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BOOK REVIEWS

An International Antitrust Primer: A Businessman's Guide to the International Aspects of United States Antitrust Law and to Key Foreign Antitrust Laws. By Earl W. Kintner and Mark R. Joelson. New York: Macmillan Publishing Co., Inc., 1974. Pp. x, 391. $12.95.

An International Antitrust Primer is the fifth in a series of six antitrust primers for businessmen, written by Earl W. Kintner, the well known former Chairman of the Federal Trade Commission, a thirteen year veteran of that troubled agency, who is now in private practice in Washington. Mr. Kintner's co-author is his law partner, Mark R. Joelson, a former staff attorney with the Antitrust Division. This being the fifth Kintner antitrust primer, there is a strong inference that the other four primers[1] have been well received—and that frankly intrigues me because I have yet to have a single client mention that he had bought, let alone read, a book on antitrust.

And yet the authors stoutly insist that the six books are intended as "primers for businessmen, lawyers and students," designed so that "if the businessman can be made aware of the nature of these laws and how they generally bear on his activities, he will be in a position to consult a specialist *before* irretrievable action is taken and, in this manner, to shape his activities intelligently and lawfully."[2]

If businessmen really are the prime targets for six primers on various aspects of antitrust, it is hard to fathom why the second longest chapter in this primer is on "Procedural and Related Considerations." I would think the busy businessman would find procedure the least interesting aspect of antitrust. But there is Chapter Four, like an obstacle course to be run before getting on to the real stuff of contracts, conspiracies, acquisitions, transfers of technology and exemptions. Thirty-six pages on subject matter jurisdiction, personal jurisdiction, venue in criminal and civil cases, venue and service for nonresident patentees, procedure in criminal prosecutions, discovery and investigation abroad, enforcement of judgments against foreign parties, considerations of comity in shaping remedies, and international treaties is heavy reading even for lawyers, let alone impatient executives. To compound the problem the longest chapter, 70 pages, is on foreign antitrust laws, and most of that

1. E. KINTNER, AN ANTITRUST PRIMER (2d ed. 1973); E. KINTNER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES (1971); E. KINTNER, PRIMER ON THE LAW OF MERGERS (1973); E. KINTNER, A PRIMER ON THE ROBINSON-PATMAN ACT (1970). *See also* E. KINTNER & J. LAHR, AN INTELLECTUAL PROPERTY LAW PRIMER (1974).

2. E. KINTNER & M. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER x (1974) [hereinafter cited as KINTNER & JOELSON].

is on Article 85 of the EEC Treaty.[3] Article 85 is assuredly relevant to any serious discussion of international antitrust. But in an antitrust primer for businessmen it has about the same priority as Blue Sky does to the Securities Act of 1933—a necessary detail, best left to specialists.

I would have thought that what executives on the move really need to know beyond the scriptural "do's" and "don'ts" of per se violations is a Pete Peterson kind of tough minded flip chart orientation course on United States foreign trade as it presently exists,[4] rather than the legal implications growing out of the old global market rigging cases such as *Sisal*,[5] *Dyestuff*,[6] *National Lead*[7] and *Timken Roller*.[8]

When you think about it, how can one hope to prime executives on the practical aspects of international antitrust without leveling with them about the real world as it now exists. There is nothing to be gained by trying to scare or confuse them. They have a right to know that most of what they do abroad is not even visible to any regulatory agency. Secondly they have a right to know that what they do will now be judged in the light of the dramatic shift on trade policy that grew out of the scary summer of 1971 when we sprung a massive dollar hemorrhage which threatened our entire balance of payments, which in turn brought the Nixon-Connolly Freeze, followed by the two dollar devaluations of 1972 and then the Arab Oil Boycott of 1973. In response to those massive policy-shaping realities, the Antitrust Division gave up its scholastic approach to international trade. Since 1973 the Foreign Commerce Section has been completely reorganized and reoriented. Comparable changes have been made at the Departments of State, Commerce, and Treasury. A review of antitrust cases brought by the Antitrust Division since the fall of 1973 speaks for itself—six cases involving imports and none involving exports.[9] I would give odds that there is simply no chance

3. KINTNER & JOELSON 190-259.

4. P. PETERSON, THE UNITED STATES IN THE CHANGING WORLD ECONOMY: STATISTICAL BACKGROUND MATERIAL (1971).

5. United States v. Sisal Sales Corp., 274 U.S. 268 (1927).

6. United States v. General Dyestuff Corp., 57 F. Supp. 642 (S.D.N.Y. 1944).

7. United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

8. United States v. Timken Roller Bearing Co., 83 F. Supp. 284 (N.D. Ohio 1949), *modified & aff'd*, 341 U.S. 593 (1951).

