

BOOK REVIEWS

The Sovereignty Dispute over the Falkland [Malvinas] Islands

By Lowell S. Gustafson. New York: Oxford University Press, 1988, pp. 268, \$39.95.

The book is arranged in seven chapters. The first three (pp. 1–80) treat the legal issues. The following four (pp. 81–208) address the historical evolution of the dispute in the period between 1969 and 1986.

As to the factual events that led to the armed conflict in 1982, the book presents the most detailed and accurate analysis so far available. The relevant chapters discuss the external causes of the war (pp. 119–42) and the internal factors (pp. 143–76) that influenced this course of action. A final part (pp. 177–208) is devoted to potential solutions of the dispute in the future. Throughout, the author considers that outdated notions of sovereignty on both sides have so far prevented appropriate compromises and that the key to a possible rapprochement lies in a reconsideration of this conceptual approach. While this assessment can be endorsed on the abstract level, it is also true that it would have been helpful for the reader to learn more precisely which political, economic, and social factors led London to insist upon the formal concept of sovereignty; Buenos Aires had been willing before 1982 to agree to solutions that would have defused the emphasis on sovereignty. Of course, the concept of state sovereignty still forms the basic fabric of international relations, and therefore, one may question whether the focus on sovereignty is suitable to reveal the special elements that have determined the options formulated in the two capitals and the choices that were finally made.

At the outset of the historical section, the author traces the consequences of oil explorations in the late 1960s upon the attitudes of Argentina and Great Britain

in the following decade (pp. 81–118). For a while, it appeared during that period that the sovereignty dispute between the two States could be overcome by compromise solutions such as a lease-back arrangement along the lines of the situation existing in Hong Kong, or a simple freeze of the dispute following the solution of the Antarctic Treaty. The author shows how practical considerations on various levels influenced both sides toward a cooperative approach that would have sidestepped the legal issues of sovereignty. An especially fascinating part in this chapter relates to the efforts of British Minister of State Ridley to discuss the issues with the islanders in November 1980, arguing in favor of a lease-back that would transfer sovereignty to Argentina, but would also secure the life-style of the islanders on the basis of a lease for a longer period (perhaps ninety-nine years). Such an agreement would have allowed broad cooperation between London and Buenos Aires on the key issues of oil exploration and fisheries. In the end, Ridley's effort failed, and he had to step down from his office. This turn of events formed the immediate background against which Argentina decided to use force in violation of international law. The author's analysis of the reason for the rejection of Ridley's scheme by the islanders and by the British Parliament is far too short. At this point, the author's general reluctance to arrive at judgments becomes especially obvious.

What is apparent throughout the book is the author's strong effort to avoid positions that could appear to place him into the camp of either one of the two States concerned, with all the attendant virtues and limitations of such an attitude of evenhanded, benevolent neutrality toward both sides. Occasionally, when such a detached approach was difficult to justify in the light of particular facts, the author seems concerned to find circumstances and explanations that would nevertheless allow him to stick to this insistence upon a mode of presentation that escapes value judgments of actions on the one or the other side. In part, this approach is also conditioned by the limited sources upon which the author has had to rely. The sinking of the Argentine ship *Belgrano* by the British at a point when the success of mediation efforts appeared to be at hand illustrates this difficulty of the author. The positive side of the author's effort to evade relative judgments has been that his presentation is never eschewed by a general positive or negative attitude toward either one of the sides in a dispute that has aroused so many emotions.

The lawyer's attention to this book will be primarily directed to the legal analysis. The author, assistant professor of political science at Villanova University, has not escaped the temptation to venture into an analysis of the relevant rules of international law that govern the status of the islands. This is unfortunate inasmuch as it is clear how difficult and complex the identification of the relevant legal rules are, even for the expert. The rules of intertemporal law, the norms governing the use of force in 1832/33, the issue of partial annexation of foreign territory at that time, the rules on acquisitive prescription

as applied to a situation of frequent protest by the state potentially aggrieved, the operation of the principle of effectiveness in this context, or the relevance of the rules on self-determination in the special case where the population has immigrated from the mother country belong to the most controversial subjects of the rules governing territorial status. How can it be expected that a nonlawyer could make a valuable contribution dealing with these legal issues? International law, in this area as in others, is highly technical, not subject to broad policy concepts and vague evaluations unconnected to the specific meaning that the applicable legal concepts have acquired in state practice. One wonders about what encourages or allows such excursions of nonexperts into the sphere of delicate and unresolved issues of law. The lack of a clear division between rules of law as prescribed by recognized sources of law on the one hand and the subjective preference for any set of policy considerations on the other hand may well tend to invite legal judgments by laymen. For better or worse, professionalism in the law is, in principle, as inescapable as in medicine or engineering.

