

Recent Publications

The Electronic Silk Road: How the Binds the World Together in Commerce. By Anupam Chander. New Haven: Yale University Press, 2013. Pp xxii. 278. Price: \$20.09 (Hardcover) Reviewed by Grace Heusner and Daniel Sheehan.

In *The Electronic Silk Road*, Anupam Chander urges the establishment of a new international trade regulatory scheme: “[W]e must dismantle the logistical and regulatory barriers . . . to trade while at the same time ensuring that public policy objectives cannot easily be evaded through a simple jurisdictional sleight of hand or keystroke” (p. 34). With the emergence of the Internet as a revolutionary platform for provision of services worldwide, Chander claims that the “existing infrastructure of trade, developed over millennia for a paradigm of goods, proves inadequate either to enable or to regulate” (p. 4).

The Electronic Silk Road focuses on some of the legal issues surrounding “Trade 2.0,” Chander’s term for today’s globalized trade network of “under-sea fiber-optic cables and satellite links, ferrying electrons brimming with information” (p. 1). Chander compares this “Trade 2.0” to the Silk Road of antiquity, which linked “the ancient world’s civilizations . . . through deserts and mountain passes, traversed by caravans laden with the world’s treasures.” (p. 1). As the ancient Silk Road transformed the lands it covered, modern technology offers a new ability to offer services to the world from a desk in Silicon Valley or Bangalore and a promise to transform the world.

In his book, Chander identifies legal roadblocks that complicate the prospects for establishing a regulatory infrastructure for managing the global trade in electronic services, such as state sovereignty and jurisdictional limitations. Another problem in the current network of trade is uncertainty about which nation’s (or international) law applies to various international and transnational transactions. In addition to helping mitigate that issue, Chander claims that the establishment of an effective infrastructure is critical to avoiding a worldwide race to a deregulated bottom. To mitigate these dangers of local control in these worldwide transactions, Chander posits a solution of “glocalization”—the “requir[ement] of a global service to conform to local rules” (p. 11). Combining this idea of “glocalization” with the harmonization of domestic and international laws, Chander preaches “harmonization where possible, glocalization where necessary” (p. 11).

The Electronic Silk Road’s structure allows Chander to address a variety of issues in electronic trade of services and goods. He first describes obstacles to the functioning of this new network in chapter case studies of controversies in cybertrade. In the second half of his book, Chander proffers a framework for “breaking down barriers to free trade while protecting public policy objectives” (p. 12). *The Electronic Silk Road* is written in a conversational tone, making it appealing to a wide audience. However, this accessibility may come at the cost

of in-depth analysis. Some of the chapters feel rushed, merely scraping the surface of what are complex issues of economic and political importance. By trying to appeal to diverse interests, *The Electronic Silk Road* has perhaps taken on too much without fleshing out the nuances of any particular issue.

For example, in the chapter called “Pirates of Cyberspace,” Chander urges that the problem of individual countries’ differing privacy laws, especially in the case of user data, demonstrates the “difficulty of enforcing rights abroad” (p. 14). In fewer than twenty-five pages, Chander rattles through five case studies of companies who have engaged in behavior that “asserts its legitimacy under the laws of its home country, but [] is denounced as a pirate by authorities elsewhere” (p. 89). He describes the factual and legal underpinnings of these circumstances to support his argument that there is a need for regulation and uniformity in global trade laws. Specifically, Chander describes the United States’s legal action in the establishment of an online gambling haven in Antigua (pp. 89-93); in a copyright infringement suit against peer-to-peer file trading system Kazaa (pp. 93-95); against the unlicensed music downloads sold through Russian company AllofMP3 (pp. 95-98); against Swedish organization The Pirate Bay’s leaking of the American movie *Shrek 2* (pp. 98-100); and against leaks related to Julian Assange’s WikiLeaks (p. 100-05). Although these case studies support Chander’s claim, they are so abbreviated that some readers might be lost, while others might be bored with the bird’s-eye view of a complicated issue.

Chander’s account of the emerging “Trade 2.0” regime portrays governments as mere rule-makers and gatekeepers. They set and enforce the regulations that service companies need to follow, but they aren’t significant actors in international trade. It is private companies and organizations – whether Facebook or WikiLeaks—with whom consumers interact, and whose services consumers must be willing to trust.

The international reaction to Edward Snowden’s revelations about the National Security Agency’s activities in cyberspace complicates Chander’s account. Snowden’s exposure of the NSA’s global surveillance programs has elicited strong reactions from governments around the world (some of whose leaders were the targets of NSA spying), consumers and consumer watchdog groups, and many of the private companies at the center of Chander’s story. Snowden’s revelations make clear that private companies are not the only bodies in need of regulation on the Internet, and that consumers who purchase services online are not dealing simply with such companies. Governments themselves are conducting involuntary one-way transfers of information with Internet users, and their clandestine activities may pose more of a threat to public welfare than the activities of private companies. In particular, the United States federal government, whose regulatory ambit includes most of the service providers Chander discusses, has been shown to be as active a collector of data as any regulated service vendor.

If the NSA revelations have moved governments to the forefront of discussions about regulation of the internet, what implications does this have for the future of Trade 2.0? Chander makes a compelling case for the importance of liberalizing trade in services (guided by principles of technological neutrality

and dematerialization) while maintaining protections for local exercises of sovereignty (guided by principles of globalization and harmonization). Is this agenda for trade in services threatened by the reaction to Snowden's NSA disclosures and, more broadly, the new attention drawn to governments' surveillance activities online? There are reasons to believe that it is.

