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BOOK REVIEWS

Down in the Dumps: Administration of the Unfair Trade Laws

Edited by Richard Boltuck and Robert E. Litan. Washington, D.C.: The Brookings Institution, 1991, pp. xii, 350, \$34.95 (hc), \$15.94 (pb).

Following the conclusion of the Tokyo Round of multilateral trade negotiations in 1979, the last successful round of multilateral trade negotiations conducted under the auspices of the General Agreement on Tariffs and Trade (GATT), Congress enacted the Trade Agreements Act of 1979¹ to implement the agreements reached in Geneva. The broad package of implementing legislation included improved laws to deal with two of the more serious unfair trade practices: dumping and subsidization. The dumping law is intended to prevent foreign manufacturers from engaging in price discrimination between their home market and the U.S. market when such discrimination causes injury to a competing U.S. industry. The Department of Commerce, through its International Trade Administration, determines whether imported goods are being sold in the United States at less than fair value. If they are, then additional duties are imposed on those goods equal to the amount of the price discrimination—the margin of dumping. Additionally, the U.S. International Trade Commission, a six-member independent federal agency, must determine in a parallel investigation that a U.S. industry has been or is being materially injured by reason of such imports. The administrative process is similar in the case of a subsidy investigation, except that the unfair trade practice that is the focus of the investigation is certain government financial assistance to the private sector that may confer an unfair advantage. The Interna-

1. Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified in scattered sections of 31 U.S.C. titles 5, 7, 13, 19, 26, 28).

tional Trade Administration is responsible for determining whether particular government assistance constitutes a forbidden subsidy and, if so, to calculate the amount of the subsidy so that a countervailing duty may be imposed on imported goods to offset the subsidy. Once again, the International Trade Commission must also find that those imports have materially injured a competing U.S. industry before a countervailing duty may be imposed.

The Trade Agreements Act of 1979 effected a sweeping overhaul of U.S. law governing international trade. It also served as the moving force behind the decision of the White House to transfer the responsibility for administering the antidumping and subsidy laws from the Treasury Department, whose performance in assessing antidumping and countervailing duties was rated as "dismal" by the Senate Finance Committee,² to the Department of Commerce in 1980.³

In November 1990, the Brookings Institution hosted a conference in Washington, D.C., at which approximately 100 private and government attorneys, economists, and academics met to review the Commerce Department's ten-year stewardship of the U.S. antidumping and countervailing duty laws. The papers presented at that conference were edited by Richard Boltuck and Robert E. Litan, both economists, and published by Brookings under the title, *Down in the Dumps: Administration of the Unfair Trade Laws*. The publication is a collection of eight essays, together with commentaries accompanying each essay, critiquing the Commerce Department's administration of the antidumping (AD) and countervailing duty (CVD) laws.

The first essay, written by the book's editors, introduces the seven succeeding papers. In addition to summarizing the conclusions reached by the other contributors, Boltuck and Litan play devil's advocate by presenting many of the standard arguments why dumping and subsidization should be deemed unfair and therefore prohibited in international trade. Boltuck and Litan make three noteworthy observations: (1) because proving a case of dumping is easier than establishing a case for section 201 escape clause relief, the dumping law may have in effect replaced section 201 in the arsenal of international trade remedy laws (page 11); (2) the fit between the dumping law and the antitrust laws is not good, since foreign manufacturers are punished under the dumping law for practices that are perfectly legal for U.S. firms to engage in under the antitrust laws (page 15); and (3) most of the complaints about the ITA's administration of the antidumping and countervailing duty laws can be cured administratively without congressional intervention (page 14).

In his paper on the administration of the antidumping duty law, Tracy Murray presents a nuts-and-bolts guide to how the ITA processes an antidumping petition. After explaining each step in the administrative process, Professor Murray offers

2. S. REP. NO. 249, 96th Cong., 1st Sess. 76-77 (1979).

3. Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (1979); Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980).

recommendations on how that process can be improved. Chief among his recommendations is the one dealing with the ITA's methodology for averaging prices. At present the ITA compares individual export sales to the United States to average foreign market sales. Because the ITA's current method of averaging foreign prices, but not U.S. prices, has a built-in upward statistical bias (which Murray explains in a helpful table (page 37)), he recommends that as a safety valve, the current de minimis dumping margin of .5 percent (below which an affirmative dumping determination will not be made) be raised substantially, and that Congress enact the appropriate legislation (page 31). An alternative safety valve that Professor Murray does not suggest would be for the International Trade Commission to consider the margin of dumping in making its injury determination. Thus, for example, a small margin of dumping should not result in an affirmative injury determination in industries that enjoy relatively high profit margins.

The third essay, "The Antidumping Duty Law: A Legal and Administrative Nontariff Barrier," written by N. David Palmetier, a private practitioner, seconds the recommended changes of Professor Murray and adds several more. Mr. Palmetier offers a scathing point-by-point attack on the ITA's administration of the antidumping duty law by comparing the administrative process to the worst of the excesses of Torquemada's Inquisition (page 68). He describes the antidumping duty law as worse than Jeremy Bentham's "dog law" (page 89) and concludes that the entire system is "an attempt to provide a fig leaf of respectability for laws whose purpose and effect are purely protectionist" (page 84).

