



NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 14 | Number 2

Article 7

Spring 1989

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Recommended Citation

Robert G. Shimp, *A Critical Review of the Justice Department's 1988 Antitrust Guidelines for International Operations*, 14 N.C. J. INT'L L. & COM. REG. 287 (1989).

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COMMENT

A Critical Review of the Justice Department's 1988 Antitrust Guidelines for International Operations

I. Introduction

On November 10, 1988 the U.S. Department of Justice (DOJ or Department) released the final draft of its Antitrust Guidelines for International Operations (1988 Guidelines).¹ This is the culmination of a two and a half year review² conducted by the Department to expand and update its 1977 guidelines (1977 Guide).³ This Comment examines the changes in form and substance proposed by the Department, compares these changes to those suggested by critics of the 1977 Guide,⁴ and offers a few suggestions for improving the new guidelines further.

A comparison of the two guidelines is important for several reasons. First, it shows how the purpose, structure, and style of Department guidelines have changed over time. Second, the 1977 Guide and the 1988 Guidelines are paradigms for studying the effect the Chicago School has had on DOJ antitrust policy over the last dec-

¹ ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR INTERNATIONAL OPERATIONS (Nov. 10, 1988) [hereinafter 1988 GUIDE], reprinted in ANTITRUST & TRADE REG. REP. (BNA) Vol. 54, No. 1391, at S-1 (Nov. 17, 1988). On June 8, 1988 the Department released a draft of the guidelines for general review and comment before preparation of the final document. ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR INTERNATIONAL OPERATIONS (June 8, 1988) [hereinafter 1988 DRAFT], reprinted in ANTITRUST & TRADE REG. REP. (BNA) Vol. 54, No. 1369, at S-1 (June 9, 1988).

² *Division Hires Consultant to Revise Guide for International Operations*, ANTITRUST & TRADE REG. REP. (BNA) Vol. 50, No. 1247, at 72 (Jan 9, 1986); *Antitrust Division Unveils Revisions of Guide for International Operations*, ANTITRUST & TRADE REG. REP. (BNA) Vol. 54, No. 1369, at 1018 (June 9, 1988).

³ ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (Jan. 26, 1977) [hereinafter 1977 GUIDE], reprinted in ANTITRUST & TRADE REG. REP. (BNA) Vol. 50, No. 799, at E-1 (Feb. 1, 1977).

⁴ Several authors have debated the merits of the 1977 Guide: Seki, *The Justice Department's New Antitrust Guide for International Operations—A Summary and Evaluation*, 32 BUS. LAW. 1633 (1977); Fugate, *The Department of Justice's Antitrust Guide for International Operations*, 17 VA. J. INT'L L. 645 (1977); Griffin, *A Critique of the Justice Department's Antitrust Guide for International Operations*, 11 CORNELL INT'L L.J. 215 (1978); Baker, *Critique of the Antitrust Guide: A Rejoinder*, 11 CORNELL INT'L L.J. 255 (1978); Silverstein, *The Antitrust Guide For International Operations—Another Point of View*, 13 INT'L LAW. 693 (1979); B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST LAW (2d ed. 1986).

ade.⁵ Third, the two guides help in isolating and analyzing the political aspects of international antitrust policy—the 1977 Guide was an early major statement by the Carter Administration on antitrust while the 1988 Guidelines are the Reagan Administration's final policy. Fourth, the two documents highlight Department trends and provide a glimpse of the future for international antitrust.

II. Changes In Form

The basic organization of the 1988 Guidelines is the same as that of the 1977 Guide. There are two main parts, an overview portion giving general guidance,⁶ and illustrative cases⁷ giving specific examples of how the overview's policies are applied. The overview sections of both the 1977 Guide and the 1988 Guidelines describe the purpose of the guidelines, the applicable antitrust laws enforced by the DOJ, enforcement policy, jurisdictional considerations, factors affecting DOJ's discretion in asserting jurisdiction, and foreign sovereign compulsion. The 1988 Guidelines, however, offer one more topic, international trade friction and the U.S. trade laws. The 1988 Guidelines break out each topic much more neatly under separate headings and cover the subjects in greater depth. This is more in keeping with the style of the Department's Merger Guidelines⁸ which commentators have said is a good example of a relatively clear, straight-forward exposition of DOJ policy.⁹

The structure of the illustrative cases is basically unchanged in the 1988 Guidelines. Each one consists of a short fact pattern followed by a discussion section which analyzes the facts in light of policies described in the overview. The cases are not simply a rework of the material in the overview; as in the 1977 Guide, these examples often provide as much or more new information about Department policy as the overview itself.¹⁰

⁵ The 1988 Guidelines' initiator was Douglas H. Ginsburg then the Assistant Attorney General for the Antitrust Division and a noted defender of the Chicago School. The Assistant Attorney General hired Professor Diane P. Wood as a special consultant to oversee the project while on leave from the University of Chicago where she taught Antitrust and International Antitrust. *Division Hires Consultant to Revise Guide for International Operations*, ANTITRUST & TRADE REG. REP. (BNA) Vol. 50, No. 1247, at 72 (Jan. 9, 1986).

⁶ 1977 GUIDE, *supra* note 3, at E-1; 1988 GUIDE, *supra* note 1, at S-3.

⁷ 1977 GUIDE, *supra* note 3, at E-3; 1988 GUIDE, *supra* note 1, at S-24.

⁸ ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, MERGER GUIDELINES (June 14, 1984), reprinted in 2 TRADE REG. REP. (CCH) ¶¶ 4491-4495.

⁹ See Seki, *supra* note 4, at 1635-36. See also Fugate, *supra* note 4, at 645-46.

¹⁰ The examples are of the typical "straw-man" variety which tends to make them overly simplistic and unrealistic. Nevertheless, they serve fairly well as illustrations of policy. The 1988 Guidelines are more formal than the 1977 Guide (e.g. no silly names are used for corporations—letter designations such as Beta Company or Product X are used instead). See Seki, *supra* note 4, at 1635. The breadth and depth of the examples combined with the much improved overview should answer concerns about the guidelines' utility. See *id.* See also Fugate, *supra* note 4, at 645-46.

III. Changes In Substance

The 1977 Guide was “intended to help businesses plan transactions which the Department of Justice is not likely to challenge, and to see which transactions are likely to require detailed factual inquiry by the enforcement agencies.”¹¹ The guide was a statement of DOJ policy, not all government agencies enforcing antitrust policy, such as the Federal Trade Commission or the International Trade Commission.¹² The 1977 Guide’s policies did not apply to private, state, and foreign antitrust actions.¹³ The vagueness about the role of the 1977 Guide in overall antitrust policy was criticized as being unnecessary.¹⁴

The purpose of the 1988 Guidelines is basically unchanged from the earlier document.¹⁵ The 1988 Guidelines are more careful to note that other agencies may have different policies¹⁶ and also to highlight that DOJ policies do not apply to private, state, and foreign antitrust actions.¹⁷ It is unlikely DOJ could do much more to clarify the reach of its policies without actually issuing its guidelines in a coordinated fashion with guidelines from all the other relevant agencies—a massive undertaking that would be far beyond the scope of the current project.

Of greater importance is the nonbinding nature of the policies

¹¹ 1977 GUIDE, *supra* note 3, at E-1.

¹² Griffin, *supra* note 4, at 217. The 1977 Guide tended to use language which made it appear to be an all-encompassing statement of federal policy. “[W]e try here to provide a working statement of *government* enforcement policy” 1977 GUIDE, *supra* note 3, at E-1 (emphasis added). “This [guide] is intended to help business plan transactions which the Department of Justice is not likely to challenge, and to see which transactions are likely to require detailed factual inquiry by the *enforcement agencies*” *Id.* (emphasis added). “Antitrust enforcement by the *United States Government* has two major purposes” *Id.* at E-2 (emphasis added).

The FTC and ITC may, in fact, be of greater concern to the average business. The number of antitrust cases brought by the government has decreased dramatically in the last thirty years to only a handful per year. On the other hand, at the end of 1987 the ITC had seventy-one dumping cases, forty-four Section 337 cases, and eighteen countervailing duty cases. Baker, *The Proper Role for Antitrust in a Not-Yet-Global Environment*, 9 CARDOZO L. REV. 1135, 1142-43 (1987).

¹³ This was a criticism of the 1977 Guide by Griffin. Griffin, *supra* note 4, at 220.

¹⁴ Griffin, *supra* note 4, at 217.

¹⁵ The Department has stated that one of the purposes is “to ensure that uncertainty about enforcement policy does not cause businesses to limit unobjectionable transactions or to avoid efficient arrangements that benefit consumers.” *New Guidelines on International Antitrust Enforcement Issued by Justice Department*, INT’L TRADE REP. (BNA) Vol. 5, No. 46, at 1542 (Nov. 28, 1988).

¹⁶ The 1988 Guidelines do not explicitly state in the body of the text that other enforcement agencies may have different policies or guidelines. They do, however, mention FTC jurisdiction in a footnote. 1988 GUIDE, *supra* note 1, at S-3 n.4. The 1988 Guidelines avoid the use of ambiguous terms found in the 1977 Guide.

