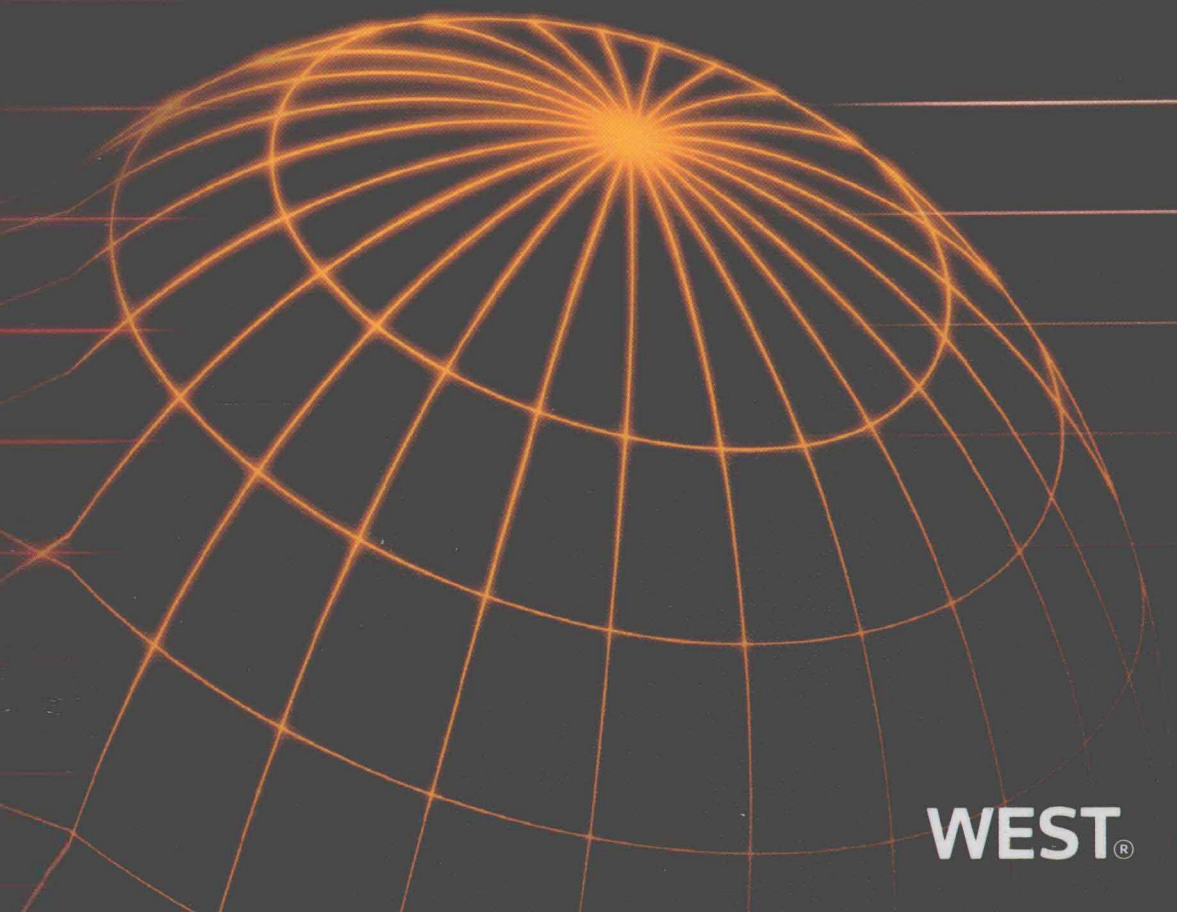


C A S E S A N D M A T E R I A L S

Global Issues in Antitrust and Competition Law

ELEANOR FOX
DANIEL CRANE



WEST®

Global Issues in Antitrust and Competition Law

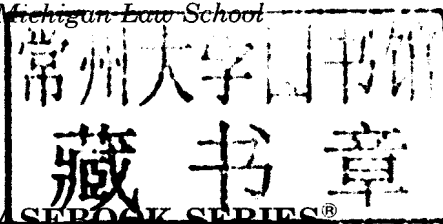
By

Eleanor M. Fox

*Walter J. Derenberg Professor of Trade Regulation
New York University School of Law*

