Book Reviews

On Teaching International Law

INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY. *By* Myres S. McDougal *and* W. Michael Reisman. *Mineola, New York: Foundation Press*, 1981. Pp. lxviii, 1584. $29.00.

*Reviewed by Rosalyn Higgins**

This monumental collection of cases and materials brings to fruition many years of effort by the authors, assisted at various stages of the project by other colleagues. For those who have been exposed to the culture shock of a policy science course on international law (and survived the experience) and for those who have had the intellectual stimulation of teaching such a course, the publication of this book is an important event. It makes available a radically different approach to the teaching of international law. This difference lies not in its content: a student who has mastered these materials will emerge with an enormous knowledge of substantive international law. The authors have never selected for our instruction materials that are ephemeral or singular, nor do they do so now. The traditionalist will feel neither that vital source materials are missing, nor that undue emphasis is given to materials of no weight. This is not the sort of fashionable textbook that is full of (ill-informed) letters to the *New York Times* on current problems of international law, but in which the *Lotus* case and the Vienna Convention on Treaties are inexplicably missing. Rather, the difference between this and other texts is one of approach and structure. By breaking away from the traditional textbook headings, the authors show that the real interrelationship of the different facets of international law is a dynamic rather than a static process. This structural approach demonstrates the importance of contextual analysis, and stresses ways in which international law is directed toward the attainment of certain policy objectives and the promotion of particular values.

Initial exposure to the policy science approach is not an entirely orderly process; it is a baffling, disturbing, and finally exhilarating experi-

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ence. One is not, initially, carried along step by step. Rather, the experience is like seeing a vast photographic negative being developed before one's eyes: out of the darkness, first some bits and then others become clearer and more intelligible; their relationships to one another become apparent; finally a comprehensive overall picture has presented itself, and it seems a wonder that previously one could have had difficulties recognizing any of the component parts or appreciating the picture as a whole. Of course, some of those from traditional law backgrounds will not have waited for the final result: they will have fallen by the wayside long since, convinced that policy science is patchy and only partly intelligible. And at least part of the reason why students often give up is an absence of sufficient guiding signals in the early days, and too much heavy substantive material to digest in a context for which the student is insufficiently prepared.

Part One of this casebook is only partially successful in dealing with this problem of initial exposure to the policy science approach. Part One is entitled "The Global Community Context" and deals with the constitutive process—how international law is made and applied. It thus covers the ground that in traditional texts would be headed "Sources of International Law"—and much more besides.

The first seven pages contain a brief but invaluable essay by the authors on international law as a process of authoritative decision, which serves the teacher well in dealing with the essential starting point, "What is international law?" This section underlines the essential point that the question of what international law is cannot be answered without reference to how it is made and applied.

While thoroughly approving this approach, I still have some difficulties with the rest of Part One. The authors begin with Article 38 of the Statute of the International Court of Justice, which lists the sources of international law to be applied by the Court. The text, unlike most others, then asks questions relating to Article 38, even before it has introduced the materials: "Is Article 38 a sufficient guide to the range of contemporary international lawmaking? Is it comprehensive? Is it homogeneous? Does it, in particular, adequately direct the inquirer to customary international law? Can it account for law made by the U.N. General Assembly? The Security Council?" (p. 7).

Is the offering of detailed studies on specific substantive topics of customary international law the best way to emphasize law as process, and to emphasize the essential relationship between the identification of international law and its creation and application? Two sets of readings follow the introductory essay and Article 38 of the Statute. The first is on the lawfulness of hydrogen bomb testings in the mid-1950s, and of atmospheric testing more generally over the last twenty years. The selec-

tion of readings is admirable—but *so* detailed that it requires the highest calibre teaching to keep reminding students that what they are here concerned with is the process of making and developing international law: by custom, by the writings of leading jurists, by treaties (which can in certain circumstances be normative even if ratified by only a limited number of parties), by resolutions, by judicial decision.

I have a similar concern about the second set of readings, entitled "The Protection of Foreign Investment" (p. 46) (and which perhaps could have been called "the Protection of Foreign Investment and the Equitable Allocation of Natural Resources" if claims of culture bias are to be avoided). Of course, this topic is an admirable one by which to illustrate the way in which non-binding General Assembly resolutions, Supreme Court decisions, congressional responses, and other indicia all interplay to make, apply, and continuously develop international law. But the substantive issues underlying the problems of expropriation and compensation are extremely difficult, as are the concepts of act of state and permanent sovereignty over natural resources (not to mention sovereign immunity, which suddenly faces the unwary student in the extracts given in the *Dunhill* case).

