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An International Antitrust Primer, and Foreign Commerce and the Antitrust Laws

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AN INTERNATIONAL ANTITRUST PRIMER. By *Earl W. Kintner* and *Mark R. Joelson*. New York: Macmillan. 1974. Pp. xiv, 391. \$12.95.

FOREIGN COMMERCE AND THE ANTITRUST LAWS. Revised Ed. By *Wilbur L. Fugate*. Boston: Little, Brown. 1973. Pp. xxv, 602. \$35.

Some seventeen years ago, Kingman Brewster and Wilbur Fugate published their respective treatises on the application of United States antitrust legislation to foreign commerce.¹ Since that time, important, relevant legal developments have occurred,² as well as events such as the debate over the wisdom and feasibility of antitrust litigation against the OPEC cartel,³ the congressional investigation of the antitrust implications of corporate bribery of foreign government officials,⁴ and the formal initiation of proceedings against prominent foreign concerns.⁵ Yet, until the publication of *An Inter-*

1. K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* (1958); W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* (1958).

2. One of the more significant developments is the application of the Celler-Kefauver Anti-Merger Act, 15 U.S.C. §§ 18, 21 (1970), to foreign commerce. *See, e.g., United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal. 1966). In addition, important jurisdictional developments have occurred within domestic law, *see, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), and antitrust legislation has been enacted by other governments and integrated economic communities. *See, e.g., Treaty of Rome of the European Economic Community*, March 25, 1957, arts. 85, 86, 298 U.N.T.S. 11, 47-49; *Treaty Instituting the European Coal and Steel Community*, April 18, 1951, arts. 65, 66, 261 U.N.T.S. 140, 194-205.

3. *See Adams, Bringing OPEC to the Bar*, Wall St. J., May 20, 1975, at 22, col. 4; BNA Antitrust & Trade Reg. Rep. No. 717, at A-21 (June 10, 1975); *id.*, No. 725, at A-24 (Aug. 5, 1975); *id.*, No. 729, at A-24 (Sept. 9, 1975).

4. *See* 5 TRADE REG. REP. ¶ 50,238 (testimony of D. Baker, Deputy Asst. Atty. Gen., Antitrust Division, before the Subcomm. on International Economic Policy of the House Comm. on International Relations, July 24, 1975).

5. The FTC has initiated litigation against Nestle Alimontana, S.A. of Switzerland because of its acquisition of Stouffer Corporation, *see* Wall St. J., Jan. 22, 1975, at 19, col. 1, and the Brunswick Corporation because of its acquisition of 38 per cent of the Japanese company Sanshin Kogyo, *see id.*, May 8, 1975, at 5, col. 1.

The Antitrust Division has indicated a serious interest in attacking price-fixing agreements that affect domestic markets, *see* BNA Antitrust & Trade Reg. Rep. No. 725, at A-12 (Aug. 5, 1975), in challenging an alleged international uranium cartel, *see id.*, No. 724, at A-12 (July 29, 1975), and in taking action against the German firm CHH-AV in relation to its recent domestic acquisitions, *see* CCH Trade Reg. Rep. No. 179, at 5 (June 2, 1975). An Antitrust Division spokesman recently stated that a government suit to enjoin the merger of two foreign firms "could be brought where a substantial percentage of their foreign production was exported to U.S. markets . . ." Address by Assistant Chief of the Foreign Commerce Section, D.E. Rosenthal, Business International Roundtable on Antitrust Policy, Washington, D.C., Oct. 15, 1975, BNA Antitrust & Trade Reg. Rep. No. 735, at A-17 (Oct. 21, 1975).

national Antitrust Primer (Primer) by Earl Kintner and Mark Joel-son⁶ and the second edition of Fugate's *Foreign Commerce and the Antitrust Laws*,⁷ there had been virtually no comprehensive treatment of international antitrust law.⁸

An author's success must be assessed in part with reference to his objective. The first edition of the Fugate book stated that it was designed "as a guide for the general practitioner who has little ex-

6. Both Kintner and Joelson practice law in Washington, D.C. Kintner has served the FTC as member, general counsel, and chairman, and is the author of several other books in the antitrust-trade regulation area: AN ANTITRUST PRIMER (2d ed. 1973); PRIMER ON THE LAW OF MERGERS (1973); and A ROBINSON-PATMAN PRIMER (1970).

Several of the chapters in this book have appeared elsewhere. Chapter 12, *Groping for a Truly International Antitrust Law*, is essentially Kintner, Joelson & Vaghi, *Groping for a Truly International Antitrust Law*, 14 VA. J. INTL. L. 75 (1973), and the section of chapter 11, *Some Important Antitrust Laws*, devoted to the United Kingdom is essentially Kintner, Joelson & Griffin, *Recent Developments in United Kingdom Antitrust Law*, 19 ANTITRUST BULL. 217 (1974).

7. Mr. Fugate was Chief of the Foreign Commerce Section of the Antitrust Division from 1962-1973 and now practices law in Washington, D.C. The first edition of the book was based upon an S.J.D. thesis written at George Washington University Law School. For a discussion of the differences between the editions, see note 10 *infra* and accompanying text.