¹⁷ The 1988 Guidelines state, “[T]hese Guidelines do not express any view regarding the applicability of the laws of other nations.” 1988 GUIDE, *supra* note 1, at S-3. The 1988 Guidelines also advise that “readers should separately evaluate the risk of private litigation by competitors, consumers, and suppliers, as well as the risk of enforcement by state prosecutors under state and federal antitrust laws.” *Id.* at S-3.

stated in the 1977 Guide and 1988 Guidelines. This has been called economically inefficient¹⁸ and misleading.¹⁹ To be sure, the 1988 Guidelines are much more detailed and thorough than the 1977 Guide,²⁰ yet the new guidelines still reserve the Justice Department's right to ignore any or all of the guidelines' considerations when expedient.²¹ This point is reemphasized by the change in titles from "Guide" in 1977 to "Guidelines" in 1988.²²

A. *Relevant Antitrust Laws*

The first subsection of the 1988 Guidelines' overview is titled "Relevant Antitrust Laws."²³ In the 1977 Guide the equivalent subsection, called "Applicable Antitrust Laws,"²⁴ only gave a sketchy description of the Sherman Act²⁵ and the Webb-Pomerene Act.^{26 27} The 1988 Guidelines give a similar, albeit somewhat more generic, definition of the Sherman²⁸ and Webb-Pomerene Acts,²⁹ but also in-

¹⁸ Silverstein, *supra* note 4, at 699 ("The key . . . is a willingness on the part of the Justice Department, not presently evident, to make binding advance determinations of the legality of certain kinds of proposed transactions so businesses could operate within the framework of relatively fixed guidelines."). See also *id.* at 694. Silverstein does note, however, that the Antitrust Division has a "Business Review Procedure," 28 CFR § 50.6 (1988), but points out several problems with this including:

delays of six weeks or more in obtaining a response, drawing attention to a transaction which might otherwise escape notice, public disclosure of the review letter, and, most significantly, the fact that a "clearance" from the Justice Department under this procedure creates no immunity from subsequent prosecution even if the actual transaction is exactly as described.

Id.

¹⁹ Griffin, *supra* note 4, at 219. Nevertheless, Griffin goes on to state, "The Guide's nonbinding nature is obviously reasonable in light of the accepted rule that one government administration's antitrust enforcement policy does not bind a subsequent administration and in light of the evolving nature of the law in the international business area." *Id.* at 220. Compare Silverstein, *supra* note 4, at 694 and note 18, *supra*.

²⁰ The 1988 Guidelines are nearly three times as long as the 1977 Guide, contain four more illustrative cases than the 1977 Guide, and more than double the number of footnotes.

²¹ "These Guidelines are intended only to provide general guidance as to how the Department analyzes certain commonly occurring issues affecting its own enforcement decisions." 1988 GUIDE, *supra* note 1, at S-3. "[T]hese Guidelines are not intended to be a restatement of the law . . ." *Id.* "[A]lthough these Guidelines should improve the predictability of the Department's enforcement policy . . . , it is not possible to remove the exercise of judgment from the evaluation of conduct . . . and the determination whether to assert jurisdiction . . ." *Id.* at S-3.

²² Webster's Ninth New Collegiate Dictionary defines "guide" as "to direct, supervise, or influence usually to a particular end" whereas "guideline" is "an indication or outline (as by a government) of policy or conduct."

²³ 1988 GUIDE, *supra* note 1, at S-3.

²⁴ 1977 GUIDE, *supra* note 3, at E-1.

²⁵ 15 U.S.C. § 1 (1982)

²⁶ 15 U.S.C. §§ 61-65 (1982).

²⁷ The bulk of the subsection described how the rule-of-reason approach might vary in the international context and reemphasized the importance of the particular facts of each situation. Both of these points fit more naturally under the next subsection "Enforcement Policies," which is where the 1988 Guidelines placed them.

²⁸ 1988 GUIDE, *supra* note 1, at S-3.

clude the Clayton Act³⁰ and Hart-Scott-Rodino Act of 1976^{31 32} as well as two newer laws, the National Cooperative Research Act of 1984 (NCRA)³³ and the Export Trading Company Act of 1982 (ETC Act).³⁴ Finally, in a footnote the Wilson Tariff Act³⁵ is mentioned almost pro forma as being essentially parallel in language and coextensive in scope to Section 1 of the Sherman Act.³⁶

The 1988 Guidelines state in an introductory footnote³⁷ that in addition to the laws described which the Department enforces, there are applicable laws which may be enforced by the FTC: the Federal Trade Commission Act³⁸ and the Robinson-Patman Act³⁹—the 1977 Guide was criticized for omitting these.⁴⁰ It seems logical that since two exemptions to DOJ enforcement are described (the Webb-Pomerene Act and the Export Trading Company Act of 1982), others probably should be at least footnoted, for example the Shipping Act of 1984.^{41 42}

Neither the 1977 Guide nor the 1988 Guidelines state how much enforcement effort is placed behind each law. For both theoretical and practical reasons it isn't wise for the Department to be too explicit on this point, at least in the guidelines. Nonetheless, the amount of emphasis placed on various statutes is markedly different. For example, it has been claimed that section 7 of the Clayton Act has been essentially abandoned because of the Chicago School's philosophy,⁴³ while the Department has renewed interest in pursuing price-fixing and bid rigging.⁴⁴ In lieu of DOJ direction, legal counsel

²⁹ *Id.* at S-5.

³⁰ 15 U.S.C. §§ 18, 25 (1982 & Supp. IV 1986) discussed in 1988 GUIDE, *supra* note 1, at S-4.

³¹ 15 U.S.C. § 18a (1982) discussed in 1988 GUIDE, *supra* note 1, at S-4.

³² Both the Clayton Act and the Hart-Scott-Rodino Act should have been included in the 1977 Guide.

³³ 15 U.S.C. §§ 4301-4305 (Supp. IV 1986) discussed in 1988 GUIDE, *supra* note 1, at S-4 to S-5.

³⁴ 15 U.S.C. §§ 4001-4053 (1982 & Supp. IV 1986) discussed in 1988 GUIDE, *supra* note 1, at S-5.

³⁵ 15 U.S.C. §§ 8-11 (1982).

³⁶ 1988 GUIDE, *supra* note 1, at S-3 n.5.

³⁷ 1988 GUIDE, *supra* note 1, at S-3 n.4.

³⁸ 15 U.S.C. §§ 41-57c (1982 & Supp. IV 1986).

³⁹ 15 U.S.C. §§ 13-13b, 21a (1982 & Supp. IV 1986).

⁴⁰ Griffin, *supra* note 4, at 217-19 ("It 'does not describe the Federal Trade Commission's [FTC's] enforcement policies [and] . . . does not deal with either the Federal Trade Commission Act or the Clayton Act, as administered by the FTC.'" *footnote omitted*).

⁴¹ 46 U.S.C.A. §§ 1701-1720 (West Supp. 1987).

⁴² In all fairness, the Department did state that it was limiting its discussion to major legislation. The number of potential exemptions that could have been included is quite large, for example: insurance, banking, farm associations, and even baseball.

⁴³ "After sifting through cases, enforcement performance, and rhetoric, one must conclude that Chicago is very close to accomplishing de facto repeal of Clayton 7, if not antitrust." Austin, *Antitrust Reaction To The Merger Wave: The Revolution Vs. The Counterrevolution*, 66 N.C.L. Rev. 931, 961 (1988).

⁴⁴ Adler, *Hands-Off Antitrust Policy Likely to End, Whoever Wins the Presidential Election*,

must stay in the habit of looking beyond the guidelines for the current status of various laws and policies.

B. Enforcement Policy

The 1977 Guide and 1988 Guidelines both follow their descriptions of applicable antitrust laws with a subsection called "Enforcement Policy."⁴⁵ The similarities between the two documents end at the title, however. The 1977 Guide's Enforcement Policy subsection consists of just three paragraphs. In them, the Department describes the two main purposes of antitrust laws in an international context: (1) "protect the American consuming public by assuring it the benefit of competitive products and ideas produced by foreign competitors as well as domestic competitors,"⁴⁶ and (2) "protect American export and investment opportunities against privately imposed restrictions."⁴⁷

The 1988 Guidelines replace these paragraphs with a similar general discussion of competition, market power, and the role of *per se* and rule-of-reason analysis.⁴⁸ But, the 1988 Guidelines then go on to give a detailed, fourteen-page description of the Department's method for analyzing the competitive effects of specific acts.⁴⁹ Six topics are covered: criminal offenses under the Sherman Act,⁵⁰ monopolization,⁵¹ mergers,⁵² joint ventures,⁵³ vertical nonprice distribution restraints,⁵⁴ and intellectual property licensing arrangements.⁵⁵

1. Criminal Offenses Under the Sherman Act

The 1988 Guidelines makes it clear that any naked restraint of trade⁵⁶ is prosecuted as a criminal violation of the Sherman Act.⁵⁷ No express agreements or overt acts are necessary⁵⁸ and any form of

Wall St. J., Oct. 24, 1988, at B1, col. 3 (citing comment by Antitrust Division head, Charles F. Rule, that the administration has been particularly tough in enforcing these laws).

⁴⁵ 1977 GUIDE, *supra* note 3, at E-2; 1988 GUIDE, *supra* note 1, at S-5.

⁴⁶ 1977 GUIDE, *supra* note 3, at E-2.

⁴⁷ *Id.*

⁴⁸ 1988 GUIDE, *supra* note 1, at S-5 to S-6.