There is nothing in the book itself to emphasize to the teacher that the purpose of these readings on nuclear testing and foreign investment is to illustrate the complex and nonmechanistic way in which international law is made and applied. This will be apparent to those of us close to the policy science school, but I am skeptical that others will understand exactly what these diverse materials on such technical matters are doing at this stage of the course. If this book is to be used by those outside of the authors' immediate circle, some clearer signals—to the teacher as much as to the student—would have been helpful. I am very skeptical that students can really understand these matters in the first few weeks of a course on international law. The question for judgment, of course, is whether, in order to emphasize international law as process, such detailed and substantive materials should be offered at this juncture. Or will it cause the wood (how is international law made and applied in real life?) to be lost for the trees (was cordoning off the high seas for nuclear testing unlawful in 1955? Is the Test Ban Treaty "law" for non-signatories? What underlay the Court's judgment in the *Nuclear Tests* case? What is the act of state doctrine? What is its relationship to sovereign immunity? What are the contemporary standards of compensation for the taking of foreign property? Is the Charter of Economic Rights and Duties of States merely aspirational?)? The matter is purely pedagogical: the selection of materials is fine, and entirely relevant to the underlying theme of constitutive process. But my own contemporary instincts as a teacher, and my recollections of first exposure to the policy science teach-

ing methods, lead me to believe that the problem I have outlined above is the real one.

The rest of this Part contains much that is very useful. The section on "More Traditional Perspectives about Prescription and Application" (p. 76) contains such problematic cases as the *Nuremberg Judgment* and the *Lotus* and *Nottebohm* cases, and allows a competent teacher full rein in drawing his or her students' attention to creativity in judicial decision-making. In this and the ensuing sections, the questions asked are buttressed by well-chosen readings, in which joint and separate writings by the authors are particularly helpful. The entire Part is very well done, and I found Section 5 (p. 99) especially impressive. This contains (under the broad heading "Global Constitutive Process of Authoritative Decision") materials organized in a way not available in other teaching books. A student asked the examination question "Is Article 38 of the Statute a comprehensive statement of the sources of international law?" will be able to reply by reference to the expansion of the authority of the United Nations vis-à-vis non-members, to the expansion of the inclusive legislative power (the Uniting for Peace resolution, the *Expenses* case, the *South West Africa—Voting Procedures* case), and to the expansion of executive and judicial competence (*Namibia* case). The readings assist with such intractable issues as predictability and change, and cultural diversity.

What is striking, as one leaves Part One, is that scarcely anything has been said about treaties in the context of making and applying international law. To be sure, there is later in Chapter X a fine treatment of the international law of treaties in the context of Part Four, which is entitled "The Strategies by which States Shape and Share Power and Other Values." But treaties are also important sources of international law in their own right. All the emphasis in Part One, apart from one or two passing references to, for example, the Test Ban Treaty, is on the making and application of international law by custom and judicial decision. The impression left is of the irrelevance of treaties in this context. My own preference would have been for some selection of materials to illustrate the richness and relevance of treaties as a separate source and their interplay with other sources, a particularly fertile area.

Part Two of this book is on "Territorial Communities as Participants in World Public Order." Instead of simply using, in the manner of so many traditional books, the heading "States" and a recitation of the terms of the Montevideo Convention of 1922 for the attribution of statehood, McDougal and Reisman look at states as the major, but by no means the only, actors on the international stage. They remind us of the importance and influence of other actors, such as multinational corporations, international organizations, and individuals.

The materials in this Part are well selected. At the outset, the student

faces the issue of self-determination in a section which includes materials relating to the establishment of a Palestinian state. No doubt this is to encourage early consideration of the policy issues underlying claims to play the role of state. The mix of materials—extracts of writings by the authors and others, the relevant parts of the U.N. Charter and regional arrangements, U.N. resolutions and International Court decisions—is especially felicitous. The Rhodesia case is considered briefly, as a case study in the withholding of the right of statehood. This discussion could usefully have been supplemented by materials on U.N. policy toward the South African *bantustans*.

Of particular interest is the section on hemispheric interests, with the Brezhnev Doctrine and United States legal policy in the Americas receiving special attention. European readers may find that the authors' comments do not sufficiently accommodate those claims to self-determination which they have favored in the preceding pages. The authors say:

> One of the realities of power is that weaker participants may often find it convenient if not necessary to survival to accommodate stronger neighbors. Major states have frequently sought to institutionalize, as between themselves, the preeminent influence position they enjoy in their own neighborhoods, through reciprocal recognition of spheres of influence. . . .
>
> While Article 2 of the U.N. Charter may be viewed as a prohibition of spheres of influence, the general flow of decision would seem to indicate that such claims continue to be made and deferred to as between the larger states.

(P. 187.) This, of course, is a fair description of the realities of international affairs, but the authors do not appraise whether these mutually-tolerated claims between the larger states are acceptable as a matter of general international law. This passage in no way reflects the unease felt by large parts of the international community. It does not assist in appraising the lawfulness of either United States actions in Central America or Soviet actions in Poland. Most European (and, one suspects, Latin American) students have difficulty in seeing real differences between these hegemonic interventions. The materials do not assist in drawing distinctions nor in assessing whether the major states' attitudes reflect naked power or a more generally shared sense of normative behavior.

The next two chapters concern topics that follow naturally from consideration of the establishment of territorial units. Chapter III deals with "Establishment and Regulation of Access to Arenas," and is full of interesting materials. Diplomatic communication and relations are dealt with here. The authors consider the protections of inviolability and diplomatic immunity, along with the ever-pertinent problem of diplomatic

asylum. For many readers this will be an unfamiliar location for this topic, but it makes intellectual sense and works well.

