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Abstract

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BOOK REVIEWS

UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE. By Barry E. Hawk. New York: Law & Business, 2d ed. 1986. Three volumes with appendices and index. $225.00. ISBN 0-15-004385-6.

*Reviewed by Joel Davidow**

For a legal scholar, the ultimate triumph is to discover a field of law, stake out its boundaries, and produce the dominant treatise. Publication of a multi-volume second or third edition is a definite sign that the scholar intends to hold on to his or her leading position for the long haul.

Professor Barry Hawk of Fordham Law School has, in recent years, demonstrated his intent to dominate the international and comparative antitrust field. His three-volume 1986 edition is the largest, newest and, I believe, best work in the area. Hawk's two major competitors, Fugate and Atwood, although formidable, lack somewhat his expertise in Common Market antitrust law and his academic devotion to ever-newer editions with ever-longer footnotes and appendices.[1]

Nevertheless, questions remain concerning whether the field can be confined by logical boundaries and whether its growth rate will justify the investment that Hawk and his book's purchasers will have made. "International Antitrust," as a sub-category of United States antitrust law, is neither separate nor growing.

Volumes I and II of the Hawk treatise differ significantly. The second volume treats the entire field of European Communities antitrust law, whereas the first volume deals only with the international application of U.S. antitrust law. Approximately ninety percent of American antitrust cases deal with domestic transactions. Many of the international antitrust cases involve substantive issues no different than those encountered

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1. *See* Davidow, Book Review, 15 VAND. J. TRANSNAT'L L. 787 (1982) (Atwood and Brewster); Davidow, Book Review, 9 YALE J. WORLD PUB. ORD. 423 (1973) (Fugate).

in the purely domestic context. The treatise writer, therefore, is faced with the difficult choice whether to (a) survey U.S. antitrust as a whole and then apply it to the international context; (b) treat the foreign commerce cases as a complete body of law, with an occasional supplement from clarifying domestic decisions; or (c) limit discussion to cases, statutes, and doctrines unique to the international context, such as the foreign compulsion cases and the Export Trading Company Act. Hawk opts largely for alternative (b), although one could learn most relevant doctrines of U.S. domestic antitrust law by studying his treatise and its footnotes carefully. In particular, the comparative law sections of Volume II contain very useful capsule discussions of domestic U.S. antitrust law and policy.

Professor Hawk is well aware that recent political developments have created a situation in which his treatise is growing faster than the field with which it deals. The Reagan Administration has reduced the staff and budget of the antitrust enforcement agencies by thirty percent, and threatens to reduce them by another twenty percent. The Foreign Commerce Section of the Antitrust Division has been reduced from twenty-five lawyers to five. Many recent proposed antitrust statutes, in reaction to the growing trade deficit, have sought to limit U.S. antitrust law. These statutes are designed to encourage mergers, joint research, and other joint activities thought likely to increase the competitiveness of U.S. firms vis-à-vis their foreign rivals. Thus, international antitrust has almost come to the rarified state of public international law, where there are more scholars than there are cases about which to be scholarly and where law review articles per year exceed decided cases by a two- or three-to-one ratio.

Hawk also perceives another trend, and has begun to follow it, in spite of the resulting dilemmas. The rising trade deficit, combined with the conservative assault on many aspects of antitrust enforcement, has resulted in a situation where unfair international trade cases far outstrip international antitrust cases, or even all antitrust cases. In 1955, the Federal Trade Commission instituted approximately one hundred prosecutions of domestic price discrimination and the International Trade Commission instituted two cases against international price discrimination, i.e., "dumping." By 1985, these numbers were exactly reversed. Economists had demonstrated that

price discrimination was usually rational and seldom predatory, and that penalizing such discrimination tended to raise prices and retard competition. Although this critique caused the FTC to change its enforcement priorities, it had no effect on the political imperatives afflicting the ITC. In his first edition, Hawk acknowledged that there are "miscellaneous statutes," such as the antidumping and countervailing duty laws, which, like the antitrust laws, can apply to unfair foreign competition.

