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## Book Reviews

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## BOOK REVIEWS

### **The Regulation of International Economic Relations through Law**

By P.T.B. Kohona; Martinus Nijhoff, Dordrecht, The Netherlands, 1985, pp. xxii, 280. Cloth Dfl. 150/U.S. \$49.50/T41.75.

International economic relations are certainly regulated by law. But how?

There are perhaps three ways. The first might be said to be through the application of municipal law to international transactions. This can occur either by the agreement of the parties to subject their relationship to a chosen body of national law, or it can take place by the assertion of governmental control through the positive lawmaking of national legislatures. The Foreign Trade Act, for example, shapes our trading relations with the other nations of the world; the International Emergency Economic Powers Act subjects every element of the United States' international economic relations to the control of the Executive Branch in times of declared emergency. There is nothing of the application of municipal law to international economic relations, however, in this book.

Nor is there anything here of the ways in which private parties make their own private law by contract. These particular efforts at lawmaking can have enormous consequences for the global economy. The massive capital movements from the United States, Europe and Japan to the less developed countries (LDCs) in the late 1970s, for instance, were the product of loan agreements between private commercial banks and their borrowers. The phenomenon took place without the intervention of national or multilateral policymakers. The parties in arm's-length negotiations created elaborate structures of law to govern their respective rights and obligations. \$350 billion of debt which resulted, however, proved too much for the borrowers to service in 1982, after the Federal Reserve Board clamped the brakes on the United States economy and sent interest rates skyrocketing. And so it is that by the legal process of private negotiation once again international financial relationships are being rejiggled through massive rescheduling agreements—with considerable consequences for the well-being of the people of the LDCs, for the financial systems of the countries that are members of the Organization for Economic Cooperation and Development (OECD),

and for the flows of international trade and finance everywhere. But there is nothing in this book of that—nothing of the role of law in regulating the Latin debt crisis, or of the other vast international economic activities controlled by private contract law.

So much for what the book is not. What is it? The answer is that it addresses the third, and perhaps least sweeping, of the three ways in which law regulates international economic activity—through multilateral economic organizations. This is a comparative study. The author submits to detailed examination the structure and practice of clusters of commodity agreements and organizations (tin, copper, coffee); of organizations influencing trade and development (the World Bank system, International Monetary Fund (IMF), OECD and General Agreement on Tariffs and Trade), of those which “establish common trading areas” (e.g., European Economic Community (EEC), Latin American Free Trade Association (LAFTA), CARICOM, ASEAN, Council for Mutual Economic Aid (COMECON), European Free Trade Association (EFTA)) and those which shape particular sectors such as labor (International Labor Organization), agriculture (Food and Agriculture Organization), transportation (International Civil Aviation Organization) and communications (International Telecommunications Union).

He begins with some general comments about the use of international agreements to create multilateral organizations, norm-making by international organizations, the use of decisions, the effect of resolutions. He then proceeds to survey the technical organizational and procedural behavior of multilateral economic institutions. He compares the membership, the general nature of their constitutive agreements, and the role of the executive. A meaty third of the book examines the process as he calls it of “determining rights and obligations.” Here the concern is with the extent to which international economic organizations adjudicate, and how.

The study is strong on comparative analysis. There is much of the texts of the constitutive documents, governing resolutions and adjudicatory determinations. It is weak on how practice has enhanced, diminished or surprised the intentions of the original draftsmen of the agreements which created these entities. For instance, there is nothing of the ways in which the IMF is being forced into the business of supervising domestic economic policy in ways never anticipated by those who originally wrote Article IV of the Fund Agreement. There is certainly nothing about the political implications of this trend.

The book is also weak on the economic behavior which international organization law is supposed to be regulating. Though commodity agreements are subject to some scrutiny in the book, for example, the author betrays no sense of the increasing ineffectiveness of buffer and stockpiling efforts. There is no consideration of the evidence of recent years that

commodity agreements, so enthusiastically embraced by the ideologues of UNCTAD, can actually work against the self-interest of their members. A word on the collapse of OPEC would not have been out of order.

The author concludes that the international horizon is littered with "numerous international economic organizations [created] to oversee the due realization of the objectives" of "an ever-growing array of multilateral agreements . . . to regulate a range of economic matters" (p. 265). But he is saddened that the consent of the nations affected seems to be a precondition to the effectiveness of the regulatory schemes. Indeed, even organs responsible for resolving disputes generally approach their task, he says, "with a view to obtaining mutually acceptable solutions rather than proceeding to determine strict legal rights and obligations" (p. 267). And he concludes that "by and large sanctions are hardly ever resorted to for the purpose of implementing the solutions arrived at" (p. 268).

All in all, the study does not suggest a very expansive future for the regulation of economic relations, at least not through international organization law.

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## Doing Business in the United Kingdom

By Clifford-Turner, Matthew Bender & Co., Inc., Albany, New York, 1985, 3 vols (loose-leaf), \$240.

The increasing complexity of international commercial legal practice requires not only that lawyers have the ability to select competent foreign counsel when questions of foreign law and practice arise, but it now also requires them to have a solid grounding in the business laws of the foreign jurisdiction involved. This is necessary not only so that U.S. lawyers can advise their clients quickly on broad questions of policy and practice on foreign law questions, but so that the right questions and issues can be raised with foreign counsel.

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A new three-volume series published by Matthew Bender & Co.<sup>1</sup> aims at providing the requisite background knowledge with regard to business laws in the United Kingdom. The treatise is *Doing Business in the United Kingdom* and has been prepared by the members of Clifford-Turner, long one of the leading firms of solicitors in London. These volumes are designed as a legal and practical guide for business, in one form or another, in the United Kingdom.