First, the reaction of governments around the world to the NSA revelations may result in a re-structuring of some of the basic arteries of e-commerce. In March, the U.S. Department of Commerce announced that it would cede its role in overseeing the system of Internet addresses and domain names to an international body.¹ Since 1998, the California-based non-profit Internet Corporation for Assigned Names and Numbers (ICANN) has contracted with the Commerce Department to assign IP addresses and domain names and to connect the two.² Chander mentions ICANN as an example of a "chokepoint" that could be used to enforce regulatory authority over online service companies.³ The transfer of power from a U.S. non-profit to an international body was driven in large part by concerns about NSA spying from foreign governments.⁴

Second, the NSA disclosures have altered the relationship between private companies that provide services online and their consumers. Revelations that the U.S. government might be covertly collecting data from unwitting consumers of services such as Facebook or Google may induce consumers to engage less with these service providers at the margin. This effect will be particularly acute where the service in question is free, because consumers are implicitly paying for such services with their data. Indeed, some analysts have predicted that the NSA spying disclosures could result in losses for cloud computing companies of up to \$35 billion by 2016.⁵ The private companies who have been targets of NSA spying are well aware of the threat posed to their bottom lines by Snowden's revelations, and some have taken their concerns directly to President Barack Obama.⁶

The emergence of governments as active (if largely covert) players in international service transactions thus risks throwing the liberalization of Trade 2.0 off course. Allowing that "[e]xcessive assertions of local law may unduly Balkanize the Internet," Chander suggests that "states should seek to harmonize

¹ Edward Wyatt, *U.S. to Cede Its Oversight of Addresses on Internet*, N.Y. TIMES, Mar. 14, 2014, <http://www.nytimes.com/2014/03/15/technology/us-to-give-up-role-in-internet-domain-names.html>.

² *Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers*, INTERNET CORP. FOR ASSIGNED NAMES AND NUMBERS (Dec. 31, 1999), <http://www.icann.org/en/about/agreements/mou-jpa/icann-mou-25nov98-en.htm>; see also Statement of Policy, Management of Internet Names and Addresses, 63 Fed. Reg. 31741 (June 5, 1998), available at <http://www.icann.org/en/about/agreements/white-paper>.

³ ANUPAM CHANDER, *THE ELECTRONIC SILK ROAD* 110 (2013).

⁴ Wyatt, *supra* note 1.

⁵ DANIEL CASTRO, *How Much Will Prism Cost the U.S. Cloud Computing Industry?*, INFO. TECH. & INNOVATION FOUND. 3 (2013), <http://www2.itif.org/2013-cloud-computing-costs.pdf>; see also Claire Cain Miller, *Revelations of N.S.A. Spying Cost U.S. Tech Companies*, N.Y. TIMES, Mar. 22, 2014, <http://www.nytimes.com/2014/03/22/business/fallout-from-snowden-hurting-bottom-line-of-tech-companies.html>.

⁶ See, e.g., Vinu Goel, *Facebook's Zuckerberg Complains to Obama Over Government Spying*, N.Y. TIMES BLOG: BITS (Mar. 13, 2014, 5:36 PM), <http://bits.blogs.nytimes.com/2014/03/13/facebook-zuckerberg-complains-to-obama-over-government-spying>.

their rules where possible, maintaining heterogeneous rules only after due consideration” (p. 14). Fleshing out those rules in more detail, as well as Chander’s proposed utilization of the 1995 Global Agreement on Trade in Services, would be useful. If Chander’s vision of a liberalized and harmonized regime of online trade in services is to come to fruition, the regulation of governments must be a concern of policy-makers alongside the regulation of private companies.

Promoting the Rule of Law in Post-Conflict States. By Laura Grenfell. New York, NY: Cambridge University Press, 2013. Pp. vi, 324. Price: \$115.00 (Hardback). Reviewed by Ashwita Ambast.

Rule of law was constructed by Western sovereign governments as the antithesis of traditional customary laws that prevailed in their colonies. During the Cold War, rule of law distinguished the communist East from the West. In the twentieth century, rule of law was perceived as the means of protecting international human rights and was the premise of the institutions involved in transitioning former colonies into market democracies. Recent, palpable failures of the rule of law model—perhaps most vividly, in Iraq—have led to demands for institutions with more popular legitimacy.

As early as 1981, Marc Galanter explicated the limited role of the formal judicial system in enforcing law. He stated that “any major advance in our understanding of how official legal regulation works in society depends on knowing more about indigenous law and about its interaction with official law.”⁷ Taking a cue from Galanter,⁸ Laura Grenfell’s *Promoting the Rule of Law in Post Conflict States* is a piercing critique of the modern, blanket application of rule-of-law models to post-conflict states. It is an application that has failed to account meaningfully for prevalent, authoritative customary norms. ‘Legal pluralism’ acknowledges that the formal state is not the exclusive source of legal authority and that local leaders administering traditional norms carry equal legitimacy. It poses a formidable challenge to rule-of-law models. Grenfell recognizes the chief shortcoming of legal pluralism: traditional customs can be unjust and are easily manipulated. However, she notes that acknowledging legal pluralism is a prerequisite for the popular legitimacy and long-term stability of a new state.

Grenfell substantiates her claims by examining the interaction between rule of law and legal pluralism in South Africa and East Timor. Grenfell explains that while the South African Constitution incorporated both “civilized” international standards and indigenous norms, it did not give sufficient consideration to the relationship between legal pluralism and rule of

⁷ Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 27 (1981).

⁸ Responding to the state-centric approach of the debate between the legal positivists and the natural law theorists on “what is law,” Galanter and others have argued that “law” should include a variety of normative orders that are not state-related. See generally Galanter, *supra* note 1, at 1-2 (questioning importance of external forum for dispute resolution); John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 1 (1986) (“[B]y ‘legal pluralism’ I mean the presence in a social field of more than one legal order.”); Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869, 872 (1988) (outlining scholarship on legal pluralism).

law (pp. 113-129). The Constitution and subsequent legislation made compromises that resulted in sharp divisions between traditional “customary law” and western legal norms (pp. 128, 131). Similarly, the United Nations Transitional Administration in East Timor neglected local custom. The constitutional “mother law” was a patchwork of international norms mired in rule of law rhetoric (pp. 199, 213). Because citizens cannot relate to the new law, East Timor’s rule of law institutions have failed and the authority of courts and law enforcement officials is under question (pp. 230-32).

