Vanderbilt Journal of Transnational Law

Volume 14
Issue 3 *Summer 1981*

Article 7

1981

Book Reviews

Edward C. Brewer, III.

W. Paul Gormley

Allaire U. Karzon.

BOOK REVIEWS

DIRECT INVESTMENT AND DEVELOPMENT IN THE U.S.: A GUIDE TO INCENTIVE PROGRAMS, LAWS AND RESTRICTIONS 1980-1981. Raymond Waldmann. Washington D.C.: Transnational Investments, Ltd.; London: Kluwer Publishing, 1980. Pp. viii, 443. $75.00, London £45 plus £1 surface mail. *Reviewed by Edward C. Brewer, III.**

Foreign direct investment in the United States has increased dramatically in the past decade, and the federal and state governments have responded to shape its direction. An initial period of suspicion has given way to considered action by Congress to ensure the maximum benefit for the economy. The present trend is to focus on how rather than whether such investment shall be permitted.[1] Apart from the investment survey acts of 1974 and 1976,[2] Congress has not yet adopted a comprehensive approach to regulating foreign investment. Whether a code would clarify existing law is uncertain; in no event would it substantially reduce the variations among state laws, which often arise from competition to attract investment. Advising the foreign investor, therefore, will probably continue to require detailed knowledge of various areas of law.

Numerous books and articles have been written to advise the advisors, as well as the investors. Raymond J. Waldmann has drawn on his experience in government and private practice to write a handbook surveying the laws affirming foreign investment directed primarily to the foreign investor who is generally familiar with a Western federal economy. The *Guide,* is divided into three

---

* Member, Alabama State Bar. B.A. 1975, The University of the South; J.D. 1979, Vanderbilt University.

1. *See, e.g.,* HOUSE COMM. ON GOVERNMENT OPERATIONS, THE ADEQUACY OF THE RESPONSE TO FOREIGN INVESTMENT IN THE UNITED STATES, H.R. REP. No. 1216, 96th Cong., 2d Sess. (1980); U.S. COMPTROLLER GENERAL, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES — THE FEDERAL ROLE (1980).

2. International Investment 1978 Survey Act of 1976, 22 U.S.C. § 3101 (1976 & Supp. II), *as amended by* Pub. L. No. 95-381, § 1, 92 Stat. 726 (1978); Foreign Investment Study Act of 1975, 15 U.S.C. § 78b note (1976).

parts: federal regulation of foreign investment, federal and state development programs, and profiles of state incentives and limitations. First published in 1978, it is updated and republished annually. Citations to general background sources are included.

Part I provides a very readable and comprehensive introduction to United States law as it affects foreign investors.[3] It discusses laws of general application including securities, antitrust, taxation, environmental, immigration, and labor regulation, as well as laws in a multitude of specific sectors. Where state law is effective, it is usually noted with a useful comment describing its relationship with federal law. Part II, perhaps the most valuable contribution for investment advisors, explains in detail federal investment incentives, and generally describes industrial revenue bond financing. The chapter on federal programs sets out eligibility for and provisions of each program. The procedures for obtaining loans, guarantees, and grants are described, with reference to applicable guidelines and required documentation. Part III presents a survey of each state's economy and discusses incentives and limitations on foreign investment.[4] The addresses and telephone numbers of state agencies charged with encouraging foreign investment, located both in the United States and overseas, are particularly useful. The age of the information is provided for investment climate indicators; in certain areas of the profile, however, it sometimes appears dated.[5] This information is not neces-

---

3. The author does not discuss the record-keeping and disclosure requirements of the investment survey acts; although technically not limitations on investment, these are often important factors in structuring an investment decision when anonymity is desired.

Transnational Investments, Ltd. also publishes the *Direct Investment Law Report,* for which Mr. Waldmann is Editorial Advisor. This monthly periodical provides information on current legislation, regulations, hearings and treaty negotiations. It is $175 yearly in the United States and Canada, $195 yearly elsewhere.

4. Each state profile contains a description of: (1) investment climate indicators, (2) federal development program spending, (3) industrial bond issues, (4) state limitations on foreign investment, (5) state development agencies (including addresses and telephone numbers), (6) financing programs, (7) industrial revenue bond programs, (8) tax incentives, and (9) other incentives (including sites and buildings, training and labor programs, and foreign trade zones).

5. One reviewer has noted that in some cases the data presented dates to 1975. Perlberger, Book Review, 14 INT'L LAW. 192 (1980). More current data is available in an article entitled *The Fifty Legislative Climates,* which is published annually in *Indus. Dev.* by Conway Publications, Inc., in Atlanta. The

sarily indicative of present conditions because incentives often change rapidly. Despite this limitation, the profiles nevertheless provide useful examples of the incentives that have historically been provided.

Mr. Waldmann's book is an enlightening explanation of United States law and state investment climates for the foreign investor. It is equally useful to any lawyer requiring basic familiarity with foreign investment. Apparently not intended as a research tool, the book's utility is limited by its lack of citations. The discussion of United States law provides helpful insights, and the book's use of the names of acts and section numbers is a valuable research aid. Citation to the United States Code and relevant cases, however, would greatly speed access to primary source material.[6] This addition would render the *Guide* an indispensible work for the layman and the practitioner alike.

