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Symposium Introduction

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INTRODUCTION

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The United States has experienced a balance of trade deficit each year since 1975. The Commerce Department has recently predicted that the United States will experience a record trade deficit this year and that exports will exceed imports by an even wider margin in 1983.¹ Some prominent domestic industries no longer enjoy positions of leadership characteristic of much of their history. Indeed, many languish when compared with their foreign competitor. Although the causes of our trade deficit and reasons for the plight of many industries are varied and complex, it is not surprising that many today question what effect our anti-trust laws have had on contemporary circumstances. These developments, together with the belated realization by many that geographic markets in large numbers of industries are truly international, makes this symposium a truly important undertaking. A. Paul Victor has succinctly posed the question:

As the world becomes smaller from the standpoint of the market place, and as the globe evolves into a single marketplace . . . we must ask ourselves whether our domestic competition policy, as reflected in the antitrust laws, has the same meaning and significance it enjoyed over the past two decades. We must ask . . . whether there are or should be any special rules when it comes to our play-

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1. Wall St. J., Nov. 29, 1982, at 3, col. 1. The highest record trade deficit (adjusted for military aid, etc.) was \$33.8 billion in 1978. *Id.* This year's deficit may be a record \$40 billion. *Id.* Deputy Secretary of the Treasury R. T. McNamar has recently predicted that next year's deficit may reach \$75 billion *Id.*

ing the competitive game internationally.²

The subject is timely. Recent changes in both case and statute law further underscore the importance of this Symposium. Illustrative are the Ninth Circuit's decision in *Timberlane Lumber Co. v. Bank of America*³ and that of the Third Circuit in *Mannington Mills Inc. v. Congoleum Corp.*,⁴ where the absolutist view of extraterritorial jurisdiction reflected in the *Alcoa* decision⁵ was rejected in favor of a comity-premised rule of reason analysis.⁶ The recently enacted Export Trading Company Act of 1982,⁷ including the Foreign Trade Improvements Act,⁸ represents legislative change. Moreover, promulgation by the Antitrust Division of two sets of international guidelines—the *Antitrust Guide for International Operations*⁹ and the *Antitrust Guide Concerning Research Joint Ventures*¹⁰—introduces yet another aspect of novelty. Furthermore, the recent wave of transnational acquisitions is significant, as is the willingness of foreign companies and foreign governments to sue domestic companies for alleged violations of United States antitrust laws abroad.¹¹ Politically sensitive litigation such as *International Association of Machinists and Aerospace Workers v. OPEC*¹² and *United States v. Bechtel Corp.*,¹³

2. Victor, *Introduction: International Acquisitions, Joint Ventures, and Other Agreements—The Applicable Substantive and Procedural Law*, 50 ANTI-TRUST L.J. 453 (1982).

3. 549 F.2d 597 (1977).

4. 595 F.2d 1287 (1979).

5. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

6. See *National Bank of Can. v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981).

7. Pub. L. No. 97-290.

8. The Foreign Trade Antitrust Improvements Act is title IV of the Export Trading Company Act legislation.

9. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977), reprinted in [Jan. - June] ANTI-TRUST & TRADE REG. REP. (BNA) No. 799, at E-1 (Feb. 1, 1977).

10. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE CONCERNING RESEARCH JOINT VENTURES (1980).

11. See, e.g., *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978) (foreign government allegedly injured by an antitrust conspiracy was held to have standing under the Sherman Act); *Industria Siciliana Asfalti Bitumi, S.p.A. v. Exxon Research & Eng'g Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,256 (S.D.N.Y. 1977) (Italian company conducting business in Italy obtained recognition of its right to sue a domestic corporation for allegedly imposing a tie-in on Italian transactions).

12. 649 F.2d 1354 (9th Cir. 1981), cert. denied, 50 U.S.L.W. 3450 (U.S. Jan. 11, 1982).

challenging the oil cartel and participation in the Arab boycott of Israel respectively, also merit attention. The growing importance of transnational licensing of know-how, ably treated in a recent symposium of this journal,¹⁴ also serves to underscore the timely nature of this discussion.

The impact of United States antitrust laws abroad has not gone unnoticed by foreign governments. The enactment of the Protection of Trading Interest Act of 1980¹⁵ within the United Kingdom serves as an example. Use of the Federal Court Act¹⁶ by the Canadian government to impede discovery in *In re Westinghouse Electric Corp.*¹⁷ and the refusal to enforce letters rogatory in *Gulf Oil Corp. v. Gulf Canada Ltd.*¹⁸ are other illustrations.

This Symposium issue of the *Vanderbilt Journal of Transnational Law* presents a collection of excellent articles on current antitrust law and United States international trade practices by some of the most knowledgeable scholars in the field, all of whom possess not only superb academic credentials but also a wealth of experience in international antitrust practice. Wilbur Fugate, former chief of the Foreign Commerce Section of the Antitrust Division and a distinguished author on antitrust and foreign commerce, opens the Symposium by examining the Webb-Pomerene Act¹⁹ in light of the very recently enacted Export Trading Company Act of 1982.²⁰

Fugate begins his analysis by examining the Webb Act and the history of attempts to repeal and modify it, including the recent debate surrounding the 1979 National Committee for the Review of the Antitrust Laws. He also examines the few judicial decisions to interpret the Act and Federal Trade Commission reports and pronouncements on the legislation.²¹ He also treats a number of civil and criminal suits brought by the Division involving export

13. 648 F.2d 660 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981).

