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The Effectiveness of International Decisions; The Planning and Drafting of Wills and Trusts

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BOOK REVIEWS

THE EFFECTIVENESS OF INTERNATIONAL DECISIONS – Edited by Stephen M. Schwebel.[1] Leyden: A. W. Sijthoff; Dobbs Ferry, N.Y.: Oceana Publications, Inc. 1971. Pp. 538. $19.50.

Reviewed by Ved P. Nanda[2]

The growing interdependence of nation states has, in the past twenty-five years, necessitated the establishment of many new intergovernmental organizations. Besides the United Nations and its various specialized agencies, there is a plethora of regional and subregional intergovernmental organizations and international and regional nongovernmental organizations engaged in varying activities—political, economic, financial, technical and humanitarian.[3]

A student of international organizations is indeed overwhelmed not only by the sheer number of these organizations but also by the wide variety in their size, objectives, strategies, achievements and long-range effects. The scope for research is limitless for one who undertakes to analyze the steps taken by these organizations to influence and affect nation-states' policies, and eventually individuals' lives. Even if one decided to study only intergovernmental organizations—specifically, the nature of their decisions (recommendations, opinions, declarations, resolutions, regulations, conventions, legislative and quasi-legislative acts, etc.), the techniques they employ for the implementation and enforcement of their decisions, and finally the effectiveness of their decisions on member states (no matter how one measures their effectiveness)—it would be a lifetime task.

It is in the light of these preliminary remarks that this reviewer finds the present volume to be of inestimable value. It contains papers written by senior legal officials of the United Nations, U.N. specialized agencies, and other international organizations, and by leading scholars on the functioning and effectiveness of international organizations. In addition, it contains an edited transcript of the proceedings of a week-long conference on the subject. Convened by the American Society of International Law and attended by official legal advisers, the conference was chaired by John R. Stevenson, then

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3. *See* UNION OF INTERNATIONAL ASS'NS, YEARBOOK OF INTERNATIONAL ORGANIZATIONS 1007 (13th ed. 1971). This publication lists 2,538 international organizations.

President of the Society, and now the Legal Adviser to the U.S. Department of State.

The first part of the book deals with the issues of the binding nature of international obligations, and of compliance. The opening essay by Oscar Schachter, Deputy Executive Director and Director of Research of the U.N. Institute for Training and Research (UNITAR), which is essentially a reprint from the *Virginia Journal of International Law*,[4] discusses the theory of international obligation. Using the conceptual framework associated with the New Haven school,[5] Mr. Schachter offers a "communications" model to determine what is and what is not legally binding. He prefers the term "community expectations" to "perception," since "the perception of authority and effectiveness must have reference to the future, not the past, or even the immediate present. The question with regard to any given possible norm or practice is whether the target audience *will* regard it as authoritative and effective, not simply whether it has done so in the past." (Pp. 22-23.) His policy-oriented, contextual analysis offers a stimulating discussion of the perennial issue concerning the "true" or "correct" basis of obligation in international law.

The next paper, by Mrs. Rosalyn Higgins of the Royal Institute of International Affairs, is on "Compliance with United Nations Decisions on Peace and Security and Human Rights Questions." In her perceptive study, she suggests the need for further research "to discover who, in what circumstances, and for what reasons, signifies approval of a UN decision but then does not comply with it." (P. 50.) Among other areas she recommends for further exploration are the situations in which nations that have voted against U.N. decisions feel obliged to comply with them, and the "disparity between conference votes approving the text of a treaty and ratifications thereof, and between UN voting on financial questions and the actual pattern on arrears . . . ." (P. 50.) She usefully identifies variables which set the pattern of compliance or noncompliance.

Mrs. Higgins' contribution is followed by those of Professors Sohn, Lauterpacht and Stein, in that order. Professor Louis Sohn of Harvard Law School raises questions concerning the relative advantages of, and problems associated with, various procedures developed by international organizations for checking compliance, such as periodic re-

4. Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L L. 300 (1968).

