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Enterprise Law of the 80's

Keywords

Antitrust, Licensing, Democracy, Economics

BOOK REVIEWS

Enterprise Law of the 80's

*Reviewed by Donald W. Hoagland**

ROWE, F.M., JACOBS, F.G., JOELSON, M.R. (eds.); ENTERPRISE LAW OF THE 80's: EUROPEAN AND AMERICAN PERSPECTIVES ON COMPETITION AND INDUSTRIAL ORGANIZATION; ABA Press (1980); ISBN 0-89707-018-6, LC 80-67958; xviii, 254 pp.; footnotes, index.

I. INTRODUCTION

This volume is a report of a symposium held in Luxembourg, Brussels and London from September 25-28, 1979. The sessions of the symposium were organized primarily by the editors and were attended by many of the preeminent experts in antitrust law of the Atlantic community. Their papers and comments represent more a set of sophisticated speculations on the evolution of competition law and organization concepts than a survey or analysis of the state of the law on either of those two subjects. As such, and as an opportunity to read the expert speculations of a group of witty and highly competent participants, this volume offers rich material for people who are concerned with the evolution of competition and industrial organization law.

As a gathering of representatives from many different nations, the symposium offered an opportunity for discussions of comparative competition law. Comparative observations or comments will not determine cases within any jurisdiction, but, particularly in the field of competition law, they are valuable because of the history of the development of legal institutions in this field on both sides of the Atlantic.¹

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1. The field of competition law presents the unique example of a legal institution imported into Europe from the United States. For better or for worse, the antitrust concepts evolving in Europe today have their intellectual roots in the American antitrust law of the late nineteenth and early twentieth centuries. Rowe, *Preface* to ENTERPRISE LAW OF THE 80's: EUROPEAN AND AMERICAN PERSPECTIVES ON COMPETITION AND INDUSTRIAL ORGANIZATION ix (F.M. Rowe, F.G. Jacobs & M.R. Joelson eds. 1980) [hereinafter cited as Rowe].

All of the scheduled speakers presented papers or extended remarks.² An additional group of knowledgeable participants gathered to offer comments, challenges, and supplemental discussion.³ It is important to note the number and range of participants in this symposium in order to understand the distillation of experience embodied in both the papers presented and the comments and discussion based on those papers.

A fine and stimulating range of issues was raised and considered. It was not the group's purpose to arrive at operational solutions to pressing problems, although suggestions for change were made, welcomed, and extensively considered. The participants, the acknowledged leaders of their profession, were having a conversation which represented the informed, sophisticated, sometimes humorous, sometimes world-weary, and regu- larly wry and witty observations of a skilled group of practitioners.

II. WHO WILL DECIDE?

It is clear that antitrust law is a fundamental element of the economic and political structures of the United States and the European Economic Community (EEC). The most penetrating observations of this symposium came from, and were stimulated by, the summaries of Frederick Rowe⁴ and the questions asked by Jeremy F. Lever.⁵ The issue which Rowe and Lever identified, and which this reviewer takes to be the most fundamental question in the field, is the political question of *who should decide* the structure of the commercial world we live in. When a subject becomes sufficiently fundamental and is covered by a set of regulations, the jurisdiction of which has been given to certain administrative or judicial institutions of government, a question which must be asked from time to time is whether authority has been lodged with the proper organs of government. This is a question which does not arise exclusively in the context of antitrust law but is one which must be answered satisfactorily before any body of law or of regulations will be accepted by the society burdened by them.

In the United States, antitrust authority was first delegated to the

2. These speakers were: Professor Michel Waelbroeck, Earl E. Pollock, John Temple Lang, Professor Barry E. Hawk, Professor James A. Rahl, Willy Schlieder, Donald L. Holley, Ivo E. Schwartz, Kingman W. Brewster, Lord Richard Wilberforce, Professor Gordon Borrie, Frederick M. Rowe, Allen C. Holmes, Professor Francis G. Jacobs, and Mark R. Joelson.

3. This group included: Professor Arved Deringer, Professor René Joliet, Aurelio Pappalardo, Frits Salomonson, Jeremy F. Lever, Professor E.J. Mestmäcker, Carl H. Amon, Dr. Betty Bock, Ira M. Millstein, Valentine Korah, J.D. Keir, A.H. Hermann, Professor Basil Yamey, Sir Alan Neale, J.P. Warner, Harvey M. Applebaum, John H. Morrison, and Douglas E. Rosenthal.