8. There have been numerous discussions of antitrust and foreign commerce, many of excellent quality, in the legal and economic periodical literature. As would be expected, most of these articles have focused on rather narrow topics. See, e.g., Adelman & Brooks, *Territorial Restraints in International Technology Agreements After Topco*, 17 ANTITRUST BULL. 763 (1972); Allison, *Antitrust and Foreign Trade: Exemption for Export Associations*, 11 HOUSTON L. REV. 1124 (1974); Bloch, *Extraterritorial Jurisdiction of U.S. Courts in Sherman Act Cases*, 54 A.B.A.J. 781 (1968); Cooper, *Tax and Antitrust Aspects of Foreign Licensing Transactions*, 13 UCLA L. REV. 25 (1965); Donovan, *The Legality of Acquisitions and Mergers Involving American and Foreign Corporations Under the United States Antitrust Laws*, 39 S. CAL. L. REV. 526 (1966) (pt. I), 40 S. CAL. L. REV. 38 (1967) (pt. II); Fugate, *Antitrust Aspects of Transatlantic Investment*, 34 LAW & CONTEMP. PROB. 135 (1969); Fugate, *Application of Antitrust Laws of the United States to International Trade: A Government Lawyer's View*, 13 PRAC. LAW., Feb. 1967, at 25. Graham, Hermann & Marcus, *Section 7 of the Clayton Act and Mergers Involving Foreign Interests*, 23 STAN. L. REV. 205 (1971); Graziano, *Foreign Government Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INTL. LAW 100 (1967); Haight, *The Restrictive Business Practices Clause in United States Treaties: An Antitrust Tranquillizer for International Trade*, 70 YALE L.J. 240 (1960); Heil & Vorbrugg, *Antitrust Law in West Germany: Recent Developments in German and Common Market Regulation*, 8 INTL. LAW. 349 (1974); Hildebrand & Matsushita, *Anti-monopoly Law of Japan—Potential Consequences of International Contract Violation*, 6 N.Y.U. J. INTL. L. & POL. 215 (1973); Joelson, *International Technology Transfers and the United States Antitrust Laws*, 8 J. INTL. L. & ECON. 85 (1973); Jones, *American Antitrust and EEC Competition Law in Comparative Perspective*, 90 L.Q. REV. 191 (1974); McFetridge, *The Emergence of a Canadian Merger Policy: the ERCO Case*, 19 ANTITRUST BULL. 1 (1974); Scott & Yablonski, *Transnational Mergers and Joint Ventures Affecting American Exports*, 14 ANTITRUST BULL. 1 (1969); Timberg, *Impact of Antitrust Laws on Multinational Licensing and Franchising Agreements*, 13 ANTITRUST BULL. 39 (1968); Victor, *Multinational Corporations: Antitrust Extraterritoriality and the Prospect of Immunity*, 8 J. INTL. LAW & ECON. 11 (1973); Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 VA. J. INTL. L. 747 (1974).

perience in this field, for the economist or business executive who wants to be quickly oriented in one of the areas covered and for the specialist who desires a ready reference tool."⁹ This "deskbook" orientation is also characteristic of the second edition. While the organization of the second edition is quite like that of the first, the author has enlarged most chapters to encompass recent developments and added entirely new sections to the book.¹⁰

In the *Primer*, Kintner and Joelson have similarly sought to "provide a readily usable [work] to help and alert the business executive to shape his activities . . . and . . . to provide an up to date reference for the general practitioner" (dustjacket). Thus, the stated objectives of the respective authors are very much the same.

Unlike Professor Brewster's *Antitrust and American Business Abroad*, both the Fugate and the Kintner-Joelson books are primarily descriptive and place little emphasis on policy analysis. For example, despite the controversy in recent years over whether the United States antitrust laws disadvantage American businesses in foreign trade,¹¹ neither book contains much discussion or analysis of the question.¹² Neither book treats in a sophisticated way the public policies underlying our antitrust legislation or its effects on our relations with other governments. Neither attempts to apply economic analysis to the law.¹³

The organization of the two works is quite similar. Both begin with a summary of federal antitrust legislation, its background and philosophy, and its application by the courts.¹⁴ Both books next ex-

9. Oppenheim, *Editor's Foreword* to W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* at viii (1958). It is interesting that the second edition contains no such representation.

10. For example, the author has expanded his discussion (*see* pp. 243-45) of the Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1970), to include specific treatment of government-financed export sales in response to *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199 (1968). Chapters 15 and 16 (pp. 433-91), discussing antitrust trends in foreign commerce and foreign antitrust laws, are new additions to the book.

11. *See, e.g., Hearings on International Aspects of Antitrust Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 3-36, 146-631 (1974). Fugate finds surprising the recent claims that American commerce is hindered and cites Senator Hart as authority for the contrary view (p. 2).

12. For a recent and interestingly written analysis of antitrust and international buying cooperation, *see* Davidow, *Antitrust, Foreign Policy, and International Buying Cooperation*, 84 *YALE L.J.* 268 (1974).

13. Although all antitrust scholarship need not be economic in orientation, it nevertheless is important that the antitrust bar consider the economic ramifications of antitrust developments. For a recent example of such treatment, *see* Posner, *Exclusionary Practices and the Antitrust Laws*, 41 *U. CHI. L. REV.* 506 (1974).

14. Fugate begins with a brief discussion of the history of economic regulation of industrial organization, follows with a summary examination of each of the statutes, and concludes with a discussion of public and private enforcement mechanisms (pp. 6-28). The Kintner-Joelson discussion, similarly organized except for the discussion of enforcement mechanisms, is less detailed and informative (pp. 1-20).

amine subject-matter jurisdiction,¹⁵ jurisdiction over persons and corporations, discovery, and venue.¹⁶ In discussing the substantive law, both begin with the Sherman Act¹⁷ and then turn (in different orders) to the "auxiliary" antitrust regulatory statutes;¹⁸ to the laws governing patents and trademarks,¹⁹ mergers, acquisitions and joint ventures;²⁰ and to foreign antitrust legislation.²¹ Each book does,

15. Under the rubric of subject-matter jurisdiction, Fugate considers the erosion of the "limited territorial" principle and the evolution of the "objective territorial" principle of jurisdiction that culminated in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (Hand, J.). The author also considers questions of comity, the act of state doctrine, *see* notes 33-39 *infra* and accompanying text, and the extraterritorial application of the *Noerr* doctrine, *see* notes 65-66 *infra* and accompanying text, within this context (pp. 29-86). Again, the organization of the *Primer* is identical though much less detailed (pp. 21-32).

