International Lawyer

Volume 19 | Number 3 Article 24

1985

Book Reviews

BOOK REVIEWS

Banking on the Act of State

Carsten-Thomas Ebenroth, Universitatsverlag Konstanz GmbH, 1985, 116 pp.

It is, to say the least, unusual to review a book that obviously is premature. In the preface, Professor Ebenroth acknowledged the early birth; one wonders not only why he did not wait but also what important considerations were neglected in the rush to publish. Yet, the book is interesting, provocative, and well-researched. The subject is timely and important.

The book is concerned with default and collection problems of commercial bank lenders and their developing country borrowers. The focus of the book is the legal issues that arise when countries enact legislation or promulgate decrees forbidding payment to external creditors in order to effect negotiated debt restructuring. These issues are still under adjudication with rapidly changing decisions.

The genesis of the book lies in the decisions in *Libra Bank, Ltd. v. Banco Nacional de Costa Rica*, 570 F. Supp. 870 (S.D.N.Y. 1983), and, more significantly, *Allied Bank International v. Banco Credito Agricola de Cartago*, 566 F. Supp. 1440 (S.D.N.Y. 1983), *aff'd*, 733 F.2d 23 (2d Cir. 1984), *rev'd on reh'g*, 757 F.2d 516 (2d Cir. 1985). The District Court in *Libra Bank* ordered payment despite the Costa Rican government's foreign exchange repayment prohibitions. In contrast, another District Court in the same district, in *Allied Bank*, found that the Act of State Doctrine was applicable and dismissed the suit. The affirmance of *Allied Bank* by the Second Circuit Court of Appeals, albeit on grounds of comity, greatly concerned the international banking community, and Professor Ebenroth's book is a response to that concern. As noted in the book's preface, the Second Circuit granted a petition for rehearing before publication. After publication, the original decision was withdrawn: the Act of State Doctrine was held to be inapplicable. *Allied Bank, supra*, 757 F.2d 516 (2d Cir. 1985).

The underlying issues, however, remain. We have not seen the demise of either comity or Act of State considerations. There remains, as well, the interrelationship of those concepts with the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C., § 1602 *et seq.*, and the Bretton Woods Agreement (Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, TIAS No. 1501, 2 UNTS 134). While Professor Ebenroth

discusses the related considerations, two important cases presently are before United States Courts of Appeals. *See Callejo v. Bancomer*, No. CA–82–1604–D, Slip Opinion (N.D.TX., Feb. 25, 1984), and *Braka v. Bancomer*, 589 F. Supp. 1465 (S.D.N.Y. 1984). *Callejo*, discussed in the book, supports Professor Ebenroth's view that the Act of State Doctrine should be restrictively applied to give full effect to the non-commercial immunity limitations of the FSIA. *Braka* applied the Act of State Doctrine in regard to the foreign exchange controls imposed by the Republic of Mexico, and discussed the applicability of the Bretton Woods Agreement. *Callejo* and *Braka* are pending on appeal, before the Fifth and Second Circuits, respectively. In view of Professor Ebenroth's thesis that the Courts should accept a broad reading of the term "exchange contract" in the Bretton Woods Agreement as a solution to the impasse, the final decision in *Braka*, a case not discussed in the book, may affect the arguments he advances.

More than anything else, the book is a plea for more predictable decisions. Because so many of the developing country loans are payable in New York in dollars and thus subject to U.S. law, the book explores the present uncertainty in United States courts. The law is less uncertain in Europe. *See AROW v. BNIC*, [1983] 2 CMLR 240, [1983] FSR 425, where the European Commission indicated dissatisfaction with the Act of State limitation. The book goes to considerable lengths to describe realistically the Act of State concept as inherently vague, being based on sovereignty notions in one case, on comity in another, on abstention principles in yet a third.

Professor Ebenroth finds a proposal of sorts in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). By accentuating the "unambiguous agreement" and "treaty" commitment exceptions to the Act of State Doctrine, as pronounced in *Sabbatino*, he suggests that a greater measure of certainty could arise if parties contracted for such issues to be determined by the International Monetary Fund. Professor Ebenroth describes the issues as relating to questions of sovereignty, extraterritorial application of currency and foreign exchange laws, and creditor priority. He argues that a more coherent system could be fashioned if private contract law principles are combined with applicable treaties and administered by supra-national institutions.

This proposed solution, at first blush, appears persuasive. Regrettably, the book does not explain why the suggested approach would be acceptable to debtor countries. After all, what is at stake is not only the securing of a system of international credit (for which all have an interest), but also the restructuring of staggering debt loads. The countries that have sought debt restructuring have not done so merely for their convenience; they have done so because their own and the world's economies have left them without sufficient resources. It is unfortunate that Professor Ebenroth did not focus

more attention on the concerns of developing countries. Those concerns, as well as those of creditors, must be melded to reach a workable accommodation.

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Foreign Trade, Investment and the Law in the People's Republic of China.

Edited by Michael J. Moser, Oxford: Oxford University Press, 1984, pp. vi, 341, $34.50.

China's interest and involvement in the outside world, particularly with regard to trade and investment issues, can best be analogized to a smoothly functioning yo-yo: rapid and continuous motion toward either of two extremes. A similar inconstancy has applied to the Chinese view of law and lawyers: what was traditionally at best seen as an adjunct to governmental control, is now seen, at least in some quarters, both as a protection against arbitrary governmental action and as a necessary corollary of international trade and finance.

The uncertainties inherent in these two areas of modern life, interest in trade with the outside world and the use of legal rules and frameworks, are only slowly being pushed aside. The books[1] and periodicals[2] that have appeared in the West on these two subjects, have just begun to clear away

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1. Among the better books on the Chinese legal system are V. LI, LAW WITHOUT LAWYERS (1978) and J. COHEN, THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949–1963: AN INTRODUCTION (1968). Although not quite of book length, another impressive treatment of Chinese legal issues is Stanley Lubman's "Emerging Functions of Formal Legal Institutions in China's Modernization," printed in CHINA UNDER THE FOUR MODERNIZATIONS: PART 2, SELECTED PAPERS SUBMITTED TO THE JOINT ECONOMIC COMMITTEE, CONGRESS OF THE UNITED STATES (1982). More general books which discuss China's ambivalent relationship with the West include: S.Y. TENG & J. FAIRBANK, CHINA'S RESPONSE TO THE WEST (1954); R. TERRILL, THE CHINA DIFFERENCE (1980); and F. BUTTERFIELD, CHINA: ALIVE IN THE BITTER SEA (1982).

2. In addition to the numerous articles that regularly appear in law reviews concerning Chinese legal and business issues, a number of periodicals have appeared which focus solely on these issues. Among the best have been the ABA's CHINA LAW REPORTER, the CHINA BUSINESS REVIEW, and BUSINESS CHINA.

the cobwebs of confusion and illusion that have characterized Western (particularly American) perceptions of China over the past 40 years.[3]

One new book that takes a direct poke at bursting this bubble of confusion and obscurity is *Foreign Trade, Investment and the Law in the People's Republic of China*, edited by Michael J. Moser. This volume is essentially a collection of essays which discuss different elements of the Chinese international business structure and the laws, rules, and regulations that surround it. Mr. Moser has carefully selected some of the most perceptive analysts of the Chinese legal and trade scene and has effectively combined their talents into a concise, but fairly detailed and practical, treatment of these issues.

One of the major dangers in writing about a developing country's legal system and its structure for international trade and investment is the possibility that the work will be outdated by the time it reaches print or certainly by the time it is put to use by its intended audience. This is without question a danger with regard to China because of the increasing number of new laws and regulations that are being drafted and published. However, since developments have been "cyclical" in China, this is not as overwhelming a problem as it might otherwise have been. Even with a fairly steady level or pace of change, the only way to really understand where you are at any one point in time with regard to Chinese legal and trade issues, is to have an understanding of where you have been. Moser's book is quite good at this: most of the essays in this volume explain current circumstances in light of past realities. And they do this largely without including unimportant features of the past which would merely have served to muddy any introductory understanding of the present.

A related strength of the book is its excellent use of footnotes (particularly strong in the articles dealing with taxation issues). The presence of such exhaustive footnotes allows the practicing lawyer to check the underpinnings of particular statements and to delve more deeply into topics of practical interest. In this way, the book is much more than just an introduction to Chinese commercial law and practice. The information provided is sufficiently detailed for continued reference by lawyers with regard to specific questions raised by clients.