Today, South Africa and East Timor struggle to harmonize custom and formal law. Creating norms for the identification of custom in formal courts of law has proved challenging in South Africa (pp. 177-80). While the 2012 South African Traditional Courts Bill recognizes the authority of customary courts, it is a feeble attempt as “[i]t transforms legal pluralism [by changing] the key features of the traditional justice system” while compromising fundamental constitutional values (pp. 130-31). East Timor has taken similar remedial steps; the Constitution recognizes custom that is not contrary to constitutional law, courts have acknowledged out-of-court negotiations, the police have taken a pragmatic approach by permitting resort to the traditional justice system when appropriate, and the Commission for Reception, Truth and Reconciliation has adopted a well-received hybrid approach (pp. 237, 255-58). However, at present, neither the formal nor customary system is capable of offering effective legal protection to citizens of East Timor (p. 263).

Without doubt, Grenfell makes a strong case for due consideration of local custom. Her objection to the one-size-fits all approach taken by international organizations and nation-states is persuasive. But at the same time, Grenfell at the outset admits that her position is “undeniably state-centric” (p. 13). That this is Grenfell’s premise, in a book designed to question the modern arbitrary conceptual limitations on legal authority and sovereignty, is surprising.

Moreover, Grenfell’s attempt at providing “a stronger understanding” of the relationship between rule of law and legal pluralism leaves many things unsaid (p. 8). How can transitional administrations best harmonize legal pluralism and rule of law? While it is clear that there must be a compromise, what direction must this compromise take? Grenfell explains that East Timor’s policy of supporting local mediation to resolve land-related disputes instills stability in rural society, but elevates traditional patrilineal norms that vitiate the inheritance rights of women (pp. 250-53). Grenfell states that this raises crucial questions about what compromises are acceptable and whether individual rights can be sacrificed at the altar of group rights. But having stated the problem, she provides no real guidance on how to resolve it. Is there a universal rule of law threshold that all custom must be tested against before being considered valid? Grenfell states that in South Africa, customary norms must pass the threshold of equality and non-discrimination if they are to be recognized as law by formal courts. But she also notes that this approach is informed by South Africa’s political history (p. 262). How far can the experiences of East Timor and South Africa be applied to other states in the process of building their constitutions? Grenfell fails to answer these questions.

Further, the book's intended audience is obscure. Grenfell concludes by addressing generally the "international community" (p. 273). However, one might expect a book designed to improve post-conflict constitutionalism to delineate *who* in particular should shoulder the important responsibility of effectuating the delicate balance between pluralism and rule of law. Grenfell attributes the general reluctance of the United Nations to dispense with the rule of law model and its ambivalence toward legal pluralism to the United Nations's commitment to a fixed notion of international human rights and its continuing partiality to the Western liberal tradition (pp. 49-53). International development agencies and financial institutions are driven by profit and benefit from Westphalian systems, as they are founded on state membership and support from sovereign states (p. 58). The motivations of internal, national political parties can be opportunistic, as seen in Grenfell's analysis of African National Congress appeasement of traditional leaders in return for political support (p. 123). Which body, then, is best placed to arrive at meaningful compromises between internal and external legitimacy, group rights and individual rights, and local and international norms? Is it a combination of the parties mentioned above? Throughout her book, Grenfell repeatedly calls for greater participation by the citizenry. But how is this best achieved?

In short, while Grenfell makes a valuable observation about the importance of recognizing local custom in bolstering the internal legitimacy and long term stability of a state, she provides no explanation for why such recognition is necessary, how it should be arrived at, and who is responsible for implementing it. At the end of *Promoting the Rule of Law in Post Conflict States*, the reader is left with far more questions than answers.

The Idea of Arbitration. By Jan Paulsson. Oxford, UK: Oxford University Press, 2013. Pp. ix, 301. Price: \$34.00 (Paperback). Reviewed by Farshad Ghodoosi.

The idea of arbitration is simple. It is a type of dispute resolution mechanism in which disputes are adjudicated through private arbitrator(s) where both parties have consented. Yet this simple idea fosters a host of challenges mainly due to its private nature. Paulsson's book gives a sweeping account of the idea of arbitration and its challenges. In a relatively short piece, Paulsson manages to familiarize the readers with underlying theories and pressing issues related to arbitration in today's world. This well-organized and succinct book also introduces several new theoretical ideas. As Paulsson states in the foreword, this book is not about the practice of arbitration. At the same time, the book also avoids becoming overly abstract. However, the book remains an introduction, and fails to deeply engage with political philosophy and international relations theories. Paulsson's book offers new approaches on three issues concerning arbitration: its underpinning political philosophy, its locus of authority, and *the public challenge*. Although novel in approach, these discussions do not provide a profoundly new framework.

Paulsson's discussion of the political philosophy of arbitration at the onset of the book is the book's main contribution. Paulsson ties the idea of arbitration to the liberty (and not efficiency) of being governed by the law of

our choosing (p. 2). His view of arbitration is centered on a matter of “political philosophy, not social engineering” (p. 2). According to him, that is the reason totalitarian regimes do not welcome the idea of arbitration. After all, arbitration creates a crack in the edifice of the justice system of which states believe they are the sole provider. Paulsson argues that in a free society, individuals should be able to devise a resolution mechanism for their disputes even if it does not conform to the procedural prescriptions of the legislature (p. 23). This intellectual move, although auspicious, is not backed by an in-depth analysis of the underlying political philosophy of arbitration. It is an invite to ponder on the issue rather than a thorough discussion of it. It takes for granted that arbitration is a product of liberal ideas without venturing into other potential justifications including the critical legal study approach.

