

BOOK REVIEWS

MIGA and Foreign Investment

By Ibrahim F. I. Shihata. The Netherlands: Martinus Nijhoff Publishers, 1988, pp. 540, \$152.00.

Ibrahim F. I. Shihata should be recognized as the father of MIGA, the Multilateral Investment Guarantee Agency. Certainly Mr. Shihata's treatise, entitled *MIGA and Foreign Investment*, will be recognized as the definitive work on the creation, workings, and aspirations of this newest addition to the World Bank system.

MIGA was conceived, inter alia, to encourage the volume of investment flows by removing international barriers thereto and by assisting the development process in the underdeveloped countries. It meets the need for the provision insurance guarantees against political risk for investors in Third World countries. In that respect it resembles OPIC, the Overseas Private Investment Corporation, in its concepts and scope. As it has worldwide application and availability, however, it is a much more comprehensive and international undertaking.

MIGA's flexibility is significant. A deliberate effort has been made to prevent bureaucratic rigidity and to encourage experimentation and innovation. The MIGA Board of Directors has considerable authority to grant exceptions and to chart new courses.

MIGA insures against noncommercial risk, specifically, (a) currency transfer risk, (b) risk of expropriation and similar measures, (c) breach of contract, (d) war and civil disturbance, and (d) other noncommercial risk—which may extend to any other noncommercial risk other than devaluation or depreciation of currency.

Dr. Shihata sets forth in detail the steps to be taken to obtain MIGA coverage. The procedures are explained in simple but comprehensive

language. The book is not meant to be exciting reading, but it is certainly not tedious or dull. Although technically detailed, the text flows in a manner that is easy for an experienced practitioner or international business person to comprehend.

With great thoroughness, the author traces MIGA from its conception to its becoming a fully fledged international organization. The first chapters present a step-by-step analysis of the very complicated processes by which MIGA came into being. It is, as Dr. Shihata describes, "A Case Study of the Preparation and Acceptance of a Multilateral Financial Institution." The study of the feasibility of a MIGA actually began as early as 1962, but it was not until 1988 that MIGA came into being. The text of the successive draft articles and staff studies, the first of which was produced in 1966, are reproduced and analyzed in considerable detail.

The most interesting feature of the first part of the book is chapter two, "The Making of MIGA—A Personal Account." This chapter outlines the procedures, bureaucratic maneuvers and personal efforts by Dr. Shihata and others that brought MIGA into being. It is a fascinating case study on how an international organization is born. For students of history, particularly of multilateral diplomacy, the making of MIGA is an intriguing story and we are fortunate that so gifted a writer as Dr. Shihata has put it in print.

Part two is the most important section for the practitioner of international business, whether lawyer or business person. In this section the details of the operations of the new organization are laid out. In order to understand how to utilize the very broad opportunities that MIGA offers, it is essential to read and understand these requirements.

Part three of the book deals with the policy and institutional issues of MIGA. It details the standards that must be met for a foreign investment to be eligible for coverage. For example, the investment must be economically sound and contribute to the development of the host country. MIGA is specific in drawing lines between commercial and noncommercial investments. Its intention is to prevent host countries from using MIGA to guarantee investments primarily for the benefit of the state, such as supplying the military. Rather, MIGA is to be utilized solely to promote economic development. Dr. Shihata then explains the institutional structure of the new multilateral agency, its organization and voting structures, and the working of the MIGA Board.

Settlement procedures are the final section of this exhaustive work. These provisions are significant to any investor who must know at the outset what to expect should a dispute arise. As MIGA is so new, the settlement mechanism will not likely be tested in the immediate future; however, it is essential to understand the ways in which they will function.

In this age of retreat from state ownership and the encouragement of private investment, MIGA can and should play a vital role in promoting private investment in Third World countries. This role can be particularly important to

the more unstable areas, such as Africa, where private investment has declined markedly over the past several years.

In summary, *MIGA and Foreign Investment* is an essential book for the practitioner of international business law and for the international investor. It should be the authoritative text for years to come.

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International Law

By N.A. Maryan Green. London: Pitman Publishing, 3d ed. 1987, pp. xviii, 333, £25.00.

N.A. Maryan Green's *International Law* is designed as a concise survey of the whole body of today's international law. The author examines the nature and sources of international law, describes the characteristics of the different subjects of international law, and discusses the positions of individual and state organs. Readers are offered chapters on the law of treaties, jurisdictional problems, state sovereignty, on seas and waterways, and on air space, outer space, and telecommunications. The last three chapters deal with responsibility, pacific settlement of disputes and—newly in the third edition¹—with war and the use of force.

