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United States, Common Market and International Trust: A Comparative Guide

Cover Page Footnote

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BOOK REVIEW

United States, Common Market and International Antitrust: A Comparative Guide. By Barry E. Hawk. New York: Harcourt Brace Jovanovich. 1979. Pp. xv, 946. \$75.

For many lawyers, antitrust law now provides both an end in itself—a field of practice, an area for study and analysis, a pulpit for preaching—and the essential conceptual framework within which to view and to control the activities of American business at home and abroad. No other American regulatory concept or principle has provided as broad, as powerful, and as long-enduring a focus as that afforded by the Sherman, Clayton and Federal Trade Commission Acts. Europeans frequently (and accurately) accuse Americans of being obsessed by the antitrust laws and, consequently, of ignoring other possible economic regimes and substituting the pursuit of competition for the “pursuit of happiness.” The past twenty years have seen the growth of foreign legislation to control restrictive business practices, particularly in the European Common Market, but the practice of the art remains uniquely American.

Barry Hawk's comparative guide to international antitrust comes at a singularly auspicious time. The principal predecessor treatises by Brewster¹ and Fugate² were first published some twenty years ago. The literature on the subject, which Professor Hawk marshals to an almost numbing extent, has continued to multiply, but Professor Hawk's work is unique and important in several respects. Part One of the book provides an updated restatement of American antitrust law and practices in the international field. Parts Two and Three examine, respectively, the competition rules of the European Common Market and the further “international” practice exemplified by various draft codes and guidelines and the national legislation of selected developing countries. They permit the reader to make comparisons “to illuminate differences and similarities” between the various regimes for regulating “restrictive business practices.”³

Professor Hawk explains that his book evolved from a set of materials used for seminars and that this origin brought about the format of the book, particularly its emphasis on primary source materials. Certainly the book succeeds brilliantly in this respect; one can confidently predict that it will be an extraordinarily useful work for classroom presentations, illustrating the “differences and similarities” in objectives, procedures and application which obtain in the widely varying legal systems of the world. The primary focus of the book is “examination of existing and proposed legal rules,” not in “hornbook” fashion but through the provision of primary and secondary materials.⁴ In at least two of the three areas, Hawk is quite successful; the

1. K. Brewster, *Antitrust and American Business Abroad* (1958).

2. W. Fugate, *Foreign Commerce and the Antitrust Laws* (2d ed. 1973).

3. B. Hawk, *United States, Common Market and International Antitrust: A Comparative Guide*, at vi (1979).

4. *Id.* at vii.

restatement of American law in the international field is encyclopedic and up-to-date while the summary of the European Economic Community (EEC) rules and their application is one of the most comprehensive which has yet appeared on either side of the Atlantic. Hawk is less fortunate in his international section, but here it is the materials which fail him. The lack of focus and the inconsistent viewpoints in evidence in the materials themselves make almost impossible any unifying overview or theme.

Professor Hawk expressly cautions the reader that "considerations of international economics and foreign relations are not directly examined at any length, although they arise implicitly throughout the book."⁵ It is clear that the author has not attempted to deal directly with economic issues, and such a decision was fundamentally wise. An examination of the relevant economic issues would have enormously expanded the scope and length of the work and caused it to lose its legal focus. Hawk goes on to note that:

Antitrust or competition policy is but one of many elements which should go into the formulation and execution of a nation's general foreign economic policy. Other considerations and national interests are involved, some of which may be given greater weight than antitrust policies. These include, among others: national security, military and diplomatic considerations; monetary, balance of payment and fiscal policies; and tariff and other protectionist policies. The application of United States antitrust laws in the international trade area must be understood against this background of differing and sometimes conflicting national policies and interests.⁶

As Hawk recalls, in 1958 Professor Kingman Brewster posed a series of questions concerning the decision of the United States to apply its antitrust laws generally to its foreign commerce. Two of the questions which Brewster raised were:

- d. Should we presumptively defer to foreign interests, policies, and laws when the matter concerned is within their jurisdiction?
- e. To what extent should we be guided by what other governments say as against our own judgment about what is in the long run the best interests of their countries?⁷

One of the most absorbing parts of Hawk's text is his discussion of the jurisdictional judgment which is involved in any answer to these two questions. Hawk retraces the familiar territory of *American Banana*,⁸ *Sisal Sales*,⁹ and *Alcoa*¹⁰ and provides a wealth of unfamiliar information and a rich analysis of the so-called "effects test" in the latter case. There now appears to be a general consensus in favor of a "balance of interests" approach to international antitrust regulation. As enunciated in *Timberlane*¹¹ and *Mannington Mills*,¹² the accepted approach seems to require a determination by the court that "the interests

5. *Id.*

6. *Id.* at 1.