Chapter IV continues the theme of the establishment and regulation of access by considering the important question of recognition. The materials in this chapter provide an excellent survey of the question in all its facets, including some that in traditional texts would not be dealt with at all under this heading. The authors usefully could have spelled out why questions of "hot oil" and the *Sabbatino* case and the Hickenlooper amendment belong here at all. These relate to the denial of local effect to acts of governments—perhaps generally recognized, perhaps not—when these acts violate international law. The acts of an unrecognized foreign government will routinely be considered to lack local effect (English and United States law differ somewhat on this), and even a recognized government may still find that *some* of its acts may not be given effect in domestic fora. Section 4, on recognition and admission to organized arenas, especially the United Nations, contains not only materials on the *Admissions* cases, but also extracts from Reisman's analysis of the Puerto Rico situation (p. 426), which remains as relevant today as when it was written in 1975.

Part Three of McDougal and Reisman's book deals with "The Bases of Power of States," and includes matters that customarily appear under the heading of "Territory" in traditional textbooks. The previous Part had addressed problems of participation in the international process. What the authors now show is that the participants draw on resources and people as power bases. The resources include marine and land territory and airspace. People, too, are considered a resource, and thus questions of nationality are included in this Part. This is of course a far cry from the way in which more conventional texts simply offer to the student random headings which (for reasons never quite explained) he or she is required to learn: "states," "rivers," "nationality," and so forth. Unfamiliar though this coupling of resources and people as power bases may be, it makes sense and is intellectually viable. The critical issue underlying the selection of materials is the illumination of the following question: "What claims do decisionmakers in nation-states in fact make against other participants (including of course other nation-states) for control over resources and people, and what are the prescriptions and practices by which other participants reject, honor, and stabilize such claims?" (p. 433).

This Part begins by considering the problem of exclusive appropriation of resources, and draws on materials concerning the *Deepsea Ventures* claim and the Law of the Sea. The authors make the important point

that the optimum community use of resources does not necessarily lead one to the view that "international" competence over any given resource is preferable to "national" competence:

> [I]f one takes into account such factors as the *nature* of different resources, the conditions necessary for their optimum use (including their conservation) and the prevailing socio-economic context, the inadequacy of the traditional dichotomy becomes apparent. Some resources will actually be used in ways that benefit the entire community if they are under the control of a single state, while other resources will yield optimum benefits to the community, if they are "owned" by no state, but are available for use by all.

(P. 434; emphasis in original.)

This dichotomy of course underlies the present refusal of the United States to become a party to the new Law of the Sea Convention. The Reagan administration takes the view that it is in the global interest that the resources of the deep sea bed should be "available for use by all" in an unregulated way, so that those with greatest current technological know-how can expeditiously exploit the resources, providing security for themselves and, if necessary, some income derived therefrom to be allocated to the developing nations. Many other nations have a radically different perception of where the common interest lies.

It is not easy from these materials to ascertain where the authors stand on this issue. Although the book went to print before the issue became acute under the present administration, it had been looming on the horizon for some time. The student (or teacher) is left very much to his or her own devices in trying to appraise, in relation to the contending arguments, where the common interest really lies. The authors are uncharacteristically reticent in suggesting where an appraisal of the relevant data and factors is likely to lead. Those critics of the policy science school who in the past have claimed that the analysis contains too much personal preference will no doubt feel reassured by this reticence. But those, like myself, who have valued the clear articulation of policy preference, will regret it.

The section on claims to exclusive expropriation of resources seems somewhat slight, taking up a mere twelve pages. It would have benefited from the inclusion of some clear statements of alternative views. Although the full records of UNCLOS negotiations are not available, such statements can readily be found in secondary source materials. Competing analyses by scholars would have been a further useful addition. The extracts of relevant sections of the Law of the Sea Draft (as it then was) are also very limited. It is hard for the student to get any overall sense of exactly what is proposed in the international regime,

other than in broadest outline. A more detailed study of the precise regime proposed for the deep sea bed would have been of value.

The rest of the "Resources" materials are admirable, and the user of the book now has a quite splendid survey of resources, coherently structured. Section 2, on resources not subject to exclusive appropriation, examines both transit and military uses of the oceans. International rivers receive examination in the context of navigational uses (scholarly writings, the *Faber* case) and non-navigational uses (scholarly writings, the *Lake Lanoux* case). The authors provide a particularly good guide (both in terms of identifying the issues and in offering further reading) to the upcoming problems concerning mineral and living resources in Antarctica. Very satisfactory treatment is also provided on outer space, internal waters, continental shelf (with a very full reproduction of the *North Sea Continental Shelf Case* judgment), and the exclusive economic zone (though on the latter, reference to the now abundant literature would be welcome).