The author's intention is to give a general overview on the most important rules of contemporary international law. Especially with regard to readers having no prior knowledge of the matter, his exposition does not aim at completeness in detail, but rather at outlining the very structures of international law. The book therefore contains, for example, no systematic description of the law of the United Nations or of any other international organization, but underlines the common denominators of the law of all international organizations. Green, who is a member of the English Bar as well as of the French Bar and who looks back on several years of practice as Secretary of the Council on Europe, approaches international law from a European point of view, yet managing to avoid a mere description of the British practice. His presentation is illustrated by a rich choice of cases and other material reflecting worldwide State practice. From the beginning, the reader's attention is drawn to the eminent relevancy of case law and diplomatic incidents for the development of international law: "It cannot be too often stated that state practice is to be looked for primarily in the acts of

1. Until this edition, the book appeared under the title *Law of Peace*.

states, and only incidentally in their statements, whether collective or otherwise." (Preface at xvi)

The author succeeds in describing the rules and principles of international law in very clear and precise language. The incorporation of several examples of very recent state practice enlivens the presentation and demonstrates the importance of international law in world events. The last chapter includes a thorough analysis of the United States–Nicaragua case. Green disagrees with the majority judgment of the International Court of Justice, favoring the dissenting opinion of Judge Jennings. In this context he also criticizes the traditional understanding of self-defense (in Green's view the right of self-defense is "total," which means that the measures taken need not to be "necessary" nor "proportional") and of reprisals (armed reprisals may be justified). In these cases as in others, Green explicitly declares his dissenting personal opinion as such.

The book contains a rich table of cases and diplomatic incidents, a table of treaties, and a very detailed index, whereas references to other authors are rare. There are some twenty footnotes as well as a scant bibliography² containing only nine titles dating from the seventies and eighties. With regard to the small volume of the book, limitations as to the contents are inevitable. In the preface, the author sets apart subjects as international economic law, international criminal law, disarmament law, and the Libyan oil cases. Pollution, nationalization, the act of state doctrine, and other problems are only mentioned without being discussed. Some chapters appear to be very short, particularly the one dealing with the law of treaties (16 pages). Finally, in a book mainly designed for university students, one misses a chapter describing the history of international law.

Notwithstanding these limitations, it is exactly the conciseness and accuracy of Green's *International Law* that makes the book valuable reading. To illustrate a subject as comprehensive, complex, and as rapidly developing as international law in a small volume is a very difficult undertaking. Green's work perfectly suits its intention to produce a good survey of contemporary international law.

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Foreign Sales Corporation

By Walter H. Diamond. Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1987, pp. xxi, 358, \$60.00.

2. Cover information describes it as "comprehensive"; the author himself describes it as "necessarily selective."

Walter H. Diamond's *Foreign Sales Corporation* introduces the complicated and complex system of taxation for promoting exports by American companies. The subject of the book is the final Internal Revenue Service (IRS) Income Tax Regulations and host government incentives relating to American corporations involved in foreign trade. The well-rounded presentation from the historical development up to the recently promulgated Regulations reflects the author's high qualifications. He is an expert of foreign taxation and a United Nations Free Trade Zone and Tax Treaty Advisor.

The book consists of a short, yet informative introduction by the author and the two final drafts of the new IRS Regulations. Eleven appendices supplement the textual part. In his introduction (pp. vii–xxi), the author presents the historical development of Foreign Sales Corporation (FSC). He throws some light on the predecessor of FSC, the so-called Domestic International Sales Corporation (DISC). Under the Revenue Act of 1971, a United States corporation could elect to operate as a DISC in order to defer the payment of United States taxation of 50 percent of its net earnings from exports until such time as they were distributed to the DISC's shareholders. The Tax Equity and Fiscal Responsibility Act of 1982 reduced the tax benefit from a DISC by 15 percent. In order to obtain the DISC tax benefits, a corporation had to meet certain conditions. To be eligible, it had, for instance, to be organized in the United States; at least 95 percent of its receipts and assets had to be qualified export receipts and assets; and a DISC could have only one class of capital stock. Under the Tax Reform Act of 1984, which became effective on January 1, 1985, Congress imposed an interest charge on reduced DISC tax deferral and, in addition, established FSCs as a primary vehicle to promote exports. This was Congress's response to contentions by some of the signatories of the General Agreement on Tariffs and Trade (GATT) that the existing tax deferral for DISCs was an illegal export subsidy, violating GATT rules because of the American Government's failure to charge interest on the deferred taxes.

