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Book Reviews

George A. Zaphiriou

Spencer Weber Waller

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BOOK REVIEWS

INTERNATIONAL BUSINESS TRANSACTIONS. By Ralph H. Folsom, Michael Wallace Gordon and John H. Spanogle, Jr. St. Paul, Minn.: West Publishing Co., 1986, 1160, pp.

Professors Folsom, Gordon, and Spanogle make a useful team in authoring a coursebook in international business transactions. All three are teaching international transactions in three important business states. They all have some exposure abroad, but their particular strength is that they have a teaching interest and expertise in domestic business subjects that are complementary: Folsom's interest is in antitrust and intellectual property, Gordon's in corporations and Spanogle's in banking and regulated industries.

The coursebook, by dealing with a number of hypothetical problems, uses the most effective approach to the teaching of international trade law and international business law. It manages to combine into one course what are in some Juris Doctor curricula separate courses in international trade law and international business law. This is a useful accommodation fitting well within the Juris Doctor curricular constraints. The book includes, as it should, references to sale of goods, carriage of goods by sea, documentary credit and international trade boycotts. All these are topics that the reviewer criticized as missing when recently reviewing a nutshell book on a similar subject in this very journal.[1]

The one major omission of the book is the lack of coverage of international taxation. Transacting business without business planning is inconceivable and business planning consists of an inseparable combination of tax and corporate planning. Including international taxation would have been particularly useful for the law students who cannot afford the time for a special course in international taxation and who by taking this one course would acquire some knowledge in international trade, business and taxation.

The reviewer appreciates the commendable reluctance of the authors to deal with an area which is outside their immediate expertise. They could, however, include some International Revenue Code provisions (*e.g.* Section 482) and International Revenue Service Regulations, followed by commentaries and articles of experts on allocation of income and deductions, foreign tax credit, avoidance of double taxation,

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1. 9 MD. J. INT'L L. & TRADE 317 (1985).

foreign controlled corporations, and the transition from the Domestic International Sales Corporation to the Foreign Sales Corporation. Reference to state rather than federal corporate taxation would have been bewildering, but some reference to unitary taxation would have been both useful and topical. As to foreign taxes, some information as to value added tax would have included a very important feature of trading by the countries of the European Community and would have provided a point of comparison for the consideration of alternatives in United States future tax reform.

The material on joint ventures should be updated and expanded. Joint ventures raise interesting problems of antitrust and taxation. In addition to their use in doing business in Japan and Mexico, they are used in doing business in Eastern Europe and increasingly in the Peoples' Republic of China.

Reference to arbitrability should be strengthened. The book incorporates the decision in *Scherk v. Alberto-Culver Co.*[2] This case should be complemented by including the decision in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*,[3] which held that the validity of a contractual clause alleged to be void because of antitrust violations is a matter that can be decided by arbitration.[4] The majority of the court went so far as to imply that matters of civil antitrust liability are generally arbitrable. This is an important development that will affect disputes relating to commercial agreements. It may even affect disputes between independent competitors by enabling them to submit to arbitration alleged antitrust violations and thus avoid publicity and protracted discovery or other lengthy court proceedings.

In spite of the lack of tax coverage and other minor omissions that can be easily cured by the addition of photocopied materials, the book is an excellent problem oriented coursebook. It is strongly recommended for use by teachers of international trade and international business law who do not choose to use their own materials.

*George A. Zaphiriou**

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2. 417 U.S. 506 (1974).

3. ___ U.S. ___, 105 S.Ct. 3346, 87 L. Ed. 2d 444 (1985).

4. This view was supported by the reviewer in Zaphiriou, *Choice of Forum and Choice of Law Clauses in International Commercial Agreements*, 3 INT'L TRADE L. J. 311, 326 (1978).

* Professor of Law, George Mason University School of Law; Panelist on the panel of arbitrators of the American Arbitration Association, Member of the Board of Editors of the AMERICAN JOURNAL OF COMPARATIVE LAW.

INTERNATIONAL TRADE POLICY: THE LAWYER'S PERSPECTIVE. Edited by: J. Jackson, R. Cunningham, and C. Fontheim. St. Paul, Minn.: West Publishing Co., 1986, pp.

The Trade Act of 1974,[1] which regarded as the price to be paid for vitalizated the import relief statutes,[2] was regarded as the price to be paid for free trade. The President was granted the authority to negotiate in the GATT Tokyo Round[3] of multilateral trade talks and received expedited and truncated Congressional approval of the ensuing agreements.[4] In return, American industry and labor received assurances, through the availability of legal remedies, that each would receive redress for any resulting injury from increased foreign competition. Since 1974, the import relief remedies have grown more powerful in their impact and more labyrinthine in their application. There are several industries which now rely more on these mechanisms for their survival than their performance in the marketplace.[5] The administration of these remedies poses enormous costs to the United States government and the private parties on both sides of a particular dispute,[6] and also has a substantial impact in the marketplace.[7]

The import relief remedies are another illustration of the principle

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1. 19 U.S.C. §§ 2101-2487 (Supp. III 1982).