In considering the utility of volumes like these, it must be admitted initially that these volumes cannot take the place of direct advice from British counsel. The compromises necessary between manageability of size and depth of coverage mean that no *ad hoc* treatment of the laws of a country (even when the focus is solely on laws related to business and commerce) can answer the complex questions that are likely to arise in real-life situations. However, these volumes by Clifford-Turner seem to strike just the right balance between "too much" and "too little" and in essence constitute a "Restatement"-type approach to business laws in the United Kingdom. The question is not whether this is an adequate treatment of the relevant issues for a solicitor or barrister in the United Kingdom, but whether these volumes provide the guidance to lawyers from outside Britain that is necessary to solve practical commercial problems.

While the focus of these volumes is limited to business-related laws and policies, the substantive coverage is nevertheless quite broad. Topics range from an introductory section on sources of law in Britain<sup>2</sup> and organization of the judicial system and legal profession, to an analysis of contract law, real property law, business accounting, company and capital gains tax, employment and immigration law, securities law, import-export restrictions, consumer protection, and merger and acquisition law. Also covered are the rather specialized areas of oil and gas law, shipping, insurance law and environmental protection. A considerable amount of thought has gone into organizing these topics in a coherent way so that they highlight the interplay of the various legal issues involved in doing business in the United Kingdom. Finally, these volumes contain a brief discussion of the relevance of European Economic Community law in Britain, but generally refer the reader to

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1. A series of similar volumes on doing business in a number of foreign jurisdictions has also recently been published by Matthew Bender & Co. Countries covered in this series include Canada, France, Mexico and Germany. For reviews of these, see: 19 INT'L LAW. 1029 (1985) (DOING BUSINESS IN FRANCE); 19 INT'L LAW. 1493 (1985) (DOING BUSINESS IN CANADA); and 19 INT'L LAW. 1503 (1985) (BUSINESS TRANSACTIONS IN GERMANY (FRG)).

2. The broad overview of Great Britain contained in the first few chapters of the treatise is reminiscent of the country studies published in profusion over the years by the U.S. Department of State. While it is somewhat unusual for this kind of broad descriptive treatment to be included in a legal text, it provides a useful primer on government organizational issues that are often incorrectly assumed to be standard knowledge in works of this type.

the publisher's separate analysis of Community law for a detailed discussion of these issues.

Even more important, however, is the fact that the authors have designed and included specific chapters analyzing the various advantages and disadvantages involved in choosing an initial business vehicle in the United Kingdom (partnership, joint venture, branch office, foreign subsidiary, licensing arrangement, etc.) or in acquiring an established business and in assessing the tax implications of these choices. A similar "how-to" section discusses the advantages and disadvantages of listing securities on the London Stock Exchange. The treatment in each of these instances is intensely practical, even going to the extent in the tax discussion of giving sample calculations demonstrating the impact of the statutory provisions being discussed.

A principal problem with volumes of this type is the speed with which the information presented becomes outdated or incomplete. While the volumes in this treatise are generally current through March 1985, that issue is addressed directly in this instance by making the series a loose-leaf one whereby the publisher supplies printed updates on a regular basis to purchasers of the volumes. Still, commercial law and practice in Britain is beginning to change at a sufficiently rapid pace, particularly with regard to securities and stock exchange matters and insurance regulation, that some care needs to be taken in assuming the continuing validity of discussions of these topics.

Perhaps it would have been asking too much, but these volumes might well have benefited from the more emphatic use of comparative discussions, particularly in contrasting U.S. and U.K. law and practice. While this might have limited the geographic audience for the book slightly, this feature would have had the marked advantage of highlighting the differences between the U.S. and U.K. business and legal environments and would have saved the less-than-expert U.S. reader the embarrassment of realizing that he or she does not precisely remember the applicable rules on a particular topic (in areas like consumer protection, insurance law, etc.) under U.S. law.

As a ready reference tool these volumes have some useful advantages and one glaring disadvantage. The advantages are the very complete Table of Cases, Table of Statutes and Descriptive Word Index that are contained in Volume 3. Also, the exhaustive tables of contents at the beginning of each chapter and section of these volumes makes it quite easy to locate the relevant issue for discussion and analysis. The major weakness of these volumes is the absence of citations to other sources of information on the topics being covered. In future supplements to this treatise it would be useful to include references to other in-depth treatments of the various

substantive issues being considered.<sup>3</sup> On balance, however, this is a strikingly lucid and well-written treatment of a broad range of complex legal and business issues. The Clifford-Turner firm is to be complimented for its work in these volumes.

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## Doing Business in France

By Simeon Moquet Borde et Associes, Matthew Bender, 2 vols. looseleaf, 1983.

*In response to publisher comments on the review of this book appearing at 19 INT'L LAW. 1029 (1985), we wish to advise readers that supplementary, numbered and dated releases have been provided to subscribers of this publication so that we are now assured it is current as of the date of the various supplementary releases. [Ed.]*

## International Business Transactions— A Problem-Oriented Coursebook

By Ralph H. Folsom, Michael Wallace Gordon and John A. Spanogle, Jr.;  
West Publishing Company, St. Paul, MN, 1985; 1157 pages; \$33.95.

It has been almost thirty-five years since I enrolled in one of the first courses in what today we would call International Business Transactions. It was at Harvard and the joint instructors were Louis Sohn and Kingman

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3. Appropriate references would have been to standard scholarly works on specific areas of English law such as M.P. Furmston, *CHESHIRE AND FIFOOT'S LAW OF CONTRACT* (1976); M. Megrah & F. Ryder, *PAGET'S LAW OF BANKING* (1972); J. Morris, *DICEY AND MORRIS ON THE CONFLICT OF LAWS* (1973); R. Megarry & P. Baker, *SNELL'S PRINCIPLES OF EQUITY* (1973); and R. Walton, *KERR ON THE LAW AND PRACTICE AS TO RECEIVERS* (1983).

