# DON QUIXOTE'S ADVICE RINGS TRUE: THIS CHICKEN SPEAKS FOR ITSELF.[1] REVIEWING *UNITED STATES LAW OF TRADE AND INVESTMENT* (BORIS KOZOLCHYK & JOHN F. MOLLOY EDS., 2000)

**Book Review**

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*United States Law of Trade and Investment* is a welcome addition to the growing collection of scholarship written specifically to increase cross-cultural understandings of dissimilar legal traditions. It is addressed to the non-common law practitioner and scholar; it provides numerous points of departure for further research and depth of understanding; and it has as one of its objectives facilitating foreign trade and investment in the United States by summarizing the "common law" from the perspective of the commercial lawyer. These four volumes are a significant contribution to a field that has a scarcity of scholarship that focuses on protocols. The limited scope of this review cannot do justice to the work's breadth and coverage of topics that are of interest to international commercial lawyers. It is only by closely reviewing the subjects covered across four volumes, as well as appreciating the quality of the coverage, that one can begin to understand the considerable effort and talent that went into the publication of this work and the value that the work contributes to the field.

The Law of International Trade and Investment has evolved significantly in the last ten years.[3] Commentators and practitioners in the field are more sophisticated

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1. Professor Kozolchyk attributes the following saying to Miguel de Cervantes Saavedra's *Don Quixote de la Mancha:* "If you are painting a chicken, don't explain in your title why you named it a chicken, let your chicken speak for itself." 1 Boris Kozolchyk & John F. Molloy, *Introduction, in* UNITED STATES LAW OF TRADE AND INVESTMENT I-1 (Boris Kozolchyk & John F. Molloy eds., 2000) [hereinafter U.S. LAW OF TRADE].

2. Associate Professor of Law, University of Arizona, James E. Rogers College of Law. I am grateful to my colleagues, Associate Dean Kay Kavanagh, Barbara Atwood, and Suzanne Rabe for their thoughtful editorial comments and feedback. It is important to disclose that Dr. Boris Kozolchyk, Professor David Gantz, and Professor Dan Dobbs are colleagues of mine here at the University of Arizona. This fact, of course, takes nothing away from the merits of their outstanding contributions to this work nor did it influence my comments about it. Indeed, Professors Dobbs, Kozolchyk, and Gantz enjoy an international reputation and are well respected in their fields. Other contributors to this work are also colleagues of mine, but I have not reviewed or commented on their particular contributions as they are beyond my field of expertise.

3. *See, e.g.*, Boris Kozolchyk, *The Unidroit Principles as a Model for the Unification of the Contractual Practices in the Americas*, 46 AM. J. COMP. L. 151, 152 (1998) (describing and analyzing the attempts at harmonizing and unifying the "Best Practices" in the Americas); *see also* David A. Gantz, *Introduction to the World Trading System and Trade Laws*

in their understandings of diverse legal cultures, as well as more intellectually enthusiastic about the subject matter and sensitive about the obstacles that differences in legal traditions place in the path of harmonization of commercial practices. In these last decades, theories on transnational harmonization and unification have become more focused and specialized. For example, the United Nations Commission on International Trade Law (UNCITRAL) has become more active in the development of Model Laws addressing specialized commercial subjects; it has focused on the general, then on the specific, and then back again. Interested parties and organizations have certainly not remained agnostic to globalization. Among other interests, comparative commercial law has been concerned with the effectiveness of "transplants," that is, the mixing and matching of different legal institutions to create a unified whole. Indeed, the efforts to support the effectiveness of international trade and investment legal regimes have been impressive. This is cause for celebration.

Developments during the last decade could be described as a collective epiphany that reaching some form of harmonization must advance international commerce. This harmonization includes cross-cultural understanding, acceptance, and accommodation. If these elements are not included, harmonization efforts will be hindered and significant costs will result. Progress has undoubtedly been modest and encumbered by theoretical and practical disagreements. It has not reached the level of harmonization idealized by model commercial laws; nonetheless, the collective international effort has not been desultory.