4. Rowe, *supra* note 1, at xi-xii; ENTERPRISE LAW OF THE 80'S: EUROPEAN AND AMERICAN PERSPECTIVES ON COMPETITION AND INDUSTRIAL ORGANIZATION 177, 200 (F.M. Rowe, F.G. Jacobs & M.R. Joelson eds. 1980) [hereinafter cited as ENTERPRISE LAW].

5. ENTERPRISE LAW, *supra* note 4, at 97, 190.

courts.⁶ Later the Federal Trade Commission (FTC) was also given authority over antitrust problems in an effort to launch an administrative agency with the capacity to anticipate and prohibit damaging anticompetitive conduct.⁷ Neither of these delegations has been particularly successful. The FTC has become involved in so many dubious enterprises that there have been times when it has come close to being abolished.⁸ The courts have become ensnared in elaborate discovery proceedings to the point that the judicial system could break down from the sheer weight of big antitrust cases.⁹ One British practitioner pointed out that the United States was making its predicament unnecessarily worse by such "errors" as allowing treble damages in antitrust cases, by permitting contingent fees, and by not charging the losing party with some of the winner's costs.¹⁰

III. THE BIG CASE

To place the problem of the "big" U.S. antitrust case somewhat in context, a few specific facts may be useful. For example, in one set of cases involving an alleged price-fixing cartel in the uranium industry,¹¹ one defendant, among many in the proceeding, has had to produce eight million documents. This defendant has employed eighty-five lawyers and 107 paralegals in three different cities, and the lawyers and paralegals have been working on these cases for about four years. Depositions were taken of over 200 individuals, each deposition taking anywhere from one-half day to forty-five days. Disputes about the discovery proceedings have been appealed to the highest state courts ten times. A trial on the merits has not yet, and may never be concluded.

When a U.S. defendant in one of these cases failed to produce certain documents because of a blocking statute¹² in Canada, the state court attempted to force production of the documents and eventually issued a final judgment on the merits against the American company for failure to produce the documents which the law of Canada made it criminal to produce. The "big case" game has become so expansive that even a public offering of shares in an antitrust claim was offered to the investing public.¹³

6. *Id.* at 219.

7. *Id.* at 217.

8. *Id.* at 224-27; Debate, *The Federal Trade Commission Under Attack: Should the Commission's Role be Changed?*, 49 ANTITRUST L.J. 1481 (1980).

9. ENTERPRISE LAW, *supra* note 4, at 227-28.

10. *Id.* at 233.

11. *United Nuclear Corp. v. Gen. Atomic Co.*, 96 N.M. 155, 629 P.2d 231 (1980), *appeal dismissed*, 451 U.S. 901 (1981). For a complete description of the proceedings, see the report of the case at 629 P.2d 231.

12. A blocking statute makes it a crime for persons to hand over business records subpoenaed in foreign antitrust proceedings and, thus, prevents discovery. See [July-Dec.] ANTITRUST AND TRADE REG. REP. (BNA) No. 993, at A-7 (Dec. 11, 1980).

13. ENTERPRISE LAW, *supra* note 4, at 185 n.37.

The scope of this problem broadens when we consider the extent of governmental participation in business in many countries of the world. The American antitrust laws were adopted in the framework of an economy whose dominant participants were privately owned and operated enterprises. Now many participants in the international markets are entirely or predominantly owned or operated by a government. For these government-owned enterprises, profit is only one of their complex of interrelated objectives, and applying antitrust laws becomes inappropriate. It is not possible to bring an offending nation into court as a defendant in a private antitrust action, although the American courts have opened the door to actions by foreign governments against U.S. companies for damages under our antitrust laws.¹⁴ The panelists in this publication have pointed out this anomaly in the availability of the antitrust laws, and it remains one of the major areas for future development.¹⁵

IV. SHIFTING U.S. ANTITRUST POLICY

These papers were delivered in 1979. The Carter Administration was still in office, and that Administration's policies were more or less comparable to the official U.S. antitrust policies pursued by Democratic administrations since 1946.¹⁶ The relatively aggressive pursuit of trade regulation enforcement mechanisms which characterized the Carter Administration is not the policy of the Reagan Administration. The antitrust philosophy expressed by the present Attorney General, William French Smith, represents a substantial reduction in reach and range for the federal antitrust laws.¹⁷ The International Business Machines case has been dismissed.¹⁸ The American Telephone and Telegraph (AT&T) case has been settled.¹⁹ Mobil apparently thought it had a reasonable chance of being permitted to acquire Marathon.²⁰ We may well find that the next symposium of this character will not be so much concerned with the extraterritorial reach of the U.S. antitrust laws as it is with a debate about simplification and dilution of the antitrust laws and the impact upon the economy of the accelerating concentration of economic power through mergers and acquisitions.