Another major contribution of Paulsson’s book is its identification of a new locus of authority for international arbitration. The underlying authority by which arbitrators are allowed to adjudicate controversies before them is a thorny challenge in the theory of arbitration. Simply put, this issue touches the very foundation of the legitimacy of arbitrators’ authority. This is the focus of Chapter 2. Paulsson’s reference to the Texaco Case demonstrates the subtlety of the matter. In that case, the Libyan government expropriated investments of two U.S. oil companies following the revolution in 1969. Libya argued that its concession agreement with the oil companies was void because the governing law was Libyan law, and thus the new decree rendered them, along with the arbitration clause, unenforceable. The Arbitrator, Dupuy, deftly distinguished between the law that governs the contract (*lex contractus*) and the law that makes the arbitral proceedings binding (*lex arbitri*).⁹ In the case, the arbitration was ultimately found to receive its authority from international, not Libyan, law (p. 31).¹⁰ In *Legal Theory of International Arbitration*, Emmanuel Gaillard has developed three theses concerning the legitimizing order of arbitration.¹¹ Paulsson adopts Gaillard’s categorization of these theses, but also adds a fourth category. The first thesis believes that the law of the place of arbitration grants authority to arbitrators (territorial thesis). The second thesis argues that the transnational effect of arbitral awards make them enforceable in multiple countries (pluralistic thesis). The third proposal stems from the particular way that several French scholars, including Gaillard, view arbitration. They believe in an autonomous transnational order distinct from national orders that grant authority to arbitrators (arbitral order thesis). Paulsson posits that the arbitral order thesis is a derivative form of the pluralistic form and not an independent category (p. 40), arguing that reference to a transnational arbitral order in several French decisions does not attest to the existence of such an order (p. 44). He then proceeds to offer a revised version of the pluralistic thesis. The thrust of his argument is that there are non-state actors both nationally (vertically) and internationally (horizontally) affecting arbitration in practice.

⁹ The idea was adopted from the distinction made by Georges van Hecke, Belgian scholar-advocate, between “law which governs the contract and the legal order from which the binding nature of the contract stems made a distinction” (p. 31).

¹⁰ Texaco Overseas Petroleum Co. v. Libya, 17 I.L.M. 1 (1978).

¹¹ EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* (2010).

Although in some ways more nuanced, Paulsson's account does not seem to be distinct from Gaillard's approach. His theoretical endeavor simply aims to include the cross-border social institutions that have significant impact on international arbitration.¹² Neither his work nor Gaillard's book provides a persuasive and rigorous account of the authoritative grammar underlying today's international arbitration.

Paulsson's discussion of *the public challenge* serves as the third salient discussion of the book. It deals with the tension arising from the interaction between private arbitrations and state regulations. The tension goes to the heart of the extent to which states can tolerate parallel justice systems. Paulsson begins by addressing public policy concerns that suggest that states limit or cease arbitration practice altogether. Consumer protection concerns, including boilerplate arbitration clauses that are not subject to "bargain" between parties, are paramount examples invoked to stress the negative effects of arbitration. Paulsson states that these concerns do not justify jettisoning the entire arbitral process, notwithstanding the shortcomings (p. 115). Paulsson continues this discussion by touching on the controversial issue of arbitrability. Legislators quite often declare certain controversies—anti-trust and intellectual property, for example—not to be arbitrable, or out of arbitration's reach. The scope of and rationale underlying the issue of arbitrability remain deeply unsettled. Paulsson argues that "legislators should not rush to declare entire categories of transactions off-limits to arbitrations" just because certain private or public interests are unrepresented in arbitral proceedings (p. 123). In fact, courts can always supervise awards for these matters at the enforcement stage. Following this discussion, Paulsson addresses the controversial issue of what ought to be considered "against public policy." Pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, national courts can refuse arbitral awards that are against public policy of that country.¹³ The question that Paulsson aims to resolve is whether arbitral tribunals assess matters of public policy independent of national courts. Similar to the existing literature, he does not attempt to dissect and analyze the notion of public policy itself.¹⁴ Instead he stops at the suggestion of a few procedural proposals. He first distinguishes matters of public policy from those that are explicitly prohibited by law (i.e. arbitrability). He proposes that arbitral tribunals *could* adjudicate matters of public policy. Courts should be deferential to arbitral decisions on matters of public policy if they are subjective, meaning that they

¹² In this section, Paulsson does not involve the literature on non-state actors' influence in international relations, for instance, the English School. *See generally, e.g.*, HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (1977); BARRY BUZAN, *FROM INTERNATIONAL TO WORLD SOCIETY? ENGLISH SCHOOL THEORY AND THE SOCIAL STRUCTURE OF GLOBALIZATION* (2004).

¹³ The New York Convention is the principal document for enforcement of international arbitral awards. Article V, paragraph 2 stipulates that: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: . . . (b) The recognition or enforcement of the award would be contrary to the public policy of that country." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 5, para. 2, June 10, 1958, 330 U.N.T.S. 3.

¹⁴ "We are still left with the daunting task of determining, in difficult cases, what may be intolerable by the standards of public policy" (p. 136).

do not have established precedents. The main contribution of this discussion lies in revisiting the public policy challenge to arbitration in a systematic way. Yet, resolving *the public challenge* requires substantive and theoretical discussion of what “public” is for the arbitral process, a matter that, like in other relevant scholarship, is missing in Paulsson’s discussion.

The book continues the discussion of *the public challenge* in Chapter 7 under the rubric of *the international challenge*. This Chapter endeavors to explain the reason that international arbitration is the best practicable cross-border dispute resolution currently available for disputants, albeit not ideal. Paulsson emphasizes the importance of international arbitration in today’s world by demonstrating the inefficiencies of worldwide transnational judgment enforcement. He resumes his discussion of public policy in here, this time in the international setting. The enforcement of arbitral awards in various countries always runs the risk of national courts finding such enforcement contrary to their public policy. Paulsson reiterates some of his assertions regarding the notion of public policy in Chapter 7, but also proposes a two-level approach to mandatory norms, labeling the levels “ordinary mandatory norms” and “overriding mandatory norms” (p. 229). Mandatory norms are fundamental norms that shape the public policy of each country. In cases involving ordinary mandatory norms, national courts should defer to arbitral judgment if the matter was properly considered. In cases involving overriding mandatory norms, the stakes of public interest are so high that arbitral determination could be challenged in front of national courts (p. 229). A categorization of mandatory rules/public policy concerns is much needed in today’s international arbitration. However, there is no convincing theoretical discussion in Paulsson’s book that could help us draw the fine line between different levels of mandatory rules. This is a quite laborious and challenging task, but one that should be accomplished.

