),<sup>3</sup> Ranganathan shows how the International Law Commission (ILC) members that drafted the VCLT were well aware of such conflicts and of the difficulty of regulating them, particularly between non-identical state parties (at 48, 61–62). They finally settled on Article 30(4), which provides that where a later treaty does not include all of the parties to an earlier treaty, the usual rule of *lex posterior* applies to the parties to both treaties.<sup>4</sup> Thus, in the event of a conflict, the later agreement governs, unless it expressly preserves rights under the prior agreement (that is, includes a 'savings clause'). However, 'as between a

<sup>1</sup> J. Goldsmith and E. Posner, *The Limits of International Law* (2005). For a critique, see, e.g., Berman, 'Review Essay: Seeing Beyond the Limits of International Law', 84 *Texas Law Review* (2006) 1265; Golove, 'Leaving Customary International Law Where It Is: Goldsmith and Posner's The Limits of International Law', 34 *Georgia Journal of International Law and Comparative Law* (2005–2006) 333; van Aaken, 'To Do Away with International Law? Some Limits to "The Limits of International Law"', 17 *European Journal of International Law* (2006) 289.

<sup>2</sup> Discussing D. Kennedy, *Of War and Law* (2006).

<sup>3</sup> See, e.g., J. Klabbers, *Treaty Conflicts and the European Union* (2009); Borgen, 'Resolving Treaty Conflicts', 37 *George Washington International Law Review* (2005) 573; S.A. Sadat-Akhavi, *Methods of Resolving Conflict Between Treaties* (2003); G. Binder, *Treaty Conflict and Political Contradiction: The Dialectic of Duplicity* (1989). Vienna Convention on the Law of Treaties (VCLT) 1966, 1155 UNTS 336.

<sup>4</sup> VCLT, *supra* note 3, Art. 30(4).

State party to both treaties and a State party to only one of the treaties, only the treaty to which they are both party governs their mutual rights and obligations'.<sup>5</sup>

Scholars have criticized Article 30 as being overly mechanistic, as providing insufficient guidance for resolving treaty conflicts<sup>6</sup> and, even worse, as serving as a 'license to breach' that favours state autonomy and sovereignty, particularly that of powerful states, over international law.<sup>7</sup> Ranganathan challenges this pessimistic view. She argues that rather than stating rules that would definitively decide the outcome of a treaty conflict – for example, by voiding provisions of a later treaty that seriously impair an essential aspect of an earlier treaty, as had been suggested by Special Rapporteur Sir Hersch Lauterpacht (at 62)<sup>8</sup> – the ILC settled on a flexible rule precisely to strengthen the international law project overall (at 51, 91). Article 30(4) gives breathing space for political decision making as states navigate potentially duelling treaty regimes. At the same time, it presses states to articulate and think of their positions in legal, rather than purely political, terms. Drawing upon the contemporaneous writings of the three ILC special rapporteurs, Sirs Hersch Lauterpacht, Gerald Fitzmaurice and Humphrey Waldock, Ranganathan persuasively argues that the Commission ultimately believed that a flexible rule would 'steer states towards legal discourse while an overly decisive provision might simply be disregarded' (at 51).<sup>9</sup>

The heart of the book is its 200-page identification, exploration and analysis of three strategically created treaty conflicts in practice. Each case study involves a situation where the majority of nations in the world sought to establish a foundational multilateral agreement, which met the objection of a single powerful state or a group of states. The first case study delves into the dispute over deep seabed mining under the UN Convention on the Law of the Sea (UNCLOS).<sup>10</sup> The second addresses the creation of the International Criminal Court. The third tackles the nuclear non-proliferation regime established by the Nuclear Non-Proliferation Treaty (NPT) and the 2007 India–USA–Nuclear deal.<sup>11</sup> Through the three case studies, Ranganathan hopes to show 'how international law may be both constraint and leverage, shield and sword, such that there can be no simple summation or dismissal of its place in international affairs' (at 144). Ranganathan broadens the concept of 'treaty conflict' to include not only direct conflicts between mutually exclusive treaty obligations as classically construed<sup>12</sup> but also situations where a later-in-time agreement undermines core purposes of an earlier-in-time agreement. Even if not technically conflicting, the two regimes compete with each other in practice (at 54, 210, 225, 302).