Daniel A. Crane

*Professor of Law
University of Michigan Law School*



AMERICAN CASEBOOK SERIES®

WEST®

A Thomson Reuters business

Thomson Reuters created this publication to provide you with accurate and authoritative information concerning the subject matter covered. However, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. Thomson Reuters does not render legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

American Casebook Series is a trademark registered in the U.S. Patent and Trademark Office.

© 2010 Thomson Reuters

610 Opperman Drive
St. Paul, MN 55123
1-800-313-9378

Printed in the United States of America

ISBN: 978-0-314-18362-0

Foreword

Eleanor Fox has frequently reminded us that while markets are global, antitrust laws—the rules that undergird effectively functioning markets—are national. She would be first to recognise that each of the key elements of this insight require a degree of qualification. In fact, surprisingly few markets are seamlessly global. And increasingly the practice of antitrust law is already in the process of becoming international, although it is certainly true that the instruments of antitrust enforcement and merger regulation are overwhelmingly national, notwithstanding their extraterritorial reach.

This monumental volume is focused on the critical interplay between the national and the global elements of antitrust. It does so through the medium of national jurisprudence, through the reproduction of key speeches, through an analysis of commissions and treaties and the efforts of antitrust enforcers to align their practice, or, at the very least, to understand the bases of divergent national practices.

Few are better qualified to undertake this task than the two authors. Eleanor Fox is the scholar most closely associated with describing, understanding and analysing international antitrust, as evidenced by her truly massive output in this area alone, and by no means her only area of contribution to antitrust scholarship. But even more than her scholarship, for those of us whose work in antitrust started at its geographical margins—that is to say, beyond the borders of the United States and the European Union—Eleanor is distinguished by her empathy with and her deep interest in these efforts. She has been a voice of the new antitrust authorities and as they have grown in stature and importance, so has she expanded her already vast horizons by incorporating the work of these new agencies into the corpus of international antitrust law and practice. The range of experiences drawn upon to produce this volume is testament not only to the centrality of the international markets/national antitrust insight, but to Eleanor's intellectual curiosity and willingness to embrace the experiences and insights of those who are not used to making an appearance in the scholarly antitrust tomes emanating from the US and Europe.

My introduction to Daniel Crane's work comes by way of his seminal historical accounts of the ups and downs, the ebbs and

flows, of US antitrust. Just as I would insist that economic historians, rather than plain and simple economists, are best placed to understand contemporary economic phenomenon and even predict their future paths, so are legal historians best placed to understand the place to which decades of antitrust law has evolved and where it is likely to go. Historians are, per definition, sensitive to the often determinative force and power of context—politics, economics, stages of development, state-business relations, even wars all, as Daniel's work reminds us, influence the character and course of antitrust. This is the canvas of history and Daniel's regard for history permeates this volume.

We are at an important cusp in the development of international antitrust. Effective public international institutions are working precisely in those interstices between global markets and national antitrust that are the concern of this volume. The International Competition Network has brought together the vast majority of the world's national antitrust authorities. The ICN has developed best practices, not only in antitrust rules and approaches, but also in the building of effective antitrust authorities. And at least, as important, it has, largely through the active participation of precisely those of its members who used to be on the antitrust margins, that the ICN is beginning to appreciate "informed divergence", essentially an appreciation of why historical and other contexts may necessitate divergence rather than convergence. The OECD continues to produce applied scholarship of high quality and to embrace participation from way beyond its membership. UNCTAD continues to support those antitrust authorities from nations whose resource endowment and history most constrains their ability to develop into effective members of the international community of national antitrust authorities. And if the WTO is the avowed and self-proclaimed agent of a globalised world, for how long can antitrust remain on the periphery of its agenda.