But celebration is accompanied by caution. Many of the models and studies on the efficacy of proposed international commercial unification norms have been one-directional; they have focused on the United States, Europe, and certain Asian countries. The relevant literature reflects a frustration with the minimal involvement Latin America has played in the dialogue affecting the development of international trade laws.[4] Commercial law comparatists have been concentrating their writings on the Continent and on Asia for quite some time. Latin America, however, has not received similar attention from commentators, courts, and practitioners.[5] It is also true, however, that Latin American countries – with the qualified exception of perhaps Mexico and Brazil – have been less than successful in making meaningful inroads into the international trade and investment discourse with the same resolve and ardor as other countries. The reasons are as complex as they are varied. They

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*Protecting U.S. Business*, 18 WHITTIER L. REV. 289, 293-300 (1997) (describing the development of the laws of trade and investment); Boris Kozolchyk, *On the State of Commercial Law at the End of the 20th Century*, 8 ARIZ. J. INT'L. & COMP. L. 1, 2-6 (1991) (evaluating the state of commercial law through a historical description dating back to the Roman and Early Medieval European marketplaces).

4. *See, e.g.*, *Proceedings of the Eighth Annual Conference on Legal Aspects of Doing Business in Latin America: Developing Strategies, Alliances, and Markets*, 10 FLA. J. INT'L L. 1, 2 (1995) (comments of Jana Sigars).

5. *See* Alejandro M. Garro, *On Some Practical Implications of the Diversity of Legal Cultures for Lawyering in the Americas*, 64 REV. JUR. U.P.R. 461, 475-78 (1995).

involve a tangled mix of national and international factors, barriers to trade and investment, underdeveloped economies, lack of investment interest or perceived opportunities in the Americas, democratic instability, and cultural and language barriers, to name a few.[6] Nonetheless, the common thread among all countries vis-à-vis international trade laws has always been, and continues to be, the tenuous recognition of how different legal traditions and societal institutions intersect with legal change and desired harmonization.

Several methods are available for dismantling legal barriers. We ought to focus on this endeavor to obtain a more sophisticated understanding of how American legal institutions both interact with and affect international trade and foreign investment. One method is to publish descriptive works of scholarship about the American legal system sensitized to the reader's potential lack of recognition and understanding of certain American legal institutions. This results from a legal education, and its accompanying legal institutions, which are vastly different from those of the Common Law. Language barriers – particularly legal language barriers – stand as one of the most common obstacles for non-English speaking scholars and practitioners to becoming fully informed participants and contributors. A descriptive work that recognizes its audience opens intellectual doors that have been closed to those trained in a different legal tradition for a long period of time.

Another method, which also incorporates the considerations expressed above, is to explain the nature of the legal principles that create obstacles in the language of the relevant targeted audience. For example, although the scantiness of relevant legal materials available in Spanish is just *one* factor contributing to the Americas' slow integration into the world economy, it is well worth the effort to translate a work such as *United States Law of Trade and Investment*, as a first step toward harmonization and integration that the literature emphasizes so energetically. But neither the passage of time, nor the advent of "globalization" and heightened sensitivity to cultural and political differences, has helped to fill the void of American legal materials written in, or translated into Spanish. While the available literature in English and its accompanying translation into German, French, Italian, or Japanese is copious and of high caliber,[7] the civilian[8] Latin American lawyer finds herself in need of even basic legal materials, to say nothing of those that involve a specialty field or are surveys of a series of fields, as is the law of trade and investment.[9]

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6. *See* DEVELOPMENT, TRADE, AND THE WTO xxvii – xxviii (Bernard Hoekman et al. eds., 2002); *see also* Charles E. Meacham, *Foreign Law in Transactions Between the United States and Latin America*, 36 TEX. INT'L L. J. 507, 509-12 (2001); William Ratliff & Edgardo Buscaglia, *Judicial Reform: The Neglected Priority in Latin America*, 550 ANNALS AM. ACAD. POL. & SOC. SCI. 59, 60 (1997).

7. *See* Garro, *supra* note 5, at 461-63.

8. I use the term "civilian" practitioner to distinguish between lawyers of the common law tradition – American practitioners – and those of the civil law tradition, a system that is representative of all of Latin America.

9. The few exceptions are PETER HAY, UNA INTRODUCCIÓN AL DERECHO DE LOS ESTADOS UNIDOS (2d ed. 1992); MARTA MORINEAU, UNA INTRODUCCIÓN AL *COMMON LAW*

*United States Law of Trade and Investment* bridges many of these chasms. With an impressive assemblage of authors, many nationally and internationally recognized as leaders in their fields, this work defines its mission precisely. In the process, it creates a new genre of comparative literature. It does specifically what it sets out to do: to introduce the laws of this country to those civilian practitioners who would like an opportunity to participate in, or learn about, commerce and investment in the United States. This is why Kozolchyk and Molloy's four-volume introduction to the *United States Law of Trade and Investment*[10] and its forthcoming Spanish translation are timely. It deserves the recognition of the academic community and the welcomed interest of the civilian practitioner, the international commercial lawyer, as well as any library with a collection on international trade, including libraries in Latin America.