V. THE ROLE OF THE COURTS

Lawyers are trained primarily to search for facts to establish the ele-

14. *Id.* at 241; Comment, *The Status of Foreign Sovereigns in Private Antitrust Actions*, 11 DEN. J. INT'L L. & POL'Y 81 (1982) [hereinafter cited as Comment].

15. ENTERPRISE LAW, *supra* note 4, at 224.

16. *Id.* at 221, 224-26.

17. See Interview with William F. Baxter, Assistant Attorney General, Antitrust Division, 50 ANTITRUST L.J. 151 (1981).

18. [Jan.-June] ANTITRUST AND TRADE REG. REP. (BNA) No. 1047, at 88 (Jan. 14, 1982).

19. *Id.* at 82.

20. However, a preliminary injunction barring Mobil's acquisition of Marathon has been upheld by the Supreme Court. *Id.* at 3.

ments of a claim and to argue the legal merits of claims. Lawyers know the elements of a claim of breach of contract or of negligence. In dealing with such claims they know what facts they have to find and what the range of effective argument may be. However, when asked to determine whether there was a conspiracy in restraint of trade or a monopoly or the abuse of a monopoly, competent lawyers can become confused. The facts do not readily trigger reactions based on fundamental values of right, wrong, fairness and reasonableness. The effort to determine and regulate the desired structure of the markets of a large, complex economy through a judicial mechanism is one of the most questionable elements of the U.S. antitrust philosophy. Should the courts be deciding how to restructure the oil industry?²¹ Should lawyers be deciding whether AT&T should be one company or twenty-two?²² The judicial process appears to be a highly inappropriate mechanism for structuring an economy, but Americans would feel over-governed if the FTC or another administrative agency were authorized to declare that it would be beneficial to have twenty-two telephone companies where there had been one. In spite of the incongruity of determining the structure of one of our most essential service industries by the decisions of the parties in a settlement conference, that method does placate the American apprehensions about centralized planning, and this is an apprehension that is not likely to fade in today's political climate.

The papers presented at this symposium emphasize the fact that the EEC antitrust system is more directly regulatory. Even though the substantive rules of EEC antitrust law were extensively adapted from American antitrust principles, their system of investigation and enforcement is much more administrative in character.²³ Although judicial procedures are employed at higher levels in the EEC, the EEC system regards the regulation of monopolistic activity as an administrative process.²⁴ As a result, the EEC employs procedures which, although lacking in the due process elements dear to the hearts of American lawyers, address more openly the political, social, and public policy content of the inquiry involved in reaching conclusions with respect to antitrust matters brought before the commissions.²⁵

VI. THIRD WORLD

The symposium was a conference of American and European practitioners. One of the factual elements they recognized was the proliferation of international trade and the extent to which the commercial world (in

21. The FTC recently dropped a case against Exxon and seven other oil companies. The purpose of the case was to restructure the oil industry. [July-Dec.] *ANTITRUST AND TRADE REG. REP. (BNA) No. 1031, at A-28 (Sept. 17, 1981).*

22. *ENTERPRISE LAW, supra note 4, at 225.*

23. *Id.* at 39, 63.

24. *Id.* at 39-40.

25. *Id.* at 43.

parallel to the political world) has become pluralistic rather than being dominated by a few imperial trading giants.²⁶ The implication of this condition seems to be, however, that the reconciliation of U.S. and European antitrust laws is not such a dominant concern for the 1980's as one might expect. The views on competition and monopoly of all countries of the world will become significant to the establishment and preservation of healthy trading and investment conditions in world commerce. As the greater interdependence of the nations of the world becomes clearer, the next symposium of this kind could well be planned as an effort to present a global perspective.

VII. CORPORATE GOVERNANCE

The subjects of industrial organization and corporate governance receive relatively minor treatment in these papers, but there are some interesting insights. American enterprises have been criticized for the failure to give the public interest a sufficient voice in corporate decisions which affect the public at large.²⁷ There are also those who believe that, with respect to internal corporate governance, there should be a federal incorporating statute.²⁸ Such a statute is desired in order to prevent interstate competition to become the popular situs for incorporations, as this popularity usually results because states have adopted statutes lax toward corporate management.²⁹ State statutes designed to induce corporations to incorporate in that state are alleged to favor interests of control groups to the detriment of the interests of minorities, employees and other groups.