With the conclusion of Mr. Palmetier's essay, *Down in the Dumps* shifts focus to the ITA's administration of the countervailing duty law. As suggested by the title of the fourth essay, "Conceptual and Procedural Biases in the Administration of the Countervailing Duty Law," Joseph F. Francois, N. David Palmetier, and Jeffrey C. Anspacher argue that the ITA's methodology for calculating foreign government subsidies results in CVD margins that are skewed upward primarily because the ITA uses an accounting rather than an economic definition of subsidy (page 111), and because the agency applies U.S. accounting standards to foreign firms (page 116). The criticisms the authors level against the ITA are well taken, but two of their eight recommended changes give one pause: (1) that when dealing with regional subsidies, the ITA should offset the costs a business incurs in locating in disadvantaged areas; and (2) that a formal mechanism for weighing affected U.S. consumer and downstream producer interests be made part of the process. In addition to the clear direction of Congress that such location costs not be considered by the ITA when calculating the net subsidy, finding a methodology for quantifying such costs in a rational manner seems elusive. Moreover, the wisdom of politicizing an otherwise highly legalized administrative process, as the second proposal suggests, seems questionable.

With chapter five, "The Economic Implications of the Administration of the

U.S. Unfair Trade Law," the discussion moves from law to economics. In contrast to the prior chapters' wide-ranging legal attacks on the ITA's administration of the AD and CVD laws, Richard Boltuck, Joseph F. Francois, and Seth Kaplan present a comparatively discrete economic critique of the ITA's methodology. In connection with antidumping duties, they reach a disturbing conclusion for consumers and downstream producers who buy foreign inputs. "The only way to avoid dumping duties under the department's usual procedures is to charge substantially more in the United States than in other markets" (page 160). Regarding the ITA's CVD methodology, the authors challenge the agency's use of an accounting-based measurement as opposed to one that is economic-based. Through a series of algebraic formulae, they demonstrate the difference it makes in the ultimate calculation of the CVD margin. In lay terms, they give the example of subsidies for the use of hand looms versus modern weaving machines (page 168). A subsidy for the former rather than the latter would undoubtedly have a different effect on production levels; yet the ITA would countervail domestic subsidies to both industries in an identical manner and derive the same CVD margin in both cases under its accounting-based methodology. The result would be different, according to the authors, if the ITA developed an economic-based methodology.

In chapter six, Ronald A. Cass and Stephen J. Narkin examine the fit of the AD and CVD laws with GATT, finding it to be rough in spots. They conclude that the question of whether the ITA's administration of the AD and CVD laws is GATT-consistent is largely beside the point:

As other countries increasingly see AD and CVD as cheap vehicles for protection, our less-than-evenhanded application of those laws is apt to set the pattern for a distortion of trade. For the United States, the world's largest exporting nation, that is hardly good news. Ultimately, the important question may not be whether our AD and CVD administration has been consistent with the GATT, but whether it has been consistent with our own best instincts and our own best interests. (page 238)

In the penultimate chapter, "Political Aspects of the Administration of the Trade Remedy Law," Robert E. Baldwin and Michael O. Moore conclude that Congress, rather than the ITA and the White House, is primarily responsible for the protectionist turn that the AD and the CVD laws have taken over the past ten years. They trace the four statutory amendments to the AD and CVD laws from 1974 to 1988 to show how in each instance Congress has added protectionist provisions to those laws. In the view of the authors, those amendments, coupled with jawboning by members of the congressional oversight committees, have put tremendous political pressure on the ITA to administer the AD and CVD laws with a protectionist slant.

The final chapter by Terence P. Stewart, "Administration of the Antidumping Law: A Different Perspective," is the one challenge to the orthodoxy of the preceding seven chapters that the administration of the AD and CVD laws consti-

tutes a nontariff barrier to trade. Although Mr. Stewart is on this occasion outnumbered, he musters a counterattack that scores several direct hits. In particular, Mr. Stewart's rebuttal to the perceived procedural deficiencies of the ITA's administration of the AD and CVD laws deserves high marks.

In addition to the eight essays, the editors of *Down in the Dumps* have included comments after each chapter that put a slightly different spin on the subject addressed in their companion essays. Two of the shorter but better comments are those of Brian Hindley (page 192), who compares the EC's treatment of dumping and subsidy disputes, and of Robert M. Feinberg, who wonders why approximately 20 percent of the ITA's CVD and AD determinations are still negative despite the upward statistical biases that have been pointed to throughout the book (page 198).

Despite its whimsical title, *Down in the Dumps* is a serious and thoughtful book. Overall, the quality of the contributions is uniformly high. The greatest strength of *Down in the Dumps* is its accessibility. Boltuck's and Litan's inclusion of contributions that give a background explanation of the operation of these labyrinthine laws will prove immensely helpful to the reader who is not an international trade specialist. The editors have also ordered the essays so that an intelligent but uninitiated reader should be able to grasp most of the points made in the book. Where technical material is included, the authors have made an effort to place that material in an appendix at the end of the essay.

