(249-57).

Generally speaking, the book is neatly arranged and superbly presented. It is eminently readable and will appeal to those with an interest in comparative law, not just trust specialists (although the latter are well catered for). Prospective purchasers will be encouraged to learn that all royalties will be devoted to research projects of the Paul-André Crépeau Centre for Private and Comparative Law,¹⁸ so readers will be contributing financially to exciting research in comparative trust law simply by purchasing a copy of *Re-imagining the Trust: Trusts in Civil Law* (5). Finally, those who enjoy this book, and have a general interest in comparative trust law, will also be keen to know that another collection from the same editor and publisher is planned for publication in the coming months under the title '*The Worlds of the Trust*',¹⁹ which will be reviewed by the author in an upcoming issue of *Trust Law International*.

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International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance. By ARMIN VON BOGDANDY AND INGO VENZKE. Heidelberg, Springer, 2012. 509 pp. £85.50 (hardcover).

At one point midway on our path in life
I came around and found myself now searching
through a dark wood, the right way blurred and lost.

Thus writes Dante in the opening lines (I.1–3) of his *Inferno* (tr R Kirkpatrick, 2006). The wording is curious, for the 'our' in the translation (*[n]el mezzo del cammin di nostra vita*) implies a shared enterprise of sorts. Dante, arguably, is not referring to his own life, but to the life of a community, and the notion that

¹⁸ Formerly the Quebec Research Centre of Private and Comparative Law. For further information about the private and comparative law projects being undertaken by the Centre, see <<http://www.mcgill.ca/centre-crepeau/>>.

¹⁹ L Smith (ed), *The Worlds of the Trust* (Cambridge: Cambridge University Press, to be published in September 2013) <<http://www.cambridge.org/us/academic/subjects/law/comparative-law/worlds-trust>>

at a certain point in time, it strayed from the path to find itself in a prenumbral forest, unable to find the way out. The vital question precedent—exactly what *did* go wrong?—is not answered expressly.

The collection of essays presently under consideration seeks to ask (and answer) the antecedent question in respect of a different community, namely the community of judges and arbitrators that are currently deciding an unprecedented number of cases within the international legal sphere, and creating thereby normative expectations beyond an individual matter. It represents the product of an ongoing discussion hosted at the Max Planck Institute for International and Comparative Law in Heidelberg. As its editors, Armin von Bogdandy and Ingo Venzke, note in their preface, the volume seeks to examine the phenomenon of judicial lawmaking in international law, and determine its correlation with democratic legitimation (xiii). Its contributions were also published in a special edition (volume 12, issue 5) of the *German Law Journal* in 2011.

International Judicial Lawmaking continues a wider programme of the Institute on the value of a democracy-based test of legitimacy in international law, as demonstrated by the earlier publication of *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010). Put another way, the editors wish to determine the danger of Dante finding himself in the darkened wood of judicial overreach, and if necessary, the processes necessary to divert him from the wrong path.

Edited volumes always pose a challenge for the reviewer, as his task is necessarily bifurcated. On the one hand, he must assess the quality of each individual essay within the work. On the other, he must assess the overall worth of the editorial vision, and whether it has been successfully prosecuted over the course of the book as between the individual contributors. The choice has been made by the reviewer in this instance to focus on the latter rather than the former, and thus he hopes he will be forgiven if some individual contributions are focused on at the expense of others.

In their opening chapter, 'Beyond Dispute: International Judicial Institutions as Lawmakers', the editors frame their project as follows (7):

The aim of this project is three-fold. It first seeks to contribute to a better understanding of international judicial lawmaking, and the challenges it raises for prevailing narratives of legitimation within international law. [...] Second, it examines instances of lawmaking by particular institutions in closer detail. [...] Third, it proposes ideas about how to react to problems in the legitimation of judicial

lawmaking, and it makes suggestions as to how to develop the law accordingly.

The project therefore seeks to comprehend the role of the judiciary in the advancement of international law on a substantive and systemic level across the entire spectrum of international judicial institutions. It proceeds in five parts. Part I, entitled 'Framing the Issue' includes the above contribution by the editors, but also further efforts by Marc Jacob on the role of precedent in international judicial lawmaking (35ff), Karin Oellers-Frahm on lawmaking through advisory opinions (69ff) and Eyan Benvenisti and George W. Downs on the prospects for the increased independence of international courts and tribunals (99ff). The chapter by Oellers-Frahm is a particularly impressive doctrinal contribution, providing a succinct but comprehensive *précis* of the international courts and tribunals that are capable of delivering advisory opinions. Curiously, however, the section of the paper on the contribution of advisory opinions to the development of international law (79–86) does not give much in the way of attention to the recent advisory opinion of the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea in *Responsibilities and obligations of States sponsoring persons or entities with respect to activities in the Area*, ITLOS Case No 17 (Advisory Opinion, 1 February 2011) para 180, which made the remarkable pronouncement that obligations relating to the preservation of the environment on the high seas and in the Area were *erga omnes*—it is understood, however, that the publication deadline may have precluded further consideration.