16. The Fugate book's discussion of these topics is good, including a detailed treatment of the rights and obligations of subsidiaries, the seizure of property, and sovereign immunity, and an excellent treatment of forced production of documents by foreign corporations where such production raises the possibility of criminal or civil liability under foreign law (pp. 87-143). The Kintner-Joelson endeavor is similar, but again less detailed (pp. 33-68).

17. Fugate devotes three chapters to the proscriptions of the Sherman Act. In chapter 4, Fugate treats in some detail pricing arrangements, market-sharing, foreign distributorships, and refusals to deal (pp. 144-72), while in chapter 5, the rule of reason, ancillary restraints, and antitrust defenses are examined (pp. 173-200). Chapter 6 contains the author's treatment of monopolization (pp. 201-22). Kintner and Joelson divide their consideration of the Sherman Act into discussions of the nature of contracts, combinations and conspiracies, the rule of reason vis-à-vis per se offenses, price fixing, boycotts, refusals to deal, and monopolization (pp. 69-90). Separate discussions of vertical restraints on price, territorial allocation and other customer restraints on resale, and exclusive dealing then follow (pp. 90-104).

18. Fugate discusses the Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1970), in one chapter (pp. 223-54) and the other "auxiliary" statutes in another. The antitrust provisions of the Wilson Tariff Act, 15 U.S.C. §§ 8-11 (1970), the Robinson-Patman Act, 15 U.S.C. §§ 13, 13a-c (1970), and section 3 of the Clayton Act, 15 U.S.C. § 14 (1970), are discussed in some detail. A brief examination is included of the Shipping Act of 1916, 46 U.S.C. §§ 801-42 (1970), the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-542 (1970), the Federal Communications Act of 1934, 47 U.S.C. §§ 151-609 (1970), the Antidumping Act of 1921, 19 U.S.C. §§ 160-71 (1970), and section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337 (1970) (pp. 393-414). Kintner and Joelson treat only the Federal Trade Commission, 15 U.S.C. §§ 41-58 (1970), and Robinson-Patman Acts in any detail (pp. 105-17), reserving the other statutes for brief consideration in their chapter on exemptions (pp. 167-89).

19. Fugate has a chapter on patents (pp. 255-302) and one on trademarks (pp. 303-18). Of particular interest is his detailed discussion of cross licenses and patent interchanges (pp. 289-302). Kintner and Joelson devote one chapter to both trademarks and patents (pp. 139-66).

20. Foreign subsidiaries and foreign acquisitions and mergers are the subject of Fugate's chapter 10 (pp. 319-53), while foreign and foreign-related joint ventures form his chapter 11 (pp. 354-71). Kintner and Joelson deal with mergers, acquisitions, and joint ventures in one chapter (pp. 118-38).

21. Chapter 16 contains Fugate's discussion (pp. 469-91); chapter 11 contains that of Kintner and Joelson (pp. 190-259).

Both books also contain similar appendices. The Fugate book contains the text of the relevant domestic statutes and the rules of the Common Market (pp. 492-97, 552-53), the recommendations of the Organization for Economic Cooperation and Development (pp. 554-55), and a table of cases and secondary authorities (pp. 559-

however, contain some collateral material not found in the other.²²

While the books are similarly organized, the Fugate book is far more comprehensive in its treatment of the relevant law. For example, in his discussion of jurisdictional problems, Fugate devotes attention to the sensitive question of sovereign immunity and to the distinctions between the public and the proprietary functions of governments (pp. 111-14). In so doing, he analyzes the significant antitrust cases²³ and considers the applicable provisions of the *Restatement of Foreign Relations Law*, the policies of the Department of State, various treaty provisions, and the literature on the topics. In contrast, Kintner and Joelson do not discuss these issues. Unfortunately, neither book considers the converse and very timely question whether a foreign sovereign has standing to sue under the antitrust laws.²⁴

Another important distinction between the books is the respective authors' use of citations. While the Fugate book is well-documented with citations to statutes, decisions, regulations, and secondary materials, Kintner and Joelson generally eschew the use of ci-

71). It also includes a table of all of the foreign commerce cases that have been instituted by the Antitrust Division, including those settled by consent decree, indicating the nature of the action and its disposition (pp. 498-543). The appendix to the *Primer* contains the text of the relevant domestic statutes and Common Market treaties (pp. 310-50, 363-76), a selected bibliography (pp. 273-309), and the Merger Guidelines of the Department of Justice (pp. 351-62).

22. For instance, Fugate devotes a chapter to a general discussion of the antitrust ramifications of investment abroad by United States companies and foreign investment in this country and concludes with a short examination of problems faced by the multinational enterprise (pp. 372-92). Fugate also examines antitrust relief (including the consent decree) in foreign commerce cases and the particularly difficult problems of obtaining and enforcing such equitable relief as a royalty-free license or a dedication in an international context (pp. 416-42). He also briefly evaluates the impact of United States antitrust enforcement on foreign commerce and foreign policy (pp. 443-66).

Kintner and Joelson separately explore antitrust exemptions (pp. 167-89) and examine the possibility of an "international antitrust law" (pp. 260-72).