The remaining discussions of the book mainly consist of a thorough reiteration of the existing literature and lack the significant contribution of the three points mentioned above. Paulsson investigates other potential challenges against arbitration. He divides them into two categories: private challenges (Chapter 3) and ethical challenges (Chapter 5). Chapter 3 offers a sweeping but unoriginal overview of challenges to the private nature of arbitration. Paulsson reviews theories of separability, competence-competence, arbitrability and eventually lauds the American Supreme Court approach.¹⁵ According to this approach, courts should only decide challenges to the arbitration agreement (clause) itself. Challenges brought on contracts incorporating arbitration clauses, the scope of arbitration, and other related claims should be decided conclusively by the arbitral body (p. 81). Paulsson proceeds to elaborate on the distinction between admissibility and jurisdiction, a theory that he pioneered in international arbitration. Simply put, admissibility refers to the timeliness of claims, whereas jurisdiction refers to the authority of arbitral tribunals to adjudicate the matter before them. Decisions related to admissibility are final,

¹⁵ Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006); First Option of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).

while decisions on jurisdiction are reviewable by national courts (p. 83).¹⁶

The Ethical Challenge deals with the Achilles' heel of arbitration. Paulsson provides a thorough account of various ethical issues arising in arbitration. He keenly observes that unless arbitrators take full ethical responsibility, legislators will likely step in to rectify the ethical shortcomings of the current system sooner or later (p. 149). To the disappointment of the readers, Paulsson does not propose an extensive overhaul or re-design of arbitration that would meet most ethical challenges. Quite the contrary, he seems reluctant to offer any alternative. For instance, regarding the existing system in which each party appoints an arbitrator, he states:

[G]iven the present reality that we must live with unilaterally appointed arbitrators and that in some situations one cannot realistically expect impartiality or independence on their part, or even be in a position to inform one's self of such a person's record and reputation in a far-off environment, the stature and rectitude of the presiding arbitrator becomes even more important (p. 165).

Simply put, Paulsson seems to complacently accept the existing system, although he admits that the system has a major weakness from an ethical standpoint.

Legal activism in arbitration is the focus of Chapter 8—a new, yet underdeveloped theory. The question is whether arbitral bodies, in implementing their law-application task, could investigate the lawfulness of certain laws. This remains highly controversial, but Paulsson shows a tendency to support more arbitral activism in this realm (pp.254-55). The last Chapter lays out Paulsson's suggestions for improving arbitration. He advocates for more cooperation with courts, more inclusiveness, less unilateral appointment, and more transparency, among other recommendations.

Paulsson's *Idea of Arbitration* offers a thought-provoking discussion on three crucial aspects of arbitration: its underpinning political philosophy, its locus of authority, and *the public challenge*. Yet, these ideas remain underdeveloped at times, and Paulsson often avoids engaging discussions on similar topics in legal and political philosophy or international relations theory.

Legal Orientalism: China, the United States, and Modern Law. By Teemu Ruskola. Cambridge, MA: Harvard University Press, 2013. Pp. xii, 338. Price: \$39.95 (Hardback). Reviewed by Idriss Fofana and Peter Tzeng.

In 1906, Congress established the United States Court for China and

¹⁶ However, the "jurisdiction/admissibility" distinction is not of much help in cases where the language is vague or overreaching. Oftentimes language incorporated in arbitration clauses could be interpreted to refer to both jurisdiction as well as admissibility. For instance, imagine that a contract stipulates that non-conformity of delivered goods would allow the aggrieved party to institute arbitration within thirty days. In this case, both the thirty-day limit and determination of the non-conformity of goods are important factors in determining the authority of the arbitral tribunal.

conferred upon it exclusive jurisdiction over U.S. citizens in the District of China. At the time, American exercise of judicial power in China was by no means a new phenomenon: ad-hoc U.S. consular courts had been assuming this responsibility since the Treaty of Wanghia in 1844. The Treaty established that American citizens accused of crimes in China would be tried under American law and by American authorities. The justification was simple: China was “lawless and despotic” (p. 50).

Legal scholars today would find these courts repugnant to the fundamental tenets of state sovereignty. The Supreme Court on more than one occasion has staunchly defended the presumption that “United States law governs domestically but does not rule the world.”¹⁷ Yet in his book *Legal Orientalism: China, the United States and Modern Law*, comparative legal scholar Teemu Ruskola suggests that this presumption only obscures a long history of extraterritorial application of U.S. law which persists today through discussions on the rule of law.

Indeed, while the creation of American courts in and for China may seem like a relic of a bygone era of global imperialism, Ruskola contends that legal Orientalism continues to structure current Western understanding of law in China, and outside the West in general. In Chapter 2, Ruskola borrows from the theories of Edward Said to describe legal Orientalism as “a set of interlocking narratives about what is and is not law, and who are and are not its proper subjects” (p. 5). These narratives have historically depicted China as lacking law and the United States as the exemplar of a state governed by the rule of law. Through this framework, Ruskola discusses how notions of China and its people as fundamentally lawless helped justify not only a U.S. Court of China but also the Chinese exclusion laws. Ruskola seeks to expose Orientalist discourses in law through three major approaches: first, by deploying post-colonial theory to elucidate the relationship between the United States and China with respect to the law, second, by analyzing historical forms of the corporation in the United States and China and third, by exploring the history and origins of the United States Court of China. Today, neither the U.S. Court for China nor Chinese exclusion laws continue to exist, and “[e]xclusive territorial jurisdiction is one of the defining features of the sovereignty of the modern nation-state” (p. 113). Yet legal Orientalism, Ruskola argues, continues to influence interactions between the West and China today, albeit in novel forms.

One such form which Ruskola points to is corporate law. Over the past few decades, American corporate law has come to “rule the world.” As Ruskola observes, over a decade ago, Henry Hansmann and Reinier Kraakman were already anticipating a “global convergence of legal development along the lines of U.S. corporation law” (p. 61). Few countries embody this trend better than China, which liberalized its economy and enacted dramatic American reforms to its corporate law in its quest to join the WTO. The WTO and other post-World War II international institutions have been “so effective in harmonizing legal regimes across the world,” argues Ruskola, “that in many areas, especially

¹⁷ Microsoft Corp. v. AT & T Corp., 550 U.S. 437, 454 (2007).

ones pertaining to the economy, it would be largely redundant for the United States to assert its laws extraterritorially” (p. 205). While radically different from the imposition of extraterritoriality in China, this indirect form of legal imperialism continues to depend on longstanding Orientalist discourses.