Moser's book is organized principally along the lines of legal specialty: taxation, foreign trade, oil and gas law, banking and finance, trademarks, and arbitration. Intermingled with these topics are several articles describing specific problem areas (foreign direct investment and contract law) or peculiarities of the Chinese economic and legal systems (special economic

3. The underpinnings of the recently burgeoning literature have been supplied by a comparatively small number of Western scholars and lawyers who continued to publish and lecture on Chinese affairs during the period when there was little or no direct contact between China and the West. Among the most influential of these have been John King Fairbank, Jerome Cohen, Victor Li, Stanley Lubman, Randle Edwards, and Orville Schell.

zones). The approach is primarily a practical one: what would a lawyer need to know to do business in China or with a Chinese organization? Substantial care has been taken to note seemingly mundane problems and how to resolve them. For example, Mr. Moser in an introductory piece rightly emphasizes the uncertainties in what actually constitutes "law" in China. He notes that there are both published and unpublished laws and that the "unofficial" translations that appear are often inconsistent. More often than not, a primary source of legal materials winds up being the daily newspaper.[4] A similar point is made in Timothy Gelatt's comments on the increasing predictability of tax law in China, but he notes that this consistency of application can be gleaned only from conversations with government officials and not directly from legal statutes or regulations themselves.[5]

Among the most perceptive articles in the book are several by Moser himself. His essay on foreign investment in China[6] is particularly adept at laying out the basic problems in this increasingly important area. In this piece, Moser emphasizes three things: the nature of the approval process, the types of investments that can be made in China by foreigners, and the problems that have surrounded equity joint ventures. With regard to the approval formalities, Moser argues that "the investment approval is principally a policing mechanism instituted for the purpose of ensuring that only those projects that are in the [government] plan are allowed to be implemented."[7] Moser is equally pragmatic in his discussion of the various forms that joint venture investments can take: what are the differences between joint development arrangements and contractual joint ventures in China? why would an American company choose one form of investment over another? and what impact do the various forms of investment have on capital contributions, profit distribution and management issues?

Finally, in focusing on the question of equity joint ventures, Moser discusses in some detail the problems with this form of investment that have

4. Moser, *Introduction*, in FOREIGN TRADE, INVESTMENT AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA 2 (M. Moser ed. 1984) [hereinafter cited as FOREIGN TRADE, INVESTMENT AND THE LAW].

5. *See* Gelatt & Pomp, *China's Tax System: An Overview and Transactional Analysis*, in FOREIGN TRADE, INVESTMENT AND THE LAW, *supra* note 4, at 37.

6. Moser, *Foreign Investment in China: The Legal Framework*, in FOREIGN TRADE, INVESTMENT AND THE LAW *supra* note 4, at 106. Other useful articles on joint venture arrangements in China include: Fenwick, *Equity Joint Ventures in the People's Republic of China*, 40 BUS. LAW. 839 (1985); Bosco, *The Law of the People's Republic on Joint Ventures Using Chinese and Foreign Investment*, 6 BROOKLYN J. INT'L LAW 217 (1980); Alford & Birenbaum, *Ventures in the China Trade: An Analysis of China's Emerging Legal Framework for the Regulation of Foreign Investment*, 3 NORTHWESTERN J. INT'L LAW AND BUSINESS 56 (1981); and Silkenat, *China's New Joint Venture Law*, BUSINESS WEEK, Feb. 25, 1980, at 14.

7. Moser, *Foreign Investment in China: The Legal Framework*, in FOREIGN TRADE, INVESTMENT AND THE LAW, *supra* note 4, at 107.

prevented it from living up to both foreign and Chinese expectations. Among the problems that Moser lists are the downturn in the world economy in the early part of the 1980s, the relative advantages of investment in other Asian states (as compared to China), and the difficulties inherent in working with the Chinese bureaucracy and decision-making structure.[8] As Moser notes, these problems are beginning to dissipate in China as a result of regulatory reforms which were initiated in 1983 and which are being carried on into the present day.[9] As Moser notes, "the ultimate test of China's commitment to foreign investment lies in how liberally it chooses to interpret its newly established legal framework rather than in the strict letter of the laws themselves."[10]

Another excellent essay is that by Preston Torbert on contract law in China.[11] Since there is no civil code or contract law applicable to foreign transactions, there is tremendous emphasis on including in the particular contract many items that are part of the overall legal structure in Western countries. In China, the contract is the source of most legal rights and responsibilities.[12] Among the uncertainties that typically exist concerning contract law in China are the authority of the contracting party, the possible retroactive effect of newly promulgated laws and regulations, and the impact on such contracts of changes in the state plan.

Jerry Cohen's essay on the role of arbitration in China's trade and investment scheme is also noteworthy.[13] Although the Chinese penchant for avoiding formal adjudication in favor of less stringent forms of dispute resolution is well known,[14] this essay is one of the few times I have seen explicit recognition of concern about China's commitment to fair dispute resolution procedures. Although several of the examples in this area which are cited by Professor Cohen are somewhat dated (from the 1960s and 1970s), there is still considerable substance to the view that the Chinese consider a request for arbitration to be an "unfriendly act."[15]

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8. *Id.* at 115–16.
9. *Id.* at 116.
10. *Id.* at 136.
11. Torbert, *Contract Law in the People's Republic of China*, in FOREIGN TRADE, INVESTMENT AND THE LAW, *supra* note 4, at 214.
12. Despite the importance of contracts in establishing the status of particular questions, there has been considerable reliance in China in recent years on standard form agreements. The use of such forms has generally been related to the absence of many lawyers to modify the terms of such agreements and the Chinese reluctance to deviate from accepted (and approved) language.
13. Cohen, *The Role of Arbitration in Economic Co-operation with China*, in FOREIGN TRADE, INVESTMENT AND THE LAW, *supra* note 4, at 296, [hereinafter cited as Cohen].
14. *See, e.g.*, Klitgaard, *People's Republic of China Joint Venture Dispute Resolution Procedures*, 1 UCLA PACIFIC BASIN L.J. 1 (1982); Aksen, *Dispute Settlement Under U.S.–China Trade Agreement*, N.Y.L.J., Aug. 9, 1979, at 1.
15. Cohen, *supra* note 13, at 297.

Professor Cohen's article touches on a number of other points that are of practical application in negotiating with Chinese entities. He notes, for example, that the Chinese preference for "consultation," "conciliation," and "arbitration" usually results in the dispute being settled in one of the first two stages. He recommends that a time limit be specified in the contract with regard to the conciliation process. Also important are his comments on the choice of governing law in Chinese contracts.[16]

Moser's book is solid, readable, and practical. Besides pointing out the issues that will be of substantive importance to international lawyers operating in China, this volume offers a basic understanding of the complexity and uncertainty that at the moment is inherent in the Chinese legal system. With the rapid and dramatic changes in economic approach that seem to take place in China now on a semi-annual basis, there should be very little in China's future that would still surprise anyone. Everything now seems possible, even the existence of private capital markets.[17] While this is not to say that another complete reversal of economic policy will happen again soon, the Moser book gives us a good head-start on figuring out how to cope with the legal and trade aspects of China's current course.

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International Financial Law

Robert S. Rendell, ed., Euromoney Publications, London, 1984, 2d ed., 384 pp.

The veritable smorgasbord of true learning, practical tips and hard-earned know-how presented by this ambitious publication reflects both the diversity of the subject and the evolving nature of its principal parts. Its two volumes embrace eleven chapters each on "Private International Lending"

16. Cohen notes that, as a response to Chinese unwillingness to allow foreign law to govern contracts involving investments in China, foreigners have agreed to omit specific mention of applicable law in certain instances. He goes on to comment that: "Many foreigners seem prepared to take their chances on this, trusting that no dispute will occur or that, if it does, it may be resolved without arbitration, or that the arbitrators may interpret Chinese law in a creative manner designed to reach a fair result." *Id.* at 314.

17. *See Share and Share Unalike*, EUROMONEY, April, 1985, at 63, col. 1; Fung, *Chinese Snap Up Corporate Shares*, Wall St. J., July 19, 1984, at 33, col. 3.