## 1. Seabed of Dreams

International law's attempt to regulate access to the anticipated riches of the deep seabed takes us back to a time of high hopes for a new world economic order where newly discovered riches

<sup>5</sup> *Ibid.*

<sup>6</sup> See, e.g., Fox, 'International Organizations: Conflicts of International Law', 96 *ASIL Proceedings* (2001) 183, at 186.

<sup>7</sup> G. Binder, *Treaty Conflict and Political Contradiction: The Dialectic of Duplicity* (1989).

<sup>8</sup> Citing International Law Commission (ILC), 'First Report on the Law of Treaties by H. Lauterpacht, Special Rapporteur, A/Cn.r/63', 2 *ILC Yearbook* (1953) 156; ILC, 'Second Report on the Law of Treaties by H. Lauterpacht, Special Rapporteur, A/CN.4/87 and Corr. 1', 2 *ILC Yearbook* (1954) 133.

<sup>9</sup> For Waldock, 'the invalidity rule "though attractive from the academic point of view," was not workable in practice, for courts would rarely take it upon themselves to invalidate treaties involving States that were not before them' (at 88, quoting Waldock, 703rd Mtg of the ILC, para. 75).

<sup>10</sup> UN Convention on the Law of the Sea (UNCLOS) 1982, 1833 UNTS 3.

<sup>11</sup> Treaty on the Non-Proliferation of Nuclear Weapons (NPT) 1968, 729 UNTS 161.

<sup>12</sup> See *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, Judgment, 27 June 1986, ICJ Reports (1986) 14, para. 270 (discussed at 54).

would be shared between developed and developing nations alike. UNCLOS' seabed mining regime, negotiated over the 1970s, premises itself on the principle that the seabed resources are the common heritage of mankind. Developing countries successfully sought to operationalize this concept through a comprehensive international regime to govern the exploitation of the seabed.<sup>13</sup> UNCLOS was adopted in 1982 with four states voting against, 17 states abstaining and 130 states voting in favour (at 158).

UNCLOS was not to be the only word on access to the seabed's resources. A number of developed states objected to the regime, which they considered overly bureaucratic, burdensome and a bar to the effective participation of states that could pioneer access to the seabed's resources (at 157). Between 1980 and 1985, the USA, the United Kingdom, France, Italy, the Netherlands, Belgium, Germany, and Japan developed a 'reciprocating states regime (RSR)' (at 150). Many of these states enacted domestic laws for licensing the exploration and exploitation of the seabed (at 151, 161–163). In 1984, they entered into the Provisional Understanding Regarding Deep Seabed Matters between Belgium, France, Germany, Italy, Japan, the Netherlands, the United Kingdom and the United States where they generally agreed to recognize each other's licences and developed procedures to resolve overlapping claims to mining sites.<sup>14</sup> The USA, the United Kingdom and Germany did not sign UNCLOS, and none of the parties to the Provisional Understanding ratified UNCLOS until 1994, when an implementation agreement to UNCLOS was adopted that met their concerns.<sup>15</sup> The Provisional Understanding was thus an agreement between non-parties to UNCLOS.

Contrary to the position taken by the RSR states, Ranganathan views UNCLOS and the Provisional Understanding (which 'crystallized' the domestic laws governing access to the seabed) to be treaties in conflict. She points to the fact that the RSR was biased towards nationals of reciprocating states and, hence, did not fulfil UNCLOS' principle of non-discrimination (at 171). Moreover, the RSR largely ignored the effective participation of developing states, which was core to the UNCLOS regime (at 171). Overall, the RSR premised itself on the principle of freedom of the high seas and an expansive view of the common heritage of mankind principle rather than UNCLOS' concept of common heritage being regulated by an international authority, as reflected in Part XI (at 171). Although UNCLOS did not enter into force until 1994, Ranganathan argues that its normative framework became legally effective as of its adoption in 1982 (at 166–167).