23. Compare *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929), in which the French Government unsuccessfully contended that the defendant *Société Commerciale des Potasses d'Alsace* was a government entity, with *In re Investigation of World Arrangements*, 13 F.R.D. 280 (D.D.C. 1952), in which it was successfully contended that the Anglo-Iranian Oil Company was an instrumentality of Her Majesty's Government. See also *Petrol Shipping Corp. v. Kingdom of Greece*, 326 F.2d 117 (2d Cir. 1964); *In re Grand Jury Investigation of the Shipping Indus.*, 186 F. Supp. 298 (N.D. Cal. 1960).

24. After *United States v. Cooper*, 312 U.S. 600 (1941), which held that the United States government did not have standing to invoke the federal antitrust law, it appeared that no sovereign had the requisite standing to sue. Nevertheless, in recent years the governments of Iran, the Philippines, South Vietnam, and Kuwait have filed actions as plaintiffs. See *State of Kuwait v. Chas. Pfizer & Co.*, 333 F. Supp. 315 (S.D.N.Y. 1971). They have not, however, been allowed to sue as *parens patriae* on behalf of their citizens. *Pfizer, Inc. v. Lord*, 1975-2 Trade Cas. 67,045 (8th Cir. Aug. 27, 1975). A similar interesting, but only briefly discussed, question is whether the Sherman Act prohibits conspiracies that injure only foreigners. Cf. K. BREWSTER, *supra* note 1, at 82; Davidow, *supra* note 12, at 275.

tations. In their discussion of jurisdiction, for example, they state the facts and holdings of a number of cases but frequently fail to provide the reader with either the case names or citations.²⁵ Similarly, when quoting from secondary source material, they properly give credit to the source but give no page citation.²⁶ These omissions seriously compromise the book's value to lawyers.

The books are also distinguishable in their treatment of background material. Reflecting their intent to write a primer that would in part serve business people,²⁷ Kintner and Joelson rather painstakingly explore the general antitrust doctrine before discussing its application to foreign commerce. For example, in the *Primer's* discussion of territorial and customer restraints on resale, the basic principles of *White Motor Company*²⁸ and *Schwinn*²⁹ are first discussed before the problem is addressed in its international setting (pp. 94-97). Fugate presumes a greater prior acquaintance with the subject matter, but nevertheless frequently provides much background discussion.³⁰

Perhaps the most disappointing aspect of the Fugate book is the author's failure to draw more fully from his experiences as Chief of the Foreign Commerce Section of the Antitrust Division. For example, he appropriately discusses the "Fulton-Rogers Agreement,"³¹ but deals with its actual impact in only a very superficial manner (p. 51). Most antitrust practitioners are familiar with the agreement's existence and provisions but would like to learn whether it has been implemented in any meaningful manner and, if so, the details of that implementation.³²

Both books also suffer from sins of commission. An example is the authors' examination of the act of state doctrine. Fugate devotes considerable discussion to *American Banana*³³ (in which the

25. See, e.g., pp. 39-40.

26. See, e.g., p. 35.

27. Indeed, the book is subtitled *A Businessman's Guide to the International Aspects of United States Antitrust Law and to Key Foreign Antitrust Laws*.

28. *White Motor Co. v. United States*, 372 U.S. 253 (1963).

29. *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967).

30. For example, prior to discussing monopolization in international trade, the author sets out the elements of monopolization and examines the criteria utilized in defining the relevant product and geographic markets (pp. 201-06).

31. [1970] Can. Y.B. Intl L. 267-72. This informal agreement between the governments of the United States and Canada (named for then Attorney General Rogers and former Minister of Justice Fulton, and updated in 1969 by former Attorney General Mitchell and former Minister of Corporate and Consumer Affairs Bashford) provides for notification and consultation between the two governments when the interests of either will be affected by their respective antitrust enforcement.

32. Similarly, some amplification of the author's discussion of the Antitrust Division's business-review procedures would have been useful (see p. 23).

33. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). In that case a domestic corporation organized to import bananas to the United States brought

doctrine was formulated) and its progeny (pp. 75-82). He argues that the teaching of the case law is that, while liability under the Sherman Act cannot be founded "solely on the influencing of officials or legislation in another country" (p. 76, emphasis original), the act of state doctrine will not insulate allegedly anticompetitive acts if anything more is involved (p. 76). He concludes that the subsequent cases have distinguished *American Banana* except where foreign law or executive authority *requires or commands* the allegedly anticompetitive conduct; where there is no compulsion, the offense is cognizable in United States courts.³⁴ Kintner and Joelson, while devoting significantly less attention to the topic, reach a similar conclusion (p. 29).³⁵ While there is some authority for this proposition,³⁶ to proffer it as the state of the law is misleading.³⁷ Indeed, the Antitrust Division has recently recognized that present case law in the area is relatively uncertain.³⁸

It might be argued that the authors of both books have confused the act of state doctrine with its corollary, the doctrine of foreign

suit under the Clayton Act. The plaintiff corporation alleged that in 1903 its predecessor (McConnell) had started a banana plantation in the Department of Panama, United States of Colombia, and had begun to build a railway to transport his crop. McConnell was allegedly threatened by the defendant and told to combine with its interests or stop his operations. In November 1903, Panama revolted and established a government independent of Colombia. The following June, the plaintiff bought out McConnell and continued his operations. But the next month Costa Rican troops occupied the plantation, ejected the plaintiff, and halted railroad construction and plantation operations. Although an earlier arbitration agreement settling a boundary dispute between Colombia and Costa Rica over the Panamanian border had provided that the plaintiff's holdings were within the Department of Panama, that August, one Astua obtained an *ex parte* judgment from a Costa Rican court that declared the plantation to be his. Defendant's agents then purchased the lands from Astua. Costa Rica continued to assert jurisdiction over the area, and Panama subsequently consented to the acquisition. The trial court dismissed the plaintiff's suit for failure to state a cause of action and was affirmed on appeal.