It is a tour de force, seven years in the making. To this commentator's knowledge, there is no other serious effort of its kind available in Spanish and perhaps in English as well.[11] This collection serves as an indispensable starting point for any lawyer or scholar, untrained in the common law tradition, who desires to begin exploring the nature of American law in this field.

Many comparative references are to Latin American institutions, all of which are in the family of civil law. Latin America can be said to be a focus of this treatise because these four volumes are the brainchild of the National Law Center for Inter-American Free Trade (NLCIFT), founded and lead by Professor Kozolchyk. The Center's mission is to provide "access to the trade and investment laws of Latin America." The end result of this collaborative effort is an essential component of the Center's mission.

This work is not a treatise, for it does not cover any subject in depth, nor does it offer an analytical exegesis on subtle points of law as a specialized treatise would.[12] It is also not a legal encyclopedia, for its function is not to provide short explanations or definitions of legal terms. Rather, it is an introduction to, and a survey of, several fields of law, all of which have an impact on trade and investment. It is, no doubt, a descriptive work. But its editing choices reflect a focused understanding of, and sensitivity to, the needs of its potential audience: academics and practitioners unfamiliar with the common law tradition or the American laws of trade and investment. It does not claim to cover any area of the law in depth. It could

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(1998), and some excellent but dated ones: JULIO CUETO-RÚA, EL COMMON LAW (1960); OSCAR RABASA, EL DERECHO ANGLOAMERICANO (1982).

10. 1 U.S. LAW OF TRADE, *supra* note 1, at I-1 to -8.

11. I have researched numerous databases in Westlaw, Lexis, and the Internet to identify similar works. I also benefited from the research assistance of the University of Michigan Comparative Law Librarians, who conducted a similar search on my behalf. They, too, obtained the same results.

12. *See, e.g.,* MANUAL OF FOREIGN INVESTMENT IN THE UNITED STATES (John Byam et al. eds., 2d ed. 1993); *see also* COMM. TO STUDY FOREIGN INV. IN THE U.S. OF THE SECTION OF CORP., BANKING AND BUS. LAW OF THE AM. BAR ASSOC., A GUIDE TO FOREIGN INVESTMENT UNDER UNITED STATES LAW (1979).

not, given its breadth of coverage. Nor does it claim to set forth the conclusive word on the applicable body of law. Rather, the editors carefully and thoughtfully inform readers that these volumes provide them with a starting point for further research and inquiry, offering a global perspective on fields of law that may affect, inform, or touch upon trade and investment.

Thus, in forty-four chapters, spread across four volumes, the editors and authors summarize entire fields of law, from the more general, as with Volume I and its explanation of the six "pillars" of American law, to the intricately specific Chapter 18 of Volume II, *Export and Import Laws and Regulations*, by Professor David Gantz. Most discussions provide prolific citations to other more specialized sources for further reference or research.

The entire set is a commendable accomplishment. Particularly praiseworthy is the outstanding summarization of entire fields of law – such as Contracts by Professor Arthur Rossett, and Torts by Professor Dan Dobbs – into one chapter, in one volume. Some of the chapters of the book are succinct but excellent. Others are helpful and informative, yet others too condensed to be helpful. A few chapters seemed irrelevant, or at most tangentially relevant, to trade and investment. Overall, however, all the topics offer an introductory exposure to our system of laws.

Although it is difficult to imitate the precise and elegant style of the authors, I undertake this review as one who has attempted to teach the fundamentals of our system to civilian law students and practitioners. Thus, the focus of this review is narrow. Although I have examined all four volumes and learned quite a bit about areas of law with which I am unfamiliar, I confine my review to Volume I. I leave to the specialists a more focused review of Volumes II through IV.

Volume I introduces the reader to the "pillars" of American law.[13] Presenting essentially a summarized overview of the first-year curriculum at any American law school, the authors explain that Contracts, Constitutional Law, Civil Procedure, Torts, Property, Conflicts of Law, and Legal Research are essential links to understanding much of the specialized areas treated in the next three volumes. For example, the principles that regulate contracts generally control the specialized contracts that are summarized in the next three volumes.