Ranganathan beautifully traces the dynamics of compromise between the two regimes. She shows how the different sides resorted to legal argument, international legal fora and a profligate generation of legal documents to reconcile their positions – ultimately leading to the 1994 Implementation Agreement that enabled nearly universal accession to UNCLOS.<sup>16</sup> Indeed, of the RSR states, only the USA has yet to ratify UNCLOS, though it has signed the Implementation Agreement.<sup>17</sup> The Implementation Agreement jettisoned UNCLOS' complex administrative framework, thereby bowing to the interests of pioneering states. At the same time, it preserved many of the core elements of the common heritage principle, including non-appropriation, equitable sharing and no harm (at 197).<sup>18</sup> Most interesting is how legality long assumed primacy

<sup>13</sup> Part XI of UNCLOS, *supra* note 10. See generally E.D. Brown, *The International Law of the Sea* (1994), at 448.

<sup>14</sup> Provisional Understanding Regarding Deep Seabed Matters between Belgium, France, Germany, Italy, Japan, the Netherlands, the United Kingdom and the United States 1984, 23 ILM 1354.

<sup>15</sup> Table Recapitulating the Status of the Convention and Related Agreements as of 10 October 2014 (Table), available at [www.un.org/Depts/los/reference\\_files/status2010.pdf](http://www.un.org/Depts/los/reference_files/status2010.pdf) (last visited 6 November 2015); Agreement Relating to the Implementation of Article XI of the United Nations Convention on the Law of the Sea (UNCLOS Agreement) 1994, 33 ILM 1309 (at 163 and 174).

<sup>16</sup> UNCLOS Agreement, *supra* note 15.

<sup>17</sup> Table, *supra* note 15.

<sup>18</sup> See generally Sohn, 'International Law Implications of the 1994 Agreement', 88 *American Journal of International Law* (1994) 696.

in international discourse, notwithstanding the real elephant in the room – the economic non-viability of deep seabed mining and the paucity of reliable technology to access the deep seabed.<sup>19</sup> Even when economic reality set in, countries appeared more comfortable expressing and navigating their positions in legal terms and through legal documents than through economic or overtly political discourse.

## 2. The International Criminal Court and the USA's Article 98 Agreements

The USA refused to join the Rome Statute that created the International Criminal Court (ICC).<sup>20</sup> US concern about the Court ran so deep that it famously 'un-signed' the Rome Statute and proceeded to conclude over 100 bilateral immunity agreements (BIAs) with other states that would protect US personnel and nationals from the jurisdiction of the Court.<sup>21</sup> These agreements represent the clearest example of a state fighting international legal fire with international legal fire. The USA concluded BIAs both with states that were party to the Rome Statute and with those that were not.

In a nutshell, the BIAs with countries that had ratified the Rome Statute provided that such countries would not surrender US nationals or US current or former personnel (including contractors) to the ICC, either directly or via a third country or entity, without the USA's consent.<sup>22</sup> Some of these agreements were reciprocal, such that the USA agreed not to yield the other country's nationals to the ICC absent such country's consent as well.<sup>23</sup> The BIAs with countries that had not joined the Rome Statute included a non-cooperation clause, whereby the USA and the other country agreed not to 'cooperate with efforts' of other countries or entities to transfer each other's persons to the ICC.<sup>24</sup>

The BIAs seemingly conflict with the Rome Statute because they obligate a state that is party to both a BIA and to the Rome Statute to refrain from surrendering a US person to the ICC, when Article 89 of the Rome Statute obligates them to do so.<sup>25</sup> On the other hand, a conflict may not exist due to Article 98(2) of the Statute. Article 98(2) envisions situations where a party, because of another international obligation, may not surrender a person to the ICC without another country's consent.<sup>26</sup> Some assert that a conflict exists even with respect to states that have signed, but not ratified, the Rome Statute and have entered into a BIA by virtue of Article

<sup>19</sup> We may be seeing a repeat of this dynamic, where legality trumps economic viability, in the development of international rules to govern access to genetic material.