Forewords traditionally extol the timeliness of the volumes that they are introducing. This volume is a majestic survey of an issue whose time has truly come. It will not only be a building block in the enterprise of aligning global markets and national antitrust, it is a veritable world tour of the rules and practices that already propel that world further and map out its future direction.

In their introduction to the volume the authors note that this volume on global antitrust issues may be used "to supplement domestic antitrust casebooks". They then immediately identify the oddity implicit in treating a volume on global antitrust as a supplement to national antitrust scholarship precisely because markets—the very stuff of antitrust—are global. As markets become ever

more global—and even that inexorable development will experience ebbs and flows—so will this volume come to occupy a central place on the bookshelves of antitrust scholars and in the reading lists of their students.

DAVID LEWIS
Gordon Institute of Business Science
Johannesburg, South Africa
Immediate Past Chairperson,
South Africa Competition Tribunal

March 2010

Global Issues Series

Series Editor, Franklin A. Gevurtz

Titles Available Now

Global Issues in Civil Procedure by Thomas Main, University of the Pacific, McGeorge School of Law
ISBN 978-0-314-15978-6

Global Issues in Commercial Law by Claude D. Rohwer, University of the Pacific, McGeorge School of Law and Kristen David Adams, Stetson University College of Law
ISBN 978-0-314-19993-5

Global Issues in Constitutional Law by Brian K. Landsberg, University of the Pacific, McGeorge School of Law and Leslie Gielow Jacobs, University of the Pacific, McGeorge School of Law
ISBN 978-0-314-17608-0

Global Issues in Contract Law by John A. Spanogle, Jr., George Washington University, Michael P. Malloy, University of the Pacific, McGeorge School of Law, Louis F. Del Duca, Pennsylvania State University, Keith A. Rowley, University of Nevada, Las Vegas, and Andrea K. Bjorklund, University of California, Davis
ISBN 978-0-314-16755-2

Global Issues in Copyright Law by Mary LaFrance, University of Nevada
ISBN 978-0-314-19447-3

Global Issues in Corporate Law by Franklin A. Gevurtz, University of the Pacific, McGeorge School of Law
ISBN 978-0-314-15977-9

Global Issues in Criminal Law by Linda Carter, University of the Pacific, McGeorge School of Law, Christopher L. Blakesley, University of Nevada, Las Vegas and Peter Henning, Wayne State University
ISBN 978-0-314-15997-7

Global Issues in Employee Benefits Law by Paul M. Secunda, Marquette University Law School, Samuel Estreicher, New York University School of Law, Rosalind J. Connor, Jones Day, London
ISBN 978-0-314-19409-1

Global Issues in Employment Discrimination Law by Samuel Estreicher, New York University School of Law and Brian K. Landsberg, University of the Pacific, McGeorge School of Law
ISBN 978-0-314-17607-3

Global Issues in Employment Law by Samuel Estreicher, New York University School of Law and Miriam A. Cherry, University of the Pacific, McGeorge School of Law
ISBN 978-0-314-17952-4

Global Issues in Environmental Law by Stephen McCaffrey, University of the Pacific, McGeorge School of Law and Rachael Salcido, University of the Pacific, McGeorge School of Law
ISBN 978-0-314-18479-5

Global Issues in Family Law by Ann Laquer Estin, University of Iowa and Barbara Stark, Hofstra University
ISBN 978-0-314-17954-8

Global Issues in Freedom of Speech and Religion by Alan Brownstein, University of California, Davis School of Law and Leslie Gielow Jacobs, University of the Pacific, McGeorge School of Law
ISBN 978-0-314-18454-2

Global Issues in Income Taxation by Daniel Lathrope, University of California, Hastings College of Law
ISBN 978-0-314-18806-9

Global Issues in Intellectual Property Law by John Cross, University of Louisville School of Law, Amy Landers, University of the Pacific, McGeorge School of Law, Michael Mireles, University of the Pacific, McGeorge School of Law and Peter K. Yu, Drake University Law School
ISBN 978-0-314-17953-1