While Americans are still trying to decide how much fiduciary and social responsibility can be required of corporations, a different corporate governance philosophy is emerging in Europe. The evolving European view of corporate governance is that any business is a joint enterprise of capital and labor.³⁰ The responsibility of the board of directors is not only to maximize the benefits accruing to the suppliers of capital but also to maximize the benefits accruing to labor. The law in West Germany requires labor representation on the board of directors.³¹ There is also labor representation in France, although its voting power is less than in Germany.³² Consider by contrast the controversy that surrounded the placement of one labor representative president on the board of Chrysler Corporation.³³ U.S. corporate law has not yet endorsed the concept that the board of directors has a responsibility to give the interests of labor representation comparable to the interests of capital, but it may be that, in the

26. *See id.* at 86-94.

27. *Id.* at 125.

28. *Id.* at 126-27.

29. *Id.* at 123-24.

30. *Id.* at 112-16, 137.

31. *Id.* at 119.

32. *Id.* at 110.

33. Rowe, *supra* note 1, at x.

pragmatic American style, a reconciliation will emerge through recognition that constructive solutions to problems between labor and management may well be lubricated by the non-compulsory inclusion of labor representation on the board of directors.

VIII. EXTRATERRITORIALITY AND THE EFFECTS DOCTRINE

The theme of extraterritoriality recurs regularly in these papers. The European nations continue to resent and challenge the efforts of American enforcement officials and plaintiffs to reach conduct which European authorities regard as being beyond the reach of the American law.³⁴ American antitrust enforcement officials have asserted for decades that they are not attempting to reach extraterritorial conduct in any unusual fashion.³⁵ The controlling U.S. principle has been the effects doctrine.³⁶ This doctrine asserts that if someone is standing in a foreign country and fires a bullet across the U.S. border which injures a U.S. citizen, the United States should be able to assert jurisdiction over the perpetrator of this assault, if it ever finds him or his property within U.S. borders, because he has caused a harmful effect in the United States which U.S. law was designed to punish. In its simplified form this argument seems hard to rebut, but problems arise from efforts at discovery and enforcement. A conceptual attack on the effects doctrine, of which some European authorities are fond, was expressed in the unfortunate opinion of Justice Holmes in *American Banana Co. v. United Fruit Co.*³⁷ The good justice stated there that "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."³⁸ Perhaps the shortcoming of this statement can be overcome by arguing that an act is "done" in the place where its effects are felt. This is too glib for analytical purposes, and it is necessary to explicitly disagree with this statement of Justice Holmes in order to permit the application of U.S. antitrust law in situations in which persons outside the borders of the United States engage in anticompetitive conduct which has a significant impact upon the internal markets of the United States. It should not be possible for foreign trading concerns to acquire economic advantage in U.S. domestic or foreign commerce through the use of pricing and competition methods which would be unlawful if undertaken within the United States.

A reconciling doctrine may have been found in the case of *Timberlane Lumber Co. v. Bank of America*,³⁹ in which the court has added to the mechanical effects doctrine the idea that, even if technical jurisdiction can be found through application of the effects doctrine, the

34. ENTERPRISE LAW, *supra* note 4, at 220-21.

35. *Id.*

36. *Id.* at 221.

37. 213 U.S. 347 (1909).

38. *Id.* at 356.

39. 549 F.2d 597 (9th Cir. 1977).

decision to assert jurisdiction should depend upon "international comity and fairness."⁴⁰ Professor Hawk does point out, however, that ironically the European Commission appears to be adopting the effects doctrine at the same time the United States may be developing a doctrine of balancing foreign interests and concerns with U.S. interests and concerns in a fashion which is less mechanical than what may be evolving as EEC doctrine.⁴¹

An interesting facet of the comparison between U.S. and European antitrust laws is developed by Frances G. Jacobs. His interesting paper⁴² compares the two systems in the context of many issues of direct concern to practicing lawyers: the determination of the jurisdiction of the courts; the extent to which the European Court of Justice may review decisions of the Commission on questions of fact; the extent to which the principles of the European governing statutes may be enforced in the national courts, particularly in private actions by plaintiffs seeking to use the legislation as a sword rather than as a shield to found a cause of action in the national courts. Particularly on this latter point, the difference between the European and American conditions is substantial because in the United States, but not in Europe, the prophylactic effect of a private right of action has been relied upon heavily for the development of the law and the enforcement of the principles of the antitrust laws. Ninety-five percent of the antitrust cases filed in U.S. courts in 1978 are said to have been private actions.⁴³ By contrast, and perhaps as an inheritance from the civil law tradition and its reliance upon administrative mechanisms, the existence of a private right of action for this purpose in European courts is only beginning to be explored.⁴⁴ Whether the European courts will wish to begin hearing such cases will depend in part on how horrified they may be at the impact of the "big case" upon caseloads and judicial procedures in the U.S. courts.