⁴⁹ *Id.* at S-7 to S-20.

⁵⁰ 1988 GUIDE, *supra* note 1, at S-7.

⁵¹ *Id.*

⁵² *Id.* at S-8.

⁵³ *Id.* at S-11.

⁵⁴ *Id.* at S-14.

⁵⁵ *Id.* at S-16.

⁵⁶ An agreement is "naked" if its sole purpose and effect is to restrict output and/or raise (or depress) price—that is, if it is not plausibly related to some economic integration of the parties' operations (beyond simply the coordination of price and/or output) that may result in increased production.

1988 DRAFT, *supra* note 1, at S-7.

⁵⁷ *Id.*

⁵⁸ *Id.*

price coordination is illegal⁵⁹ regardless of whether the agreement is successful in creating an anticompetitive effect.⁶⁰

This is identical to the analysis used in domestic cases;⁶¹ the only significant contribution over the 1977 Guide is that all this is explicitly stated. In the 1977 Guide, for example, although the per se illegality of price fixing was mentioned, its criminal nature and the test for its illegality were not.⁶² The 1977 Guide did provide some insight through three illustrative cases,⁶³ but essentially the analyses used were the same as those now in the 1988 Guidelines.

2. Monopolization

According to the 1988 Guidelines, unlawful monopolization consists of the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power.⁶⁴ The three elements of attempt to monopolize are specific intent to monopolize, anticompetitive acts, and a dangerous probability of success.⁶⁵ These definitions hold no surprises; they are identical to domestic analyses of monopolization.⁶⁶ In the only real reference to international operations, DOJ highlights the two cases where monopolization or attempt to monopolize are most likely to occur: (1) when a foreign firm sells a product at predatory prices in the United States; and (2) when U.S.-based firms stymie foreign imports

⁵⁹ For example, naked agreements among competitors to raise their individual prices by a specified amount, to maintain a specified profit margin, to adopt a standard formula for computing price, or to notify one another before reducing price are also criminal violations of section 1 of the Sherman Act.

Id.

⁶⁰ *Id.*

⁶¹ See generally P. AREEDA, VI ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATIONS (1986).

⁶² Certain types of agreements are regarded as illegal per se—including, most notably, agreements among competitors to fix prices at which their offerings are sold, or to allocate territories or customers in order to avoid competing with each other. This is done because experience generally has established that such agreements' "pernicious effect on competition and lack of any redeeming virtue" makes an "elaborate inquiry as to the precise harm [that individual restraints] have caused or the business excuse for their use" generally not worth the effort.

1977 GUIDE, *supra* note 3, at E-1 quoting *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958).

⁶³ In Case A, the Department reiterated the Supreme Court position in *Timken Roller Bearing Co. v. U.S.* that naked territorial restraints between U.S. and foreign manufacturers are per se illegal. 341 U.S. 593, 598 (1951), cited in 1977 GUIDE, *supra* note 3, at E-4. In Case K, the Department states that a U.S. manufacturer is guilty of horizontal group boycott if it agrees with other manufacturers, foreign or domestic, to boycott a retailer even if done under pressure from the government of a foreign nation supplying raw materials. *Id.* at E-14 to E-15. Case L deals with a classic horizontal price-fixing cartel with foreign sovereignty overtones. *Id.* at E-15 to E-16.

⁶⁴ 1988 GUIDE, *supra* note 1, at S-7.

⁶⁵ *Id.*

⁶⁶ See generally P. AREEDA, III ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATIONS (1986).

through frivolous private actions under U.S. trade laws. The 1988 Guidelines contain one illustrative case, Case 13, which describes the latter situation.⁶⁷

Curiously, monopolization and attempts to monopolize were omitted entirely from the 1977 Guide and the draft revision of the 1988 Guidelines. Possibly this is because there are very few DOJ prosecutions of these acts.

3. Mergers

The 1977 Guide does not mention mergers in its enforcement policy subsection, but does discuss them in Case B.⁶⁸ The guide lists a four-part test for determining their validity.

[T]he inquiry will be whether (1) the U.S. market (or relevant local market) is highly concentrated; (2) the foreign firm is by virtue of its capability of entering the market one of a relatively small group of potential entrants; (3) the foreign firm has the incentives to enter the U.S. market; and (4) the foreign firm has the capability of entering the market or is threatening to enter.⁶⁹

This also presumably applied to a merger of a foreign company and a domestic company or an acquisition of one by the other.

The 1988 Guidelines, in contrast, take their test from the Department's Merger Guidelines⁷⁰ published in 1984. There are two basic parts. "The first step in the Department's merger analysis is to identify the relevant market or markets that would be affected by the merger and the firms that compete in that market or those markets."⁷¹ To define the market the Department tries "to identify a group of products (the 'product market') and a geographic area (the 'geographic market') with respect to which sellers could exercise market power if they were able to coordinate their actions so as to act like a monopolist."⁷² In the second step, "[i]f merging firms compete in the same product and geographic markets the Department next determines whether the elimination of competition between them would likely create, enhance or facilitate the exercise of market power."⁷³ The 1988 Guidelines also suggest several other factors which may affect the Department's decision to contest a merger or acquisition.⁷⁴ Essentially then, the two tests cover the same ground,

⁶⁷ 1988 GUIDE, *supra* note 1, at S-44.

⁶⁸ 1977 GUIDE, *supra* note 3, at E-5.

⁶⁹ *Id.*

⁷⁰ ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, MERGER GUIDELINES (June 14, 1984), reprinted in 2 TRADE REG. REP. (CCH) ¶¶ 20,551-20,568.

⁷¹ 1988 GUIDE, *supra* note 1, at S-9.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ "One such factor is recent or ongoing changes in market conditions." 1988 GUIDE, *supra* note 1, at S-10. "Another factor is . . . a firm's financial condition." *Id.* "The Department also considers special factors affecting the competitive significance of foreign firms, such as government restrictions on imports or foreign export restrictions." *Id.*

which means no significant changes for business.

In addition, there is not much that is actually unique to international operations in the new guidelines. For example, the Department states that the analysis "does not discriminate against or in favor of firms on the basis of their citizenship."⁷⁵ Foreign competitors and potential competitors as well as the existence of effective trade barriers are taken into account when determining market power,⁷⁶ but this would be true for a purely domestic merger.⁷⁷ Thus merger analysis, whether domestic or international, is about the same.

The illustrative cases on mergers, Cases 1 through 4, do point out a growing problem for businesses, however. The cases try to describe the effects of various trade barriers such as Voluntary Export Restraints (VERs) and tariffs have on defining the relevant market. It is clear from the number and complexity of examples that determining markets is becoming much more difficult as the variety and volatility of barriers increases. Although the Department cannot do anything about the proliferation of arcane market barriers and must try to define relevant markets regardless of them, this leaves businesses with a great deal more uncertainty.

Merger policy has been one of the areas most heavily influenced by the Chicago School. An efficiency analysis dominates, resulting in far fewer challenges to businesses—not always to the approval of others.⁷⁸ Future merger analysis may move back to a mix of economic, social, and political considerations. Robert B. Reich, an adviser to the Democratic Party, has stated that economic analysis alone is insufficient. Social and political factors must be explicitly taken into account.⁷⁹ Lawrence Summers, another Democratic ad-

"[T]he Department also considers the likelihood, timing, and scope of substantial new entry into the relevant market, the likelihood of expansion by fringe firms, and other factors (such as heterogeneity of the relevant product and historical market performance)" *Id.*

⁷⁵ 1988 GUIDE, *supra* note 1, at S-10.

⁷⁶ *Id.* at S-10 to S-11.

⁷⁷ See generally P. AREEDA, II ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATIONS (1986).

⁷⁸ [During the Reagan Administration] the Antitrust Division was turned over to . . . William F. Baxter, . . . a devotee of the University of Chicago school of economics Baxter encouraged a merger boom. Business people began to put together giant combinations that they would not have even considered before Baxter took over, and the number of huge mergers broke records year after year, often with government help in designing and facilitating the combination.

Government antitrust enforcement having been effectively halted by 1986, the Antitrust Division decided that the next goal was . . . legislative reform. This turned out to be a six-bill package weakening the law on mergers, reducing the penalties for a violation, and in general trying to lock into permanent legislation the Administration's anti-antitrust policies. The bills went nowhere.

H. SCHWARTZ, PACKING THE COURTS 195-96 (1988).

⁷⁹ *Advisers to Presidential Candidates Differ on Most Aspects of Enforcement*, ANTITRUST &

viser, also feels that there has not been enough enforcement.⁸⁰ But, Timothy J. Muris, an advisor to the Republican Party, believes that "[b]y focusing on economic power, you satisfy the social and political concerns of § 7."⁸¹ One neutral authority believes merger policy "might change under a more liberal administration, but the likelihood is that the changes would be modest and the basic framework would be left intact."⁸²

4. Joint Ventures

This is one of the most important sections of the new guidelines.⁸³ As with mergers, the 1977 Guide did not discuss joint ventures in its Enforcement Policy subsection, but did cover this subject extensively in Illustrative Cases C,⁸⁴ D,⁸⁵ E,⁸⁶ and M.⁸⁷ In Case C, the 1977 Guide listed three elements which generally determine the legality of joint ventures:

(1) "whether the *creation* of the joint venture itself unreasonably restrains competition;"⁸⁸

(2) "whether the joint venture has any unreasonable collateral restraints that must be struck down even if the venture is allowed;"⁸⁹ and

(3) "whether the joint venture is in essence a 'bottleneck monopoly' which is so important to those in the business that it must be opened to all on reasonable and nondiscriminatory terms."⁹⁰

TRADE REG. REP. (BNA) Vol. 55, No. 1382, at 449 (Sept. 15, 1988) [hereinafter *Presidential Advisers' Opinions*].

