

Antitrust and American Business Abroad, by James R. Atwood and Kingman Brewster

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Antitrust and American Business Abroad. By James R. Atwood and Kingman Brewster. Colorado Springs. Shephard's/McGraw Hill, 2nd ed. 1981, vol. 1, pp. xxxix, 359, Vol. 2, pp. xxi, 411.\$120.

The senior author's first edition of this book in 1958¹ was the first treatise to address this octopus-like theme. At the time the subject may have seemed arcane, but the extraterritorial reach of the United States antitrust laws had already raised troublesome legal issues and created adverse political reactions overseas. International antitrust law is a subject which has since attracted other scholars,² and it certainly is no longer arcane; the international implications of our antitrust laws are now routinely addressed when commercial lawyers gather,³ and a working knowledge of the subject belongs to the intellectual equipment of every practicing lawyer who advises clients on international transactions.

The occasion for a comprehensive and updated treatment of the subject could hardly be more timely. What is perceived abroad as an imperialistic expansion of the United States jurisdiction in the antitrust area, both procedural and substantive, has now spawned reactions which have come home with a vengeance. No longer are foreign governments content with diplomatic protests or other *ad hoc* reactions to specific instances of perceived overreaching by American courts or enforcement agencies; many foreign states have enacted systematic and broadly based defensive measures.⁴ Further, antitrust law is no longer a peculiarly American institution. The free market principles underlying our antitrust laws have been endorsed by the United Nations themselves,⁵ even though the effect of such endorsement, being hortatory in nature, may as yet be largely symbolic. More importantly, several countries, acting alone or in concert, most notably the European Economic Community, have enacted antitrust regimes which are no less keen than our own in seeking to assure the operation of the free market and which are no less vigorously enforced, even though the enforce-

1. K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* (1st ed. 1958).

2. See, e.g., W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAW* (2d ed. 1973); E. KINTER & M. JOELSON, *AN INTERNATIONAL ANTITRUST PRIMER* (1974); B. HAWK, *UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE* (1979).

3. See, e.g., *Antitrust and International Trade—Special Rules* (28th Annual Spring Meeting, American Bar Association), 49 *ANTITRUST L. J.* 1185-23 (1980).

4. See, e.g., Pettit and Styles, *The International Response to the Extraterritorial Application of United States Antitrust Law*, 37 *BUS. LAW.* 697, 699-714 (1982).

5. UNCTAD, *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, UN Doc TD/RBP/CONF/10 (1980), reprinted in 19 *INT'L LEGAL MATERIALS* 813 (1980).

ment mechanism and philosophy of such foreign antitrust regimes may differ vastly from our own. Finally, in 1958 the American economy was pre-eminent in the world, while today it is comparatively of a lesser stature. This fact alone has curtailed the ability of the United States to project its "home grown competitive ethic" into the international environment; when viewed in conjunction with the changed international legal environment, it gives ample reason for a sober reassessment of the extraterritorial application of American antitrust law and its supporting procedural rules.

Atwood's revision of Brewster's pioneering work⁶ is, therefore, a welcome guide to the "Great Grimpen Mire"⁷ that is international antitrust. One could not wish for more competent pilots. After he wrote the first edition, Brewster went on to become the President of Yale University and our ambassador to the court of St. James. Atwood was associated with the Department of State while his work on this revision was in progress. From their varied experiences, the authors bring to bear on the subject the combined insights of the scholar, the diplomat, and the private counselor in a thoughtfully balanced manner.

Not surprisingly, then, the authors' approach is practical in the best sense of the term. The book begins with an outline of the global context in which the legal rules of our antitrust laws operate when applied beyond our shores, including economic constraints such as the raw materials deficit and the intertwined political tensions stemming from the traditional East-West confrontation and the often acrimonious North-South dialogue. The same approach is used in the presentation of each topic. For instance, the chapters on particular business ventures, such as exporting, licensing and the like, begin with an outline of what a business firm may wish to do within the concrete international setting in which it finds itself, and then move on to discuss how antitrust rules steer, channel, promote or frustrate such undertakings. At a time when much academic writing on antitrust law makes the law appear to be a mere appendage of micro-economic theories, this book is a healthy reminder that the antitrust laws, at least in the international arena, are embedded in a rich and complex setting which does not permit any single mode of analysis.