IX. SOVEREIGN IMMUNITY

The existence of state participation in the ownership of enterprises will create problems in connection with antitrust enforcement because of the existence of the sovereign immunity, sovereign compulsion, and the act of state doctrines.⁴⁵ Whether foreign governments will be able to defend the anticompetitive activities of their commercial instrumentalities by asserting that the actions of these instrumentalities are acts of state⁴⁶ which may not be challenged in the courts, is an area with vast implica-

40. *Id.* at 613.

41. ENTERPRISE LAW, *supra* note 4, at 44.

42. *Id.* at 204-15.

43. *Id.* at 185.

44. *Id.* at 213, 232-33.

45. See Comment, note 14 *supra*.

46. The act of state doctrine is accepted by U.S. courts and, according to the doctrine, a U.S. court must refrain from examining the validity of the acts of a foreign state. *Id.* at 86.

tions for the development of the antitrust law of the 1980's.

X. BERNARD BARUCH

The breadth and depth of the issues involved here make it difficult to imagine that only the courts will participate in the development of the major principles of antitrust law. There is a continuing debate in all nations about the extent to which business and government should cooperate or merge. Even in the thinking of major American business leaders there has never been unanimity on this subject, although the prevailing stereotype of the American businessman is that he wants as little government as possible. The Reagan Administration has squarely lined itself up with this approach. Nevertheless, the idea that the public good must be a factor in corporate decisions has been with us for a long time.⁴⁷ In spite of his dominant position as a Wall Street figure, Bernard Baruch is said to have "preferred voluntary cooperation between business and government."⁴⁸ Viewing free competition as chaos, but resisting government ownership of industries, he favored cartel-like arrangements to stabilize prices and production.⁴⁹

XI. ESSENCE OF EUROPEAN ANTITRUST LAW

The pithiest description of the national antitrust laws of western Europe was reported by Mr. Rosenthal, based on a recollection by Lloyd Cutler: "Under German antitrust law, everything is prohibited unless expressly permitted; under British antitrust law, everything is permitted unless expressly prohibited; and under French antitrust law, everything is prohibited but there is always a way around it."⁵⁰

XII. WARNING TO U.S. COUNSEL

One of the significant lessons of this volume for U.S. lawyers is that antitrust law is not an exclusively U.S. product. As U.S. manufacturers compete more effectively in European markets, and as exports increase, more and more lawyers in all parts of the United States will be called upon to advise regional clients with respect to foreign operations. The existence of a form of antitrust regulation in Europe will require serious consideration in addition to the consideration which U.S. lawyers normally give to the operation of U.S. antitrust principles upon their plans for sales representation and product distribution. The objective of European Community law is not so much to maximize competition as it is to minimize restraints upon trade between participating countries in the European Community.⁵¹ This difference is reflected in the detailed consider-

47. ENTERPRISE LAW, *supra* note 4, at 134.

48. N.Y. Times, Aug. 30, 1981, Book Review Section 22.

49. *Id.*

50. ENTERPRISE LAW, *supra* note 4, at 245.

51. *Id.* at 45.

ation given to territorial restrictions in establishing systems of distributorships, in comparison with the absence of any controls over mergers and acquisitions.⁵²

XIII. CONCLUSION

In sum, the essential character of these papers is that of a snapshot of sophisticated thinking about antitrust law in Europe and the United States at a given moment in time. They do not represent a comprehensive study nor a reference work for explicit counseling research. They do not present the black letter law or the detailed requirements of any of the statutes bearing on the subject. They assume the reader has most of that knowledge and move on to survey the significant developments and implications for the 1980's. Because of the quality of the participants and the openness with which they were able to approach these subjects, the papers are a stimulating and useful collection of readings for Atlantic community practitioners who are going to deal with the antitrust and corporate governance problems of the 1980's.

52. *Id.* at 45-46.