7. K. Brewster, *Antitrust and American Business Abroad* 11-12 (1958), *quoted in* B. Hawk, *supra* note 3, at 2-3.

8. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

9. *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927).

10. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

11. *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1977).

12. *Mannington Mills, Inc. v. Congoleum Corp.*, [1979-1] Trade Cas. (CCH) § 62,547 (3d Cir. 1979).

of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.”¹³ In applying the jurisdictional “rule of reason” advocated by Professor Brewster, this approach relies heavily on the conflict of law approach set forth in sections 18 and 40 of the Restatement (Second) of Foreign Relations Law. The latter section states the principles of forbearance to which courts should look in tempering their exercises of jurisdiction in cases where two or more states have jurisdiction. In assessing the degree of conflict which exists between American antitrust law and foreign law or policy, it is necessary to consider the type, goals and implementation of the conflicting foreign policy or policies.

Unfortunately, Hawk points out, the Justice Department has sometimes chosen to give a narrower reading to section 40 in antitrust situations. In his 1978 ABA speech, Assistant Attorney General Shenefield proclaimed that the Antitrust Division endorsed the restatement of section 40 by Judge Choy in *Timberlane*. In so doing, Mr. Shenefield emphasized that, in the Division’s view, the courts are not required to balance the interests of the American parties against those of the other nations involved, but only “that the interest of the United States in prosecuting the violation be measured both quantitatively and qualitatively against the potential damage to United States foreign relations generally that might result.”¹⁴ I agree with Professor Hawk that this reading does not adequately weigh the interests of the other nations involved since it weighs only the respective American interests in enforcement and in avoiding foreign relations “embarrassments.”

Professor Hawk goes on to criticize the so-called territorial limitation on the act of state and foreign government compulsion defenses proposed by the Antitrust Division in its International Antitrust Guide (and also in the Government briefs in *Bechtel*¹⁵ and *Hunt*¹⁶). He notes that the major policy consideration which underlies the sovereign compulsion and act of state defenses is that of fairness to a defendant who is caught between conflicting demands from two or more sovereigns. In the event of such a conflict, fairness requires rejection of any “mechanical rule requiring all aspects of the foreign act to take place within the sovereign’s territory”¹⁷ and suggests the propriety of the balancing of interests approach suggested in *Timberlane*.

Hawk observes that foreign antitrust discovery has generated most of the international controversy, with the major discovery issue in antitrust cases today that of foreign limitations on discovery. His text was written before the introduction of the United Kingdom Protection of Trading Interests Bill in 1979. Briefly stated, this bill would enable the British Secretary of State to prohibit

13. *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1977).

14. Address by John H. Shenefield, Assistant Attorney General, Antitrust Division, before the ABA International Law Section (Aug. 9, 1978), *quoted in* B. Hawk, *supra* note 3, at 41 n.74.

15. *United States v. Bechtel Corp.*, Civil No. C-76-99 (GBH) (N.D. Cal.), Department of Justice Response to Comments Received Regarding Proposed Final Judgment, 43 Fed. Reg. 12,953 (Mar. 28, 1978).