34. Fugate asserts that there are three possible situations in which this defense may be asserted: first, when foreign law or executive authority requires or directs the act or contracts in question; second, when foreign law or executive authority acquiesces in such acts or contracts; and third, when foreign law does not prohibit such acts or contracts. Fugate asserts that only in the first situation should the defense apply (p. 76).

35. Kintner has also discussed the topic elsewhere and in somewhat greater detail. See Kintner & Hallgarten, *Application of United States Antitrust Laws to Foreign Trade and Commerce—Variations on American Banana Since 1909*, 15 B.C. IND. & COM. L. REV. 343 (1973).

36. See, e.g., Graziano, *supra* note 8, at 116. See also ABA, ANTI-TRUST LAW DEVELOPMENTS 367 (1975). *Continental Ore Corp. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962), and *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), are among the most frequently cited cases as authority for this position. However, these cases can be read otherwise.

37. See notes 39-55 *infra* and accompanying text.

38. See 5 TRADE REG. REP. ¶ 50,238 (testimony of D. Baker, Deputy Asst. Atty. Gen., Antitrust Div., before Subcomm. on Intl. Econ. Policy of the House Comm. on Intl. Relations, July 24, 1975).

government compulsion.³⁹ Recent case law well illustrates the entanglement. For example, in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*,⁴⁰ the plaintiff had been granted an exclusive concession by the Sheik of Umm al Qaywayn to explore for, extract, and sell oil. Defendants negotiated a similar arrangement with the Sheik of Sharjah.⁴¹ After learning of rich oil deposits within the plaintiff's concession, the defendants allegedly induced the Sheik of Sharjah to assert sovereignty over the oil-rich segment.⁴² The Sheik of Umm al Qaywayn was forced to relinquish his claim over the disputed territory,⁴³ and the land with its oil then fell within the defendants' concession. The defendants successfully argued that the act of state doctrine precluded consideration of the Sherman Act claims. There was no evidence, nor was an allegation required, that the foreign sovereign compelled or directed the defendants' participation in the allegedly anticompetitive conduct. Rather, the court assumed it was the defendants who induced the conduct of the Sheik of Sharjah. The court determined that an adjudication on the merits would nevertheless require it to sit in judgment on the acts of another sovereign done within the sovereign's territory.⁴⁴ And the court expressly stated that the act of state doctrine as articulated in *American Banana* barred its exercise of jurisdiction notwithstanding the fact that the allegedly anticompetitive conduct was induced or otherwise procured by the defendant.⁴⁵ This holding is in accord with *Ameri-*

39. The distinction between these doctrines has been recently recognized by the Deputy Assistant Attorney General in testimony before Subcomm. on International Economic Policy of the House Comm. on International Relations. 5 TRADE REG. REP. ¶ 50,238, at 55,445. Fugate's mixup is bizarre since he notes the distinct nature of the doctrine in a closing paragraph of his discussion of the topic (*see p. 82*).

40. 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd.*, 461 F.2d 1261 (9th Cir.) (*per curiam*), *cert. denied*, 409 U.S. 950 (1972).

41. Both Sharjah and Umm al Qaywayn are sheikdoms in what is commonly referred to as the Trucial States, now the United Arab Emirates, located at the southeastern tip of the Persian Gulf.

42. Prior to the discovery, the plaintiff and the defendants had amicably agreed to share seismic and subsoil test information. Presumably, the defendants learned of the plaintiff's good fortune in this manner.

43. The facts as alleged are colorful. The plaintiffs argued that the Sheik of Sharjah, in making his claim, had used fraudulently back-dated letters and decrees. The Sheik's representations had failed to convince the British Foreign Office, which, according to treaty, managed the foreign relations of the Trucial States. Undaunted, the defendants had allegedly enlisted the aid of the Iranian government. Ultimately, the British requested the plaintiff to refrain from its activities in the area until the dispute could be resolved. The British allegedly secured the consent of the Sheik of Umm al Qaywayn by stationing troops around the palace, "buzzing" the palace with British aircraft, and threatening the Sheik with exile.

44. 331 F. Supp. at 108. This is the classic formulation of the act of state doctrine expressed by the United States Supreme Court in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

45. 331 F. Supp. at 110. ("[T]he holding of *American Banana* that has endured is that the act of state doctrine bars a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by the defendant").

can Banana, yet it does not fit within Fugate's act of state rubric.⁴⁶ Nor does it stand alone among recent decisions.⁴⁷ *American Banana* therefore cannot readily be dismissed as no longer viable on this point.