<sup>20</sup> Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9, 1 July 2002.

<sup>21</sup> US Department of State, International Criminal Court: Letter to UN Secretary General Kofi Annan, Press Statement, 6 May 2002; US Department of State, US Signs 100th Article 98 Agreement, Press Statement, 3 May 2005, available at [www.state.gov/r/pa/prs/ps/2005/45573.htm](http://www.state.gov/r/pa/prs/ps/2005/45573.htm); US Department of State, Article 98 Agreements and the International Criminal Court, <http://www.state.gov/t/pm/art98/> (last visited 6 November 2015).

<sup>22</sup> Sample bilateral immunity agreement (at 382–383, Appendix 5).

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, at 383.

<sup>25</sup> Rome Statute, *supra* note 20, Art. 89.

<sup>26</sup> *Ibid.*, Art. 98(2). But see James Crawford, Philippe Sands and Ralph Wilde, Joint Opinion, In the Matter of the Statute of the International Criminal Court and In the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute, 5 June 2003, at 11–23, available at [www.iccnw.org/documents/SandsCrawfordBIA14June03.pdf](http://www.iccnw.org/documents/SandsCrawfordBIA14June03.pdf) (last visited 6 November 2015) (concluding that Art. 98(2) does not allow a state party to join a bilateral immunity agreement [BIA]).

18 of the VCLT.<sup>27</sup> Article 18 obliges a nation that has signed a treaty 'to refrain from acts which would defeat the object and purpose' of that treaty. These commentators consider a non-surrender obligation to violate the object and purpose of the agreement.<sup>28</sup>

On some level, what impresses about the BIAs is not their disregard of treaty law but, rather, their attempt to avoid direct conflict with the Rome Statute. They distinguish, for example, between obligations included for countries that have ratified the Rome Statute and those that have not. In the main, they restrict the reach of the ICC to nationals or actions of the USA – a non-party. Even the un-signing of the Rome Statute radiates concern about treaty law. The USA seemed unwilling to even risk running afoul of Article 18 of the VCLT.<sup>29</sup> Its letter to Kofi Anan 'un-signing' the Rome Statute tracks the language of Article 18, stating that the USA 'does not intend to become a party to the treaty' and 'accordingly ... has no legal obligations arising from its signature on December 31, 2000'.<sup>30</sup>

Arguments can be made both in favour of, and against, a treaty conflict. In Ranganathan's view, whether the BIAs technically conflict with the Rome Statute may be a 'red herring' (at 225). The BIAs challenge the effective operation of the Rome Statute and the international regime that it establishes (at 225).

Ranganathan proceeds to show how this challenge played out. The ICC prosecutor took steps to legitimize the Court, while simultaneously avoiding direct conflict with the USA, in a delicate dance of international politics and international law. Political realities constrained the ICC prosecutor. At the same time, the prosecutor created its own paper trail of policy papers, warrants, referrals and trial documents such that the Court came to exist as a functioning international institution (at 278).<sup>31</sup> The Court could not ignore the USA, but neither could the USA ignore the Court.<sup>32</sup> Like Everest, the ICC is there. The USA came to accept the Court's existence and moved from a position of opposition, to one of neutrality, to one of qualified cooperation.<sup>33</sup>

### 3. India and the Nuclear Governance Regime

The 1968 NPT serves as the international legal bedrock for combating the spread of nuclear weapons while permitting the expansion of nuclear energy for peaceful purposes.<sup>34</sup> The NPT effectively divides states into two categories: those that had nuclear weapons as of 1 January 1967 (the nuclear weapons states or NWS) and those that did not (the non-nuclear weapons

<sup>27</sup> See, e.g., Tan, Jr., 'The Proliferation of Bilateral Non-Surrender Agreements among Non-Ratifiers of the Rome Statute of the International Criminal Court', 19 *American University International Law Review* (2004) 1115; Human Rights Watch, Bilateral Immunity Agreements, 20 June 2003, available at [www.hrw.org/legacy/campaigns/icc/docs/bilateralagreements.pdf](http://www.hrw.org/legacy/campaigns/icc/docs/bilateralagreements.pdf) (last visited 6 November 2015); Crawford, Sands and Wilde, *supra* note 26, at 23–24.

