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Book Reviews

EDITED BY ALWYN V. FREEMAN

Applicable Law in International Commercial Arbitration

By Julian D. M. Lew. New York: Oceana Publications, 1978.
Pp. 633. Index. $45.00.

International commercial arbitration is, in the view of many participants and commentators, an idea whose time has clearly come. From a procedure seeking clients, since World War II arbitration has achieved increasing acceptance and recognition as a uniquely suitable method for resolving the complicated and often delicate disputes accompanying international trade and investment. The "growing consensus on international commercial arbitration," to use Donald Straus's phrase, has seen the adoption of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 1961 European Convention on International Commercial Arbitration, the World Bank ICSID Convention of 1965 and the 1975 Panama Convention providing for Inter-American commercial arbitration; the founding in 1972 of the International Committee for Commercial Arbitration; the adoption of the UNCITRAL and ECE Rules and the amendment of the International Chamber of Commerce rules in 1975; the provision for third "country" arbitration in Stockholm for East-West commercial disputes; and the growing realization, among developed and developing countries alike, that some impartial auspices for dispute settlement must be provided if substantive North-South agreements are to be reached.

Robert MacCrate has observed that arbitration is frequently more talked about than practiced. Certainly the number of international commercial arbitrations has been comparatively limited. The American Arbitration Association administered some 48,000 cases in 1977 but only 102 involved disputes with foreign parties. The ICC has noted an increase in the number of its international arbitrations, which amounted to 110 in 1977. The statis-

tics obscure perhaps the more important point: that a growing number of international commercial agreements and investment arrangements routinely provide for some form of international commercial arbitration as a "fail safe" device, which is widely believed to obviate recourse to the courts and to make formal disagreement less likely.

This work by Julian Lew, a Brussels-based English barrister-at-law, is a significant contribution to the literature of the field. Dr. Lew's objective has been to analyze how in practice arbitrators actually determine the applicable law: the method by which they determine the "applicable law or extralegal yardstick," the rules actually applied by arbitrators and the extent to which arbitral practice coincides with or differs from legal theory. In so doing, Dr. Lew considers several hundred awards, many of which have never been analyzed or published (at least in the West) before. He reviews awards of the International Chamber of Commerce (ICC), of arbitral tribunals in the East European socialistic countries, other institutional awards and a number of ad hoc awards. The result is a treasure trove of precedent and information, one that is more revelatory of the arbitral process than Dr. Lew's thesis, ambitious though it was, required. He has assembled material much of which will be excitingly new and unfamiliar to his readers.

One of the objections which critics of arbitration have leveled at the process has been the mystery and aura of unpredictability that has surrounded the procedure. Many arbitrations are conducted under strict laws of privacy and confidentiality. Others, such as the awards of the tribunals established under the auspices of the Council for Mutual Economic Assistance (CMEA) in the East Bloc countries, have been largely inaccessible to Western readers for a variety of reasons. Dr. Lew's book strips away many of the veils which have hitherto enveloped the process of private international commercial arbitration. The result will surely confirm the wisdom of the ICC decision, announced this past year, to begin publication of the essentials of most of its awards. Familiarity with the results as well as the procedures of international arbitration will confirm to many what they have long suspected: that, under many circumstances, international commercial arbitration offers a preferred alternative to reliance on the national courts of one of the parties, preferable for its flexibility and its capacity for adaptation to meet the special needs of the parties.

Dr. Lew draws two principal conclusions as to prevailing practice. His first conclusion is that:

> The right of parties to themselves identify the law to apply and the obligation on arbitrators to respect that choice is the one overwhelming and truly international conflict of laws rule which has developed in international commercial arbitration.

This emphasis on party autonomy to choose the applicable law is one that seems completely in keeping with the nature of arbitration as a privately chosen and individually crafted method of dispute settlement.

Dr. Lew's second conclusion is that arbitrators, when determining the

applicable law, should and frequently do "denationalize" or "internationalize" the dispute, by applying some non-national and generally accepted rule or practice rather than applying a national legal provision. Dr. Lew cites the application of the rules of international conventions, the customs and usage of a particular trade or industry, the "laws of international trade," public international law and the terms of the contract itself. He recites in compelling detail the histories of the more celebrated of the great arbitrations of the post-war period: the India-Pakistan dispute, the Qatar and Abu Dhabi Arbitration, the Aramco Award involving the Onassis concession and, most recently, the 1977 award of Professor Rene Dupuy in the ad hoc arbitration involving Libya and two American oil companies, Texaco and California Asiatic. In all of these arbitrations, the arbitrators found the general principles of international law to be both applicable and controlling.