Down in the Dumps does fall short in two respects. The first is its lack of balance in offering more viewpoints supportive of the Commerce Department's administration of the AD and CVD laws. In fairness to the editors, however, that was not their stated objective. Second, in order to gain a better perspective on the problem, it would have been useful if the editors had included a discussion of the dollar volume of trade that is subject to AD and CVD orders and contrasted that with the volume of trade covered by so-called voluntary restraint agreements or VRAs (so-called because there is nothing voluntary about them). Excluding the AD steel cases of the early 1980s, the actual volume of trade that is subject to AD or CVD orders is a tiny fraction of the total volume of trade entering the United States each year. Although some critics argue that the contingent nature of the AD and CVD laws poses the real nontariff barrier to trade, the VRAs, which affect a vastly larger quantity of international trade, are a far greater protectionist threat to free trade and, ultimately, to U.S. consumers. Under VRAs, huge volumes of international trade to the United States in steel, autos, textiles, and wearing apparel are restricted each year. For all of its warts and pimples, the AD and VD process is at least transparent and public, in marked contrast to VRAs, which affect far more trade but which are not subject to scrutiny through either a regularized administrative or judicial process.

In his essay on the administration of the antidumping duty law, David Palmeter observes that "[b]efore political change can be made, the intellectual case must

be made. The perceptions of policymakers must be changed.” (page 83) *Down in the Dumps* ably makes the intellectual case for changing the ITA’s administration of the AD and CVD laws.

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EEC Competition Law: A Practitioner’s Guide

By Lennart Ritter, W. David Braun, and Francis Rawlinson. Deventer, Boston: Kluwer Law and Taxation Publishers, 1991, pp. lxx, 1169, \$180.00.

At a time when titles often promise more than they provide, it is refreshing to encounter a book that actually delivers more than its title might suggest. Messrs. Ritter, Braun, and Rawlinson have entitled their treatise *EEC Competition Law: A Practitioner’s Guide*, but it is far more than a guide in the sense of a mere introduction to this area of law. While it well serves that purpose, it is also an exhaustive commentary on the law and practice in the area and an extensive sourcebook.

The book is directed primarily to practitioners, but its depth and the richness of its presentation make it valuable to anyone who seeks to understand the operations of Community competition law. It aims to describe and explain the practice of competition law in the European Community and to provide a detailed and comprehensive set of primary materials in all areas of competition law. It does not seek to contribute to the scholarly development of Community competition law, but its authors bring to bear important analytical strength in explaining the content of the law.

One of the book’s greatest strengths is the breadth of experience and insight brought to it by its authors. Dr. Lennart Ritter has been a member of the competition directorate (DGIV) of the European Commission since 1959 and is among the most respected and knowledgeable competition law officials in Brussels. A German national, he also maintains close contact with developments in Germany and has brought this rich experience to the book. David Braun is a U.S. lawyer practicing in Chicago. He is a well-known specialist in German and European Competition law who was in the Foreign Commerce Section of the Antitrust Division of the United States Department of Justice before entering private practice and who also has studied law in Europe. He thus provides important comparative insights into U.S. law and the particular problems of U.S. attorneys in understanding Community competition law. Finally, Francis Rawlinson is a British national who has been with the Commission for almost twenty years. One of his specialties is the procedural aspects of Community competition law. This

extraordinary combination of perspectives and experience differentiates the current work from others in the field and is of immense value.

The format of the book follows traditional doctrinal lines. It provides a brief introduction to EC competition law and its place within the framework of Community law generally. It then provides chapters on the major substantive areas such as horizontal agreements, vertical agreements, abuse of a market-dominating position, merger controls, and industrial property rights and licensing. The text portion of the book then concludes with an unusually comprehensive and detailed section on the procedural aspects of the law. This section is of particular importance for practitioners because the material contained there tends to receive far less detailed and informed treatment in most books on European competition law.

The book's longest chapter (128 pages) is devoted to the new European merger control law. The materials here are particularly valuable because the area is so new and because acquiring the practical insights and information necessary to operate in the area is so difficult. The authors provide much useful information that is based on their inside knowledge of the current operations of DGIV and that is, therefore, often extremely difficult to find in print anywhere else.

The style of the work is perhaps best described as meticulous. This book has developed over more than six years of actual writing and many decades of experience. It is full of detail, substance, and practical commentary, often of the kind that can be acquired only through extensive experience. The authors deserve special accolades for their extreme care and thoroughness in the presentation of the material.

Another of the book's great strengths and values is in its many special features. There are now a fair number of books on the competition law of the European Community, but this one contains special features seldom, if ever, found in other treatments of the subject.