9. United States v. DeBeers Indus. Diamond Div. Ltd., Civil No. 74-5389 (S.D.N.Y., filed Dec. 10, 1974). Judgment was filed with respect to Anco Diamond Abrasives Corporation and Diamond Abrasives Corporation on Dec. 17, 1975; a 60 day comment period must pass before entrance of the judgment. Prosecution continues against the third defendant, DeBeers Industrial Diamond Division Ltd.

United States v. DeBeers Indus. Diamond Div. Ltd., Criminal No. 74-1151 (S.D.N.Y., indictment returned Dec. 10, 1974). The court has accepted pleas of nolo contendere from

that the Antitrust Division would today launch another silly *Gillette-Braun* type case, given our present trade climate.[10] Businessmen are entitled to that kind of practical expertise if they are to understand international antitrust. Clients may have a passing interest in knowing a bit about the old cases, but their real interest is in knowing what the Antitrust Division is doing today and is likely to do tomorrow.

In that connection, I would also suggest that an antitrust primer for businessmen should include a frank discussion concerning the Antitrust Division's new determination to make use of its Business Review Procedure.[11] It was once fashionable to say the Europeans had a *regulatory* approach to antitrust, while we in the United States had a *prohibitory* approach. That neat comparison may have been true twenty years ago, but today the lines are very fuzzed. With more and more businessmen taking action or withholding action at the direction or suggestion of some agency of government, here or abroad, state action has become a prime consideration in antitrust enforcement. The Antitrust Division has had to put aside its standoffish, prosecutorial ways and start providing more affirmative advice on which businessmen can reasonably rely.[12] It is no accident that the procedures for getting a business review were revised on December 19, 1973, amid much publicity. And it is no accident that all sorts of businesses and groups are making much more

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Anco Diamond Abrasives Corp., which has been fined $20,000; and from Diamond Abrasives Corp., which has been fined $30,000. Prosecution continues against the third defendant, DeBeers Industrial Diamond Division Ltd.

United States v. Korean Hairgoods Ass'n of America, Civil No. 75-3069 (S.D.N.Y., filed June 24, 1975). A consent judgment was filed on Dec. 3, 1975; the 60 day comment period must pass before entrance of the judgment.

United States v. Korean Hairgoods Ass'n of America, Criminal No. 75-622 (S.D.N.Y., indictment returned June 24, 1975). The court has accepted a plea of nolo contendere and imposed a $2500 fine.

United States v. Addison-Wesley Publishing Co., Civil No. 74-5176 (S.D.N.Y., filed Nov. 25, 1974). Consent decree negotiations are pending.

United States v. National Bd. of Fur Farm Organizations, Inc., Civil No. 74-C 546 (E.D. Wisc., filed Nov. 19, 1974). The parties are negotiating consent decree.

United States v. National Bd. of Fur Farm Organizations, Inc., Criminal No. 74-211 (E.D. Wisc., indictment returned Nov. 19, 1974). Sentencing was scheduled for Jan., 1975.

United States v. Foote Mineral Co. and Metallgesellschaft, A.G., Civil No. 74-1652 (E.D. Pa., filed June 28, 1974). A consent judgment has been deposited; the 60 day comment period must pass before entrance of the judgment.

A merger involving Gutehoffnungshutte Aktienverein has also been blocked. Dep't of Justice Press Release, May 29, 1975.