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(Vol. I) and on "International Capital Transfers" and "International Government Financial Institutions" (Vol. II). The topics addressed include such "nuts and bolts" subjects as loan agreements and project financing (including forms); very complete essays on national capital controls and the proliferating law of sovereign immunity (principally the United States and the United Kingdom); and thought-provoking comments on the impact of the "Iranian hostage crisis" on international financial law. The resourceful editor has ensured delectability as well as nourishment by recruiting as chapter authors a host of private and public lawyers (plus the odd banker) whose knowledgeability and current experience are of the first order.

In his Introduction to these volumes Dean Robert H. Mundheim of the University of Pennsylvania Law School (and formerly General Counsel of the Treasury Department) correctly describes them as providing both "an overview" and a "compact reference tool for the practitioner confronted with a problem in international finance." They constitute a sort of mini-encyclopedia which may be consulted broadly by novices and selectively by the already initiated. Here one can find quite thorough yet readable treatments of anything from United States Government regulation of banks and financial transactions to international mutual funds and ship finance documentation in the Eurocurrency market. The chapters are for the most part successful in being instructive without being pedantic.

The obvious authority of the chapter authors and the catholicity of their contributions should have the blessed effect of enabling the worlds of public finance and private lending to become better acquainted. The self-contained expositions in particular of the International Monetary Fund (by its long-time General Counsel, Sir Joseph Gold) and the World Bank (by its retired Vice President and General Counsel, Aron Broches) cannot help but be useful reference pieces for private lenders and their legal advisors. Similarly useful chapters cover the International Finance Corporation, the Inter-American Development Bank, the Asian Development Bank, the Export-Import Bank of the United States, the Overseas Private Investment Corporation, and assorted Middle Eastern financial institutions, Japanese government agencies, European export credit agencies and providers of political risk insurance. Leaders in public financing can profit equally from what lawyers for the principal American (and some foreign) banks have to say about such things as Eurodollar borrowings and syndicated and term loans.

Given the richness of these offerings one might have anticipated a great deal more attention being given in these volumes to sovereign debt restructuring and other aspects of the growing international debt crisis. Yet only one 13-page portion of a chapter largely devoted to "problem loans" is specifically allocated to that topic. Perhaps this is inevitable in a work on international financial law when the "law" involved is at best in gestation

and the whole related process of adjustment is increasingly affected by political developments. Nonetheless, one is left to wonder with Dean Mundheim "how much time, energy and goodwill should be expended in negotiating tightly drafted, complex loan agreements with sovereign borrowers in light of the special, practical difficulties in legally enforcing the agreements."

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Doing Business in France

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

Doing Business in France is more than welcome, especially to those of us who have had to respond to the question: "What can I read in English about French exchange control or French accounting?" Several works in English exist[1] on the legal aspects of doing business in France which deal with taxation, with company law and the like, but there is, to this reviewer's knowledge, nothing in English that sets out both generalities and details concerning the controls exercised by the French government over foreign exchange operations and investment in France or that examines French accounting principles. For these two parts alone, therefore, this book would be valuable to the practitioner. But there is a great deal more. The two volumes made available to this reviewer include chapters on trading in France without the creation of a taxable presence, company law, competition law, taxation, accounting, bankruptcy and dispute settlement. Moreover, the buyers of these volumes are promised chapters on the law of obligations (contracts and torts), sales, products liability, commercial paper, real property, labor relations, banking, imports and exports, and intellectual and industrial property.

While it is always a bit unfair to use hindsight in criticizing a book, it is very important in a book meant, as this one is, for a readership which wants to

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1. *E.g.*, Lefebvre, FRENCH BUSINESS LAW GUIDE (CCH, 1983); Goldsmith, *Business Operations in France* (Portfolio n° TM 39-6th) (latest supplement at the time of this writing dated April 1984) (part of BNA's Tax Management Foreign Income Portfolios).

know what the law is now, to fix the dates as of which one speaks and to warn of pending changes. The pages are undated and one discovers that the operative date is, probably, sometime in 1983 (the publication date). The authors and the publisher of the work under review clearly suffered timing problems and have, consequently, produced a book which, useful as it is, is not a reliable guide to existing law on several subjects.

Since 1983, there have been a number of events which have rendered certain chapters obsolete or have significantly changed the law in the area discussed. A few examples are set out below. Rules governing foreign investment in France were modified at the end of 1984 with a view to speeding up the approval process where required and to permitting, without limit, certain kinds of investment without prior authorization.[2] In company law, it is perhaps enough to point out that the book speaks of the share certificates of a *société anonyme* whereas on 1 October 1984, there came into force a law, which has been on the books since the end of 1981, which eliminates share certificates and substitutes book entries.[3] In the chapter on trading in France without a taxable establishment, there is a discussion of the impact of Common Market rules on distribution contracts in France which is founded on Regulation No. 67/67 of the Commission of the European Economic Community. This regulation was replaced in mid-1983.[4]

And, finally, there is the long-heralded adoption by the French parliament at the beginning of this year of a new bankruptcy law and the abrogation of the statute which is discussed in the book. Two important points in the new statute which affect whether an investment is made and how it is to be managed may be mentioned here. Article 99 of the old bankruptcy law[5] created a presumption of bad management applicable to the managers in law or in fact of a French company in bankruptcy, a presumption which will be removed by the new law.[6] Emphasis, and this is the second point, has also changed. While it may have been overstating matters to begin with the point that the old law was applied in the interest of creditors since, as a general proposition, the protection of jobs has come first in this period of high unemployment, the bias of the new statute is clearly toward saving the enterprise and the concern for creditors is only grudgingly admitted as one of the conditions of accomplishing the main task.

None of these changes was unexpected—except perhaps the modification

2. Decrees and Circulaires of 29 November 1984, Journal Officiel, Lois et Décrets [hereinafter J.O.] 1984, at 3672.

3. Article 94-II, Law n° 281-1160 of 30 December 1981, J.O. 1981, at 3555.

4. Regulations 1983/83, 1983/84, OFFICIAL JOURNAL OF THE EUROPEAN ECONOMIC COMMUNITY of 30 June 1983.

5. Law n° 67–569 of 12 July 1967, Dalloz, Code de Commerce 341 (Série "Petits Codes," 1984–85).

6. Law n° 85–98 of 25 January 1985, J.O. 1985, at 1097, art. 180.

of the foreign investment rules[7]—when the book went to press. Failing to anticipate is therefore not the burden of the criticism. It is that readers are neither told that change is expected nor given a ready reference (e.g., page dates) enabling them to determine the age of the text.

The authors of the book have, in some areas, either taken for granted the similarity of the United States and French legal systems or have simply failed to recognize the extent to which certain points of difference are critical. The most flagrant example is to be found in the absence of distinct treatment of abuse of right in the context of the enforcement mechanisms available to the French tax authorities.[8] To this reviewer, at least, it is very important to point out to non-French readers that "tax planning" is nearly a dirty word in the French system and that many of the wisest tax plans are put to naught because of the broad powers of the administration to characterize such plans in accordance with its own view of the underlying economic reality rather than the wishes or words of the parties. And then what of the French attitude toward the common-law trust? Hardly a word is said, and yet almost any serious reader from a common-law jurisdiction will ask the question. The trust is out of place in civil-law systems like the French, but the tax authorities[9] (as well as practitioners and interested observers) have to grapple with it for income, estate, and wealth tax purposes.

Another example of differences which are insufficiently emphasized and which may therefore mislead the foreign reader is the treatment of civil procedure. The chapter on dispute settlement speaks of "trials" in France. There are none in civil matters. In general, the parties exchange papers concerning the arguments and the facts in dispute, there is a public hearing at which the advocates of each side address the court, and a decision is rendered. The judge has certain powers, rarely exercised, to carry out various investigative measures. The most common form of investigative measure is the appointment of an "expert," who may go to the length of conducting what amounts to a mini-trial and whose report to the court will, in most instances, be decisive of the outcome even though the expert is not entitled to reach legal conclusions. The difference between the roles of common-law lawyers and French *avocats* in litigation is often difficult to understand even for lawyers who have worked with both systems. The English-speaking readers certainly need to know that there is no, or, at any

7. In exchange and foreign investment matters, it is difficult, in any event, to produce a durable text. The rules change frequently through the issuance of administrative directives of various kinds.

8. The question is briefly treated (at 13–91) of the book under review, but solely in the context of the treatment (in some cases) of the acquisition of substantially all of the shares of a company as a constructive dissolution. A recent treatment of the problem in French is Cozian, *Abus de Droit, Simulation et Planning Fiscal*, Bulletin Fiscal n° 623 (Lefebvre 1984).