Ruskola’s discussion limits itself to China. Yet the questions that Ruskola raises throughout his book carry great relevance to modern issues outside of U.S.-China relations. Extraterritorial jurisdiction, for one, remains a very active debate today. The U.S. Court for China may have been abolished, but the Supreme Court has confronted the question of extraterritorial jurisdiction in two recent cases: *Kiobel v. Royal Dutch Petroleum Company*¹⁸ and *Daimler AG v. Bauman*.¹⁹ Moreover, the U.S. government continues to try alleged enemy combatants before military tribunals domestically. Does the perceived failure of foreign legal systems to deal with foreign controversies justify the extraterritorial application of American law? Or do American courts only apply extraterritorial jurisdiction when it is convenient? In 1993, the Supreme Court held in *Sale v. Haitian Centers Council*²⁰ that the United States is not bound by its non-refoulement obligations under the Refugee Convention on the high seas. And in March 2014, the Obama administration took the stance before the Human Rights Committee that its obligations under the International Covenant on Civil and Political Rights do not apply extraterritorially.

The bottom line is that the notion of exercising jurisdiction in “lands of lawlessness” has not disappeared with the U.S. District Court for China. In the realm of cyberspace, at least one modern scholar has considered a modern equivalent of extraterritorial extension of American jurisdiction. In 1992 Professor Henry H. Perritt, Jr. put forth the idea of a U.S. District Court for the District of Cyberspace. The court would exercise jurisdiction over all of cyberspace, in order to promote “international standards” of cyberspace law, especially in countries where intellectual property, for example, is not protected according to American standards. Does the United States have the right to set these standards?

Extraterritoriality is not a concept unique to the United States. Belgium and Spain have enacted universal jurisdiction laws, but they have faced considerable obstacles. After the Arrest Warrant Case before the International Court of Justice in 2002, the Belgium parliament repealed its universal jurisdiction law. And in February 2014, the Spanish parliament limited its own universal jurisdiction law for the second time, after a judge opened an inquiry into human rights violations in Tibet, provoking the ire of Chinese authorities. The question remains, how may governments in the West promote legal values without reinforcing Orientalist discourses?

Although *Legal Orientalism* implicates these pressing modern issues, Ruskola devotes a surprisingly small portion of his book—the epilogue—to discussing the consequences of legal Orientalism today. In fact, until the epilogue, *Legal Orientalism* reads essentially like an edited volume of distinct

¹⁸ 132 S. Ct. 472 (2011).

¹⁹ 134 S. Ct. 746 (2014).

²⁰ 509 U.S. 155 (1993).

articles that share a broad theme but have little else in common. Until the epilogue, Ruskola does not provide a satisfying explanation of the relationship between Qing-era Chinese corporations, the U.S. district court for China, and Said's Orientalism. In an attempt to encourage communication between the post-colonial theorist, the comparative legal scholar, and the historian, Ruskola adopts the jargon and theoretical frameworks of each, without fully engaging these distinct perspectives with each other. As a result, while comparative legal scholars would likely find themselves drawn to Ruskola's exploration of the origins of the corporation in imperial China and the United States, they may have difficulty wading through the complex and jargon-heavy analyses of Orientalist discourses in the law. Ruskola's apparent mastery of a wide range of disciplines works against him in this context.

The limitations of Ruskola's approach are most obvious in his attempt to reconcile post-colonial theory and comparative law. Part of the problem is that he fails to adopt some of the nuances that post-colonial theory has developed over the several decades since Said in his depiction of the East-West binary. While previous generations of American scholars have certainly depicted China as intrinsically lawless, clichés of a country governed by an excessively legalistic bureaucracy represented by the aloof mandarin are also widespread. At the same time, the United States has not always represented a paramount respect for the rule of law. From tropes of the Wild West to modern avoidance and violations of international law—including its “unsigned” of the Rome Statute in 2002 and the invasion of Iraq without a U.N. Security Council mandate in 2003—the United States has often stood for the proposition that “might makes right” in the eyes of the international community. These examples suggest that the borders between legal Orient and Occident remain more dynamic than Ruskola admits.

Ruskola also has difficulty setting aside the critical approach of post-colonial theory to propose clear and effective guidelines for legal scholars. Ruskola contends that the pervasiveness of Orientalist discourses is such that “we cannot help essentializing others, and even ourselves” (p. 54). Any comparative endeavor therefore risks reducing the subject of the comparison to a static cliché that fails to capture the nuance and dynamism of the subject. And yet, Ruskola concedes that “comparison is the only way for us . . . to enter into a world of similarities as well as differences, which in turn both provide boundaries for our subjectivity and allow us to connect with other subjects in the world” (p. 54). How then may comparative legal scholars successfully study non-Western societies without inappropriately evaluating them by Western standards? The solution, according to Ruskola, is an “ethics of Orientalism” which instead of simply decrying the evils of paternalist attitudes, encourages comparativists to self-consciously temper the effects of their own biases and to consider the broader implications of the comparisons they present.

Ruskola demonstrates this “ethics of Orientalism” in the third chapter, through a comparison of the modern American corporate form and Qing-era Chinese clan organizations. Rather than simply discussing how clan organizations bore certain distinctly corporate aspects, Ruskola claims to refrain from elevating the American corporate form to a universal standard by

also exploring elements of kinship in American corporations. While well-meaning, Ruskola's attempt falls short of his own standards. Although he spends over thirty pages discussing corporate aspects of the clan organization, he dedicates only four to "provincializing"—that is rebutting the universalist pretensions of—the modern American corporation. Ruskola's desire to place the two comparisons on equal footing is so strained that it seems disingenuous. What seems important, and particularly relevant to comparative legal scholars, is not a mechanical adherence to bidirectional comparisons, but rather a critical awareness of the discourses which structure the discipline and a willingness to place the objects of study in their social and cultural context. In this regard, comparative legal scholars have much to learn from German sinologists who first applied the notion of *Sitz im Leben*, the contextual interpretation of biblical texts based on their function in community life, to the study of Chinese classics, thereby obviating the futile attempts of their predecessors to evaluate classical Chinese thought by the standards of Enlightenment European philosophy. Ruskola demonstrates the power of combining critical and contextual interpretive approaches in the epilogue, when he finally applies the tools of post-colonial theory and the history of U.S. legal imperialism in China, to elucidate the relationship between China, the United States and law today.

