BOOK REVIEW

INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS (2d ed.)

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International Civil Litigation in United States Courts: Commentary and Materials (2d ed.), by Gary B. Born & David Westin. Deventer, The Netherlands: Kluwer Law & Taxation Publishers, 1992. Pp. 928 (paperback).

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I. INTRODUCTION

Rare indeed is the legal textbook that does not include a variant on this sentence: "This book is designed to meet the needs both of law school professors and students and of private practitioners."[1] These are words over which the reader's eye does not tarry long. Everyone knows that professors look for questions, students look for answers, and practitioners look for shortcuts. The devout aspiration of satisfying all three constituencies is as false as that of a politician who seeks to bridge vast gulfs between opposing sides (at least until Election Day) with platitudes, smiles, and vain promises.

Gary B. Born and David Westin's book quietly and unpretentiously spans the divide, and does so without the self-absorption characteristic of pedagogical works or the "do-it-yourself approach" of practical ones. It is not an illusion. This book belongs on the shelf of any student or teacher either of international law or of litigation, and it should be consulted by practicing lawyers as well. The book gets high marks as an instructional vehicle, as a compendium and resource, and—rarest of all!—as a work of literature.

II. DISCUSSION

International Civil Litigation in United States Courts: Commentary and Materials sets out to explore "the special problems raised by for-

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1. GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 3 (2d ed. 1992).

eign litigants and transactions"[2] in lawsuits in the United States. These problems are organized under eight broad headings: (1) judicial jurisdiction; (2) service of process abroad; (3) forum selection; (4) the taking of evidence abroad; (5) foreign sovereign immunity; (6) subject matter and what the authors call "legislative" jurisdiction; (7) the act of state doctrine; and (8) recognition and enforcement of foreign judgments.

In each area, the reader is presented with a brief introduction to an issue, several pages excerpted from a leading decision (or other primary material), and then a critical commentary followed by a discussion of points raised by the excerpt. Although whole topics with significant jurisprudential value are dealt with in this way and with brutal rapidity, the analysis is unfailingly thought-provoking; the lack of exhaustive completeness is no criticism.

For example, in their discussion of the territorial limits of jurisdiction,[3] the authors present a three-page summary of the dimensions of the issue and its history in both public international law and the laws of the United States. Born and Westin then reproduce the Supreme Court's decision (as well as the dissent by Justice Marshall) in *EEOC v. Aramco*,[4] followed by a careful and scholarly critique that leaves no doubt they believe the case to have been wrongly decided.[5] The authors string-cite decisions applying *Aramco* and set out the statutory language by which Congress undid the Court's handiwork.[6] This analysis neatly leads into the following section: a discussion of the specific and vexed area of extraterritoriality of U.S. antitrust laws.[7]

The work also contains a dozen appendices, including statutory material referenced in the text, relevant Federal Rules of Civil Procedure, the Foreign Sovereign Immunities Act,[8] and international convention texts and applications.[9] Of these materials, most will already be close at hand, at least for practitioners; perhaps the inclusion of the Federal Rules of Civil Procedure

2. *Id.* at 2.

3. *Id.* at 572-90.

4. Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991), *reprinted in part in* BORN & WESTIN, *supra* note 1, at 575.

5. *See* BORN & WESTIN, *supra* note 1, at 585-90.

6. *See* The Civil Rights Act of 1991, 42 U.S.C. § 2000e(f) (Supp. III 1991), *noted in* BORN & WESTIN, *supra* note 1, at 589.

7. BORN & WESTIN, *supra* note 1, at 590.

8. 28 U.S.C. §§ 1602-1611 (1988), *reprinted in* BORN & WESTIN, *supra* note 1, app. at 897-905.

9. *See* BORN & WESTIN, *supra* note 1, app. at 789-905.

might be reconsidered for future editions of what is already a large and heavy volume.

One addition to the thickness of the book that would be useful is a table of cases. Since there are related and even overlapping areas of the law that are treated in different sections (*e.g.*, sovereign immunity and the act of state doctrine), some readers will want to know how cases affecting both areas reconcile the differences.

Those quibbles aside, Born and Westin have produced a marvelously useful and readable work. Any book, however, that focuses on specific cases selected to illustrate particular points will draw criticism from a reader or reviewer who would have selected different or additional illustrations.

In the area of sovereign immunity, for instance, it would seem as if the Supreme Court's pronouncement[10] that *all* actions against foreign states and their agencies must be founded, for jurisdictional purposes, upon the Foreign Sovereign Immunities Act,[11] is worth more than the passing attention given to it by the authors. The key case of *Argentine Republic v. Amerada Hess Shipping Corp.*[12] merits lengthier consideration for another reason as well: the implicit suggestion of Justices Blackmun and Marshall in concurrence that, by violating the most fundamental tenets of international law constituting *jus cogens*,[13] a state may impliedly waive its entitlement to sovereign immunity.[14] This notion has important consequences for human rights litigation. Were it ever to be embraced by the Court, it would permit actions of the *Filartiga v. Pena-Irala*[15] variety to be brought, not against individuals who perpetrated human rights abuses and who fortuitously happened to wander into the jurisdiction of the United States, but rather directly against outlaw regimes that engage in state

10. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989), *noted in* BORN & WESTIN, *supra* note 1, at 516.

11. 28 U.S.C. §§ 1602-1611 (1988).

12. 488 U.S. 428 (1989).

13. *Jus cogens* has been defined as a "peremptory norm" of international law—a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344. *Jus cogens* embraces customary laws considered binding on all nations and is derived from values taken to be fundamental in the international community. *See* Siderman de Blake v. Republic of Arg., 965 F.2d 699 (9th Cir. 1992).