Particularly strong is the section entitled "Claims Relating to the Modalities of Establishing Exclusive Appropriation" (Section 4)—or "Title," as it would be termed in the traditional texts. This section gathers and harnesses the ample case law and the writings of jurists, including those of the authors, into a splendidly coherent and articulate whole. Students working their way through pages 610-77 will at the end have a very good understanding of the legal concepts at play in securing title to territory. In later editions the competing claims made by the United Kingdom and Argentina to the Falkland Islands—which so graphically illuminate notions of discovery, *terra nullius*, cession, prescriptive acquisition, protest, estoppel, and self-determination—could perhaps be added.

The materials on "People," dealt with as a base of power, are particularly interesting, and are perhaps less self-selecting than those on territory, space, and other resources. This is particularly so when one is accustomed, as is this writer, to teaching "people" as "participants" rather than as "bases of power." This necessarily leads to a different emphasis in the choice of materials, though the same ground has to be covered. Thus in the treatment of "people as participants" great weight is given to human rights generally (in the context of the ability of individuals to obtain direct access to judicial or quasi-judicial arenas and to mitigate the rigors of the nationality of claims rule) and not just to human rights as they relate to nationality and statelessness. McDougal and Reisman's selection of materials implicitly makes a powerful case for dealing with "people" as a resource. It allows the natural inclusion of a

wider spread of relevant materials. Questions of national link as a condition for exercising protection (with *Nottebohm*, *Flegenheimer*, and *Barcelona Traction* as inescapable choices), and claims regarding exhaustion of local remedies (*Finnish Shipowners*, *Interhandel*) will be found in either alternative treatment. Some materials on modalities of protection of nationals are included by the authors, and under this broad heading they deal both with methods specific to United States law and, somewhat disconcertingly (if one is not yet adjusted to this frame of reference), with the difficult question of humanitarian intervention. I teach this as part of the law of the use of force, but find faultless the logic of including it here. I have some difficulty, however, in understanding why materials on the Entebbe incident are followed by the heading "Arbitration and Adjudication," and a reproduction of the *Norwegian Loans* case, with an immediate return to humanitarian intervention and the examples of the Franco-Belgian intervention in Katanga in 1978. It would have been of great interest to have materials on the attempted United States rescue of the hostages held in Teheran, but presumably this occurred too near the date of going to press.

The chapter proceeds to an excellent section on various facets of nationality. This section naturally draws heavily on United States cases and legislation. The issues are clearly identified, and the authors offer their own clear analysis of the various ways in which claims arise out of multiple nationality (pages 901-02). Extracts of McDougal's, Lasswell's, and Chen's prior writing on nationality provide assistance to the student on the question of statelessness.

The materials on access to territory (immigration, expulsion) are excellent. It is here that the authors turn to the question of state responsibility. Many readers will of course be accustomed to finding state responsibility as a separate major textbook heading. But as the authors indicate, the doctrine really deals with claims to exercise control over people within state territory, and the protections that international law provides. The materials on state responsibility nonetheless seem slight, and surprisingly the *Corfu Channel* case, with its important competing views on imputability, is not included. Of course, a good teacher will be able to build a great deal upon the International Law Commission's Draft Articles on State Responsibility, which are included, but appear without analysis or commentary.

The authors follow a traditional approach in dealing with property rights as part of state responsibility. Some might argue that it is more appropriately dealt with under the topic of the state's resources. Each preference carries its own value overtones, and plausible arguments can

be made in support of either decision. But for a topic of such major contemporary importance, this section is surprisingly sparse. Sections 187-190 of the *Restatement (Second) of Foreign Relations Law of the United States* (at pp. 951-52 of the book) are hardly enough. There is much pertinent case law, diplomatic practice, treaty practice, and scholarly comment that could be included here. Part of the trouble arises from the fact that some of the relevant materials have been used in Part One on "The Making and Applying of International Law," in the section on the protection of foreign investment. These materials—Resolution 1803, the Charter of Economic Rights and Duties—are an essential component of any contextual study of the issues. But in this earlier section the materials shade off rapidly into problems of act of state (*Sabbatino*) and immunity (*Dunhill*); and even when both sections are read together it cannot be said that the deeply important question of foreign property protection/natural resource control by the state is dealt with in a satisfying manner. I would hope that these materials could be recast in subsequent editions.

Part IV is entitled "The Strategies by which States Shape and Share Power and Other Values." It thus covers matters that those familiar with more traditional texts will be unused to having grouped together. The military instrument is an area in which both of the authors have written widely, and it is not surprising that it is very well done. Section 1 is on "Aggression and Self-Defense," and provides pertinent articles of the Charter, treaty provisions, and U.N. resolutions, as well as a fine selection of competing scholarly writings on such questions as the definition of aggression and anticipatory self-defense. Subsequent sections concern the questions of preparation for war (with use of Nuremberg Tribunal materials as well as the *Nuclear Tests* case) and the prohibition of certain weapons. The latter is especially full, with excellent readings provided and questions put to the reader. Nor is the question of disarmament and arms control forgotten. Particularly fascinating, and somewhat novel, is the full section on covert operations. War crimes, too, receive thorough coverage, with the *Calley* case of 1975 added to the grim litany. A very strong section is concluded by materials on belligerent occupation (which include some writing on the question of the West Bank and on the contemporary status of conquest). Brief reference is made to, and further citations provided for reading in relation to, the phenomenon of non-state violence.