9. *See, e.g.*, the Treasury's Note of 25 March 1981, Bulletin Officiel de la Direction Générale des Impôts part 14 13-2-81.

rate, not much, discovery in the United States sense in which the lawyers of the parties are able to require the production of evidence by the other side even against the latter's interest.

Perhaps it would help in dealing with problems of the kinds mentioned above to include a "general part" at the head of each chapter. It seems to this reviewer that this is probably the only way in which authors can make their readers aware of problems which are quite as important as questions relating to the substantive rules of the system. It is not necessary to write a treatise on comparative law for this purpose, but the non-French lawyer should at least be warned that he or she can know a great many rules and still fail to realize that the French system conceals problems which no rule answers.

The translation of French legal concepts into English in the book under review offers another manifestation of a similar difficulty. This reviewer is attached to the idea that if a concept does not mean the same thing in French law as it means in a non-French system, the fact that there may be, and often is, an analogy is not particularly helpful and may at times be misleading. I would prefer to see the problem dealt with either by the adoption of a term which has no technical meaning in English (for example, "company" for "corporation," which the authors used, and "organization" or "formation" for "incorporation"—the authors preferred the latter), or simply by retaining the French term (for example, "*société anonyme*" rather than the English "corporation"). After all, if one calls a *société anonyme* a "corporation," what does one call a *société à responsabilité limitée*? On the other hand, to speak of "incorporating" a *société en nom collectif* and to fail to mark the evident and close analogy to the common-law partnership seems odd to this reviewer. To add several further examples of this kind of problem, the very important concept of a *fonds de commerce* is translated (on p. 5–8) as "going concern." "Going concern" is an economic concept not always present where there is, for French legal purposes, a *fonds de commerce*. The translation/definition is awkward and does not really fit in all the places where it is used. For example, it is moderately disturbing to learn (on p. 18–00) that a "going concern" may be a failing one. The trouble is that *fonds de commerce* has remained without a satisfactory definition for generations in France. It is an "I-can't-define-it,-but-I-know-it-when-I-see-it" kind of expression. But numerous legal consequences are attached to it. I would have said either "business" or left the French. A *société en participation* is called a "Joint Venture" by the authors in English (p. 5–182). While we are admittedly talking about a flexible arrangement in both cases, a *société en participation* is a company-law-and-tax classification while "joint venture" is an expression of an economic arrangement which may or may not take the form of a *société en participation*. The *précompte mobilier* is translated as "equalization tax." While this may be a fair description of its

function, it does not provide much help to the person who is trying to find his way through the law or, for example, the France–United States Income Tax Treaty where it is called, in the English version, "prepayment" but where the French is also retained.[10]

Handling legal terms in translation is not an easy task. The authors have done an admirable job, but there remains considerable room for improvement. It seems to this reviewer that what is needed to enable the work to live up to the ambitious goals of the authors and their publisher is a coherent theory of both cultural and linguistic translation.

Despite these criticisms, which in the end are minor, I doubt very much that a practitioner in or out of France whose clients have, or wish to create, an interest there and whose mother tongue is English will want to be without this book. It is the beginning of a much needed contribution in this field and, with any luck at all, authors and publisher will see it through many further editions.

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What is International Law and How Do We Tell It When We See It?

By Sir Robert Y. Jennings, Kluwer, Boston and Antwerp, 1983, pp. 57.

Identifying international law has never been a simple task. In contrast to the domestic situation, an international attorney looking for legal evidence for a particular proposition cannot simply turn to a statute book and locate a controlling section or paragraph. Even when working with case law, the international lawyer is hampered. While there is indeed a rich reservoir of decisions by international courts and arbitral bodies, such decisions lack a particular hierarchy. Beyond this, they are nowhere fully compiled or neatly classified. A LEXIS or WESTLAW of international law simply does not exist.

To Sir Robert Jennings, the problem involves more than just the practical difficulty of locating the law. To him, it is above all a problem of being able to distinguish between "what is [international] law" and "what is not," that

10. Art. 9 (5), CCH TAX TREATIES ¶ 2812.

is, of differentiating the legitimate sources of international rules from sources where we should not be looking in the first place. And the importance of this distinction lies in the fact that by identifying the proper sources, one has also identified "the ways in which law is made and changed."

This is the central theme of Jennings' small, but useful, book. How international law is changing and can be changed should be of high concern to international legal scholars and to practitioners. This is particularly important in light of the fact that, as Jennings observes, looking for the sources of law has become "not just a question of inquiry but also a policy choice." As a judge at the International Court of Justice, Jennings is in a particularly good position to assess the trends in identifying international law. His observations—casual though they seem at times—are both interesting and revealing.

Jennings' point of departure is Article 38 of the Statute of the ICJ.[1] Although pointing out that the formulation of the Article dates back to 1920—a time when international law operated in a context vastly different from that of today—Jennings sees no utility in challenging its articulation of the established sources of international law. At the same time, he recognizes that each of the four sources listed in Article 38 is currently under considerable strain. With regard to treaties, he properly observes that their standing as the surest source of international law is being eroded by the growing practice of states to insist on extensive reservations to the treaties they sign. This is being witnessed currently in the United States, where efforts in the Senate are being made to condition United States ratification of the Genocide Convention on reservations which severely limit the jurisdiction of the ICJ under the treaty where the United States is a defendant. In the view of many observers this reservation may not only strip the document of any significance for the United States, but may induce other nations to do the same, threatening thus the legal value of the entire treaty.

Paradoxically, an opposite trend may also be emerging which could give treaties legal validity outside of their status as treaties. Key provisions of major treaties or whole treaties altogether are being cited by non-signatories as evidence of developing customary law. Moreover, treaties not yet in force—if around long enough—are being claimed by litigants and some courts to have attained a quasi-official status. Such was the case with the Vienna Convention on the Law of Treaties, which was cited in litigation and diplomatic correspondence long before it came into force in 1980, and may

1. Article 38 provides that, in deciding cases, the ICJ is to apply:
   a. international conventions,
   b. international custom,
   c. the general principles of law recognized by civilized nations, and
   d. judicial decisions and teachings of the most highly qualified publicists of the various nations (as subsidiary means for determining rules of law).

become the case with some of the private international law treaties, such as the International Sale of Goods Convention, which has been open for ratification for several years.

That treaties may become custom[2] complicates the fact that custom itself is one of the sources of international law cited in Article 38 of the ICJ Statute. Jennings does not find this troubling *per se*, but he is concerned that a perversion of the concept of custom could take place if the trend is taken too far. He rejects, therefore, the notion of "instant custom," quipping that the reason why it is instant is because it is not custom at all! Nonetheless, he is unwilling to dismiss entirely another claimed source of "instant custom": resolutions from international organizations. Such resolutions "may not make law," he writes, "but you would hesitate to advise a government that it may, therefore, ignore them, even in a legal argument."[3]

Given the state of growth and flux in which international law seems to find itself today, the role of judicial decisions and the teachings of publicists—which Article 38 states are subsidiary means for determining the rules of international law—appear to Jennings to be more important than ever before. "Judicial decisions," he writes, "must become even more important in direct ratio with the quantity and contradictory nature of modern material evidences of law." This is particularly good news to common law lawyers accustomed to working with case law. Jennings, however, does not go so far as to claim that an international *stare decisis* principle is beginning to take effect, though he admits that an international tribunal "will not feel free to ignore a relevant [court] decision."

Jennings' observations on the fourth source of international law of Article 38—general principles of law of nation states—are rather perplexing. He chides those who consider this provision "a blank cheque to go delving among selected municipal laws." While it is true that international lawyers (and domestic courts) should refrain from attributing universal validity or applicability to the laws of any one nation, there is little doubt that the comparative approach—looking at the trends in a given area of law in several countries so as to help identify an international rule—is among the most fertile in international law today. The truth is that in many areas "pure international law" has not kept pace with new changes and developments in human activity. As a result, the practice of key nations, the contractual trends of major social and economic entities, and the laws of frequent trading partners all are emerging as eminently relevant for identifying the direction of international law in a number of important areas. For this

2. *Cf.* Article 38 of the Vienna Convention on the Law of Treaties, which provides that nothing in the Convention "precludes a rule set out in a treaty from becoming binding upon a third State as a customary rule of international law."