<sup>28</sup> Crawford, Sands and Wilde, *supra* note 26.

<sup>29</sup> For possible US concerns underpinning its 'un-signing', see Bradley, 'Unratified Treaties, Domestic Politics, and the U.S. Constitution', 48 *Harvard Journal of International Law* (2007) 307, at 317–318.

<sup>30</sup> US Department of State, *supra* note 21.

<sup>31</sup> This serves as a modified example of Abram and Antonia Chayes' view of the implementation of treaties. A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1998).

<sup>32</sup> See Statement of US Department of State Legal Adviser John Bellinger: 'The U.S. must acknowledge that the ICC enjoys a large body of international support and that many countries will look to the ICC as the preferred mechanism' for punishing war crimes. Reported in Jess Bravin, 'U.S. Accepts International Criminal Court', *Wall Street Journal* (26 April 2008).

<sup>33</sup> Emily C. Barbour and Matthew C. Weed, *The International Criminal Court (ICC): Jurisdiction, Extradition, and U.S. Policy*, Congressional Research Service, 16 March 2010, at 1.

<sup>34</sup> NPT, *supra* note 11.

states or NNWS).<sup>35</sup> Under the NPT, NNWS forswear nuclear weapons programmes. In return, NWS agree to nuclear energy cooperation with them and to pursue nuclear disarmament (at 295). From the outset, India, which at the time was developing a nuclear weapons programme, objected to the NPT and refused to sign it (at 289). India viewed as unfair the NPT's cut-off date, which effectively accorded NWS status to the five permanent members of the UN Security Council alone (at 289).

Nearly 40 years later, the president of the United States announced, as part of an overall bilateral relationship between the USA and India, 'to work to achieve full civil nuclear energy cooperation with India'. The president promised to 'seek agreement from Congress to adjust US laws and policies' and to 'work with friends and allies to adjust international regimes to enable full civil nuclear energy cooperation and trade with India'.<sup>36</sup> Under this 'deal', India committed to protecting nuclear technology on terms similar to those applied to NWS (at 299). Less than a year later, the USA and India concluded a bilateral civil nuclear agreement, 'the 123 Agreement,' which entered into force on 6 December 2008.<sup>37</sup>

Ranganathan allows that one can 'avoid reading the NPT and the 123 Agreement as in conflict', as those charged with treaty interpretation would normally strive to do. However, such a reading can be achieved 'only at the cost of ignoring how' the bilateral treaty 'threatens the bargain embodied in' the multilateral one (at 302). India would enjoy the benefits accorded to NNWS without making the reciprocal commitments shouldered by those states.

This strategically created treaty conflict reveals the tug of international law. Ranganathan shows how the ratification of the 123 Agreement began a legal process where the USA and India sought to justify, legitimize and operate the deal within the overall nuclear non-proliferation framework. The USA sought approval for its civil nuclear cooperation with India from the International Atomic Energy Agency (IAEA) and from the Nuclear Suppliers Group (NSG). This approval from the IAEA and the NSG, however, shaped the terms of the deal itself by strengthening India's non-proliferation commitments (at 316). The USA and India argued that their deal was legally justified because it comported with the aims of nuclear governance: 'But these very claims of the Deal's legality pushed them towards accepting additional terms that more closely aligned the Deal with the NPT-based regime' (at 345–346).

*Strategically Created Treaty Conflicts* is a welcome addition to the study of treaty conflicts and to the study of the relationship between international law and international relations. The three case studies show how ambitious multilateral regimes bend in the face of political realities. At the same time, they reveal how multilateral agreements become part of the geopolitical landscape that shapes the actions and legal norms of even the most powerful of nations. They further show how the craft of international law often involves not only 'speaking law to power' but also serving as a bridge to resolve conflicting positions.