The second major strategy is legal regulation of the economic instrument. Here special attention is paid to deprivatory techniques such as tariffs, boycotts, and expropriation. To deal with the Charter of Eco-

nomic Rights and Duties of States under the heading of "Deprivation" is value-laden, but one party's economic gain is all too often another party's deprivation. That regrettable fact is equally true of boycotts, and it is the task of international law to facilitate solutions of common benefit even while it tolerates some strategies of unilateral benefit. In these pages the student will find fascinating materials on Rhodesian sanctions—U.N. resolutions, U.K. legislation, U.S. regulations, and case law. There is a very full and instructive coverage of the Arab boycott against Israel, the Western sanctions against Iran in relation to the holding of United States hostages, and the Cuban embargo. They offer the student an absorbing area of study.

To the European reader it is fascinating to see included the section entitled "Regulation of Economic Indulgence" (p. 1094)—the world of the bribe, the payoff, the kickback. Extracts from Reisman's stimulating and provocative book *Folded Lies* (1979) are reproduced here, along with other writings, resolutions of the U.N., and the Foreign Corrupt Practices Act (15 U.S.C. § 78dd-2).

The ideological instrument is not forgotten. The chapter on this strategy is brief, but it is full of pertinent and unusual material, and very stimulating. This is the best treatment of the subject in any teaching book.

This part of the book concludes with the massive Chapter X, entitled "The Legal Regulation of International Agreement-Making." This excellent treatment is some hundred and fifty pages long, and is a veritable teaching book in itself on the law of treaties. It concerns all the elements of the law of treaties, including: the competence of the participants (including United States constitutional aspects), the content of treaties, the legal effect of treaties, reservations, interpretation, performance, and termination. In each of these there are skillfully interwoven the relevant parts of the Vienna Convention, state practices of various sorts, and writings of jurists (including the authors themselves), and judicial and arbitral decisions; an abundance of reference to other writings in learned journals is also provided. The organization, selection, and skillful use of these materials is a *tour de force* and any student working through them will have a very good understanding indeed of the law of treaties.

The penultimate part of this book deals with "Jurisdiction." I find its location, as nearly the last topic covered, baffling. It is so central to our understanding of what states can do, to whom and in what circumstances, that I firmly believe it must come much earlier in any course. I myself teach it immediately after covering "Participants," and find it important to have treated these materials before coming to resources, as, all

said and done, there is a jurisdictional aspect to resource claims. I think it is extraordinarily hard for students to deal with the prescriptions of the 1958 and 1982 Law of the Sea Conventions on, for example, collisions, transit, or exploitation of resources, without a solid understanding of the alternative bases of jurisdiction authorized under international law.

However, that aside, Part Five itself is of the greatest interest, because it reflects the authors' important original thinking on the topic of jurisdiction. It begins with a clear statement that it is necessary to distinguish the competence to prescribe law from the competence to apply law to particular persons, events, and things. The distinction between competence to prescribe and competence to apply is both more subtle and realistic than the more traditional distinction (insofar as writers on jurisdiction make any such analysis at all, which is frequently not the case) between legislative jurisdiction and enforcement jurisdiction. The application of law (in contradistinction to the prescription of laws) may involve, as the authors point out, the application of a law other than the law of the forum: here we have, in a readily understandable way, the interface with choice of law questions. Whereas other writers will often seek to explain other phenomena by reference to "exceptions" to normal rules of jurisdiction, McDougal and Reisman speak of secondary assertions of competence to prescribe and apply. The secondary assertion of competence to prescribe is usually advanced by a private party, and less often by a state, and is a claim:

> that the policies applied should be those prescribed by a state other than that making the application. This secondary assertion of competence, which embraces the whole field of choice of law in private international law, arises because states commonly exercise a competence to apply [legal policies] over events for which it is inappropriate to apply locally prescribed policies.

(P. 1273.) By the secondary assertion of competence to apply, the authors have in mind what some others have spoken of as "indirect jurisdiction"—for example, the recognition and enforcement of foreign judgments, but also of acts of state more generally.

The introductory pages to this part, together with the selection from the authors' own relevant writings, make an admirable introduction to this difficult topic. The chapter contains the *Lotus* case as a general lead-in, and then moves on to specific materials on the principle of territoriality. So-called "impact territoriality" is dealt with under the protective principle, and contains most of the leading cases, a very detailed further reading list in the area (especially, of course, in antitrust matters), as well as the United Kingdom Protection of Trading Interests Act of 1980. About this last the authors maintain a tactful silence, though they pro-

vide guidance and comments in a more general sense on the difficulties of the protective principle. A third section concerns the principle of nationality. In an unusual grouping, jurisdiction based on the nationality of corporations is treated in a separate section, with *Barcelona Traction* holding pride of place. The *Eichmann* case is used to discuss the personality principle. All these relate to the competence to prescribe law.