The proper application of sections 921–927 of the Internal Revenue Code as enacted in 1984 is dependent upon the IRS's detailed specifications of the manner in which the requirements of the statute will be administered. Because of the need for immediate guidance in this regard, the Internal Revenue Service issued temporary regulations without notice and public comment procedure on December 12, 1984, and proposed amendments to the Income Tax Regulations (26 C.F.R. pt. 1). After a public hearing held on May 13, 1985, the IRS promulgated the final regulations on February 19, 1987 (52 Fed. Reg. 5084), and on March 3, 1987 (52 Fed. Reg. 6468). The temporary regulations differ only minimally from the final regulations. Under the new regulations, DISC corporations can continue as "Interest Charge DISCs" or elect to qualify as "FSCs" or, in the case of small export businesses, as "small FSCs."

To obtain the FSC status, a company needs to meet special requirements, such as foreign presence, foreign management, foreign trade income, and arm's

length pricing methods with its related suppliers. Unlike DISCs, FSCs need to be incorporated outside the United States under the law of a country or U.S. possession granting FSCs exemptions from corporation and franchise tax on their foreign trade income. This procedure is necessary to avoid a compensation of the tax incentives for the related corporations in the United States. Under the FSC legislation, the tax-exempt income in the United States will be 32 percent or 30 percent of the foreign trade income earned by the FSC at arm's length pricing or 1.83 percent of gross sales up to 23 percent of the combined taxable income, whichever is greater.

The Virgin Islands, Barbados, and Jamaica are the most favorable tax havens for establishing FSCs. By 1987, nearly 4,000 United States exporters had applied to the Virgin Islands to become FSCs. This number represented about 82 percent of the 4,900 export firms that have incorporated FSCs throughout the world. Barbados and Jamaica are reported to have established about 300 and 200 FSCs respectively since their tax incentive laws were approved, while the remaining 400 are scattered throughout the world.

Following the introduction, the book contains the two final drafts (pp. 1–196 and pp. 197–233) of the final IRS Regulations of 1987. In the numerous appendices, the author produces the pertinent foreign sales corporation laws of the U.S. Virgin Islands (pp. 235–76), Barbados (pp. 277–81) and Jamaica (pp. 283–88). Interesting are the earnings comparison table (p. 345) regarding different pricing methods, an Application Form to Elect as an FSC (pp. 347–48), and the State Treatments of DISCs with a Laws and Decisions chart (pp. 349–53). The model agreement (pp. 355–58) between an FSC and a management servicing company as subsidiary to handle FSC operations abroad will also be valuable for lawyers.

The book is a salutary effort to familiarize lawyers with FSCs and to provide the reader with the relevant legal provisions, application forms, and model agreement. While the book's introduction is merely descriptive, it is a good starting point for every lawyer dealing with FSCs.

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Product Liability Actions by Foreign Plaintiffs in the United States

By Warren Freedman. Deventer, Antwerp, London, Frankfurt, Boston, New York: Kluwer Law and Taxation Publishers 1988, pp. 292, \$67.50.

Products liability is today recognized as having important international dimensions, for there literally are not physical boundaries that a given consumer product may not cross during the course of its manufacture, marketing, distribution and ultimate use by the consumer. (p. 1)

This is the opening sentence of Mr. Freedman's excellent short treatise and sets the framework for his detailed analysis of why, whether, and how persons who are injured abroad by products manufactured either in the United States or in foreign countries may sue the defendants (either U.S. or foreign companies or governmental bodies) in the United States.

