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Book Reviews: American International Law Cases 1783-1968

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AMERICAN INTERNATIONAL LAW CASES 1783-1968 (VOLUME I) by Francis Deak. Oceana Publications, Inc. 1971. Pp 484 and Table of Cases. Professor Deak is Visiting Professor of International Law at the Rutgers Law School at Camden, New Jersey.

*Reviewed by Stuart S. Malawer**

The increase in the quantity of litigation involving issues of international law in the federal and state courts and before administrative bodies has been very great.¹ This has been a consequence of many varied factors—increased foreign expropriations of U.S. owned foreign property;² greater U.S. foreign investments,³ and greater foreign direct investments in the United States.⁴ With the advent of recent investment liberalization in Japan, the anticipated expansion of the European Common Market, and the anticipated trade expansion by the United States with both the Soviet Union and the Peoples Republic of China, an increase in litigation involving international law issues in the courts and the administrative agencies in the United States is inevitable.

It is at this moment with the vast increase of international transactions that the first volume of *American International Law Cases* appears. All practitioners of the legal profession, both specialists and non-specialists in the field of international law, owe an immeasurable debt of gratitude to the editor and Oceana Publications for the undertaking of such a project. In a few years hence, when the multi-volume set is completed, it is to contain all the federal and state cases that have treated questions of international law.

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¹ For recent state, federal and administrative cases treating issues of international law see the following: *South African Airways v. New York State Division of Human Rights*, 64 Misc. 2d 707, 315 N.Y.S. 2d 651 (Sup. Ct. 1970); *Oliner v. Canadian Pacific Ry. Co.*, 34 App. Div. 2d 310, 311 N.Y.S. 2d 429 (1970); *Banco Nacional de Cuba v. First National City Bank of N.Y.*, 442 F. 2d 530 (2d Cir. 1971), cert. granted, 40 U.S.L.W. 3161 (U.S. June 17, 1971) (No. 295); *In the Matter of the Arbitration Between Valentine Petroleum and Chemical Corporation and Agency for International Development*, (September 15, 1967), 9 INT'L LEGAL MATERIALS 1144 (1970). For the treatment by arbitration of international legal questions, see: *The Emerging Law of Dispute Settlement Under the United State Investment Insurance Program*, 3 LAW & POLICY IN INT'L BUS. 101 (1971).

² As to recent nationalization by Chile of U.S. copper interests see *N.Y. Times*, September 29, 1971 at 1, col. 3 (city ed).

³ *Int'l Herald Tribune*, August 19, 1971 at 7, col. 5.

⁴ Cray, *European Investment in American Growing*, *N.Y. Times*, July 25, 1971, §3, at 15, col. 1. See generally INSTITUTE FOR INTERNATIONAL AND FOREIGN TRADE LAW, PROCEEDINGS OF THE CONFERENCE ON DIRECT INVESTMENT IN THE UNITED STATES (1970).

The topics promised to be developed as contained in the table of contents for the collection are: international law in general, control of resources, jurisdiction, diplomatic and consular intercourse, treaties, control of persons, international organizations and war, belligerency and neutrality. This first volume, divided into two chapters, presents fifty-three cases relating to international law in general. The first chapter discusses the nature, sources and application of international law; and the second discusses states as subjects of international law, specifically, sovereignty and recognition.

The first volume presents cases, among others, that are popularly known as the Chinese exclusion cases,⁵ prize court cases,⁶ and the Soviet recognition cases.⁷ A reading of these cases presents to the reader the multi-faceted problems of both international law and the foreign relations law of the United States. These problems reveal the tremendous intricacies and wide range of complex legal issues that are involved in these two areas of the law.

Several problems of international law that are discussed by these cases are: whether there is a rule of restrictive or broad interpretation of treaty law in customary international law;⁸ whether consent is the basis of obligations in both customary and conventional international law;⁹ and the legitimacy of territorial conquest.¹⁰ Some problems of American foreign relations law that are discussed are: the weight of executive suggestions as to the applications of the act of state doctrine and sovereign immunity;¹¹ how statutory provisions are interpreted when referring to international law;¹² the application of the federal act of state doctrine in the context of non-recognized regimes;¹³ the extraterritorial application of U.S. and foreign legislation;¹⁴ the general role of the judiciary in foreign affairs;¹⁵ the significance of the executive suggestion as to treaty interpretation;¹⁶ and the incorporation of both customary and conventional international law into domestic law.¹⁷

⁵ *E.g.*, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); F. DEAK, AMERICAN INTERNATIONAL LAW CASES (Volume I) 187 (1971) (hereinafter cited as DEAK).