My caveats are minor. The reader is not always certain what "law" or legal rule Dr. Lew is discussing, whether it be procedural, substantive or conflict-of-law principle. And the author's assault upon the "siege d' arbitrage" principle of conflict-of-law resolution, ascribed to Professor Sauser-Hall, is somewhat strained and gratuitous, if the purpose of the attack was to defend "party autonomy." Surely party autonomy is exercised in the typical case where the parties effectively choose the "siege" by their clause. But these are small cavils indeed, to set beside an achievement of impressive vision and industry, a rendering incarnate of the growing body of international commercial arbitration, a source book of the art.

D. G. GILL

America for Sale

By Kenneth C. Crowe. New York: Doubleday, 1978. Pp. 297. $10.00.

October 1973 marks a watershed in the economic history of the modern world. In that month, events occurred in the Middle East which led to the fourfold increase in the price of oil and the resulting transfer of massive amounts of wealth from the West to a handful of oil producing states located around the Persian Gulf. The impact on the Western economies was unprecedented: serious inflation existing side-by-side with a major recession. Five years have passed since these historic events, and the West has yet

to assimilate the radically different international economic climate. Policymakers are afraid to confront the realities of a lower standard of living which is required to bring inflation under control or to take firm steps to constrain the pricing policies of the OPEC nations. Witness the spectacle of a succession of United States Treasury Secretaries travelling to Persian Gulf capitals pleading for a freeze on oil prices at the next OPEC meeting. These trips are one unmistakable symbol of the new economic situation in the world.

Another symbol is the tremendous increase of foreign investment in the United States which has occurred during the last five years. In the 1960s, it was United States investment which was flooding the world, and J.-J. Servan-Schreiber's *Le Defi Americain* was needed to document the causes and effects of these investments. Today, the flow of investment is in the opposite direction, and Kenneth C. Crowe, a journalist for *Newsday,* a Long Island newspaper, has written *America for Sale* to call our attention to this dramatic reversal.

Relying principally on published sources, such as magazines, Government reports and Congressional testimony, as well as occasional interviews, Crowe traces the movement of capital into the United States from the Middle East and Europe. All of the colorful personages from the jet set world of international business may be found in this book — Adnan Khashoggi, Roger Tamraz, Ghaith Pharaon, Baron Guy De Rothschild, Ruport Murdoch and Michele Sindona. Familiar institutions are also the subject of the author's scrutiny — the major New York City banks, the Pahlavi Foundation, UBAF, Washington law firms, British Petroleum, even Alexander Hamilton! One learns that the new money pouring into America takes many forms, from Berkeley-educated Kuwaitis buying domestic construction firms, to Japanese acquiring hotels on Hawaii, to Germans purchasing segments of the United States chemical industry.

But what does all this mean? At the outset, Crowe assumes that recent foreign investments in the United States constitute a serious threat to the economic and political independence of this country. However, when this assumption reappears as a conclusion at the end of the book, the reader is still searching for a systematic analysis of the consequences of these investments within the vast reaches of our economy. The reasons for the surge of foreign capital into the United States are clear enough; what is lacking in this book is a thoughtful examination of its impact. For example, one could argue that Middle Eastern investments in the United States are beneficial because they give these nations a financial stake in the well-being of this country and make it less likely that another boycott will be imposed on our oil and gas supplies. Simply stated, Crowe fails to make the case for his conclusions — he merely asserts them and goes on to the next anecdote.

Having said this, one can still recommend the book for lawyers involved in international practice. It offers a fascinating glimpse into the background and activities of many of the major figures in today's international business

world. When the next set of Government regulations from the Federal Register becomes impossibly dull, pick up *America for Sale* for some intellectual refreshment.

ROBERT S. RENDELL

Trading Under EEC and United States Antitrust Laws

By Alfred F. Crotti. London: Butterworths, 1977. Pp. 342. Index. $43.80.

With the proliferation of multinational corporations, there is a need for works serving as practical guides to the antitrust laws of the European Community and of the United States. While there have been excellent works dealing with the antitrust jurisprudence of these respective jurisdictions, works comparing and contrasting such laws and thus providing a basis for corporate antitrust planning have been sought. The author, a member of the New York Bar and a Fellow of the Institute for Foreign and International Trade Law, University of Frankfurt (Germany), has undertaken this ambitious task.

The work is divided into two parts. The first deals with an overview of the field of antitrust in the United States and Europe, concentrating on Sections 1 and 2 of the Sherman Act and Articles 85 (prohibiting agreements and concerted practices having the object or effect of preventing, restricting or distorting competition within the Common Market) and 86 (prohibiting abuses of dominant position) of the Treaty of Rome, respectively. We are introduced to such topics as the rule of reason, the *per se* principle, price fixing, division of markets, group boycotts, tying arrangements and monopolization. The second part discusses specific business practices such as mergers and acquisitions, joint ventures and the licensing of intellectual property against an antitrust backdrop.