Global Issues in Labor Law by Samuel Estreicher, New York University School of Law
ISBN 978-0-314-17163-4

Global Issues in Legal Ethics by James E. Moliterno, College of William & Mary, Marshall-Wythe School of Law and George Harris, University of the Pacific, McGeorge School of Law
ISBN 978-0-314-16935-8

Global Issues in Property Law by John G. Sprankling, University of the Pacific, McGeorge School of Law, Raymond R. Coletta, University of the Pacific, McGeorge School of Law, and M.C. Mirow, Florida International University College of Law
ISBN 978-0-314-16729-3

Global Issues in Tort Law by Julie A. Davies, University of the Pacific, McGeorge School of Law and Paul T. Hayden, Loyola Law School, Los Angeles

ISBN 978-0-314-16759-0

Table of Cases

The principal cases are in bold type. Cases cited or discussed in the text are in roman type. References are to pages. Cases cited in principal cases and within other quoted materials are not included.

- ACF Chemiefarma NV v. European Commission**, 8
Advanced Micro Device, Inc. v. Intel Corporation, 487
Åhlström Osakeyhtiö v. European Commission, ECR I-1307 (ECJ 1993), 14
Åhlström Osakeyhtiö v. European Commission, ECR 5193 (ECJ 1988), 350, 456
Air Cargo Shipping Services Antitrust Litigation, In re, 490
Airtours Plc v. European Commission, 314
AKZO Chemie BV v. European Commission, 123
Alcoa, United States v., 306, 454, 492
Allied Tube & Conduit Corp. v. Indian Head, Inc., 189
Altmark Trans GmbH, 393
Arnold, Schwinn & Co., United States v., 205
ASNEF-EQUIFAX v. Asociación de Usuarios de Servicios Bancarios (AUSBANC), 170

Baker Hughes Inc., United States v., 303
Bates v. State Bar of Arizona, 385
Beef Industry Development Society Ltd. (Irish), Competition Authority v., 21
Bell Atlantic Corp. v. Twombly, 13, 443
Boeing Company/McDonnell Douglas Corporation, 305
Boral Besser Masonry Ltd. v. Australian Competition and Consumer Commission, 126
British Airways PLC v. European Commission, 224
British Telecom (Italy v. European Commission), 367
Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 94, 122

Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG, 373

Cardizem CD Antitrust Litigation, 185
Centre Belge d'Etudes de Marche-Marketing SA (CBEM) v. Compagnie Luxembourgeoise de Télédiffusion SA (CLT), 367
Chadha v. Bayer Inc., 443
Cipolla v. Fazari, 382
City of (see name of city)
CNSD (European Commission v. Italy), 391
Commission v. Intel Corp., 149
Consorzio Industrie Fiammiferi v. Autorità Garante della Concorrenza e del Mercato, 373, 373, 386, 416
Consten and Grundig v. European Commission, 202
Continental T.V., Inc. v. GTE Sylvania Inc., 205
Courage Ltd. v. Crehan, 430

Dentsply Intern., Inc., United States v., 233
Deutsche Telekom AG v. European Commission, 143

Empagran, see *F. Hoffmann-La Roche European Night Services Ltd. (ENS) v. Commission of the European Communities*, 191

Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. European Commission, 372
F. Hoffmann-La Roche Ltd. v. Empagran S.A., 467, 478, 487
France v. European Commission (Telecommunications Terminals), 382