Perhaps one of the most valuable contributions to this volume from the perspective of a civilian practitioner is Chapter 1, written by Professor Kozolchyk. In this introductory chapter, he explains with elegant simplicity the differences in legal reasoning and legal understandings (or misunderstandings) between the common law and the civil law. The chapter also explains the institution of *stare decisis* and legal precedent; the peculiarities of American-style statutory interpretation, contract, legislative drafting and the role of the Uniform Commercial Code, the relevance of the Constitution to all laws, the place of custom in public and private law, and a brief comparison of the approaches to legal education taken in the civilian and common law systems.

Not long ago, I experienced the relevance of Chapter 1. I had the

13. *See* 1 U.S. LAW OF TRADE, *supra* note 1, at I-1 to -2.

opportunity to teach a course on Introduction to American Law to Latin American law students. In preparing the course and speaking with some Latin American academics, I realized that it was impossible for me to teach the concept of precedent without possessing at least some basic fundamental understandings: (1) in the civil law tradition the institution of *stare decisis* does not exist; (2) one must understand the reasons *why* it does not exist – *i.e.*, understand the evolution of the civil law in a particular country and in its historical context; and (3) one must also understand the importance of the different conceptual frames of reference from which juridical concepts arise and are understood and defined.

It was difficult to have a conversation with civilian academics and practitioners – all of whom were bright, highly educated, erudite, and even had some exposure to the common law – because we could not begin a dialogue about, say, the ambiguity of words, without understanding that we were starting from different analytical, cultural, historical, political, and legal assumptions. Thus, to teach, much less have a normative discussion about a substantive topic in American Law, required a fundamental explanation (and understanding on the part of the instructor) of why Americans view certain issues in a peculiar way, and why Latin Americans do not. One needs to be able to explain the differences between what it means to interpret a legislative provision in Latin America and what statutory interpretation entails in the United States, and why the differences in approach are significant for the evolution of the law.[14] This is the reason an introductory course can become impenetrable without some threshold understandings along the lines of Professor Kozolchyk's discussion.

This discussion brings me back to Chapter 1 of Volume I. I distributed this chapter to my students, and I studied it closely as well. It helped advance the course and elevate the sophistication of class discussions. After acknowledging, explaining, and understanding the differences among our legal cultures, we were able to further our discussions from a better-informed comparative frame of reference. Students understood *stare decisis*, without having to adopt it as their own tradition. They understood it because they were able to learn it from a perspective that was different from their own. The advice of Chapter I helped me understand how to structure the course in a way that ensured students would understand what I was trying to teach.

Subsequent chapters follow naturally from the comparative explanation of Chapter I. There is a circular structure to this work. The reader is referred back, or forward as the case may be, to the significance of the principles being discussed, to other, more specialized areas. The Law of Contracts, for example, is relevant to the Regulation of Business Organizations, addressed in Chapter Ten, and to the Law of Extension of Credit, but it also at times overlaps with the Law of Torts, explained in Volume I by Professor Dobbs. The information conveyed about foundational principles of American law helps the reader make an easier transition to the more specialized areas of trade and investment.

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14. *See, e.g.,* John Linarelli, *Anglo-American Jurisprudence and Latin America*, 20 FORDHAM INT'L L.J. 50, 59-60 (1996) (explaining this dissonant approach to law in Latin America).

Though presented in a prefatory manner, this work addresses focused and intricate topics. Volume II, for example, addresses Taxation generally, but also discusses tax classifications for foreign investors. It also covers Business Organizations, Administrative Law, Antitrust Law, Labor Law, Products Liability Law, International Litigation of Commercial Disputes, Arbitration and Alternative Dispute Resolution, and Export and Import Laws and Regulations. Each chapter commences with comparative points of importance to the civilian lawyer and explanations for the different treatment or understandings of legal terms.

Volume III concentrates on Agency and Trusts, Securities, Leases under the Uniform Commercial Code (U.C.C.), Negotiable Instruments and Bank Deposits and Collections, Wholesale Transfer of Funds under U.C.C. Art. 4A, Commercial and Standby Letters of Credit, Documents of Title, the U.C.C. itself, Secured Transactions, Bankruptcy, and E-Commerce. Comparative points at the beginning of each chapter help to focus the reader. For example, Professor John Reitz, in describing the Law of Agency and Trusts, explains that this area of the law offers the most important contrasts between the common law and countries of the civil law tradition. He explains the importance of agency and trust law for trade and investment considerations.

