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Lowenfeld

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INTERNATIONAL PRIVATE INVESTMENT. Andreas F. Lowenfeld.
New York: Matthew Bender, 1976 pp. ix, 495. \$7.50. L. of C.
75-24748.

Reviewed by Alan C. Swan*

In the three volumes issued to date on International Economic Law, Professor Andreas Lowenfeld has offered a pointed challenge to those of his colleagues who teach in this unruly and all too rapidly changing field. But it is a challenge with a curious and surely unintended twist. Especially in Volume II — which is the focus of this review — as well as Volume III, Lowenfeld employs the problem method in its ultimate form without compromise.

Doubtless this rests upon a conviction that only the problem method can do justice to the vastness of the subject and its rich entanglements with politics and economics and the pragmatic world of governmental and business management. Yet, in the mind of this reviewer, too much is sacrificed by the method for the material to serve as the basic resource in any semester-long survey course designed to introduce the general law student to the wider mysteries of the subject. It can only serve, in such a setting, as a supplemental resource. More pointedly it is this limitation which suggests how utterly dependent effective problem method teaching may be upon other more traditional law school modes. Indeed, the dependence in Lowenfeld's case is so complete that the material would appear to come into its own only for the more advanced offerings where a good deal of traditional learning has already occurred.

To Lowenfeld a problem is not merely some extended and slightly dressed-up version of an appellate case. It is an unfolding story. And it is not only a story in which legal issues take their shape from the surrounding political, economic and managerial context, but a story where issues emerge slowly, often in uncertain shapes which, in turn, influence the structure, the timing and the tone of decision. In short, a problem is, to Lowenfeld, a means of conveying the total setting in which the lawyers' craft is actually practiced.

To the teacher this is the beauty and the challenge of the material. It tests whether he can direct the student in the systematic learning of how the disciplined legal mind orders all these riches. And if Lowenfeld

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challenges the teacher, he also assists with questions and notes well-executed for the purpose. Yet there is a vital distinction between conveying an awareness of the real world of the law in all its complex engagements and teaching the lawyers' craft. Especially must one differentiate between the several levels through which the learner must progress.

Generally, it seems fair to suggest that two basic pieces of equipment must be in place before the student is ready to move thoughtfully through the multi-dimensional stuff of Lowenfeld's problems. There is first the matter of legal doctrine; a vast amount of legal doctrine which the student must know something about before questions concerning financing alternatives, contract clauses, corporate structures, or litigating tactics have any meaning whatsoever. This is the stuff of corporate and administrative law, of constitutional law, of international law of antitrust and taxation and civil procedure. Unfortunately, exposure to these areas taught from a predominantly domestic perspective offers only a start in attaining the knowledge needed to work in the transnational setting of Lowenfeld's problem. And it is a matter not only of rules, but of the modes by which decision makers have approached the raw material of rules; methods which vary widely depending upon the "field" in which they are working.

Secondly, beyond legal doctrine are the more theoretical constructs of the social sciences, particularly of economics, which men have traditionally found indispensable to the ordered thinking about complex social phenomena. Precisely because Lowenfeld insists so uncompromisingly upon intruding such phenomena into the lawyers' world, some rudimentary knowledge of these tools is essential to understanding the world he portrays. And willy-nilly the law schools are too often left the task of supplying that knowledge or at least refining the capacity to use it in solving legal problems.

In Volumes II and III Lowenfeld makes little effort to assure that these essentials are in place. Indeed he appears to assume their availability. But this is probably less a deliberate assumption than a consequence of his method. For the systematic building of these tools would seem to lie beyond the pretense or the capabilities of the problem method in the fullness with which it is employed in these volumes.

Systematic building, instead, is the province of more traditional techniques where subjects are divided into conventional categories which, if artificial because they fail to replicate the way real world problems come to the law, are nevertheless the essential underpinnings for all

orderly thought. If problems can be introduced into these modes — as they surely can — they must appear in more modest form within limits dictated by the subject matter they are intended to elucidate. Rarely can they offer the whole unfolding story which Lowenfeld presents.

This point deserves a few illustrations. In Volume II Lowenfeld considers the expropriation of the American copper companies in Chile. In the section dealing with the final take-over by the Allende government, he presents a series of questions apparently intended to direct the student's attention to the legal issues that were obviously critical in fashioning both company and governmental strategy. Here he alludes to the Hickenlooper Amendment; to the relationship between the form of the take-over and that Amendment; to the UN Resolution on Permanent Sovereignty over Natural Resources; to the procedures established by Chile to avoid being charged with a denial of justice; and to the outcome of the copper company litigation in Europe. In all of this a certain ambivalence is apparent. If the material was intended to introduce the uninitiated to the wider international law of expropriations and the range of remedial possibilities that confront any legal strategist in dealing with an expropriation, it is altogether too thin. Even if, more modestly, it was intended to focus such a student's attention on the law and remedial possibilities in the narrower Chilean situation, it still lacks that completeness of doctrinal material essential to the task. If intended only to invite an appraisal of the wisdom of the companies' strategies, it is trivial compared with what such a student needs to learn. On the other hand, as a means of presenting to students already familiar with the doctrinal undergirdings of the problem the factual and policy questions that faced both the companies and the several governments involved, the material is very useful. The only criticism is that, in structure and perhaps quantity, the material may go too far, often answering rather than inviting questions. Perhaps, in other words, Lowenfeld was trying to carry water on both shoulders.

Again, in the dealing with an ITT investment in lumbering and pulp operations in Canada, Lowenfeld calls attention to the absence in the applicable agreements of a dispute settlement clause, and asks why. The question is potentially quite interesting. Placed in the total setting nicely portrayed by Lowenfeld, it offers possibilities for some interesting discussion of the pragmatic considerations — political, economic and managerial — that often, if not invariably, determine upon the use of such devices. But it is usable in this way only if there is already in place

knowledge concerning the stipulations that context suggests the adept tactician should have considered: choice of forum, choice-of-law, arbitration, waiver of immunity, etc. Without knowledge of these possibilities and the rules that define their functional characteristics, the question is only usable if accompanied by explications by the teacher. Such explications are however virtually impossible to execute without oversimplification and are likely, in all events, to disrupt the flow and rigor of the classroom dialogue.

Now, however, let me join Mr. Lowenfeld's side on a broader point. The ultimate challenge, of course, is to those of his colleagues who stubbornly refuse to bring to their subject any of the political and economic realities within which all legal doctrine lives. This is the law as rules and the teaching of law as the teaching of rules syndrome. To those of this persuasion, Mr. Lowenfeld has asked to see the emperor's clothes. I, for one, think the question is well put and suspect the answer. While I harbor no undue optimism, I still hope some few of this persuasion will take up Mr. Lowenfeld's challenge. Should they do so, all will stand to gain, especially the students, whatever may be their level of initiation into the mysteries of our subject.