The dilemma Professor Hawk has not entirely avoided, however, is that a little knowledge about crucial statutes such as the trade laws may be a dangerous thing, while full knowledge would double the size of the treatise and entirely change its focus. He compromises by providing a basic statutory analysis with virtually no case discussion or critique.

In contrast, the antitrust volume contains excellent case discussion supported by carefully selected quotation. There is also liberal reference to important policy documents, such as enforcement guidelines. The book is not structured as a critique or an exegesis of a doctrinaire analytic approach. Nevertheless, the text is peppered with critical remarks and suggestions. Most of these are conservative; restraint is praised more than zeal. Hawk finds the middle or sensible ground often enough that one tends to nod agreement to most of his asides, while valuing his intelligence even in those few instances where his comment or approach seems debatable.

The volume on Common Market competition law is a particularly fine achievement. Even Europeans commonly turn to Professor Hawk and his writings for clear and definitive exegesis of the legal principles they have developed. He cogently and succinctly sets forth the 30 years of cases and regulations that constitute the body of rules governing competitive behavior in a twelve-nation market that has a population and GNP larger than that of the United States. All U.S. firms doing business with Europe need some familiarity with these rules because they have important procedural and substantive differences from the antitrust rules of the United States, and they are also enforced strictly and with substantial sanctions.

The appendices are unusually comprehensive and useful. There are thirty-six documents related to U.S. law or interna-

tional conventions and statutes affecting the enforcement of U.S. law (including foreign laws designed to block such enforcement). In connection with the European Common Market volume, thirty-four appendices are provided, which include virtually every major regulation or guideline issued by the Common Market Commission. The treatise is thus one of the rare sources in which all the materials can be found in a comprehensive and easily usable form.

Clearly, the United States realizes the importance of international competition and international competitiveness. The policies that emerge from this catharsis may deviate considerably from free competition or free trade. Nevertheless, no major law school or law firm can ignore the issues. No one should be without this monumental work by Professor Hawk.

LAND ACQUISITION IN DEVELOPING COUNTRIES. By Michael G. Kitay. Boston: Oelgeschlager, Gunn & Hain, 1985. xx + 127 pp., appendices, bibliography, index. $30.00. ISBN 0-89946-192-1.

*Reviewed by Allan J. Berlowitz**

Michael G. Kitay, author of *Land Acquisition in Developing Countries*, began his association with the Third World and the law over twenty years ago as an instructor of law at the Louis Arthur Grimes School of Law in Monrovia, Liberia. He served at the law school for two years teaching courses to his African students based upon principles of the English common law as adapted by Liberia. During those formative years in his professional career, however, his presence in Africa and the Third World enriched his career with knowledge and insights that he would not have attained through books or his presence in a classroom.

After completing his tour in Monrovia, Mr. Kitay returned to this country and began practicing corporate law in New York City, affording him a basis of comparison with the principles and techniques of the Third World he had just left behind. In the early 1970s, he joined the United States Agency for International Development, the agency responsible for implementing United States policies to foster development in Third World countries and promote trade between those countries and the United States. He has remained with the agency, and currently holds the position of Chief Counsel for the worldwide housing and urban program.

Land Acquisition in Developing Countries is a direct outgrowth of the year the author spent as a visiting scholar at Harvard Law School as a Fellow of the Lincoln Institute of Land Policy. During that year, Mr. Kitay did extensive reading on the subject of land acquisition, enhancing the practical knowledge he already possessed as a practitioner in the field.

The book's introduction reveals a startling premise that will potentially affect all countries, not just those in the Third

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World: by the year 2000, almost sixty urban centers will have populations in excess of five million, and almost fifty of those urban centers will lie in developing countries. (p. xv) The growth of population in the Third World and the shift of those populations from rural to urban settings, according to one source, has resulted in one of the greatest migrations in the history of the world. (p. xvii)

If the author's projections are at all close to being accurate, the resulting population growths and movements will have a profound effect not only on the Third World, but also on the quality of life in the United States and in other developed countries. The effect on life in the countries experiencing the growth and movement will also be significant. Overcrowding in urban areas that lack infrastructure breeds poverty and frustration. That poverty and frustration, however, can no longer be expected to influence only those countries in which they originally occur. Population movements are likely to cross borders, and even if they do not spill over into more developed countries, adverse conditions caused by exacerbated population growth in urban areas could easily influence the external policies of developing countries to the detriment of the developed countries.