⁶ *The Scotia*, 81 U.S. (14 Wall.) 170 (1872); DEAK 65.

⁷ *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938); DEAK 369.

⁸ *United States v. Pink*, 315 U.S. 203 (1942); DEAK 383.

⁹ *Henfield's Case*, 11 F. Cas. 1099, (no. 6360) (D.D.C.Pa. 1793); DEAK 125.

¹⁰ *Cobb v. United States*, 191 F. 2d 604 (9th Cir. 1951); DEAK 313; *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191 (1815); DEAK 3.

¹¹ *Union of Soviet Socialist Republics v. National City Bank of N.Y.*, 41 F. Supp. 353 (S.D.N.Y. 1941); DEAK 477.

¹² *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820) DEAK 7.

¹³ *Banque de France v. Equitable Trust Co. of N.Y.*, 33 F. 2d 202 (S.D.N.Y. 1929); DEAK 441.

¹⁴ *United States v. Belmont*, 301 U.S. 324 (1937); DEAK 358.

¹⁵ *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); DEAK 339.

¹⁶ *United States v. Ushi Shiroma*, 123 F. Supp. 145 (D. Hawaii 1945); DEAK 320.

¹⁷ *The Paquete Habana*, 175 U.S. 677 (1900); DEAK 88.

It is evident that the presentation of U.S. cases has a great relevance for the practicing lawyer attempting to determine what the domestic law is in relation to matters involving international transactions. The value of these cases is great for the international lawyer or foreign lawyer attempting to determine the content of an international legal rule. Article 38(1) (d) of the Statute of the International Court of Justice declares that national jurisprudence is to be utilized as a subsidiary means in order to determine international law.

In the Introduction, Professor Deak states a theme that the implicitly suggests emerges from the reading of the cases presented.

It is fair to say that of the three coordinate branches of the United States Government, the judiciary has done far the most for the interpretation, the application and the growth of international law As compared to the role of the judiciary in the development of international law, the contributions of the executive and, particularly, the legislative branches of the Federal Government can hardly be characterized as distinguished.¹⁸

However, a reading of the cases emphasizes the proposition that the courts have developed doctrines, especially the act of state doctrine, that has precluded judicial inquiry into the Government's conduct of foreign relations and the acts of a foreign state, no matter how revolting those acts are.

The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. *Oetjen v. Central Leather Co.* (1918).¹⁹

However revolting the acts of a sovereign state may be to a free people . . . our courts must recognize the comity established by International Law and leave the solution of political questions of an international character to those upon whom the Constitution devolves that duty. *Medvedieff v. Cities Service Oil Co.* (1940).²⁰

These views have recently been applied in the latest of the Sabbatino-type cases *when* the federal court *considered* the federal act of state doctrine as precluding judicial inquiry into alleged violations of international law by the foreign expropriation acts of the Cuban Government, and thus precluding the application of the U.S. view of international law to expropriations.²¹ Although it is doubtful, one

¹⁸ DEAK XI.

¹⁹ 246 U.S. 297, 302 (1918); DEAK 342.

²⁰ 35 F. Supp. 999, 1001 (S.D.N.Y. 1940); DEAK 294.

²¹ *Banco Nacional de Cuba v. First National City Bank of N.Y.* 442 F. 2d 530 (2d Cir. 1971), *cert. granted*, 40 U.S.L.W. 3161 (U.S. June 17, 1971) (No. 295).

hopes that the cases to be subsequently reported by Professor Deak bear out his opening remarks.²² One also hopes that in the final volume a general index will be included; this index would make the work an even greater asset to the lawyer attempting to locate case law as it relates to the many and varied rules of international law.

For both the practitioner and the legal scholar *American International Law Cases* is indispensable. Since Clive Parry attempted a similar task with the *British International Law Cases*, the American legal profession has been waiting for a similar herculean undertaking. The first volume has proven equal to the challenge.

²² Professor Deak's theme is of course not unique, e.g., R. Lillich, *The Proper Role of Courts in the International Legal Order*, 11 VA. J. INT'L. LAW 9 (1970).