16. *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

17. B. Hawk, *supra* note 3, at 132.

compliance with foreign requests for production of documents, preclude actions in the United Kingdom to enforce sums payable under foreign multiple damage awards, and permit British residents to recover in British actions the non-compensatory portion of any such foreign judgments. The United States Ambassador to England, who by glorious coincidence is none other than Kingman Brewster, expressed the concern of the American government on the provisions of the bill by note dated November 9, 1979 to the British government. In a reply note, dated November 27, 1979, the British Ambassador to the United States returned the compliments of Her Majesty's Government, including the following:

Her Majesty's Government believe that two basically undesirable consequences follow from the enforcement of public law in this field by private remedies. First, the usual discretion of a public authority to enforce laws in a way which has regard to the interest of society is replaced by a motive on the part of the plaintiff to pursue defendants for private gain thus excluding international considerations of a public nature. Secondly, where criminal and civil penalties co-exist, those engaged in international trade are exposed to double jeopardy.

Her Majesty's Government consider that there are further aspects of U.S. civil penal procedure under the Anti-Trust Acts which are questionable in their application to non-U.S. nationals engaged in international trade. A defendant does not have to be present in the U.S. for jurisdiction to be exercised by the courts of that country over him. In the defendant's absence the allegations contained in the plaintiff's pleadings are accepted, i.e. failure to appear in the U.S. court is treated as tantamount to an admission of guilt. Wide and prejudicial discovery procedures are enforced. The potential penalties can be enormous and totally out of proportion to alleged mischief, particularly where the activities concerned were entirely legal where they occurred.

Finally, and most important, the U.S. courts claim subject matter jurisdiction over activities of non-U.S. persons outside the U.S.A. to an extent which is quite unacceptable to the U.K. and many other nations. Although in recognition of international objections to the wide reach of anti-trust law enforcement in civil cases, the U.S. courts have begun to devise tests which may limit the circumstances in which the remedy may be available, these tests remain within these wider claims to jurisdiction to which Her Majesty's Government object.¹⁸

This exchange between two old allies underlines the truth of Lord Wilberforce's remark, quoted by Professor Hawk, that "[i]t is axiomatic that in antitrust matters the policy of one state may be to defend what it is the policy of another state to attack."¹⁹ Is there a better way than the present regime of national regulation, tempered by wise application of conflict of law principles? Part Three of Hawk's work reports a few of the repeated attempts since World War II to fashion an international antitrust law, from the ill-fated Havana Charter to the current attempts in the United Nations Conference on Trade and Development to agree on "codes" of principles to guide the international regulation of "restrictive business principles" and the transfer of technology. These discussions, between representatives of the developed nations, the Communist East Bloc governments and the so-called "Group of 77" developing countries, are no longer chiefly negotiations about antitrust principles. The substance of the debate in

18. Comments of Her Majesty's Government on Note No. 56 from the United States Ambassador in London (Note No. 225) (Nov. 27, 1979) (on file with the *Fordham Law Review*).

19. *Rio Tinto Zinc v. Westinghouse Elec. Corp.*, [1978] 2 W.L.R. 81, 94, quoted in B. Hawk, *supra* note 3, at 341.

both arenas now concerns the developing world's demand that the developed world transfer to it, on as favorable a basis as can be achieved, both the resources and the tools for its accelerated development. The legal discussions—still embalmed in the deceptively legal language of much of the texts—have been overtaken by the *haute politique* of development and ideological maneuver by the respective power blocs, whose attitudes toward antitrust unsurprisingly are as disparate and irreconcilable as their economic and political regimes. What began as a proud crusade by the United States has increasingly come to resemble a desperate series of rear guard actions fought for many different objectives.

I regret that the stringencies of space do not permit a more complete discussion of the many virtues of Hawk's work—for example, his incisive discussions of the legality of foreign exclusive selling arrangements (Hawk rejects the Antitrust Division's suggestion, in Case J of the International Antitrust Guide,²⁰ of probable per se illegality), mergers and acquisitions, and joint ventures. His 375 pages on EEC antitrust principles and their application are also very informative. For this reader, however, Hawk's discussion of jurisdiction and the act of state and foreign sovereign compulsion defenses is particularly outstanding, illuminating the dangers and inadequacies, respectively, of both unilateralism and multilateralism and the essentiality of the balancing of interests approach in situations of possible conflict. Professor Hawk's thoughtful text demonstrates that *Timberlane*, rather than *Alcoa*, now points the way.

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20. U.S. Dep't of Justice, Antitrust Guide for International Operations, Case J (1977).

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