Mr. Freedman, who is also the author of a two-volume treatise entitled *International Products Liability* (Kluwer Law Books 1987), starts his discussion by quoting from *Piper Aircraft Co. v. Reyno*,¹ where the Supreme Court described some of the reasons why foreign plaintiffs find it so attractive to bring their product liability actions in the United States:

First, all but 6 of the 50 American states . . . offer strict liability. . . . Rules roughly equivalent to American strict liability are effective in France, Belgium, and Luxembourg. . . . However, strict liability remains primarily an American innovation. Second, the tort plaintiff may choose, at least potentially, from among 50 jurisdictions if he decides to file suit in the United States. Each of these jurisdictions applies its own set of malleable choice-of-law rules. Third, jury trials are almost always available in the United States, while they are never provided in civil law jurisdictions. . . . Fourth, unlike most foreign jurisdictions, American courts allow contingent attorney's fees and do not tax losing parties with their opponent's fees. . . . Fifth, discovery is more extensive in America than in foreign courts.²

Additional reasons cited by the author are the high monetary verdicts awarded by American juries, the availability of punitive damages and the fact that survival and wrongful death statutes in virtually all states recognize elements of damages, including pain and suffering, far beyond those recognized in many foreign jurisdictions.

In a book filled with citations and discussions of pertinent cases (including decisions up to the latter part of 1987), the author lays out a road map for a foreign plaintiff, telling him how to commence an action in the United States and even furnishing sample complaints, how to establish jurisdiction, how to deal with such defenses as forum non conveniens and sovereign immunity, and how to conduct pretrial discovery and prepare for trial. The book also has chapters dealing with the recognition and enforcement of foreign judgments in the United States, arbitration, and the availability to foreign plaintiffs of claims under RICO.

Mr. Freedman's book appears to be addressed in part to foreign readers and contains rather elementary introductions to the American court system and American civil procedure. While an American lawyer may wish to skip some of

1. 454 U.S. 235 (1981).

2. *Id.* at 252 n.18 (citations omitted).

these introductory portions, the rest of the book will be of considerable value to any practitioner who is involved in the prosecution or defense of tort claims by foreign plaintiffs in the United States.

There are no jurisdictional barriers to suits by foreign individuals against American companies and the initial battle usually centers on a defense of *forum non conveniens*. An American defendant will argue tenaciously that its own home state is an "inconvenient" forum because witnesses and documents are located abroad. While at first blush it may seem odd for an American defendant to insist that it would be inconvenient to defend an action in its home state, the real issue, of course, is not convenience but a desire to foreclose the foreign plaintiff from gaining access to all of the benefits that have turned the United States into an El Dorado or promised land for foreign plaintiffs: the ability to retain attorneys who will take the case on a contingent basis, the right to claim an unlimited amount of damages,³ the availability of strict liability or relatively easy standards of proving negligence, the right to a jury trial, the likelihood of high jury verdicts, and the possibility of punitive damages.

A classic illustration of a defendant's efforts to plead *forum non conveniens* is the *Bhopal* case, where Union Carbide was successful in having the claims of Indian plaintiffs transferred from the federal court in New York to the courts of India. Mr. Freedman discusses the *Bhopal* case at some length and even includes the full text of Judge Keenan's May 12, 1986, decision granting Union Carbide's *forum non conveniens* motion. Although the initial interim decisions of the Indian courts were unfavorable to Union Carbide, the case was recently settled for an amount (\$470 million) that was probably substantially lower than it would have been had the case proceeded in the United States.

While Mr. Freedman's book discusses all types of product liability actions, it focuses particularly on cases involving airplane crashes and pharmaceuticals, which seem to make up a significant percentage of actions brought by foreign plaintiffs in the United States.

The aviation cases involve actions against American airplane manufacturers seeking to blame a crash abroad on faulty design or fabrication. In *Piper Aircraft Co. v. Reyno*⁴ the Supreme Court decided that the claims of Scottish plaintiffs arising out of a crash in Scotland should be resolved by Scottish and not American courts. The Court rejected the argument that because foreign substantive or procedural law might be less favorable to the foreign plaintiffs than American law, they should be allowed to pursue their claims in the United States, saying:

3. In many foreign countries, legal fees and court costs are based on the stated amount of the claim. The higher the claim, the higher the legal fees and court costs. Since the losing party is required to pay the court costs (which are by no means minimal) and the legal fees of his own attorney as well as the legal fees of the prevailing party, there is a strong incentive not to assert high claims.

4. 454 U.S. 235 (1981).

[T]he American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.⁵

However, the Court left a loophole; it added that "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all,"⁶ then a court should take this factor into account, along with other factors, in deciding the forum non conveniens motion.⁷

In a subsequent case involving a crash in India, the court refused to dismiss a suit by Indian plaintiffs against Boeing arising out of the crash in India on the ground that India did not provide an adequate alternative forum.⁸ In a case against Boeing by American and Portuguese plaintiffs arising out of a crash in Portugal, the Court of Appeals for the Seventh Circuit reversed a dismissal for forum non conveniens because the district court had failed to consider the unavailability of contingency fees, the taxation of losing parties, and restrictive discovery procedures in Portugal.⁹ The court expressed particular concern over the financial burden imposed on the American plaintiffs in an action claiming alleged wrongdoing by American manufacturers.