Despite the shortcomings of his work, Ruskola makes a timely and important contribution to both comparative and international law by calling the attention of legal scholars to the problematic nature of discourses on the rule of law. In his analysis, Ruskola cites Carl Schmitt's observation that "[w]hoever invokes humanity wants to cheat" (p. 53). *Legal Orientalism* suggests that whoever invokes law, and particularly the rule of law, may bear equally duplicitous intentions. Certainly, this was the case of those who fought for the establishment of the U.S District Court for China. At its best, Ruskola's work could equip budding scholars of Chinese law with the tools to reclaim the notion or rule of law in order to engage in more rigorous scholarship and to interact as equals with their counterparts around the world. And although Ruskola does not always provide a clear way to avoid the pitfalls of Orientalist discourses, his own work, and particularly the epilogue, provides an excellent example of a direction Chinese legal studies may take.

Assessing the Effectiveness of International Courts. By Yuval Shany. Oxford, UK: Oxford University Press, 2014. Pp. xix, 322. Price: \$101.19 (Hardback). Reviewed by Tasneem Ravindra Deo.

The proliferation of international courts and tribunals, having the power to settle disputes, enforce commitments, and interpret norms ranging from criminal responsibility to commercial transactions, has dramatically affected the landscape of international law. It is no surprise therefore that scholarship abounds on the desirability of international adjudication. Yuval Shany's *Assessing the Effectiveness of International Courts* seeks to add a new dimension to the literature by reconceptualizing the framework within which the performance of international judicial institutions is judged.

The book locates itself within the empirical literature and offers a method to approach fundamental questions regarding the utility of international courts

in light of concerns about viability, negative side effects, and high costs (p. 3). The central claim of the book is that effectiveness of an international court must be assessed on the basis of attainment of the mandate providers' goals. Shany argues that the goal-based approach provides new tools for measurement of effectiveness and improves our understanding of the methodological limits of the exercise. It enriches the discourse on the factors that render some courts more effective than others, and challenges the reliability and utility of effectiveness analyses which focus on "judgment-compliance, usage rate, and impact on state conduct" (p. 5).

The book is divided into three parts. Part I describes the goal-based effectiveness model, as well as its components, promise, limitations, and measurement challenges. Part II analyzes the contribution of specific effectiveness variables to judicial performance. Part III applies this goal-based approach to five courts in an attempt to illustrate the application of the model and its importance as a means of assessment of international courts.

The core of the book lies in Part I as it describes the framework of assessment that Shany seeks to propose. Shany introduces the goal-based approach by outlining the various social science approaches to defining organizational effectiveness and discussing their suitability for assessing international courts (pp. 13-16). This description is extremely helpful to understanding the model he proposes and also comparing it to other existing methods of data analysis. He convincingly argues that the open system approach (focused on the sustainability of an institution's interaction with its external environment) and the system resource approach (focusing on an institution's ability to obtain the resources it needs to survive) are unsuitable on account of their normative deficit, and the process oriented model (focusing on the usefulness of an institution's tools for meeting its goals) and strategic constituencies model (focusing on an institution's relationship with external constituencies) are subsumed within the goal-based approach. While he is mindful of the importance of efficiency and cost effectiveness studies, he chooses to engage with these only as an extension of the goal-based model. The goal based approach he puts forth is primarily descriptive and analytical, neutral to the desirability of the goal itself. These organizational goals are intended to serve as a normative baseline for effectiveness analysis (p. 17). The strength of his articulation of the model lies in the clarity with which he contextualizes it and outlines its limitations. He acknowledges that institutions' goals may differ in their sources, level of abstraction, and degree of articulation and also discusses goal ambiguity and time frame concerns (pp. 18-25).

Shany's identification of the goals of international courts springs from the claim that the "thick brush" approach to judging effectiveness must be replaced by institution-specific analysis (p. 31). While his choice to focus on the goals articulated by mandate providers can be questioned as promoting a narrow view of the role that international courts play within the larger scheme of international law, it helps to contain the analysis. Furthermore, the model is such that its application can be extended to goals as articulated by other constituencies. In addition to the idiosyncratic goals of each international court, the four generic goals that Shany identifies are: norm support, resolving

international disputes and problems, regime support, and legitimizing public authority. Shany explains each of the four generic goals in detail, describing their contours, limitations, correlation to effectiveness as a whole, change over time and across courts, and differences in impact. He reviews earlier empirical studies and anecdotal data that are relevant to these goals, including case law and case studies, offering alternate explanations for their findings (pp. 37-46). His discussion of these generic goals suggests their centrality to the study of effectiveness and calls into doubt the importance afforded to idiosyncratic goals. To this extent, the generic goals seem to subsume the idiosyncratic goals and therefore threaten the specificity in assessment of the courts that Shany argues is important.

In the final section of Part I Shany describes the method of measuring goal attainment. This is an admittedly difficult exercise and he argues that it is best dealt with by moving away from a focus on outcomes and studying the structure and process of international courts. This has the benefit of shedding light on cost effectiveness and social utility. It also helps assess the feasibility of effective outcomes through a process of “reverse engineering” (pp. 50-51). This section is crucial from the point of view of building an empirical study design as it lays down possible performance indicators and also clarifies the structure and process proxies for outcome indicators.

Part II of the book moves the conversation from creating a model of effectiveness assessment to applying that model to judicial functions and features. This part sheds light on the nature and extent of the effect that these functions and features have on the effectiveness of an international court. The conclusions that are highlighted in this portion of the book are extremely interesting and will impact the discourse on the best route to goal attainment. Shany focuses on four features and identifies the correlation of each to effectiveness as viewed from the perspective of goal attainment.

Jurisdiction and admissibility criteria control the caseload and determine the range of influence of the court either directly through adjudication or through the shadow of adjudication. Therefore it is an important feature of an international court and is to that extent correlated to its effectiveness (p. 75). Shany argues, however, that the relation between the structural element of jurisdiction and the outcome (goal attainment potential) “is not necessarily linear” (p. 95). A reading of this section supports the intuitive understanding that jurisdictional limits imposed by the creators of the court and the admissibility criteria laid down by the court itself generally help increase the potential for effectiveness, and actual effectiveness. It also serves to explain the relative success of the court.