14. See *Symposium: Transnational Technology Transfer: Current Problems and Solutions for the Practitioner*, 14 VAND. J. TRANSNAT'L L. 249 (1981).

15. The Trading Interest Act of 1980 is reprinted in [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 959, at F-1 (Apr. 10, 1980).

16. CAN. REV. STAT. ch. 10 (Supp. II 1970).

17. 16 Ont. 2d 273 (High Ct. Justice 1977).

18. 111 D.L.R.3d 74 (Can. 1980).

19. 15 U.S.C. §§ 61-66 (1976 & Supp. IV 1981).

20. Pub. L. No. 97-290.

21. The Act gives the Commission investigative powers to determine compliance and requires all export associations to register with the FTC.

cartel activities where a Webb association either did not exist or was not named a party defendant. The current roster of associations and the amount of trade involved is also examined. Mr. Fugate thus presents a concise legal history of the Webb Act. In so doing, the tension between our export and domestic antitrust philosophies is noted.²²

Fugate then examines the likely impact of the Export Trading Company Act of 1982 on foreign commerce today. After reviewing the statutory provisions, Fugate compares and contrasts the new law with the Webb Act. Finally, the author treats the Foreign Trade Antitrust Improvements Act (actually title IV of the Export Act of 1982) and its effect on the extraterritorial jurisdiction of United States antitrust laws.

One of the more significant events in this area was the publication in 1977 by the Antitrust Division of its *Guide on International Operations*. In the second article of this Symposium, Professor Eleanor Fox, a noted antitrust scholar with substantial practical experience, examines the effect of the Guide on foreign commerce. She not only examines the text of the 1977 document, but does so in the context of current Department of Justice policy as reflected in the statements of its policymakers. A myriad of topics including acquisitions, joint bidding, research, and manufacturing ventures, as well as know-how licensing are discussed. As such, the article is most valuable because it presents a more accurate assessment of potential problems that are likely to be of interest in light of the enforcement policies of the Antitrust Division. Of course, to the extent that they are more permissive than established case law, such policies would not necessarily impede plaintiffs in private treble damage actions.

David Goldsweig, Kenneth Enborg, and Thomas Walton undertake to examine the important and controversial subject of whether the antitrust laws affect the United States balance of trade. Whether or not one agrees with the authors' conclusion that the evidence fails to support the view that antitrust has handicapped domestic industries in international commerce,²³ the

22. Fugate aptly calls attention to a recent statement by Assistant Attorney General William F. Baxter indicating that he "would consider it appropriate to prosecute similarly formed private cartels aimed at our market place." See *infra* at 693.

23. A study conducted by the National Association of Manufacturers in 1975 revealed that 70% of responding firms believed the antitrust laws disadvantage

subject is an important one.

Fortunately for both scholars and practitioners, the Symposium contains a selective bibliography on the territorial reach of United States antitrust laws. Howard Hood has reviewed not only published books and articles, but also relevant government reports and congressional hearings. Reports and studies prepared by private nongovernment entities are also surveyed.

The Symposium concludes with a review of James Atwood and Kingman Brewster's *Antitrust and American Business Abroad* by Joel Davidow. The 1958 edition of this book by Brewster was the first—and for years the most important—analytical discussion of the field. Subsequent publication by Wilbur Fugate of *Foreign Commerce and the Antitrust Laws* in 1974,²⁴ and the very recently published two-volume revised edition in 1982, together with Barry Hawk's *United States, Common Market and International Antitrust* in 1979, have added to the short list of important contributions in recent years. Joined now by Atwood in this 1981 revised and expanded work, Brewster again makes a significant addition to this growing literature. Davidow, himself an antitrust scholar and practitioner of international reputation, presents an insightful and interesting critique of this new book.

Unfortunately, two scholars were unable to contribute to this issue. Dr. Martin Hirsch, a German practitioner with the firm of Gleiss, Lutz, Hootz, Hirsch & Partners of Stuttgart, was injured in a serious traffic accident. James Rahl, the Owen L. Coon Professor of Law at Northwestern University, was also unable to contribute due to surgery he underwent. On behalf of the *Vanderbilt Journal of Transnational Law*, I express sincere regret that Dr. Hirsch and Professor Rahl were unable to contribute and wish them speedy and complete recoveries.

This Symposium does not survey the entire waterfront of antitrust in multinational context—none could. Nevertheless, it presents quality articles by impressive writers on subjects of great importance. I heartily commend it to you.

domestic industries in their effort to compete abroad. NATIONAL ASSOCIATION OF MANUFACTURERS REPORT ON THE INTERNATIONAL IMPLICATIONS OF U.S. ANTITRUST LAWS (1975).

24. For a review of the 1974 edition, see Calvani, *Two Books on Antitrust 74* MICH. L. REV. 164 (1975).