The Law of Transnational Business Transactions

Reviewed by Peter M. Sussman*

NANDA, V. P. (ed.), *THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS*; Clark Boardman Co., Ltd., New York, N.Y. (1981); \$75.00 (practitioner's edition), \$15.00 (student edition); ISBN 0-87632-342-5, LC 81-2392; xxii, 13 chapters, each separately paginated; footnotes, index, appendices. Introduction by Donald W. Hoagland.

The Law of Transnational Business Transactions deals with subjects that traditionally have not been of concern to most practicing American lawyers. There have long been international law specialists in major commercial centers such as New York, Chicago and San Francisco. To most American attorneys in private practice, international law was, and perhaps remains, an esoteric field. As Donald W. Hoagland makes clear in his excellent introductory chapter, the interdependence of the nations of the world is a fact of modern life. Consequently, more and more U.S. attorneys, in all parts of the country, will be called upon to represent clients in matters that raise international issues. These clients may be American businessmen engaged in international trade or investment or they may be foreigners involved in ventures in the United States. Such representation will require a degree of understanding of international law and of the international environment that has hitherto been demanded of only a few specialists in the American legal profession.

Professor Nanda's volume on international commercial transactions is well-timed. It meets the growing need for a better understanding of the law and customs that govern international commercial transactions. The timing is all the more fortunate because the existing legal literature in this field is largely inadequate. While there are some good textbooks, such as Steiner and Vagts' *Transnational Legal Problems*,¹ they are generally out of date. The exception is A. Lowenfeld's six-part series on international economic law,² three volumes of which were updated last year. The

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1. H.J. STEINER & D.F. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* (2d ed. 1979).

2. A.F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW, PT. I, INTERNATIONAL PRIVATE TRADE* (2d ed. 1981); A.F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW, PT. II, INTERNATIONAL INVESTMENT* (2d ed. 1981); A.F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW, PT. III, TRADE CONTROLS FOR POLITICAL ENDS* (2d ed. 1981); A.F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW, PT. IV, THE INTERNATIONAL MONETARY SYSTEM* (1977); D.R. TILLINGHAST, *INTERNATIONAL ECONOMIC LAW, PT. V, TAX ASPECTS OF INTERNATIONAL TRANSACTIONS* (1978); A.F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW, PT. VI, PUBLIC REGULATION OF INTERNATIONAL TRADE* (1978).

Lowenfeld books, however, are definitely designed as teaching tools, and they are not suitable for, nor are they intended to be, handbooks for the practicing lawyer.

Professor Nanda's book is advertised as a handbook for the practicing attorney, but it is also available in a student edition. Thus, it seems intended to serve two purposes. Whether one book can serve the needs of both practicing lawyers and law students is debatable. A law student must learn basic concepts to analyze problems and formulate the legally relevant questions to which those problems give rise. The student must also have some idea of how to find the answers to those questions, but he is not required to know specific answers to detailed questions. Furthermore, such knowledge would not be particularly useful to the student since the law is likely to change before he enters practice and is called upon to advise clients. The practicing attorney, on the other hand, is looking for specific, reliable, and up-to-date information when he consults a legal handbook.

Several of the chapters in Professor Nanda's book provide the type of information practicing attorneys need. Thus, there is an excellent chapter entitled "United States Taxation of Foreign Investors" by H.K. Lidstone and R.S. Rich, which provides essential guidance for the practitioner who is called upon to represent a foreign investor. This chapter was partially obsolete by the time the volume was published, however, since it discusses U.S. law only up to July 1980. Since that time Congress has passed the Foreign Investment in Real Property Act³ which imposes new reporting requirements and potential tax obligations on the foreign investor. It is, of course, to be expected that there will be constant and rapid change in the volatile field of international commerce. To the extent that *The Law of Transnational Business Transactions* is a handbook, it will therefore need frequent updating. The publisher has indicated that periodic updates will be issued for the looseleaf edition. No such service is available for the more reasonably priced student edition.

Other chapters that appear to be geared to satisfy the needs of the practicing attorney are: "Foreign Business Organization" by R.B. Lake; "Selected Clauses in Transnational Contracts" by M.S. Caldwell; "International Technology Transfers" by R.Y. Peters; "International Technology Transfer Agreements" by M. Bard and R.Y. Peters; "Foreign Natural Resource Investment" by J.E. Horigan; "Forum-Selection and Choice-of-Law Agreements in International Contracts" by Ved P. Nanda; "Antitrust Aspects of International Business Operations—U.S. and EEC Substantive Law" by T.L. Banks; and "International Boycotts" by S.J. Doyle. On the other hand, many of the chapters such as "Jurisdictional Problems in the Application of the Antitrust Laws" by D.K. Pansius, "Enforcement of the European Community's Antitrust Laws—The Single Enterprise Theory" by L. Heimke Filegar and L.L. Helling, and "Foreign

3. I.R.C. §§ 897, 6039C (1981 Supp.).

Trade and Economic Injury—A Survey of U.S. Relief Mechanisms” by P.S. Dempsey seem better suited for classroom use. The division of the chapters into two distinct categories is necessarily somewhat arbitrary. Some of the chapters fit into both categories, but most of them do not.