⁸⁰ "Allowing the 18 largest mergers in history to go through without raising questions almost certainly represents insufficient enforcement." Adler, *supra* note 45, quoting Professor Lawrence Summers of Harvard University.

⁸¹ *Presidential Advisers' Opinions*, *supra* note 79, at 449.

⁸² Gellhorn, *Climbing the Antitrust Staircase*, 31 ANTITRUST BULLETIN 341, 348 (1986). Professor Gellhorn later notes that a worsening international trade picture would, in fact, help efforts to limit antitrust enforcement of mergers. *Id.* at 350. Professor Summers concurs in this opinion. Adler, *supra* note 44.

⁸³ "The guidelines treatment of joint research and development ventures and the joint commercialization of products resulting from those ventures may be of particular interest to the U.S. business community." *Justice Department Releases Updated International Guide*, ANTITRUST & TRADE REG. REP. (BNA) Vol. 55, No. 1390, at 890 (Nov. 17 1988) (quoting Charles F. Rule, head of the Antitrust Division of DOJ).

⁸⁴ 1977 GUIDE, *supra* note 3, at E-6.

⁸⁵ *Id.* at E-7.

⁸⁶ *Id.* at E-8.

⁸⁷ *Id.* at E-16.

⁸⁸ *Id.* at E-6.

⁸⁹ *Id.* The 1977 Guide goes on to note in Case D that "[e]ven where the creation of a joint venture is legitimate, collateral restrictions may be challenged under the Sherman Act if they unreasonably restrain competition among the parties to the joint venture." *Id.* at E-7. "A restriction that is not per se illegal will be examined under the so-called 'ancillary restraints' doctrine to see whether such restraint is truly necessary to the legitimate purpose of the joint venture." *Id.* (citing *United States v. Addyston Pipe and Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)).

⁹⁰ 1977 GUIDE, *supra* note 3, at E-6.

The 1977 Guide then added, "The creation of joint venture of the more permanent variety will in essence be looked at as if it were a merger between parties in the field covered by the venture."⁹¹

This test was rather muddled. Step one could have been interpreted as making some joint ventures per se unlawful because of the amount of competition restrained, regardless of any offsetting procompetitive efficiencies. It could simply have meant that a balancing of pro- and anticompetitive effects was to be done. Step two had the same ambiguities for collateral restraints. Step three did not seem to address the *legality* of the joint venture at all, but rather the scope of participation required of the venture. The fundamental problem with the whole test was the total lack of detail on how the "unreasonableness" standard was actually implemented.

The 1988 Guidelines go a good bit further toward solving this problem. Most importantly, the Department downplays a per se unlawful analysis for true joint ventures. "Because joint ventures typically achieve integrative efficiencies, the Department judges the likely competitive effects of joint ventures under a rule of reason."⁹² This involves a four-step test somewhat different than the one outlined in the 1977 Guide.

"First, the Department determines whether the joint venture would likely have any anticompetitive effect in the market or markets in which the joint venture proposes to operate or in which the economic integration of the parties occurs. . . . Second, the Department determines whether the joint venture would likely have an anticompetitive effect in any other market or markets ('spill-over market(s)') in which the joint venture members are actual or potential competitors outside the joint venture. Third, the Department analyzes the likely competitive effects of any nonprice vertical restraints imposed in connection with the joint venture."⁹³ "If . . . the Department's analysis under the first three steps reveals significant anticompetitive risks, then, under step 4, the Department considers whether any procompetitive efficiencies that the parties claim would be achieved by the joint venture would outweigh the risk of anticompetitive harm."⁹⁴

The first step's analysis concentrates on the venture's effect on independent decision making by participants in the joint venture market.⁹⁵ If the members of the joint venture do not currently participate in the market and are not considered potential competitors in that market then there can be no threat. If the members are par-

⁹¹ *Id.*

⁹² 1988 GUIDE, *supra* note 1, at S-11.

⁹³ *Id.*

⁹⁴ *Id.* at S-11 to S-12.

⁹⁵ *Id.* at S-12.

ticipants in the market then the Department looks at the increase in their market power using much the same techniques as for mergers.⁹⁶ This includes defining the market, calculating market concentration, and examining offsetting factors like ease of entry. Unlike mergers, joint ventures are given wide latitude when analyzed because they operate for a limited time or can more easily be undone.⁹⁷

The 1988 Guidelines' second step, analysis of spill-over markets, is barely touched upon by the 1977 Guide.⁹⁸ According to the 1988 Guidelines, an active inquiry into this area is now made when analyzing joint ventures.⁹⁹ But, "[t]he use of effective safeguards may . . . eliminate the need to conduct an elaborate structural analysis of the spill-over market."¹⁰⁰ If conditions in the spill-over market make successful collusion unlikely, the Department again does not investigate further.¹⁰¹ If market characteristics show the potential for anticompetitive effects, the Department weighs the restraint against the effect to determine whether it must be disallowed. This is, once again, a pure rule of reason approach reflecting the Chicago School perspective that spill-over effects cannot be anticompetitive per se and that there should be a presumption that these sorts of restraints are more beneficial than not.

The third step is to check for vertical nonprice restraints to be used by venture members. There is a potential for anticompetitive effects at either the primary or the secondary levels of the market, just as any business entity could cause.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ The only places spill-over markets come into play in the 1977 Guide are in Illustrative Cases C and D. "Any joint venture among competitors involves some antitrust risk that the cooperation may spill over into other areas. Accordingly the parties should use special care in policing the operations of a joint venture . . ." 1977 GUIDE, *supra* note 3, at E-6. "The Department obviously cannot police each research joint venture to ensure that production and marketing are not also discussed. Of course, in appropriate cases the Department may wish to make subsequent inquiries to confirm that the . . . collaboration has not extended into other areas." *Id.* at E-8.

⁹⁹ 1988 GUIDE, *supra* note 1, at S-12.

¹⁰⁰ *Id.* at S-13. "Examples of safeguards . . . include . . . a requirement that certain types of sensitive business information be disclosed only to neutral third parties, a requirement that meetings involving representatives of the venture members be monitored by knowledgeable counsel, or a requirement that accurate and complete records of such discussions be maintained." *Id.*

The Department also cited a variety of other sources of examples in footnote 98: "The Antitrust Division's Approach to Shippers' Associations," Remarks of Charles F. Rule, Deputy Assistant Attorney General Antitrust Division, U.S. Department of Justice Before the Chemical Manufacturers Association, Oct. 21, 1985 (setting forth guidelines for assessing the competitive effect of shipping associations); ETC Guidelines, 50 Fed. Reg. at 1794-1796 (discussing, *inter alia*, conditions of certification relating to exchange of competitively sensitive information).

¹⁰¹ *Id.* at S-13, citing Letter from William F. Baxter, Assistant Attorney General, Antitrust Division, to Irving B. Yoskowitz, Vice President and General Counsel, United Technologies Corp., Oct. 27, 1983 (identifying disincentives to collusion among joint venture participants in spill-over markets.)

The fourth step makes it clear that the 1988 Guidelines' test is a balancing between pro- and anticompetitive effects. If the joint venture members can show that despite any anticompetitive effects discovered under steps one through three, there are more procompetitive effects then the venture will be permitted to proceed.

Note that the Department does not completely reject the per se unlawful concept. DOJ recognizes that naked agreements to restrain price or output are still per se unlawful regardless of whether they are labelled "joint ventures."¹⁰² Thus there is actually a zeroeth step to the Department's analysis: whether the agreement is, in fact, a naked price or output agreement.

A direct comparison between the 1977 Guide's test and the 1988 Guidelines' test is difficult. Essentially, the 1988 Guidelines collapse the first two elements of the 1977 Guide's test then break them back out into the four step analysis. This treats the joint venture and ancillary restraints in an identical, parallel fashion while creating a more detailed analytical framework.

Overall, the 1988 Guidelines on joint ventures are still vague; there are no explicit safe harbors. In theory, a joint venture by companies which have not previously participated in the relevant market is safe. Nevertheless, the definition of the relevant market and participation in that market are flexible enough to trap joint ventures which might appear safe to the venture members. Presumably, another safe harbor is a joint venture which leaves the relevant market with an HHI of less than one thousand, but this is not clearly stated in the guidelines.

Joint venture participants do have reason to be optimistic though. This is an area in which both political parties seem to agree that a hands-off approach is warranted. Both parties believe that industrial competitiveness is becoming such an important social concern that antitrust policy must be adapted. Attorney General Thornburgh has proposed an exemption certification process à la the ETC Act for joint production ventures and an elimination of triple damage penalties for these actions.¹⁰³ Although the Democrats generally agree there is a need for improvement, if the U.S. position in the world economy improved markedly, there might be a renewed interest in tougher enforcement.¹⁰⁴

5. Vertical Nonprice Distribution Restraints

Vertical restraints have most obviously been affected by the Supreme Court's ruling in *Continental T.V., Inc. v. GTE Sylvania*,

¹⁰² 1988 GUIDE, *supra* note 1, at S-11.