10. United States v. Gillette Co., Civil No. 68-141 (D. Mass., filed Feb. 14, 1968).

11. Antitrust Division Directive No. 14-73 (Dec., 1973); 2 CCH TRADE REG. REP. ¶ 8559 (1971).

12. Statement of Walter B. Comegys before Senate Subcommittee on Foreign Commerce and Tourism, Jan. 25, 1972, quoted at 5 CCH TRADE REG. REP. ¶ 50,129 (1971).

frequent use of the business review machinery for complex international transactions. It may well be on its way to becoming what it should be, the functional equivalent of the SEC "No Action Letter." Businessmen need to know about such developments; and yet I could not find any listing in the Index of Kintner & Joelson for Business Review Procedure.

Primers have to be brief and well written. Much has to be excluded. Indeed, when I used to give antitrust seminars for executives, the most I could hope to get my victims to read was about fifty double-spaced typewritten pages which I abstracted from the Norbye Report.[13] For openers I would ask them to speculate on why the antitrust laws have proven so durable in the face of such unrelenting opposition from businessmen and their flacks. One broadly held theory is that the Sherman and Clayton Acts endure because they are so utterly irrelevant, or as Sam Butler, one of our best Wall Street corporate brethren, puts it — their application is "random and erratic" and the conclusions reached by the courts "almost irrational."

Kintner and Joelson never get into that fight. This primer is so cool and neutral one cannot tell what the authors really think about the antitrust laws. I wonder why. As practicing lawyers the authors must know that the direct approach, including value judgments, is very effective in getting busy businessmen to take the time to think about antitrust as something more than anachronistic populism or bureaucratic despotism.

I submit the record is there to show that the antitrust laws have been and are very good for United States business. But their value can only be understood in the special historical, political and social background of this country's rise to economic, political and military dominance during and after the Two Wars. Norbye, for example, asserts that the antitrust laws are a natural expression of certain "predominant [American] economic attitudes" including our professed belief in the free enterprise system, with the emphasis on the belief, not the system itself; our attitude that continued progress and growth are possible and even probable; our fear of bigness; and our general lack of interest in foreign trade.

By contrast the Kintner and Joelson book pretty much rejects any historical analysis or qualitative evaluation and focuses instead on decided cases, some of which are very dated. Given that focus I conclude that the authors and their publishers have targeted lawyers as their real market — and within the broad class of lawyers, those "entering for the

13. O. NORBYE, MISSION REPORT ON RESTRICTIVE BUSINESS PRACTICES IN THE UNITED STATES (1959).

first time into the field of trade regulation."[14]

So viewed, the Kintner and Joelson book should prove quite useful. Lawyers new to antitrust may not be smarter or better informed than their clients, but they probably are more driven. They are the readers most likely to read through those chapters on procedure and Article 85 and ultimately, in an effort to know more, to make use of the excellent bibliography in Appendix I. Truly, that bibliography is the best part of the book, thirty-six pages of source materials—cases, comments and treatises—neatly arranged by categories that invite further research. Using that bibliography a young lawyer setting out to build his own antitrust library could easily survey the bulk of the books those of us in the field use most.

When you think about it, antitrust lawyers must surely be a publisher's dream come true. We buy nearly everything which is published — and that is a lot. A basic antitrust library costs at least $1,000. The abiding question is not why we buy so much, but why nothing really outstanding has yet to be published which compares to Loss on Securities Regulation, Scott on Trusts, Moore on Federal Practice or Collier on Bankruptcy. Is there something about antitrust and its infatuation with facts which makes systematic exposition difficult? Is it that antitrust cuts across so many disciplines? Or is it simply that the practice of antitrust is so lucrative none as yet has moved to take off the time to do a definitive work?

My own theory is that most of those who write about antitrust today have failed to recognize that the Antitrust Division is more a policy-making body than an enforcement agency, especially in the area at issue. Right or wrong, the Antitrust Division now has more clout on the Hill, in the White House and at the various independent regulatory agencies than it does in the courts. If I am right, the treatises which focus on old cases are bound to miss the mark.

Whatever the explanation, I find it distressing that in a field as important as antitrust there is only one treatise practitioners recognize as truly first rate — Rowe on Robinson-Patman[15] — and that after all, as good as it is, is not really about antitrust, is it? Perhaps this sorry state of affairs will change when authors and publishers set their sights on an honest to God antitrust bible for professionals rather than yet another antitrust primer for businessmen.