2. The import relief laws consist of the antidumping laws, 19 U.S.C. §§ 1673-1673g (Supp. III 1982); the countervailing duty laws, 19 U.S.C. 1671-1971n (Supp. III 1982); the intellectual property laws, 19 U.S.C. §§ 1337-1337a (Supp. III 1982); the escape clause, 19 U.S.C. §§ 2251-2253 (Supp. III 1982); and a series of statutes designed to let the government take action against illegal foreign government conduct, conduct by non-market economies, and the protection of national security, 19 U.S.C. §§ 2411-2415 (Supp. III 1982). 19 U.S.C. § 2436 (Supp. III 1982), and 19 U.S.C. § 1862 (Supp. III 1982).

3. The Tokyo Round constituted the seventh round of multilateral trade negotiation under the auspices of the General Agreement on Trade and Tariffs which was launched in September, 1973. The President was empowered under Chapter 1 of the Trade Act of 1974 to enter into trade agreements concerning both tariffs and non-tariff barriers for a five year period.

4. Chapter 5 of the Trade Act of 1974 created a special fast track for the consideration of agreements resulting from the authority of the Tract Act which prohibited amendments.

5. By far, the greatest number of import relief proceedings have been related to the steel industry.

6. *See*, Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570 (1984).

7. *See*, Waller, *Abusing the Trade Laws: An Antitrust Perspective*, 17 LAW POL'Y INT'L BUS. 1570 (1984).

that protectionism is a one-way street.[8] Since the Trade Act of 1974 these remedies have operated like a ratchet tightening their grip on familiar practices such as dumping and subsidies,[9] and extending their grip to new and formerly unregulated practices.[10] When domestic industries have been frustrated by the results of a trade proceeding, they have turned to Congress to give them another chance or even an outright victory.[11] In addition, the import remedies are being increasingly abandoned for the negotiation of differing forms of voluntary solutions to trade disputes.[12]

There are two styles of lawyering in approaching the import remedies. The first approach is that of the litigator, the familiar marshalling of evidence and law for use at a trial or administrative proceeding. The second approach is that of the deal maker or lobbyist, the negotiation of a favorable administrative or political result for a client. These differing styles do not exist as absolute polar opposites, but rather define the range of reactions of trade lawyers to the current statutory scheme. In seeking to change the laws and regulations to suit a particular style, the "litigator" seeks in general a more legalistic set of rights and remedies to be vindicated in as judicial a forum as possible. In contrast, the "dealmaker" in general seeks a more discretionary and politically sensitive framework.

This basic division in the trade bar is mirrored within *International Trade Policy: The Lawyer's Perspective.*[13] This collection of essays grew out of the work and the legal education programs of the International Trade Committee of the International Law and Practice Section of the American Bar Association. The volume addresses both

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8. Two examples consist of the history of the textile and steel industries. Since World War II textiles have been covered by an increasingly restrictive series of voluntary restraints culminating in the legally enforceable Multi-Fiber Agreement. Since the late sixties, steel has been subject to a series of restraints under U.S. law as well as increasingly broad voluntary restraints. *See*, A. LOWENFELD, PUBLIC CONTROLS OF INTERNATIONAL TRADE (1979).

9. The Trade Agreements Act of 1979 and the Trade and Tariff Act of 1984 have modified and strengthened the substantive and procedural provisions of the 1974 Act.

10. For example, the 1984 Trade Act expressly defines subsidies to include upstream subsidization of inputs in the production process.

11. The 1984 Trade Act specifically addressed failed import relief efforts by the footwear and the grape growers industries.

12. *See generally*, Waller, *Redefining the Foreign Compulsion Defense in United States Antitrust Law: The Japanese Auto Restraints and Beyond*, 14 LAW POL'Y INT'L BUS. 747 (1982).

13. INTERNATIONAL TRADE POLICY: THE LAWYER'S PERSPECTIVE (J. Jackson, R. Cunningham, and C. Fontheim, eds. 1985) [hereinafter cited as INTERNATIONAL TRADE POLICY].

the philosophy of the import relief statutes and the myriad of technical issues that affects their application.