- Franzen, Criminal Proceedings Against, 381
- GB-INNO-BM NV v. Vereniging van de Kleinhandelaars in Tabak, 372, 373
- Gencor Ltd. v. European Commission, 350
- GlaxoSmithKline Services Unlimited v. European Commission, ECJ, 213**
- GlaxoSmithKline Services Unlimited v. European Commission, CFI, 208**
- Hammons v. Alcan Aluminum Corp., 29
- Harmony Gold Mining Company Ltd. v. Mittal Steel Corp., 98**
- Hartford Fire Ins. Co. v. California, 460**
- H.B. Ice Cream Ltd. v. Masterfoods Ltd., 232
- Hilti AG v. European Commission, 224
- Hoffmann-La Roche & Co. AG v. European Commission, 224
- Höfner v. Macrotron GmbH, 368**
- Hoover v. Ronwin, 385
- IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG, 130**
- Information Resources, Inc. v. Dun & Bradstreet Corp., 489
- Intel Corp. v. Advanced Micro Devices, Inc., 160
- International Ass'n of Machinists and Aerospace Workers, (IAM) v. Organization of Petroleum Exporting Countries (OPEC), 51
- John Deere Ltd. v. European Commission, 169
- Keck and Mithouard, Criminal Proceedings Against, 373
- Kruman v. Christie's Intern. PLC, 488
- Ladbroke Racing Ltd., Commission v., 385**
- Lafayette, La., City of v. Louisiana Power & Light Co., 372
- Laker Airways Ltd. v. Sabena, Belgian World Airlines, 455
- Langnese Iglo GmbH v. European Commission, 232
- Leegin Creative Leather Products, Inc. v. PSKS, Inc., 206, 219
- Mannington Mills, Inc. v. Congoleum Corp., 455
- Masterfoods Ltd., 233
- Meng v. Germany, 373
- Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabriella SpA, 361**
- Microsoft Corp. v. Commission, 132**
- Microsoft I (Japan), 275
- Mittal Steel South Africa v. Harmony Gold Mining, 103**
- Multi-Juice, S.A. v. Snapple Beverage Corp., 489
- National Soc. of Professional Engineers v. United States, 177
- Nationwide Poles and Sasol (Oil) Pty. Ltd., Matter of, 112**
- Neste Markkinointi Oy, 228
- Nippon Paper Industries Co., Ltd., United States v., 20
- NYNEX Corp. v. Discon, Inc., 164
- Ohra Schadeverzekering NV, 373
- Pacific Bell Telephone Co. v. LinkLine Communications, Inc., 96, 122
- Parker v. Brown, 385
- Polygram Holding, Inc. v. FTC, 173
- Port of Rødby, 363**
- PreussenElektra AG v. Schleswig AG, 394
- Prewitt Enterprises, Inc. v. Organization of the Petroleum Exporting Countries, 51**
- Provimi, Ltd. v. Aventis Animal Nutrition SA, 491
- Rambus Inc. v. FTC, 163
- Refined Petroleum Products Antitrust Litigation, In re, 64**
- Régie de Postes v. Corbeau, 371
- SA Binon & Cie SA v. SA Agence de la Presse, 219
- Schering-Plough Corp. v. FTC, 185
- Scholler Lebensmittel GmbH & Co. v. European Commission, 228**
- Schwegmann Bros. v. Calvert Distillers Corp., 416
- Slovakian Postal Legislation Relating to Hybrid Mail Services, 375**
- Sot. Lelos Kai Sia EE v. GlaxoSmithKline AVEE, 216**
- Stergios Delimitis v. Henninger Brau AG, 225**
- Stichting Baksteen (Dutch brickmakers), 28
- Tetra Pak International SA v. European Commission, 224
- Texaco Inc. v. Dagher, 190
- Timberlane Lumber Co. v. Bank of America, 455
- Todd v. Exxon Corp., 177
- Toshiba Elevator, 274
- United Brands Co. v. European Commission, 96, 111