Although space does not permit a detailed review of each of the thirteen chapters, a few remarks are in order. R.B. Lake’s chapter on foreign business organizations is quite useful. It provides a brief overview of corporate organizations abroad. Also, it deals with the important subject of international distributorships and provides a good basic form for a distributorship agreement. On the other hand, this chapter suffers more than most from sloppy editing and proofreading, particularly with regard to Table A⁴ which lists the names used in certain foreign countries for stock corporations and limited liability companies. There are printing errors in the entries for Belgium and Luxembourg, and the Italian names for the two types of organizations are reversed.

M.S. Caldwell’s chapter on selected contract clauses provides a very good basic guide for lawyers who are not specialists in international commercial law. It touches briefly on arbitration, a subject that should have been dealt with at greater length at some point in the volume. A number of useful sample contract clauses are provided. This author would suggest that Caldwell’s apparent belief that a force majeure clause may be invoked because inflation drives up prices is probably not well-founded. Inflation cannot be regarded as wholly unforeseeable,⁵ and provisions for price increases can be inserted into commercial contracts.

The chapters on international technology transfer by R.Y. Peters and M. Bard offer solid basic information required by a practicing lawyer whose familiarity with the field is limited. These two chapters and the extensive documentation that is appended to the second of the chapters constitute an excellent starting point for an attorney desiring to arrange an international technology transfer.

J.E. Horigan’s chapter on foreign natural resource investment deals with a politically sensitive subject. His point of view is that shared by most people in the United States but by very few in the Third World or perhaps even Canada. When control over natural resources is at stake, the concept of sanctity of contract as it was thought to apply to foreign investors has lost its force. To the American lawyer that may indeed seem like a reversion to the “law of the jungle,” but realistically American lawyers will have to adjust to this irreversible development. To show what today’s investor is up against, it might have been useful if Horigan had cited some of the more recent UN resolutions dealing with this subject⁶ or

4. THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS 2-48 (V.P. Nanda ed. 1981).

5. A force majeure clause used in a contract can generally be invoked only to protect the promisor from contingencies beyond his control such as acts of God and government actions. *Id.* at 4-16.

6. Foremost among these resolutions is G.A. Res. 3281 (XXIX) 29 U.N. GAOR Supp. (no. 31) at 50, U.N. Doc. A/9631 (1974). For a discussion of the Charter of Economic Rights

if he had referred to Canada's new National Energy Program.⁷

Professor Nanda's chapter on forum-selection and choice-of-law agreements is an excellent guide to an extremely important aspect of international commercial law. It is hoped that this chapter will eventually be expanded to cover other procedural aspects of transnational litigation. In his chapter on antitrust, T.L. Banks undertakes the difficult task of describing U.S. and EEC antitrust laws and their international effects. The chapter provides solid information and analysis.

As indicated above, D.K. Pansius' chapter on jurisdictional problems in the application of antitrust laws is broad enough in scope and sufficiently well written to serve as a teaching text. The chapter provides interesting insight into the practical limitations of conventional legal concepts when such concepts are applied to litigation which transcends national boundaries. Pansius suggests, for instance, that it is not clear if U.S. antitrust law applies to cartels such as OPEC. He contends that such cartels might well be amenable to antitrust action under the commercial activity exception to the act of state doctrine. The argument is legally interesting, but it is of no practical consequence since no U.S. antitrust judgment against OPEC would be enforceable given the political and economic realities of today's world. Furthermore, the current legal skirmishes between the U.S. courts which are attempting to assert extraterritorial jurisdiction⁸ and the British Government which maintains that such attempts infringe on British sovereignty, which culminated in the passage of the Protection of Trading Interests Act by Parliament in March of 1980,⁹ demonstrate that there are limits to the extent that our courts can assert extraterritorial jurisdiction in antitrust proceedings. In the long run, the controversy that has arisen can be resolved only by government-to-government negotiations.