1980 article is in the January-February issue, and the 1981 article is in the March-April issue.

6. More useful in this regard are the following: DISTRICT OF COLUMBIA BAR, FOREIGN INVESTMENT IN THE UNITED STATES: LEGAL ISSUES AND TECHNIQUES (J. Marans, P. Williams & A. Mirabito eds. 1977), and Practicing Law Institute, Foreign Investment in the United States (1980).

NUCLEAR ENERGY AND NUCLEAR WEAPON PROLIFERATION. Frank Barnaby, Jozef Goldblat, Bhupendra Jasani, and Joseph Rotblat, eds. Published for the Stockholm International Peace Research Institute. London: Taylor & Francis, 1979. Pp. xxiv, 462. *Reviewed by W. Paul Gormley.**

In anticipation of the second review conference on the Non-Proliferation Treaty (NPT), the Stockholm International Peace Research Institute (SIPRI) convened to discuss the effective control of fissionable materials during non-military applications. At this symposium, a group of highly qualified experts dealt with the scientific, social, political, and legal aspects of utilizing nuclear energy while preventing the spread of nuclear weapons.

The initial issue, which serves as the book's underlying theme, is whether mankind can utilize nuclear power without severe negative consequences. Dr. Rotblat treats this issue dramatically:

> The peaceful and military aspects of nuclear energy are intrinsically linked and it is impossible to separate them. The links are psychological, historical and factual . . . [T]o this day it is impossible to generate electricity in a peaceful nuclear reactor without at the same time using or manufacturing materials which could be used for nuclear weapons. . . . Any nation which acquires nuclear reactors for peaceful purposes will have personnel trained in nuclear reactor technology, from which it is only a short step to the acquisition of nuclear weapon technology. . . . Thus, the widespread use of nuclear energy for peaceful purposes is likely to lead to 'horizontal proliferation,' that is, an increase in the number of nuclear weapon states.[1]

This series of papers concludes that nuclear proliferation will necessarily increase military risks and that existing international and regional organizations cannot effectively control military applica-

---

* Member, District of Columbia and United States Supreme Court bars. B.A. 1949, San Jose State University; M.A. 1951, University of Southern California; Ph.D. 1952, University of Denver; J.D. (honors) 1957, LL.M. 1958, George Washington University; M.Int.-Comp. L. 1974, D.Jur. 1975, Free University of Brussels (VUB); LL.D. 1972, Victoria University of Manchester; Formerly Leverhulme and Simon Fellows, 1968-72, University of Manchester, England.

1. STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, NUCLEAR ENERGY AND NUCLEAR WEAPON PROLIFERATION 373 (1979) [hereinafter cited as NUCLEAR ENERGY].

tions. The authors contend that the present systems of control contained in United States legislation and in the regulatory safeguards of the International Atomic Energy Agency (IAEA), the European Atomic Energy Community (EURATOM), and the International Nuclear Fuel Cycle Evaluation (INFCE) cannot prevent the spread of nuclear technology to the less developed countries (LDCs). The authors generally agree that because states such as India, Israel, Pakistan, and Brazil already possess independent nuclear capability, controls on plutonium can be enforced at most for a decade. A secondary theme is whether the LDCs should adopt alternative energy sources and completely exclude nuclear development. The Third World bitterly protests that such a policy violates the principle of technology transfer, which is a basis of the new international law. LDCs even contend that their exclusion from nuclear power constitutes a continuing imposition of colonialism and, therefore, violates their legal right to development. Despite the developing states' nearly unanimous opposition to their exclusion from the nuclear club, several authors strongly oppose nuclear proliferation in Africa, Asia, and Latin America. Several other authors, however, support the LDCs' position and concede the need to utilize nuclear power.

This excellent volume is an institutional product, and it accordingly reflects and supports SIPRI's basic philosophy and goals. The Preface provides clear insight into the Institute's position concerning the NPT's future implementation.[2] It is extremely difficult not to be sympathetic toward SIPRI's goal of a world free from nuclear terror and accidents.[3] Despite its advocacy, SIPRI

---

2. *Id.* at v.

3. In SIPRI's opinion the following steps could and should be taken to implement the aims and purposes of the NPT:

(a) the nuclear weapon powers should clearly commit themselves to reversing the arms race; they could start by halting all nuclear weapon tests and undertaking to reduce significantly their strategic and tactical nuclear armaments;

(b) participation in the treaty should be made more attractive by the provision of internationally agreed, legally binding security assurances to non-nuclear weapon parties;

(c) pressure should be brought to bear upon non-parties by denial of supplies of nuclear materials and equipment, while outright defiance of the treaty should be met with more stringent measures;

(d) the obligation not to assist others in manufacturing nuclear weapons should apply to all states without exception and, consequently, all exports of nuclear material and equipment to nuclear weapon powers should be subject to IAEA safeguards so as to avoid their use for weapon purposes; and

has produced a masterful volume that will prove to be an invaluable reference for scholars of international law, political science, and diplomacy.

