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Fulda & Schwartz: Regulation of International Trade and Investment, Cases and Materials

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REGULATION OF INTERNATIONAL TRADE AND INVESTMENT, CASES AND MATERIALS. By *Carl H. Fulda* and *Warren F. Schwartz.* Mineola, N.Y.: Foundation Press. 1970. Pp xliv, 796. $13.50.

The authors of this casebook have attempted a difficult, useful, and praiseworthy job. Within the covers of an 800-page volume purporting to deal with the regulation of international trade and investment, the authors develop (a) the United States and the European Common Market approaches to private restrictions on international trade—the conventional area of antitrust law (pp. 17-177); (b) the United States and international approaches toward various governmental restrictions on international trade, including tariffs, escape clauses, import quotas, antidumping controls, countervailing duties, commodity agreements, export subsidies, price supports for agricultural commodities, and the system of "integration industries" in the Central American Common Market and "complementary economy agreements" in the Latin American Free Trade Area—the so-called domain of international commercial policy (pp. 178-571); and (c) government controls over foreign direct investment—a grab bag of contending national policies promoting and restricting investment (pp. 572-790). Perhaps unduly submerged in the foregoing are informative materials relating to the licensing of technology abroad, where trade liberalizing antitrust policies are contending with the isolationist thrust of national patent and trademark protection.

There is a timeliness to this volume, when balance-of-payment difficulties have caused the Nixon Administration to reverse prior United States initiatives in the area of multilateral tariff reduction, to breach this country's international obligations under the General Agreement on Trade and Tariffs (GATT), to limit American investment abroad, and to ask for a fundamental overhaul of the inter-

national monetary system. Concurrently, the AFL-CIO has been mounting a heavy campaign in support of the Burke-Hartke bill,[1] calling for the mandatory imposition of import quotas, the revision of the antidumping laws so as to exclude still more commodities from importation into the United States, and restrictions on American firms licensing their foreign technology; this is truly a restrictionist avalanche the dimensions of which can only be appreciated by those familiar with the background presented in this volume. Another pending bill,[2] sponsored by Senators Magnuson and Inouye, would permit American export associations to participate in international cartels, thereby legislatively repealing the case of *United States v. United States Alkali Export Association*.[3]

A lesson to be drawn from this volume is the truly schizophrenic attitude of this country toward competition in international trade. During the time when the Justice Department was successfully conducting a Sherman Act case against the manufacturers of Swiss watches and component parts (including two Swiss trade associations) for restricting imports into the United States (*see* pp. 52-89), American producers were asking for quotas to exclude Swiss watch imports from this country, on the ground that "national security" required the protection of the domestic watch industry (*cf.* pp. 306-63, dealing with a similar argument in the case of oil imports). While the Government proudly points to the Sherman Act as its national policy to keep the channels of international trade free from private trade restrictions, it has at the same time erected, under the guise of international commercial policy, legal safe havens in which entire industries can seek shelter from the winds of foreign competition. Likewise inconsistent with the objectives of antitrust policy is the practice under which foreign exporters to the United States are continually being persuaded, both by agencies of our Government and by private interests, to establish so-called "voluntary" quotas.

The responsibility for enforcing this inconsistent blend of procompetitive and anticompetitive policies in international trade is fragmented and diffused among many governmental organs—the Antitrust Division, the Federal Trade Commission, various divisions within the State Department, the Tariff Commission, the Treasury, Agriculture, Commerce, and Interior Departments, the General Services Administration, the Congress, the Special Representative for Trade Negotiations, and individual members of the White House staff. It is interesting to speculate whether similar policy contradictions obtain in legal systems where foreign trade is subject to more concentrated supervision. Thus the European Common Market rec-

1. S. 2592, H.R. 10914, 92d Cong., 1st Sess. (1971).

2. S. 2754, 92d Cong., 1st Sess. (1971).

3. 86 F. Supp. 59 (S.D.N.Y. 1949).

ognizes that its basic policy of eliminating governmental trade barriers (*e.g.*, tariffs and quotas) could easily be thwarted were privately imposed trade barriers allowed to impede the flow of goods across national boundaries. Hence, the Common Market's emphasis on removing all kinds of practices that might "distort competition," and the conferring of jurisdiction on its Directorate of Competition not only over private restrictions of trade of the type covered by our Sherman, Clayton, and Robinson-Patman Acts, but also over such matters as the equalization of turnover taxes, control over government subsidies to national exporters, and the development of a Common European Patent and Common European Trademark, good without territorial restriction for the entire Market.

It would be well if both law students and the formulators of public policy in the United States could be introduced to the broader concept of avoiding the distortion of competition that animates the European Common Market. The difficulty lies not only in our Government's dispersed responsibility for policy formulation, but in the fact that antitrust policy formulation and enforcement are controlled by lawyers, whereas tariffs and quotas and similar regulations of international trade have been largely formulated by economists, with the lawyers playing a tangential representational role. Both kinds of policies give rise to conflict situations, but the resolution of antitrust conflicts takes the familiar form of the judicial decision, whereas the basis for deciding commercial policy conflicts has to be inferred, as these materials make clear, from reports reflecting governmental or private surveys and appraisals of the problems involved. Any volume such as this, which gives the legal profession a background in conflict situations of a type in which the underlying analysis is economic and the final resolution is nonjudicial in form, is a valuable extension of the lawyer's capacity. It is also a contribution to the formulation of public policy, which requires the aid both of legal and economic knowledge and techniques.