The author gives the reader some interesting analyses of the differences between and similarities of the laws of these jurisdictions. We are shown the respective functions played by the rule of reason and Article 85.3 of the Treaty of Rome providing exemption for those agreements and concerted practices which have been held to be within Article 85.1. Similarly, there are interesting comparisons made between Section 2 of the Sherman Act and Article 86 of the Treaty and discussion of whether a merger can be an abuse under that Article.

However, the relatively narrow scope of the work with regard to United States antitrust enforcement is unfortunate as it excludes substantive discussion of the Federal Trade Commission and Robinson-Patman Acts and important portions of the Clayton Act. Indeed, although cases involving the Commission are discussed, we are not made aware of the significance of Section 5 of the FTC Act. Fleeting reference is made to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, with no substantive discussion of such matters as premerger notification. Despite growing concerns over the scope of United States jurisdiction over foreigners, the author allocates a bare two pages to this subject, without reference to recent developments.

One senses, however, that this volume has more utility for a European practitioner than for his colleague on this side of the Atlantic. A great portion of the work consists of the elucidation of the constituent elements of a Sherman Act violation, the author taking the reader through a discussion of relevant precedent. An American practitioner would have hoped for a more thorough discussion of such Community administrative procedures as the availability of a "negative clearance" from the European Commission under Regulation 17 — a declaration that a particular agreement or concerted practice does not fall within the ambit of Article 85.1. Similarly, more substantial discussion of the provisions of Article 85.3 could have been made. These administrative procedures are at great variance with United States practice and have been of interest to our antitrust bar. Finally, it would have been useful to learn more of the interaction between Community and national competition law and the applicability of Article 177. Under Article 177, the European Court of Justice is granted jurisdiction to give preliminary rulings concerning interpretation of the Treaty of Rome when questions are raised in proceedings before courts or tribunals of Member countries.

The author has set forth a guide, rather than a comprehensive study, of the interaction of two increasingly important bodies of competition law. Perhaps one's disappointment with the scope of the subject matter discussed is tempered by the realization that a comprehensive study would fill more than this one volume. As the bulk of the work is given to a discussion of United States law, an American practitioner seeking to obtain a firm grasp of European competition law should recognize that the author has only briefly touched on various questions and issues relating to this body of law. More detailed discussion should be sought in some other work. In short, the author has whetted the appetite, but those seeking a more complete meal should dine elsewhere.

LEO H. PHILLIPS, JR.

Laws Against Restraints of Competition: Text and Commentary in German and English

By Alexander Riesenkampff. Köln, Federal Republic of Germany: Dr. Karl Schmidt, K.G., 1977. Pp. 272. Index. DM 75.

This brief volume, containing a text and commentary on the German antitrust laws, should be useful for English and Americans, lawyers and non-lawyers alike, doing business in the Federal Republic of Germany (F.R.G.), and to every student of the American antitrust laws.

The F.R.G. has, in your reviewer's opinion, the most comprehensive system of national antitrust legislation in the world. Although drafted in the light of the long experience of American antitrust law, it is not simply a vestige of the Allied occupation, but genuine German legislation. As such, it stands as a major personal and political achievement of Ludwig Erhard, who had to persuade and compromise with a legislature that tended to view cartelization as a legitimate form of business regulation.

The Germans have also made significant changes in the law since its adoption, which have strengthened it significantly. Merger control, missing from the original law, was added by amendment. A further, recent amendment expanded the market domination concept and granted significant new powers to the F.R.G. Cartel Office with respect to mergers and supervision of the abuse of a dominant position.

This concise volume is not designed as a reference work, but as a brief explanation of the laws for Anglo-American lawyers who are not antitrust specialists and for businessmen. The book succeeds in this very well, pinpointing the more difficult abstractions in the law and explaining them in terms of Anglo-American parallels.

There is an immediate practical need for a work of this kind for anyone doing business with the F.R.G. because, although the EEC competition rules apply in F.R.G., every transaction is subject to separate scrutiny under the more stringent German laws as well (the so-called "two barrier test"). F.R.G. has expressly adopted the "effects" test of extra-territorial jurisdiction from American law so that, even in the absence of physical presence in the F.R.G., foreign businessmen risk some exposure to liability.

