

Washington University Law Review

Volume 1958 | Issue 4

January 1958

Review of “Foreign Commerce and the Antitrust Laws,” By Wilbur L. Fugate

John E. Dunsford
Saint Louis University School of Law

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview



Part of the [Antitrust and Trade Regulation Commons](#)

Recommended Citation

John E. Dunsford, *Review of “Foreign Commerce and the Antitrust Laws,” By Wilbur L. Fugate*, 1958 WASH. U. L. Q. 457 (1958).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol1958/iss4/8

This Book Review is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

FOREIGN COMMERCE AND THE ANTITRUST LAWS. By Wilbur L. Fugate. Boston: Little, Brown & Company, 1958. Pp. xxxiii, 384. \$16.00.

This is a book that deserves delicate handling, because it courageously roams over fearfully-treaded ground, and because its goal of articulating the antitrust aspects of foreign commerce is so urgently needed. However, the suggestion should be made, delicately, that its value lies more in the attempt than in the fulfillment.

The ritualistic intonation that it belongs on the shelf of every attorney concerned with antitrust problems can be given without hesitation. In the present state of legal development of foreign commerce, only a brave or foolish man would knowingly turn down any available aid and comfort. This is the first vessel on the horizon in many years, and the shipwrecked need not wait to check its tonnage before signaling for help.

To start with the positive: an outstanding virtue of the work is its attempt to be comprehensive. After an adumbration of the philosophy of the antitrust acts generally, the author handles the thorny questions of the United States' jurisdiction over foreign commerce and over foreign corporations, and then works easily into the application of antitrust laws to prevalent trade practices in this area. He discusses possible defenses based on the rule of reason and the doctrine of ancillary restraints, and considers the types and forms of relief which the courts will grant. Separate chapters deal with antitrust problems of joint exploitation abroad, foreign subsidiaries, and foreign investments, and special treatment is given patents and trademarks. To round out the picture, the author discusses the Webb-Pomerene Act, auxiliary regulatory statutes, and attempts on the international level to deal with restrictive business practices.

Well organized, indexed to cases and statutes, the book is an invaluable starting point on most antitrust problems of clients doing business involving foreign trade. This much needs to be stated clearly so that the reservations which follow, fundamental as they may be, do not obscure the real merits of the volume.

Second in the Trade Regulation series edited by S. Chesterfield Oppenheim, the book was written by a trial attorney in the Antitrust Division of the Department of Justice who points out in a preface that he has "generally taken a conservative view as to what may be done in foreign commerce under the antitrust laws." If this arouses expectation of an integrated theory illuminating both the commerce and the law, the subsequent failure cannot be severely criticized: no one has a right to expect such a *tour de force* in this mortal world. But another point is not so easily parried: the book is offered as a guide for the general practitioner with little experience, for the

economist or business executive who wants a quick orientation, and for the specialist who needs a reference tool. Whether it fulfills adequately any of these purposes is dubious. The general practitioner may consider it a Restatement whose summaries seem to limp; the economist and business executive are apt to feel confined in a thicket of unrelieved legalisms; and the specialist, appreciating the convenience of having the cases categorized and bundled, may feel that he is bringing more to the book than he finds there. On what basis are these judgments made?

Basically the method of exposition, a time-honored one, is the recitation and contrast of cases. But any method is only as good as its execution, as every golfer knows. And case analysis, even for a practical handbook of law, is only meaningful in the light of some projected or readily assumed standard, a thread which both orients and unifies. Ad hoc appraisals are defensible for isolated problems but not for a field of law. In short, what is lacking is a perspective. Neither economic, political nor social considerations are seriously brought into play. Of course what the practitioner wants is a statement of *the law*. But trying to describe the law purely in terms of itself is like writing a letter before deciding to whom it will be sent. Even if it is possible to do this, how much does the result contribute to the understanding of the business man? the economist? the general practitioner? Furthermore, antitrust cases are ordinarily too factually complex to permit short summaries; they occur too infrequently to stand by themselves as a satisfactory elucidation of the whole picture of the law. The author offers some highly-polished summaries, but their relevance to each other (and this relationship is the important thing) is not particularly enlightening. Certainly the specialist is looking for more than case briefs.

Since a book relying so exclusively on case exposition cannot be criticized within the accepted limits of a review, a few random statements as to content may be proper. The author's treatment of the territorial principle of international law, relative to the question of the United States' jurisdiction over foreign trade, seems inadequate in view of the serious objections that have been raised by foreign governments over what they consider extraterritorial control of the acts of their nationals abroad. In particular, one may wonder if the territorial principle has been tailored to our antitrust laws, rather than vice versa.

Again, there is a heavy reliance on interstate commerce cases as guides to what will happen in sparsely litigated areas of foreign commerce. This is unobjectionable in itself, but since everyone is ready to admit that the factors controlling the two areas are not identical,

would it not be profitable (necessary?) to show wherein the differences lie, and what consequences they may have.

In fairness it must be admitted that these objections are partially directed to the scope of the work, and that is, after all, the author's prerogative. But the point goes deeper than that. The book contributes much more to our knowledge of the field than it does to our understanding. That, of course, is not a negligible accomplishment. And perhaps it is the indispensable clearing of ground for better battles in this "frontier area of law."

JOHN E. DUNSFORD†

†Assistant Professor of Law, St. Louis University.