Brewster, Jr., now famous for a great many accomplishments other than co-conducting experimental seminars. Their material was what one would expect in a pioneering effort of that era: an entire mountain range of mimeographed materials, mostly primary source, capped with the compilers' comments and questions.

Since that time the topic of International Business Transactions has matured into a staple item of the curriculum. But it has seemed impossible for a single and manageable coursebook to cover it all. Those who teach in this field, as I do, have had to do one of three things: (1) cobble together their own confection of photocopied materials; (2) adopt one of the current excellent works of a narrower scope, such as trade or investment or international economic law; or (3) combine the first two, adopting a coursebook but omitting large segments of it and supplementing it with one's own material.

There is now, for the first time, a fourth choice: a large (almost 1200-page) volume that spans the field from one end to the other. What Professors Folsom (University of San Diego School of Law), Gordon (University of Florida College of Law) and Spanogle (SUNY at Buffalo School of Law) have done is to produce for general use a composite omnibus version of their own classroom materials, developed by them together because nothing of such breadth was available in the market. They have done an impressive job. *International Business Transactions—A Problem-Oriented Coursebook* should rapidly become a standard work for law schools who offer a survey course on the subject.

The first quarter of the book deals with the documentary sale of goods and letters of credit. The second quarter focuses on imports and exports. The third concerns transfer of technology and direct investment. The concluding fourth of the book is something of a miscellany: EEC (and other European) law, non-market economies, extraterritorial jurisdiction and so-called questionable payments abroad.

The format of each segment is as follows: (1) a hypothetical problem (the setting), such as Computers to Caracas, Gold Pens from France, Leather Goods from Botswana, Wheat Wars and Beef Blockades, Tractor Engines to East Germany and Colonel Chicken Goes Abroad; (2) a description of the issues presented (focus of consideration); and (3) readings, questions and comments. The pattern is repeated throughout some thirty-five "problems."

The ratio of quoted "readings" to author-redacted material is 76 percent (readings) to 24 percent (authors). The 76 percent for readings breaks down into law reviews, books and miscellaneous, 41 percent; judicial and regulatory decisions, 23 percent; and documents, 12 percent. The authors' 24 percent breaks down into 6 percent for the problems and 18 percent for questions and comments. The mix seems appropriate for the subject and for a market in which pedagogical preferences will vary.

Judicial decisions are set forth fairly fully, without the kind of drastic and frustrating editorial surgery that leaves the reader to guess the *ratio decidendi*. For those who prefer a straight expository text of the treatise-and-law-review variety, there is an abundance of that too (two-fifths of the entire book), and I judge it well selected. The documentary material is integrated with the text. This is easier for teaching but more difficult for reference. By rather severe editing and rigorous selectivity the authors have spared the student the extra expense and trouble of a documentary supplement.

The thirty-five hypothetical problems are more or less what one would expect. It might be noted in passing that their function is to direct attention, not to test comprehension of subject matter. A special comment is appropriate for the authors' questions and comments. They convey a great deal of substantive law. More often than not the questions are answered, either straight out or by implication in the wording of the question. Tyro teachers will not feel uncomfortable. A qualification to this may be the treatment of the International Monetary Fund.

There are other affirmative aspects worth recording. The blend of public international law, comparative law and conflict-of-laws matters is exceptionally well covered and integrated. The cases and articles quoted are notably up-to-date (except for a rather stale excerpt from Shea's 1955 volume on the Calvo clause). The franchising section is particularly specific, with its lengthy check-list of points to cover. The same is true of the Export Administration Regulations on Refusals to Do Business, whose terms and whose examples (in even smaller type) are set forth *in extenso*. Each section of the book contains ample and current citations for further reference. Practitioners too will appreciate this.

There are criticisms. Most of mine are personal and perhaps idiosyncratic. The treatment of European antitrust seems a little skimpy while too much is made of European worker participation and "co-determination" (almost twelve pages of text). The European "full faith and credit convention," and the United States doctrines of sovereign immunity and act-of-state are given a lighter touch than I prefer. The point of view on expropriation, as revealed in the reference to UN General Assembly resolutions and in the selection of law review article excerpts, is a bit more pro-business than I think contemporary practice supports.

There should have been some discussion of the International Convention on the Settlement of Investment Disputes, so effectively sponsored by the World Bank. Not all of the important cases referred to in the text are listed in the table of cases. There is no table of books and articles, a handicap to both students and practitioners when more than 40 percent of the book consists of such material. And the index, like that of most coursebooks, could usefully be expanded. The work is relatively free of typographical errors, but the Legal Adviser is not the Legal Advisor and the United

Kingdom Sale of Goods Act is not the Sales of Goods Act. Finally, it seems to me that the lengthy and labored opening allegory about why nations trade—the “Westian” monetary unit is the “dollah,” etc.—might with profit give way to a straightforward and adult exposition on such phenomena as absolute scarcity, relative efficiency and comparative advantage.

My initial perusal indicates that Folsom-Gordon-Spanogle's *International Business Transactions* is an exceptionally good coursebook. When the practicing lawyer becomes familiar with its arrangement it will be of considerable utility to him as well. For the moment the book has the “omnibus” field to itself. No doubt its adoption for classroom use will be widespread. The final verdict must await that use, but the authors should expect it with confidence.

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## Guide to Foreign Legal Materials: French

By Charles Szladits and Claire M. Germain, Oceana Publications, Dobbs Ferry, New York, (Second Revised Edition) 1985, pp. xi, 205, incl. Apps. & Index, \$35.