Second, judicial independence and impartiality influence the manner in which judicial power is exercised (p. 97). However, they do not affect the extent of the judicial power. Hence while it is a relevant feature for effectiveness studies, it is difficult to identify its impact on goal attainment (p. 102). Shany claims that the goal-based model which focuses on constraints to judicial independence rather than the “ideal type” of judicial independence can help develop a new understanding of the relationship between this feature and effectiveness and thereby settle the debate between those who claim that there

is an inverse relation between these features and effectiveness and those who argue that the relation is direct (pp. 100, 109-110). This bold claim is supported to some extent by the additions that Shany's model makes to earlier studies, that is, independence-enhancing rules, structural attribution of impartiality, and the need for the study of outcomes. This section is especially illuminating as it discusses correlation using the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) as examples. His conclusion that the relation is non-linear (p. 115) is supported when viewed in light of the tension between independence and responsiveness as is borne out by the cases of the 1999 NATO bombing in Yugoslavia and the response of the Rwandan authorities to the ICTR Appeal Chamber's decision to release Barayagwiza, a suspect in the Radio Mille Collines case (pp. 111-115).

Third, judgment compliance pertains to the outcome of the judicial process. While it has been traditionally viewed as the litmus test for judicial effectiveness, Shany argues that compliance and effectiveness are not correlated. This challenge to the focus on compliance is echoed by other authors (p. 118). However, Shany's contribution to the literature lies in the fact that he dispels the myth of compliance by bringing into focus judgment content and practices of third parties and the trade-offs between goals inherent in formulating judgments and designing remedies (pp. 123-124). Through reference to case studies from the European Court of Human Rights and the International Court of Justice, Shany explains the relevance of high-aiming and low-aiming judgments to post-judgment party conduct and the need for a more comprehensive study of judgment compliance which combines qualitative and quantitative elements (pp. 125-135). Considering that compliance and enforcement have consumed the attention of scholarship on the desirability of courts and the value of international law in general, Shany's denial of its centrality to effectiveness has far reaching implications for the study of international courts.

Fourth, legitimacy of the court in the eyes of its constituencies affects the extent to which the norms and regimes it endorses are legitimated. Of the four features discussed by Shany, this feature bears the strongest correlation to effectiveness to the extent that it can be considered as an intermediate goal. The model proposed by Shany seeks to test the extent to which international courts attain and maintain internal legitimacy (that is, securing their own legitimacy) while conferring external legitimacy (that is, conferring legitimacy on other institutions or principles) (pp. 137-138). This section details the contours of legitimacy as a concept and its relation to the elements of fairness, legality, justice and effectiveness. It locates legitimacy within the structure-process-outcome paradigm of social science research and discusses the effect of changes in legitimacy capital. Shany also draws links between this feature and the earlier three features. While the section is informative, it fails to clearly draw the distinction between legitimacy as a judicial feature and legitimacy as a goal. The characterization of internal legitimacy as an intermediate goal makes the application of this indicator to a study design rather problematic. If viewed both as a goal in itself and as a factor that determines the attainment of goals, legitimacy would have to appear as a determinate and indeterminate variable in

the operationalization of a study. This could create difficulties in the statistical calculations of strength and direction of the variable's effect. The section would have benefitted by a discussion of the concepts using an example.

Overall, Part II serves to highlight the strength of the goal-based model as a tool that helps explain the interaction between international courts, their creators, the disputing parties, and the international community. While most of the correlations that Shany puts forth seem intuitive, the discussion helps outline the nuanced manner in which judicial features must be understood and calibrated if they are to support broader conclusions regarding effectiveness.

Part III is a collection of six essays co-written with members of Shany's research team, each applying the goal-based approach to assess the effectiveness of a separate international court. The courts analyzed are the International Court of Justice (pp. 161-188), the World Trade Organization Dispute Settlement System (panels and Appellate Body) (pp. 189-222), the International Criminal Court (pp. 223-52), the European Court of Human Rights (pp. 253-76), and the Court of Justice of the European Union (pp. 277-306). The essays provide a brief history of each court, an identification of the mandate provider's goals, a discussion of judicial outcomes seen as the attainment of the identified goals, and recommendations for the direction that future research should take. The essays engage with the literature by applying the goal-based approach to pre-existing data sets.

By choosing a wide spectrum of courts that deal with different international law concerns, this section serves to explain the functioning of the model and clarifies its intricacies of its application to the assessment of international adjudication as a whole. It is useful to the extent that it makes replication of the model easier.

The essays certainly illustrate the advantages of the model Shany proposes, but they also bring to the fore the biggest weakness of the book, one that perhaps could not have been avoided in the presence of the constraints of time and space. While Shany diligently outlines the limitations of the goal-based approach in providing the basis for empirical research, he certainly understates them. The reliance on pre-existing data sets and the application of the goal-based model to earlier studies instead of conducting original data analysis exacerbates the difficulty of establishing measurable variables. The biggest barrier to conducting holistic empirical research lies in the operationalization of the variables and this step is avoided by reliance on pre-existing data sets. The difficulties in quantification that he admittedly refers to in Parts II and III would have been appropriately captured if the essays in Part III had been based on data that was collected and coded first-hand. The book fails to realistically outline the actual extent of difficulty that empirical research in this field is bound to face. The framework that Shany lays out is so attractive that it might be misleading. Scholars that seek to undertake empirical analysis, including primary data collection, of the performance of international courts might have to face challenges that have not been dealt with in the book. There is hence a need to proceed with caution and circumspection while utilizing the model that Shany proposes.

Through this book, Shany sets out to propose a framework within which

international courts can be appropriately assessed. The strength of the model he puts forth lies in its normative treatment of goal attainment through the use of judicial features contextualized as indicators of effectiveness. The book serves as a detailed guide to understanding and applying the model and to this extent it is a novel and important contribution to the mass of literature dedicated to analyzing international adjudication.