By inviting us to think of treaty conflict not only in terms of direct conflicts between mutually exclusive treaty obligations but also in terms of overall conflict in effect, Ranganathan provides an illuminating account of treaty conflict and the dance between law and power in practice. That being said, this broadened understanding of treaty conflict can diminish the legal integrity of treaty law. Ranganathan exercises care in her analysis of conflict, and I offer the following less as a critique of her impressive book, whose purpose after all is to study the interaction of law and politics, and more as a word of caution.

<sup>35</sup> *Ibid.*, Art. IX(2).

<sup>36</sup> India–United States Joint Statement, 18 July 2005.

<sup>37</sup> Agreement for cooperation concerning the peaceful uses of nuclear energy, with agreed minute, signed at Washington 10 October 2008, entered into force 6 December 2008, TIAS 08-1206.



The book's broadened portrayal of treaty conflict to encompass treaty conflict in effect, if taken too far, threatens to blur unlawful with 'unlawfulish' and conflict with 'conflictish'. Those who support the goals of a multilateral regime will likely consider bilateral or small group treaties that they object to as conflicting, let alone conflicting in effect, with the multilateral agreement, particularly through the broad and often flabby lens of the multilateral agreement's overall object and purpose.<sup>38</sup> Thus, for example, in the case of the deep seabed, Ranganathan and others characterized much of UNCLOS' seabed system as an international norm prior to the treaty's entry into force and in the face of opposition of those states best able to access the deep seabed (at 166–167). Those who objected to the BIAs found them in conflict with the Rome Statute even with respect to countries that had signed, but not ratified, the Rome Statute due to their perceived inconsistency with the Rome Statute's broad object and purpose of preventing impunity.<sup>39</sup> Imagine how often treaty conflict will be alleged if it is extended to include situations where bilateral and small-group treaties between signators and non-parties, even if not directly conflicting with a multilateral agreement, challenge the multilateral agreement's desired operation (at 230–231).<sup>40</sup> Finally, the line between parties and non-parties becomes blurred. For example, in the deep seabed account, the Provisional Agreement entered into entirely by non-parties to UNCLOS becomes viewed as a treaty 'in conflict' with UNCLOS.

Like expansion seams in a highway, multilateral treaties may include flexibility provisions, such as the Rome Statute's Article 98(2), precisely to avoid direct treaty conflicts. Baked into the multilateral agreement are provisions, including ambiguous terms that are subject to differing interpretation, that make the treaty substantively less powerful than its proponents may wish but amenable to greater political buy-in and less treaty conflict as a legal matter. In reconciling potentially duelling treaty regimes, nations are doing more than 'document rattling' or resorting to 'legalize'; they are avoiding a treaty conflict and, in so doing, strengthening international law as law.

If Ranganathan's account of the goals underlying Article 30(4) of the VCLT is correct, her three case studies would seem to vindicate this Article's flexible approach to reconciling treaty conflict. In each case studied, the country or countries that objected to the multilateral regime and entered into a competing small group treaty did not simply walk away or ignore the multilateral system. They did express their conflicting claims in legal terms. They were moved to engage

<sup>38</sup> For a discussion of international law scholars and commentators' preference for multilateral agreements, see generally Alvarez, 'Multilateralism and Its Discontents', 11 *European Journal of International Law* (2002) 393, at 394 (observing that for most international lawyers and scholars 'multilateralism is our shared secular religion'. Most of us take offence at any 'suggestion that we need to re-examine the idea that multilateral approaches, preferably accompanied by institutionalized dispute settlement, are the most enlightened response to modern dilemmas'); Safrin, 'The Un-Exceptionalism of U.S. Exceptionalism', 41 *Vanderbilt Journal of Transnational Law* (2008) 1307, at 1354 (noting that multilateral agreements have come to be viewed as a moral good in and of themselves and how nations that fail to join them face opprobrium).

<sup>39</sup> Human Rights Watch, *supra* note 27; and Crawford, Sands and Wilde, *supra* note 26, at 24. Bradley, *supra* note 29, at 331, observes that 'exaggerated claims about the object and purpose obligation' may have actually helped push the USA to disassociate itself from the Rome Statute.