This book is also valuable to students of American antitrust policy. At a time of comprehensive review of United States antitrust law, when a Presidential Commission is undertaking a study and the Chairman of the Federal Trade Commission is speaking in terms of an innovative "competition policy," F.R.G. legislation deserves the attention of United States policy-makers. Take, for example, the area of conglomerate mergers in which German law, in contrast to the American preoccupation with market shares, stresses other sources of competitive strength, such as financial resources, product diversification and the benefits of vertical integration.

Additionally, under F.R.G. law, the concept of a market dominating enterprise serves two distinct purposes. One is as a standard for merger control (the test being whether a merger would create or strengthen an existing market dominating position), and the other, together with the concept of the abuse of a market dominating position, as a flexible concept for controlling the power of large firms that is missing from United States law. While the F.R.G. law does not prohibit price discrimination generally, it does prohibit firms having a dominant position from discriminating or refusing to deal. In addition, the concept of "dependence" requires a supplier to continue dealing with a firm that has become dependent on it.

Together, these rules enabled the F.R.G. to respond through its antitrust legislation and without a separate energy agency to the same emergency objectives in the oil crisis of 1973 that required special legislation in the United States to prevent price exploitation and assure supplies to independents.

While F.R.G. law permits much that would be unacceptable in the American antitrust tradition, there is much in the German law that is innovative and will reward the study of this very useful volume. And, by way of language study, law students looking toward a use of German in their practice will find the text an excellent introduction to the technical use of German.

DUDLEY H. CHAPMAN

Taxation of Multinationals in Communist Countries

By Paul Jonas. New York: Praeger Publishers, 1978. Pp. 88. $16.95.

A caveat to potential readers of *Taxation of Multinationals in Communist Countries:* the title is over broad. The book does not concern the taxation of all forms of multinational entities doing business in every communist country, but only that of joint ventures with Yugoslavia, Romania, Hungary, Bulgaria or Czechoslovakia.

That said, Paul Jonas' text is a concise (although complex) introduction to, and summary of, the systems of taxation in those five countries and their application to joint ventures. It should be of interest to attorneys whose clients are interested in expanding their activities into Eastern Europe. It should be noted, however, that Dr. Jonas is a professor of economics and not a lawyer. His book seems designed for economists, accountants, businessmen and academicians, as well as lawyers.

The avowed aim of the work is to "strike a balance between the theoretical and the pragmatic" in describing "the fiscal rules in selected European socialist countries that apply to foreign corporations." After a brief introduction, which sketches the history of joint ventures with such countries, Dr. Jonas describes their philosophies of taxation and economic situations. He then examines the concept of joint ventures between foreign investors and host countries, summarizing the regulation of joint ventures in Yugoslavia, Romania and Hungary and within the Council for Mutual Economic Assistance ("COMECON").

Of less interest to the casual reader is the fourth, and most lengthy, chapter, which details the taxation of joint ventures in Yugoslavia, Romania, Hungary, Bulgaria and Czechoslovakia, in turn. In contrast to the introductory chapters, these sections are more valuable as a resource for answering specific questions as they arise, rather than as general background.

In closing, Dr. Jonas notes that only Yugoslavia, Romania and Hungary have authorized joint ventures with Western countries, and that while Poland "may experiment in the future with Western business ventures, . . . the

Soviet Union . . . Bulgaria, Czechoslovakia, and the German Democratic Republic have realized the complexities and risks of the joint venture and are thus unlikely to engage in joint business undertakings on their own soil." He also points out that, of the three countries willing to accept Western capital in the form of joint ventures, Romania and Hungary have centrally planned economies. Only in Yugoslavia do the workers' councils ("soviets") actually have power and only Yugoslavia's economy "is a decentralized market socialism where the most important success indicator is the profit of the enterprise." In Romania and Hungary he concludes that

> the strong common denominator in [their] economies is that taxation, especially in its hidden excise tax form, is the most prominent feature of economic life. In the command economics in the Soviet bloc, the accepted policy is a forced industrialization process, and the average rate of taxation with compulsory government bonds on the citizen is probably the highest in the world.

While Dr. Jonas' text does not provide the international practitioner with solid legal authority concerning the taxation of joint ventures in Eastern European countries, it is a well written description of the philosophies of taxation and economic conditions of the five subject countries and their taxation and regulation of joint ventures.

F. WALTER BISTLINE

Corporate Competition Law in the European Communities

By Ralph Houghwout Folsom. Lexington, Massachusetts: Lexington Books, 1978. Pp. xii, 160. $15.00.

This is a slim book, a monograph. It has few pretensions, and, woefully, has even fewer achievements. The author must have had an inkling of this at the close of the book, where he made the following observation: "Competition and law in the European communities involve complex national, regional, and international phenomena. To do these phenomena full justice is beyond the scope and purpose of this book" (p. 107). While such modesty, even belated, is refreshing, the reader can then only conclude that the book's title and much of the discourse in the text is overly broad.