The book has five main parts and includes twenty-one conference reports. Most of the contributions are supplemented by tables, figures, and appendices. Part I consists of seven distinct papers organized into five chapters and provides the scientific and technical information required to understand the growing political disputes. It discusses the distinct phases in the nuclear cycle, which include enrichment, reprocessing, recycling, and waste disposal. Part II continues the scientific analysis by dealing with the breeder reactor. The spread of fast breeders will result in lower costs while simultaneously increasing the plutonium supply, thereby making it easier for additional states to manufacture weapons.[4] Although costly at the present time, fast breeders and hybrid breeders offer the most reliable energy source because more efficient use is made of the world's decreasing uranium supply. Part III[5] distinctly shifts the text's emphasis by focusing attention on the NPT, which became effective in 1970. This treaty imposes binding legal obligations upon the parties. Regrettably, the United Kingdom, the United States, and the USSR are the only members of the growing nuclear club who have ratified it; conversely, France and China, plus a dozen smaller states possessing significant programs for peaceful purposes, have retained their nuclear option. Almost one-third of all states remain beyond the scope of the treaty. Accordingly, any consideration of future

---

(e) safeguard procedures should be improved, and IAEA authority strengthened, to enable rapid detection of any diversion of fissionable material for weapon purposes, and quick subsequent action.

Insofar as the peaceful use of nuclear energy is concerned, the cause of nonproliferation would best be served if:

(a) the sensitive parts of the nuclear fuel cycle, that is, uranium enrichment, fuel fabrication and reprocessing, were managed on an international scale and operated only under the authority of an international agency with full responsibility for the security of the plants and their sites;

(b) an international repository of spent fuels and a bank of fresh fuels were to be established; and

(c) encouragement, including financial support, was given to countries wishing to rely on non-nuclear sources of energy. This might best be achieved by the setting up of a specialized international body to deal with energy matters.

4. *See* B. Barre, Paper 8, *The Proliferation Aspects of Breeder Deployment*, in NUCLEAR ENERGY, *supra* note 1, at 127-40.

5. NUCLEAR ENERGY, *supra* note 1, at 173-240.

international regulation must take into account the NPT's limitations coupled with the possibility of states taking unilateral action as an assertion of their sovereignty. "Thus, the international legal barrier against further nuclear weapon dissemination is far from being impermeable."[6] Several of the papers attempt to review the NPT's detailed provisions. The NPT restricts only the export of technology; parties remain free to develop their independent nuclear capabilities. Yet, one of the book's aims is to indicate how the treaty can be improved or reinterpreted to shift the emphasis away from encouraging accelerated proliferation, even for peaceful purposes.

The second level of international control is found in IAEA safeguards that have been perfected, including on-the-spot inspections. Several papers propose extending these surveillance techniques to prevent weapon-grade fissionable material from reaching a would-be atomic power. In this regard, the London Club developed the Guidelines for Nuclear Transfers to impose controls on the transfer of technology and nuclear items. It is further suggested that additional sanctions be placed upon treaty violators, such as denying them additional nuclear material or technical aid.

At the national level, the United States Nuclear Non-Proliferation Act of 1978 imposes restrictions on the export of United States technology without prior approval.[7] Pursuant to this legislation,[8] bilateral treaties have been negotiated with appropriate states. The aim is to restrict certain items that the United States believes will create the risk of proliferation. Canadian legislation contains similar restraints, but the French and German governments are less rigid in their approach, as can be seen in the recent agreement between Germany and Brazil for the construction of a reactor. Yet it would be incorrect to assume that these nuclear states lack a policy of controlling the nuclear outflow.

The reality of the situation is that it remains impossible to prevent the spread of nuclear materials and weapon components. Ex-

---

6. *Id.* at 173.

7. B. Sanders, *Nuclear Exporting Policies,* in NUCLEAR ENERGY, *supra* note 1, at 241-50.

8. *See* W. Donnelly, Paper 14, *Applications of United States Non-Proliferation Legislation for Technical Aspects of Control of Fissionable Materials in Non-Military Applications, in* NUCLEAR ENERGY, *supra* note 1, at 199-222; *see* note 21 *infra.*

isting safeguard measures have the effect of making it more difficult for the LDCs to acquire needed sources of power; hence, the bitter debate continues to grow. This series of reports distinctly emphasizes the needs of all affected parties. While the book supports the position that nuclear free zones should be used to restrict or cut back nuclear power, the growing demand for additional energy sources is also given merit.

The volume's underlying philosophy is that alternative energy sources should be perfected in order that "the use of nuclear energy will become only a short episode in the history of mankind."[9] Though laudable, such an idealistic position is far from reality. Alternative methods cannot make up for the shortfall caused by the oil shortage in member countries of the Organization for Economic Cooperation and Development, much less meet the increasing requirements of the Third World or the industrialized states. Nevertheless, the book argues effectively for avoiding the spread of nuclear reactors to underdeveloped countries,[10] claiming "that nuclear energy is probably the most undesirable form of energy for them [the LDCs]."[11] The book contends that developing regions lack the grid systems necessary to distribute the electricity generated in large reactors. It also contends that new nuclear undertakings may result in dependence on the supply source, thus resulting in a type of colonialism. The risk of nuclear war will be increased accordingly. Implicit in this latter contention is the fear that Third World states will become active participants in the global arms race.