An outstandingly original and effective chapter on the initial competence to apply law deals with such relevant matters as consent, domicile, and location of property, as well as less immediately obvious topics, such as hot pursuit. In the case of hot pursuit a state is nonetheless applying its own prescriptions in relation to an offense committed within its jurisdiction. In the case of universality, the matter is more clearly one of application of commonly held principles (which may find expression in national legislation). It is here that the authors have chosen to place the *Filartiga* case. But it is a sad fact that torture is not listed as an international crime in the present International Law Commission draft on State Responsibility. The concept of universal jurisdiction does not yet fully coincide with the concept of an international crime.

The doctrine of "state immunity" is, of course, really all about immunity from the application of laws, and it is properly dealt with in that way. It is extraordinary to think that some law schools and texts teach state immunity as if it were a topic entirely distinct from jurisdiction. The materials on state immunity are, understandably, largely American, and the recent European case law and United Kingdom legislation are not included.

The final pages of this Part are on secondary assertions of competence. Thus disregarding formalistic distinctions between private and public international law, the authors make reference to choice of law issues. Again, in a categorization that will be unfamiliar to some, this is the location for materials on extradition, because extradition involves a claim that governments having jurisdiction over a person surrender him for trial in and punishment by the laws of another country. The authors now move to the secondary competence to apply law. The act of state doctrine is appropriately considered in this framework: in what circumstances should one state honor the decisions of another? The reader will here find the great cases of *Sabbatino*, *Dunhill*, and *First National City Bank v. Banco Nacional*, as well as discussion of the Hickenlooper Amendment. There is also a full coverage of enforcement of foreign judgments, with reference to the important treaty law now in existence on the topic as well as to leading cases in various jurisdictions.

Of all the Parts in this remarkable book, that on jurisdiction most

stands out as reflecting the originality of the authors' conceptual thinking. That originality is expressed, on a pedagogical level, in the decisions made on the organization and classification of this teaching book's materials. It whets our appetite for a full-blown study of this difficult but crucial area.

Skeptics will perhaps approach the book with two main anxieties, both of which prove groundless. The first is that the book will be written in policy science jargon and incomprehensible to the uninitiated. Even if the special language employed elsewhere by McDougal and his colleagues presents an insuperable barrier for "outsiders" who make a modicum of intellectual effort (a point I have never been able to accept), there is nothing to fear on that score in this volume. Its vocabulary is straightforward and it is immensely and readily readable. The second anxiety might be that the authors will at all times be promoting their own policy preferences. This, too, is not the case—indeed, as I have indicated above, McDougal and Reisman are at times so reticent that one could wish to see more clearly where they themselves come out on certain issues. But they have chosen to let those who teach from this book use the materials and discussions to reach their own conclusions.

International Law in Contemporary Perspective could usefully be subtitled *Or How to Stop Worrying and Learn to Love the Policy Science Approach*. It is a fine achievement and deserves wide use by those who care about the teaching of international law.

FOREIGN COMMERCE AND THE ANTITRUST LAWS. 3d ed. 2 Vol. Pp. xlviii, 887. By Wilbur Fugate. Boston: Little, Brown, 1982. $100.

Reviewed by Joel Davidow *

The present state of international antitrust may well breed cynicism among supporters of free competition and free trade. The new edition of Wilbur Fugate's treatise, like some other recent books on international antitrust, concentrates on tracing the expanding reach of United States antitrust law, the spread of American principles of competition to other nations, and the embodiment of these principles in international codes and declarations.[1] These developments are surprising, in light of the odds against them. But little stressed in such surveys is the evidence that all national laws are heavily influenced by self-interest and mercantilist considerations, and that in most countries competition is honored more in the breach than in the observance, and in a substantial number rejected outright.[2] The recent enactment in England, France, and Australia of laws aimed at counteracting United States antitrust investigations has shown that conflict and hindrance are far more common than cooperation in international antitrust enforcement.[3]

It has been a major tenet of both the Common Market treaty and the United Nations Principles on Restrictive Business Practices that cartels are undesirable because they counteract trade liberalization and thus deny consumers the benefits of specialization and comparative advantage.[4] Nevertheless, in very recent times, as in similar periods in the 1930s, governments facing industrial problems, recession, or trade disputes have been quite prepared to allow or encourage cartel arrangements designed to restrict production, raise prices, and/or control

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1. Other major surveys in this field include J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (2d ed. 1981) and B. HAWK, UNITED STATES, COMMON MARKET, AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE (1979).

2. *See, e.g.*, Bock, Korsch & Wilner, *Germany*; Castel, *France*; and Osakdani, *Japan*, in ANTITRUST LAWS (W. Friedmann ed. 1956).

3. These laws are discussed in Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247 (1982).

4. The United Nations Restrictive Business Principles are framed with the intention of achieving, in part, the following objectives: "To ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries." Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, § A(1), U.N. Doc. TD/RBP/CONF./10, Annex (1980), *reprinted in* 19 I. L. M. 813 (1980).