¹⁰³ Thornburgh, *U.S. Firms Get Tripped in Race to the Marketplace: Grant Antitrust Exemptions*, Wall St. J., Dec. 27, 1988, at A10, col. 4.

¹⁰⁴ See Gellhorn, *supra* note 82, at 350.

Inc.,¹⁰⁵ which approves of these restraints in some situations. The 1977 Guide was released just before this decision and described the Department's pre-*Sylvania* position in Illustrative Case J.¹⁰⁶ In that example, the Department relied on *United States v. Arnold, Schwinn & Co.*¹⁰⁷ to assert that "terminating a domestic distributor who resells to customers in [a newly recruited] foreign distributor's territory may adversely affect the distributor's export opportunities"¹⁰⁸ and be illegal. This is only true, per se, if the domestic manufacturer and the new foreign distributor are also competitors who had divided sales territories. Any other sort of arrangement was to be analyzed by the Courts under a rule of reason approach.¹⁰⁹

The 1988 Guidelines acknowledge this¹¹⁰ but specify three narrower conditions necessary for a vertical nonprice restraint to cause collusion: "(i) the [primary] market . . . must be . . . highly concentrated . . . ; (ii) firms in the [secondary] market . . . using or subject to the restraints . . . must account for most sales in that market; (iii) entry into the primary market must be difficult."¹¹¹ The 1988 Guidelines also list three similar conditions which may lead to exclusion of rivals from the market by denying them access to necessary inputs or facilities: "(i) the market in which the firms imposing the restraint operate must be . . . very highly concentrated and leading firms . . . must use the restraint . . . ; (ii) the restraints must cover most of the capacity of the market . . . ; (iii) entry into the 'foreclosed' market must be difficult."¹¹² The Department then lays out a two-step process for analyzing these situations. First, the Department takes a "quick look" at the degree of concentration in the relevant markets and at the market shares of firms employing the restraint to determine whether the restraint could plausibly have an anticompetitive effect.¹¹³ In most cases, the minimum necessary conditions will not exist. If these conditions do exist, however, the Department con-

¹⁰⁵ 433 U.S. 36 (1977) (location restraint imposed on franchisees by franchisor is to be judged under the rule of reason).

¹⁰⁶ 1977 GUIDE, *supra* note 3, at E-13.

¹⁰⁷ 388 U.S. 365 (1967).

¹⁰⁸ 1977 GUIDE, *supra* note 3, at E-13 n.79.

¹⁰⁹ See generally *Fugate*, *supra* note 4, at 778-80.

¹¹⁰ "Because vertical nonprice restraints hold significant potential for generating procompetitive efficiencies, the Department analyzes such restraints under a rule of reason." 1988 GUIDE, *supra* note 1, at S-14.

¹¹¹ *Id.* This is an improvement over the 1977 Guide which was criticized for lacking a description of specific factors for determining whether anticompetitive effects were possible. Griffin, *supra* note 4, at 229.

It's interesting to note the change in wording from the draft to the final copy. The test for collusion goes from lenient to *very* lenient. For example, "The primary level of the market must be . . . concentrated;" becomes "*highly* concentrated;" "firms at the secondary level using the restraint must account for a large portion of the sales . . . ;" becomes "*most* sales."

¹¹² 1988 GUIDE, *supra* note 1, at S-15.

¹¹³ *Id.*

siders other relevant factors.¹¹⁴ The end result is that under the 1988 Guidelines vertical nonprice restraints which would have failed under the 1977 Guide easily pass muster, despite the fact that both guides say they use a rule of reason analysis.

The Department relies heavily on its Vertical Restraints Guidelines, published in 1985, for enforcement policy in this area.¹¹⁵ The Vertical Restraints Guidelines were roundly criticized by Congress as being a poor reflection of the state of the law at the time the Guidelines were released.¹¹⁶ Democratic Party advisor Robert Reich has said the Reagan Administration went too far in permitting vertical restraints without expressly considering their potential horizontal anticompetitiveness.¹¹⁷ Herman Schwartz criticizes the use of rule-of-reason analysis in this area as causing too much uncertainty.¹¹⁸ Nevertheless, the Supreme Court has indicated that a lenient posture towards vertical nonprice restraints is probably justified.¹¹⁹ Given this endorsement, this policy is far less likely to change with a different administration than, for example, merger policy.

6. *Intellectual Property Licensing Arrangements*

Intellectual property licensing arrangements were covered by the 1977 Guide in cases F,¹²⁰ G,¹²¹ H,¹²² and I.¹²³ Case F described enforcement policy for know-how licenses¹²⁴ and three common re-

¹¹⁴ *Id.* These mitigating factors include: whether the restraint has an exclusionary effect; whether the restraint has survived for a long period; whether the restraint is airtight; whether market conditions are conducive either to collusion or to anticompetitive exclusion; whether use of the restraint results in significant integrative efficiencies producing benefits to consumer welfare that outweigh the risk of potential anticompetitive harm; and whether there is a history of collusion by firms at either level of the market. 1988 GUIDE, *supra* note 1, at S-15 to S-16.

¹¹⁵ ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, VERTICAL RESTRAINTS GUIDELINES (Jan. 23, 1985), *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) Vol. 48, No. 1199, Special Supplement (Jan. 24, 1985). The vertical restraints guidelines are only cited in footnote 107, but the draft version of the 1988 Guidelines contained roughly the same substance as the final 1988 Guidelines and noted that the policy was derived directly from the vertical restraints guidelines. 1988 DRAFT, *supra* note 1, at S-10 n.86.

¹¹⁶ See *Proposed Senate Resolution Urges Justice To Recall Vertical Restraints Guidelines*, ANTITRUST & TRADE REG. REP. (BNA) Vol. 49, No. 1224, at 171 (Jul. 18, 1985).

¹¹⁷ *Presidential Advisers' Opinions*, *supra* note 79, at 448. DOJ may have been sensitive to this criticism because vertical restraint analysis had been left out of the draft guidelines for joint ventures but found their way into the final version.

¹¹⁸ H. SCHWARZ, *supra* note 78, at 193-94.

¹¹⁹ "[S]upport for the cartel-facilitating effect of vertical nonprice restraints was and remains lacking." *Business Elecs. Corp. v. Sharp Elecs. Corp.*, — U.S. —, 108 S. Ct. 1515, 1520 (1988).

¹²⁰ 1977 GUIDE, *supra* note 3, at E-10.

¹²¹ *Id.* at E-11.

¹²² *Id.* at E-12.

¹²³ *Id.*

¹²⁴ "Know-how" is defined as "useful technical information concerning productive activity that is not generally known or accessible but is not protected by a patent." 1988 GUIDE, *supra* note 1, at S-42.

strictions on them: territorial allocation, product tie-in, and trademark use.

First, the 1977 Guide stated that know-how licenses are subject to stricter antitrust safeguards than patents because know-how does not have the protection of the patent system behind it.¹²⁵ The 1977 Guide then went on to describe factors which made the various restraints more or less objectionable. For example, in Case F the foreign licensee was barred from exporting products made under the license to the United States for twenty years. The Department stated that it would challenge this restraint unless the time theoretically necessary to reverse-engineer the licensed technology was greater than twenty years.^{126 127}

This position was sharply criticized¹²⁸ and has been completely reversed in the 1988 Guidelines:

Because of the essentially similar roles that know-how transfers and patent licensing play in the competitive process, the Department generally analyzes them in the same way. In fact, precisely because know-how is not statutorily defined and protected by government grant, restrictions in agreements transferring know-how may be even more essential to protecting procompetitive investment in valuable technology.¹²⁹

There are two other issues that were mentioned in the 1977

¹²⁵ 1977 GUIDE, *supra* note 3, at E-10.

¹²⁶ The concept of "time to reverse-engineer" as being the time limit to permit anticompetitive restraints has been called ambiguous and highly impractical:

Aside from the technological difficulties in accurately forecasting when someone else can come up with a better mousetrap, there are questions of financial capability to support the necessary research and development to successfully complete such a project. Even if a comparable product is developed independently of the originally licensed product, there are marketing considerations which have to be overcome, including brand name loyalties and organization of sales and service outlets

Seki, *supra* note 4, at 1653-54. See also Fugate, *supra* note 4, at 676.

This concept has been dropped from the 1988 Guidelines. In fact, the 1988 Guidelines are in favor of such territorial restrictions. "[R]estrictions such as . . . exclusive territories may be used to encourage the licensee to make investments that are necessary to develop and promote the licensed technology." 1988 GUIDE, *supra* note 1, at S-16.

¹²⁷ There are other examples of factors affecting the legitimacy of restraints. With regard to product tie-ins, the 1977 Guide stated in Cases F and G that tie-ins in other countries were not policed by the Department unless they substantially affected the ability of other U.S. exporters to compete as suppliers to that market or affect goods reexported to the United States. 1977 GUIDE, *supra* note 3, at E-10 and E-11.

Requiring the use of U.S. trademarks on foreign licensee's products was considered suspicious according to the 1977 Guide. This restriction could be used in conjunction with Section 526 of the Tariff Act of 1930, 19 U.S.C. § 1526 (1970), to keep these goods out of the United States.