14. 488 U.S. at 443.

15. 630 F.2d 876 (2d Cir. 1980); *see infra* text accompanying note 20.

terrorism as a means of acquiring or consolidating power.[16] Yet the book's discussion of implied waivers of sovereign immunity[17] does not mention, let alone explore, this possibility.

On the other hand, the fact that Born and Westin's discussion of a case is brief does not mean that it is cursory or not nuanced. In their section on the Alien Tort Claims Act,[18] the authors present an excellent analysis of the three very diverse opinions of members of the D.C. Circuit in *Tel-Oren v. Libyan Arab Republic*.[19] The authors correctly focus on the question of whether, for a violation of international human rights law to be actionable (either under 28 U.S.C. § 1350 or some other jurisdictional basis), the precept alleged to have been traversed must itself contain a provision for such a private right of action. Clearly, such a prerequisite will be found satisfied only in the rarest of cases, and if it is to be generally imposed, then human rights abusers will almost never be haled before U.S. courts.

In particular, while *Filartiga*[20] held that a Paraguayan family could sue a Paraguayan police official for the torture of their decedent in Paraguay because the three criteria of 28 U.S.C. § 1350 were satisfied (the plaintiffs were aliens, their cause of action was "in tort only," and their complaint alleged that torture was a violation of the law of nations), Judge Kaufman did not conclude in that case that the substantive norm of customary international law prohibiting official torture itself provided for domestic judicial relief.

While the authors' own views on the correctness of this line of cases are somewhat elusive, they present the issues raised with great clarity. Even seasoned practitioners in the field of human rights litigation may find their insights useful.

Perhaps the most valuable sections of the book to non-specialists are those on service of process and the taking of evidence abroad. After a detailed explanation of the nature and use of letters rogatory, for example, Born and Westin provide step-by-step "practical guidance" in their use that includes not only a model letter, but even the telephone number of the office at the Depart-

16. *See, e.g.*, Princz v. F.R.G., 813 F. Supp. 22, 27 (D.D.C. 1992), *appeal docketed*, Nos. 92-7247 and 93-7006, 1993 WL 264479 (D.C. Cir. Apr. 14, 1993).

17. BORN & WESTIN, *supra* note 1, at 469.

18. 28 U.S.C. § 1350 (1988), *noted in* BORN & WESTIN, *supra* note 1, at 561-71.

19. 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), *noted in* BORN & WESTIN, *supra* note 1, at 569-70.

20. 630 F.2d 876 (2d Cir. 1980).

ment of State that can provide specific advice.[21]

The approach consistently taken throughout the book is the clear presentation, in distilled form, of a large mass of material. Thus, in the confusing area of extraterritorial effects of U.S. antitrust laws, the progress from *Alcoa*[22] to *Timberlane I* and *Timberlane II*[23] is neatly traced, and the factors the courts will weigh under the "rule of reason" are set out with practical examples.[24]

That discussion, however, points up one weakness in the book's organization. The authors note that *Aramco*[25] "reaffirmed (and strengthened) the presumption that U.S. statutes apply only within U.S. territory."[26] Here, then, there are potentially major consequences for antitrust law and commercial regulation emerging from a case about equal employment opportunity and discrimination. Yet the book suggests no resolution, no hypothesis. It asks the question "Does the *Timberlane* rule of reason survive the *Aramco* decision?"[27] but provides no guidance as to how the reader should or the courts will deal with it.

Of course, the lawyer whose crystal ball works reliably is a rare breed. But the point is that readers are frustrated not by the omission of what will happen, but by the abdication of the authors' analytical role. Frequently, Born and Westin end a paragraph in their discussion of a decided case with a rhetorical question: "Is this persuasive?" or "Is this wise?"[28] That seems to mean, "For reasons we have just explained, we believe the decision to be wrong, or the logic to be weak."

This reader, at least, wishes that authors of law books—especially authors as learned in their subject as Born and Westin—would abandon the conceit of the rhetorical question (presumably, law students are trained *always* to ask whether a court's reasoning is persuasive, even without helpful prompts), and instead state, and argue for, their own views. Even if the issue is patently

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21. BORN & WESTIN, *supra* note 1, at 180-83, 406-08.

22. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945), *noted in* BORN & WESTIN, *supra* note 1, at 592-94.

23. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976) [*Timberlane I*], *reprinted in part in* BORN & WESTIN, *supra* note 1, at 605-07; Timberlane Lumber Co. v. Bank of Am., 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985) [*Timberlane II*], *reprinted in part in* BORN & WESTIN, *supra* note 1, at 608-11.

24. BORN & WESTIN, *supra* note 1, at 608-17.

25. Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991).

26. BORN & WESTIN, *supra* note 1, at 611.

27. *Id.*

28. *See, e.g., id.* at 517.

unresolved by the courts (as in the case of *Timberlane* and *Aramco*), that should be stated, with suggestions as to how the uncertainty should ultimately be resolved.

In other words, I would like to have Born and Westin tell me whether *they* are persuaded by the Supreme Court's discussion of the implied repeal of the Alien Tort Claims Act[29] in its *Amerada Hess* decision,[30] rather than exiting their analysis with the question "Are you persuaded?"[31]

III. Conclusion

Gary B. Born and David Westin have given students, teachers, and practitioners of international law a wonderful resource to increase their understanding and practical skills. That they have also presented a very readable, well-organized book is to their even greater credit. My principal criticism is that I would like to see more of the authors—I wish they would fuel debates, rather than merely note that debates exist.

29. 28 U.S.C. § 1350 (1988).

30. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989). *See supra* notes 10-14 and accompanying text.

31. Born & Westin, *supra* note 1, at 571.