The book makes a major contribution by suggesting new solutions. Two alternatives, which are not mutually exclusive, are the strengthening of present institutions and the creation of new international organizations. Basic to this approach is the need for global schemes. Because of the spread of nuclear capability, it appears inevitable that additional states will actively engage in the armaments race. This conclusion emerges as one of the book's underlying themes, particularly throughout Parts IV and V.[12] Considerable attention must be directed toward the peaceful uses of

9. NUCLEAR ENERGY, *supra* note 1, at 271.

10. *See, e.g., id.* at 279-80.

11. *Id.* at 280.

12. See chapters 11-14, in conjunction with Appendix B, and chapter 13, *Final Declaration of the Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, id.* at 357-65.

nuclear energy, such as underground explosions and the use of nuclear reactors to power space satellites.[13] The recent underground explosion in India and the crash of Cosmos-954 onto Canadian territory illustrate the inherent military applications and the resulting danger to the global environment.[14]

Several of the chapters or subsections are worthy of separate consideration.[15] For example, paper twenty-one by Dr. D. Paul, entitled *Nuclear Reactors in Satellites*,[16] is of special significance to outer space exploration. The fundamental problem of powering space objects is that this highly worthwhile undertaking for peaceful purposes has potential military consequences in the emergence of hunter-killer satellites. The proposal is that energy sources such as solar energy be developed to power satellites. The United States and Soviet experience has demonstrated that the placement of nuclear reactors aboard satellites can be avoided because the required power can be generated by other types of equipment. This excellent book encourages the development of alternative energy sources while de-emphasizing nuclear power. It is regrettable that this solution realistically cannot be extended to the entire energy production field as the book suggests.

This volume contributes new remedies for the resolution of political and legal disputes. Following an analysis of present shortcomings, the book proposes to strengthen the NPT[17] by restricting the flow of fissionable materials, even for peaceful purposes, and by encouraging nuclear disarmament. Similarly, greater supervisory authority is sought for the IAEA. The right to control the amount of fissionable material in circulation, including surplus plutonium that may be produced beyond immediate peaceful requirements, and the right to inspect all nuclear facilities in order to detect any materials that can be diverted to weapons manufacture are strongly urged. It is suggested that control be shifted

---

13. D. Paul, Paper 21, *Nuclear Reactors in Satellites*, in NUCLEAR ENERGY, *supra* note 1, at 319-32. *See also* B. JASANI, OUTER SPACE — BATTLEFIELD OF THE FUTURE? (SIPRI 1978).

14. *The Canadian Experience with the Cosmos-954 Satellite: Operation 'Morning Light,'* in NUCLEAR ENERGY, *supra* note 1, at 324-27. *See also* STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, WARFARE IN A FRAGILE WORLD: MILITARY IMPACT ON THE HUMAN ENVIRONMENT (1980).

15. *See, e.g.*, WARFARE IN A FRAGILE WORLD, *supra* note 14, at 114-82 (ch. 5, Arctic Regions; ch. 6, Island; and ch. 7, The Ocean).

16. *See* note 17 *supra*.

17. *See, e.g.*, NUCLEAR ENERGY, *supra* note 1 at *passim*.

from the IAEA to regional control centers, specifically by using multinational fuel cycle centers as an alternative to international supervision. This plan for decentralization was originally proposed by the London Club and the 1975 NPT Review Conference. Based on the success of EURATOM, and on the overall achievements of European integration,[18] the book maintains that regional control will result in greater security and economic advancement. On the other hand, the disadvantage of nuclear regionalism, not present in the European regional experience, is possible competition between regions and discrimination against the Third World regarding the transfer of scientific information and technology.

Various schemes to internationalize the fuel cycle are offered, including the strengthening of the NPT. The new recommendation is the establishment of an International Nuclear Fuel Authority (INFA), which would have the responsibility for providing nuclear fuel services and for allocating fuel supplies. "[I]t would set up and manage repositories for the storage of special nuclear materials and spent fuels, under effective international auspices and inspection; and it would make arrangements for compensation for the energy content of spent fuels."[19] Similarly, the existing International Nuclear Fuel Cycle Evaluation (INFCE) would assume control over the nuclear cycle with the participation of fifty-six countries and five international agencies. The INFCE, like the IAEA, however, would encourage a greater number of states to turn to nuclear power. The book is critical of the IAEA's role in furthering nuclear expansion for peaceful purposes.

The most enlightened and far-reaching recommendation is for the creation of a specialized United Nations agency. Tentatively designated the World Energy Organization (WEO), it would possess functions similar to those possessed by the World Health Organization (WHO) and the Food and Agriculture Organization (FAO), but with sufficient funds to support national efforts, on the theory that "energy is as vital to the community as food and

18. The superiority of the regional approach in contrast to the experiments of the United Nations is stressed in W. GORMLEY, THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS (1966), and W. GORMLEY, HUMAN RIGHTS AND ENVIRONMENT: THE NEED FOR INTERNATIONAL CO-OPERATION (1976).