International Trade Policy is divided into three loosely grouped series of essays. Following an introduction by one of the distinguished editors on the current state of U.S. import relief statutes,[14] the first section deals with the broad philosophy and national interests behind the import relief laws. The debate over the nature of the international trade remedies begins early. Noel Hemmendinger argues that all the import relief laws should be replaced with a single discretionary remedy modeled on the current escape clause.[15] Thomas Howell and Alan Wolff argue that the lack of attention to the national economic interest in the current statutory scheme requires a system based more on governmental action than private rights of action.[16] Charles Johnson argues for a unification of trade law, but more on a litigation model in keeping with current proceedings under Section 337 of the Tariff Act of 1930.[17]

The second and third sections of the book address narrower but significant issues relating to the trade laws. Here the editors have done a fine job in assembling a group of knowledgeable and prominent authors to write on issues within their areas of practice and expertise. Part two addresses current issues already the subject of current U.S. trade law. The articles examine injury findings under the escape clause,[18] trade adjustment assistance,[19] circumstances of sales adjustments in antidumping investigations,[20] calculating subsidy values,[21] upstream subsidies,[22] preliminary determinations in antidumping and sub-

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14. Cunningham, *The Current State of U.S. Import Relief Laws - Increased Importance and Increased Complexity*, in INTERNATIONAL TRADE POLICY, *supra* note 13.

15. Hemmendinger, *Shifting Sands: An examination of the Philosophical Basis for U.S. Trade Laws*, in INTERNATIONAL TRADE POLICY, *supra* note 13.

16. Howell and Wolff, *The Role of Trade Law in the Making of Trade Policy*, in INTERNATIONAL TRADE POLICY, *supra* note 13.

17. Johnston, *Administrative Relief for Unfair Import Trade: A Proposal for a Unified Statute*, in INTERNATIONAL TRADE POLICY, *supra*, note 13.

18. Rosen and Bayer, *Comparing Causes of Injury under the Escape Clause*, in INTERNATIONAL TRADE POLICY, *supra* note 13.

19. Hufbauer and Samet, *Trade Adjustment Assistance: Addressing the Consequences of International Competition*, in INTERNATIONAL TRADE POLICY, *supra* note 13.

20. Victor and Ehrgood, *Circumstances of Sale Adjustments in Antidumping Investigations: A Reevaluation*, in INTERNATIONAL TRADE POLICY, *supra* note 13.

21. Sciortino, *Calculating Subsidy Values in Countervailing Duty Cases: The Use of the Present Value Methodology*, in INTERNATIONAL TRADE POLICY, *supra* note 13.

22. Koenig, *Upstream Subsidies and U.S. Countervailing Duty Law* in INTERNATIONAL TRADE POLICY, *supra* note 13.

sidy cases,[23] suspension agreements,[24] revocation of antidumping duty orders,[25] and the definition of domestic industries.[26] Part three addresses trade issues not currently within the purview of U.S. law. The articles examine the treatment of imports from non-market economies,[27] industrial targeting,[28] foreign cartels,[29] and export credits.[30]

Unfortunately, *International Trade Policy*, when taken as a whole, ends up as a debate whether legalism or discretion is a more efficient method of protecting domestic industry. With few exceptions,[31] there is little attention paid to the legitimacy of the trade remedies or their costs to foreign firms and U.S. consumers. As the book reflects at least the individual views of an important segment of the trade bar, *International Trade Policy* reflects just how far the advocates of free trade have fallen. Arguments based upon comparative advantage, the classic economic rationale for free trade, have lost their force.[32] The short-lived prominence of the consumer movement appears to have left no lasting imprint on the trade laws.[33] Even the occasional coalition between U.S. exporting industries and domestic fabricators dependent on raw material imports has had only limited success in opposing import restraints.[34]

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23. Reade, *Preliminary Determinations in Antidumping and Countervailing Duty Cases: Should They be Changed?*, in INTERNATIONAL TRADE POLICY, *supra* note 13.

24. Frangedakis, *Suspension Agreements*, in INTERNATIONAL TRADE POLICY, *supra* note 13.

25. Dunn, *Revocation of Antidumping Duty Orders under the Trade Agreements Act of 1979*, in INTERNATIONAL TRADE POLICY, *supra* note 13.

26. Appelbaum and Gaston, *What is a "Domestic Industry" for Purposes of Application of the United States Trade Laws*, in INTERNATIONAL TRADE POLICY, *supra* note 13.

27. Horlick and Shuman, *Nonmarket Economies and the U.S. Trade Law*, in INTERNATIONAL TRADE POLICY, *supra* note 13.

28. Kamarck, *An examination of Foreign Industrial Targeting Practices and their Relationship to International Agreements and U.S. Trade Laws*, in INTERNATIONAL TRADE POLICY, *supra* note 13.

29. Howell, *Foreign Cartels and American Competitiveness*, in INTERNATIONAL TRADE POLICY, *supra* note 13.

30. DeKieffer, *The Role of Export Credits in International Trade*, in INTERNATIONAL TRADE POLICY, *supra* note 13.

31. *See* Reade, *supra* note 23, and Dunn, *supra* note 25.