In a traditional subject-matter sense, the substantive core of the book is a brief number of chapters dealing with specific types of business transactions and their international antitrust implications. Chapters 9 and 10 dis-

6. J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* (2d ed. 1981) [hereinafter cited as ATWOOD & BREWSTER].

7. *The Hound of the Baskervilles*, 2 A. DOYLE, *THE ANNOTATED SHERLOCK HOLMES* 3, 47 (W. Baring-Gould ed. 1967); Fortenberry, *Jurisdiction over Extraterritorial Antitrust Violations—Paths through the Great Grimpen Mire*, 32 OHIO STATE L.J. 519 (1971).

cuss export and import arrangements; chapter 11 treats the licensing of patents, trademarks, and unpatented information; and chapter 12 deals with investments, joint ventures and similar arrangements involving United States and foreign enterprises. This discussion is preceded by a presentation of the doctrinal, historical, and policy concerns of the extra-territorial reach of our antitrust laws. Chapters 2, 5, and 6 present a lucid presentation of the jurisdictional and substantial developments of this aspect of the law from its timid origin in *American Banana*⁸ via the landmark *Alcoa* case⁹ to the present attempts at refinement in cases such as *Timberland*¹⁰ and *Mannington Mills*.¹¹ Already intricate, this canvas is enriched, in chapter 3, by a guided tour through the United States foreign trade laws, whose origin and purpose is unconnected to the concerns of antitrust but whose operations in the real world impinge upon it: subjects such as GATT, the statutory regulation of imports, and regulated industries such as ocean shipping, aviation, insurance, and agriculture. This area is complex in itself. The bewildered novice leaves it somewhat comforted by the authors' valiant attempt to provide a lucid exposition of an opaque subject. When thus viewed as a whole, our law pertaining to international commerce is not only fraught internally with conflicts of policy and uncertainty of doctrine, it is confronted with competing legal regimes as it travels beyond the water's edge.

In chapter 4, the authors discuss the reaction of foreign governments to the extraterritorial applications of our antitrust laws that are perceived abroad as improper incursions into legitimate preserves of foreign states or the rights of their nationals. The most extreme of these foreign reactions was pioneered by the United Kingdom. Among other provisions, the Protection of Trading Interests Act of 1980¹² introduced a concept which was new to English law and, at the time, to other legal systems as well: A defendant meeting certain qualifications who has suffered a treble damage judgment in the United States now has a cause of action in the British courts to recover from the successful plaintiff the excess of the American judgment over the actual damages which the foreign plaintiff has incurred. A similar

8. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (doctrine of strict territoriality, excluding all foreign acts from the scope of the Sherman Act).

9. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (establishment of so-called "effects" tests).

10. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) (application of a jurisdictional rule of reason).

11. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) (suggestion of ten-factor balancing test).