19. NUCLEAR ENERGY, *supra* note 1, at 430.

health care are to the individual."[20] Accordingly, the WEO would have jurisdiction similar in nature to that of the World Bank. Regrettably, a single page is devoted to this enlightened proposal. Rather than devoting an entire chapter to the recommended agency, the book suggests only that the WEO should be patterned after the WHO or the FAO. Unfortunately, a precise plan is not presented. May it, therefore, be suggested that the experience of the International Labor Organization (ILO) be considered, particularly its methods of implementing labor and human rights conventions.[21] Precedent drawn from the experience of United Nations specialized agencies, such as the interstate cooperation achieved by the World Meteorological Organization, the regulatory power of the International Civil Aviation Organization, the measures of present ocean dumping developed by the International Maritime Consultative Organization, and the regulatory force of International Telecommunications Union allocations, could inspire both the proposed WEO and the INFA.

SIPRI has produced a masterful volume that has unquestionably achieved its intended purpose of providing a valuable resource for the second NPT Review Conference. As is true of other recently published SIPRI books,[22] *Nuclear Energy and Nuclear Weapon Proliferation* will serve as a basic reference text for at least a decade. Because the material presented is fundamental and involves basic political and legal controversies that will remain unresolved following the conference's conclusion, notwithstanding any treaty modifications, this book will not become outdated. The vast collection of statistical data, appendices, tables, and figures will remain a valuable source for the serious researcher or policy maker.

---

20. *Id.* at 282.

21. *E.g.*, Gormley, *The Use of Public Opinion and Reporting Devices to Achieve World Law: Adoption of ILO Practices by the United Nations*, 32 ALBANY L. REV. 273 (1968); Gormley, *The Growing Protection of Human Rights and Labour Standards by the International Labour Organization*, 9 BANARAS L.J. 1 (1973). As concerns the application of ILO procedures to implement the expanding corpus of international environmental law, see Wolf, *The Protection of the Environment and International Law*, in COLLOQUIUM 1973, THE HAGUE ACADEMY OF INTERNATIONAL LAW 452-56 (A. Kiss ed. 1975).

22. *See* notes 17-19 *supra*. *See also* STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, CHEMICAL WEAPONS: DESTRUCTION AND CONVERSION (1980).

INTERNATIONAL ASPECTS OF U.S. INCOME TAXATION, Vols. I and III. Elisabeth Owens. Boston, Mass.: Harvard Law School, 1980. Pp. 305. 492 Appendices and Diagrams. *Reviewed by Allaire U. Karzon.**

Within the past few years, there has been a heightened awareness that the field commonly referred to as international taxation is no longer an esoteric specialty flourishing only in a handful of grand law firms with clients in exotic climes. As grass roots business in the United States has continued its outward overseas expansion, and as the influx of foreign corporations to our shores has swelled with Japanese truck plants in Smyrna, Tennessee, French tire factories in Greenville, South Carolina, and German investors competing to buy Kansas farm land, it is clear that a working knowledge of international taxation is now an essential in the armamentarium of tax practitioners with offices on Main Street, U.S.A. International taxation does not refer exclusively or primarily to taxes imposed by distant foreign governments, but it refers with increasing frequency to the body of knowledge that describes how the United States applies income taxation to transactions within its jurisdiction that also happen to cross national boundaries or happen to involve citizens or residents of other countries. Along with the need to understand how United States income taxation presently operates in the transnational area, there are the parallel inquiries of why the maze of tax laws has evolved to its present state and whether the law should be different. It is, therefore, a pleasure to report the publication, under the auspices of the Harvard International Tax Program, of an outstanding new casebook, entitled *International Aspects of U.S. Income Taxation.* The book is superb for the formal study of international taxation; its enormous range of materials from the practical to the profound will make it an indispensable resource to all tax professionals.

The book is being published in three volumes. The first and third volumes, both by Professor Elisabeth Owens of Harvard Law School, have now been released and are the subject of this

---

* Associate Professor of Law, Vanderbilt Law School. B.A. 1945, Wellesley College; J.D. 1947, Yale University.

review.[1] The two volumes are broken into four parts. Part One, the introduction, places the subject in perspective with a series of articles on United States participation in the international economy, foreign participation in the United States economy, and the contraints, constitutional or otherwise, limiting the extension of United States taxing jurisdiction.[2] Part Two thoroughly examines the principles established by the Internal Revenue Code for the taxation of income derived from United States sources by nonresident aliens and foreign corporations.[3] Part Four is devoted to the exposition of United States income tax treaty law.[4] Part Five analyzes the causes and control of international tax evasion,[5] a subject that has only recently begun to receive serious attention but which foreshadows legislative developments.

The term "casebook" is a misnomer for this undertaking. The texts of relatively few judicial decisions are included[6] due to the fact that relatively few judicial pronouncements exist in this environment of statutory and treaty-made law. The author offers as additional primary source authorities selected Revenue rulings, Treasury Department decisions, private letter rulings from the Internal Revenue Service (now required to be made public under the Freedom of Information Act),[7] Internal Revenue Service publications and forms, Congressional testimony from officials, industrialists, and academicians, legislative history of House and Senate committees, the entire text of the United States Model Income Tax Treaty, and relevant excerpts from numerous United States income tax treaties.