Perhaps most useful among these is the book's extensive document section, which covers almost 400 pages and which includes many documents that often are hard to find, such as many Commission notices. In addition, this section includes the relevant competition law regulations and directives. Thus in most cases it provides the user not only with a description of the law in the area, but also the text or texts relevant to the issue at hand, interpretations of the text by the Commission, and an analysis of its application by the Commission and the courts. This organization can be an immense help in dealing with European Community legal issues, for much time is often wasted in discovering which documents are relevant to a particular issue and then acquiring the material.

Another valuable feature for the practitioner is a table of all the fines that have been assessed by DGIV in competition law cases. The table includes the name and number of the case, the infringement, its length, the amount of the fine, and the relevant European Court of Justice decision, if any, on the fine. This table allows quick assessment of the practical enforcement problems and of enforce-

ment trends of fines in particular areas or for particular types of infringements. While of primary importance to practitioners, it serves anyone interested in how European Community law is actually operating; and, again, few sources of such information exist.

A final special feature to mention relates particularly to the U.S. practitioner and to those who need to know how U.S. law compares with Community law. Here, frequent references (often in the footnotes) to comparable concepts, cases, or procedures in U.S. antitrust law enhance the value of the book. These references greatly aid practitioners in understanding the differences between Community competition law and U.S. antitrust law.

Although I obviously regard this work very highly, it has several potential limitations. First, the materials introducing the basic principles of Community competition law could be more engaging. The authors carefully and competently set out the legal framework of competition law, and certainly the accuracy of their description is not at issue. On occasion, however, the presentation tends to be rather dry. Some additional illustrations of doctrinal points combined with more references to the role of institutions and ideas in creating and developing particular legal principles might make it more attractive to some readers.

Second, I regret that the book does not include more references to secondary literature. I suspect that the authors made the decision to minimize such references in order to keep the book from being overly long, and I also suspect that the publisher played a role in that decision. Nevertheless, references to journal articles or treatises that analyze the material in the area, or that have influenced the thinking in the area, often help the reader to understand the dynamics of the law. In my opinion, more such references would have been valuable.

Finally, the authors seldom peek through the text to give their subjective views on the legal situation and its dynamics. While their reluctance to include this material in a long book such as this one is understandable, probably more than a few readers would benefit from knowing more about the authors' personal views as to what is happening and why.

EC Competition Law: A Practitioner's Guide is an extremely professional and useful guide to the practitioner and to anyone interested in the subject of Community competition law. Its combination of thoroughness, practical orientation, depth of material, and variety of perspective make it unique among the works in this area. This book not only is indispensable to any serious collection of materials on Community competition law, but also is of great, perhaps unequalled, benefit for any individual, firm, or institution that is acquiring its first book on the subject.

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Formation of Contracts and Precontractual Liability

Edited by International Chamber of Commerce. Paris, France: ICC Publishing S.A., 1990, pp. 354, \$100.00.

The present publication¹ contains sixteen essays that were presented at a conference on comparative contract law. The conference was held in 1989 in Paris under the auspices of the Institute of International Business Law and Practice of the International Chamber of Commerce.

The relevance of the conference's topic to the field of international contracts and agreements is evident. International commercial contracts and agreements are regularly preceded by negotiations. Precontractual negotiations give rise to a great number of legal issues. Thus, for example, the question arises, to what extent does a legal obligation of good faith and fair dealing exist and what is its bearing on precontractual duties to disclose material information? How can a line be drawn between precontractual understandings not yet binding on the one hand, and binding agreements on the other, be they specific agreements governing the course of negotiations, such as confidentiality agreements, or principal contracts that are final but not yet specified in full detail? This latter question undeniably was the pivotal issue in the much discussed *Pennzoil* case.²

The various legal systems present a rather puzzling picture. While in American and English law considerable caution prevails as to the imposition of precontractual duties to disclose information,³ German law takes a radically different approach. Still in keeping with Rudolf von Jhering's theory, German law imposes far-reaching duties of disclosure and fair dealing, the violation of which may result in damages based upon the theory of *culpa in contrahendo*.⁴

The national reports contained in the present publication illustrate the diversity of views and approaches taken by various legal systems.⁵ Because of this diversity, the present conditions are far from being ideal for international business transac-

1. FORMATION OF CONTRACTS AND PRECONTRACTUAL LIABILITY (International Chamber of Commerce ed., 1990) [hereinafter FORMATION OF CONTRACTS].

2. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). For details of this case, see E. Allan Farnsworth, *General Report*, in FORMATION OF CONTRACTS at 15, 24; Ugo Draetta, *Legal Effects of Letters of Intent: A Case Study*, in FORMATION OF CONTRACTS at 259, 261–68.

3. U.C.C. § 1–203 (1987) and RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979) limit the “duty of good faith” and “fair dealing” to the performance of contracts. See Farnsworth, *supra* note 2, at 21. Goode emphasizes “the absence of any general principle of good faith in English law, which does not recognise the concept of *culpa in contrahendo*.” See Roy M. Goode, *England*, in FORMATION OF CONTRACTS at 51, 59 (footnote omitted).