¹²⁸ The policy considerations tending toward the Department's current view are somewhat persuasive, yet common law rights in know-how are being enforced continually and, in many cases, are considered on par with patent rights. There is authority for the proposition that both patents and non-patented proprietary rights are worthy of equal protection under the law.

Seki, *supra* note 4, at 1653.

¹²⁹ 1988 GUIDE, *supra* note 1, at S-42.

Guide, nonmarket enterprises and grantback licensing. Case H, in which the 1977 Guide described licensing to nonmarket (state-owned) enterprises, expressed concern that state-owned businesses have unfair competitive advantages over domestic firms.¹³⁰ This has been termed more of a trade issue than an antitrust issue¹³¹ and probably for that reason was omitted from the 1988 Guidelines. It also has a murky economic basis which may have made it an unappealing position to take.

Case I of the 1977 Guide described exclusive grantback licensing. Three scenarios were posed: one in which the domestic company owned eighty-five percent of the foreign licensee's stock; one in which the domestic company owned thirty percent of the foreign licensee's stock; and one in which the domestic company licensed technology to an unaffiliated foreign firm.¹³² The Department cited two factors which influenced the decision to challenge a grantback under the 1977 guidelines: the scope of the licensee's obligation to grant back; and the competitive relationship between licensor and licensee.¹³³

In the first two proposed scenarios, the Department did not challenge the grantback under the 1977 guidelines so long as the domestic company did, in fact, exercise control over the licensee. In the third scenario, the Department stated that it would challenge the grantback. Notably, the 1977 Guide cautioned, "The Department . . . questions the . . . appropriateness of exclusive grantback provisions; and it may in an appropriate case wish to assert that an exclusive grantback requirement involving independent parties is per se illegal."¹³⁴ This was criticized by observers outside the Department¹³⁵ and the 1988 Guidelines now state that grantbacks are analyzed under the rule of reason.¹³⁶

The 1988 Guidelines' discussion of grantbacks is found in Case 11.¹³⁷ The Department's new position is that unless the underlying technology transfer is a sham, grantbacks can serve important procompetitive purposes.¹³⁸ The cumulative competitive effect of all licensing restrictions is assessed to determine whether the agreement will be challenged.¹³⁹ The Department's analysis tends to be qualitative, focusing on other substitute technologies available, and

¹³⁰ 1977 GUIDE, *supra* note 3, at E-12.

¹³¹ Griffin, *supra* note 4, at 240.

¹³² 1977 GUIDE, *supra* note 3, at E-12.

¹³³ *Id.* at E-13.

¹³⁴ 1977 GUIDE, *supra* note 3, at E-12.

¹³⁵ Fugate, *supra* note 4, at 678.

¹³⁶ 1988 GUIDE, *supra* note 1, at S-40.

¹³⁷ *Id.* at S-39.

¹³⁸ *Id.* at S-40 and S-41.

¹³⁹ *Id.* at S-40.

the time needed to bring them to market.¹⁴⁰ Several factors are considered: whether the product produced using the licensed technology has a large or small share of the overall market; whether other firms possess similar technology; and whether the patents are soon to expire.¹⁴¹ In general, only grantbacks with extreme anticompetitive effects seem likely to be challenged.

C. Jurisdictional Issues

The next section of both the 1977 Guide and the 1988 Guidelines is on subject matter and personal jurisdiction policy.¹⁴²

1. Subject Matter Jurisdiction

The 1977 Guide stated, "[T]he U.S. antitrust laws should be applied to an overseas transaction when there is substantial and foreseeable effect on the United States commerce [sic]"¹⁴³ Any conduct with a "direct or intended effect" on U.S. consumers or exporters is subject to Department scrutiny.¹⁴⁴ There were strong domestic complaints that this antitrust policy was adversely affecting U.S. export business.¹⁴⁵ In response to this, Congress enacted two pieces of legislation: The Export Trading Company Act of 1981 (ETC)¹⁴⁶ and the Foreign Trade Antitrust Improvement Act (FTAIA).¹⁴⁷ ETC expands Webb-Pomerene-type antitrust exemptions for U.S. exporters while FTAIA limits Sherman Act jurisdiction¹⁴⁸ over non-import foreign commerce.¹⁴⁹

The 1988 Guidelines reflect this change in their jurisdictional policy statement. "[C]onduct relating to U.S. *import* trade that harms consumers in the United States may be subject to the jurisdiction of the U.S. antitrust laws regardless of where such conduct technically occurs or the nationality of the parties involved."¹⁵⁰ However, under FTAIA, the Department can only pursue those *export* trade situations where the conduct results in injury to export business in the United States. These changes should eliminate concern over possible adverse effects of antitrust policy on exports.¹⁵¹

¹⁴⁰ *Id.* at S-40 to S-41.

¹⁴¹ *Id.*

¹⁴² 1977 GUIDE, *supra* note 3, at E-2; 1988 GUIDE, *supra* note 1, at S-20.

¹⁴³ 1977 GUIDE, *supra* note 3, at E-2 to E-3.

¹⁴⁴ This is basically the intent and effects test first described in *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945).

¹⁴⁵ See generally J. TOWNSEND, EXTRATERRITORIAL ANTITRUST: THE SHERMAN ACT VERSUS U.S. BUSINESS ABROAD (1980).

¹⁴⁶ 15 U.S.C. §§ 4001-4021 (1982).

¹⁴⁷ 15 U.S.C. §§ 6a, 45(a)(3) (1982).

¹⁴⁸ It also limits FTC Act jurisdiction.

¹⁴⁹ 1988 GUIDE, *supra* note 1, at S-21.

¹⁵⁰ *Id.* at S-20.

¹⁵¹ See generally I B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL AN-

Nonetheless, there are several other issues that have been suggested: (1) Should foreclosure of U.S. exporters be enough to warrant Department action or should proof of anticompetitive effects in the United States be necessary? (2) How will foreclosure be measured? (3) What factors will be weighed when balancing policy between protection of competition and protection of competitors in export trade?¹⁵²

Unfortunately, the Department provides few answers. The guidelines cite two circumstances in which DOJ may act: (1) if the U.S. and foreign markets are highly inelastic and a substantial number of U.S. firms agree to increase exports in order to reduce supply and raise price in the United States; (2) if export conduct was actually intended to affect the price of products in the United States.¹⁵³

The first scenario seems to be just a specific instance of the second scenario, not a different class of conduct.¹⁵⁴ The second scenario is just a broad proscription against intent to affect prices or output.

There is ample room for political interpretation of this policy. Essentially, it is a protectionist mandate from Congress which may enable certain classes of exporters to be protected from self-defined unfair competition. The Department's position is simply a bending of its will to the political reality that Congress expects to have significant input on which exporting industries may be disciplined.

2. *Personal Jurisdiction*

Unlike subject matter jurisdiction, the Department's stance on personal jurisdiction has not changed much since the 1977 Guide was produced. That document asserted, "The general trend of modern history has been to expand personal jurisdiction of our courts to reach those who transact business in a certain place, even if they are not 'found' there in a traditional jurisdictional sense."¹⁵⁵ The 1988 Guidelines continue to use similar broad language.¹⁵⁶

The 1977 Guide was vague on subject matter and personal jurisdiction policy regarding foreign sovereigns. In 1976 Congress had passed the Foreign Sovereign Immunities Act¹⁵⁷ which altered and

TITRUST: A COMPARATIVE GUIDE, ch. 1, at 10-15 (2d ed. 1986) [hereinafter HAWK TREATISE]; Hawk, *Antitrust in Today's World Economy*, 9 CARDOZO L. REV. 1161, 1166 (1988).

¹⁵² Hawk, *Antitrust in Today's World Economy*, 9 CARDOZO L. REV. 1161, 1166-67 (1988). See also generally HAWK TREATISE, *supra* note 151, at Vol. 1, ch. 3, pp. 165-71.

¹⁵³ 1988 GUIDE, *supra* note 1, at S-21.

¹⁵⁴ Moreover, the effects of the first scenario are just as likely to occur due to independent business judgment as from a horizontal agreement.

¹⁵⁵ 1977 GUIDE, *supra* note 3, at E-3.

¹⁵⁶ See text accompanying note 150.

¹⁵⁷ 28 U.S.C. § 1605(a)(2) (1982).

clarified existing judicial doctrine with respect to standards of immunity, personal jurisdiction, and remedies available against foreign sovereigns.¹⁵⁸ The 1977 Guide did not mention this law by name. Rather, it referred to the doctrine of sovereign immunity and noted that although foreign governments are immune for acts within their "sovereign" capacity, they may be liable for acts done in their "proprietary" capacity. Later in Illustrative Case L, the 1977 Guide mentioned the sovereign immunity defense does not extend to "commercial" activity and cited FSIA in a footnote.¹⁵⁹ It is not clear what distinction the Department meant by using the differing terms "proprietary" and "commercial." Presumably they were intended to be interchangeable. It is also surprising that the 1977 Guide seemed to view the sovereign immunity defense and FSIA as related solely to personal jurisdiction when, in fact, they also go to subject matter jurisdiction.¹⁶⁰ All in all, this portion of the 1977 Guide was not well constructed.

