Charles Leben. ***The Advancement of International Law***. Oxford: Hart Publishing, 2010. Pp. 339. £45. ISBN: 9781841132785.

The Advancement of International Law assembles 11 articles and book chapters by Charles Leben, emeritus professor of law at the Université Panthéon-Assas (Paris II), that were first published between 1989 and 2006. With two exceptions, they appeared in French and are presented here in translation for the first time to make them accessible to a larger academic audience. The essays are grouped into three parts: the first part revolves around several theoretical issues within the realm of international investment protection; the around groups five essays under the rubric of 'advances in the theoretical analysis of international law' and features, in particular, engagements with the jurisprudence of Hans Kelsen; the third part deals with select issues concerning the European Union and the European conception of human rights.

A recurrent concern in these essays is the notion, as indicated by the book's title, of the 'advancement' of international law which, in Leben's view, requires 'going beyond (or at least avoiding) the anarchic system' (at 216) and which he defines at one point as consisting centrally 'in establishing treaty-based regimes allowing direct action by individuals against states', an advance 'first made in the area of human rights, then in the area of investment protection' (at 52). It is from the latter field that Leben draws most of his empirical examples. In order to show that the developments ushered in by the growth of foreign direct investment, on the one hand, and its legal regulation, contractually and through bilateral investment treaties, on the other, mark genuine advancement of international law along these lines, Leben pursues two arguments in particular: first, he argues that state contracts – that is, contracts between a state acting as the sovereign and a private entity – are international legal acts governed by international law. Secondly, Leben espouses the view that individuals have become international legal subjects in their own right by way of the new legal techniques that enable them to circumvent the traditional route of diplomatic protection by their state of nationality and instead pursue their claims against foreign states directly before international tribunals.

Doctrine had grappled for some time with the categorization of state contracts after they first emerged in the form of petroleum concessions after World War II: were they to be governed by municipal law? Private international law? Some yet-to-be defined body of transnational law? Or really by no law at all, as Leben's French colleague, Pierre Mayer, maintains in his theory of the '*contrat sans loi*',[1] according to which arbitrators have to 'invent' the appropriate rules when called upon to settle disputes based on state contracts? Leben dismisses these alternatives and argues straightforwardly for a type of 'contract law governed by public international law, i.e., an *international contract law*' (at 9, emphasis in the original). This law remains the governing law, he asserts, even where the state contract includes a stabilization clause which affirms the applicability of municipal law, but freezes its content at the point in time at which the contract is concluded. While international contract law recognizes the parties' freedom to choose the applicable law, that freedom 'does not deliver the contract from the international legal order' (at 11, emphasis omitted).

Subsequently, Leben uses the concept of state contracts as a touch point to discuss certain theoretical takes on the dual personality of the state in the works of Anzilotti, Kelsen, and others

[1] See, e.g., Mayer, 'La neutralisation du pouvoir normatif de l'Etat en matière de contrats d'Etat', *Journal du Droit International* (1986) 5. Mayer revived a thesis previously articulated by authors such as Verdross and Bourquin: see Verdross, 'Die Sicherung von ausländischen Privatrechten aus Abkommen zur wirtschaftlichen Entwicklung mit Schiedsklauseln', 18 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1957–58) 635, at 641; Bourquin, 'Arbitration and Economic Development Agreements', *The Business Lawyer* (1960) 860, at 868.

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(at 114–120, ch. 8). In particular, Leben attempts to show that despite Kelsen's rejection of the view that the state in municipal law and the state in international law constitute two distinct legal subjects (as defended by Anzilotti and others), Kelsen's own theory provides a way to conceptualize the essence of that construction in a non-dichotomous way by internalizing one subject as a subset of the other: the state in the sense of international law is represented by a polity's total legal order, whereas the municipal law state is simply a partial legal order within the total order which is formed by what H.L.A. Hart had labelled 'secondary norms', that is, norms relating to the creation, modification, and application of primary norms (at 247–248). In contrast to the double personality concept, this 'secondary norms state' (at 248–249), identical in substance with what Kelsen calls 'the state as a bureaucratic machinery', is not a discrete subject different from the state in international law, but 'part of the total legal order just like other infra-state partial legal orders', all of which are 'both separate and organically linked' (at 253). As a result, the unity of the state is being preserved.