The work is intended to be used as a text in colleges, law schools and business schools. It foreswears any attempt to be of use to lawyers or their

clients who are faced with EEC antitrust compliance or enforcement problems. Rather, the author sets out to survey very generally the approach taken by the Common Market in articulating Articles 85 and 86 of the Treaty of Rome, and, as his unique contribution, does so only after having reviewed the history of European economic integration, the economic theories favoring integration and the role of "competition policy" in such economic theories. As an analytic approach to understanding Articles 85 and 86, this framework is unassailable. Unfortunately, in its execution the book suffers from using out of date material which is presented in a shallow, non-critical survey of events. To add to the reader's discomfort is the transmission of this weak message in some of the most incomprehensible social science jargon and doubtful syntax this reviewer has ever seen.

The first of Professor Folsom's six chapters exemplifies the book's problems. In it he surveys the variety of significant and insignificant European institutions which are associated with economic integration. Mention is made of BENELUX, the now dormant Organization for European Economic Cooperation, the almost defunct Council of Europe, the somnolent Nordic Council, the European Coal and Steel Community, EURATOM, the European Economic Community (EEC), the European Free Trade Association, and last (and perhaps least), the Soviet-sponsored COMECON. Of the thirteen pages of the chapter devoted to this quick overview, only two and one-half contain any unifying commentary and analysis. The remainder is a case-by-case series of thumbnail sketches of this motley collection of "institutions." Each sketch briefly sets out the historical circumstances and dates of the founding of the organization and alludes to the basic structure and principal purposes of the entity. The discussion appears pointless, unless the inconsistent, uncoordinated approach taken in the various institutions is itself the point. The latter is perhaps confirmed by the unforgivably trite closing sentence of the closing paragraph of the chapter: "Any complete picture of the present state of the European economic integration must, therefore, reveal a house fundamentally divided against itself."

In fact, throughout the book the author seems to struggle with banal paragraph endings. Read some choice excerpts, chosen from among many:

> Some of these problems in the research and development field are revealed in a case considered later in the chapter. (p. 63)
>
> Council action on the proposed merger regulation will come none too soon. (p. 100)
>
> More vigorous, even-handed development and enforcement of Article 86 in national courts and by the Commission ought to follow. (p. 102)
>
> The effects of this order are far-ranging. (p. 68)

These and many other slightly ludicrous send-offs infect the entire book with the alternating tones of a homily and a pep talk.

Where the text does offer analytic commentary the results are often less than desirable. There is a tendency to make sweeping, unsupported general-

izations. For instance, in the first chapter it is stated that "all regional economic integration, whatever the form, is premised on the opening up of hitherto nationally protected markets. In other words, all regional economic groups are premised on increased competition among enterprises based within the region" (p. 2). These comments are surely made without consideration of the sectorial programs of the Andean Common Market. (*See* Cartagena Agreement, Chapter IV.)

Despite the turgid prose and disappointing approach, it remains true that Professor Folsom has chosen a fascinating and important subject, and his perusal of it is worth some further comment here. After listing the institutions mentioned above, and before getting to EEC competition laws, the book dabbles in some economic theory paraphrased (with due citation) from Professor Samuelson's introductory college text on economics. The point of the discussion, stated succinctly, is that free trade maximizes economic benefits and is therefore a goal to be sought.

Thus armed with a general principle that the law should be used to make European integration succeed, we finally are ready to read about the EEC competition laws. Already half of the short book is gone.

Then, the substantive material on Articles 85 and 86 is presented in a series of uncritical brief factual reviews. It is almost in the form of annotations. Regulation 17, Regulation 67/67, Regulation 2779 and the other key events all get descriptive, thumbnail treatment. While the text often mentions the "organizing principle of non-distorted competition," and hails it as the norm properly being sought under the Treaty, it nowhere seeks to define it or evaluate it in the context of the various Regulations and cases which are drily set forth.

There are glimmers in the discussion of Article 85 of one of the fascinating contradictions in EEC "antitrust" law: the conflict between pursuing a truly competitive model of a free market economy versus pursuing an integrated European economy, without national borders, regardless of how many or how few competitors participate in the market. The text might be considerably helped by an occasional query as to the economic wisdom of concentrating as the Commission has under Article 85 on intrabrand competition. After all, if the Commission has its way, and the market is truly integrated, the best relief from its sanctions may be found in having a single, monopolistic, distributor for each brand throughout the Common Market. Is this the "non-distorted" competition which Professor Folsom would have the Commission seek?