4. See Werner F. Ebke, *Federal Republic of Germany*, in FORMATION OF CONTRACTS at 35.

5. *Id.*; Goode, *supra* note 3, at 51; Dominique Dreyer, *Switzerland*, in FORMATION OF CONTRACTS at 65; Joanna Schmidt-Szalewski, *France*, in FORMATION OF CONTRACTS at 89; Samir M. Hamza, *Egypt*, in FORMATION OF CONTRACTS at 99; Farnsworth, *supra* note 2, at 15.

tions. Therefore, it makes good sense to address the question of international legal harmonization and unification in this area. Unfortunately, the Vienna Convention on International Sales does not contain any express provisions concerning precontractual issues. The Convention contains, however, some standards for certain categories of precontractual liability, provided it is "interpreted imaginatively."⁶

Due to the lack of uniform laws and standards, precontractual liability in international business transactions gives rise to a number of complex issues of conflict of laws. Françoise Rigaux⁷ states that for purposes of conflict of laws, the question of what is the proper connecting factor in cases of precontractual liability is highly controversial. In some legal systems precontractual duties qualify as contractual or quasi-contractual in nature. Other legal systems, for example France's, treat precontractual liability as a concept of noncontractual or tort liability. The legal nature of precontractual obligations has far-reaching effects on the determination of the law applicable to a given case of precontractual liability in international business transactions and, consequently, on the outcome of such cases.

The contributions to the present publication offer valuable insights into legal issues concerning the formation of major international contracts such as construction contracts,⁸ contracts for the sale of companies,⁹ petroleum contracts,¹⁰ and transfer of technology contracts.¹¹ The legal consequences of violations of confidentiality in contract negotiations are the subject of a lengthy article by Jérôme Huet and Frédérique Dupuis-Toubol.¹² Ugo Draetta carefully analyzes the role of the Letter of Intent in international contract negotiations.¹³ David Jones discusses at length the role of bonds in relation to the formation of contracts and their possible confiscation.¹⁴ Yves Derains deals with some complex legal issues in connection with the interpretation of international contracts.¹⁵ The results of the Paris conference are aptly summarized in a lengthy article by Marcel Fontaine.¹⁶

6. Michael J. Bonell, *Formation of Contracts and Precontractual Liability Under the Vienna Convention on International Sale of Goods*, in *FORMATION OF CONTRACTS* at 157, 166-71.

7. François Rigaux, *Détermination du droit applicable aux relations précontractuelles*, in *FORMATION OF CONTRACTS* at 121 (English summary at 147).

8. See J.J. Goudsmit, *Construction Contracts*, in *FORMATION OF CONTRACTS* at 181.

9. See Axel H. Baum, *Purchase and Sale of Companies*, in *FORMATION OF CONTRACTS* at 191.

10. See Nicholas David, *Contrats pétroliers*, in *FORMATION OF CONTRACTS* at 201 (English summary at 209).

11. See Gérard Hertig, *Transfer of Technology Agreements: The Pharmaceutical Industry Example*, in *FORMATION OF CONTRACTS* at 215.

12. Jérôme Huet & Frédérique Dupuis-Toubol, *Violation de la confidentialité des négociations*, in *FORMATION OF CONTRACTS* at 239 (English summary at 255).

13. Draetta, *supra* note 2, at 259.

14. David Jones, *Bonds in Relation to the Formation of Contracts and Their Possible Confiscation*, in *FORMATION OF CONTRACTS* at 281.

15. Yves Derains, *Valeur interprétative des négociations*, in *FORMATION OF CONTRACTS* at 309 (English summary at 317).

16. Marcel Fontaine, *Rapport de synthèse*, in *FORMATION OF CONTRACTS* at 323 (in French), 343 (in English).

In sum, the present publication provides a wealth of information and will inspire every lawyer who, in theory or practice, deals with international contracts and agreements and their negotiation.

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International Efforts to Combat Money Laundering

Edited by William C. Gilmore. Cambridge, England: Grotius Publications Ltd. (P.O. Box 115, Cambridge CB3 9BP, England), 1992, pp. xx, 335, £ 48.00, \$91.00 (pb).

This collection of documents (hereinafter referred to as *International Efforts*) is Volume 4 in the Cambridge International Documents Series, published by the Research Centre for International Law in association with the Commonwealth Secretariat. The editor of the volume, Dr. William Gilmore, is the Head of the Commercial Crime Unit at the Commonwealth Secretariat in London. The contents of the volume reflect this genealogy. It focuses, in succession, on documents produced within the following groups:

- (1) Financial Action Task Force of the Group of 7;
- (2) Initiatives Undertaken by the United Nations;
- (3) Commonwealth Initiatives;
- (4) European Developments; and
- (5) Other Multinational Developments.

All the documents are international in scope, with an emphasis on developments in the United Nations, the Commonwealth, and Europe. Some South American developments are addressed, all of which are related to combating the export of narcotic drugs.

The reference to money laundering in the title of the work under review, and in most of the documents contained therein, is overinclusive. Money laundering issues are addressed only in three contexts: drugs, drugs, and drugs. The laundering of funds for political purposes, and to avoid taxation, is barely mentioned. For example, the chapter devoted to United Nations initiatives covers ninety-seven pages and sets out seven documents (pp. 57–153). All but one of these documents is entirely devoted to narcotic drugs, and the excerpts from that one document (UN Treaty on Mutual Assistance in Criminal Matters) consumes precisely one page (p. 153).