Part II, on 'Judicial Lawmaking for Economic Governance: The ICSID and the WTO' focuses on one of the most active areas of judicial lawmaking in international law. The section is headed by a substantial piece by Stephen Schill entitled 'System-Building in Investment Treaty Arbitration and Lawmaking' (133ff), which details the scope for international judicial lawmaking through investor-state arbitration, e.g. in giving the investor the right to initiate arbitration and seek damages, the inability of states to influence the arbitral process, the finality of arbitral awards under the ICSID Convention, the widespread recognition and enforceability of awards under the same, the general vagueness of investor rights in the terms of most investment treaties (141–51). At the same time, however, Schill points out that certain deficiencies within the system—the fragmented nature of the investment treaty regime, the *ad hoc* nature of the tribunals, and the lack of a doctrine of *stare decisis*—inhibit the lawmaking capabilities of the individual tribunals (151–3). Schill then proceeds to analyze how, despite these limitations, tribunals have still been able to advance the *system* of investor-state ar-

bitration, most often through informal practices of courtesy evidenced between tribunals (165–74). The result is a quite persuasive enunciation of how a system prioritizing *ad hoc* resolution of disputes, without the benefit of anything more than an overarching institutional continuity, is able to create a corpus of persuasive and non-binding precedents that shapes the normative expectations of states and investors alike (175–7). Other papers in this section include an investigation by Ingo Venzke on the interaction between precedents concerning Article XX of the General Agreement on Tariffs and Trade and domestic regulatory policies (179ff), a piece by Michael Ionnidis on the development of standards of participation in WTO law (215ff). Finally, there is a substantial contribution by Thomas Kleinlein that considers the use of techniques of balancing and proportionality as a response to the much commented upon phenomenon of ‘fragmentation’ in international law in the context of ICSID and the WTO (251ff).

Part III of the book concerns ‘Judicial Lawmaking to Protect the Individual’ and examines the contribution of the Inter-American Court of Human Rights, the European Court of Human Rights and the International Criminal Tribunal for the former Yugoslavia (ICTY) to the book’s theme. The first chapter in the section, by Christina Binder, is a lively *précis* of the Inter-American Court’s jurisprudence on amnesties, a truly dynamic example of international lawmaking (295ff), in which the excellent point is made that despite the progressive character of the Court’s jurisprudence in nullifying amnesty arrangements, it still requires the support of national courts in implementing its decisions—with the signal examples being Chile in *Almonacid v Chile* [2006] IACtHR Ser C No 154 and Peru in *Barrios Altos v Peru* [2001] IACtHR Ser C No 75—a fact of obvious importance when considering the democratic legitimacy of the Court’s admittedly broad reading of its powers in those cases (314–18). The second chapter of the section, by Markus Fyrnys, focuses on a new form of judicial lawmaking by the European Court, the pilot judgment (329ff). This procedure, brought about by the dramatic expansion in the range of human rights problems confronted by the Court since the accession of the Eastern Bloc states to the European Convention on Human Rights, involves the Court identifying a particular issue that is likely to lead to a series of further individual applications in the future (i.e. in the sense of a ‘systematic malfunctioning of domestic legislation or administrative practice’ (331)) and recommending general measures to combat the issue as between all members of the Convention. One focus of the piece is on the elaboration of the pilot judgment procedure in the case of *Broniowski v Poland* [2004] ECtHR 31443/96 (341–5), but more interesting from the book’s point of view is the democratic legitimacy of such judgments, particularly insofar as they amount

to the 'judicialization of politics' (353–63), i.e. in the Court's attempt to carry out what is effectively a 'constitutional' form of adjudication. Finally, Milan Khuli and Klaus Günther contribute a chapter on judicial lawmaking and the ICTY, examining the creative impulse of the judges of that tribunal with respect to the law of belligerent reprisals, as inaugurated in *Prosecutor v Kupreškić et al*, ICTY IT-95-16-T (Judgment, Trial Chamber, 14 January 2000) (365ff). An interesting feature of the chapter is an examination of the effect of the ICTY's jurisprudence not only on the International Criminal Court, but also on the German *Völkerstrafgesetzbuch*, a domestic code of crimes against international law (378–81).

