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Book Review

Extraterritorial Antitrust: The Sherman Antitrust Act and U.S. Business Abroad, by James B. Townsend. Westview Studies in International Economics and Business. Boulder, Colorado, Westview Press, 1980. 302 pp.

James B. Townsend, an assistant professor of business administration at Kansas State University, has written an interesting survey of the evolution of the extraterritorial reach of the U.S. antitrust laws. The major portion of the book provides a useful and readable summary of major U.S. antitrust cases, both in the domestic and international spheres. However, in this reviewer's judgment, Townsend's book is ultimately flawed by its failure to adequately analyze recent legal and policy developments limiting the ability of U.S. courts to apply the antitrust laws to conduct abroad.

Townsend observes that for seventy years the U.S. business community has claimed that the Sherman Act has inhibited its foreign operations and has thus made it less able to compete in world markets, although late in the book he does acknowledge that business has provided little direct evidence to substantiate its claim. In order to test the validity of this claim, Townsend discusses current antitrust doctrines that may affect the decisions of U.S. multinational corporations to enter foreign markets whether by exporting, licensing, or acquisition; yet he does not comprehensibly identify the effects that the antitrust doctrines have on such market entry decisions.

Townsend does, however, put the antitrust doctrines in perspective by reviewing the foundations of the U.S. antitrust laws and then describing how the concept of extraterritorial application evolved from the basic Sherman Act precepts. This review of the twenty or so most significant Sherman Act cases provides a particularly useful introduction to antitrust law, for lawyer and businessman alike.

Townsend defines the extraterritorial application of the U.S. domestic antitrust statutes as "the employment of those laws in considering the business operations of U.S. enterprises outside the territorial limits of the United States." This definition is, in this reviewer's opinion, incomplete because it implies that the U.S. courts decide whether they should apply U.S. antitrust laws extraterritorially by focusing on the location of the conduct in question. In fact, under U.S. antitrust law the courts resolve the extraterritoriality question not by focusing on the location of the conduct but by determining the impact of the business operations abroad on U.S. domestic or foreign commerce.[1] Indeed, the Antitrust Division of the U.S. Department of Justice has repeatedly said that it will apply the U.S. antitrust laws to a

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1. Continental Ore. Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 704–05 (1962).

foreign transaction only if such conduct abroad has a substantial and foreseeable effect on U.S. commerce.[2]

According to Townsend, the 1945 *Alcoa*[3] case is the controlling decision on the extraterritoriality question; indeed, he claims it to be the single most significant Sherman Act decision of the last fifty years. In essence, *Alcoa* holds that even if the conduct occurs outside of the United States it can nonetheless be subject to challenge under the U.S. antitrust laws if it is intended to and actually does have an anticompetitive effect on U.S. domestic or foreign commerce.

However, in the last several years the so-called "intended effects" test of *Alcoa* has been substantially modified by the seminal decision in the 1977 *Timberlane*[4] case. The book, which was published in 1980, makes virtually no mention of the fact, only citing *Timberlane* in a footnote. In *Timberlane,* the Ninth Circuit held that the federal courts in an antitrust case should not automatically exercise jurisdiction just because intended effects were present. Rather, in the interest of comity, the federal courts should exercise a jurisdictional "rule of reason" when conduct is challenged that might well be either legal or permitted in the country where it occurred. This holding is consistent with Restatement 40 of the Foreign Relations Law of the United States, as well as with a long line of U.S. conflicts of law cases arising in contexts other than under the antitrust laws. Specifically, *Timberlane* states that a court, in deciding whether to take jurisdiction, should consider whether the conduct abroad is in conflict with foreign law or policy, the nationality and location of the firms involved, where the conduct occurred, whether enforcement will achieve compliance, the significance of effects in the United States as compared with those abroad, and whether the conduct was purposefully designed to affect U.S. commerce.[5]

The extraterritoriality question is also influenced by yet another factor not discussed in Townsend's book. Within the last several years a number of major U.S. trading partners have enacted blocking statutes, many of which arose in the direct antitrust context as early as 1976. These statutes prohibit firms or individuals from using in antitrust proceedings, or even in government investigations, documents located within the country having a

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2. United States Department of Justice, Antitrust Division, *Antitrust Guide for International Operations* 6 (January 2, 1977; revised March 1, 1977).

3. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1948).

4. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1977).

5. The *Timberlane* approach has been adopted in Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979) and, so far as this reviewer is aware, has not been definitively rejected by any U.S. federal court.

blocking statute in effect. Australia, Canada and the United Kingdom are among the countries that have such statutes. Many of these statutes arose by reason of the uranium cartel investigation that the Justice Department began in 1976.[6] In the main, countries enacting blocking statutes claim that, because relief obtained in U.S. antitrust litigation will often conflict with their own domestic economic policies, such statutes intrude upon their rights as sovereign nations, which are recognized in international law. Furthermore, these countries' legal systems rarely authorize the extensive pre-trial discovery common to U.S. antitrust litigation.

In addition, several countries have proposed or enacted so-called "clawback" statutes to counter the prospect of nationals of their countries being subject to antitrust treble damage judgments in the United States. The British Protection of Trading Interests Act of 1979, for example, would enable a British firm, against whom a private antitrust treble damage judgment is entered, to obtain an offsetting judgment in Britain against the U.S. plaintiff's assets in Britain in the amount of the penal two-thirds of the U.S. judgment.

Even as to those cases where a U.S. court would likely assert jurisdiction after weighing the *Timberlane* criteria, the private plaintiff is not likely to prevail if he files a treble damage action, and, more importantly, the government prosecutor may well not even file a civil or criminal suit in such an event.[7]

In the concluding chapters of his book, Townsend, by briefly quoting various antitrust scholars, *e.g.*, Robert Bork, implicitly criticizes the value of present day antitrust policy and enforcement practice, and implies that such criticism is applicable to the extraterritoriality question as well. Here, however, Townsend improperly blurs the distinction between two distinct and essentially unrelated strains of criticism of U.S. antitrust policy. Townsend should have noted that even antitrust's most severe critics still vigorously support the proscription against price-fixing, the heart of the

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6. United States v. Gulf Oil Co., Cir. No. 78–123 (W.D.Pa. 1978); in that case the Department only sued Gulf and the case was resolved by the company's taking a plea of *nolo contendere* to the misdemeanor charge. Private treble damage actions are pending against Gulf and various foreign-based firms alleged to have been co-conspirators. Westinghouse, Inc. v. Rio Algom, Ltd., *et al.*, No. 76 C. 3830 (N.D. Ill.).

7. *See e.g.*, Societe Internationale v. Rogers, 357 U.S. 197 (1958) (although prohibition under foreign law is no excuse for failing to obey a discovery order, the court is not justified in imposing harsh discovery sanctions when the failure is due to a good faith inability to produce documents). *See also* remarks by Donald L. Flexner, Deputy Assistant Attorney General, Antitrust Division, "Foreign Discovery and U.S. Antitrust Policy—The Conflict Resolving Mechanisms," before the Fordham Corporate Law Institute, November 15, 1978.

Sherman Act.[8] This is significant because, at least with respect to cases filed by the Justice Department, the major and most controversial extraterritorial antitrust cases have been basically international price-fixing cases.[9]

In sum, Townsend's book provides, as far as it goes, worthwhile background material on the extraterritoriality issue. The book should, however, be supplemented so that Townsend could fully assess the significance of the major foreign statutory and domestic case law developments in the last few years. In particular, in such a supplement, Townsend should weigh the overall policy implications of the potential adverse impact on U.S. foreign relations of an aggressive approach to the application of U.S. antitrust law to conduct abroad against the economic benefits of an active anti-cartel enforcement program.