The 1988 Guidelines cite FSIA directly in the overview and, like the 1977 Guide's Case L, note that some sovereign actions may be pursued under exceptions to FSIA, especially the "commercial acts" exception. In Case 14, the 1988 Guidelines use almost identical language as the 1977 Guide to describe how the "commercial act" exception would be applied¹⁶¹ although the subject matter jurisdiction/personal jurisdiction confusion over FSIA is cleared up.¹⁶²

D. Discretion in Asserting Jurisdiction

The 1988 Guidelines add three subsections not explicitly found in the 1977 Guide's overview: Factors Affecting the Department's Discretion in Asserting Jurisdiction;¹⁶³ Foreign Sovereign Compulsion;¹⁶⁴ and International Trade Friction and the U.S. Trade Laws.¹⁶⁵ The 1977 Guide does cover these topics to some degree in Illustrative Cases K,¹⁶⁶ L,¹⁶⁷ M,¹⁶⁸ and N.¹⁶⁹

Discretion in asserting jurisdiction centers around the concept of comity—"the notion that foreign nations are due deference when

¹⁵⁸ See HAWK TREATISE, *supra* note 151, at Vol. 1, ch. 5, p. 566; *id.* at 569.

¹⁵⁹ 1977 GUIDE, *supra* note 3, at E-15.

¹⁶⁰ HAWK TREATISE, *supra* note 151, at Vol. 1, ch. 5, p. 566 (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 485 n.5 (1983)).

¹⁶¹ 1988 GUIDE, *supra* note 1, at S-45.

¹⁶² This is implicit in Illustrative Case 14 because the discussion of personal jurisdiction does not begin until after the discussion of FSIA and sovereign immunity. See *id.*

¹⁶³ 1988 GUIDE, *supra* note 1, at S-22.

¹⁶⁴ *Id.* at S-23.

¹⁶⁵ *Id.* at S-24.

¹⁶⁶ 1977 GUIDE, *supra* note 3, at E-14.

¹⁶⁷ *Id.* at E-15.

¹⁶⁸ *Id.* at E-16.

¹⁶⁹ *Id.* at E-17.

acting within their legitimate spheres of authority.”¹⁷⁰ Comity is an important public policy underlying two defenses to antitrust actions in international cases: the act of state doctrine and the foreign sovereign compulsion doctrine.

The 1977 Guide discussed comity in Case K. The Guide first stated that under principles of comity, “the laws of the nation with the more important national interest at stake, based upon its own laws and policies, should prevail.”¹⁷¹ The 1977 Guide then went on to say that the U.S. antitrust laws represent “a fundamental and important national policy.”¹⁷² This begs the questions of exactly what factors are to be used in weighing competing nations’ interests and what kinds of interests may outweigh those of the United States. Because other sovereigns will inevitably find their interests more “fundamental and important” than our own, the 1977 Guide’s policy causes the very foreign relations tensions that comity is intended to reduce.

In the years following the release of the 1977 Guide, the Department embarked on several antitrust enforcement actions involving foreign governments.¹⁷³ This resulted in diplomatic and political fallout¹⁷⁴ that has led to a careful softening of the Department’s comity policy in the 1988 Guidelines. The Department has now “committed itself to consider the legitimate interests of other nations.”¹⁷⁵

The basic policy is still the same, a balancing of nations’ interests, but at least the process is clearer.¹⁷⁶ The 1988 Guidelines describe a two-part test for weighing interests. Before asserting jurisdiction or seeking remedies, the Department first considers whether any significant effect will be felt by the foreign nations involved.¹⁷⁷ If so, six factors are weighed against U.S. consumer welfare loss including the significance of the conduct and effects, and

¹⁷⁰ 1988 GUIDE, *supra* note 1, at S-22.

¹⁷¹ 1977 GUIDE, *supra* note 3, at E-15.

¹⁷² *Id.* at E-15.

¹⁷³ See generally HAWK TREATISE, *supra* note 151, at Vol. 1, ch. 1, pp. 22-27.

¹⁷⁴ “[A]ntitrust has been the chief focus of foreign complaints that application of United States laws to foreign conduct and persons is inappropriate, if not contrary to international law.” *Id.* at 23.

¹⁷⁵ 1988 GUIDE, *supra* note 1, at S-22.

¹⁷⁶ In addition, the Department notes that the United States has entered into a series of agreements with other nations on antitrust enforcement which should further decrease confusion. *Id.* See, e.g., Revised Recommendation of the [OECD] Council Concerning Cooperation Between Member Countries in Restrictive Business Practices Affecting International Trade, OECD Document C (86) 44 (Final) (May 21, 1986); Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, United States-Australia, T.I.A.S. No. 10365, reprinted in [1969-1983 Transfer Binder] TRADE REG. REP. ¶ 50,440; Memorandum of Understanding as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, Mar. 9, 1984, United States-Canada, reprinted in 5 TRADE REG. REP. ¶ 50,464.

¹⁷⁷ 1988 GUIDE, *supra* note 1, at S-22.

the degree of conflict expected with foreign law.¹⁷⁸ These factors are still too nebulous for business planning purposes, but serve to confirm that the Department is taking a more cautious attitude.

Unfortunately, Case 14 in the 1988 Guidelines, which discusses comity, does not present a good example of the test's application.

As mentioned previously, one of two important defenses to international antitrust actions relying on the principle of comity is the act of state doctrine. It is a judicially created principle under which a court refuses to inquire into the validity of acts by a foreign sovereign within its own borders.¹⁷⁹

The act of state doctrine received a great deal of attention in the 1977 Guide, but unfortunately the treatment is simplistic and confused. A major part of the confusion occurred because the act of state doctrine is blended with the foreign sovereign compulsion doctrine in the same discussion. Actually, these are separate although sometimes overlapping concepts. In Cases K and L, the 1977 Guide recognized the validity of the act of state doctrine and then laid out what the Department saw as basic limitations on it. First, the doctrine only protects foreign government directed activities occurring in foreign territory, not in the United States.¹⁸⁰ Second, the activities must be performed by a truly sovereign entity acting within its own laws.¹⁸¹ An agent of the government is not protected. Third, the doctrine does not apply to commercial activities of a foreign government, only public, political actions.¹⁸²

The 1988 Guidelines mention the act of state doctrine in a pair of footnotes.¹⁸³ The Department believes that no government actions should be dismissed by the courts because of considerations of comity (which would occur through invocation of the act of state doctrine), although the doctrine should still be applicable to private actions.¹⁸⁴ The Department's reasoning is simple: the conduct of

¹⁷⁸ The actual six factors listed are:

- (1) The relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad;
- (2) The nationality of the persons involved in or affected by the conduct;
- (3) The presence or absence of a purpose to affect United States consumers or competitors;
- (4) The relative significance and foreseeability of the effects of conduct on the United States as compared to the effects abroad;
- (5) The existence of reasonable expectations that would be furthered or defeated by the action; and
- (6) The degree of conflict with foreign law or articulated foreign economic policies.

1988 GUIDE, *supra* note 1, at S-22 n.170.

¹⁷⁹ See *Underhill v. Hernandez*, 168 U.S. 250 (1897); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

¹⁸⁰ 1977 GUIDE, *supra* note 3, at E-15.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ 1988 GUIDE, *supra* note 1, at S-22 n.169 & S-46 n.286.

¹⁸⁴ *Id.* at S-22 n.167.

foreign relations is constitutionally reserved to the Executive Branch.¹⁸⁵ Therefore, an action by the Justice Department, an arm of the Executive Branch, cannot be questioned by the Judiciary on grounds of foreign relations considerations.

The act of state doctrine has been rejected in the majority of international antitrust cases¹⁸⁶ and the future of the doctrine in general has been questioned by the Supreme Court.¹⁸⁷ This may explain the diplomatic manner by which the Department approaches the topic.

E. Foreign Sovereign Compulsion

The foreign sovereign compulsion defense, described in the next subsection of the 1988 Guidelines, maintains that a private company cannot be liable for its acts under the antitrust laws where its conduct has been compelled by a foreign sovereign.¹⁸⁸ The Department stated in the 1977 Guide's Case L that it recognized the defense, but with four limitations. First, foreign sovereign compulsion only protected foreign government directed activities occurring in foreign territory, not in the United States.¹⁸⁹ This is called the territorial limitation. Second, the act must have been due to an order by a truly sovereign entity acting within its own laws.¹⁹⁰ Third, referring back to comity, the balance of national interests must have been reasonable and, fourth, the response of the private company must have been reasonable in light of the degree of pressure applied to it.¹⁹¹

There were several criticisms of this position. First a public policy in favor of fairness¹⁹² to private companies (particularly in light of possible criminal liability) augurs for a rule of reason approach versus absolute proscriptions such as the territorial limitation.¹⁹³ Second, the fact that there is a wide spectrum of liability facing private companies, from civil damages to prospective relief to criminal sanctions, a flexible set of standards for conduct needs to be applied.¹⁹⁴ Third, the comity balancing problem is similar to that under act of state. Actions against private companies which follow the commands of foreign sovereigns implicitly impune the com-

¹⁸⁵ *Id.* at S-23 n.171.

¹⁸⁶ HAWK TREATISE, *supra* note 151, at 586.

¹⁸⁷ *Id.* at 581.

¹⁸⁸ *Id.* at 615.

¹⁸⁹ 1977 GUIDE, *supra* note 3, at E-15.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at E-15 to E-16.