*Robert Beshar**

14. KINTNER & JOELSON 190.

15. F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 675 (1962).

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The Indirect Credit. By Elisabeth A. Owens and Gerald T. Ball. Cambridge, Massachusetts: Harvard International Tax Program, 1975. Vol. I, pp. 477, $40.00.

Since 1961 when *The Foreign Tax Credit* by Elisabeth Owens was published there have been significant changes in and additions to the deemed-paid foreign tax credit provisions of the Internal Revenue Code. Section 902 was amended to modify "developed country" computations; section 1248 and Subpart F, which contains its own deemed-paid foreign tax credit provisions, were enacted; and section 902 was further amended to allow for deemed-paid foreign tax credits from third-tier foreign subsidiaries. There also have been numerous and important administrative developments in the form of published rulings and new and revised Treasury regulations. Furthermore, this period has witnessed both an increase in foreign investment that has magnified the importance of the foreign tax credit provisions and a movement to completely eliminate the provisions from the Internal Revenue Code.

The Indirect Credit was published in 1975 not as a revision to Professor Owens' earlier book but as a welcome expansion of Chapter Three of the 1961 treatise. Volume I, which is the subject of this review, deals with the indirect foreign tax credit rules applicable when a United States corporation receives dividend distributions from a foreign corporation (section 902), when it liquidates or sells its interest in a foreign corporation (sections 367 and 1248) and when it receives actual or constructive distributions from a DISC. It also deals with indirect credit relief available to an individual United States shareholder who is taxed on Subpart F income (section 962) or who disposes of his interest in a controlled foreign corporation (section 1248(b)).[1]

Because the authors' perceptiveness enables them to consider many of the more subtle foreign tax credit problems, *The Indirect Credit* constitutes a significant contribution to the literature dealing with federal income taxation. Discussions of some of the seemingly smallest details of the indirect credit mechanisms should prove to be of invaluable assistance to international tax planners as well as to those responsible for international tax research. As was true of Professor Owens' 1961 treatise, the authors' practical and mathematical approaches to many foreign tax credit problems will offer a significant assist to one faced with maximizing available foreign tax credits.

Professor Owens and Mr. Ball, however, demonstrate somewhat of a bias against taxpayer interests both in expressing their views of what the

1. Volume II, which has not yet been published, will consider the indirect credit granted to United States corporations with respect to income taxed under Subpart F (§ 960).

law is and of what the law should be. They also demonstrate a great reluctance to question the published rulings of the Revenue Service, except to suggest that some rulings are too liberal in favor of the taxpayer. For example, the last sentence in Revenue Ruling 71-388[2] states that the foreign corporation's earnings and profits should not be reduced even though the selling United States shareholder is subject to tax on a "section 1248 dividend." The authors seem to view this statement as tantamount to law[3] and mention only once that "it has been argued that earnings and profits should be reduced by the amount of the section 1248 dividend . . ."[4] The "argument," which is not discussed in the book, was well presented and was based upon the legislative history of section 1248. But without discussing whether the statement in the Ruling is correct or whether it applies only to sales (and not to liquidations), the authors wrestle at length with its anomalous results.

As a second example, in considering the effect of foreign losses on deemed-paid foreign tax credits,[5] Professor Owens and Mr. Ball cite and discuss Revenue Ruling 74-550,[6] which requires that a foreign subsidiary's operating losses must be "carried back," thereby reducing or eliminating the subsidiary's earlier years' accumulated profits. On the facts in the Ruling there was a loss of foreign tax credits. The authors state that it is "necessary" to apply the losses against profits of a specific year or years and that it would "seem reasonable" to carry the losses back as required by Revenue Ruling 74-550 notwithstanding the loss in foreign tax credits[7] but they do not say why. Nor do they discuss alternative solutions to the foreign loss "problem." They seem more concerned that the Ruling will permit an acceleration of credits in certain circumstances, and accordingly, suggest that an "anti-acceleration" computation should be required. Additionally, they do not consider at any length the more difficult foreign loss problem: What happens if the foreign country has an operating loss carryback provision?[8]

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2. Rev. Rul. 71-388, 1971-2 CUM. BULL. 314.