Charles Szladits and Claire M. Germain have provided the English-speaking world with a succinct and quite useful *Guide to Foreign Legal Materials: French* which is sure to be added to the shelves of many practicing international lawyers. The book has three very distinct parts of which the first (written by Szladits) is devoted to the sources, one might better say varieties, of French law. There are five short chapters given over to legislation (pp. 3–11), custom (pp. 13–15), case law (pp. 17–31), legal science (doctrine) (pp. 33–35), and general principles and equity (pp. 37–45). In an hour's reading, a lawyer inexperienced in French law can gain an excellent introduction to the field. Even an attorney already familiar with French law is likely to appreciate Part One's artful integration of so many diverse elements making up some of the central characteristics of French law. Not only is the description useful for understanding the nature of the civil law, it is illuminating for the light it throws on international law, so many concepts of which are borrowed from the civilians. The only complaint and that a

small one that might be made about Szladits' otherwise admirable rendition is that there are perhaps too many longish substantive footnotes which occasionally disrupt the otherwise smooth flow of the discussion.

Part Two of the *Guide* (written by Germain) is a bibliographical presentation of the literature of the laws of France. These six chapters turn to bibliographies (pp. 49–51), legislative materials (pp. 53–72), case law (pp. 73–95), encyclopedias and legal dictionaries (pp. 95–105), and doctrinal writings (pp. 107–154). The chapter on doctrine contains a section devoted to books in English on French law (pp. 146–154) which should prove enormously helpful to non-French-speaking lawyers. Unlike Part One, Part Two should not (indeed could not) be read at a sitting. It is intended to be a reference source when one is faced with a specific problem calling for use of French law materials.

The third part of the book (also written by Szladits) is called a Conclusion but might more descriptively have been termed "working with French law" (pp. 157–167). These pages more or less extend Part One's discussion of the sources of French law but do so by making specific references to some of the materials introduced in Part Two. Although quite useful, this is the part of the book most in need of development. It would have been very helpful if the authors had offered a case study or two showing how a common lawyer should come to grips with research problems in the civil law. For example, there might be case studies devoted both to research problems using French language materials and to problems where only English language literature is tapped. In any case, the Conclusion, like the rest of the *Guide*, is an important contribution to our understanding in the English-speaking world of our French-speaking neighbors.

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## International Trade Policy: The Lawyer's Perspective

Edited by John H. Jackson, Richard O. Cunningham and Claude G.B. Fontheim of the Committee on International Trade, Section on International Law and Practice, American Bar Association, New York, Matthew Bender, New York, N.Y., 1985, pp. 475, \$75.

This book is a collection of essays written by legal practitioners on the subject of the international trade policy of the United States. *International Trade Policy* was published at an opportune time. The response of Congress to the U.S. trade deficit over the last year has been frantic. Over three hundred international trade bills have been introduced. The authors offer numerous ideas for change in U.S. trade laws which should be tapped on Capitol Hill.

The three sections of this work examine: (1) the philosophy of U.S. trade laws, (2) current U.S. trade laws, and (3) trade problems facing U.S. international trade regulation. The greatest number of essays are devoted to a review of current U.S. trade laws.

The first section contains more of an overview of U.S. import relief laws than of the philosophical underpinnings of international trade regulation. Both Noel Hemmendinger and Charles R. Johnston, Jr. suggest that a fundamental reexamination of the Trade Agreements Act of 1979 is required to clear up confusing provisions. Thomas R. Howell and Alan William Wolff recommend a consolidation of trade policy formation, negotiation and enforcement in a single U.S. government agency.

The focus of most of the second section is the U.S. antidumping and countervailing duty laws although some attention is also paid to the "Escape Clause" (Section 201 of the Trade Act of 1984). Most of the essays are critical of the current U.S. antidumping and countervailing duty laws. John S. Sciortino and Peter J. Koenig respectively berate the Commerce Department's methodology for calculating subsidy values and its handling of upstream subsidies in countervailing duty cases. The essay written by Claire E. Reade is the only essay which finds virtue in current unfair trade procedures. Ms. Reade concludes that the procedure for making preliminary determinations in antidumping and countervailing duty cases is basically sound.

The criticism comes from both U.S. industry and foreign export perspectives. For example, from the U.S. industry perspective, Dr. Koenig argues that current Department of Commerce practices and procedures regarding upstream foreign subsidies creates a large loophole in the countervailing duty law. From the foreign export perspective, A. Paul Victor and Thomas A. Ehrgood, Jr. argue that the International Trade Administration of the Commerce Department should consider more factors when it makes "circumstances of sale adjustments" in antidumping investigations. The effect

of Messrs. Victor's and Ehrgood's argument would be to make it harder to prove that goods are being dumped in the U.S. for less than they are being sold at home.

Some essays are more neutral. Elaine M. Frangedakis, for example, suggests improvements in the use of suspension agreements which could provide more equitable solutions to trade disputes for both domestic petitioners and foreign respondents.

The third section covers foreign activities which create vexing problems for U.S. import trade regulation. The topics of the essays include U.S. trade with nonmarket economies, foreign industrial targeting, foreign cartels and export credits.

This collection of essays is a worthy effort by its executive editors and the members of the ABA's Section of International Law and Practice who were involved in bringing the book into being. The book brings together many different points of view, albeit all from the private legal perspective, and contains many suggestions for change in U.S. international trade regulation which should receive attention. Any practitioner of U.S. international trade law who is concerned about the legal framework in which he practices and policy makers who want to improve U.S. import relief laws should read this book.

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## **Comparative Law and Legal System: Historical and Socio-Legal Perspectives**

Edited by W. E. Butler and V. N. Kudriavtsev, Oceana Publications, Inc.,  
Dobbs Ferry, N.Y., 1985, pp. 141, \$20.