3. *See* the discussion on the legal value of resolutions by international bodies in G. S. VARGES, THE NEW INTERNATIONAL ECONOMIC ORDER LEGAL DEBATE 87–92 (1983).

reason, Jennings' comments on such things as the validity of contracts—which he suggests has been greatly exaggerated by associating contracts with the principle of *pacta sunt servanda*—seem both out of place and inconsistent with the evidence.

Despite this, the book is generally on solid ground and certainly makes for interesting reading. Having been adapted from a lecture given as part of the well-known Cambridge–Tilburg Law Lectures, this book was not intended as a scholarly treatise,[4] though it treats subjects of deep concern to international jurisprudence. One wishes Jennings might have taken the time to document some of his statements and give formal citations to the cases he refers to. Nonetheless, this book should be of use to the international lawyer who wishes to catch up with the trends in "source seeking" in international law. Sometimes brief works of this sort, because they are more easily digestable, achieve this purpose more effectively than the more traditional large-volume legal treatises.

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Multilateral Trade Negotiations—World Trade After the Tokyo Round

By Leslie Alan Glick, Rowman & Allanheld, 1984, pp. 423, $49.00.

The author brings his familiarity with foreign legal systems into this well arranged and thorough presentation of the international public law regimes governing international trade. The book is a straightforward and informative primer on trade developments and negotiations under the auspices of the General Agreement on Trade and Tariffs (GATT). It contains an overview of the last rounds of formal negotiations under the GATT, the considerations fundamental to operating under the implemented agreements, and an appendix with a wealth of original source material amounting to over one-half of the book. The book does not contain an index, but an extensive table of contents almost compensates for that lack. Footnotes accompany the text. The book, which is divided into eight parts and an

4. For a more thorough treatment of many of the issues raised by Jennings *see* G. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW (1983).

introduction, constitutes a reliable source of all relevant background material for the scholar and student of trade developments.

This account of world trade focuses on negotiations as well as on the trade regimes prior to and since the Tokyo Round and on the United States implementing legislation such as the Trade Agreements Act of 1979. The author notes that the failures and successes of the Tokyo Round are the keys to understanding the prognosis for world trade in the 1980s and beyond. The description of the implementation of the agreements, explained in relation to specific MTN packages and particular trading partners, is very detailed. For example, chapter 3, "The Results of the MTN," begins by examining the tariff cuts for industrial and agricultural trade between the United States and its trading partners, specifically the EEC, Canada, Japan, other European countries, and developing countries, before turning to the next sections which contain in-depth evaluations of the Tokyo Round codes and agreements. The value of the book as a tool for trade law analysis and background research is enhanced by the fact that it outlines the positions taken by the negotiating parties. Chapter 5 explores the achievements of global trade talks, such as the opening of new markets through the procurement agreement. A discussion of the 1982 GATT Ministerial Meeting in chapter 6 deals with the emerging challenges like trade in services and trade-related investment issues.

The treatment of lesser known aspects and technicalities that affect the practice of international trade law are educative and informative. For a lawyer new to the field, the book is an outstanding introduction. For the experienced trade lawyer, the book can bring into comprehensive form the information accumulated over a period of time. Anyone interested in the manner in which the GATT, the Tokyo Round Agreements, and the Trade Agreements Act of 1979 were conceived and how the interrelationship between national law and international agreements works could find the book useful.

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Outer Space: New Challenges to Law and Policy

By J. E. S. Fawcett; Oxford, Clarendon Press; New York, Oxford University Press; 1984; pp. vi, 169. $24.95.

In this short book, J. E. S. Fawcett, DSC, professor emeritus of international law, University of London, identifies the unprecedented importance of space activities and calls for a further assessment of relevant policies and laws. Eight chapters focus on topics constituting the fabric of international space law. They deal with the province of mankind, the uses of outer space, space operators, telecommunications, remote sensing, space stations, astronomical observation, and strategic uses of outer space. A final chapter offers a general view of the future.

In the fourteen-page chapter on astronomical observation, attention is drawn to the science and technology of the solar system and beyond and of cosmology. These pages constitute a primer on the physical environment in which space activities occur. In this unique and sobering assessment, the reader obtains insights as to the physical constraints on space activity and the natural hazards confronting those who travel to outer space and celestial bodies for the purposes of exploring, using, and exploiting the area and its valuable resources.

The book draws attention to many of the principles set forth in the five UN-sponsored outer space treaties. The appendix republishes the terms of the 1967 Principles Treaty, the 1972 Liability for Damages Convention, the 1975 Registration Convention, and the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies. However, the 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space is not reproduced.

Professor Fawcett accepts the mandate of the 1967 Principles Treaty that outer space should serve the common interest of mankind. This is to be realized through the fullest possible use of the area and its resources, including the capture and return to Earth of solar energy. He asks whether this goal can be achieved in the light of the prohibition contained in Article 2 of the Treaty which ordains that national sovereignty shall not exist in space. However, when it is considered that solar energy is a constantly renewing natural resource, it may be concluded that the capture of such energy is to be treated as a use of the resource, which is authorized by Article 1, paragraph 1 of the Treaty. Moreover, the Treaty does not inhibit the exploration, use, and exploitation of the natural resources of the area. Thus, the author's concerns may be ascribed to excessive caution. Undoubtedly, future users and exploiters of this resource need not be immobilized pending the unlikely revision of Article 2.

Fawcett has drawn attention to analogies between ocean law and space

law. He has identified practical lessons derived from both ocean and air activities and the treaty regimes which apply to them. Several references are made to the need to protect the natural environment against harmful pollutants, the special needs of the developing countries to share in benefits flowing from space activities, and the need for the establishment of institutions suited to the formal management of such activities so that orderly procedures will govern the use and exploitation of space resources.

Among the suggestions made by the author, some not often heard, are that the exclusive economic zone now applicable to the ocean might be used for space, that astronauts who land in foreign countries might be able to claim asylum, and that the World Intellectual Property Organization agreement "implies" the need for agreement among sending and receiving states when transnational broadcasts occur. Some of the suggestions may be challenged, for example, the view that States when entering into widely supported multilateral agreements (eighty-five states are parties to the 1967 Principles Treaty) may not impose certain duties on States and international intergovernmental organizations. However, the author argues that article 6 of the agreement, which does impose such constraints, is a policy directive rather than a rule of law, and that as promulgative of policy it does not allow for the parties to create obligations for third parties.

Important arguments are made in favor of the sharing of outer space resources, based on the common-interest-of-mankind provision of the 1967 Principles Treaty and the common-heritage-of-mankind principle of the 1979 Moon Agreement, of the common need to protect the human environment against harmful pollutants and space debris, of the need to assure the efficient use of orbit and spectrum resources in the light of increasing and competing demands for the operation of broadcast facilities, and of the implementation of international norms by domestic procedures.

The author observes that, in the debates relating to direct television broadcasts, unwilling recipients had offered vague invocations of national sovereignty as the basis for preventing such broadcasts. He comments at page 74:

> But if sovereignty here is to be understood as meaning an exclusive right or jurisdiction over the reception of broadcasts in state territory, it cannot itself be either the basis or explanation of a right to require and give prior consent; for the bare statement that the right of prior consent is a sovereign right is, like many statements involving sovereignty, a circularity: what is in effect being said is that the reception of broadcasts in State territory is within its exclusive jurisdiction because it is within its sovereignty, that is, its exclusive jurisdiction.

In the light of this assessment of the relevance of claims of national sovereignty, Fawcett supports the policies contained in the 1969 Human Rights Covenant on Civil and Political Rights, which assigns preference to seeking, imparting, and receiving of direct broadcast information over any rule of non-intervention in domestic affairs or the proposed, but still highly

controversial, duty of obtaining the prior consent of the recipient country.

Professor Fawcett urges that constraints should be imposed on current trends toward the militarization of space. He attributes to technological advancement the increasingly destabilized relationship among the United States, the Soviet Union, and other countries. In his view, industrial and political forces give direction to scientific and technological inquiries. The author takes several positions with which the reviewer respectfully disagrees. The author believes that the space shuttle when in a landing mode is an aircraft. He suggests that proprietary rights cannot presently be acquired by those who are able to remove moon resources from their "in place" location.