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8. For example, Bork concludes that:

> The subject of cartels lies at the center of antitrust policy. The law's oldest and, properly qualified, most valuable rule states that it is illegal per se for competitors to limit rivalry among themselves. . . . Its contributions to consumer welfare over the decades have been enormous.

Bork, *The Antitrust Paradox* 263. Basic Books (New York 1978).

9. The government's uranium case, *supra,* is one recent example. The North American Liner Conference cases are another. United States v. Atlantic Container Line, *et al.;* United States v. Bates, *et al.,* Crim. Nos. 79-271, 79-272 (D.D.C., filed June 1, 1979) (price fixing beyond that immunized by the Federal Maritime Commission in the North Atlantic Liner Conference; *nolo contendere* pleas accepted; total lines of $6.1 million; some 60 private treble damage actions pending).

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Quest For World Monetary Order: The Gold-Dollar System and Its Aftermath, by Milton Gilbert, with posthumous editing by Peter Oppenheimer and Michael Dealtry. New York, John Wiley & Sons, 1980. 225 pp.

This book represents both a personal memoir and an analytic history of the international monetary system from 1944 to the late 1970s.

In the mid-1960s, Milton Gilbert was one of a few analysts who had a solid grasp of the fundamental problem besieging the free world's gold-dollar system. Gilbert recognized that the problem was not that the American dollar was overvalued extensively relative to other currencies, but that it was was overvalued relative to the stock of gold. In point of fact, the American dollar played the role of the free world's reserve currency. As such, it took on the responsibility of expanding sufficiently to accomodate growth rates in the free world output. Consequently, insofar as the gold supply via new gold production did not expand, *pari passu*, with the dollar, the dollar became overvalued vis-a-vis gold. Gilbert, recognizing this as the problem, also recognized the solution to be a rational adjustment of exchange rates of all countries relative to gold, and not only an adjustment of the American dollar.

Thus, the major theme of this book is that the fixed exchange rate gold-dollar system is a viable system which occasionally requires some individual countries to adjust their exchange rates relative to each other, and sometimes requires a uniform devaluation of all currencies relative to gold. Implicit throughout this book is the assumption that both a flexible exchange rate system and a full-bodied gold standard are wholly inferior to the fixed exchange rate gold-dollar system on the grounds that they bring with them far too much instability and uncertainty. Gilbert's book stands as a classic study of the gold-dollar fixed exchange rate system. He presents a clear and persuasive argument for such a system; however, his argument is not without logical weakness.

His analysis carefully portrays the roles of institutional lethargy and political expediency on the part of all nations in impeding rational adjustment of exchange rates. However, one could suggest that Gilbert's line of reasoning concerning the efficacy of such a gold-dollar system seems to ignore the hard facts that he so well documents concerning the recalcitrant attitude of any nation to adjust its parity rate. Indeed, Gilbert lucidly suggests that it was this refusal to adjust on the part of all nations that caused the demise of the fixed exchange rate gold-dollar system. Still, Gilbert writes with an unshakeable faith in the fixed exchange rate system. One must assume that implicit in his reasoning is that the alternative—flexible exchange rates—would be a greater evil. Such a line of reasoning would be taken to task by most economists. In the light of recent experience with

floating exchange rates, it must be remembered that a nation's domestic monetary and fiscal policies are more rapidly reflected in exchange rates than the prices of many commodities, and therefore, unstable exchange rates, for the most part, reflect the instability in national economies.

The book is divided into three parts. In part one, Gilbert traces the major changes in the post World War II international economic environment, and provides the reader with an excellent summary of the gold-dollar system, the balance of payments adjustments process under such a system and the conditions for stability of such a system. Part two of the book consists of three chapters, each containing a case study of England, France and Germany's balance of payments positions and adjustment problems under the gold-dollar system from the Bretton Woods agreement up to the breakdown of the fixed exchange rate system. These three chapters are excellently written and Gilbert has much to offer the reader in terms of insight, since he was personally involved and acquainted with many of the officials in international finance.