The international dissemination and licensing of technology functions within the framework of an international patent system that has two conflicting phases—a liberal internationalist phase that permits firms to obtain world-wide protection for their inventions,[4] and a restrictive phase that enables national patent systems to bar competitive imports of patented products from a country.[5] The public interests affected by the clash of these two phases, and the special characteristics of patents and other forms of industrial property, lead this reviewer to prefer a separate, integrated (and expanded) treatment

4. Convention of Paris for the Protection of Industrial Property of March 20, 1883, as revised at Lisbon on Oct. 31, 1958, [1962] 1 U.S.T. 1, T.I.A.S. No. 4931.

5. *See* Timberg, *International Patent Licensing and National Antitrust Laws*, 43 J. PAT. OFF. SOC. 171 (1961); Report of U.N. Secretary-General, *The Role of Patents in the Transfer of Technology to Developing Countries*, U.N. Doc. E/3861/Rev. 1 (1964).

of this complex field, rather than the split and subordinated treatment given the subject in the present volume. But there is enough in this volume to give a good overview of the issues involved.

The price for developing a timely and controversial area of law is that it will continue to expand after publication date. One need only note such recent developments in the patent and trademark licensing area as the broadening of the European Common Market's antirestrictionist policies in the *Sirena*[6] and *Grammophon-Metro*[7] cases. Similarly, noteworthy developments have taken place in the merger area, such as the first flexing of the Common Market against the massive wave of acquisitions and joint ventures engineered by multinational corporations, the recent action brought against Continental Can under article 86 of the EEC Treaty;[8] the consent divestiture by two merging Swiss companies (Ciba and Geigy) of some of their United States assets;[9] British Petroleum's difficult entrée by merger into this country;[10] and the dismissal by a FTC hearing examiner of the case attacking Litton Industries' acquisition of Triumph-Adler, a leading European typewriter manufacturer.[11]

The traditional response to such postpublication developments is to put out a second edition or supplemental materials. In the merger and joint venture area, this reviewer would make a further recommendation. This country is still in the embryonic stages of applying section 7 of the Clayton Act to foreign mergers and acquisitions. Hence, there is need to give a fuller perception of the issues involved in domestic merger cases, and in particular the doctrine of potential competition, which is the major jurisdictional base for any large scale attack on foreign acquisitions. To make way for this, *United States v. Jos. Schlitz Brewing Co.*,[12] the only section 7 case reproduced in the book (in essence a domestic merger case), could well be relegated to "Notes and Questions" status rather than main treatment in the text.

While the part of this book dealing with foreign direct investment contains much interesting and useful information, one is left with the feeling that it is a somewhat truncated introduction to the field. Within a compressed 200-page compass, it is not possible to develop adequately such important investment topics as concession agreements, the non-antitrust aspects of joint ventures, controls over capital issues, local investment laws, relevant labor legislation, and

6. Sirena S. r. I v. Eda GmbH, No. 40/70 (Eur. Ct. J. Feb. 18, 1971).

7. Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH & Co. KG, No. 78/70 (Eur. Ct. J. June 8, 1971).

8. Continental Can Co., 2 CCH COMM. MKT. REP. ¶ 9481 (1971) (EEC Commission Decision).

9. United States v. Ciba Corp., 1970 TRADE CAS. ¶ 73,319 (S.D.N.Y.).

10. United States v. Standard Oil Co., 1970 TRADE CAS. ¶ 72,988 (N.D. Ohio).

11. Litton Indus., Inc., 3 CCH TRADE REG. REP. ¶ 19,918 (FTC 1972).

12. 253 F. Supp. 129 (N.D. Cal.), *aff'd. per curiam*, 385 U.S. 37 (1966).

over-all tax problems. A few pages are devoted to the problem of avoiding double taxation, but any student or practitioner interested in foreign investment would necessarily desire a broader treatment of the relevant tax picture. Likewise, distinctions between the investment policies of the industrialized and the developing countries, quite well delineated in the earlier part of the book dealing with exports and imports, are neglected in this later part.

The concluding part of the volume, purporting to deal with "Regulation of the Interests Participating in the Direct Investment Enterprise," is by the authors' own statement limited to two areas, the relation between the enterprise and its stockholders (revolving around the famous *Fruehauf*[13] case in the Paris Cour d'appel) and the protection of white-collar employees and commercial agents against arbitrary dismissal. It is clearly impossible, save in a much more extended treatment, to deal with all the questions of private and public law that affect the multinational corporation's foreign investment decisions.

Despite these shortcomings, the materials presented give a good sample of measures taken by national governments to avoid the domination of their domestic industries by foreign capital and to promote local participation in foreign investment, and to avoid investments (or returns on investments) that create balance-of-payments problems for either the investing or host country. The volume also deals satisfactorily with measures taken by countries to protect their nationals' investments against political risks (expropriation and currency controls) and commercial risks through aid and guarantee programs.

Great credit must be given the authors for the explanatory materials they have written and the probing questions and notes accompanying their selected cases and reports throughout the book. These serve the purpose of clarifying sometimes complex questions of economics and law, and they greatly broaden the reader's intellectual horizons.

For a reader desiring a grasp of the extent to which antitrust or anticompetitive policies control foreign trade and investment, this volume is excellent. To the law student it will impart valuable insights and information on the economic techniques and legal procedures employed in resolving important conflict situations in international trade. And anyone professionally grappling with the substance of international trade and investment transactions will find this book a good basis for getting to know the fundamental policy issues involved.

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13. Freuhauf Corp. v. Massardy, [1965] J.C.P. II. 14274 (Cour d'appel, Paris).