While history may prove the author correct in asserting that the common-heritage-of-mankind principle contained in the 1979 Moon Agreement, which entered into force as the book was being published, possesses "property overtones," this clearly was not the intent of the early proponents of the principle. In the reviewer's opinion, the relevant provisions of article 11 of the 1979 Agreement allow one who is able to take possession of "in place" resources to obtain exclusive proprietary rights to them. In examining the law on this subject, it is necessary to go beyond a literal reading of the terms of the Agreement to an analysis of the positions advanced during the negotiations and also to interpretative statements made by the negotiators.

Professor Fawcett cogently raises many critical issues of space law and policy. His book serves usefully to open the field to the novice. For basic insights it can be read in conjunction with Judge Manfred Lach's *The Law of Outer Space*, published in 1972. For a more comprehensive view of international space law and policy students may wish to consult books published in recent years by American, Canadian, and Soviet scholars.

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Manual of Foreign Investment in the United States

Edited by J. Eugene Marans, Peter C. Williams, Joseph P. Griffin and Joseph E. Pattison. Shepard's/McGraw Hill, 1984, pp. 582, $75.00, plus shipping and handling charges, annual supplement currently $25.00.

Direct foreign investment (i.e., non-portfolio investment) in the United States is becoming increasingly significant in the United States economy. Direct foreign investment is well in excess of $100 billion, and a recent New York Times article estimated that new foreign direct investment was more than $11 billion in 1983 and more than $15 billion in the first three quarters of 1984. This investment takes all the usual forms—including establishment of factories, warehouses, service centers, and branch offices; acquisition of United States companies; formation of new business ventures; and financing of or equity participation in such things as shopping centers—and is spread through most areas of the country. Japanese, European and Middle Eastern businessmen are now a common sight in even modest-sized cities in the United States, and lawyers far from the great financial centers are regularly called upon to advise foreign clients on their business activities and related problems.

Although the United States is quite open to foreign investments, and United States policy since at least the early 19th century has encouraged foreign investment, there are nevertheless a number of provisions in United States law that restrict or affect such investment. Many of these provisions provide no great barrier or burden to the foreign investor, but some of them may present significant problems. Indeed, while this review was written, it was widely reported that Mr. Rupert Murdoch, an Australian citizen, has avoided the extensive restrictions on foreign ownership of United States television stations by the simple, but no less imaginative, expedient of becoming a United States citizen.

This book is a very useful, indeed indispensable, reference work for any United States lawyer who may have occasion to advise foreign direct investors, and for foreign lawyers advising their clients on United States investment. The editors are lawyers in major law firms in Washington, D.C., New York, Chicago, and Boston with extensive experience in advising international clients and considerable expertise in the subjects they have written about. It has an April 1985 Supplement, and annual supplements are planned in the future.

The book is divided into two parts with a number of separate chapters in each part. Part I deals with federal and state laws of general applicability which would be of interest to all foreign investors. One of the major factors motivating foreigners to invest in the United States is a belief that the investment is relatively secure and free from the risks of expropriation and

possible anti-foreign sentiment, and the opening chapter provides a good description of the legal structures supporting this view. A portion of the chapter deals with material reminiscent of a law school constitutional law course in its discussion of the due process and equal protection limitations on federal and state action and of the commerce clause and preemption doctrine limitations on state action. The remainder of the chapter deals with protections provided to foreign investors under the various Treaties of Friendship, Commerce and Navigation which the United States has entered into with countries from which most foreign investment comes into the United States.

Other chapters in Part I deal with federal tax, securities, and antitrust laws and are necessarily brief treatments of these topics, which are the subject of vast amounts of publication in the legal literature. The authors of these chapters have done a difficult job rather well in providing excellent summaries of these topics uncluttered with excessive minutiae, yet at the same time technically accurate and providing excellent references to statutes, case law, and other sources for more extensive research. The nonspecialist in these topics and the foreign lawyer will find these chapters quite useful as a good overview of the field. Even the specialist may find the chapters helpful, however, since they also focus on problems within those areas that have a particular impact on the foreign investor, for example: (a) *tax*—the estate, gift and income tax problems of aliens living or working in the United States, the requirements of I.R.C. § 367, including the changes made in the Tax Reform Act of 1984 which are reviewed in the April 1985 Supplement, and a separate chapter on the effect of income tax treaties with various foreign countries; (b) *antitrust*—the significant antitrust cases involving the acquisition of United States firms by foreign investors; and (c) *securities*—the problems faced by foreign corporations in using their own securities to acquire publicly held United States companies.

The remaining chapters in Part I provide a thorough description of and excellent reference source for a number of areas of law that may have a particular impact on the foreign investor. One chapter covers in considerable detail the extensive reporting requirements (and lethal penalties for failure to report) imposed by the Agricultural Foreign Investment Disclosure Act of 1978 on foreign persons who own, directly or indirectly, even extremely modest interests in agricultural land, including land used for timber production. That chapter also reviews the reporting obligations of a foreign person who acquires, directly or indirectly, a 10 percent or more interest in a United States business enterprise. Another chapter contains a good discussion of the immigrant and non-immigrant visa classifications that are most commonly available to foreign investors and business personnel. Other chapters provide: an introduction to the Defense Industrial Security Program, which requires that any facility performing a classified govern-

ment contract have a facility security clearance and restricts the availability of or bars such a clearance if a facility is under foreign ownership, control, or influence; a description of the possible problems that can arise through the disclosure of certain types of technical data to foreign investors or to foreign personnel; and a review of the possible impact of Buy American (or Buy Local) procurement laws of the federal and state governments.

Part II of the book deals with specific limitations on foreign investment in various sectors of the economy. Real estate ventures are undoubtedly the foreign investment most widely spread across the country, and one chapter in Part II contains a thorough discussion of the Foreign Investment in Real Property Tax Act (FIRPTA), including the reporting requirements and the broad definition of what constitutes an interest in real property under the Act. The 1985 Supplement covers in some detail the extensive changes made in FIRPTA by the Tax Reform Act of 1984. Another chapter provides a good overview of the various types of state provisions restricting foreign ownership of real property (many of which are of doubtful constitutional validity, at least as applied to resident aliens), and a useful state-by-state summary of constitutional and statutory provisions affecting foreign investment in real estate. A second major area of direct foreign investment has been in banking—at least 15 percent of United States bank assets are foreign owned—and one chapter provides a comprehensive treatment of the various permissible alternatives for banking and non-banking activities of a foreign bank. Another chapter provides a thorough review of the restrictions on foreign investment in energy resources and covers in detail the subject with the most potential problems, i.e., mineral leases on federal lands. The remaining chapters deal with areas where there are extensive federal restrictions on foreign investment but much less widespread investment (in part, no doubt, because of such restrictions), namely: commercial aviation and related fields; radio, television, and wire communications; commercial fishing; and various other maritime activities. These chapters all provide a good introduction to the problems confronting foreign investors in these areas.

The editors have performed a valuable service in putting this book together. Although obviously not designed for the specialist in the various specific legal areas covered in the book, it is a well written, well organized, and extremely useful reference work for a broad range of problems important to a foreign investor.

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La Frontera Norte de México, Historia, Conflictos, 1762—1982

By César Sepúlveda, Editorial Porrúa, México, D.F., 1982, Second Edition.

Literally translated, the title of this book is *The Northern Border of Mexico, History and Conflicts, 1762—1982*. This is the second edition of a work originally published in 1976. The book is primarily a reissuance of the first edition with the addition of a chapter on maritime-zone negotiations, a chapter essaying the concepts of territory and borders, and additional explanatory notes on issues covered in the first edition. The book reflects the continuing interest among Mexican writers in one of the more significant sources of concern affecting their nation. Other recent books on the same general subject are V.C. García Moreno, ed., *Análisis de Algunos Problemas Fronterizos y Bilaterales Entre México y Estados Unidos*, México, National Autonomous University of Mexico, 1982[1] and Romeo R. Flores Caballero, *Evolución de la Frontera Norte*, Monterrey, Centro de Investigaciones Economicas, 1982, Second Edition.[2]

Each of the three books covers much of the same area—the historical developments leading to the present northern border of Mexico. Each, however, also offers some unique subjects for study. *Análisis* is a collection of articles cataloging bilateral problems: consular operations, *maquiladora* (transnational or twin plant industrial production) enterprises, Chicano (Mexican-American) ethno-cultural movements, water and boundary disputes, undocumented Mexican workers in the United States, maritime economic zones, and border-area economic development and commerce. Those articles are studies in international public and private law prepared by the Institute of Legal Research of the School of Law of the National Autonomous University of Mexico (UNAM). *Evolución* is the product of the Center of Economic Research of the School of Economics of the Autonomous University of Nuevo Leon and is written from the standpoint of a political economist. It covers the development of Mexican economic independence, boundary and water (salinity) disputes, Mexican migratory workers in the United States, and the recent emphasis on border industrialization, including the *maquiladora* concept.