The final substantive portion of the book, Part IV, is directed to 'Further Fields of Judicial Lawmaking', focusing on the International Court of Justice and the Court of Arbitration for Sport (CAS). The editorial choice to include these two bodies as bedfellows immediately raises eyebrows. Really? The informal apex of the international judicial hierarchy alongside a tribunal that *prima facie* has very little to do with the balance of public international law? One gets the sense that the editors were confronted with a chapter on the CAS and were at a loss to know what to do with it, leading to a somewhat tone-deaf allocation which has the unfortunate corollary of consigning the International Court to the margins of the judicial lawmaking debate as a mere 'further field', rather than the main game. At any rate, the chapter on the creation of a '*lex sportiva*' by the CAS by Lorenzo Casini (439ff) first introduces the body (439–52) before making the claim that it is involved in judicial lawmaking as the terminus of a complex set of review mechanisms distributed internationally (452–67). This on its own is a worthy endeavour, but one is left wondering how this contributes to the wider development of public international law, considering that the CAS is to an extent hermetically sealed off from other international courts or tribunals: within the context of the book under review, the CAS is of value only as a comparator, not a contributor. It is submitted that a chapter on the recent activity of the Permanent Court of Arbitration, which is undergoing something of a revival, would have been a better thematic fit.

More interesting are the two other chapters in the section on judicial lawmaking at the International Court. Karin Oellers-Frahm makes a very interesting contribution to international judicial lawmaking in a procedural context, examining the expansion of competence to issue provisional measures (389ff). Each expansion has been driven, in part, by the International Court, with Oellers-Frahm examining the Court's effect on the questions of outright competence or order measures (express or implied), the capacity to grant

measures in cases of contested jurisdiction and the binding nature of provisional measures (393–401), before making the interesting claim that the capacity to issue binding provisional measures per *LaGrand* (*Germany v US*), ICJ Reports 2001 p 466 is only possible in cases where the jurisdiction of the Court is clearly established—*prima facie* jurisdiction, which has been a touchstone of the Court's thinking on the subject since Judge Lauterpacht's dissent in *Interhandel* (*Switzerland v US*), Provisional Measures, ICJ Reports 1957 p 105, 117ff, is not sufficient (406). This would appear to have substantial practical consequences for certain majorities on the Court, which post-*LaGrand* have become used to ordering binding measures on the basis of *prima facie* jurisdiction, e.g. in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v Russia*), Provisional Measures, ICJ Reports 2008 p 353. Finally, Niels Petersen contributes a fascinating chapter on 'Lawmaking by the International Court of Justice—Factors of Success' (411ff). This looks at the extent to which instances of judicial lawmaking by the International Court have been accepted by states through two case studies, namely obligations *erga omnes* and exclusive fisheries zones (420–36).

Part V of the book comprises a single chapter, a comment by its editors on democratic legitimation and international judicial lawmaking (473ff). It is here that the reviewer will break cover and ask two questions that have concerned him since picking the book up—is international judicial lawmaking really *in need* of justification? And even if it is, why should democracy—and whose idea of democracy anyway?—be used to quantify or qualify legitimacy? Von Bogdandy and Venzke's two tightly argued bookends tend to present 'democracy'—as hotly a contested a term in political theory as any—as some kind of monolithic universal good. Take for example, the statement that '[d]emocratic justification is ineluctable for the exercise of any public authority' (475). This is all well and good, but it overstates the point. Public authority is exercised in Beijing, in Moscow, in Hanoi, in Havana and in many other places on a daily basis in a manner that is undemocratic, but not necessarily unfair. The rule of law does not require democracy to survive.

Leaving that to one side, von Bogdandy and Venzke further do not acknowledge that democracy may take on a different meaning in the context of different individual courts and tribunals, let alone in the minds of individual (possibly undemocratic) states. An ICSID tribunal, the mayfly of international dispute settlement, will have a far more narrowly constrained view as to the 'democratic' legacy of its decision than the International Court, which is keenly aware of its status as (a) the successor to the Permanent Court of International Justice, (b) the

principal judicial organ of the United Nations, and (c) a permanent court of non-compulsory jurisdiction servicing an extremely cagey and obstreperous clientele. This perhaps accounts for the inconsistent use of the designated yardstick throughout the individual chapters.

But that is not to say that the work under consideration is deficient or asinine, simply that its intellectual underpinnings should be treated with caution. If one accepts the proposition offered, the book is a valuable contribution to the theory of adjudication underpinning international law. Provocative and well-developed ideas such as this are essential to understanding the ebb and flow of international judicial lawmaking *as a phenomenon*, even if one does always agree with the units of analysis. Fundamentally, the reviewer and the participants in this worthy volume want the same thing: an international judiciary in the mode of Dante's Virgil (II.136–42):

You, as you speak, have so disposed my heart
in keen desire to journey on the way
that I return to find my first good purpose.
Set off! A single will inspires us both.
You are my lord, my leader and my true guide.'
All this I said to him as he moved on.
I entered on that deep and wooded road.

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