International Efforts is limited to documents produced by international and multinational groups. Gilmore notes that modern criminal policy is incomplete

unless it includes an international element (p. ix). Few will question the accuracy of this observation, but it is equally true that the law that provides the basis for the actual prosecution of money laundering, and of persons engaged therein, is national law.¹ Still, to publish a volume devoted exclusively to international documents is a sensible and useful undertaking. An attempt to cover the law of even a few nations would result in an unwieldy volume that would be out-of-date before the book could be published.

The rate at which important international documents relating to the laundering of funds associated with drug transactions were promulgated between late 1988 and 1991 is truly astonishing. In December 1988, the United Nations adopted the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (commonly called the Vienna Convention) (p. 75). The Convention came into force in 1990, upon being ratified by twenty nations. Also in December 1988, the Basle Committee on Banking Regulations and Supervisory Practices (composed of central bankers from the G-10 nations, which meet at the Bank for International Settlements in Basle) adopted a Statement on Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering (p. 273).

The seven major industrial nations created a Financial Institutions Task Force (FATF) at their Economic Summit meeting in July 1989 (p. 3). The FATF has issued two reports, and more will be forthcoming (pp. 4, 31). The 1990 report contains forty recommendations, the first being that all nations should promptly ratify the Vienna Convention.

The Commonwealth issued three important communiques between 1989 and 1991 (pp. 157, 159, 164). In 1989, the General Assembly of Interpol adopted a Resolution on Money Laundering and Related Matters (p. 278). The Council of Europe, in 1990, adopted a Convention on Laundering, Search, Seizure, and Confiscations of the Proceeds from Crime, which is open to all nations for signing (p. 177). Australia, Canada, and the United States participated in the Council deliberations although they are not members. The European Community adopted a Council Directive on Prevention of the Use of the Final System for the Purpose of Money Laundering in June 1991 (p. 250), only sixteen months after it was adopted.²

Unfortunately, books about narcotic drugs just speak generically about "drugs," as if there were no distinctions between ganja, chat, crack cocaine, and heroin. Most countries make distinctions between low alcohol (beer), moderate alcohol (sherry), and high alcohol (whiskey) spirits. No distinctions are drawn between sale or use by minors and adults, as is commonly done with cigarettes. Nor is account taken of the difference between moderate use and excessive use.

1. The relevant American law is discussed in STEPHEN K. HUBER, *BANK OFFICER'S HANDBOOK OF GOVERNMENT REGULATION* para. 23.06 (1988 & Supp. 1992).

2. Anabelle J. Ewing, *The Draft EEC Money Laundering Directive: An Overview*, 4 J. INT'L BUS. L. 139 (1991) (characterizing the legislative process as "remarkably speedy").

The fact that some people gamble to excess is not regarded as a sound reason to ban gaming for all persons. The failure to draw such elementary distinctions demonstrates the paucity of international thinking by the authorities whose documents are reproduced in *International Efforts*. The failed experiment with Prohibition in the United States should give pause to the leaders who are committing their nations to a war on drugs.

It is a telling irony that the first American Drug Czar, William Bennett, was a chain smoker of (tobacco) cigarettes. To his credit, Mr. Bennett kicked this vicious habit, but he has not suggested that the sale of tobacco should be made illegal. Indeed, the United States Government provides extensive subsidies to those who grow and market this narcotic drug.

As in all wars, there are casualties, but the fate of those warred upon is commonly ignored. No attention is given to the circumstances of the people who live in drug-producing areas, or to alternative economic options to their participation in illegal activities. The recommendations of a UN expert group: *The Economic & Social Consequences of Illicit Traffic in Drugs* sounds promising, but it is nothing more than another set of proposals for enhancing law enforcement (p. 150).

The recent national and international focus on the role of financial institutions in money laundering reflects law enforcement concerns, rather than a perceived need to regulate the affairs of banking organizations. There is no pretense that the laws requiring customer disclosures promote safety and soundness, or any other goal of financial regulation. The focus on banks and other financial intermediaries is due to their central role in facilitating the movement of money.

In order to combat illegal money laundering, extensive and complex recordkeeping and reporting requirements are imposed on financial intermediaries with regard to all transactions, not just the tiny minority of illegal ones. In a world where trillions of dollars are moved on a daily basis, serious restraints on the rapid movement of money, whether they take the form of substantive rules or reporting requirements, have substantial, albeit not easily quantifiable, economic costs. The American Bankers Association estimates that the annual cost of employee time devoted by banks to compliance with U.S. money laundering legislation is \$26 million.³ Full cost accounting would raise the figure to some \$100 million per year.