32. *See* P. LINDERT & C. KINDLEBERGER, INTERNATIONAL ECONOMICS 17-25 (7th ed. 1982).

33. For a *pro bono* case brought by a consumer group aimed at opposing import restraints *see* Consumers Union v. Rogers, 352 F. Supp. 1319 (D.D.C. 1973), *aff'd sub nom.*, Consumers Union v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974).

34. This coalition has a rare success in the President's decision not to impose import restraints following the ITC's affirmative recommendation on the escape clause

If the legal structure accurately reflects the political climate, then any effort to develop a free trade legal structure must await the return of free trade as a significant political force. Given the current world economic conditions, it may well be impossible to create the type of consensus in favor of free trade that existed following World War II where it appeared that free trade truly promoted the national interest of the United States.

International Trade Policy suggests that such a consensus is very far away. The focus of the essays remains on the refining of the mechanisms for import relief and not the rationale for their existence. This is particularly apparent in the final section which attempts to bring certain foreign trade practices within the reach of the import relief laws.[35] The authors all examine a practice which may adversely affect a domestic industry and propose that current law be interpreted or amended to impose import relief against the practice. Such an approach ignores the fact that there are any number of very destructive practices that are simply not the proper subject for unilateral United States action under the trade laws.

The most extreme example is Thomas Howell's article on foreign cartels.[36] Howell contends that domestic firms confront a host of foreign cartels in international markets to their decided detriment.[37] He contends that antitrust doctrines which restrict subject matter jurisdiction over actions taken abroad[38] and defer to certain acts or policies of foreign governments[39] create a double standard which makes antitrust law ineffective in combating foreign cartels. Howell's solution is to broaden antitrust exemptions for U.S. industries and to amend the trade laws to apply dumping and countervailing duties to "classic" cartels.[40]

Such a suggestion is both bad antitrust policy and bad trade policy. The real success story of U.S. antitrust law has been the curtailment of the classic cartel in international trade.[41] To promote new U.S. cartels to take on a series of foreign cartels is to return to a form of

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petition brought by the domestic copper industry.

35. *See* Horlick and Shuman, *supra* note 27; Kamarck, *supra* note 28; Howell, *supra* note 29, and DeKieffer, *supra* note 30.

36. Howell, *supra* note 29.

37. *Id.* at 16-7.

38. *Id.* at 16-20.

39. *Id.*

40. *Id.* at 16-27.

41. *See* Rahl, *International Cartels and their Regulation*, in COMPETITION IN INTERNATIONAL BUSINESS: LAW AND POLICIES ON RESTRICTIVE PRACTICES (O. Schachter & R. Hellawell eds. 1981).

pronounced government market involvement that both competition and trade law abhors.

Moreover, the "classic" cartel cannot be squeezed or twisted to fit within the framework of the import relief laws. If a foreign cartel or monopolist sells in the United States there may well be a price difference between the home market price and the United States price. In fact, this will be inevitable if the firms possess sufficient market power in the home market to charge prices above the competitive norm. In order to sell in the United States, the firm would have to sell at less than a monopoly price because of the presence of vigorous competition. The fact that consumers in foreign countries are being exploited should have no relevance for the United States. To insist that the foreign producer maintain monopoly prices in the United States is to either exploit U.S. purchasers or to effectively prohibit dominate foreign producers from selling in the United States. More importantly, the fact that foreign producers are pricing in a competitive manner in the United States is the surest guarantee that the cartel has not been extended to the United States market.[42]

It is theoretically and practically almost impossible to conceive of a foreign cartel constituting a subsidy within the meaning of the countervailing duty laws. A subsidy is defined as a bounty or grant bestowed by a government to a business entity. This has nothing to do with the behavior of a cartel which creates and polices agreements to raise prices and restrict output in order to reap monopoly profits. To apply countervailing duty law to private decision making would be to change the fundamental nature of the trade laws and would be inconsistent with the international obligations of the United States under the GATT.

The pendulum of feeling toward protectionism has already made several swings in this century. Perhaps the tenor of our times represents just another swing in public opinion. This is a very difficult issue to analyze when viewing the trade laws at only one point in time. Nonetheless, the import relief laws were created for a purpose related to the liberalization and not the restriction of international trade. It would be ironic if the price for free trade turned out to be protectionism.

*Spencer Weber Waller**

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42. *See* J. PATTISON, ANTIDUMPING AND COUNTERVAILING DUTY LAWS Section 6.01(5) (1984).

* Associate, Freeborn & Peters, Chicago, Illinois; B.A., University of Michigan; J.D., Northwestern University Law School.