One final point bears mention regarding the relevance of the author's work to people living both inside and outside the Third World. Recent studies indicate that although the populations of several of the largest urban centers in the United States have been decreasing slightly, the poverty-level populations of those same centers have been increasing. That trend is narrowing the differences between our major cities and those of the developing countries, as they gradually assume the guise of their sister cities in the Third World. Thus, the observation made by Professor Charles M. Haar, in his foreword to the book, that the process of applying land acquisition principles to developing countries may very well be bi-directional for the developed countries, may prove in the years to come to be true in even more cases than it is today. (pp. xi-xii)

The essential structure of Mr. Kitay's book consists of passages of explanation and analysis, with examples and observations concerning land acquisition in developing countries. The explanation and analysis portion begins with a discussion of the threshold issue of whether the private sector or govern-

ment should be primarily responsible for land policy formulation, and proceeds to an analysis of the cost advantages to a municipality if it undertakes a program of advanced land acquisition.

This threshold issue merits special consideration because the author's analysis of how it should be resolved spawns his discussion of the techniques of land acquisition in the Third World. He concludes that government intervention is necessary to provide communities with appropriate social needs, such as schools, housing and health facilities, and to stabilize the market for their land. (p. 4) On the other hand, he observes that if development were left entirely in the hands of the private sector, the profit motive would predominate to the detriment of lower profit projects that are nonetheless essential to community development.

Once he establishes his premise, the author examines the techniques employed in acquiring the land, the institutions charged with that responsibility, and methods of financing the acquisition. His discussion is peppered with examples from developed countries as well as the Third World.

Mr. Kitay also makes some interesting observations about voluntary acquisitions and eminent domain. For example, the author notes that notices of public acquisitions in themselves tend to inflate prices. (p. 15) He compares the conventional government approach with that of the private sector where the identity of a buyer attempting to acquire a substantial parcel is secretly guarded. As an exception to the general rule, however, the procedures of Mexico and Portugal are used as examples. Those countries have adopted laws that permit secrecy concerning the identity of the public authority making purchases in recognition of the general approach of a private assembler.

The author also explains the process of land adjustment where a plan for an undeveloped parcel on the periphery of an urban area is formulated, calculating the costs of completing the infrastructure as well as the increase in the value of the remaining property. (p. 24) A determination is then made as to how much private land must be sold to recoup the costs of development.

The discussion of expropriation based upon undervalua-

tion is also informative. Mr. Kitay uses the procedures invoked by Taiwan as an example. Under those procedures, a land owner is expected to declare the value of his own land for purposes of taxation. Undervaluation could eventually result in sale to the government at self-determined valuation. (p. 53)

The main problem facing the developing countries in implementing a policy of land acquisition is the lack of funding. Mr. Kitay points out the related problem that a sophisticated professional staff is needed to carry out a land acquisition program. (p. 72) In any case, both problems arise from the lack of money, which usually must be sought from external sources. Obstacles in obtaining the external financing are candidly discussed by Mr. Kitay, and, to his credit, he comments on the element of corruption that all too frequently plays a role in government projects involving large sums of money.

It is interesting to note that Mr. Kitay does not believe that the prospect of corruption in land dealings are any greater than those for other programs involving donor financing. (pp. 96-97) He supports his conclusion by calling to our attention that the price of urban land is well known in the Third World. Thus, he infers that such knowledge would serve to check extreme incidents of corruption, especially when coupled with proper supervision from donor agencies.