5. *See, e.g.*, M. MCDOUGAL, H. LASSWELL & J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1967).

ports, interpretations of international agreements, and complaints by nongovernmental organizations and individuals. Professor Elihu Lauterpacht of Cambridge University offers the intriguing possibility of using national courts to secure compliance with the decisions of international organizations. Specifically, on the sensitive issue of securing compliance with the U.N. sanctions against Rhodesia, he suggests that the British Government could pass legislation "vesting in the Crown title to all Rhodesian prohibited commodities at the moment that they are shipped for export contrary to the prohibition." (Pp. 507-08.) Subsequently, the British Government could sue, for example, the Japanese purchaser in the Japanese courts to recover the commodity or its value. Similarly, in the South West African case, the title in any South West African commodity could be considered vested in "the U.N. authority responsible for the government of South West Africa at the moment of export" (p. 508), so that the United Nations could sue to recover the commodity or its value in the courts of whatever country that commodity reaches. Professor Eric Stein of the University of Michigan Law School raises questions regarding the application and enforcement of international organization law—both self-executing and non-self-executing—by national authorities and courts.

These general observations are followed by papers on the practice of specific organizations. The two major financial organizations—International Monetary Fund (Fund) and the International Bank for Reconstruction and Development (World Bank)—are examined respectively by Joseph Gold, General Counsel and Director of the Legal Department of Fund, and Lester Nurick, Deputy General Counsel for World Bank. The emphasis here is on the successful institution of informal means of implementing decisions: Fund's standby arrangements and World Bank's contractual relationships. The practice of the Inter-American Development Bank, outlined by its General Counsel, Elting Arnold, offers useful insights into the techniques of implementation employed by a regional financial organization.

The practice and experience of nonfinancial, functional and technical organizations, which have been among the most successful international organizations in effecting compliance with their decisions, are discussed rather comprehensively in four papers. These treat the International Civil Aviation Organization (ICAO) (by Gerald Fitz-Gerald, Senior Legal Officer, ICAO); the Food and Agricultural Organization (FAO) (by Jean Pierre Dobbert, Office of the Legal Counsel, FAO); the International Labor Organization (ILO) (by Nicholas Valticos, Chief, International Labor Standards Department, ILO); and

the Universal Postal Union (UPU) (by Z. Caha, Assistant Director General, International Bureau, UPU). In addition, practices of the International Atomic Energy Agency (IAEA), the World Health Organization (WHO), and the General Agreement on Tariffs and Trade (GATT) are examined.

The techniques of implementation used by the most effective regional arrangement, that of the European Communities, is analyzed by Michel Gaudet, Director General, Legal Service of the Commission of the European Communities. Brief but equally valuable studies are contained in the papers dealing with the Council of Europe, the European Convention on Human Rights, and the Inter-American System, especially the Central American Common Market.

It is obviously impossible to do justice to the rich material presented in these papers in a short review. One is struck, however, by the wide variation in compliance techniques used by these organizations, and their effectiveness, which necessarily varies with the nature of the organization, its purpose, the subject matter under review, the objectives of the decision, and the acceptance by member states of the techniques used.

It is not surprising, therefore, that even specialized and technical organizations use various techniques—diplomatic, economic and regulatory measures, and technical co-operation and assistance—with different emphasis to secure compliance with their decisions. Of special note seems to be the evolving informal structures and techniques, including recommendations and "gentlemen's agreements" (pp. 375-77). For example, the General Counsel of the Inter-American Development Bank said: "Finally, on the question of the traditional concept of international law and the concept of the charter interpretation, it may be of interest to say that we pay practically no attention to formal international law in our Bank. We just go ahead interpreting our charter very liberally." (P. 384.) Nonfinancial functional organizations such as ILO, UPU and FAO, however, still seem to rely greatly upon conventions entered into through the traditional treaty-making procedures to create binding obligations. The "mobilization of shame" is successful in some cases but of highly doubtful effect in others (pp. 434-35, 447-56, 511-12).