The author has culled the vast tax and economic literature and has selected with acumen secondary source material, choosing pertinent articles from law journals, tax and international law

---

1. Volume II, containing Part Three, will deal with the United States income taxation of United States citizens, residents and domestic corporations on foreign source income. Its publication is expected in 1981, but it was not available for this review.

2. E. OWENS, INTERNATIONAL ASPECTS OF UNITED STATES INCOME TAXATION 13-90 (1980).

3. 2 *id.* at 113-300.

4. 3 *id.* at 3-242.

5. 3 *id.* at 245-432.

6. Volume I contains the text of only twenty-nine cases in its 390 pages and Volume III has only nineteen cases in its 432 pages. Of course, both volumes contain numerous citations to other cases.

7. 5 U.S.C. § 552 (1976).

publications, and business and economic journals. Generally these have been chosen either to illuminate the rationale for the evolution of a particular principle or to raise basic issues with which tax planners and the government are still grappling. Each subsection is followed by extensive additional references. This casebook undoubtedly contains the most complete and exhaustive source of citations to primary and secondary material that has been published to date in the field of international taxation. It is doubtful that any author in the foreseeable future will be able to match the wealth of references and source material which Professor Owens has assembled. There is even a thirty-page Appendix in Volume III[8] summarizing, with short clear headings, every section, by number, in the Internal Revenue Code relating in any respect to foreign income, foreign taxpayers, and domestic or foreign definitions. To anyone unfamiliar with the dizzying interweaving of the Code, this Appendix will be an invaluable time-saving guide. Despite the voluminosity of the material, each point is clearly delineated with an excellent outline and well-indexed headings enabling the reader to locate any particular topic with relative ease and speed. The author's textual commentary has been kept brief, but it is the connective tissue that holds the parts together. Periodically the commentary is punctuated with questions. Some of these are designed to suggest unobtrusively the author's own policy views, and others are framed as fact problems to stimulate the student to interrelate and apply the abstract concepts presented to realistic situations encountered in practice.

Part Two (in Volume I) and Part Four (in Volume III) are inextricably related, and it is regrettable that the exigencies of space prevented their appearing in the same volume. Each deals with United States taxation of the same type of income from the same class of persons, *i.e.*, United States source income of nonresident or foreign taxpayers. Part Two covers the subject under the Internal Revenue Code alone and Part Four covers the subject under United States income tax treaties. The author observes that the treaty system affects United States taxation of foreign taxpayers more than United States taxation of United States taxpayers. Each treaty establishes a separate regime of United States taxation for those foreigners who are residents of the particular

8. 3 E. OWENS, *supra* note 2, at 438-68.

treaty partner country, and this regime generally reduces their tax and supersedes the otherwise pertinent Code provisions. Thus, foreign taxpayers who can avail themselves of the benefits of United States income tax treaties have lower United States income taxes than the Internal Revenue Code would otherwise exact.[9] The United States is presently party to approximately thirty treaties, signed over a period of thirty years, which vary in terms by country, the effectiveness of the United States negotiators, and the relative bargaining power of the United States at the time each treaty was executed.[10] Therefore, there is no uniform treaty tax law applicable to all foreign taxpayers comparable to the uniform statutory law of the Code. Most foreign taxpayers subject to United States income tax are also entitled to the more advantageous terms of a United States tax treaty. As a result, the impact of the treaty system (covered in Part Four) must constantly be examined together with the Code treatment (covered in Part Two) to determine the actual United States income tax exposure of most foreign taxpayers. The dichotomy of an approach which separately addresses the tax consequences under the Code and those under treaties may be artificial in practice but is useful as a pedagogical technique. It emphasizes the two entirely distinct structures of United States income taxation encountered by foreign taxpayers and places on the treaty system the prominence it has long deserved. If one is tempted to speculate beyond the horizon of United States taxation, the burgeoning network of treaties may become the foundation for an emerging international tax code.[11]

Given a treaty system composed of thirty non-uniform contracts, Professor Owens presents a cohesive analysis by selecting articles of different treaties to illustrate common questions that are usually addressed in some fashion by every treaty, although the precise results vary with the language in each document. For example, the different definitions of the term "permanent establishment" are examined.[12] Even though foreign taxpayers have "effectively connected" business income (a term of art under the

9. 1 *id.* at II-265.

10. *See* 3 *id.* at 47-51.

11. There may be as many as 500 bilateral tax treaties world-wide. Among the OECD countries alone, there are approximately 190 income tax treaties in effect. 3 *id.* at 47-48.

12. *Id.* at 125-35.