Cesar Sepulveda, the author of the primary subject of this review, is probably the best known of the three writers to United States lawyers. He is eminently well qualified to write on this subject as former dean and profes-

1. The title of this book may be translated as *Analysis of Some Border and Bilateral Problems Between Mexico and the United States*.
2. The title of this book may be translated as *Evolution of the Northern Border*.

sor of international public and private law of the School of Law of UNAM, President of the Mexican branch of the International Law Association, and Director of the Mexican Institute of Diplomatic Studies. Several of his writings have appeared in United States publications.[3]

Sepulveda's book is primarily concerned with international public law. He presents the history of the development of the northern boundary of Mexico and a study of the diplomatic issues between Mexico and the United States since the Treaty of Guadalupe Hidalgo in 1848. In the first seven chapters, he writes in great depth regarding the developments from the Spanish acquisition of Louisiana in the Treaty of San Idelfonso in 1762 to Mexico's loss of its claims to the present southwestern United States in the Treaty of Guadalupe Hidalgo. It is a subject which persons from the United States traditionally view quite differently. His is a study of colonial geopolitics, ethnic aspirations, intrigue, and aggression. His view is that of a Hispano-Mexican writing for Mexicans. Nevertheless, his analysis is not unsound, and it is well documented with United States and continental as well as Hispano–Mexican authorities.

The second part of the book reviews problems such as originally determining the border in 1848, negotiation of the Gadsden Purchase, arrangements to deal with cross-border violence, negotiations to settle disputes over river boundary changes (with special reference to the Chamizal Zone), disputes over distribution of surface water, and the Colorado River salinity problem. These chapters are the main thrust of the book—the long-term development of a viable and positive diplomatic relationship.

The discussion of that development begins with the effectuation of Article V of the Treaty of Guadalupe Hidalgo, that the parties would establish a bilateral survey commission to determine and mark the border from the Pacific Ocean near San Diego to the Gulf of Mexico at the mouth of the Rio Grande. Considering the 2000 miles of trackless, uncivilized territory this was a monumental undertaking. In Sepulveda's view, the technical problems were exacerbated by continued United States expansionist goals. It is evident from the book that the treaty negotiators had a very imprecise knowledge of the territory they were negotiating over. Sepulveda is no doubt correct that many Americans held out expansionist goals for Mexican territory. The most grandiose wanted all of northern Mexico and the least of the expansionists wanted northwestern Mexico and Baja California. It is also true as he states that a war might have been possible over the goals. Nevertheless, the aspirations were settled on the basis of the reality of a

3. *See, e.g.*, Sepúlveda, *Mexican-American International Water Problems: Prospects and Perspectives*, 12 NAT. RESOURCES J. 487 (1972); Sepúlveda, *Implications for the Future: Design of International Institutions*, 15 NAT. RESOURCES J. 215 (1975); Sepúlveda, *Colorado River Management and International Law*, in ENVIRONMENTAL MANAGEMENT AND THE COLORADO BASIN (A. B. Crawford & D. F. Peterson eds. 1974).

southern transcontinental railroad route by the Gadsden Purchase of land in southern New Mexico and Arizona in 1854.

Sepulveda recognizes that the first real progress toward cooperation came in 1882. This was as a direct result of the mutual need to deal with cross-border violence. A pragmatic arrangement was reached by executive agreement to eliminate the use of the border to provide sanctuary for raiders. The rigid constraints of the border were reduced to allow military and local police authorities to cross the border in hot pursuit of outlaw groups.

Another external influence, the periodic natural change in river courses, led to a second executive agreement he refers to—the 1889 Convention Respecting the Dividing Line. That Convention recognized the continuing nature of the river-course problem and created the International Boundary Commission to deal with the problem on a long-term basis. As had been intended by the bilateral survey commission, the Commission was designed as a body of technicians to determine the disputes on a technical rather than a diplomatic basis. In Sepulveda's view, the Commission was the most important result of the 1889 Convention. Originally created for only five years, it was extended from year to year until 1900 when it was made permanent. This can be attributed to its success and mutual acceptance.

Also on the subject of periodic natural changes in river courses, Sepulveda dedicates an entire chapter to the Chamizal Zone dispute which began with a flood-induced river change in 1864. Because of the size of the change (affecting 500 acres of Mexican territory) and its location (within El Paso, Texas during much of the period), it was not settled until 1964. He attributes the delay to the old expansionist attitude; he fails to give weight in mitigation to the long periods of political turbulence in Mexico during those 100 years. Nevertheless, it is a study in patient diplomacy. The significance of the Chamizal to the continuing relationship, because of its importance to Mexico in real and symbolic terms, cannot be overstated. As Sepulveda notes, the settlement "heralded a better and more just treatment by our neighbor." He is right in that it made a new beginning possible in the relationship for both Mexico and the United States.

After Chamizal, in Sepulveda's view, the remaining issues were water allocation, water salinity, and the maritime-zone issues. The water allocation issue had been settled "on paper" in the Treaty for Distribution of Water from the Rio Grande, Colorado and Tijuana Rivers of 1944. Water in real terms is a critical issue throughout the Southwest, and it always has been. On the basis of a long history of insufficient supplies of water from the named rivers being made available to Mexico, the Mexicans had a just complaint. To resolve that complaint, the Treaty built upon the success of the past: the International Boundary Commission became the International Boundary and Water Commission (IBWC). The IBWC acquired the additional function of gauging the distribution of the water within the Treaty

limits. Again, as Sepulveda reports, this approach has been a success. Nevertheless, water will be an increasing problem in the Southwest, not only because of its shortage, but also because of the increased needs which can be projected.

An example of the problem is the salinity issue. Because of increased demands, the remaining water in the Colorado River flowing into Mexico developed high levels of dissolved mineral salts. The levels reached made the water unusable for irrigation purposes in Mexico. This was raised by Mexico as a diplomatic claim of a violation of the Treaty of 1944, i.e., that the Treaty "imposed an obligation with respect to the quality of water." As he reports, the dispute was disposed of, in part, by the IBWC Issuance No. 242, which determined the principle of legal responsibility for man-made contamination of flowing water. Although the IBWC did not determine the acceptable level of salinity or how the conflicting levels of water flow and salinity levels would be resolved, Sepulveda remains optimistic that a resolution of these problems will be made.

The maritime-boundaries issue remains as a current issue. In 1976, Mexico declared an exclusive maritime economic zone of 200 miles. After a preliminary fishing arrangement between the United States and Mexico, negotiation of a maritime boundary treaty was begun in 1978. The Treaty of 1978 was quickly agreed to by the parties. After being reported favorably by the United States Senate Foreign Relations Committee further consideration of the Treaty resolving the issues was suspended. In the view of Sepulveda, the failure to ratify the Treaty is unjustified. He maintains that the Treaty fairly disposes of the issues raised by Mexico's Mexican 200-mile limit.

Sepulveda's book is an excellent study of a growing diplomatic relationship. It is not exhaustive of all issues and concerns which have existed or presently exist between the United States and Mexico. Nevertheless, he presents an optimistic and positive view that disputes will be worked out to the substantial satisfaction of both parties. The primary lesson of the book is that the parties to a common frontier must continue to work at a positive relationship. His presentation is well worth reading.

James W. Mast

Hague Conference Handbooks

Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service of Process Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

Maarten Kluwer's International Uitgeversonderneming, Antwerpen Apeldoorn. U.S. Distributor: Butterworth Legal Publishers, Stoneham, Massachusetts 02180. $32.00.

Practical Handbook on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Maarten Kluwer's International Uitgeversonderneming, Antwerpen Apeldoorn. U.S. Distributor: Butterworth Legal Publishers, Stoneham, Massachusetts 02180. $37.50.

On August 24, 1967, the United States ratified the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (hereinafter "Service Convention"). The purpose of the Service Convention is to establish a system to bring *actual* notice of documents to be served in time to give the intended recipient an opportunity to defend, to simplify transmission of such documents, and to facilitate proof that service has been effected abroad. The Convention entered into force on February 10, 1969.