<sup>40</sup> For a discussion of a trend among some commentators to expand the obligation of nations that sign a multilateral agreement from an obligation to refrain from acts that actually defeat the object and purpose of a treaty to an obligation to comply with the multilateral agreement's core or important provisions, see Bradley, *supra* note 29, at 316, citing as examples Goodman and Jinks, 'Measuring the Effects of Human Rights Treaties', 14 *European Journal of International Law* (2003) 171, at 173; McDonnell, 'Cluster Bombs over Kosovo: A Violation of International Law?', 44 *Arizona Law Review* (2002) 31, at 107; Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position', 64 *Law and Contemporary Problems* (2001) 67, at 94.

in international legal discourse. Ultimately, a legal solution involving interpretation, modification or accommodation enabled the reconciliation of the competing regimes in a way that arguably left the overall project of international law stronger. Perhaps the ghosts of Lauterpacht, Fitzmaurice and Waldock are smiling.

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M. Sornarajah, ***Resistance and Change in the International Law on Foreign Investment***. Cambridge: Cambridge University Press, 2015. Pp 451. \$125. ISBN 9781107096622.

In 1994, Muthucumaraswamy Sornarajah published the first edition of his treatise, *The International Law on Foreign Investment*.<sup>1</sup> There, he sought to demonstrate that investment law as a separate branch of international law was ‘in the process of development’ and could and should be isolated for separate study. Organizing his material from the disparate sources of domestic law, contract-based arbitration and public international law along the overarching tension between the interests of developing countries and those of traditionally capital-exporting states, his stated aim was to ‘help in the identification of the nature of the disputes’, which would lead, in turn, to the ‘formulation of acceptable solutions’.<sup>2</sup>

The treatise was a well-timed pioneering effort that rightfully earned the author a lasting reputation as one of the founding fathers and towering figures of the academic discipline.<sup>3</sup> There seems to be no one better placed, then, to ask, 20 years on, what happened or, rather, what went wrong. Investment law has developed with breathtaking speed into a (very) separate branch of international law – yes – but almost entirely on the waves of treaty-based investor–state arbitration, which has all but eclipsed contractual and domestic processes, at least in terms of academic interest.<sup>4</sup> And this system has, in the eyes of Sornarajah and many others, rather spectacularly failed to lead to ‘acceptable solutions’, especially for developing countries.<sup>5</sup>

More than half of *Resistance and Change* is dedicated to a linear account of ‘what went wrong’ in chronological steps of doctrinal adventures leading inexorably to greater investment protection. The story starts with the theory of the internationalization of investment contracts, launched in the pre-bilateral investment treaty (BIT) era. Expounded famously in the mid-1970s by René-Jean Dupuy in *Texaco v. Libya*,<sup>6</sup> and thriving in early contract-based arbitrations within the International Centre for Settlement of Investment Disputes (ICSID), the general idea is to subject concession contracts to international – not domestic – law, either because the submission to international arbitration is held to be an implicit choice of international law, because of stabilization clauses or because

<sup>1</sup> M. Sornarajah, *The International Law on Foreign Investment* (1994).

<sup>2</sup> *Ibid.*, at 26.

<sup>3</sup> The treatise is now in its third edition, published in 2010.

<sup>4</sup> But see J.W. Salacuse, *The Three Laws of International Investment: National, Contractual and International Frameworks for Foreign Capital* (2013).

<sup>5</sup> See, e.g., M. Waibel (ed.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (2010); Sornarajah, ‘Evolution or Revolution in International Investment Arbitration? The Descent into Normlessness’, in C. Brown and K. Miles (eds), *Evolution in Investment Law and Arbitration* (2011) 631.

<sup>6</sup> *Texaco Overseas Petroleum Co. v. Libya*, Award, 19 January 1977 (1979) 53 ILR 389. For a kinder view than Sornarajah’s, see Cantegreil, ‘The Audacity of the *Texaco/Calasiatic* Award: René-Jean Dupuy and the Internationalization of Foreign Investment Law’, 22 *European Journal of International Law* (2011) 441.