One aspect stands out. Almost all international organizations resist the use of coercive strategies, such as expulsion from membership or even suspension, until they have exhausted all persuasive measures. Political organizations, on the other hand, face a more difficult task. The United Nations, for example, cannot use the "carrot and stick" technique as effectively as Fund and World Bank. "Multilateral sur-

veillance" used by Fund and the sanction of suspending further payments that World Bank uses are, of course, not available to the United Nations with the same degree of effectiveness. Of necessity, therefore, the United Nations has to rely more on informal means such as reciprocity and retaliation by its members against the violating state. The U.N. practice of using resolutions in the form of declarations and recommendations raises the question of their binding character. Neither Mrs. Higgins' paper nor the participants' discussion of that question offers specific guidelines. Perhaps there is no simple answer to the question, for it is only after a contextual analysis of the nature and the objective of the resolution, and the expectations it creates for the target audience as to its binding or nonbinding nature, that one can determine whether it bound a member voting for it, one abstaining, or even one voting against it.

The proceedings of the conference, ably edited by Professor Stephen M. Schwebel, are highly informative and interesting. This reviewer would recommend that the reader initially peruse the first seventy pages, then read the proceedings at pages 359-517, and finally return to pages 71-354. This reading order should provide the necessary background to better appreciate the material presented in the papers.

The practices of a few more regional organizations should have been presented to offer a comprehensive study of the varying techniques of compliance and effectiveness of decisions. Some comments should also have been directed to the need, if any, of bringing about structural changes in international organizations as a means of improving compliance techniques. Finally, a concluding chapter on "appraisal and recommendation" might have been added to enhance the usefulness of this volume. But in all fairness it should be said that, given the nature of the subject matter, these 500 pages offer the best that is available in this important area. The collection raises pertinent questions, offers useful comparisons and tentative conclusions, and opens doors for further creative and rewarding research. In the contemporary interdependent world a viable global order based on human dignity and the widest sharing of values presupposes the existence of a network of effective international organizations.

THE PLANNING AND DRAFTING OF WILLS AND TRUSTS. By Thomas L. Shaffer.[1] Mineola, N.Y.: The Foundation Press, Inc. 1972. Pp. xvi, 292. $8.00.

Reviewed by Edward S. Grenwald[2]

Dean Shaffer's new book is not just another wills and trusts coursebook. It aims at a much more difficult goal and in this writer's opinion probably hits the mark. The author seeks to reintroduce and stress three often-neglected aspects of "property settlement" practice. The first is the fact that, while knowledge of the law is important—this, of course, is a point most courses and coursebooks stress—much more important is knowledge of people. After all, it is people who make a law practice. Moreover, an attorney who knows how to deal effectively with people and how to appreciate their feelings will do much better, both in terms of personal satisfaction and in terms of monetary rewards, than the attorney who merely knows the law.

This book employs neither a case method nor a hornbook method, but instead uses a "clinical," or quasi-clinical, approach. The entire first chapter, as well as the underlying theme of the whole book, concerns itself with human needs and emotions, discussing and analyzing deeply held attitudes toward death and toward property.

Getting a client to face and discuss his own death, to envision and plan for a world without himself is just not the same as getting someone to talk about the weather, the Nixon administration, local traffic congestion, or trade relations with Rhodesia. The latter are topics which an individual may, or may not, see as affecting him, be concerned about, or care to talk about. The future disposition of possessions which embody a lifetime of goals and memories, as well as the care of dear ones, are subjects which rarely, if ever, can be easily discussed in the lawyer's office. Dean Shaffer offers some very interesting observations on how to make the client feel more at ease, or at least how to be more understanding of the difficulty which the client experiences in attempting to plan for the future of a world which he has departed.

The second major refocusing which Dean Shaffer accomplishes is in taking the spotlight off the unsuccessful planning of an estate and the resultant litigation—especially appellate litigation—and concentrating instead on the other ninety-nine percent of the instances which will more likely be the concern of practitioners. It leaves discussion of esoteric legal problems (tax and property types), and many of the

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not-so esoteric problems, to other sources which he directs the reader to in his over sixty-page "Appendix One: Authorities."