Yet is the price of urban land as well established as the author believes? There have been numerous incidents of corruption in food programs involving fungible products, so it would seem that a greater possibility for corrupt practices exists when dealing with property that is unique in character, such as land. And even the author admits that the lack of a vigorous private land market makes valuation of real property in the Third World difficult. (p. 16)

Mr. Kitay's diverse background, integrity, and commitment to assisting the developing countries command respect for his ultimate message that the obstacles to the programs he sets forth should not stand in the way of their implementation:

> The main issue, though, is for all concerned to move, to make the hard decisions, and to carry them through to execution. The tools are outlined here, and in other works of this nature. All that needs to be added is a national will and the skill and integrity of dedicated public servants. The need is clear and present, and so is the danger. (p. 127)

Perhaps Mr. Kitay's work could be better organized and indexed by numbering the headings, and by either expanding the table of contents to indicate the subheadings or reducing the number of those subheadings. This minor flaw, however, does not undermine the value of Mr. Kitay's effort.

Land Acquisition in Developing Countries is an important work. It provides a comprehensive survey of the land acquisition techniques used by developing countries and an analysis of their operations, by a person with comprehensive vision of both the developing and the developed worlds.

INTERNATIONAL TRADE POLICY: THE LAWYER'S PERSPECTIVE. Edited by John H. Jackson, Richard O. Cunningham and Claude G. B. Fontheim. New York: Matthew Bender, 1985. xxvi + 470 pp., tables, index. $75.00 Library of Congress No. 85-71801.

*Reviewed by Kevin G. Nealer**

Baseball great Satchel Paige has been quoted as offering the warning, "don't look back—something might be gaining on you." The something that is gaining on the trade bar is a broad political consensus in favor of basic changes in United States trade law and policy. That consensus has come slowly over the past several years. It was a leitmotif in both the presidential election of 1984 and the recent midterm elections that returned control of the Senate to the Democratic Party. The trade problem seldom became the central theme in the campaigns, but candidates understood its political potency. Few neglected to sprinkle their stump speeches with a few lines of outrage over the declining terms of trade.

The basis for that outrage is easy to understand. The 1986 trade deficit of nearly US$170 billion exceeded the total trade shortfall in all four years of the Carter Administration. Despite currency adjustments, the monthly trade figures have yet to signal a meaningful improvement. Moreover, growth in world trade has been nearly stagnant for the past five years, and GATT economists predict an anemic growth rate of about three percent for the near term.

Faced with a mounting U.S. trade shortfall and little growth in total trade, members of Congress have witnessed a fundamental shift in interest group lobbying on trade. Members of the House and Senate listen to a steady stream of calls for restrictions on access to United States markets from those sectors of the economy—agriculture and technology groups among them—that have been the traditional voices of free trade in the post-war period. Declining export sales and loss

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of domestic market shares have turned the free trade stalwarts into skeptics.

In this environment, the American Bar Association (A.B.A.) and editors Jackson, Cunningham, and Fontheim have undertaken an ambitious effort in their new book, *International Trade Policy: The Lawyer's Perspective*. In the past, the A.B.A.'s Section on International Law has offered guidance to practitioners on the fundamental aspects of trade law practice through its seminars and such publications as *Current Legal Aspects of International Trade Law* (P. Macrory & P. Suchman eds. 1982). But in *International Trade Policy: The Lawyer's Perspective*, the editors offer a look at the landscape of issues in United States import relief law which should remain useful for some time. This is accomplished through a series of essays by a group of seasoned commentators. As Professor Jackson explains in the introduction,

> [t]hese essays are not designed to initiate the beginner, nor are they designed to present an overview of the law or a 'how to do it' manual. Instead, each practitioner was asked to focus on some particular problem which he or she had experienced, and to address not only the technical legal questions of that problem but the related policy issues. (p. xii.).

The initial chapters provide an intellectual framework and policy perspectives on current import relief law, along with proposals for change. Richard Cunningham's opening essay sounds the theme against which the rest of the book—and the current congressional debate on trade law reform—will be played out. Cunningham recognizes the strains that an extraordinary U.S. trade shortfall and the associated loss of faith in the process have created on import relief laws and the international system. He points out the important foreign policy concerns that are ineluctably bound up in trade policy choices—a fact underlined by recent government actions in the proposed Fujitsu/Fairchild merger and the evolving dispute over the semiconductor agreement between the United States and Japan. Finally, he points out that the loss of faith in the process has found expression through greater politicization of the trade debate.

