

## Competition in International Business, Edited by Oscar Schachter and Robert Hellowell

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## BOOK REVIEWS

**Competition in International Business**, edited by Oscar Schachter and Robert Hellawell. New York, Columbia University Press, 1981, 441 pp. Index. \$35.

This conference volume, sponsored by the Columbia University Center for Law and Economic Studies, is a timely response to the increasing dissatisfaction of the developing nations with the dominant position of multinational companies in their international business practices. It is not uncommon, and quite understandable, for nations with lesser power to resent the greater power of other nations and their instrumentalities—private and public—operating in the recipient countries. It is, therefore, of prime importance that the subject be explored in depth by experts. This has been admirably accomplished in the essays, commentaries and observations of the conference participants.

As stated in its preface, this book was inspired by recent efforts in the United Nations to establish a code of conduct on restrictive business practices affecting international trade and development—a sort of international antitrust law. The code was adopted in the United Nations in 1980. Although not legally binding, it does serve as a consensus that anti-competitive practices adversely and markedly affect international trade and economic development. It forms the general framework, for the substantive scholarship undertaken in the Columbia project.

The idea of such a code is not new. Its roots may be traced as far back as the Atlantic Charter of 1941. President Roosevelt and Prime Minister Churchill, respecting their two governments, declared their desire and endeavor to further the economic prosperity of all states. To achieve this goal, they deemed it necessary that all states enjoy access on equal terms to the trade and raw materials of the world. In the master lend-lease agreements (signed by the USSR, the UK, Belgium, Poland, the Netherlands, Greece, Czechoslovakia, Norway and Yugoslavia), the U.S. provided that the final settlements should not burden commerce, but should promote mutually advantageous economic relations between states and the betterment of worldwide economic relations. They agreed to the aims of elimination of all forms of discriminatory treatment in international commerce, the reduction of tariffs and other trade barriers, and to all of the objectives set forth in the joint declaration of Roosevelt and Churchill. This agreement was followed by the Bretton Woods Conference of 1944, which established the International Monetary Fund and the International Bank for Reconstruction and Development, in which United States membership was authorized by Congress in the Bretton Woods Agreement Act of July 31, 1945. While

concentrating on problems of international money and finance, the Final Act of the Conference, containing the fundamental concepts embodied in the prior conferences, included a reference for reducing obstacles to international trade and set the stage for the adoption by the Dumbarton Oaks draft of a proposed United Nations. These concepts were broadened by the adoption of the United Nations Charter in 1945.

It is against this back-drop of U.S. initiative and leadership in post-World War II international conferences that the Economic and Social Council of the UN began its consideration of what was to emerge as a proposed International Trade Organization, the Havana Charter (again put forth by the United States). Articles 46-54 dealt specifically with curbing restrictive business practices. Due to Congressional opposition, the U.S. denied final approval, and the proposed I.T.O. was aborted.

This historic perspective is essential to an understanding of Schachter and Hellowell's conference volume and, as brought out by a number of the participants, the need for a continuing (or perhaps, revived) U.S. leadership. This leading economic role is imperative because of the dominant position of the U.S., particularly *vis-a-vis* the developing nations. In this, the cooperation of U.S. multinational companies is a key factor. There are signs that this effort has begun. Thus, the Columbia volume edited by Schachter (Hamilton Fish Professor of International Law) and Hellowell (Professor of Law at Columbia) comes at an opportune time in the fast-moving relations between the U.S. and other countries.

The problem of restrictive business practices has a different dimension from the problem as it was considered in the post-war conferences. The proliferation of multinational companies, brought about in large part by technological advances, has created specific problems in the developing countries which must be addressed.

The tone of the book is set by N.T. Wang in his introductory essay "Analysis of Restrictive Business Practices by Transnational Corporations and Their Impact on Trade and Development." He emphasizes the new role of the transnationals as one of the appointed agents of development, requiring an adjustment by them as well as a new approach by governments. Such an adjustment by the transnationals is crucial not only to their future relations with the lesser developed countries (LDCs), but also to the LDCs' attainment of their own aspirations.

Wang's essay leads to the related aspects which in the form of commentaries and discussions, follow each of the six subsequent principal essays: "Control of Terms and Conditions for International Transfers of Technology to Developing Countries," by Douglas F. Greer; "Restrictive Business Practices in the International Transfer and Diffusion of Technology," by Sigmund Timberg; "Economic and Political Characteristics of Cartel and Cartel-like Practices," by Robert E. Smith; "International Car-

tels and Their Regulation," by James A. Rahl; "Merger Control in Western Europe: National and International Aspects," by Kurt Markert; and finally, "The Seeking of a World Competition Code: Quixotic Quest?", by Joel Davidow. These essays are subjected to close scrutiny and dissection through Commentaries and Discussion by such recognized authorities as Mark Joelson, David Gill, Walter Glass and others who have contributed to the stimulating coverage of a subject which is always at the forefront of U.S. international trade relations (the individuals are listed on pages 429-432). One can only be impressed with their treatment of a complex subject which is never free from controversy.