Not surprisingly, the author's treatment of the legal issues shows how difficult it often is for the nonexpert to understand and to grapple with categories of law. Moreover, the author's consistent inclination to be evenhanded and to avoid the appearance of being one-sided is carried over to the legal sphere as well. On page 31, the author concludes that Argentina's lack of title made the use of force illegal. Technically, Argentina's actions were unlawful due to article 2(4) of the UN Charter, even if Argentina's title is accepted. The author's initial conclusion upon the issue of title, however, subsequently is placed in doubt and even contradicted. On page 37, the author speaks of "Argentina's superior historical claim." Thus, the lawyer's verdict of the book cannot but be reserved. As the study is otherwise written in a clear style, in part provides for fascinating reading, and is well researched in its major nonlegal parts, the reviewer still finds the book to be of nonlegal value. The author should have presented the legal views and conclusions reached by the experts without independent judgment and conclusions, and, given the limitations that arise from the currently available sources, the book would then have been highly recommendable.

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Bilateralism, Multilateralism and Canada in U.S. Trade Policy

Edited by William Diebold, Jr. Cambridge, Massachusetts: Ballinger Publishing Company, pp. xviii, 206, \$16.95.

When Prime Minister Brian Mulroney won the Canadian federal elections on November 21, 1988, he removed the last obstacle to the ratification of the free trade agreement with the United States. As planned, the agreement entered into force on January 1, 1989. It represents Canada's second major step to liberalize its economic relations with the United States after the replacement of the Foreign Investment Review Act by the Investment Canada Act in 1988.

Numerous books and articles have already been published that consider the economic and political consequences of an American-Canadian free trade agreement.¹ The focus of the present publication is the effect of the bilateral agreement on the future trade policies of the two countries and on the multilateral trading system. Two sets of questions are addressed: (1) Is the bilateral trade agreement compatible with the multilateral system?; (2) Is it possible to improve the multilateral system through bilateral action? Because most of the book's six articles were being completed before the agreement was finalized, some of the authors have added epilogues written after the text of the agreement was released in December 1987.

Following an historical introduction into the subject by William Diebold, Jr., Gilbert R. Winham explains why Canada departed from its traditional preference for multilateralism and initiated bilateral trade negotiations with the United States. As Professor Winham points out, the U.S. market accounts for almost 80 percent of Canada's total exports and over 70 percent of its imports. Given this unique economic dependency, he argues that Canada's turn toward bilateral negotiations does not imply a rejection of the General Agreement on Tariffs and Trade (GATT) but is only a recognition of the fact that multilateral talks do not address Canada's economic problems. According to Professor Winham, the bilateral agreement does not violate the United States' or Canada's international obligations. On the contrary, Professor Winham considers the blending of the American and Canadian position to be valuable for the Uruguay Round negotiations in the GATT.

In his analysis of relevant GATT provisions, Andreas F. Lowenfeld expounds that a free trade agreement limited to certain sectors would be at variance with GATT, while an agreement covering all trade in goods would be acceptable. Consequently, an agreement that purports to be comprehensive but that makes

1. See CANADA/U.S. FREE TRADE AGREEMENT (E. Fry & L. Radebaugh eds. 1986); BRIDGING THE GAP: TRADE LAWS IN THE CANADIAN-U.S. NEGOTIATIONS (M. Smith, C. Aho & G. Horlick eds. 1987); P. Wonnacott, THE UNITED STATES AND CANADA: THE QUEST FOR FREE TRADE (1987).

significant exceptions would depart from GATT, but would probably be eligible for a waiver under GATT article XXV(5). In his epilogue, Professor Lowenfeld conceded that the bilateral agreement contains more respect for GATT than he had feared. However, he does not rule out that a GATT waiver will be required.