Further, this book suffers a serious timing problem. There is not a single reference in the book to a case or secondary source dated after 1976. There have been significant developments in EEC law in the last two years — everything from zippers to green bananas to suggested changes in Regulation 67/67. For a book such as this to maintain viability without pocket-parts or supplements it must concentrate on forming a coherent analysis upon which later cases build. Instead, this volume offers a pedestrian sur-

vey, with little commentary and with no solid coherent analysis. As such a survey, it is stale and tedious.

But, for all its faults, let me not finish without repeating the praise with which I began: This book is short! Of course, at times it does not seem so; or, as the author said when speaking of other matters:

> This policy is a market-supplementing and market-supplanting effort which is still in nascent, sometimes expert, sometimes fumbling stages. In pursuit of all these tasks, both national and supranational institutions have and will continue to play critical roles. (p. 107)

BARRY A. SANDERS

American Multinationals and American Interests

By C. Fred Bergsten, Thomas Horst and Theodore H. Moran. Washington, D.C.: The Brookings Institution, 1978. Pp. 535. Index. $18.95.

The dogged reader who will labor through these 500 pages of statistics, analyses, case studies, arguments and recommendations will be rewarded by exposure to an informative mass of statistical and historical data on the foreign direct investment activities of multinational business enterprises and some stimulating ideas which are certain to generate controversy. At the same time, he will suffer a style of argumentation which is too repetitious, compendia of prior scholarship which can be tiresome and a final chapter which will leave him staggering under the burden of its many recommendations.

This is a study done by the Brookings Institution, financed by a grant from the Sloan Foundation supplemented by grants from the United States Government. The three authors were, at the time the work on the study was done, associated with the Brookings Foreign Policy Studies program. C. Fred Bergsten is now Assistant Secretary of the Treasury for International Affairs.

The stated objective of the book is to "provide a basis for American policy toward American multinationals by analyzing the whole array of their effects on the United States economy and on United States foreign policy." The underlying dilemma posed by the authors is that, notwithstanding (or perhaps because of) the existence of highly polarized attitudes

concerning the power and behavior of the United States multinationals, there exists no consistent federal government policy towards their foreign direct investment activities, nor any institutional basis in Washington for formulating or coordinating such a policy. The authors believe that deficiencies in traditional analysis may have contributed to the chaos.

Consistent with their ambitious objective, the authors proceed with a massive review of data to evaluate the economic and political implications of foreign direct investment by United States multinationals. This review includes case studies, prior scholarship and statistical analysis bearing on the effects of foreign direct investment on trade, balance of payments, monetary stability, level of employment, industrial concentration and foreign policy. There are also studies of the effects of United States policies, especially tax policy, on multinational foreign investment behavior. The results of statistical analyses are somewhat inconclusive, but tend to defuse current controversy by indicating no generally adverse effect of foreign direct investment on the United States economy. On the positive side, there is a finding that multinationals have a salutary influence on trade and monetary policy; on the negative side the authors find that foreign direct investment tends to increase the market power of the multinationals and fails to maximize access to natural resources.

The bugaboo of natural resource investment haunts this book; it is so frequently invoked by the authors that it must be considered their central thesis. Conventional wisdom in the United States and elsewhere in the developed world has been to encourage foreign equity investment in natural resources as a means to secure access to raw materials. Not the case, say the authors. On the contrary, such equity investments in today's world are an "obsolescing bargain" and place the investors in thralldom to their host governments. This leads to all kinds of nasty consequences such as cooperation with cartels, restriction of output, uneconomic projects, governmental confrontations and multinational behavior which may be antisocial and un-American. The solution proposed is to discourage such equity investments, by denying the benefit of the tax credit, and by other means. Instead, multinationals should be encouraged to "unbundle" their offerings, *i.e.*, to provide management services and know-how without equity. Such projects would be financed with debt rather than equity. It is argued that this approach would diversify the sources of raw materials, and maximize their production. It is not possible, in a book review, to do justice to the many facets of this presentation. The case studies are revealing, and the arguments, if not all of the remedies proposed, are convincing.

There are disturbing shifts in tone from place to place in this book which may reflect differing views among the authors. They extol the virtues of comparative advantage as a determinant for location of production, and seem not disposed to experiment with comprehensive economic and social planning or any kind of Galbraithian intervention in the affairs of multinationals. "Indeed," they say, "a finely tuned policy is inconceivable without

fundamental changes in our basic economic system, changes that cannot be justified by the need for better policy control over American multinationals" (p. 451). They find that foreign investment, in the aggregate, has no significantly positive or negative effect on the United States economy and conclude that United States Government policy should be neutral, neither to encourage nor to discourage such investment. But then, "neutrality does not mean noninvolvement by the United States government in the affairs of American Multinationals." The clouds which the perceptive reader may have seen on the horizons in the first two chapters have darkened.