While the costs are high, the benefits that accrue from financial reporting laws appear to be small. Transaction reports are of little assistance to enforcement officials in uncovering (as opposed to the subsequent prosecution of) wrongful activities. As Terrence Burke, a senior official at the Drug Enforcement Administration (DEA) admitted, the DEA receives "virtually no leads" from random

3. AMERICAN BANKERS ASS'N, *THE BURDEN OF BANK REGULATION* (1989).

screening of currency transaction reports (CTRs).⁴ Instead, CTRs are used as evidence in cases that were built on information from other sources. Thus it appears that the returns to law enforcement from financial reporting legislation is quite modest.

Part of the discussion here relates to the subject matter covered by the book under review, rather than the book itself, a luxury permitted to the author of a book review. As the reader will have noted by now, this reviewer has serious doubts about international policy regarding money laundering in general, and prohibitions on narcotic drugs in particular. This should in no way be read to reflect negatively on *International Efforts*, which is a useful and timely collection of international documents relating to money laundering, notably in the context of the international traffic in illegal narcotic drugs.

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International Transactions and Claims Involving Government Parties: Case Law of the Iran-United States Claims Tribunal

By John A. Westberg. Washington, D.C.: International Law Institute, 1991, pp. xx, 392, \$125.00

A literary coup greeted the publication of John Westberg's study of the Iran-United States Claims Tribunal: the *Vanderbilt Journal of Transnational Law* printed not one, but three reviews of the text!¹ The reviewers were all present or former members of the Tribunal, and each represented one of the three classes of arbitrators (Iranian, U.S., and neutral) that make up the Tribunal. After detailed and informed critiques of Mr. Westberg's book, all the reviewers recommend it highly to those engaged in international business transactions. Judge Nils Mangård concludes, for example, that "Mr. Westberg has undertaken an impressive task

4. Sen. Kerry Urges Banks to Refuse Business from Countries Without Bank Secrecy Laws, 53 Banking Rep. (BNA) 462 (1989) (discussion of Hearing before the Senate Foreign Relations Subcommittee on Narcotics and Terrorism).

1. Richard M. Mosk, *Book Review*, 24 VAND. J. TRANSNAT'L L. 587 (1991) (reviewing JOHN A. WESTBERG, INTERNATIONAL CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1991)); Nils Mangård, *Book Review*, *id.* at 597 (reviewing same); Koorosh H. Ameli, *Book Review*, *id.* at 611 (reviewing same).

[that is, the systematic presentation of the awards] and accomplished it in an excellent fashion, benefitting both the international legal community and the international business lawyer."²

As a subsequent reviewer I am tempted merely to endorse the recommendations of Judge Mangård and the other reviewers, and to refer the interested reader to the *Vanderbilt Journal*. I certainly have no hesitation endorsing their conclusion. No other single-volume text synthesizes so succinctly, and with such care, the Tribunal's jurisprudence during its first decade (1982-1991). Whether or not the reader is familiar with the Tribunal or with international business practices, he or she will find Mr. Westberg's guide to the awards useful, his analysis of individual cases insightful, and his practical advice helpful. As an added bonus the reader will find in the book's appendices the basic texts establishing the Tribunal (pp. 285-376) and a selective bibliography prepared by Nassib G. Ziadé (pp. 379-92).

Much of the power of Mr. Westberg's story comes from the cautionary tale he tells. Again and again the Tribunal's awards reveal that during the decade of the 1970s, U.S. businesses eager to close deals with Iranian entities did not always anticipate risks or resolve potential problems. Not all the attorneys advising these U.S. businesses had the experience and professional skills of Mr. Westberg, who for over two decades practiced international business law in London and Tehran. Mr. Westberg demonstrates this experience and these skills in the practical advice he offers readers, both when they plan transactions (for example, pp. 52-54, 97-98, 159-60) and when they present a case to an arbitration tribunal (for example, pp. 181-85). His advice is neither surprising nor exceptional. What gives it weight is the cumulation of illustration after illustration showing what can go wrong if one does not take precautions.

Mr. Westberg's telling of this cautionary tale is, however, strangely dispassionate. For each of the many cases discussed he states the facts, the legal principles at stake, and the award rendered. He then tests the arbitrators' opinions for their clarity and consistency. Those that are "reasoned and clearly stated" (p. 42) or "clearly reasoned and articulated" (p. 52) are praised; those that are neither clear nor consistent are criticized implicitly. Readers trained in the United States will no doubt be sympathetic with Mr. Westberg's judgments about the soundness of the awards analyzed. This should not be surprising, for his concept of law is very much in the "formally rational" tradition of modern Western law.

Yet the proceedings of the Claims Tribunal have hardly been dispassionate. Most claimants not only have had millions of dollars at stake, but their claims arose in the politically charged context of the Iranian revolution. Apparently simple claims of contract breach frequently raise complex legal and factual questions, including such sensitive issues as the Iranian Government's responsibility

2. Mangård, *supra* note 1, at 609.

for the acts of an Iranian entity. The arbitrators themselves have frequently disagreed vigorously on fundamental issues, as the large number of concurring and dissenting opinions evidence. Neutral arbitrators who chair the individual panels have struggled to forge legal formulas that satisfy at least one of the other two arbitrators.