The chapter on the European single enterprise theory by L. Heimke Filegar and L.L. Helling sheds an interesting light on the legal devices used by the Commission of the European Communities to assert extraterritorial jurisdiction in antitrust cases. This chapter should be of particular importance to U.S. attorneys who represent multinational corpora-

and Duties of States, see Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth*, 75 AM. J. INT'L L. 437 (1981).

7. THE NATIONAL ENERGY PROGRAM 1980, Dep't of Energy, Mines and Resources (Ottawa, 1980). See generally W. DOBSON, CANADA'S ENERGY POLICY DEBATE (available from C.D. Howe Institute, Montreal, 1981) (discusses the Canadian debate over the new federal energy policy).

8. Extraterritorial discovery has been particularly problematic because discovery is crucial in U.S. antitrust cases, and foreign nations resent the efforts of U.S. courts to exercise jurisdiction in their countries. As a result, they have enacted laws precluding discovery by U.S. plaintiffs. *Id.* at 10-51.

9. Protection of Trading Interests Act of 1980, reprinted in 18 HALSBURY'S LAWS OF ENGLAND ¶1531A (4th ed. 1981 Cum. Supp.). For a general background discussion of American, British and European Community antitrust case law, see Extraterritorial Application of Trade Laws, reprinted in 18 HALSBURY'S LAWS OF ENGLAND ¶1531 (4th ed. 1977).

tions with European subsidiaries.

Professor Dempsey's survey of U.S. relief mechanisms against economic injury caused by foreign trade deals with a topic that will inevitably grow in importance as the world economic situation deteriorates. There is at the moment a retreat from the free trade principles enshrined in the General Agreement on Tariffs and Trade (G.A.T.T.)¹⁰, and at least a flirtation with protectionism. This tendency will be aggravated, in this country and elsewhere, if the recession deepens. Professor Dempsey argues that U.S. industry is placed at a disadvantage because it is heavily burdened by government regulation while our government's free trade policies expose domestic industry to the full force of international competition. Hence, U.S. industry will have to avail itself of the relief mechanisms outlined in Professor Dempsey's chapter. It is questionable that U.S. industry is as shackled as Professor Dempsey suggests. Many of the competitors of our domestic industry operate in countries where the laws regarding environmental protection, health and safety, wages and hours, and employee benefits are far more stringent than they are in this country. This would suggest that our industrial decline may be due to internal factors such as inadequate investment in new plants and equipment, wage demands that have outpaced increases in productivity, and management that is overly concerned with short-term profits. If such is the case, resort to protective devices to shield U.S. industry against the effects of its shortcomings would not be a cure for our economic ills. It would, in fact, aggravate them.

S.J. Doyle's chapter on international boycotts is merely a description of the Arab boycott of Israel and of the resultant U.S. antiboycott laws. While it is a useful resume of the boycott and the relevant laws, this chapter, like others in the book, evidences less than careful proofreading.¹¹ The many spelling errors¹² in this book may be regarded as a non-substantive fault, but the errors are so numerous that they seriously detract from the content and undermine the book's claim to be regarded as an important contribution to legal literature. An effort should be made to correct these errors in the next edition of this work.

In summary, Professor Nanda's *The Law of Transnational Business Transactions* constitutes a not totally successful first step in the right direction. Such a book is needed. What is lacking, however, is a focus. It

10. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat., Pts. 5 & 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

11. Thus, footnote 1 on page 132 reads: "Arab League, *General Principals for the Boycott of Israel* (1972) [hereinafter cited as *General Principals*]." Also, the footnotes on pages 9-18 through 9-53 do not correspond to the numbers in the text.

12. Merely by way of example, chapter 12 contains references to "principle legal remedies", "wrecking havoc", and "deter-nine." Foreign words fare less well. For instance, in chapter 2, there are three spelling errors in Table B which deals with French business organizations. In addition, the accent marks that are essential in French are omitted entirely. In chapter 9, there are frequent references to the *Commission des Communautés européennes*, usually in case citations, and it is misspelled every time.

is unlikely that the book can serve both the practitioner and the student well. If it is to be a practitioner's handbook, frequent updates must be assured.¹³ In addition, the scope of the book might have to be enlarged. Overall, the title of this volume promises more than it delivers.

13. An update and expansion of the book, Release #1, appeared in August 1982. The Release includes an expanded chapter 9, new material in chapter 10, a revised index, and an entirely new chapter by Harold S. Bloomenthal on International Capital Markets and Securities Regulation.