In most of this book, the authors exhibit a degree of restraint and balance which must be admired. Unfortunately, much of this is cast off in the last chapter, with its wide-ranging recommendations giving the impression of having been hastily prepared, without the deliberation of the preceding text. There is much here to interest the lawyer: specific proposals for changes in tax and expropriation legislation, OPIC insurance and antitrust policy. A "New International Regime for Multinational Enterprises" is proposed which would involve a wide array of internationally adopted rules to harmonize the policies, especially of the important multinational home countries, on taxes, accounting, antitrust, disclosure requirements and other things. Certainly there appears to be merit in many of the recommendations, but it is just too much and too sudden to digest properly.

In the end, it is the recommendation of this book that the United States monitor foreign investment activity by multinationals closely and in very specific ways, and that this should be done unilaterally until a multilateral system is negotiated. Notwithstanding earlier protestations of the authors against a finely tuned policy or regulatory system, this is in fact the end result of what is proposed. It is suggested that OPIC is well suited to perform the coordinating role; based on its recommendations (after public hearing, presumably) the President would have the authority to delay, stop or place conditions on specific foreign investments, or even to require disinvestment. Ultimately, international rules would be developed to supplant the United States unilateral system.

There may be differences of opinion as to whether these proposals will advance the cause of comparative advantage.

T. P. HEFFELFINGER

The Antitrust Paradox

By Robert H. Bork. New York: Basic Books, 1978. Pp. xi, 462. $18.00.

The theme of former Solicitor General Bork's book is that the antitrust laws should be concerned with maintaining competition, not with protecting individual competitors. He argues that the antitrust laws should be pro-consumer by favoring the maintenance of high levels of efficiency in the economy. To that end, interpretations which have distorted the antitrust laws to protect small business should be overturned.

He points out that the anticompetitive interpretations of the antitrust laws in judicial decisions have been lifted out of context and misapplied. The view that the courts have made overstatements is one with which many lawyers would agree.

Mr. Bork is now a professor at Yale Law School. He is a forceful advocate for his positions on the Congressional purpose in enacting the antitrust laws and on the proper interpretation of these laws.

Of course, contrary to Bork's position, a strong argument can be made that the antitrust laws are directed against concentrations of power entirely apart from the economic goal of preserving competition. He acknowledges that this is not a recently developed argument.

One of the great strengths of the book is its explanation of difficult economic concepts in clear language. There is a chapter that distinguishes between allocative and productive efficiency which is a classic example of clear economic writing.

In general, Professor Bork would limit the practices that violate the antitrust laws to those which are intended to be, and are, exclusionary and do not increase productive efficiency. He thinks that the significance of supposed automatically exclusionary practices has been greatly exaggerated by two widely believed major fallacies. The first is the creation of a category of economic motivation or behavior that does not exist. The second is the arithmetic error of counting the same market power twice.

As to the first fallacy, he refers to Judge Wyzanski's holding that policies

"honestly industrial" can violate antitrust law.[1] As any business seeks to be more efficient, he believes that the legal test should be whether the defendant was trying to be predatory. The so-called "intermediate" case of the honestly industrial practice that nevertheless violates the law should not exist. For a company's behavior that is efficient or competitive must have in its economic effects an exclusionary result if the behavior is successful. The antitrust laws should not attack businesses for taking steps which are "honestly industrial."

The fallacy of double counting is that a firm with monopoly power can only be expected to obtain the monopolist's profit once. To the extent that a firm uses monopoly power to coerce a tie-in sale, an exclusive dealing agreement or an exclusionary long-term lease, by definition it must be reducing a price below the monopolist's maximum price. For if the company charged the profit-maximizing price, it would be requiring its customers to pay all that the traffic would bear. If it did, there would be nothing left for the company to use as a lever to compel any additional advantage.

Another example of double counting can occur when a monopolist acquires a second monopoly in a vertical acquisition. This can lead to an improvement for the consumer, the reason being that the integration of the two monopolies can avert the danger that separate monopolists, unable to agree, will arrive at a final price above the one an integrated firm would have chosen to maximize its profits. The maximum profit of a monopolist is limited by customers' willingness to pay and could not be increased by the monopolist's vertical integration.

On the difference between monopoly and oligopoly, Bork concludes that the evidence of antitrust cases is that a large price drop occurs when even one firm appears to challenge an established monopolist. He writes that this conclusion is supported by cases of overt collusion among oligopolists that would be unnecessary if oligopolistic pricing without collusion could approach the results of monopolistic pricing.