Perhaps the most important essays are those dealing with the transfer of technology, a subject which vitally concerns the foreign policy of the United States. Greer, drawing on his rich experience as Consultant to UNCTAD and service with the Federal Reserve Board of Governors, has given us a thorough coverage of the issues raised, and perhaps has provoked the liveliest of the comments. A major point is that restrictive business practices, if left unchecked, impose excessive and needless costs on the LDC's receiving technology due to an imbalance in bargaining power. This is not surprising since the principle of the use or abuse of power is reflected throughout national as well as international restrictive business practices. Because, as Greer points out, the adverse conditions imposed on LDCs, especially in the nonconventional and non-competitively supplied technology, arise mainly from the structural circumstances, corrective measures to improve the lot of the LDCs should focus on structural remedies. Curbing international mergers (e.g. Bayer of Germany and Miles Laboratories of U.S.), abolishing advanced-country cartels, expanding the international jurisdiction of the U.S. antitrust laws, and divesting domestic monopolies of their large foreign subsidiaries are the major policies Greer outlines. This reviewer whole-heartedly agrees with him that the most effective way to improve the terms for recipients is to change the structure of industries so that there are potentially more independent suppliers of the technology.

Timberg's essay, together with Greer's, forms a complete blend of treatment on restrictions in technology-licensing arrangements in the transfer of technology. Timberg is an old hand at international antitrust matters and international trade in general. Therefore, it is not surprising, that his article is scholarly, and, at the same time, pragmatic. Since much of technology transfer is in the form of licensing, this aspect treated by Timberg takes on special significance.

The two essays which follow deal with cartels. A cartel is described as "like a labor union . . . a political institution with economic consequences", and following Heinrich Kronstein, is defined as an association wherein the "members impose parallel restrictions upon their conduct, that have the effect of market regulation." As used by Smith, cartel encompasses "a broad

array of techniques to coordinate horizontal interfirm activities." Cartels are an amalgam of goals, coordinating devices and operational techniques. His emphasis is on understanding the nature of market power. He deals incisively with the drive initiated by the LDCs toward a "New International Economic Order." Smith's graphic illustration of the four components of market power is instructive. He has written extensively on cartels and international competition policy, and his coverage of the economic and political characteristics of the cartel demonstrates his rich governmental experience.

Rahl deals with the regulation of international cartels essentially private in nature, but apparently he cannot refrain from stating his opinion that restrictive practices created by various governments interfere more with free trade than do private cartels. In the examples that he cites this may be true, but there may be instances where, in the opinion of this reviewer, that is not so. This is not the place to take issue with Rahl, since he touches this aspect very lightly and it does not form part of the essential core of his study. Rahl demonstrates how cartels thrive when antitrust laws are ineffective or absent, and he traces the international impact of U.S. and European Economic Community antitrust laws against cartels. In his section on limitations on the effectiveness of antitrust law, he really gets into the meat of the legal questions rather than the economic issues, covering international procedure and enforcement, jurisdiction and discovery. This aspect is of special interest to those of us who are engaged in international legal practice.

Kurt Markert, in his review of European merger law, covers the laws of the Federal Republic of Germany (Sections 23-24 of the Act Against Restraints of Competition—considered the most sweeping merger law in Europe), France (The Act to Control Economic Concentration and Prevent Unlawful Cartels and Abuses of Dominant Positions, 1977), the United Kingdom (included in the Fair Trading Act of 1973), the European Coal and Steel Community (E.E.C., Articles 85-86 of the E.E.C. Treaty)—all of which differ substantially from U.S. merger laws.

Davidow's scholarly essay (the final one in the book) on international codes of conduct and conventions deals primarily with the United Nations Conference on Trade and Development (UNCTAD) and UN-OECD efforts, culminating in the Transfer of Technology Code and the Restrictive Business Practices Code, which function as voluntary guidelines. This reviewer tends to agree with the view of Seymour Rubin, a participant in the Columbia Conference and a prolific writer on international trade, in his review of "Legal Problems of Codes of Conduct for Multinational Enterprises", Vol. I, edited by Norbert Horn in 76 AM. J. INT'L L. 191, 193 (1982): ". . . The relevance of codes to improvement of the economic and social circumstances of the developing nations is somewhat in doubt." How-

ever, such codes as evolving documents serve to focus attention, of which this book is an example, on the matters which must be addressed. In this connection, the wise words of Oliver Wendell Holmes are relevant: "I find the great thing in this world is not so much where we stand as in what direction we are moving."

This wealth of material is not conducive to easy reading or analysis. It is obviously not intended as such, and is not recommended for other than the academic expert in the field, the governmental official involved in international antitrust matters or the legal practitioner in this speciality. The subject, "Competition in International Business," cannot be simplified, but it is a mark of great professional skill that the eminent editors of this outstanding study have organized this volume into essays, commentaries and discussion which tell the story so completely and articulately. In this sense, it joins the hope for international trade that a great statesman cherished many years ago: "The spirit of commerce has a tendency to soften the manners of men, and to extinguish those inflammable humours which have so often kindled into war." - Alexander Hamilton, 1787.

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