For a brief discussion of a major tenet of the Common Market Treaty, *see* U. TOEPKE, EEC COMPETITION LAW 10 (1982).

exports or imports.[5] The recent arrangement setting precise quotas for most steel trade between the United States and Europe provides a dramatic example of this trend.[6] The situation is little different in regard to international competition in automobiles[7] and video tape recorders.[8] Quotas abound, and more are called for continually. The United States on October 8, 1982, enacted legislation to encourage further the use of export cartels and to make clear that the Sherman Act does not apply when Americans use restrictive business practices to victimize foreigners.[9] A cynical observer might conclude that the only serious offense recognized in international antitrust today is for private businessmen to participate in a form of cartel that governments have not yet decided to encourage.

Wilbur Fugate is not a cynic. He is one of the grand old men of international antitrust, and of international antitrust scholarship. Educated in the subject by his experience as lead counsel in the international oil cartel case of the 1950s, he wrote an early international antitrust textbook in 1958.[10]

In the early 1960s, he was selected as the first chief of the newly created Foreign Commerce Section of the Antitrust Division of the Justice Department. It is well to note, however, that the Foreign Commerce Section was created not to increase enforcement activity in the international area, but rather to control zealous trial lawyers who were offending political sensitivities and to serve as liaison with the State Department to improve the diplomatic atmosphere concerning such enforcement.[11] As Fugate well describes, the heyday of international antitrust enforcement was not the 1960s, when he was chief of the Foreign Commerce Section, but rather the late 1940s and early 1950s, when the Justice Department finished the attack on international cartels that it had begun even before World War II.[12] The major case brought during Fu-

5. *See, e.g.*, Consumers Union of United States, Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975). *See generally* Davidow, *Cartels, Competition Laws and the Regulation of International Trade*, 15 N.Y.U. J. INT'L L. & POL. 351, 366-75 (1983).

6. 7 U.S. IMPORT WEEKLY (BNA), at 99-101, 124-33 (Oct. 27, 1982).

7. 7 U.S. IMPORT WEEKLY (BNA), at 635 (Feb. 16, 1983).

8. 7 U.S. IMPORT WEEKLY (BNA), at 666 (Feb. 23, 1983).

9. Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (Titles I and III codified at 15 U.S.C. §§ 4001-4003, 4011-4021 (1982)). In particular, *see* Title IV thereof, the Foreign Trade Antitrust Improvements Act of 1982, 96 Stat. 1246 (amending the Sherman Act and the Federal Trade Commission Act).

10. W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS (1958).

11. W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 451-52 (2d ed. 1973).

12. *See* W. BURGE, CARTELS: CHALLENGE TO A FREE WORLD (1946). For representative cases, *see* United States v. Nat'l Lead Co., 332 U.S. 319 (1947); United States v. Imperial Chem. Indus., 100 F. Supp. 504 (S.D.N.Y. 1951); United States v. General Elec. Co., 82 F. Supp. 753 (D. N.J. 1949); United States v. General Elec. Co., 80 F. Supp. 989 (S.D.N.Y. 1948).

gate's tenure, the quinine cartel case, attacked a holdover cartel from the 1930s that gained new notoriety when a disgruntled ex-conspirator provided evidence to a Senate Committee that the cartel had raised the price of quinidine, an important heart medicine, to United States consumers.[13]

The aftermath of the quinine cartel case illustrates two somewhat contradictory features of United States international antitrust enforcement. The two primary defendants, a German company and a Dutch company, initially declined to appear for arraignment, as did their indicted executives. Some years later both firms eventually appeared voluntarily to pay their fines, the German firm because it wished to begin doing business in the United States and the Dutch firm because its managing director had been arrested when he attempted to pass through New York on a business trip.[14] This denouement illustrated that the importance of the American market is such that the United States has very considerable power to impose its antitrust views even on companies that have little or no presence in the United States market.

The other development after the quinine case was that the price of quinidine eventually rose considerably, much to consumer consternation. The reason was that those developing countries that grew and exported chincona bark, the primary raw material for quinine, imposed taxes or took other governmental steps to raise prices in reaction to the ending of the cartel. The lesson thus learned was that antitrust enforcement cannot always guarantee low prices, since antitrust laws are not intended or able to be applied to the tax and commodity policies of foreign sovereigns. This point was brought home again when a United States court of appeals held in 1981 that an antitrust action against the OPEC oil cartel should be dismissed under the act of state doctrine, as applying American law to foreign sovereigns would involve political questions, and the assessment of the legality of a foreign state's sovereign acts.[15]

Fugate reviews or discusses some of these events, but his book is neither a memoir nor a policy study. It is basically a review of United States cases and case law in this area largely from a prosecutor's point of view. For a variety of reasons, including Fugate's background and the fact that this is the third edition of a book started many years ago, there is relatively more emphasis on cases decided three decades ago than on those decided in the last few years. In some fields of law such emphasis

13. *See Prices of Quinine and Quinidine: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967).