The conclusion noted above that state contracts are international legal acts paves the way for Leben's second major point: that individuals, the non-state side in state contracts, have acquired (limited) subjectivity in international law (at 120 ff; 179 ff). Employing a definition of international subjectivity that requires, in addition to having rights and obligations within the international legal order, the ability to defend one's rights directly before international judicial bodies (at 32, 112, 122), Leben traces the emergence of individuals' limited subjectivity in the field of international investment law to the inclusion of arbitration clauses in state contracts and bilateral investment treaties that enabled investors to bring host states before arbitral tribunals for alleged breaches of the latter's obligations. In doing so, and siding with Kelsen whom he praises as already having laid the theoretical groundwork for capturing this recent evolution in international legal doctrine (at 163, 183), Leben rejects the position of those who deny subject status for individuals simply on the basis of a narrow definition of international law as the law regulating the relations only between states and international intergovernmental organizations. As a corollary, Leben notes that breaches of investment protection treaties necessarily engage the international responsibility of states (ch. 2), as do breaches of contractual obligations that are covered by umbrella clauses in such treaties (at 78, 80). Leben's position in these respects is that of a practice-dependent theorist, noting that 'the legal scholar must observe facts to decide which conceptualization provides the more accurate account of reality' (at 183; see also at 188).

In another chapter on international investment law, Leben takes up the currently much debated issue of the impact of bilateral and multilateral rules on the regulatory freedom of states,[2] here in the context of claims of indirect expropriations due to legislative activity in the host state (ch. 3). Going through judgments and awards made in the contexts of NAFTA, the Energy Charter Treaty, the European Convention on Human Rights, and bilateral investment treaties, Leben finds that arbitrators have generally exercised restraint in applying provisions on expropriation to alleged regulatory takings linked to host state legislation. Concluding that arbitrators are 'justifiably cautious', he argues that '[i]t is hard to see how an arbitration tribunal, with none of the legitimacy that surrounds national courts and even less national courts of last instance, could challenge any statutory or regulatory provision of a state if the matter submitted to it is not a flagrant case of infringement of a private person's property' (at 106).

Given that the piece was first published in 2006, this reviewer would have liked to see some discussion in this context of the Argentine 2001–2002 financial crisis and the flood of cases that

[2] See Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements', 13 *J Int'l Econ L* (2010) 1037; Burke-White and von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor–State Arbitrations', 35 *Yale J Int'l L* (2010) 283; Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?', 41 *Vanderbilt J Transnat'l L* (2008) 775.

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have since come before ICSID tribunals, in at least one of which an award had been issued by 2006 (in the *CMS* case in 2005). The principal measures at issue in the Argentine cases, such as the de-pegging and devaluation of the Peso and the limits on bank withdrawals known as the 'corralito', were based on an Emergency Law and on various decrees and thus implicated the legislative activity of the state. While these measures were responses to a specific crisis and thus not 'normal' regulatory activity, they were still based on general, if temporarily applicable legislation. As such they raise the question of a state's regulatory freedom in the context of responding to impending or actual crises. Would a judicially recognized 'margin of appreciation', which Leben cites approvingly in the context of a different case (at 101), apply here as well? The preponderance of arbitral awards concerning Argentina has so far denied the availability of such a regulatory margin under either the customary necessity defence or the US–Argentina BIT's non-precluded measures clause, but the approach taken by three of these awards has subsequently come under heavy criticism from ICSID annulment committees, with two of the awards being annulled as a result.[3]

In a subsequent chapter, Leben examines the brief appearance of the notion of the '*civitas maxima*' in Kelsen's writings (ch. 6), a term Kelsen borrowed from German Enlightenment philosopher Christian Wolff in whose work it captures the theoretical construct of the international community understood as a 'great city' whose citizens are the nations of the world. That metaphor served Kelsen as a useful foil against which to develop his own theory of international law as the supreme law of a world community that might one day, with further legal centralization, be transformed into a 'truly universal state' (at 198). Next, Leben addresses the status and significance of international courts and tribunals (ch. 7) whose existence he considers 'a telltale sign that international society constitutes a true legal order' (at 204). In the book's last part, he takes up the issue of the legal nature of the European Communities/European Union, siding with those who qualify them, in strictly legal terms, as 'run-of-the mill international organizations' (at 260; see also at 128, 176), albeit with an unprecedented degree of centralizing, federal features (ch. 9). These features, however, do not yet push the EU beyond the character of a confederation or justify a new theoretical construct situated between a confederation and a federal state (ch. 10).