On August 8, 1972, the United States ratified the Hague Convention on the Taking of Evidence Abroad (hereinafter "Evidence Convention"). The purpose of the Evidence Convention is to facilitate the gathering of evidence abroad by improving and unifying domestic practices relating to the transmittal and execution of Letters of Request (Commissions Rogatoires). The Convention entered into force on October 7, 1972.

Both conventions have been ratified or acceded to by Barbados, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Sweden, the United Kingdom (including Akrotiri and Dhekelia, the Cayman Islands, the Falkland Islands, Gibraltar, Hong Kong, and the Isle of Man) and the United States (including Guam, Puerto Rico and the Virgin Islands). Spain has signed both but has not yet ratified them. Cyprus and Singapore have

ratified only the Evidence Convention. Belgium, Botswana, Egypt, Japan, Malawi, Seychelles, and Turkey have ratified only the Service Convention.

The procedures under both conventions are significant to any litigation involving foreign parties or witnesses. While the international legal community has had mixed reactions to the helpfulness and operation of the conventions, any attorney involved in multinational litigation must have the resources to find information on the conventions, their scope and their limitations. With this in mind, the Permanent Bureau of the Hague Conference on Private International Law put together two "handbooks" on the conventions.

These handbooks, together with Bruno Ristau's recently published *International Judicial Assistance*, represent a significant step forward in making information concerning private international law available to the United States legal community. While Bruno Ristau's book will not be reviewed at this time,[1] it should be noted that his book and the handbooks serve two distinct purposes, with the same goal in mind—that of assisting the practitioner to handle transnational aspects of litigation. Bruno Ristau's book is relatively comprehensive, filled with editorial comment and opinion, and expensive. His book is written as a guide to the litigator in the use of foreign judicial offices of both parties and non-parties to the Service and Evidence Conventions. The Hague Convention handbooks, on the other hand, are narrow, with little original material, and they are comparatively inexpensive. All three will enable both the State and Justice Departments to field a multitude of inquiries by directing the curious to these books.

The international practitioner, of course, is probably already aware that both conventions are published in Martindale Hubbell Law Directory, Volume VIII (1985), along with the Convention for Enforcement of Foreign Arbitral Awards and Convention for Abolishing the Requirement of Legalization of Foreign Public Documents. Accompanying the conventions are the State Department's annotations on reservations and designations made by the parties to the conventions. Current information on the treaties is also available from the Treaty Affairs Section of the Office of Legal Adviser, Department of State, Washington, D.C. 20520.

The Hague Conference's handbooks, on the other hand, provide far more detail than Martindale Hubbell and in a much more readable format. For instance, the handbooks provide charts listing all parties to the conventions, the date of ratification by each party and the date in which the convention came into force vis-a-vis other parties to the convention. Additionally, the handbooks have a series of charts that show designations, declarations, and reservations made by each state. The charts in the Evidence handbook,

1. The book will be reviewed in a future issue of THE INTERNATIONAL LAWYER.

showing the designations of the Central Authorities which execute letters of request under the Evidence Convention, provide an exact address and phone number for each authority. Martindale Hubbell merely mentions the name of the authority. Another useful feature is a section of each chart devoted to other channels of transmission, methods of taking evidence or special agreements. Here bilateral treaties on judicial cooperation are set forth, as well as other agreements and regulations. For example, under the Federal Republic of Germany, the authors have set forth and noted a series of agreements which have been concluded with the United States of America that were effected by an exchange of notes in 1956, and again in 1979 and 1980. The text of these important agreements is set forth in whole.[2]

Not found in Martindale Hubbell, or anywhere else for that matter, is a digest of case law on the Evidence Convention and a bibliography of law review articles on both the Service and Evidence Conventions. The digest of case law on the Evidence Convention, unfortunately, is rather brief and probably nowhere complete. As would be expected, most cases are from the United States. The bibliography for the Evidence Handbook was drafted by David M. Schlitz, an attorney with the Office of Foreign Litigation in the United States Department of Justice. Thus the Evidence Convention bibliography contains a good many English articles. On the other hand, the author of the bibliography for the Service Handbook was probably foreign: a majority of the articles in the bibliography on the Service Convention do not appear to be in English. Whether the Permanent Bureau will expand these sections to make them more complete, and keep them up to date, remains to be seen.

The handbook on the Evidence Convention contains as a background piece the verbatim reproduction of Philip Amram's article which appeared in 62 American Journal of International Law 776 (1968). Of course, this article can be obtained by a quick trip to the library. Nevertheless, it is useful to have it included in the handbook. Following Mr. Amram's article is the Report on the Work of the Special Commission of 1978 on the Operation of the Convention, with an annex containing model forms for the letters of request that are recommended for use in applying the Evidence Convention. While Martindale Hubbell also publishes these model forms, the Special Commission's report is not published. The report is short and somewhat helpful for providing background on the Evidence Convention, although probably not necessary nor binding in any interpretation of the Convention.

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2. A good explanation concerning these agreements and the obtaining of evidence in the Federal Republic of Germany can be found in Shemanski, *Obtaining Evidence in The Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation*. 17 INT'L LAW. 465 (1983)

Not found in the Evidence handbook is the Permanent Bureau's recent (March 1985) working paper on problems with the operation of the Evidence Convention circulated for use at the June meeting of the Hague Conference's Special Commission. This paper, perhaps, is the most comprehensive work by the Permanent Bureau on the current thought concerning the Evidence Convention. For instance, it discusses the movement by some members of the Hague Conference to have the Convention made applicable to arbitration proceedings, and to define its application in suits involving competition law. It also contains a synthesis of recent case law, including the Fifth Circuit's internationally criticized opinion, *In re Anschuetz & Co.*, 754 F.2d 602 (5th Cir. 1985), holding that the Evidence Convention does not supplant the Federal Rules of Civil Procedure where the United States court has jurisdiction over the foreign resident under a state's "long arm" statute. Omission of this material can be attributed to its recent vintage, but without knowledge of the underlying controversies, a practioner trusting the thoroughness of the book will be caught off guard when problems surface. Publication of the handbook without this material is unfortunate.

The handbook on the Service Convention was drafted approximately one year before the handbook on the Evidence Convention. Like the handbook on the Evidence Convention, it contains much more information than that contained in Martindale Hubbell. Specifically, it contains a text of the Convention, a chart showing the parties to the Convention, the date of ratification and the date of entry into force, some general remarks concerning practice under the Convention drafted by the Permanent Bureau of the Hague, a section on each party's requirements on the transmission and execution of requests for service by the Central Authority, including the Central Authority's complete name, address and phone number as well as fees, translation requirements, and methods of service. Another particularly useful portion of the handbook is a section on other channels of transmission of papers with respect to parties to the Service Convention, and a chart showing declarations made by each country under the Service Convention and any limitations as to the time after which an application will not be entertained.

Finally, included in the handbook on the Service Convention is an annex. The first portion of this annex is a "Recommendation on Information to Accompany Judicial and Extrajudicial Documents to be Sent or Served Abroad in Civil or Commercial Matters." Curiously this recommendation contains a reference to a "warning" that should be included in the summaries to be sent with documents abroad. Nowhere in the book can be found an explanation of what this warning is or what is intended by the meaning of the word "warning." Accompanying this recommendation is a form entitled "Summary of Documents to be Served" which is identical to the summary annexed to the Convention except that this form is in *both* French and

English. Why this bilingual form is recommended can only be surmised because, again, no explanation is included. Next follows instructions on filling out the form. These instructions are not in Martindale Hubbell, but add only marginal value.

In conclusion, both handbooks of the Permanent Bureau of the Hague Conference serve a valuable function and provide useful materials that are not found elsewhere. Neither handbook attempts to be an original work. Unfortunately, this is a drawback. What is needed is the careful hand of an editor tying together the many sections of the handbooks to provide clear explanation as to why certain sections exist and what they are intended to achieve. Perhaps, later revisions of the Hague Conference handbooks will contain such additional clarification and editing. Finally, the fact that the Permanent Bureau states that the books will be supplemented from time to time means that the volumes should not become outdated. Already, the United States distributor, Butterworth Publishing, has stated that a supplemented version of the Service handbook is available. Hopefully, the Evidence handbook will be supplemented to include the Permanent Bureau's most recent work, noted above, and the results of the June Special Commission meeting on the Evidence Convention. In a world where the international practitioner needs quick, yet reliable, reference sources on international laws, these handbooks are a welcome, though somewhat wanting, addition.

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