The pharmaceutical cases arise in several contexts:

- (1) A drug manufactured in the United States and distributed abroad.
- (2) A drug manufactured and distributed abroad by a foreign subsidiary of an American corporation.
- (3) A drug manufactured and distributed abroad by a foreign corporation.

The author, who makes no attempt to conceal his own bias in favor of granting foreign plaintiffs the right to bring their claims in the United States in order to obtain the benefits of the American legal system, seems to be particularly enamored of a decision by a lower court New York judge, who held that British plaintiffs should be allowed to sue an American defendant, whose English subsidiary had manufactured and distributed oral contraceptive products in England.¹⁰ In a lengthy, well-reasoned opinion, the New York judge explicitly rejected the reasoning of the U.S. Supreme Court in *Piper Aircraft Co. v. Reyno* and concluded that the alleged tortious conduct derived from defendant's efforts to dump unsafe products onto a specific foreign market and that "an injured person should be able to sue the primary tortfeasor—the decision-maker—on its home turf under home-turf law."¹¹ The judge expressed sympathy for the plaintiffs who, if relegated to suing in Great Britain, would be denied a trial by

5. *Id.* at 252.

6. *Id.* at 254.

7. For an enumeration of the other factors, see *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947).

8. *In re Air Crash Near Bombay, India*, 531 F. Supp. 1175 (M.D. Wash. 1982).

9. *Macedo v. Boeing Co.*, 693 F.2d 683 (7th Cir. 1982).

10. *Bewers v. American Home Prods. Corp.*, 459 N.Y.S.2d 666 (N.Y. Sup. Ct. 1982), *rev'd*, 472 N.Y.S.2d 637 (N.Y. App. Div.), *aff'd*, 185 N.Y.2d 39 (1984).

11. *Id.* at 675.

jury. In addition, pretrial discovery would be severely curtailed, the possibility of recovering punitive damages would be diminished and the contingency fee representation by counsel would not be permitted. The court concluded that it would be quicker and less expensive to transfer witnesses from abroad than to transfer the lawsuit to England and accordingly denied a motion to dismiss for *forum non conveniens*.

Mr. Freedman expresses his dismay that what he terms the "brilliant analysis" of the New York judge (p. 16) was reversed by the Appellate Division and that the reversal was affirmed by New York's highest court. The author is equally critical of decisions in other states holding that where products were manufactured and sold only abroad, claims should be litigated abroad even if the manufacturers were subsidiaries of U.S. corporations and the ultimate decision-making power rested with the American parent company.

The book also discusses other cases where American courts did retain jurisdiction over actions by foreign plaintiffs who claimed to have been injured by pharmaceuticals manufactured by the U.S. defendant in the United States and thereafter sold abroad.¹²

On the other hand, a German woman, who purchased Thalidomide in Germany and subsequently gave birth in New York to a deformed infant, was held to have no right to bring an action against the German manufacturer in New York, where the latter had no reason to believe that a purchaser would use the product in the United States.¹³

The author urges that it is particularly important to allow foreign plaintiffs to sue multinational corporations (MNCs) in the United States. Without citing any supporting evidence, he charges that "many MNCs dump unsafe products in foreign markets and commit toxic torts and cause hazardous waste" (p. 19) and concludes that such companies can be effectively brought to justice only in the United States.

The book contains a discussion of the EC Directive on Products Liability, which was adopted by the European Community's Council of Ministers in July 1985 and which provides for strict liability in tort. Mr. Freedman notes, however, that EC Member States will be permitted to apply certain variations in national law during a ten-year transitional period. For example, some Member States do not hold manufacturers liable for "development risks," that is, defects in the products that were not discoverable during manufacturing operations in light of the then current scientific, medical, and technical knowledge. Interestingly, the California Su-

12. See, e.g., *Carlenstolpe v. Merck & Co.*, 638 F. Supp. 901 (S.D.N.Y. 1985), *appeal dismissed*, 819 F.2d 33 (2d Cir. 1987); *Hodson v. A.H. Robbins Co.*, 528 F. Supp. 809 (E.D. Va. 1981).