The Tribunal's awards must be read with this context in mind. Consider, for example, Judge Mangård's poignant description of the unenviable position of the neutral arbitrator:

It is for the chairman to attempt to negotiate the required majority of two votes, under considerable pressure from the other two arbitrators, and often in an atmosphere of tension and distrust.

The resulting award is not always one that any of the arbitrators among the majority would have rendered if acting alone. For instance, concurring United States arbitrators frequently begin written opinions, which in reality are dissents, with a sentence to the effect that they reluctantly join in the award "only to form the necessary majority," and proceed to severely criticize the same award. The necessity for compromise and the contentious political climate both contribute to rendering a chairman unwilling, or even unable, to innovate in the field of law. . . . [These] working conditions . . . also may explain, at least in part, why the conclusions reached in certain awards may seem surprising, if not questionable, to legal writers.³

Elsewhere Judge Mangård notes "the frequent practice in the Tribunal of presenting separate opinions some time after the judges sign and register a majority award."⁴ In some cases a majority of arbitrators failed to agree on the whole of the ultimate award.⁵

Given these practices, what precedential weight should be given the work of the Tribunal? Mr. Westberg does not analyze this question. He states (pp. 11-13) that the Tribunal's work is "significant" because of the great number of published awards and the broad range of issues addressed. Subsequent arbitrators, he apparently assumes, will look to this "case law" for guidance (p. 13). Yet it is one thing to think that arbitrators *will* look to the Tribunal's awards and another to think that they *should* do so.

Surprisingly few authors address this question of precedential weight. Professor David Caron has recently flagged the importance of the issue,⁶ and in his review of Mr. Westberg's book Judge Richard Mosk defends vigorously the authority of the Tribunal's awards.⁷ Judge Mosk finds analogues to many of the Tribunal's

3. *Id.*

4. *Id.* at 605.

5. Mosk, *supra* note 1, at 593.

6. David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104, 105 n.4 (1990).

7. Mosk, *supra* note 1, at 590-94. At one point, Judge Mosk writes: "Nevertheless, because of the paucity of published authorities on many international issues, the Tribunal decisions, which are reported widely, *should* be utilized extensively." *Id.* at 593 (emphasis added). It is unclear whether Judge Mosk is predicting that in practice later arbitrators will recognize the awards as authoritative or that in principle they should so recognize the awards.

practices in the domestic legal system, and he stresses the factors—the highly-skilled advocates, the well-qualified judges, and the detailed opinions—that make the awards well reasoned and persuasive.⁸ Judge Koorosh Ameli, an Iranian member of the Tribunal, is considerably more critical of the Tribunal's practices,⁹ but he does offer the following pragmatic test of the appropriate weight to be given an award:

In my view, priority should be given to the unanimous awards of the Tribunal when trying to discern the authoritative statements of the law. This priority should also extend to the full Tribunal majority awards, for which there is at least one vote from each block of the arbitrators. Other majority awards should be considered in light of all circumstances of the case, as well as the Tribunal, rather than only in view of the separate opinion of the United States arbitrator.¹⁰

Judge Ameli, in other words, does not deny that the awards should be given some weight, even when a majority award goes against the Iranian Government, but he would give greater weight to awards that evidence greater agreement on the grounds of decision.

Readers of Mr. Westberg's volume will, however, sometimes find it difficult to apply Judge Ameli's test when reading Mr. Westberg's analysis of an award. Nor, with only one or two notable exceptions, will they find analysis of the separate opinions written by Iranian members of the Tribunal.

These omissions make me uneasy. I concede to no one my admiration for Judge Howard Holtzmann, but Mr. Westberg apparently has not read a concurring or dissenting opinion written by Judge Holtzmann that he did not think preferable to the reasoning of a majority award. Not all future arbitrators will necessarily share the assumptions of U.S.-trained participants about the nature of the Tribunal or of its awards. I therefore have this niggling fear that one should not discount quite as heavily as Mr. Westberg does the reasoning in the opinions of the non-U.S. arbitrators.

My fear suggests that readers should exercise some caution. I do not mean to suggest that the awards are of little value. A remarkable number of awards evidence consensus on general principles of contract law—principles with respect to formation, performance, breach, and remedy. Even on highly-charged issues such as expropriation, the awards show considerable agreement on the duty to compensate and differ principally on the amount of compensation. Read with a cautious eye to context, Mr. Westberg's study is a very useful survey of the extent to which the Iran-United States Claims Tribunal has recognized general principles that might be applied in subsequent arbitral proceedings. Coupled, as this survey

8. *Id.* at 594.

9. *See, e.g.,* Ameli, *supra* note 1, at 614: ("The Tribunal issued few awards under conditions that should not be criticized. In many instances, the presiding judge was challenged, but nevertheless persisted in maintaining his position against Iranian protests. Other judges were imposed upon the Tribunal despite vigorous opposition from Iran.').

10. *Id.* at 623.

is, with Mr. Westberg's practical advice, the volume is a useful addition to the library of readers who advise enterprises engaged in transnational business transactions.

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