A better distillation of the case law is that the act of state doctrine may appropriately be invoked whenever a court would be called upon to sit in judgment on the internal acts of another sovereign, notwithstanding that the defendant's conduct was un-compelled.⁴⁸ However, if a foreign state has required or directed the allegedly anticompetitive conduct, then a distinct but related doctrine, that of foreign government compulsion, applies.⁴⁹ A court determining whether these doctrines apply might properly look first at the most restrictive: If the alleged anticompetitive conduct is mandated by a foreign sovereign, the doctrine of foreign government compulsion should control.⁵⁰ If not, although Fugate and Kintner and Joelson seem to suggest the opposite, the inquiry is not terminated. Rather, the court should consider whether it would nevertheless be required to judge the propriety of the activities of a foreign sovereign.⁵¹

46. See note 34 *supra*.

I am not sure that I understand Fugate's treatment of *American Banana*. He suggests that that case is no longer good law to the extent it does not require the compulsion of a foreign sovereign as a requisite to the successful invocation of the act of state doctrine (p. 76). But *Occidental Petroleum* and other cases seem to undermine Fugate's thesis. I do agree that *American Banana* has been seriously eroded, but in a different way. A better reading of that decision would reveal its dual holding. First, dismissal was granted because the court held that the antitrust laws had no extraterritorial effect. I would agree that this segment of the Court's opinion has long since been abandoned. See, e.g., *United States v. American Tobacco Co.*, 221 U.S. 106, 184 (1911); *United States v. Aluminum Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945). Second, dismissal was granted under the act of state doctrine. This aspect of the opinion continues to be viable in cases like *Occidental Petroleum*.

47. See *Timberlane Lumber Co. v. Bank of America Natl. Trust & Sav. Assn.*, No. C-73-0792 (N.D. Cal. Feb. 28, 1974) (unreported).

48. See, e.g., *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (N.D. Calif. 1971); *Timberlane Lumber Co. v. Bank of America Natl. Trust & Sav. Assn.*, No. C-73-0792 (N.D. Cal. Feb. 23, 1974) (unreported).

49. An excellent example of this type of case is *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970) (discussed at pp. 80-81 in Fugate's book). In an action under the Sherman and Clayton Acts, the plaintiff refining corporations alleged, and the defendant oil producers did not deny, repeated refusals to sell Venezuelan crude oil. The defendants pleaded the defense of foreign compulsion, alleging that the Venezuelan government, under whose license they operated, had forbidden them from selling oil to the plaintiffs and that they had only refused to deal with the plaintiffs in order to comply with that order. (Many of the plaintiffs' principal stockholders were, or had been, Venezuelan citizens hostile to the government then in power.) The court held that compulsion constituted a complete defense and granted the defendants' motion for summary judgment.

50. See *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970), discussed in note 49 *supra*.

51. See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Occidental Petroleum Corp. v. Buttes Oil & Gas Co.*, 331 F. Supp. 92 (N.D. Cal. 1971),

This formulation is preferable in light of the underlying policies of the act of state doctrine. The most important of these are international comity and the principle that governmental interaction with foreign states is exclusively an executive function.⁵² It is generally accepted that an investigation into whether a foreign sovereign *compelled* anticompetitive conduct violates notions of comity and may impede the implementation of foreign policy by the executive.⁵³ Regardless of whether a Trucial shiek sua sponte decides that it is in his country's best interest to eliminate a competitor from the marketplace or is "only" a willing participant in a scheme devised by others, a court is presented with the very same problem. Had *Occidental* been decided otherwise, an American court would have been forced to determine whether the claims of the Shiekhdom of Sharjah to the disputed territory were bona fide or induced by the defendants. As the *Occidental* court perceptively noted, "[S]uch inquiries by this court into the . . . motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert."⁵⁴ For this reason participation, not coercion, should be the requisite test.⁵⁵

This is not to say that the respective authors' characterization of the law is necessarily incorrect. One might plausibly argue that neither tenet of *American Banana* is presently viable and that there has recently been a failure by some courts to adhere to the appropriate rule.⁵⁶ But neither book notes that several courts have re-

aff'd., 461 F.2d 1261 (9th Cir.) (per curiam), *cert. denied*, 409 U.S. 950 (1972); *Timberlane Lumber Co. v. Bank of America Natl. Trust & Sav. Assn.*, No. C-73-0792 (N.D. Cal. Feb. 28, 1974) (unreported).

52. *Cf.* *Banco National de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

53. *But cf.* 69 MICH. L. REV. 888 (1971).

54. 331 F. Supp. at 110. The plaintiff had also alleged that several of the sheik's acts were in violation of international law, but the court found that the act of state doctrine was again applicable and barred consideration of that allegation. Moreover, the court ruled that "because a private antitrust claim requires proof of damage resulting from forbidden conduct, plaintiffs necessarily ask this court to 'sit in judgment' upon the sovereign acts pleaded, whether or not the countries involved are considered co-conspirators." 331 F. Supp. at 110.

55. As Professor Brewster has written: "While it is theoretically possible that a government might be able to assert the fact of instigation of the alleged foreign legal compulsion on American firms, it still holds true that United States courts will be loathe to inquire into the motives underlying foreign statutes." K. BREWSTER, *supra* note 1, at 96. *Continental Ore Corp. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962); *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), and *United States v. Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. 77,414 (S.D.N.Y. 1962), should be viewed as cases in which the court would not be called upon to pass on the validity of the acts of foreign governments. These cases appropriately fall within Fugate's second category. *See* note 46 *supra*. *Cf.* K. BREWSTER, *supra*, at 95.