-
- | | |
|---|--|
| <p>United Nuclear Corp. v. General Atomic Co., 51</p> <p>United States v. _____ (see opposing party)</p> <p>United States Postal Service v. Flamingo Industries (USA) Ltd., 372</p> <p>Uranium Antitrust Litigation, 51</p> <p>U.S. Gypsum Co., United States v., 176</p> <p>Van den Bergh Foods Ltd. v. European Commission, 232, 233</p> <p>Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 95</p> | <p>Visa U.S.A., Inc., United States v., 186</p> <p>Vitamin C Antitrust Litigation, 36</p> <p>Volkswagen AG v. European Commission, 207</p> <p>Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., 110</p> <p>Wal-Mart Stores, Inc. v. Rodriguez, 309</p> <p>Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 122</p> <p>Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten, 177</p> |
|---|--|

Global Issues in Antitrust and Competition Law

Summary of Contents

| | Page |
|---|-------------|
| FOREWORD | iii |
| TABLE OF CASES | xix |
| Chapter 1. Cartels | 4 |
| A. Introduction | 4 |
| B. Law and Attitude Towards Cartels | 4 |
| C. Proof of a Cartel Agreement | 7 |
| D. Are Effects Necessary? | 19 |
| E. Crisis Cartels | 20 |
| F. Foreign Government Action or Involvement: A Defense? ... | 29 |
| G. Cooperation, Convergence, and Cross-Fertilization in International Cartel Enforcement | 74 |
| Chapter 2. Monopolies and Abuse of Dominance | 94 |
| A. Introduction | 94 |
| B. Exploitative Offenses | 95 |
| C. Exclusionary Offenses | 122 |
| Chapter 3. Collaborations of Competitors Other Than Cartels | 166 |
| A. Introduction | 166 |
| B. Loose Collaborations | 169 |
| C. Learned Professions | 177 |
| D. Collaborations in the New Economy | 182 |
| E. Joint Ventures | 190 |
| Chapter 4. Vertical Restraints | 197 |
| A. Introduction | 197 |
| B. European Union | 198 |
| C. Japan and Korea | 274 |
| D. Developing Countries: Special Concerns | 298 |
| Chapter 5. Mergers | 302 |
| A. Introduction | 302 |
| B. Domestic Issues in Analysis of Transborder Mergers | 302 |
| C. Comparative Issues | 311 |
| D. Cooperation and Conflict | 347 |

| | Page |
|---|-------------|
| Chapter 6. The State | 353 |
| A. Introduction | 353 |
| B. Advocacy | 355 |
| C. Abuse of Dominance by State-Owned Enterprise | 359 |
| D. State Privilege or License; Limits to Exclusivity | 367 |
| E. State Measures That Restrict Competition or Facilitate Private Restrictions | 372 |
| F. State Aids | 391 |
| G. The Relationship Between Regulation and Competition | 412 |
| H. Hybrid State and Private Restraints—The WTO | 412 |
| Chapter 7. Enforcement: Systems and Institutions | 419 |
| A. Introduction | 419 |
| B. Public Enforcement Models | 422 |
| C. Specialized Antitrust Courts | 423 |
| D. Federalism and Enforcement by Multiple Sovereigns | 424 |
| E. Private Enforcement | 429 |
| F. Criminal Enforcement | 444 |
| G. Merger Enforcement | 450 |
| Chapter 8. Extraterritoriality and Jurisdiction Over International Behavior | 454 |
| A. Introduction | 454 |
| B. The Effects Test and Comity Concerns | 456 |
| C. Frontiers of Antitrust Jurisdiction | 488 |
| Chapter 9. Global Governance | 492 |
| A. Introduction | 492 |
| B. The UNCTAD Set of Principles | 493 |
| C. Bilateral Cooperation Agreements | 505 |
| D. Regional Cooperation: Developing Countries, Small Juris- dictions, and Other Cooperations | 518 |
| E. The Van Miert Report and the Debate on Competition in the WTO | 532 |
| F. The Doha Declaration | 558 |
| G. The OECD Hard Core Cartel Recommendation | 560 |
| H. ICPAC | 565 |
| I. ICN | 568 |
| Appendices: Excerpts from Treaties and Statutes | 571 |
| INDEX | 629 |