Internal Revenue Code) which ordinarily would subject them to United States tax,[13] tax treaties generally provide that foreign taxpayers are not taxable on such effectively connected business income unless the taxpayers are conducting a trade or business through a "permanent establishment" within the United States. "Permanent establishment," a term of art unique to the treaty system, is a condition precedent to United States tax liability and, therefore, plays a crucial role for foreign taxpayers with access to treaty coverage. Problems in defining, interpreting, and applying the term "permanent establishment" are illustrated by reference to the Swiss, United Kingdom, Canadian and Australian treaties.[14] The differing rates of reduction of United States tax negotiated under treaties on various types of investment income are collated in chart form to illustrate the discrepancies with which tax planners must contend.[15]

Since there are variations in language from treaty to treaty, certain concepts are discussed by reference to the United States Model Income Tax Treaty[16] made public in 1977, such as the treatment of business profits,[17] personal service income,[18] and investment income.[19] Reference is also made to the commentary of the Organization for Economic Cooperation and Development (OECD) for its detailed explanation of the OECD draft treaty,[20] to which the United States Model Treaty closely conforms. The United States Model Treaty serves well as a teaching tool but, as the author warns, it has limited practical value because it is unrepresentative of treaties actually in effect. The Model Treaty deserves study as it reflects the present views of the United States government on the precise treaty language it prefers and does resolve many ambiguities in existing treaties. Nevertheless, it is only an inoperative model and simply a document which United States Treasury officials use as their starting point for negotiations.[21]

The part of the casebook dealing with treaties is on one level a

---

13. I.R.C. § 864.
14. 3 E. OWENS, *supra* note 2, at 125-34.
15. *Id.* at 137-38.
16. *Id.* at 471-92.
17. *Id.* at 146-67.
18. *Id.* at 168-74.
19. *Id.* at 136-46.
20. *Id.* at 26-40.
21. *Id.* at 51.

comprehensive practical source of information for tax lawyers on the interrelationship of treaty and statutory law in determining their clients' United States tax liability. On a higher level, Professor Owens probes deeply into a panoply of policy issues arising from the treaty network with legal, economic, and political ramifications of great interest to those who formulate tax legislation. One cannot do justice to her enormous range of interest and to the wealth of articles she has gathered. The few examples that follow are intended to illustrate the diversity of the material; they are not a finite survey.

One section focuses on the tension inherent in treaty negotiations between the source country (where the income arises) and the country of residence (in which the investor resides), a tension frequently referred to by economists as the conflict between the capital-importing (source) country and the capital-exporting (residence) country. Various treaties are then analyzed for their economic impact on the flow of international investment and as catalysts or deterrents in the struggle of developing countries to attract international capital and to retain through the treaty system what they deem is their fair share of the profit from international investment derived within their borders.[22] Professor Owens explores alternative views of whether the United States should grant tax incentives for investment in less developed countries and whether such incentives should be legislated under the Internal Revenue Code, where a degree of uniformity is attainable, or under the treaty system which lacks uniformity but offers the flexibility of tailoring individual arrangements most appropriate to each new treaty partner.[23]

Another section addresses whether the tax jurisdiction of individual states can or should be controlled by United States tax treaties. The precise question is the extent to which treaties entered into by the federal government should determine how much of the income of a multinational corporation is reasonably attributable to a particular state and taxable by such state. This question is examined in the context of the recent United States-United Kingdom treaty where it first surfaced, and excerpts are presented expressing views on both sides of this controversy. The author notes that although the United Kingdom treaty was ratified as a tactical matter after the excision of the original provision

22. *Id.* at 10-38.
23. *Id.* at 210-36.

that would have restricted state taxing jurisdiction, the fundamental conflict as to the authority of the federal government versus the states on this question remains unresolved.[24]

Owens also examines the perennial question of whether the United States should integrate its domestic corporate and individual income taxes, as some of the Common Market countries have, and the further question of whether integration is warranted, as some claim, because of its positive effect upon existing and future United States tax treaties.[25] International complications have already been faced when the United States classical system of taxing corporations and shareholders as separate entities interacts, in treaty negotiations, with the laws of countries such as the United Kingdom, France, and West Germany. These governments have adopted a form of partial integration under which shareholders are granted a credit for all or a portion of the corporate tax paid on the income which is actually distributed out by corporations as dividends. Many articles are presented on the problems the United States faces under its nonintegrated system when it negotiates a bilateral income tax convention with a country that has an integrated system, and on the potential effects on the international flow of capital to or from the United States which would result from its adoption of an integrated system. The author illustrates with simple diagrams the discriminatory effects of integration on inward and outward portfolio and direct investment, and contrasts the solution achieved under the United States-France treaty with that negotiated under the United States-United Kingdom treaty. This is also an area where she focuses on the reasons for the conflict and offers no pat satisfactory solution.[26]

Part Four concludes with an interesting observation. The author enumerates the many international arrangements in place which may not be recognized by the tax bar as possessing income tax consequences. Most United States commercial treaties, it is pointed out, contain tax provisions. As an illustration, sections are quoted from the Treaty of Friendship, Commerce and Navigation between the United States and Japan, executed in 1953.[27] Numerous executive agreements have been signed by the United

24. *Id.* at 83-102.
25. *Id.* at 176.
26. *Id.* at 176-209.
27. *Id.* at 238-39.

States exempting the income from the operation of ships or aircraft from United States taxation. What is not widely recognized is that many of these executive agreements are with nations with whom the United States does not have a traditional income tax treaty (*e.g.*, Brazil, Chile, Jordan, Mexico, Panama and the Republic of China). The author examines the multinational treaty known as the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, sponsored by the World Bank, signed by the United States and others, in effect since 1966. This treaty, among other things, created an International Centre for Settlement of Investment Disputes. Professor Owens makes the provocative comment:

> There is nothing in the convention or in the Report of the Executive Directors of the [World] Bank on the convention which indicates that the services of the Centre were intended to be used for the settlement of tax disputes. But there is also nothing to indicate that they were not; in view of the requirement of consent by both parties, the jurisdiction was clearly intended to be very broad.[28]

Professor Owens thus invites one to speculate that the legal machinery may already be in place for the Centre to function as a World Tax Court.