13. *Harvey v. Chemie Gruenthal*, 354 F.2d 428 (2d Cir. 1965), *cert. denied*, 384 U.S. 1001 (1966).

preme Court, in a decision that was too recent to be reported in Mr. Freedman's book, has held that strict liability should not apply to prescription drugs in order to avoid inhibiting the development of new pharmaceutical products, perhaps presaging a new trend in American product liability law.¹⁴

The book contains good discussions of sovereign immunity, the Federal Tort Claims Act, choice of law questions with particular emphasis on the *renvoi* problem, rules of evidence, admiralty law, and arbitration.

There is a comprehensive index which, unfortunately, is not cross-referenced to pages but rather to chapters and sections, making it more time-consuming to locate indexed references. Regrettably, the book follows the increasingly frequent practice of putting citations in notes at the end of each chapter, which requires much page shuffling by the reader and makes it especially difficult to trace a citation in the Table of Cases, which is not keyed to pages or footnotes but only to chapters and sections.

Such technical problems aside, Mr. Freedman's book is a valuable handbook for any practitioner in the field. Although it is to some extent written in the form of a tract (replete with exclamation points to emphasize the author's views) arguing for unlimited access by foreign plaintiffs to United States courts, regardless of the cost to the already overworked American court system, it nevertheless contains a useful compendium and discussion of relevant cases and covers in considerable detail the various issues that may arise in actions by foreign plaintiffs in the United States.

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The Juridical Bay

By Gayl S. Westerman. New York: The Clarendon Press, Oxford University Press, 1987, pp. 290, \$45.00.

It will be recalled that from the traditional common law distinction between certain bays and the sea below low-water on the open coast have flowed significant differences in the treatment of jurisdictional and proprietary issues.¹ In spite of the practical importance and great antiquity of this distinction, the

14. *Brown v. Superior Court*, 751 P.2d 470 (Cal. 1988).

1. See, e.g., *R. v. Keyn*, [1876] 2 Ex. D. 63, 162 (*per Cockburn C.J.*).

term *inter fauces terrae* has acquired "little precision of meaning."² In the colorful words of Justice Hill in the 1926 case of *The "Fagernes"*: "What are bays, gulfs or estuaries *inter fauces terrae*? What is the metaphor, the open mouth of a man or of a crocodile?"³

In a similar fashion international law has for long recognized that waters lying within bays enjoy a more intimate connection with the landmass than those fronting straight and relatively unindented coasts. In consequence the area lying within a bay has been subject to designation as internal waters rather than territorial sea. Yet, as with the common law doctrine, much remained uncertain in the traditional application of this widely accepted principle at the international level. As Lord Blackburn was to remark in the 1877 case of *Direct United States Co. Ltd. v. Anglo-American Telegraph Co. Ltd.* of the position of the law of nations at that time: "[W]e find an universal agreement that harbors, estuaries, and bays landlocked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is 'bay' for this purpose."⁴ Similarly, customary law failed to provide a clear rule on "the maximum length of the closing line across a bay."⁵

In *The Juridical Bay* Westerman outlines, in chapter III, the historical treatment of bays and the search by the international community for a more precise and usable definition. This process culminated in the formulation and inclusion in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone of detailed provisions containing objective criteria and even, unusually, utilizing a mathematical equation. Although the author characterizes article 7—which has been, for reasons which are not made clear, retained in near identical form in the 1982 United Nations Convention on the Law of the Sea (p. 9, n. 19)—as "[w]ell drafted and remarkably unambiguous," (p. viii) she acknowledges that its wording "has not ended but merely narrowed the scope of controversy" (p. 12). The force of this remark is illustrated in chapter IV, which constitutes a textual and contextual analysis of article 7 of 105 pages and accounts for some 40 percent of the total text. This contains a wealth of detail and some lively discussion particularly on the subject of the appropriate treatment of islands pursuant to article 7(3). The writer draws on the records of the International Law Commission and the 1958 Conference, and scholarly works, among other sources. Somewhat curiously, however, Bouchez's *The Regime of Bays in International Law*⁶ does not even find a place in the bibliography.

For the international lawyer, however, it is likely to be the fifty-six pages of chapter V in which Westerman treats United States practice in respect of bays,

2. *Re Attorney-General of Canada and Attorney-General of British Columbia*, 8 D.L.R.4th 161, 202 (Can.) (*per Wilson J.*).