Third, and most important, Shaffer does not dwell on the problems of the extremely wealthy. He deals at length with the "lower echelons of the upper middle class"—the strata of a large proportion of clients—and even deals with the poor (albeit, those who are not likely to remain so, *e.g.*, law students, junior executives, etc.). The wealthy are not disregarded, but most of the problems peculiar to large estates are left to other books to which the practitioner can refer when an "extraordinary case" presents itself. Many hypothetical individuals, with their personal wants and needs, are introduced to the reader, both in the text and in an appendix. Sample will and trust forms, complete with detailed explanations, are given.

In short, it is the personalization of the law of wills and trusts by the infusion of the psychological dimension inherent in the counseling relationship, as well as the focus on more typical financial levels, wherein the real value of this book lies.[3]

Furthermore, the book totally rejects the notion that, after students have been taught or exposed to many of the various and difficult problems of an area, they can independently "get it all together." Instead, here we have the concentration on getting it all together in a functional context, allowing the student to plug in the interesting and diverse solutions to the specialized problems that may occasionally arise.

The question then arises: If this reviewer thinks so highly of this book, does he plan to adopt it for his wills and trusts course? And if not, why not? The answer is he will not. The reason for rejecting something which is probably superior to the current materials is twofold: (1) the approach used by Shaffer, unfortunately, cannot be used with classes in the range of 100-150 students. The size of such a class itself precludes simulated counseling, in-depth personal interviewing, and adequate supervision of drafting exercises; (2) while the materials in the Shaffer book would probably produce better trained and better equipped attorneys than do those coursebooks generally prevailing, they would be wholly unsatisfactory in preparing law graduates to take bar exams. It is tragic that this should stand in the way. It does little good, however, to turn out more capable attorneys if they will not be allowed to practice because they overlook the hidden questions and items of minutia which bar examination drafters frequently view as being so important.

3. Let me not leave the impression that Dean Shaffer does not deal with such things as intervivos trusts, life insurance trusts, marital deductions, etc. He does, and very effectively; but the focus is on the client rather than on the trust.

If the Shaffer book is not satisfactory for the traditional basic wills and trusts course, could it be used in an estate planning course? It probably could not be. Dean Shaffer's underlying assertion is that most clients' needs call for the planning of "non-estates" (p. 59). Individuals who have not amassed large fortunes are usually not given adequate attention in estate planning courses. Instead, these courses frequently, and with good reason, deal with the more complicated problems of the wealthy few. Traditional estate planning courses which follow the general approach of Professor Casner—that of the "property lawyer," rather than the "legal counselor" approach (p. 10)—teach property lawyer skills which, by themselves, "are not adequate in education, or anywhere else in the real world of people. The model they build tends toward an inhumane and unresponsive legal profession." (P. 11.) If a "property lawyer" approach is worthwhile, and Shaffer, as well as this reviewer, thinks that it is, it nevertheless should not be regarded as adequate. It is valuable to acquire the in-depth knowledge necessary to deal with the special problems which arise in planning estates—going businesses, employee benefits, charitable transfers, and others; all this is interesting, challenging, and useful—but it is not enough.

What this reviewer would propose to meet the urgent need which remains is a two- or three-hour course, of limited enrollment, offered one or more times each year, dealing with interviewing and counseling, as well as planning and drafting. The wills and trusts area is a good framework in which to develop these skills because of the complex emotional and interpersonal problems involved. For a course such as this, Dean Shaffer's book would serve as an excellent nucleus, to be supplemented by additional problems, some real-life interviews, and some guest presentations by psychologists and others. The author seeks to foster development of the ability to see and deal successfully with the functional whole—presenting not only the property and tax law dimensions of wills and trusts practice, but the crucially important personal dimension as well. The great message of this book is that *counseling* is the most important function which attorneys perform. It is only logical that it be taught and further explored within the law school experience.