Finally, Volume IV collects an interesting, if not eclectic, set of topics. It surveys Environmental Law, Consumer Protection, Insurance Law, the U.S. Banking System, the all-important Immigration and Naturalization Laws, Intellectual Property, Motor Carrier Law, the Law of Eminent Domain as a separate subject, Professional Malpractice, Foreign Ownership of Property, Real Estate Development and Construction, Indian Law, and Franchising. As with all other volumes, the authors explain the comparative points and make salient the contrasts, where appropriate, between civil and U.S. law. Many authors offer citations to relevant treatises and other collections of legal materials that treat the subject matter with more depth.

## CONCLUSION

The Laws of International Trade and Investment do not consist of a discrete packet of rules, regulations, and treaties to which all participating countries agree. It is neither a field of law nor an isolated perspective on politics, diplomacy, commercial trade, investment opportunities, or protections. It is a collection of concerns about creating stability in international trade through the creation of conflict-resolving mechanisms and rules and regulations that are beneficial to all participants. It is no longer a specialty for the foreign practitioner alone.[15] The United States Laws of Trade and Investment are no different from those of International pedigree. They interrelate, connect, and reflect virtually every precept

15. *See, e.g.,* Katherin Guerin, *International Contracts and Terminology: An Annotated Research Guide for the U.S. Practitioner*, 29 INT'L J. LEGAL INFO. 575, 577-78 (2001).

that touches upon international trade.[16]

Because of the richness of its foundations, International Trade as a subject matter has also become susceptible to intense debate on the merits and demerits of regulated globalized commerce and the efficacy of the institutions that are part of that regime, or the injurious impact of such regimes.[17] Although the codification of international trade and investment principles certainly has its detractors,[18] its proponents appear to have the better argument.[19]

Through the work of entities like the National Center for Inter-American Free Trade (NLCIFT),[20] devoted lawyers, similar organizations, think tanks, and academics, inter-American free trade has been facilitated and made more accessible than ever before. Today we understand the impact of cultural and legal differences more significantly. But much more remains to be done if the goal is to "construct an international legal highway for trade, commerce and investment, certain and just, which can be realized in the not too distant future."[21] This work is an excellent first step toward at least three important objectives: demystifying American law with a focused target on trade; providing international practitioners with an excellent place to start understanding the complex web of rules and regulations that investing in the United States entails; and bringing Latin America into focus by facilitating its participation in the world-wide discourse on trade.

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16. For an excellent summary of the system of world trade and investment, see generally Gantz, *supra* note 3.

17. *See, e.g.,* John Miller, *Globalization and its Metaphors,* 9 MINN. J. GLOBAL TRADE 594, 598 (2000); *see also* HERMAN E. DALY & JOHN B. COBB, FOR THE COMMON GOOD 233-35 (1989) (proposing that local communities are eroded through global trade).

18. *See, e.g.,* Jim Chen, *Globalization and its Losers*, 9 MINN. J. GLOBAL TRADE 157 (2000) (offering a sanguine description of "antiglobalists"); *see also* Mark J. Roe, *Backlash*, 98 COLUM. L. REV. 217 (1998) (discussing why controlled trade arrangements might generate political backlash).

19. *See* Michael D. Pendleton, *A New Human Right - The Right to Globalization*, 22 FORDHAM INT'L L.J. 2052, 2052-53 (1999) ("Globalization offers a realistic vehicle for escaping from failed nationalism to an expanded concept of global rights and duties . . . ."); *see also* Renato Ruggiero, *Reflections After Seattle,* 24 FORDHAM INT'L L.J. 9, 14 (2000) ("Without the WTO, we will go back to a world of national barriers, protectionism, economic nationalism, and conflict. History has repeatedly showed (sic) where this road can lead."). Of course, many opponents to globalization would argue that protectionism and economic nationalism *are* or *should be* the focus of a sovereign state. *See, e.g.,* Miller, *supra* note 17, at 597 (expressing concern regarding the costs to and consequences for domestic industries).

The United Nations has concluded in a recent report that "[t]here is now widespread acceptance that, in the long-run, the expansion of international trade and integration into the world economy are necessary instruments for promoting economic growth and reducing and eradicating poverty . . . ." *Report of the Secretary General to the Preparatory Committee for the High-Level International Intergovernmental Event on Financing for Development*, U.N. GAOR PrepCom, 2d Sess., at 26, U.N. Doc. A/AC.257/12 (2000).

20. Of whose efforts this Book is a part.

21. 1 U.S. LAW OF TRADE, *supra* note 1, at I-8.