3. 1926 P. 185, 189.

4. [1877] 2 App. Cas. 394, 419.

5. R. CHURCHILL & A. LOWE, *THE LAW OF THE SEA* 33 (2d ed. 1988).

6. L. BOUCHEZ, *THE REGIME OF BAYS IN INTERNATIONAL LAW* (1963).

rather than chapter IV, that will be regarded as the most interesting and the most important contribution of this work. This is particularly so of the judicial practice where one can see article 7 being utilized by judges in a variety of complex geographical situations. This, in turn, stems from the fact that:

[T]he U.S. Supreme Court has held that Article 7 of the Territorial Sea Convention is the best and most workable definition available for defining inland waters such as bays and is, therefore, to be used exclusively for bay delimitation purposes in order that the United States may establish a single coastline under both international and domestic law. (pp. viii-ix) Coverage includes the 1985 Supreme Court decisions in *United States v. Louisiana (Alabama and Mississippi Boundary Case)*⁷ and *United States v. Main et al (Rhode Island and New York Boundary Case)*⁸ and related materials.

It should be noted that this work is, perhaps unfortunately, essentially confined to an examination of the law and practice of bays within the meaning of article 7 and does not purport to deal in significant detail with "historic bays" in spite of their domestic and foreign policy importance to the United States. Nor, more justifiably, does Westerman subject to extensive analysis the highly subjective straight baseline system accepted by the International Court of Justice in the 1951 *Anglo-Norwegian Fisheries Case*⁹ and incorporated in the 1958 Convention as article 4. The author acknowledges that this system has been widely abused and that many claims "would seem to have been asserted in order to enclose some coastal indentations which on the face of it would not appear to meet the criteria of article 7. . . ." (p. 186 n.17) This has resulted in what Westerman feels is only the "temporary eclipse" of the article 7 system in the international practice of States. (p. ix) As she has explained:

States have made extensive and arguably impermissible use of Article 4 to draw straight baselines in situations never envisioned by convention drafters. As these expansive claims are tested by courts and arbitral tribunals in the next several years, it seems inevitable that many extravagant baselines will be disallowed, and the regime mandated for bay delimitation under Article 7 will once again become the authoritative basis for the enclosure of coastal indentations. (p. ix)

Given the continued unpopularity of adjudicative dispute settlement at the international level, well illustrated by the failure of the large majority of States to accept the compulsory jurisdiction of the World Court, one can but wonder at the author's optimism. Even if, as seems likely, such sentiment proves to be misplaced, that would not significantly affect the strong academic and practical case for a study of the juridical bay. Thus, criticism of this work must flow, if at all, not from the fact that it was written but from the manner and form of its execution.

Unfortunately such criticism of this book can, and in one area in particular, must be made. This relates to the legal status of article 7 within the existing

7. 470 U.S. 93 (1985).

8. 469 U.S. 504 (1985).

9. (U.K. v. Norway), 1951 I.C.J. 116.

international legal order. The 1958 Geneva Convention in which it is found has, as a matter of treaty law, entered into force for a mere forty-six States, somewhat less than one third of the present-day international community.¹⁰ The 1982 United Nations Convention on the Law of the Sea, in which the previous wording has been retained virtually unaltered, has yet to enter into force at all and is unlikely to do so in the short term at least. In addition, it is clear from the drafting history that much of article 7 constituted, when adopted, an attempt at progressive development rather than the codification of preexisting customary international law. This, as Westerman herself admits, is clearly reflected in the inclusion of the somewhat arbitrarily selected twenty-four mile limitation in paragraphs 4 and 5 of article 7. (*See, e.g.*, pp. 163, 169).

Although mention is made of the possibility that a treaty provision that, like article 7, did not at the time of its conclusion codify international law might subsequently become "binding upon a third State as a customary rule of international law, recognized as such,"¹¹ no effort is made to examine in detail the process of transformation involved¹² let alone to determine whether or not this has been the fate of the provision in question. (*But see* pp. 169–70.) In the absence of such a focus for analysis, the overall exposition of State practice in chapter V can only be described as disappointing.

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10. *See, e.g.*, R. CHURCHILL & A. LOWE, *supra* note 5, at 359.

11. 1969 Vienna Convention on the Law of Treaties art. 38.

12. Described in detail by the World Court in the *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands), 1969 I.C.J. 3.