To students of legal history and to practicing lawyers curious about how their counterparts in different legal systems view their own law as well as that of their neighbors, essays in this volume pose some tantalizing questions. What did Elizabeth I borrow from Boris Godunov? ("[I]t is faintly possible" that her Statutes of Labourers of 1562-63 "owe something" to his edict on the serfs, so Professor Rudden tells us in his essay "Comparative Law in England.")<sup>1</sup> Taking into account the expansion of statutory law in

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1. Rudden, *Comparative Law in England*, in *COMPARATIVE LAW AND LEGAL SYSTEM: HISTORICAL AND SOCIO-LEGAL PERSPECTIVES* 80 (W. Butler & V. Kudriavtsev eds. 1985) [hereinafter cited as *COMPARATIVE LAW*].

England, does the mother country of our common law herself remain a common law country? Yes, at least in the view of the Soviets, as Professor Tumanov writes in "On Comparing Various Types of Legal Systems." Bernard Rudden's essay alone contains facts of bizarre and obscure legal history sufficient to formulate "Legal Trivial Pursuit." Examples: Has Parliament ever made murder a crime? (No, "the legislature has never condescended to say so in a statute."<sup>2</sup>) Who brought legislation to England? (Edward I. He learned it from his brother-in-law Alfonso X, the codifier of Spain's 13th century *Las Siete Partidas*.) My favorite concerns the basis for the holding in *Hadley v. Baxendale*. English common law, right? Wrong: Roman law embodied in articles 1149–51 of the French Civil Code. "It is one of the ironies of legal history," Oxford's Professor of Comparative Law Rudden observes, "that the American lawyers of today appear to believe that this rule—which is applied in most states of the United States—derives from England."<sup>3</sup>

But scholars of comparative law enticed by the overblown title of this modest (141 pages) collection of a dozen essays by English and Soviet academics may come away frustrated. Most of the essays collected here do not live up to the billing announced by the subtitle, "Historical and Socio-Legal Perspectives," and none of them offers much in the way of comparative views on England's common law and the Soviet Union's socialist legal system, as a reader might expect in a collection of essays that originated in the first bilateral academic symposium to be held in Britain between legal scholars from these two countries. Comparative views of eminent scholars as are the authors of these essays would indeed be welcomed. For example, in some important ways the criminal justice system in England more closely resembles the Soviet Union's than our own and comparative inquiries into two societies where lay magistrates, not professional judges, decide the vast majority of petty criminal cases could make fascinating reading.<sup>4</sup> The more we Westerners can understand about the socialist legal system through comparison or contrast to our own common law the better we will understand this newest of the major legal systems of the world.<sup>5</sup>

Several of the Soviet writers point to the need for Westerners to study Soviet politics less and Soviet law more. V.V. Pustogarov, the Deputy Director of the Institute of State and Law of the USSR Academy of Sci-

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2. *Id.* at 79.

3. *Id.* at 83.

4. See M. GLENDON, M. GORDON & C. OSAKWE, *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES* 337 (1985) [hereinafter cited as *COMPARATIVE LEGAL TRADITIONS*].

5. So new it is that Professor John Henry Wigmore did not consider socialist law in his 1928 three-volume conspectus of the world's legal systems and despite the fact that the revolution which was to give the world socialist law was then eleven years old, would write that "we (have) before us *virtually all the actual systems*" of law in the world. (Italics are his.) J. WIGMORE, 3 *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS* 1125 (1928).

ences, admonishes that "British scholars concerned with the study of Soviet State and law give greatest attention, in our view, to politics: political theories, political system, political culture, and so forth, and far less attention to the development of law in the USSR."<sup>6</sup> He encourages "a deeper mutual investigation of legal problems, by various means, including comparative legal studies. . . ."<sup>7</sup> This is no cavil. And the situation in fact may be or become worse in the United States where law schools and casebook authors generally have neglected Soviet socialist law and thereby an important part of the education of the next generation of American lawyers. Of the five comparative law casebooks presently taught in our law schools, only one—and it was published just six months ago—raises socialist law to the status of equal treatment with civil and common law.<sup>8</sup> The comparative law casebook used in the largest number of American law schools contains only ten references to socialist law in its 843 pages.<sup>9</sup>

Professor Tumanov echoes his colleague's concern: "Regrettably, there is still very little comparative research on Soviet and English law. At the same time, all the prerequisites are there for the development of research that undoubtedly would be useful to both sides."<sup>10</sup> Perhaps the organizers of the symposium which produced this book, the Faculty of Law of University College, London, and the USSR's Academy of Science's Institute of State and Law, had in mind this very purpose. Unfortunately, their combined effort has produced an uneven product. The twelve essays are grouped under the three quite grand titles: "Legal Theory and Legal System," "International and Comparative Law," and "Comparative Law and National Systems of Law." The three essays in the first part, which constitutes nearly one-quarter of the book, briefly trace the origins of socialist law (Kudriavtsev's "Soviet Legal System: Trends of Development"), discuss the British version of what we Americans recognize as social science falling somewhere between sociology and critical legal studies (Cotterrell's "Sociology of Law in the United Kingdom"), and consider the idea of socialist legality (Smirnov's "Law, Culture, Politics: Theoretical Aspects").

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6. Pustogarov, *Law and Politics: National and International Aspects*, in *COMPARATIVE LAW*, *supra* note 1, at 57.

7. *Id.*

8. The five are: *COMPARATIVE LEGAL TRADITIONS*, *supra* note 4; J. BARTON, J. GIBBS, V. LI & J. MERRYMAN, *LAW IN RADICALLY DIFFERENT CULTURES* (1983); R. SCHLESINGER, *COMPARATIVE LAW: CASES, TEXT, MATERIALS* (1980) [hereinafter cited as *SCHLESINGER, COMPARATIVE LAW*]; J. MERRYMAN & D. CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* (1978); and A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* (1977).