The stage further is set in three essays that challenge the

basic premises of United States import relief law, and offer their own prescriptions for change. Noel Hemmendinger attacks the idea that United States trade law—and, therefore, economic policy—should be driven by an adversarial process. He proposes that all import relief be consolidated under a modified escape clause that would allow the political dimensions of trade policy to come to the surface. Hemmendinger sees a world trade system shaped by government intervention—a premise he shares with the new Chairman of the Senate Finance Committee, Senator Lloyd Bentsen.[1]

Thomas Howell and Alan Wolff echo some of Hemmendinger's concerns in an essay that concludes that trade law *is* trade policy in the United States. They offer the important observation that the adversarial trade law process shapes the actions of the trade bureaucracy and describes the terms of debate on trade in this country. This leaves us with a policy process that is reactive—keyed to problem resolution—rather than one moved by national priorities.

A final essay by Charles Johnston, Jr. calls for consolidation of all trade remedy laws under Section 337 of the Tariff Act of 1930. Johnston accepts much of the foundation built in the earlier pieces, but comes to the conclusion that a unified legalistic approach will solve the problems that the other authors attribute to the very fact that legalism has been given primacy over policy formation.

The core of the book is given over to topical writings on current import relief law, each addressing some aspect of practice under Section 201, countervailing duty, or antidumping statutes. These essays will be instructive notwithstanding the action that Congress will take in rewriting the underlying statutes, because they address the theoretical underpinnings of the law in these important areas.

Stuart Rosen and Charles Bayar examine the causation standard under Section 201 in a discussion that tracks the current debate in the House and Senate. In one of the most important essays in the book, Gary Clyde Hufbauer and Andrew James Samet go beyond a review of the operation of the escape

1. *See generally* THE NEW GLOBAL ECONOMY: FIRST STEPS IN A UNITED STATES TRADE STRATEGY, Preliminary Report of the Senate Democratic Working Group on Trade Policy, April, 1985.

clause and reassess the role of Trade Adjustment Assistance (TAA) in an effective trade policy. A reconsideration of this program has begun in the context of the competitiveness debate now so much a part of the trade law reform effort. Indeed, the Senate Omnibus Trade Bill (S. 490) addresses the adjustment assistance program in its competitiveness title. After actively seeking the destruction of TAA in 1981, the Administration has done an about-face in its own trade proposal (H.R. 1155/S. 5.39), calling for US$1 billion in funding for the TAA program. Hufbauer and Samet urge a re-invigorated TAA effort, with an emphasis on long-term adjustment and a training voucher program similar to that proposed in S. 490.

Antidumping or countervailing duty law is also examined in the book. For practitioners in this area, the essays by A. Paul Victor and Thomas Ehrgood, John Sciortino, Peter Koenig, Claire Reade, Elaine Frangedakis, Christopher Dunn, and Harvey Applebaum and Paul Gaston will be a welcome addition to the literature.

The final section assures this book a lasting place in the literature. While the preceding chapters deal with current trade law and policy, the final essays reach beyond to important topics that are, to a greater or lesser extent, not covered by existing law. Gary Horlick and Shannon Stock Shuman discuss the question of bringing greater certainty to non-market economy cases by urging passage of the Heinz Bill for establishing a reference price. Here again, the essay offers a useful backdrop to the current legislative effort, though more recent proposals to extend countervailing duty law to non-market economies show how fast the debate is moving. This entire topic has taken on a much greater importance with the emergence of the People's Republic of China as a serious participant in world trade, as evidenced by its recent interest in GATT participation.

The final three essays reach the cutting edge of the trade debate in discussing industrial targeting, cartels and competitiveness, and the role of export credits. Those who wish to enter the competitiveness debate armed with something better than their own preconceptions and prejudices are well served by these chapters.

As noted at the outset of this review, this new collection is

especially relevant now that Congress is debating the most sweeping trade law revisions in more than fifty years. But the greatest utility of *International Trade Policy: The Lawyer's Perspective* is found in its examination of *policy* concerns. It goes behind the statutes and examines the underpinnings of key provisions of United States import law. In so doing, it gives the reader a sense of perspective and continuity from which to view the coming changes.