Table of Contents

| | Page |
|---|--------------|
| FOREWORD | iii |
| TABLE OF CASES | xix |
| Chapter 1. Cartels | 4 |
| A. Introduction | 4 |
| B. Law and Attitude Towards Cartels | 4 |
| C. Proof of a Cartel Agreement | 7 |
| Quinine | 8 |
| <i>ACF Chemiefarma v. Commission (Quinine)</i> | 8 |
| Wood Pulp | 14 |
| <i>Åhlström Osakeyhtiö v. Commission (Wood Pulp)</i> | 14 |
| D. Are Effects Necessary? | 19 |
| E. Crisis Cartels | 20 |
| <i>Competition Authority v. Beef Industry Development Society Ltd.</i> | 21 |
| F. Foreign Government Action or Involvement: A Defense? ... | 29 |
| 1. US Agency Guidelines | 30 |
| <i>Antitrust Enforcement Guidelines for International Operations, US Department of Justice and FTC 1995</i> | 30 |
| 2. US Caselaw | 36 |
| a. Act of State, Foreign Sovereign Compulsion, Comity | 36 |
| <i>In re Vitamin C Antitrust Litigation</i> | 36 |
| b. OPEC | 51 |
| <i>Prewitt Enterprises, Inc. v. Organization of the Petroleum Exporting Countries</i> | 51 |
| <i>Refined Petroleum Products Antitrust Litigation</i> | 64 |
| <i>NOPEC (Introduced in Senate)</i> | 73 |
| G. Cooperation, Convergence, and Cross-Fertilization in International Cartel Enforcement | 74 |
| <i>Scott D. Hammond, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades</i> | 74 |

| | Page |
|---|------------|
| Chapter 2. Monopolies and Abuse of Dominance | 94 |
| A. Introduction | 94 |
| B. Exploitative Offenses | 95 |
| 1. Excessive Pricing..... | 95 |
| The Competition Tribunal of South Africa | 98 |
| <i>Harmony Gold Mining Company Ltd v. Mittal Steel Corp</i> ... | 98 |
| In the Competition Appeal Court of South Africa..... | 103 |
| <i>Mittal Steel South Africa v. Harmony Gold Mining</i> | 103 |
| 2. Discriminatory Pricing | 110 |
| <i>In the Matter Between Nationwide Poles and Sasol (Oil) Ltd.</i> | 112 |
| C. Exclusionary Offenses | 122 |
| 1. Predatory Pricing | 122 |
| <i>AKZO Chemie BV v. Commission</i> | 123 |
| High Court of Australia | 126 |
| <i>Boral Besser Masonry Limited v. Australian Competition</i> | 126 |
| <i>and Consumer Commission</i> | 126 |
| 2. Refusals to Deal | 130 |
| <i>IMS Health GmbH & Co. and NDC Health GmbH & Co.</i> | 130 |
| <i>Microsoft Corp. v. Commission</i> | 132 |
| 3. Margin Squeezes | 143 |
| <i>Deutsche Telekom AG v. Commission</i> | 143 |
| 4. Loyalty Clauses and Exclusive Dealing | 148 |
| <i>Commission v. Intel Corp.</i> | 149 |
| 5. Patent Ambush | 160 |
| Chapter 3. Collaborations of Competitors Other Than | |
| Cartels | 166 |
| A. Introduction | 166 |
| B. Loose Collaborations | 169 |
| <i>Note on John Deere Ltd. v. Commission</i> | 169 |
| <i>Asnef-Equifax v. Asociación De Usuarios De Servicios Bancarios</i> | 170 |
| (AUSBANC)..... | 170 |
| <i>Note on Polygram Holding, Inc. v. FTC</i> | 173 |
| C. Learned Professions | 177 |
| <i>Wouters Et Cie</i> | 177 |
| D. Collaborations in the New Economy | 182 |
| 1. Pharmaceuticals | 182 |
| 2. Credit Cards | 186 |
| 3. The Internet | 188 |
| 4. Standard-Setting Organizations and Related Patent | |
| Practices | 189 |