14. ANTITRUST & TRADE REG. REP. (BNA) No. 690, at A-6 (Nov. 26, 1974) (reporting arraignment in United States v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, No. 68 Cr. 870 (S.D.N.Y. Sept. 4, 1974)); for the subsequent history of the criminal aspect of the case, *see* 453 F. Supp. 462 (S.D.N.Y. 1978) (granting motion to dismiss indictment).

15. Int'l Ass'n of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries (OPEC), 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

on the seminal precedents is appropriate, since the subsequent law may represent little more than logical extensions of the early rulings. Unfortunately, I do not believe that this is the case in regard to antitrust law or international antitrust law. The economic critique of most of the antitrust rulings in regard to vertical relationships such as distribution and licensing has been so incisive and influential that decisions from the 1940s and 1950s, even Supreme Court decisions, are not a very reliable guide to counseling or prediction at present.[16] In the international area the nature of the issues has been so altered by the decline of United States hegemony, the increased degree of interdependence among nations, and the accelerated role of governmental trade and regulatory policies, that new standards of jurisdiction, enforcement approaches, and even statutory provisions continually have had to be developed.[17]

The Fugate treatise has no emphasis on critical analysis, economic or otherwise. Nearly all cases are presented as if they were correctly decided initially and as if each had equally stood the test of time. When Fugate notes the existence of criticism of past cases or doctrine, his tendency is in subtle ways to defend the decided law. This to a limited extent is a conservative approach, but the reader may feel that an expert author should explain more fully why criticisms are valid or not, and indicate more precisely whether the newer or the older view is becoming or will be the decisive influence on enforcement policy and on the content of the law.

Fugate indicates his awareness of various legislative proposals to expand the exemption for export cartels, restrict the jurisdictional standard for application of United States law to international transactions, and reverse or alter decisions in controversial cases, such as *Pfizer v. Government of India*.[18] He refrains from any detailed analysis of the merits or desirability of such legislation, though the implication of most of what he writes is that the present situation is tolerable. It happens that legislation expanding the exemption for joint export,[19] tightening the jurisdictional standard,[20] and limiting the *Pfizer* holding was enacted in the year following publication of his book.[21] Thus, his cursory and stand-pat treatment of legislative issues leaves the reader less than fully prepared to deal

16. *See, e.g.*, R. BORK, THE ANTITRUST PARADOX (1978); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976).

17. *See generally* Kestenbaum, *Antitrust's "Extraterritorial" Jurisdiction: A Progress on the Balancing of Interests Test*, 18 STAN. J. INT'L L. 314 (1982).

18. 434 U.S. 308 (1978).

19. *See* Export Trading Company Act of 1982, *supra* note 9.

20. *See* Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 (enacted as Title IV of Export Trading Company Act of 1982).

21. *See* Antitrust Reciprocity Act, Pub. L. No. 97-393, 96 Stat. 1964 (1982) (amending Clayton Act § 4, 15 U.S.C. § 15).

with the changed state of the law. Arguably, the new legislation changes the law so little that it is not worth taking seriously; this remains to be seen. Still, other international antitrust treatises, such as the recent new edition of Atwood and Brewster,[22] are far more helpful than the Fugate book in understanding the issues that caused the laws to be changed.

The treatise has been expanded in this edition to two volumes. It is thus considerably longer than the 1973 edition (eight hundred pages as opposed to five hundred). There is quite comprehensive treatment of topics within the general subject of the application of United States antitrust laws to international activities. The first volume deals with the antitrust statutes, subject matter and personal jurisdiction, rule of reason and special defenses applicable in foreign trade, monopoly in foreign trade, and, finally, the Webb-Pomerene Act and joint exports. The second volume covers patents, trademarks, foreign investment, auxiliary antitrust statutes, and special problems of relief. The final two chapters deal with antitrust trends and policies in foreign trade and with foreign antitrust laws.

Despite all this, much is left out that might have been included. There is little discussion of the antidumping and countervailing duty laws that also affect notions regarding acceptable methods of competition in international commerce. The very important antitrust law of the European Common Market is described in only fifteen pages. The antitrust laws of the major western countries are surveyed in another fifteen pages. There is no discussion of competition laws in developing countries.

Conclusion

Despite alarmist cries that we have entered a new world where free trade and free competition are insufficient to protect our national interest, it is quite possible that these declared fundamental American policies will survive the onslaught. Just as critics of democracy are seldom able to prove that the alternatives to it are really preferable, the critics of antitrust and free trade may well not be able to demonstrate that cartels, industrial policy, and protectionism would advance the national interest in significant ways and would do so without generating such adverse results as domestic favoritism and international retaliation.

Upon a return to the fundamental values reflected in the antitrust laws and in our dedication to open international competition, books like Wilbur Fugate's treatise will be of significant worth. His steady and clear perception of where we have been in international antitrust policy and his obvious conviction that we have been doing the right thing and

22. J. ATWOOD & K. BREWSTER, *supra* note 1.

should keep on doing it provides answers for most questions that assume continuity of law and policy. The treatise is neither trendy nor polemic, but it is probably right, for the right reasons, much of the time, and that is no small thing in a field darkened by chauvinism, panic, and cavil.