3. E. OWENS & G. BALL, THE INDIRECT CREDIT 238-41, 246, 248, 252 and 262 (1975).

4. *Id.* at 221, *citing* W. GIFFORD, CONTROLLING FOREIGN CORPORATIONS—SECTION 1248 A30-A31 (Tax Management No. 240-2d, 1975).

5. *Id.* at 170-76.

6. Rev. Rul. 74-550, 1974-2 CUM. BULL. 209.

7. E. OWENS & G. BALL, *supra* note 3, at 173. Professor Owens expressed a similar viewpoint with regard to the allocation of foreign losses in an earlier work, but noted that the practice of the Revenue Service at that time was to require allocation to earliest years first. E. OWENS, THE FOREIGN TAX CREDIT 127 (1961). Thus Rev. Rul. 74-550 would seem to represent a change in Revenue Service policy. Query whether this Ruling is within the Commissioner's discretion under Int. Rev. Code § 902(c)(1)?

8. *See* W. GIFFORD, U.S. TAX TREATMENT OF FOREIGN LOSSES A10-A13 (Tax Management No. 306, 1974).

The authors also do not give due consideration to an important area in which the Revenue Service could be viewed as remiss—the determination of a foreign corporation's earnings and profits. The authors set forth an elaborate "earnings and profits" table (pp. 242-44), but do not discuss at any length the determination of earnings and profits and accumulated profits when the taxpayer has not made, or cannot make, the election in Treas. Regs. § 1.902-3(c)(5)(i) (1973).[9] Revenue Ruling 63-6[10] was declared obsolete and Treas. Reg. § 1.902-3(c)(1) (1973) offers no practical guidance. While the book also would seem to have been an appropriate place to discuss the Revenue Service's peculiar and ambiguous earnings and profits and accumulated profits currency translation rules,[11] the authors apparently felt the topic was adequately covered in an earlier Harvard International Tax Program treatise.[12]

Despite these minor points, the book deserves high marks. It is by far the best and most complete treatise on the subject for which Professor Owens and Mr. Ball deserve much praise. The book should be on the required reading list of every international tax practitioner, or, at least, it should be available in his library.

*James P. Fuller**

9. *See* OWENS, *supra* note 7, at 119-25.

10. Rev. Rul. 63-6, 1963-1 CUM. BULL. 126, was declared obsolete by Rev. Rul. 72-621, 1972-2 CUM. BULL. 651. The Revenue Service stated in Rev. Rul. 63-6 that the criteria applied under United States income tax law in determining "earnings and profits" are also applicable in determining "accumulated profits" for pre-1963 years for purposes of § 902. Despite its narrow holding, Rev. Rul. 63-6 was a landmark ruling. For example, the instructions to Revenue Service Form 3646 require that earnings and profits must be determined in accordance with Rev. Rul. 63-6 if they cannot be determined in accordance with Treas. Reg. § 1.964-1 (1974). Rev. Rul. 63-6 gave rise to many questions. *See* Weiss, *Earnings and Profits and the Determination of the Foreign Tax Credit*, 43 TAXES 849 (1965). Its "declared obsolescence" gives rise to many more.

11. It is not clear to what extent the currency translation and exchange gain or loss rules of Treas. Reg. §§ 1.964-1(d) and (e) (1974) apply. *See* D. RAVENSCROFT, TAXATION AND FOREIGN CURRENCY (1973); Lynch, *Determination of Earnings and Profits of a Controlled Foreign Corporation*, 45 TAXES 263 (1967); and Ravenscroft, *Foreign Exchange Rate Changes, the Indirect Credit for Foreign Tax of Controlled Foreign Corporations, and Revenue Ruling 74-230*, 30 TAX L. REV. 419 (1975). Nor is it clear why taxpayers that make the Treas. Reg. § 1.902-3(c)(5)(i) (1973) election to compute their foreign subsidiary's earnings and profits in accordance with Treas. Reg. § 1.964-1 (1974) are barred from using subsections (d) and (e) thereof. *See* de Kosmian and Chapman, *The Derivative Foreign Tax Credit: The Complex Problems and Planning Possibilities*, 23 J. TAXATION 46 (1965).

12. *See* E. OWENS & G. BALL, *supra* note 3, at 2 n.3 and 165 n.238 *citing* D. RAVENSCROFT, *supra* note 11.

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