In the hands of many authors, what Professor Owens labels a "Part" could well have been an entire book. Thus, Part Five, on "Control of International Tax Evasion," is separable from the preceding parts and is an extensive legislative-oriented analysis of a subject that is seldom approached from this direction. The working definition used for tax evasion is "the reduction of taxes by taking advantage of the special opportunities that the existence of national boundaries provides for escaping payment of U.S. taxes, other than by tax avoidance, while "tax avoidance" is defined as "the reduction of taxes by legal means."[29] These definitions are not totally satisfactory because, as the author admits, tax avoidance and tax evasion tend to merge in the international area.[30]

To find the appropriate government response to the problem of international tax evasion, Professor Owens proposes a three-step analysis: first, that the causes of tax evasion at the international

28. *Id.* at 240.
29. *Id.* at 245.
30. *Id.*

level be identified; second, that a judgment be made as to whether the causes consist of inadequate procedural and enforcement processes or are due to inadequate substantive law or both; and third, that a cost-benefit ratio approach be utilized to evaluate the cost of the action necessary to remedy the deficiencies compared to the cost of continuing the status quo.[31]

Various factors permit tax evasion more readily in international transactions than in the domestic arena. The federal government is handicapped by the fact that it cannot obtain as much information about overseas transactions as it can about domestic transactions.[32] The government position is that transactions with foreign entities are often planned to avoid United States requirements for filing either tax returns or information returns.[33] Given this void, government officials assert that the second factor fostering international tax evasion by United States taxpayers is the overly aggressive international tax practitioner.[34] Since the federal government lacks the power to compel the filing of information returns and the production of information on purely international transactions, the federal government is left with only criminal sanctions to control international tax abuses.[35] As the substantive law of international tax has grown more complex, government officials claim it has become "increasingly hard to distinguish foolishly aggressive tax planning from outright fraud."[36] Consequently, they claim that United States taxpayers are consulting lawyers to insulate themselves from criminal penalties by obtaining tax opinions which operate as fraud insurance.[37] Professor Owens quotes the sweeping government charges without presenting any substantial rebuttal on behalf of the international tax bar. The inferences are disquieting for the profession and the public.

A final obstacle hampering effective government control of international tax abuse schemes is the fact that transactions are often structured with entities created in tax haven countries with no or low taxes and with banking and business secrecy laws that prohibit disclosure of the very information the United States gov-

---

31. *Id.* at 248.
32. *Id.* at 253.
33. *Id.* at 253-62.
34. *Id.* at 262-68.
35. *Id.* at 264. See *id.* at 245-48 for a summary of domestic United States enforcement powers.
36. *Id.* at 264.
37. *Id.* at 265.

ernment seeks.[38] When a significant part of the tax haven's domestic economy may be derived from activities attracted to its shores by its secrecy laws, it is asserted the country has little incentive to repeal such laws.[39] Even when treaties call for the exchange of information, the United States encounters difficulties in obtaining such information from its treaty posture, which the author points out with material ranging from a United Nations survey to illustrative disputes under the Canadian and Swiss treaties.[40] The most pressing need remains, it appears, to establish some arrangement to exchange information with more than the limited numbers of countries with whom we have traditional tax treaties. The author quotes 1979 congressional testimony to the effect that the United States had not one bilateral tax treaty with a developing country, that "full blown" tax treaties are time-consuming to negotiate and ratify, and, under these circumstances, the information the government wants so badly from these countries could be more realistically obtained if the United States would execute limited minitreaties with developing countries. The proposed minitreaties could be designed to cover only the exchange of necessary information and omit substantive controversial points which block agreement on a standard-size treaty.[41] Along this line, the Treasury Department requested authority to enter into executive agreements with other countries that would not require Senate ratification, for the sole purpose of exchanging tax information with such countries.[42] Such proposals have much to commend them.

Even though Volume II is still to come, it is not too early to express the hope that Professor Owens is turning her hand toward keeping her two 1980 volumes current with supplements. Tax events move swiftly and much of her material is of a timely nature, so that small sections are already outdated.[43] This is an

38. *Id.* at 258.
39. *Id.* at 291.
40. *Id.* at 292-325.
41. *Id.* at 325-26.
42. *Id.* at 326-27.
43. For example, the Foreign Investment in Real Property Tax Act of 1980 was signed into law December 5, 1980. Thus the specific discussion of the alternatives for taxation of foreign taxpayers on capital gains from United States real estate (Vol. I, at II-220-23), may be moot, although the policy rationale remains sound. *See* Wilkins, *The Foreign Investment in Real Property Tax Act of 1980,* TAX MANAGEMENT INT'L J., Feb. 1981, at 26.

inevitable fact with which all tax authors must contend. The two volumes already published establish the casebook as a work that is monumental in scope, reference, and policy insights. For those who have hungered for a major sourcebook on international taxation, Professor Owens has prepared a feast.