9. *SCHLESINGER, COMPARATIVE LAW*, *supra* note 8. This casebook is taught in 29 American law schools. The next most frequently used casebook in the comparative law course is *COMPARATIVE LEGAL TRADITIONS*. It is taught in 19 law schools in the United States.

10. Tumanov, *On Comparing Various Types of Legal Systems*, in *COMPARATIVE LAW*, *supra* note 1, at 76.

These essays seem to be full enough descriptions, if pedantic ones at times, of their subject matter.

The next section, of exactly the same length as the first, is three essays, two by Soviets, on international law. These seem out of context and therefore out of place both with the theme of the book announced by its title and with the other essays. This is especially true of Kasian's article on the Helsinki Final Act.

The last section makes up slightly more than half the volume. It contains essays ranging from interesting to provocative and redeems the reader who has ploughed patiently through some of the earlier deep and sticky furrows. Tumanov's essay describes the two scholarly tools of the comparativist, microcomparison or the narrow study of a specific legal problem by reference to how other legal systems have addressed it, and macrocomparison or the study of the whole of legal systems. One occasionally stumbles, however, as over the term "contrastive comparison." Other essays here describe aspects of the writer's own legal system without comparative inquiries: Topornin's treatment of the 1977 Brezhnev Constitution, Rideout's historical review of English labor law, Hepple's fascinating piece on English tort law, and Freeman's essay on English family law. Professor Rudden's article appears in this section.

The twenty dollar purchase price for *Comparative Law and Legal System* is well spent if only for Rudden's article on 800 years of comparative law practices in England. It is a gem.

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## World Politics and International Law

By Francis Anthony Boyle; Duke University Press, Durham, North Carolina, 1985, pp. xi, 366, \$14.75.

*World Politics and International Law* is a significant contribution to the international law literature. It spurns the specialization which has afflicted recent international legal studies, engaging in a general and wide-ranging analysis of the role of international law in international relations in general, and the formation and conduct of U.S. foreign policy in particular.

The author, professor of law at the University of Illinois College of Law, is both a lawyer and political scientist. Professor Boyle therefore sets forth in an effort to construct a functionalist analysis of the relationship between

international law and international political science, in order to reconcile the hitherto irreconcilable disciplines.

Professor Boyle has undertaken an ambitious agenda in *World Politics and International Law*. His inspiration for this challenging undertaking was the late Hans Morgenthau, author of *Politics Among Nations: The Struggle for Power and Peace*, and the founder of the modern doctrine of power politics. Professor Boyle recounts a remarkable transformation by Morgenthau, late in his career, in which Morgenthau, the exponent of political realism, espouses international law and international organizations as the only possible solution for mankind in a nuclear world.<sup>1</sup>

Professor Boyle attributes responsibility to Morgenthau for the common viewpoint among political scientists and the practitioners of "Machiavellian power politics" that international law is irrelevant to foreign policy and the conduct of diplomacy. He seeks to refute this viewpoint and demonstrate the relevance of international law in three ways, in each of the three parts of *World Politics and International Law*.

The focus of Part One is largely historical. It examines the school of international legal positivism which flourished in the early decades of the twentieth century and contributed both to the codification of international law and the establishment of such institutions as the Permanent Court of Arbitration, the Permanent Court of International Justice and the League of Nations. Boyle believes that the legal positivist approach has been unfairly portrayed as a "phantasmagorical legal-moralist straw man"<sup>2</sup> responsible for the naive moralism of Woodrow Wilson, the Kellogg-Briand Pact and the other idealistic excesses of the interwar period. Instead, Professor Boyle contends, the international legal positivist approach was a carefully-constructed and prudent program for the establishment of international law and international organizations. Indeed, he even asserts that legal positivism might have prevented the outbreak of World War I:

The historical record will substantiate the proposition that with just a little more support from a few obstreperous actors at key moments in time, the elements of the pre-World War I American legal positivist war prevention program for world politics could have fallen into place soon enough to create a reformed structure of international relations in which conditions propitious for the outbreak of a general systemic war in Europe could have been substantially ameliorated.<sup>3</sup>

Part Two of *World Politics and International Law* is an analysis of the international legal process in the Entebbe crisis of 1976 and its aftermath. Professor Boyle goes well beyond questions of whether the rescue raid by

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1. Boyle, *WORLD POLITICS AND INTERNATIONAL LAW*, at 70-73, where the author describes what he terms Morgenthau's "volte-face" before a Harvard foreign policy seminar.

2. *Id.* at 17.

3. *Id.* at 43.

Israeli commandos was legal under international law.<sup>4</sup> He illustrates five functions of international law by describing the sequence of events following Entebbe. These five functions are: (1) definition of applicable standards of international behavior, (2) service as a component of crisis management decision-making, (3) adjudication of international disputes by the U.N. Security Council, (4) resolution of international disputes by the U.N. Security Council, and (5) redefinition of international behavioral standards following resolution of the crisis.

Professor Boyle derives from his analysis of the Entebbe crisis a set of quite detailed theoretical propositions concerning these five functions of international law and concludes that these theoretical propositions could allow the construction of a general model for the role of international law and organizations in time of crisis. Such a general model could, in turn, serve as the basis for predictive hypotheses and prescriptive recommendations.

Part Three of *World Politics and International Law* is the longest but the weakest section of the book. Even the author of the foreword, Professor Louis Sohn, acknowledges that "This part is less analytical and more prescriptive."<sup>5</sup> A reviewer in *Foreign Affairs* was less charitable, observing that "In a lengthy critique of U.S. foreign policy on this theme [the importance of international law and organizations] he makes some telling points, but also others that are overblown and even approach the ridiculous."<sup>6</sup> Such criticism is perhaps unfair, but Part Three does lack the clear analytic focus and theme of Parts One and Two.

