

**FOREIGN
COMMERCE
and the
ANTITRUST
LAWS**

WILBUR L. FUGATE

Foreign Commerce and the Antitrust Laws

Third Edition

Volume II

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Member of the District of Columbia Bar



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Preface

There have been a large number of important developments in the antitrust laws since the second edition of this book was published in 1973. A violation of the Sherman Act is now a felony, and fines have been increased to one million dollars. A wave of antitrust procedural legislation has been enacted in this period covering such areas as premerger notification, consent judgments, civil investigative demands, and, of particular interest here, expansion of interstate and foreign commerce jurisdiction. The Webb-Pomerene Act is now under congressional scrutiny, and there is present consideration of a commission to study the international aspects of U.S. antitrust laws. As set out in Chapter 2, foreign nations have registered more protests in recent years against the U.S. doctrine of the extraterritoriality of the U.S. antitrust laws and have enacted blocking statutes to prevent U.S. courts from obtaining documents in antitrust cases. To meet foreign reaction some courts have evolved a “jurisdictional rule of reason” in foreign antitrust cases to take into account comity with foreign nations and other special factors affecting U.S. foreign trade. Foreign governments themselves in recent years have been more and more involved in activities of a cartel-like nature. Paradoxically, at the same time, much progress has been made in cooperation among nations in antitrust enforcement.

As set out in Chapter 10, there has been a great increase in acquisitions of U.S. companies by foreign firms. The law as to foreign mergers in general has been clarified by current cases. The courts have appeared to take more account of global markets and foreign competitors in assessing even domestic mergers. Assistant Attorney General William F. Baxter has indicated that he plans to rework the Department of Justice Merger Guidelines to stress horizontal competition.

The Justice Department has rendered a real service and has clarified foreign antitrust law by the publication of its Antitrust Guide for International Operations in 1977. The examples cover jurisdiction and

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difficult areas such as joint ventures and patents. Comity with foreign nations is also treated.

Some changes in enforcement are currently being considered. Attorney General William French Smith has said that "bigness is not badness," and Assistant Attorney General Baxter has indicated that he does not favor bringing vertical cases unless there is a horizontal aspect. On the international side, however, they appear to go along with the policy of past administrations.

Foreign antitrust laws are now more actively enforced and have been constantly changed and updated, particularly in Canada, the United Kingdom, and Japan.

In preparing this third edition the author wishes to thank S. Chesterfield Oppenheim, editor of the original Trade Regulation Series, of which the first two editions were a part, for his invaluable aid and members of the firm of Baker & Hostetler for their support and encouragement. Grateful appreciation is due to Mrs. Helen Carothers who typed most of the manuscript and to Mrs. Eileen Young who began the typing. The author also wishes to thank the staff of Little, Brown and Company, particularly Marian Wolotkiewicz, for their expert assistance. Some of the material in the book is based upon speeches or articles by the author, and kind acknowledgment is made of these sources below.*

Wilbur L. Fugate

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*Some sections of Chapter 12 and of other chapters: The Department of Justice's Antitrust Guide for International Operations, 17 Va. J. Intl. Law 645 (1977); some sections of Chapter 10: Problems of International Acquisitions and Mergers, 2 Canada-U.S.L.J. 190 (1979); some sections of Chapter 16: speeches — Specialization and Export Agreements under the Proposed [Canadian] Law, University of Toronto, Toronto, Canada, May 15, 1977; and Specialization and Export Agreements, Queens University, London, Ontario, Canada, 1976.

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