12. See, Pettit and Styles, *supra* note 4, at 701 et seq.

statute has since been enacted in Australia¹³ and one is under consideration in Canada.¹⁴ Less assertive protective statutes, ones preventing the enforcement of United States judgments under certain circumstances, have been enacted by a number of countries, and an even larger number of countries have passed legislation designed to inhibit the exercise of discovery orders by American courts. Characteristically, such legislation provides for the involvement of the executive in its implementation, thus permitting perhaps a more predictable balancing of the conflicting policy interests than decentralized balancing attempts by individual courts. The breadth and frequency of these foreign responses belies the assertion by some commentators¹⁵ that the motivations of foreign countries are merely cynical attempts to protect their own nationals against their just desserts. This is further reflected in the existence and vigor of foreign antitrust laws. Chapter 13 provides an overview of such foreign antitrust regimes, principally in the European Economic Community. In this comparative chapter, the authors emphasize that the doctrinal underpinnings for the extraterritorial application of the United States antitrust laws are by no means unique or exotic. Thus, the basic principle underlying the "effects" test as established in *Alcoa* is shared by the Commission of the European Economic Community and by the antitrust statutes of Germany, Australia, and other countries.¹⁶ On the other hand, our reliance on private antitrust suits, reflecting, as it does, our faith in the efficacy of private litigation as a tool to accomplish public objectives, is uniquely American and is not shared abroad. As a British law reform commission has put it: "A society in which all human and social problems were regarded as apt for a legal remedy or susceptible to legal procedures would not be one in which we would find it agreeable to live."¹⁷ Particularly instructive in this connection is a comparison between the familiar mechanism of pre-trial discovery as a mainstay in the American enforcement system (chapter 15) and the reliance on regulatory controls elsewhere.

In the final part of the book the authors offer an evaluation of the impact of the application of the U.S. antitrust laws to business activities abroad and offer recommendations how better to attune our antitrust laws and their administration to the realities of the international environment. Both their evaluation and their recommendations are offered with characteristic modesty and circumspection. The authors conclude that "it is diffi-

13. *Id.*, at 710-11.

14. *Id.*, at 708-09.

15. *See, e.g., remarks at ABA Proceedings, supra* note 3, at 1223.

16. 2 ATWOOD & BREWSTER, *supra* note 6, at 148-49.

17. *New York Times*, October 19, 1979, at D4, col. 1.

cult to build a convincing case that antitrust as presently applied has had a major negative effect on American business abroad."¹⁸ They concede some adverse effects, but they believe that these are counterbalanced by the opening of markets which otherwise might have remained closed by private agreement.¹⁹

In addressing the question of what adjustments should be made, the authors remind the reader that the U.S. antitrust laws must serve a variety of needs and accommodate a variety of policies. Nonetheless, they do not hesitate to present formal recommendations addressed to Congress, the enforcement agencies and the courts. Perhaps the most ambitious legislative proposal is for congressional action to create a presumption against the availability of the treble damage remedy in certain situations involving only indirect contacts with the United States.²⁰

A reviewer cannot blame the authors for having written the book they wrote rather than the book the reviewer might wish that someone would write: "U.S. antitrust as seen through foreign eyes".²¹ Perhaps only such a book could fully elucidate the intensity of foreign concerns (of which counsel engaged in advising foreign clients are well aware²²), and help distinguish areas of international consensus from those where the intellectual and institutional solutions adopted in this country are parochial and, when seen from abroad, inept. Such a treatment might serve as a useful antidote to the ethnocentric perspective that underlies not only much of our traditional enforcement philosophy but also, ironically, some scholarly writing in the international field.²³ It is out of an awareness of such foreign concerns that these reviewers wish the authors had included among their recommendations restraints on the extraterritorial scope and reach of American discovery procedures. To be sure, discovery is not a tool that is unique to the antitrust laws. But it was in the context of antitrust enforcement, in particular through private plaintiffs, that foreign persons and governments learned perhaps their most unhappy lessons on this procedural aspect of American law.

18. 2 ATWOOD & BREWSTER, *supra* note 6, at 308-09.

19. *Id.*

20. *Id.* at 355.

21. See Stiefel, review of E. KINTNER & M. JOELSON, *supra* note 2, at 6 CAL. W. INTL. L. REV. 434 (1976).

22. See, e.g., remarks by Rosenthal, 49 ANTITRUST L.J. (*supra* note 3), at 1195 (foreign officials viewing the U.S. antitrust laws not as neutral principles but as a plot to disadvantage foreign businesses).

23. See, e.g., Note, *Power to Reverse Foreign Judgments: The British Clawback Statute under International Law*, 81 COLUM. L. REV. 1097 (1981) (arguing that British Protection of Trading Interests Act violates international law).