Finally, the last chapter (ch. 11) addresses the question whether there is a specifically European approach to the protection of human rights. Concerning the debates between human rights universalists and relativists, Leben adopts a middle position that distinguishes between universal and local human rights: '[t]here is . . . room beside a *ius commune* for a *ius proprium* of fundamental rights particular to each State' (at 297). These systems interact, however, thus creating a layered system of human rights in which 'each level, whether state, regional, or universal, contains an element of *ius proprium* characteristic of its level and an element of *ius commune* from the upper level' (at 319). With the universal *ius commune* capturing the 'nucleus of human rights, which hold good everywhere for everyone' (at 298), there also is a regional European *ius proprium* which distinguishes the European conception of human rights from that of other regions and states and which is reflected in particular in the case law of the European Court of Human Rights and of the European Court of Justice (at 312–315). Comparing, at a fairly high level of abstraction, the approaches to human rights of the US and Europe, Leben finds distinguishing features in the latter's greater emphasis on second generation social rights, its restriction of rights applicable to what are considered 'enemies of humanity', divergent views on the death penalty, and, in light of US affirmative action policies, different understandings of permissible forms of discrimination (at 322–325).

[3] See von Staden, 'Towards Greater Doctrinal Clarity in Investor-State Arbitration: The CMS, Enron, and Sempra Annulment Decisions', 2 *Czech Yrbk Int'l L* (2011) 207.

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Leben's essays are exercises in legal theory. Practising lawyers may find little in this volume that will help them win specific cases, but those who are theoretically and conceptually inclined will pick it up to their benefit, even if some of the arguments, such as those on the limited international legal subjectivity of individuals, are no longer particularly novel when viewed from the vantage point of by now long-standing doctrinal developments in international legal scholarship. At the same time, most of the essays proceed in lucid prose and provide, if not novel arguments, at least useful restatements of the principal positions. When read cover to cover, there is also some repetition of arguments and engagements with the writings of other authors which may be unavoidable, without more intrusive editing, in a volume of collected essays first published elsewhere.

What would have greatly benefited the volume, however, is a brief introductory essay on the notion of 'advancement' which provides the book with its title. As it is, what Leben means by 'advancement' emerges inductively and sparingly, with the explicit statements noted above being rare exceptions. It may well be that the front matter blurb says it all when it explains 'advancement' as the introduction of 'legal possibilities into international law that did not exist heretofore', irrespective of their evaluation as either 'good' or 'bad'. The emergence of investor–state arbitration is certainly a fitting example in that regard, but it would have been worthwhile to spend a few pages adumbrating a general analytical concept of 'advancement' in international law to make it applicable to a larger set of observable developments and circumstances.

Specifically, are these new 'legal possibilities' necessarily linked to novel institutional mechanisms such as investor–state arbitration, or may they also arise as a consequence of changes in interpretation of substantive provisions of international law? For example, is the identification of positive obligations under substantive human rights norms that have for a long time been understood primarily in negative terms – such as those enshrined in Articles 2 and 3 of the European Convention on Human Rights (ECHR) on the right to life and the prohibition of torture, inhuman and degrading treatment[4] – 'advancement' as well? Novel interpretations such as these also open up 'legal possibilities' in international law that did not previously exist by allowing individuals to hold states accountable for the failure to comply with the positive obligations under these articles. However, if the notion of 'advancement' is understood that broadly, then nearly any act of judicial interpretation and lawmaking would qualify, which in turn would deprive the concept of analytical bite.

So maybe 'advancement' is indeed best reserved for developments of an institutional character (and their doctrinal implications for the international legal system as a whole). Leben's own principal examples – state contracts as legal acts governed by international law; the limited subjectivity of individuals as a result of the emergence of investor–state arbitration; the unprecedented centralized character of the European Union – all suggest that his understanding of advancement is linked to such institutional and systemic changes of a comparatively far-reaching nature. An introductory essay could have further clarified his take on the notion of advancement and might have illuminated whether certain institutional changes of a presumably less profound sort would also qualify. Remaining within the ECHR context, one might think here, for example, of new institutional developments such as the introduction of the pilot judgment procedure[5] or the Court's declaration that the interim measures it indicates should henceforth be considered legally binding (despite the absence of any authorizing provision to that effect in the Convention itself),[6] both of which affect the relationship between the Court and its users.

[4] See, e.g., A. Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (2004).

[5] First introduced in App. No. 31443/96, *Broniowski v. Poland*, ECHR Reports (2004-V), at paras 188–194.

[6] See App. Nos. 46827/99 & 46951/99, *Mamatkulov & Askarov v. Turkey*, ECHR Reports (2005-I), at paras 103–129.

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Despite this missed opportunity to give the notion of 'advancement' more precise contours as a distinct analytical concept, Charles Leben's book is still very warmly recommended to all international legal scholars with a theoretical bent and to those who would like to gain access, with respect to the issues discussed in the book, to some of the principal debates and arguments in the French academic literature.

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