Murray G. Smith, director of the International Economic Program at the Institute for Research on Public Policy in Ottawa, rejects the idea that an American-Canadian free trade agreement will be one more step in a process of erosion in the multilateral trading system. In his opinion, a North American free trade area is a response to the changing economic environment within which the American and Canadian economies are operating. Mr. Smith argues that the elimination of tariff and nontariff barriers between the two countries will make both economies more competitive and will create further incentives for Europe and Japan to negotiate the reduction of trade barriers in the Uruguay Round. He suggests that the provisions concerning trade in services, direct investment, and dispute settlement will stimulate similar types of arrangements in the multilateral negotiations. For Mr. Smith, the bilateral agreement will provide a much needed impetus to the multilateral trade talks.

From a Mexican perspective, Gerardo M. Bueno examines the effects of an American-Canadian free trade agreement on the Mexican economy. Mr. Bueno calls for a selective liberalization of Mexico's trade. Since Mexico is already integrated in the North American economic region, he argues that in the medium term the option to join the free trade agreement could assume increased importance for his country if the United States and Canada were prepared to make concessions to Mexico's special status as a developing economy.

In the last article of the volume, William Diebold, Jr. gives an overview of the provisions of the agreement concerning tariffs, sectoral arrangements, nontariff barriers, fair trade, government procurement, investment, and intellectual property. Although he stresses that the meaning of the agreement for the multilateral system will depend on how it is carried out, he agrees with Professor Winham and Mr. Smith that the United States and Canada have not weakened the multilateral trading system and may even have strengthened it. Mr. Diebold argues, however, that Canada and the United States should make further efforts to improve the multilateral trading system in order to save it.

What might have resulted in a shortcoming of the book turned out to be a gain for the reader: Since most authors were unfamiliar with the text of the United States-Canada free trade agreement, the volume, more than providing an analysis of the relationship between this agreement and GATT, delivers a thorough examination of many basic problems resulting from bilateral arrangements in a multilateral trading system.

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Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West German Law

By Adam Samuel. Zürich, Switzerland: Publication de l'Institut Suisse de Droit Comparé, 1989, pp. 325, SF 53.00 (\$33.15).

Rare is the international arbitration practitioner who has not been confronted with "jurisdictional" problems. Such problems can arise from the disputed incorporation of an arbitration clause in a series of contracts and amendments, from party substitution or identity issues, from the consolidation or attempted consolidation of arbitration cases, or from a host of other situations. Jurisdictional issues can also relate to the arbitrability of disputes concerning particular subject matters such as competition law, employment agreements, patent controversies, or other domains that may touch important public policies. The term "jurisdictional problems" in the arbitration context thus covers a multitude of situations where the arbitrator's actual or potential authority is or may be put in question. These problems can arise in litigation prior to the establishment of the arbitral tribunal, before the arbitrator or arbitrators, when the arbitral award is sought to be enforced or set aside, or in an interlocutory or interim application to the courts during arbitration.

Jurisdictional Problems in International Commercial Arbitration approaches this significant, and often highly technical, area of international commercial arbitration practice by comparative law analysis. The author makes a conscious attempt to survey and contrast the development of statutory and case law on specific arbitral jurisdictional issues in the eight major arbitration venues listed in the book's subtitle. The apposite articles of the New York Convention,¹ The UNCITRAL Model Law,² and, to a lesser degree, various international arbitration rules are also frequently referred to and discussed. In authoring this ambitious book, Mr. Adam Samuel, an English barrister and *collaborateur scientifique* at the Institut Suisse de Droit Comparé in Lausanne, benefited from the research and assistance of numerous members of the Institut's multinational staff. The book attempts to state the law in the jurisdictions concerned as of August 1, 1988 (p. 2).

The book's comparative and international approach to arbitration problems and procedure is particularly valuable since arbitration issues are increasingly treated by reference to solutions adopted by previous arbitral panels as well as

1. Convention on the Ratification and Enforcement of Foreign Arbitral Awards (the New York Convention), June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

2. Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General, U.N. Doc. A/CN. 9/264; see also Herrmann, *The UNCITRAL Model Law—Its Background, Salient Features and Purposes*, 1 *ARB. INT'L* 6 (1985).

court decisions and municipal laws in various nations.³ For this reason, a number of jurisdictional issues related to international arbitration, such as the separability of the arbitration clause, the arbitrator's power to determine his own jurisdiction, and the interpretation of crucial clauses of the New York Convention, have developed in a parallel manner, albeit at different speeds and with different emphases, in the majority of the major international arbitration venues. Books such as Mr. Samuel's both reflect and encourage this trend by organizing important arbitration issues thematically across national borders.