The first edition of this book was not only a pioneer among scholarly studies, it helped make a contribution to the development of the law. Its call for a retreat from the "effects" test of *Alcoa* in favor of a balanced approach to the jurisdictional determination²⁴ has commended itself to the *Timberlane* court²⁵ and other American courts²⁶, and it should find the approval of foreign commentators otherwise critical of the perceived tendency of our laws to overreach.²⁷ This second edition may prove equally influential. It is certain to be seriously studied by practicing counsel, enforcement officials, and judges as well as (one may hope) by legislators.

But a word of caution seems in order. While the concept of a balanced approach has appealed to most observers, it is not certain whether it provides the answer to the conflicts created by extraterritorial assertions of American antitrust jurisdiction. Some objections, such as the complexity of balancing tests or the risk of denial of the protection of the laws to an injured plaintiff for policy reasons,²⁸ may not withstand scrutiny. Our courts are routinely entrusted, and are quite able to cope, with complex issues calling for the evaluation and balancing of complex factors; *and* jurisdictional determinations involving issues of comity do not constitute choices between "law" and "policy" (with the possibility that "law" might lose out) but rather constitute, in their entirety, legal determinations not unlike conflicts of laws questions generally.²⁹ It may, however, be legitimately asked "whether it is effectively more insulting to the sovereignty of a foreign country for its interests to be ignored under an 'effects' test or to be directly considered and found inconsequential under a 'balancing approach'".³⁰ As suggested above, foreign objections to our legal practices have not been so much directed at the "effects" doctrine as such but to typically American procedural and enforcement mechanisms, principally our heavy reliance on private suits buttressed by the contingent fee system, absence of cost recovery by a successful defendant, discovery, and the multiple damage remedy.³¹ Foreign legislative reactions have, accordingly, been

24. 1st ed. at 446.

25. *Supra*, note 9, at 613.

26. *See, e.g., Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 870 (10th Cir. 1981) (citing both *Timberlane* and the 1st edition with approval).

27. *Cf.*, Pettit and Styles, *supra* note 4, at 714-15 (approving of moderating tendency believed to be reflected in *Timberlane* and *Mannington Mills*).

28. Binkowski, *Timberlane: Three Steps Forward, One Step Backwards*, 15 INT'L LAW. 419, 423 (1981).

29. *But see*, Griffin, review of ATWOOD & BREWSTER, *supra* note 6, 13 L. & POLICY IN INT'L BUSINESS 871, 875-77 (1981) (doubting trial courts' ability to undertake proper balancing, as suggested by *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980)).

30. *Id.*, at 422.

31. *See, e.g.*, HANSARD, HOUSE OF COMMONS, November 16, 1979, at 1535 (remarks by

principally directed against these elements. It is doubtful whether our procedural techniques will be modified in deference to foreign concerns, although, if the authors have their way, the treble damage remedy would be so modified. As to subject-matter jurisdiction, these reviewers are not convinced that our courts have yet declined jurisdiction under a "balancing" test where they would have asserted it under an "effects" test.³² Thus, the jury is still out on the issue of "our law against theirs." Whatever the verdict, the authors have doubtlessly done their part to respond to the invitation expressed in the House of Commons when the Protection of Trading Interest Act was debated:

The late Sir Winston Churchill said that jaw-jaw was better than war-war. For years we tried jaw-jaw. We have now been driven to law-law. That is the situation in which we have landed. We hope that the American authorities will notice our reluctance and draw the conclusion that is for them now, in the fullness of time, after the Bill is enacted, to come forward with their ideas on how we should proceed beyond that.³³

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Secretary of State for Trade Nott).

32. *Cf.*, *Conservation Council of Western Australia, Inc. v. Aluminum Co. of America*, 518 F. Supp. 270 (W.D. Pa. 1981) (complaint by Australian environmentalist group seeking injunction against activities carried on entirely within Australia dismissed, *inter alia*, for lack of jurisdiction).

33. HANSARD, HOUSE OF COMMONS, November 16, 1979, at 1591 (remarks by Under-Secretary of State for Trade Tebbit).

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