¹⁹² See generally HAWK TREATISE, *supra* note 151, at 614-15. See also *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D.Del. 1970); *United States v. Field*, 532 F.2d 404, 410 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976).

¹⁹³ HAWK TREATISE, *supra* note 151, at 615.

¹⁹⁴ *Id.*

mands and the foreign sovereigns themselves.¹⁹⁵ Thus the 1977 Guide's poor formulation of comity policy was considered likely to create more problems than it solved.

The 1988 Guidelines' foreign sovereign compulsion policy uses similar language to that in the 1977 Guide. Once again, the Department recognizes this defense but with two limitations. First a foreign sovereign must actually and unambiguously compel the conduct. Second, where conduct has clearly occurred primarily in the United States, the Department generally will not accept a foreign sovereign compulsion defense.¹⁹⁶

The second limitation is a slight softening of the Department's former absolute territorial limitation.¹⁹⁷ The Department's milder stance is probably a pragmatic response to complaints by foreign governments of interference by the United States.¹⁹⁸

After describing the scope of the doctrine, the 1988 Guidelines carefully distinguish it from the state action doctrine.¹⁹⁹ This delineation is not included in the 1977 Guide and is a valuable addition to the new one. The Department's position is taken wholly from the Supreme Court's opinion in *Southern Motor Carriers Rate Conference, Inc. v. United States*.²⁰⁰ Essentially, the state action doctrine's lower standard for compulsion of private conduct is driven by considerations of federalism,²⁰¹ which obviously are inapplicable to foreign sovereigns. In addition, the requirement under the state action doctrine of "active supervision"²⁰² would be impossible to enforce in the international context without interfering with legitimate interests of foreign sovereigns.²⁰³

¹⁹⁵ *Id.* at 616.

¹⁹⁶ 1988 GUIDE, *supra* note 1, at S-23. In its draft version of the new guidelines, the Department had additionally required that the command be within the foreign sovereign's own legal authority and limited comity to those situations where the foreign sovereign's acts were reasonably required. 1988 DRAFT, *supra* note 1, at S-14. These are identical to the second and third limitations in the 1977 Guide.

¹⁹⁷ At first blush, this indicates acceptance of the fairness principle, however, in footnote 117 of the draft version of the guidelines, the Department stated, "In the absence of [comity] considerations . . . , abstract and undefined notions of 'fairness' to firms that engage in anticompetitive conduct should not obstruct the legitimate prosecution of anti-trust offenses . . ." *Id.* at n.117. That footnote was removed, but may still be the best statement of DOJ's position.

¹⁹⁸ See *supra* note 174.

¹⁹⁹ The Sherman Act doctrine of state action "embodies the notion that the U.S. Congress should not be presumed to have intended to interfere with the authority of the states 'constitutionally to regulate their domestic commerce.'" 1988 GUIDE, *supra* note 1, at S-23 (citing *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985)).

²⁰⁰ 471 U.S. 48 (1985).

²⁰¹ HAWK TREATISE, *supra* note 151, at 619.

²⁰² For domestic private conduct to be protected under the state action doctrine, there are two requirements. First, the conduct must be pursuant to clearly articulated state policies and subject to active supervision by the state. Second, the conduct must be actually compelled by the state.

²⁰³ 1988 GUIDE, *supra* note 1, at S-23 n.179.

F. International Trade Friction

In the last subsection of the 1988 Guidelines, the Department provides its position on a Noerr-Pennington-like doctrine²⁰⁴ applicable in the international context. The stated policy is slightly changed from the 1977 Guide which took the position in Case N²⁰⁵ that the Noerr-Pennington doctrine itself applies internationally.²⁰⁶ The 1977 Guide listed three exceptions to the defense recognized in domestic cases: (1) sham activity intended to slow competitors without actually trying to seek government help;²⁰⁷ (2) providing false information to gain government help;²⁰⁸ (3) conspiracy with or bribery of a regulatory body.²⁰⁹ The 1988 Guidelines equivocate on Noerr-Pennington's direct applicability in the international context,²¹⁰ but for reasons of comity the Department does not pursue legitimate petitioning of foreign sovereigns by U.S. or foreign firms under circumstances in which the U.S. Government protects similar activities.²¹¹

The guidelines mention the sham exception noted in the 1977 Guide, but omit the other two.²¹² In Case 17 of the 1988 Guidelines,²¹³ the Department also describes how trade arbitration agreements are affected by the antitrust laws. In effect, any agreement among international competitors to raise price or restrict output is exempt from the antitrust laws only so long as "the agreement is reached and carried out in accordance with the suspension agreement provisions of the antidumping law."²¹⁴

The guidelines go on to outline the basic procedures of the

²⁰⁴ The Noerr-Pennington doctrine asserts that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly." *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961); *accord*, *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). *See also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

²⁰⁵ 1977 GUIDE, *supra* note 3, at E-17.

²⁰⁶ The doctrine was formulated in cases of a purely domestic nature, but because the heart of the issue is the First Amendment right to petition, the doctrine or a very similar doctrine is believed by some to apply in the international context. HAWK TREATISE, *supra* note 151, 609-11. *See Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983). *But see Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

²⁰⁷ 1977 GUIDE, *supra* note 3, at E-17. First recognized in *California Motor Transport*.

²⁰⁸ 1977 GUIDE, *supra* note 3, at E-18. *See Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

²⁰⁹ 1977 GUIDE, *supra* note 3, at E-18. *See California Motor Transport*, at 513.

²¹⁰ 1988 GUIDE, *supra* note 1, at S-24 (citing *Occidental*, at 107-08 and *Coastal States*, at 1364-67).

²¹¹ 1988 GUIDE, *supra* note 1, at S-24.

²¹² This is makes sense because perjury, bribery, conspiracy, etc. are obviously illegal under other statutes and therefore intuitively create exceptions to the Noerr-Pennington doctrine or any similar doctrine.

²¹³ 1988 GUIDE, *supra* note 1, at S-46 to S-47.

²¹⁴ *Id.* at S-47.

Commerce Department but add, "A detailed discussion of the provisions in various U.S. trade laws that allow agreements or other measures to restrict import competition is beyond the scope of these Guidelines."²¹⁵ This is probably the most serious gap in the new document. With the explosion of trade laws and regulations in the 1980s, it is becoming important to understand what the Department's role is. This is a very complex problem and it is understandable if the Department feels it is too soon to announce detailed policies, but follow-up to this guide is needed.

IV. Conclusion

The Department has generally done a good job in describing its current policies. There are no significant differences between the new international guidelines and current domestic guidelines for criminal offenses under the Sherman Act, mergers, and vertical non-price restraints. Policies for joint ventures and intellectual property restraints are being liberalized under the new guidelines, but again, this will probably be as true for purely domestic situations in the future as for those involving international operations today. All in all, there are no significant surprises in the new guidelines.

Nevertheless, the Department has not been as successful in meeting one of its primary goals: defining safe harbors for business. For example, the Department has reiterated that mergers which leave the relevant market with an HHI of less than one thousand will not be challenged—a fairly objective criterion. Yet there is such a long list of nebulous ways to measure the relevant market, that businesses cannot be absolutely certain of the result. The Department admits that even with the guidelines, there is no substitute for experienced counsel.²¹⁶

The problem may be inherent in the Chicago philosophy which advocates the generous use of the rule of reason approach. The Reagan Administration intended this to open up the market, to give business every economic benefit of the doubt. Unfortunately, rule of reason is a means and not an end. The next administration or some other future administration can easily interpret rule of reason in a much stricter fashion as suits whatever ends they may wish to achieve. Mergers, and to a lesser degree possibly vertical nonprice restraints, are the most likely candidates for this treatment. International joint ventures may enjoy bipartisan support for several years to come, but even they will probably face resurgent protectionism or fears of collusion at some point.

These political realities of antitrust enforcement point out one major change that should be made to these guidelines as well as

²¹⁵ *Id.*

²¹⁶ *Id.* at S-1.

other Department policy statements. As a new administration enters office, timely notice of changes in policy must be given to the business community. Certainly, a full set of guidelines would be too difficult to produce immediately, but a letter of policy considerations should be required within six months after a change in administrations. A more complete rewrite of guidelines as necessary should then be delivered within two years.²¹⁷ Guidelines are far less useful when delivered virtually at the end of an administration as occurred with these guidelines.

A second and much tougher part of the uncertainty problem alluded to early in this Comment is the lack of coordinated guidelines from the various government bodies overseeing international operations. It would be a tremendous advantage to have a series of linked policy statements from the FTC, the ITC, and even the States' Attorneys General on this topic so that a complete picture can be drawn.

Finally, it is heartening to note that DOJ does not see the guidelines as a final answer to business uncertainty. The Department has proposed limiting private suit damages and other actions which should minimize the penalty on a business for guessing wrong about antitrust policy and encourage more international activity.²¹⁸

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²¹⁷ The Justice Department had initially promised to update the Merger Guidelines every two years. But when asked about a possible revision as the second year anniversary approached, then Assistant Attorney General Ginsberg stated, "I anticipate that [the Merger Guidelines] will largely be codified by then." *Interview With Assistant Attorney General Douglas Ginsburg*, ANTITRUST & TRADE REG. REP. (BNA) Vol. 50, No. 1247, at 59 (Jan. 9 1986).

²¹⁸ Thornburgh, *supra* note 103.