56. *See* 12 VA. J. INTL. L. 413 (1972). *Cf.* 21 J. PUB. L. 151 (1972). *But see* 5 VAND. J. TRANS. L. 251 (1972). Indeed, Fugate does an admirable job of making this argument (pp. 76-78). His reliance on *Continental Ore Co. v. Union*

cently adopted a different approach. The authors may have stated the position they personally find most agreeable; if so, they should have informed their readers of this, particularly in volumes designed to acquaint nonspecialized practitioners and business people with new terrain.⁵⁷

Also perplexing is the respective authors' treatment of the question of the amount of foreign trade that must be affected to establish subject matter jurisdiction under the Sherman Act. Kintner and Joelson virtually ignore this important issue except to state that "it is now well established that the Sherman Act is applicable to acts . . . if they have an intended substantial effect on U.S. commerce" (p. 23). Fugate treats the issue in more detail (pp. 196-98), but his analysis is somewhat incomplete. He concludes that while it is clear that the amount of commerce affected is not important as to unreasonable per se offenses, as to other types of offenses "the foreign trade cases furnish no real guide as to the amount of commerce which is necessary"⁵⁸ (p. 198). Neither book discusses the authorities indicating that the substantiality of the *actual* effect on commerce is important. For example, in the *Japanese Wire Nails Case*,⁵⁹ the court intimated that the restraint on United States foreign commerce must be both direct and substantial. And the Attorney General's National Committee To Study the Antitrust Laws concluded that, even if the defendant firm is engaged in foreign commerce, the Sherman Act applies only where "substantial anticompetitive effects" upon American foreign trade are demonstrated.⁶⁰

Carbide & Carbon Co., 370 U.S. 690 (1972), and *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1962), is well taken. That argument need not be repeated here.

57. Perhaps Fugate has raised the red flag in telling his readers that the "book is intended to indicate such a *safe path* in the foreign commerce field . . ." (p. 4; emphasis added).

58. Fugate cites *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. Socony-Vacuum Co.*, 310 U.S. 150 (1940), and *United States v. General Dyestuff Corp.*, 57 F. Supp. 642 (S.D.N.Y. 1944), as authority for this conclusion. Fugate may well be correct; nevertheless, it must be noted that the cited cases are not direct authority for the principle. Neither *Trenton Potteries* nor *Socony-Vacuum Oil* were cases involving foreign commerce and thus the question of the requisite quantum of commerce necessary to sustain federal jurisdiction in that context was not before either court. While *General Dyestuff* was a foreign commerce case, that court merely held that federal antitrust law does not distinguish between the "strangling" of existing commerce and preventing the initiation of nonexisting commerce; both are actionable. Undoubtedly these cases lend support to Fugate's argument; that is not to say—as he seems to—that they establish it.

59. *United States v. R.P. Oldham Co.*, 152 F. Supp. 818, 822 (N.D. Cal. 1957). See also *United States v. Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. 77,414, at 77,457 (S.D.N.Y. 1962).

60. ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS, REPORT 70 (1955). The Committee concludes: "We feel that the Sherman Act applies only to those arrangements between Americans alone, or in concert with foreign firms, which have such substantial anticompetitive effects on this country's 'trade or commerce . . . with foreign nations' as to constitute unreasonable restraints." *Id.* at 76. It is noteworthy that Fugate served as the Antitrust Division's

Other authorities would require a substantial effect only in limited circumstances. At least one court has recently stated in dicta that only some effect on foreign commerce need be alleged to secure federal jurisdiction, but that a substantial effect must be demonstrated to support a finding of liability.⁶¹ One commentator has suggested that the substantiality of the effect is relevant only when the effect is indirect.⁶² The split in authority calls for treatment of this issue in greater detail.

Even though the topics are pregnant with significant policy issues, discussion of public policy is conspicuously absent from the examinations in both books of the act of state doctrine and the requirement of substantiality of anticompetitive effect. The authors' reluctance to discuss policy considerations is a consistent characteristic of both works. For example, while both books seem to conclude that the *Incandescent Lamp Case*⁶³ is an extremely narrow construction of the Wilson Tariff Act,⁶⁴ neither pursues the policy implications. Fugate postulates that the court's construction "is not in accord with the purpose of the act," (p.397) but goes no further. Kintner and Joelson also conclude that the case "illustrates the problems that lurk in a statute with relatively limited objectives in mind" (p. 16), but again do not further analyze the act. Similarly, in his discussion of the *Noerr* doctrine,⁶⁵ Fugate outlines the state of the law and concludes that the doctrine has no extraterritorial application (pp. 84-86).⁶⁶ However, he never considers whether the result is a sound

liaison to the Attorney General's National Committee. Presumably, he is well acquainted with the Committee's Report.

61. See *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 102-03 (C.D. Cal. 1971), *affd.*, 461 F.2d 1261 (9th Cir.) (per curiam), *cert. denied*, 409 U.S. 950 (1972). It is very important to note that the court of appeals expressly limited its affirmance to the trial court's holding with reference to the act of state doctrine and therefore did not reach this question.

62. J. VON KALIMOWSKI, *ANTITRUST LAWS AND ORGANIZATION* § 5.02[2] (1974).

63. *United States v. General Elec. Co.*, 82 F. Supp. 753 (D.N.J. 1949).

64. 15 U.S.C. §§ 8-11 (1970). The court held that a participant in an otherwise illegal conspiracy must be actually engaged in importing before there is an offense under the act.

65. See *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In *Noerr*, the plaintiff trucking companies alleged that the defendant railroads had conspired to oppose legislation favorable to truckers and unfavorable to railroads. The Court held that such conduct was not actionable because of first amendment barriers. *But cf.* *California Motor Transp. Co. v. Trucking, Unltd.*, 404 U.S. 508 (1972); *United States v. Otter Tail Power Co.*, 360 F. Supp. 451 (D. Minn.), *affd.*, 410 U.S. 366 (1973).