Part three of the book traces the response of the United States to the balance of payments problem: the Smithsonian agreement, the advent of the S.D.R., other suggestions of monetary reform, floating exchange rates and the O.P.E.C. surplus system. This section, similar to part two, is enhanced immensely by Gilbert's personal recollections of the individuals involved in world monetary negotiations. Indeed, a major feature of this book is that it is in part a personal memoir of Gilbert who worked so long at the Bank of International Settlements.

Gilbert provides a rigorous, personal and accurate analysis of the death of the gold-dollar fixed exchange rate system. For these points, his book is highly recommended. The reader can judge for himself whether a gold-dollar fixed exchange rate system is workable. This reviewer has grave doubts. Such a system failed in a period of mild price instability. In today's world, continuous rational exchange rate adjustments would be required. If we have learned one thing in the past decade, it is that the regulation of prices, be they exchange rates, or the price of electricity, is a difficult task in a highly unstable economic environment. This is not to gainsay Gilbert's analysis of the balance of payments problem. Indeed, in pointing out the root of the problem, he was largely correct. Whether such a system is workable in today's world is an altogether different question. His book should be read by all those interested in the balance of payments problem and the quest for world monetary order.

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Direct Investment and Development in the U.S.: A Guide to Incentive Programs, Laws and Restrictions 1980-1981, by Raymond J. Waldmann. Washington, D.C., Transnational Investments, 1980. 443 pp.

Direct Investment and Development in the U.S. by Raymond J. Waldmann is a compendium of the laws, rules, and regulations covering the conduct of business in the United States and the various states in the United States. This book is primarily a reference book for use by international and interstate business executives, bankers, lawyers and accountants who must determine the places where their interstate corporate activities are to be located throughout the United States.

The first part of the book reads like a textbook, calling the reader's attention to the fact that there are certain laws, rules, and regulations governing business activities. This text material regarding the regulation of business by the federal and state governments is technical and of insufficient detail to be of value except to alert the reader to the existence of such restrictions or regulations. To become acquainted with precise applications of such material to a particular business will require further research and investigation.

European and Asian executives may have difficulty in understanding these restrictions as outlined. It is rather difficult for businessmen from Asia, especially, to envision our country, comprised of fifty states, each one of which has jurisdiction over the business organizations and the business activities of the corporations within its boundaries which is in turn governed by a central government, super-imposing federal regulations and laws governing business. The result is that the context established in the first part of this book may not be too intelligible for the European or Asian businessman. Even for a United States businessman, its contents may be rather difficult to assimilate.

The balance of the book gives the reader statistical data on the economics, demographics, population, weather and other pertinent information of the individual fifty states in the United States that may be of value to a businessman facing the problem of choosing a location advantageous to his company's investment plans. Of particular value is a list of names and addresses of the state and local agencies in each state that one can write to to get more specific information.

The book does not, however, give the reader the political climate of a locality that may be of help in, or a deterrent to, starting a business. Questions of zoning, building regulations and other requirements, as well as whether the local authorities are prone to encourage or to restrict further development are all left unanswered. Waldmann does not give information about the strength of the labor unions in any locality which may be an

important factor in considering whether to establish a business in an area. Nor does the statistical data show where the labor is in a particular area and whether such labor would be available to the organization that would be locating there. All of this information will necessarily have to be discovered by personal contact and personal research and cannot be set forth in a publication of this type.

This is a very good book for reminding anyone of the difficulties, complexities and restrictions confronting any businessman who would consider locating his business within the United States. It provides a good sketch of the demographics of each state, the economic possibilities, weather conditions and availability of labor, and as such, is a welcome reference for the business planner.

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Treaties of the People's Republic of China, 1949-1978: An Annotated Compilation, by Grant F. Rhode and Reid E. Whitlock. Boulder, Colorado, Westview Press, 1980. 307 pp. $24.50.

This first English language annotated compilation of thirty-seven treaties of the People's Republic of China contains treaties of commerce and navigation as well as friendship, boundary, consular, and dual nationality treaties. Each subject group begins with an explanatory essay. Concluding chapters examine recent developments between China and the United States and China and Japan. Maps appropriate to the boundary treaties are included.