The book's considerable usefulness to the practitioner in this respect, however, is somewhat lessened by the fact that it contains few references to actual arbitration practice and specific arbitral awards. International arbitration "case law" is increasingly cited before arbitration tribunals and is often quite compelling on procedural issues;⁴ the book is regrettably weak in this area. Admittedly, the research and analysis of theoretically private arbitration awards is a difficult and imperfect science, but it is of significant practical value. The book's usefulness as a reference tool is also inhibited by the failure to include an index, a failure only partially compensated for by the particularly complete table of contents. Nevertheless, a book cannot be all things to all persons and Mr. Samuel's excellent work can, and should, be a springboard for further analysis,⁵ including practical and empirical research.

This being said, the book stands well on its own, both thematically and in the breadth of its research. The theme is explored logically and to a certain extent chronologically in the sense that jurisdictional issues and problems are discussed in the order in which they might arise in the arbitral process. The book begins with an exposition of the nature of arbitration and a discussion of the now familiar "four theories of arbitration": contractual, jurisdictional, hybrid, and autonomous. Mr. Samuel concludes that a variant on the "mixed or hybrid" theory by which the arbitration is also submitted to the laws of its seat is the best system yet devised (p. 67). This analysis is followed by a detailed chapter exposing the wide variety of grounds or circumstances on which an arbitrator's jurisdiction might be challenged (pp. 75–153); this useful and informative chapter will particularly appeal to the practitioner.

The book then proceeds to two scholarly chapters addressing the separability doctrine and the arbitrator's right to rule on his own jurisdiction (the so-called *Kompetenz-Kompetenz*). Mr. Samuel is not, of course, the first scholar to address

3. Indeed Professor Claude Reymond in his introduction to the book goes so far as to state (p. 3 [translation by the reviewer]): "Au cours de ces trente dernières années, nous avons assisté à un phénomène assez exceptionnel: le développement d'un droit commun de l'arbitrage dans les pays habituellement choisis comme siège d'arbitrage commerciaux internationaux." [During the last thirty years, we have witnessed a fairly extraordinary phenomenon: the development of general principles of arbitration law in the countries habitually chosen as the seat of international commercial arbitrations.]

4. See *L'Apport de la Jurisprudence Arbitrale* (ICC Publishing S.A., 1986).

5. A view shared by Professor Reymond (p. 4).

these arbitration doctrines,⁶ but his expositions are clear, lucid, and up-to-date. As concerns the separability doctrine, for instance, he includes a very helpful subchapter succinctly reviewing the development and current status of the doctrine in the eight municipal legal systems the book addresses (pp. 162–71). Mr. Samuel concludes that the separability doctrine is now commonplace in Western Europe and the United States; only in England has the doctrine not been fully accepted, largely because the English courts have not squarely addressed the issue (p. 175).

The last third of the book is the fruit of much careful research into the interaction of national courts and international arbitration on jurisdictional issues. This part is broken out into a long chapter dealing with the scope of judicial review of the arbitrator's ruling on his own jurisdiction, followed by a shorter analysis of the "nationality" of international arbitral awards (for example, which country's courts should undertake such judicial review?). These chapters are inevitably quite technical, and will likely be read only by someone concerned with one of the specific issues addressed. Nevertheless this intelligent and largely original research makes a significant contribution in this difficult area.

Mr. Samuel is perhaps most impressive in discussing the arbitration law of England and the United States, but he also demonstrates a substantial knowledge of developments on the European continent. He is particularly detailed and up-to-date on Switzerland; he refers both to the solutions offered by the Intercantonal Arbitration *Concordat* and to those adopted by the international arbitration provisions of the new Swiss Private International Law.⁷ Indeed, Mr. Samuel even provides an appendix setting forth his own, quite good, English translation of the new Swiss international arbitration provisions.