66. This is the position recently taken by the court in *Occidental Petroleum Corp. v. Buttes Oil & Gas Co.*, 331 F. Supp. 92, 107-08 (C.D. Cal. 1971), *affd.*, 461 F.2d 1261, (9th Cir.) (per curiam), *cert. denied*, 409 U.S. 950 (1972). While the court of appeals affirmed the decision, it expressed no opinion as to this segment of the lower court's decision. As Fugate notes, albeit somewhat ambiguously, it has been argued that *Noerr* has extraterritorial application. See, e.g., Graziano, *supra* note 8, at 132. Moreover, Professor Areeda has suggested that *Noerr* might have application

one. Kintner and Joelson discuss neither the *Noerr* doctrine nor its relation to public policy.⁶⁷

As deskbooks, the works should be effectively cross-indexed. While the Fugate book generally wins high marks in this regard, in many places it could be improved. For example, the author includes a subsection entitled "Antitrust Provisions of the Wilson Tariff Act" (pp. 393-98). Elsewhere in the book, Fugate discusses the Wilson Tariff Act as it relates to resale price maintenance (pp. 153-55)⁶⁸ and seizure-forfeiture means of securing jurisdiction (pp. 108-09). Regrettably, there is no cross-reference to these discussions within the primary treatment of the act.⁶⁹ Just as they omitted citations, Kintner and Joelson included no cross-references.

The Fugate book avowedly attempts to delineate the "safe path"⁷⁰—probably reflecting the author's lengthy association with the Antitrust Division. Kintner and Joelson do not expressly make such a representation, but theirs is also an exposition of the safe path—perhaps a result of Kintner's tenure with the FTC. Given this intent, the respective authors' presentations are generally fair. But on occasion both books, and particularly the Fugate work, overstate the plaintiff-government position to the point of misleading the reader. The treatment of the act of state doctrine is again an example.⁷¹ A more pointed example is Fugate's statement in his discussion of the Robinson-Patman Act⁷² that "one case [*Nashville Milk Co. v. Carnation Co.*]⁷³ has held that § 3, the Borah-Van Nuys Amendment, is not one of the 'antitrust laws' for the purpose of treble damage actions." He thus implies that only one case has so

to the petitioning of democratic governments. See P. AREEDA, *ANTITRUST ANALYSIS*, ¶ 187, at 68 n.206 (1967). Interestingly, Professor Areeda has made no similar suggestion in his second edition.

67. For a discussion of this question, see Note, *Corporate Lobbyists Abroad: The Extraterritorial Application of Noerr-Pennington Antitrust Immunity*, 61 CALIF. L. REV. 1254 (1973).

68. Fugate notes the very interesting question, raised by Judge Frank's dissent in *Adams-Mitchell Co. v. Cambridge Distrib. Co.*, 189 F.2d 913 (2d Cir. 1951), whether the insulation of retail price maintenance provided by the passage of the Miller-Tydings Act, 15 U.S.C. § 1 (1970), applies with the same vigor to foreign commerce as it does to domestic commerce. Although both the Sherman Act and the Wilson Tariff Act proscribe vertical price fixing, the exculpatory language within the Miller-Tydings Act mentions only the Sherman Act and makes no reference to the Wilson Tariff Act. Fugate does not consider whether the language of the McGuire Act, 15 U.S.C. § 45 (1970), passed since *Adams-Mitchell*, renders the whole question moot—if the majority opinion in *Adams-Mitchell* did not already do so.

69. This defect is remedied somewhat by the excellent index, which directs the reader to all places where the Act is mentioned.

70. See note 39 *supra*.

71. See notes 33-56 *supra* and accompanying text.

72. 15 U.S.C. §§ 13, 13a-c (1970).

73. 238 F.2d 86 (7th Cir. 1956).

held (p. 399) and neglects to state either that the Supreme Court affirmed that decision⁷⁴ or that a host of other courts have similarly held that no private cause of action accrues for violation of the Borah-Van Nuys amendment.⁷⁵

Both books are interestingly written, well organized, and authored by knowledgeable and experienced scholar-practitioners. But despite their similarities, the two books attain different measures of success by whatever standard they are gauged. Fugate well achieved his goal of writing a handbook for the general practitioner. The book is also sufficiently detailed to provide a handy reference work for the antitrust specialist. On the other hand, despite representations by Kintner and Joelson that the *Primer* is meant "to provide an up-to-date reference for the general practitioner who counsels businessmen," its lack of detail, superficial discussion, and absence of documentation seriously compromise that end. The *Primer* is therefore a poor investment for lawyers, whether general practitioners or specialists.

The Kintner and Joelson book better achieves its principal goal of serving as a primer for business people. For nonlawyers desiring a cursory overview of the application of antitrust law to foreign commerce, the *Primer* may be the better book because it assumes less familiarity with the subject matter. Nevertheless, the more detailed treatment of the subject in the Fugate book will be more useful to many business people, and most with antitrust problems in a foreign context are not likely to have difficulty reading the more detailed and comprehensive *Foreign Commerce and the Antitrust Laws*.

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74. 355 U.S. 373 (1958).

75. See *Safeway Stores, Inc. v. Vance*, 355 U.S. 389 (1958); *Gold Fuel Serv., Inc. v. Esso Standard Oil Co.*, 306 F.2d 61 (3d Cir. 1962); *Englander Motors, Inc. v. Ford Motor Co.*, 293 F.2d 802 (6th Cir. 1961); *Mackey v. Sears, Roebuck & Co.*, 237 F.2d 869 (7th Cir. 1956); *Robinson v. Stanley Home Prods., Inc.*, 178 F. Supp. 230 (D. Mass.), *affd. on other grounds*, 272 F.2d 601 (1st Cir. 1959); *Dallas Corp. v. Margon Corp.*, 164 F. Supp. 41 (D.N.J. 1958); *Sperry Rand Corp. v. Nassau Research & Dev. Associates, Inc.*, 22 F.R.D. 321 (E.D.N.Y. 1958); *Kroch v. Texas Co.*, 167 F. Supp. 947 (S.D.N.Y. 1958).