The stated purpose of Part Three is to articulate a new philosophy for American foreign policy, one that is based on adherence to the rules of international law. This philosophical restatement is accompanied by one quite useful practical suggestion, that the Attorney General be appointed a permanent member of the National Security Council.<sup>7</sup> Although individual attorneys general, such as Robert Kennedy and Edwin Meese, have been involved in national security decision-making, this involvement was due to their personal relationships with the President, not to any institutional role. The existing bureaucratic mechanism for legal input into the foreign policy-making process, the State Department Office of the Legal Adviser, rarely exercises significant influence over foreign policy decision-making.

Part Three then examines a series of recent foreign policy crises, ranging from the Iranian hostages crisis to the alleged responsibility of the Carter Administration for the death of detente, the efforts to restore Persian Gulf

4. However, for a fairly convincing argument that the rescue raid was a justifiable act of retorsion under international law, see Sheehan, *The Entebbe Raid*, 1 FLETCHER F. 135 (1977).

5. Boyle, *WORLD POLITICS AND INTERNATIONAL LAW*, *supra* note 1, at x.

6. Review, Boyle, *World Politics and International Law*, 64 FOREIGN AFF. 172 (Fall 1985).

7. Boyle, *WORLD POLITICS AND INTERNATIONAL LAW*, *supra* note 1, at 202.

security in the early 1980s, the Israeli invasion of Lebanon in 1982, the impasse in nuclear arms-control negotiations, and "international lawlessness in the Caribbean Basin." Part Three therefore provides a legal *tour de force* through several of the significant international political events of the late 1970s and the early 1980s.

Much of Part Three is devoted to demonstrating that the U.S. government should discard Machiavellian power politics into the "dustbin of history." Boyle thus assumes that recent U.S. foreign policy failures are attributable to what he describes as the "rotting morass of Machiavellian power politics that has engulfed the American foreign policy decision-making establishment."<sup>8</sup> However, particularly during the Carter Administration, an equally plausible explanation for U.S. foreign policy failures is that American policy-makers were not Machiavellian enough in the crisis management decision-making process.

Boyle's critique of recent U.S. foreign policy in Part Three begins with the statement "Power politics as a philosophy of international relations is dead."<sup>9</sup> It concludes that "The present danger is Machiavellian power politics. The only antidote is international law and organizations."<sup>10</sup> While one could question how a dead philosophy of international relations remains a present danger, a more interesting aspect of Part Three is Boyle's application of rules of international law to foreign policy decision making.

It is certainly possible to differ with several of Professor Boyle's conclusions in Part Three on the status under international law of particular foreign policies. The conclusion that the U.S. must assume full legal responsibility for the Sabra and Shatila massacres by virtue of its permission for Israeli use of American weapons,<sup>11</sup> lacks legal or logical support. It is also possible to object to the stridently asymmetrical ideological tone taken in Part Three. For example, while the U.S. invasion of Grenada<sup>12</sup> and the Israeli invasion of Lebanon<sup>13</sup> are both vehemently denounced as illegal, no mention is made of the illegality of the Soviet invasion of Afghanistan. Professor Boyle's discussion of the Soviet invasion of Afghanistan virtually goes so far as to blame allegedly bellicose U.S. policies for providing the Soviet Union with every incentive for and no deterrent against the invasion of Afghanistan.<sup>14</sup>

Nevertheless, Professor Boyle does argue forcefully throughout Part Three for the rule of law in international relations, consistently referring to the U.N. Charter, the Geneva Conventions and other applicable rules of

8. *Id.* at 57.

9. *Id.* at 171.

10. *Id.* at 295.

11. *Id.* at 235.

12. *Id.* at 272.

13. *Id.* at 231.

14. *Id.* at 213.

international law. Despite its shortcomings, Part Three therefore does serve as an important reminder of the significance of international law and organizations in the formation and conduct of foreign policy. This reminder assumes added importance under an Administration which cannot be accused of an unduly reverential respect for international law and organizations. The Reagan Administration's repudiation of the Law of the Sea Treaty, withdrawal from UNESCO, and withdrawal from the compulsory jurisdiction of the International Court of Justice are the antithesis of what Professor Boyle would view as a foreign policy conducted in accordance with international law and organizations.

In summary, *World Politics and International Law* is a provocative and interesting book. Its occasional rhetorical excesses and flights of hyperbole are usually balanced by stimulating and well-researched analysis. Professor Boyle may not have successfully reconciled the advocates of international law with the practitioners of power politics, but he has succeeded in making a cogent argument for the relevance of international law in the conduct of diplomacy and foreign policy.

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## **American Hostages in Iran, The Conduct of a Crisis**

By the Council on Foreign Relations, Yale University Press, New Haven & London, 1985, pp. 443, \$25.

For four hundred and forty-four days from November 1979 to Inaugural Day 1981, Americans and the world were transfixed by the unlawful seizure of the U.S. Embassy in Tehran and the detention of diplomatic personnel as hostages. No similar event has occurred in recent history. International law, the recognized principles of diplomatic immunity, and the obligation of host states to protect foreign diplomats suddenly became meaningless. The American government seemed helpless.

*American Hostages in Iran* is a collection of essays by several of the principal U.S. Governmental and private sector participants. It is a fascinating, insightful account of the difficulties faced, the options pursued, and the alternatives rejected during the tedious quest for a peaceful solution. The Council on Foreign Relations deserves praise for sponsoring these essays, thus enabling us to appraise the forces at work and to appreciate the intelligent dedication of those who directed our struggle.

While most of the essays describe in detail the unfolding events, the introduction by Warren Christopher is the most provocative. The former Deputy Secretary of State, in reviewing the crisis, raises these critical questions: how can government power be used effectively; what are the effective limits of that power; what is the role of the international community; how effective is international law; are there really military options; and how useful are economic sanctions? Christopher makes it clear that there are no facile answers—only dubious options with unpredictable consequences. The other essays present the circumstances involved in a manner that permits us to reach our own conclusions.