United Shoe Machinery is cited for the fact that United charged a substantially lower price for its machines whenever it met competition. Also cited is the trial court's finding in *Telex* that IBM had substantially reduced prices when it met with competition for plug-compatible peripheral equipment.[2]

The examples of hectic competition between oligopolistic network television companies and in organized professional sports are also mentioned.

On the point that advertising in oligopolistic industries is not a means of

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[1]United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954).

[2]Telex Corp. v. International Bus. Mach. Corp., 367 F. Supp. 258 (N.D. Okla. 1973), *rev'd,* 510 F.2d 894 (10th Cir. 1975).

creating a barrier to entry, but a way to provide increased value to a product, Charles Revson of Revlon is quoted as saying that in the cosmetic business advertising is essential because "we sell hope." The same thought is also expressed, although less clearly, by the statement that raising average costs through promotional and informational expenditures is not different in kind from raising average costs through expenditures on larger engines.

On the subject of mergers, the book has a good example of the complexity of categorizing mergers as conglomerate, vertical or horizontal. When CBS acquired the Yankees, it could have been classified as horizontal by viewing the two firms as rivals in the entertainment market. Or it might have been considered vertical, since the Yankees are a supplier of programs to television. Finally, the merger might have been considered conglomerate, because baseball and television may be viewed as selling in different markets.

The importance of efficiency to consumers and to the goals of the antitrust law is emphasized, according to Bork, by the basic distinction in treatment that the antitrust laws make between mergers and cartels. Mergers can produce increased efficiencies, while cartel agreements lead only to output restriction (through higher prices that in economic theory always require reduced output). The book refers to the opinion of Justice Taft that referred to the polar models of the law as the cartel and the partnership, the former creating resource misallocation and the latter efficiency.[3]

From this Bork draws the example of the law firm partnership that eliminates competition between lawyers, fixes the fees partners and associates charge for services and usually leads to a division of markets along the lines of partners' specializations and primary responsibilities for particular clients. The rationale is that greater efficiency results when lawyers practice as a partnership and can rely upon each other and divide their labors systematically, and that this should not be prohibited by the antitrust laws.

Professor Bork might have mentioned the distinction between mergers and cartels recognized in the European Economic Community, where the general prohibitions against agreements or concerted practices that restrain competition have been held inapplicable to mergers.[4] However, the Community's prohibition against abuse of a dominant position can apply to a merger on the theory that a dominant company's making an acquisition may be an abuse of its power.[5]

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[3]United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899).

[4]SHV-Chevron Oil Europe, [1975] O.J.E.C. (No. L 38) 14, [1973-75 New Dev. Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9709. *But see* DeLaval-Stork, [1977] O.J.E.C. (No. L 215) 11, 2 COMM. MKT. REP. (CCH) ¶ 9972.

[5]Case No. 6/72, Euremballage Corp. and Continental Can Co. v. Commission of the Eur. Comm., [1973-2] Comm. E. Rec. 77, [1973-74 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8171.

Bork would permit vertical price fixing and all forms of horizontal restrictions that are ancillary to agreements which have the effect of increasing efficiency. For example, he would allow agreements by non-dominant enterprises to integrate their activities by having each party specialize in certain products or technologies. Again, he could have referred to the European Economic Community, where categorical exemptions from antitrust law have been authorized for specialization agreements between smaller enterprises on the grounds that increased specialization will be beneficial to consumers.[6]

Tying arrangements are a system of flexible pricing which can be used to accomplish price discrimination, and price discrimination is usually a form of competition. The book describes the landmark *Northern Pacific*[7] case as possibly an attempt to avoid ICC rate regulation. The railroad may have been offering rate reductions to potential shippers through bargain land prices. Requiring purchasers of land to ship over the railroad may have been necessary to make sure the railroad got the business it paid for.

The Supreme Court's recent decision that price cutting is not a tying arrangement could reflect a concern for competition. In its decision, the Court required a unique quality for there to be a tying product, and held that a low price for a product is not enough.[8]

Professor Bork discusses the preference of courts to permit some "restraint" to exist when the alternative is the destruction of both the restraint and the affected commerce. An example is when activities can only be carried out jointly, such as in league sports. The courts have not declared cooperation by the members of a league illegal on the grounds that there are no other professional teams in a given sport, or compelled major league teams to allow bush league teams to play them!

The Antitrust Paradox should stimulate renewed public awareness that antitrust laws ought to promote the vigor of competition and the interest of consumers. The nation will be indebted to Professor Bork if this occurs.

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[6]Regulation No. 2821/71, [1971] O.J.E.C. (No. L 285) 46, 1 COMM. MKT. REP. (CCH) ¶ 2729.

[7]Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

[8]United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 621-22 (1977).