The detailed and technical nature of the book is significantly relieved by Mr. Samuel's commendable habit of having each chapter, and the book itself, come to short and coherent conclusions. In drawing these conclusions, Mr. Samuel does not hesitate to express his own opinions, even if these challenge arbitration orthodoxies. The book's clear and occasionally irreverent prose is also commendable. This style is in pleasant contrast to the opaque commentaries that characterize some academic research on international arbitration.

The book is at once a serious thematic development of a complex international arbitration problem and a compendium of detailed comparative research and analysis on the subject. As a practitioner, this reviewer is more interested in the latter, but the book carries out both functions well.

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6. See, e.g., S. SCHWABEL, *INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS* (1987).

7. These new international provisions came into force on January 1, 1989, and are contained in Chapter 12, arts. 176–194, of the *Loi Fédérale sur le droit international privé* du 18 décembre 1987.

International Tax Planning After the Tax Reform Act of 1986

By Jon Bischel, General Editor; Robert F. Hudson and John C. Klotsche, Contributing Editors; Joseph J. Norton, Series Editor-in-Chief. New York: Matthew Bender & Company, Inc., 1989, pp. 451, \$95.00.

The Institute on International Finance of Southern Methodist University sponsored a conference on international tax planning after the U.S. Congress passed the Tax Reform Act of 1986, and this volume contains the papers presented at the conference. The Institute assembled a distinguished panel of speakers, all from the international law firm of Baker & McKenzie, the cosponsor of the conference. The authors are acknowledged experts in international taxation. In addition, the editor, Jon Bischel, is a similarly recognized expert in U.S. international taxation.

The volume contains nine chapters, each authored by one or more members of Baker & McKenzie. The subjects of the chapters are timely and important:

- the "super" royalty provisions
- foreign tax credit planning
- subpart F provisions of the 1986 legislation
- foreign currency transactions
- interest expense allocation rules
- foreign investment in U.S. real estate
- inbound reorganization of Netherland Antilles corporations
- section 338 considerations in foreign acquisitions of U.S. corporations
- Structuring debt instruments for portfolio or direct investments.

This volume does not contain mere speech outlines; the authors have converted their speech outlines to in-depth narrative discussions. In addition, many of the chapters include relevant portions of the Internal Revenue Code, the legislative history of the provision (i.e., the Congressional Committee Reports), and in some cases, a comparison of the old and the new law. I recently was overseas teaching and found myself needing a reference for the foreign provisions of the Tax Reform Act of 1986. On the flight home from overseas, I examined this book to prepare this review and discovered that the reference I needed for my teaching was in this volume. In other words, this volume is useful not only for the quality of the authors' analyses but also for the other materials it contains.

The volume is intended to be useful to tax professionals, attorneys, and business people. The volume clearly is of significant assistance to lawyers and accountants who work in the international tax arena, but business executives would be well advised to acquire a substantial grounding in U.S. international taxation before picking up this volume. Of necessity, this book contains very technical discussions. Indeed, a main strength of this volume is its substantive depth. A useful discussion for a tax professional must be technically precise if

the subject matter of the chapter is the foreign tax credit baskets, the numbing depths of Subpart F, or the new statutory creature known as foreign currency gains or losses. This book will not be easy reading unless the reader has a strong background in international taxation or is a bit of a masochist.

The chapters are well organized, and most have sufficient subdivisions and headings so that practitioners who are looking for an answer to a specific question should be able to find their way without having to read the entire chapter. In addition, the volume has a useful subject matter index that should facilitate use by professionals. Note that the "table of contents" at the front of the volume really serves as a summary of contents. Each chapter contains a "synopsis" that provides greater detail as to the contents of the chapter than does the table of contents. The chapters contain many useful examples, one of which is in Chapter 5, Interest Expense Allocation Rules After the 1986 Act and the New Proposed Regulations, and which contains an extensive and useful example of how to make the required allocation of interest expense.

I found the volume to be helpful, technically comprehensive, accurate, well organized, and understandably written. In addition, this book may introduce the reader to some wonderful new phrases: "hyperinflationary currency loans to 10% affiliates," "super" royalty, the "high withholding tax interest" basket of the foreign tax credit, "functional" and "nonfunctional" currency (does the phrase "nonfunctional" currency suggest that one should pay off unliked creditors or spendthrift children with such a currency?), "high tax kickout" rule (what some taxpayers would like to do to IRS auditors, but not what it means).

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