Harold Saunders, at the time an Assistant Secretary of State and head of the Iran Working Group, emphasizes that Americans must learn to cope with societies motivated by distinctly different world views, whose political and decision making processes are unfamiliar or incoherent to us, and whose social and religious conditions make it unlikely they will respond to Western pressures. Senator Abraham Ribicoff, in a concluding essay, summarizes that in a future, similar crisis: "it will be wrong and indeed dangerous to assume that the other actors are motivated by the kinds of forces that shape American behavior."

The book is a critical examination, sometimes in trying detail, of the developing events in the crisis. More importantly, it brings into sharp focus some of the critical issues of our contemporary times. Outside the realm of partisan debate, the essays give voice to the complex, frustrating problems inherent in reconciling states whose world views are antithetical. They focus on the practical limitations of U.S. military and economic power, and the settled but seemingly unenforceable principles of international law. Finally, the essays speculate on whether other approaches might have been more effective.

At the time of the hostage taking, communicating with the new Iranian regime seemed almost impossible. The Governmental hierarchy of the Ayatollah Khomeini was ephemeral. Government officials seemed to depart shortly after retaining some measure of authority. The Revolutionary Council exercised power in a way unintelligible to outsiders, and Khomeini was inscrutable. Iran, for months, showed no apparent interest in resolving the situation. It was a crisis for us, but for them it was another step toward consolidating revolutionary power and installing an Islamic state. John Hoffman, Jr., of Shearman & Sterling, describes attempts to open private communications, and other authors detail various direct and circuitous routes followed to establish meaningful discussions between the two countries. The U.S. effort to negotiate was relentless.

As Saunders points out, President Carter's objective was to convince the leaders of Iran's revolution that it was in their interests to release the hostages, "but to do it in a way Americans would see as honorable." The

pressures on the Administration were immense. Several essays delineate the difficulties involved in "balancing" the humane concern for the safety of American citizens against the imperative to present a forceful national "image." Despite the Administration's agonizing efforts to secure quickly the safe and honorable release of our diplomats, Iran remained intractable.

The Administration developed a two tiered approach toward Iran. Massive public and private communication efforts were pursued to open a dialog, along with a policy of economic strangulation and international isolation. United Nations' mediation assistance was secured, although the Soviet Union vetoed economic sanctions. We froze all Iranian bank accounts and assets, and generally blockaded the economy of Iran.

Some of the essays question whether these economic sanctions were effective. No answer is provided and we probably will never know definitively. We do know, however, that the breakdown of economic relations, the freezing of sizable bank accounts, and the cooperation given to us by other nations, had their effects. These pressures, coupled with the turmoil inside Iran and the unrelated Iranian war with Iraq, imposed forces that so altered the dynamics of the situation that they may well have facilitated the ultimate resolution of the crisis.

Gary Sick, then a National Security Council staff member for Iran, discusses our military options and restraints. Regarding the unsuccessful attempt to rescue the hostages, Sick notes that "historically, American military forces have not demonstrated a capacity to plan and conduct successful raids." At the same time, he points out that the human judgments made by the military personnel conducting the raid were decisively influenced by technological uncertainty. This uncertainty led to the abandonment of the mission in the deserts of Iran when equipment warning lights on some helicopters indicated possible malfunctions. Sick feels that the "odds would have been altered slightly in favor of success" had the pilots chosen to ignore the malfunction warnings.

The failure of the rescue mission made a lasting impact on those conducting the negotiations, and cast a shadow on the wisdom of the Administration's decisions. It ruled out further military actions. Sick questions the existing relationship between the President and his military advisors. Unlike President Kennedy in the Cuban missile crisis and President Johnson in Vietnam, President Carter left the details of the mission to the military. Sick suggests that a President should never rely entirely on military counsel since institutional pressures always inhibit the military from acknowledging their limited abilities to perform certain missions. Thus, while military options may be considered viable, this essay makes clear that practical, effective use of military power in such situations is rarely possible and must be considered with extreme skepticism.

Lawyers will be particularly interested in the essay by Oscar Schachter on

the relevance of international law to the American approaches to the situation. Schachter discusses a myriad of legal issues including the right to use force in response to a seizure, the Conventions pertinent to diplomatic personnel, the economic and non-military sanctions, and the validity of the eventual accords.

Various essays describe how other states viewed Iran's violation of international law and how those states, individually and collectively through the United Nations, came to our aid. Iran was viewed by the community of nations as an egregious violator of settled international law principles. As the crisis developed, Third World and other smaller nations recognized their own stake in the enforcement of these principles. In the United Nations, this recognition helped to isolate Iran. The widely respected decision of the International Court of Justice, while ignored by Iran, increased disapproval of Iranian actions. Algeria in particular, but not solely, entered the negotiating arena to offer assistance in finding a workable solution. Had the nations of the world not felt themselves offended by this flaunting of universally accepted customary law, the isolation of Iran undoubtedly would not have occurred. Iran began to recognize its own interest in ending the crisis in part because of the international pressure.

The book raises the intriguing domestic question of whether this crisis could have been handled in a way less politically destructive to President Carter. It has been argued that his Administration was consumed by these events and that U.S. foreign policy in general was frozen. It is suggested that future crises be assigned to a special working group so that the President, along with his principal advisors, could continue to focus on other global concerns. However, at the time, the magnitude of this unique situation, the reaction of the American people, and the constant media attention may have foreclosed other, less intense administrative approaches.

*American Hostages in Iran* is an insightful analysis of a trying event. Moreover, the reader is provided with profound implications for future policies and actions.

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