Pollution, Politics, and International Law: Tankers at Sea, by R. Michael M'Gonigle and Mark W. Zacher. Berkeley, California, University of California Press, 1979. 412 pp. $15.95.

This book documents international efforts to control pollution of the oceans by oil. Since oil is the principal commodity transported over the oceans, the efforts for a legal regime for tankers reflect the international struggles for jurisdiction taking place for the oceans as a whole. The political processes surrounding the International Maritime Consultative Organization and the United Nations Conference on the Law of the Sea are examined as they apply to pollution control, coastal state intervention and compensation, and jurisdiction and enforcement rights.

Technology and the Multinationals, by Jack Baranson, Lexington, Massachusetts, Lexington Books, D.C. Health & Co., 1978. 183 pp.

World economic trends are compelling U.S. corporations to alter their method of foreign involvement. The traditional "empire" relationships with owned and controlled subsidiaries are becoming outmoded due to: demands of newly industrializing nations for technology sharing, increasing risks of nationalization of capital investments, greater competition from foreign enterprises as suppliers of industrial technology, and escalation of research, development and capital investment costs. The new "commonwealth" approach to world marketing and production includes greatly expanded technology-sharing arrangements between U.S. corporations and noncontrolled foreign enterprises. Baranson illustrates these observations with case

studies from aircraft, automotive, computer, electronics and chemical industries.

A New International Commodity Regime, edited by Geoffery Goodwin and James Mayall. New York, St. Martin's Press. 1980. 237 pp.

A conference held by the Centre for International Studies at the University of London School of Economics and Political Science brought together trade experts from governments, mining companies, international organizations, universities, and research centers from several countries to discuss the case for an international commodity regime. Papers examine developing countries' desire for a program securing better terms for their commodity exports and industrialized countries' concern with ensuring a steady flow of raw materials for their industries. The volume draws together political and economic aspects of the intergovernmental debate.

The Middle Eastern States and the Law of the Sea, by Ali A. El-Hakim. Syracuse, New York, Syracuse University Press, 1979. 310 pp. $27.00.

This volume is a startlingly thorough, unequivocally documented, and refreshingly literate illumination of the Middle Eastern States and the law of the sea. The current conflict in the Arabian Gulf further guarantees the value of this text to students and scholars of international law and to those in business and government whose work relates to this vital oil producing region. This book emphasizes the importance of the Middle Eastern waterways to the shipping industry, to the petroleum industry, and ultimately to all industry.

Law and Offshore Oil Development: The North Sea Experience, by David B. Keto. New York, Praeger, 1978. 123 pp.

Estimated world wide offshore oil reserves exceed estimated land reserves. Advancing technology and increasing demand which could make development highly productive could be outweighed by the risk to oil companies of loss of rights to the oil due to an unstable framework of international law governing offshore development. Keto recommends the

establishment of a continental shelf regime. In evaluating the development of North Sea petroleum he reviews the growth of the law of the sea, international law affecting development, and national law and policy, principally of Britain and Norway. The North Sea experience sets forth, for other regions with offshore oil, a basis for negotiating zonal boundaries and demonstrates the usefulness of international arbitration in offshore boundary disputes.

A New Means of Financing International Needs, by Eleanor B. Steinberg and Joseph A. Yager with Gerard M. Brannon. Washington, D.C., The Brookings Institution, 1978. 256 pp.

Skyrocketing world population, proliferation of high technology, and growing interdependence of nations demand new sources of funds for international purposes. To continue international programs to aid poorer nations, control environmental threats, maintain world health programs and peacekeeping forces, the authors propose various methods of fund rainsing, such as contributions by national governments, direct taxes on firms and individuals, taxes on polluters of the marine environment, revenue from ocean mineral resources, and loans. The study provides world planners with an outline for shaping a future, more powerful, international revenue system.