

A Critique of the Justice Department's Antitrust Guide for International Operations

Joseph P. Griffin

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Griffin, Joseph P. (1978) "A Critique of the Justice Department's Antitrust Guide for International Operations," *Cornell International Law Journal*: Vol. 11: Iss. 2, Article 3.

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A CRITIQUE OF THE JUSTICE DEPARTMENT'S ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS

Joseph P. Griffitt[†]

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[†] Member of the District of Columbia Bar. Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C.; Adjunct Professor of Law, Georgetown University Law Center. B.A. 1966, University of Virginia; J.D. 1971, Georgetown University; Diploma in Law 1973, Oxford University.

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INTRODUCTION

The Antitrust Division of the U.S. Department of Justice in January 1977 released a sixty-three page booklet entitled the *Antitrust Guide for International Operations*¹ (the Guide). The Guide's principal architect, Donald I. Baker, then Assistant Attorney General in charge of the Antitrust Division, stated at the time that the Guide was being released "for critique and cannonade," so that the Division could start a discussion on the issues raised by the Guide with those outside the Division.² Later, Douglas E. Rosenthal, Chief of the Division's Foreign Commerce Section and a major contributor to the Guide, echoed Mr. Baker's remark, stating that the Guide "is an invitation to a dialogue. If we are wrong in what we say, tell us."³ This Article is intended to contribute to such a discussion.

I

WHAT THE GUIDE WAS INTENDED TO BE AND NOT TO BE

The Guide is an outgrowth of discussions between the Justice Department and the President's Export Council.⁴ Members of the Council believed that increased international trade and investment were deterred in certain situations by what they viewed as the unclear enforcement policy of the Antitrust Division.⁵ They therefore posed several of these situations to

1. ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977) [hereinafter cited as ANTITRUST GUIDE], reprinted in ANTITRUST & TRADE REG. REP. (BNA) No. 799, at E-1 (1977) and TRADE REG. REPORTS (CCH) No. 266, pt. II (1977).

2. Remarks by Donald I. Baker, then Ass't Attorney General, Antitrust Div., U.S. Dep't of Justice, before the Antitrust Law Section, N.Y. State Bar Ass'n, *Antitrust in the Sunshine* 20 (Jan. 26, 1977) (copy on file at the offices of the *Cornell International Law Journal*). This speech was later published in a slightly revised form. Baker, *Antitrust in the Sunshine*, 21 St. Louis U.L.J. 347 (1977).

3. Address by Douglas E. Rosenthal, then Ass't Chief, Foreign Commerce Section, Antitrust Div., U.S. Dep't of Justice, before the Antitrust and Trade Regulation Committee, U.S. Chamber of Commerce (Mar. 9, 1977), reprinted in [1977] 5 TRADE REG. REP. (CCH) ¶ 50,309, at 55,653.

4. The President's Export Council is a group of executives of American-based transnational enterprises that advises a cabinet level committee on export expansion. See generally Remarks by Baker, *supra* note 2, at 18, 21 St. Louis U.L.J. at 355.

5. See, e.g., ANTITRUST TASK FORCE ON INTERNATIONAL TRADE & INVESTMENT, U.S. CHAMBER OF COMMERCE, FINAL REPORT ON U.S. ANTITRUST LAWS AND AMERICAN EX-

the Division as hypothetical cases. The Division's response—the Guide—comprises two major sections. A nine page Introduction reviews general principles and policy considerations of antitrust enforcement. The Guide then analyzes fourteen hypothetical situations in order to illustrate the thought processes of Division personnel in making enforcement decisions and the factors deemed relevant to those decisions.⁶

An important threshold criticism of the Guide is that it fails to explain adequately what it was intended to be and not to be, and that it may therefore mislead some people who rely upon it. According to its Preface, the Guide is intended as a "general statement of enforcement policy for use by business decision-makers, lawyers, and others concerned with antitrust enforcement in the international sector."⁷ To their credit, senior Antitrust Division officials have, since the Guide's publication, emphasized that it is not "a substitute for . . . experienced private antitrust counsel."⁸ Nonetheless, some of the Guide's readers, particularly those who do not monitor speeches and articles by Division personnel, may not fully comprehend the significance of the Guide's silence on some issues and very brief caveats on others.

A. A GUIDE TO JUSTICE DEPARTMENT RATHER THAN U.S. GOVERNMENT ENFORCEMENT POLICY

Laymen and lawyers who have little experience in the international antitrust field are often unaware that more than one federal agency is responsible for enforcing American antitrust laws in the area of international business transactions. The Guide is no more than a statement of the en-

PORTS (Feb. 26, 1974) (copy on file at the offices of the *Cornell International Law Journal*); NATIONAL ASS'N OF MFRS., THE INTERNATIONAL IMPLICATIONS OF U.S. ANTITRUST LAWS (1974); BUS. WEEK, Apr. 10, 1978, at 54. For examples of previous responses by antitrust enforcement officials to such criticisms, see Letter from Thomas E. Kauper, then Ass't Attorney General, Antitrust Div., U.S. Dep't of Justice, to Arch N. Booth, President, U.S. Chamber of Commerce (Apr. 26, 1974), reprinted in ANTITRUST & TRADE REG. REP. (BNA) No. 663, at F-1 (1974); Remarks by Joel Davidow, then Chief, Foreign Commerce Section, Antitrust Div., U.S. Dep't of Justice, before the Fordham Corporate Law Institute, *Antitrust, International Mergers and International Joint Ventures* (Nov. 12, 1974) (copy on file at the offices of the *Cornell International Law Journal*); U.S. Dep't of Justice, Memorandum Concerning Antitrust and Foreign Commerce (Jan. 31, 1972), reprinted in [1977] 5 TRADE REG. REP. (CCH) ¶ 50,129, at 55,208.

6. Address by Rosenthal, *supra* note 3, at 55,651; Address by Joe Sims, Deputy Ass't Attorney General, Antitrust Div., U.S. Dep't of Justice, before the American Society of International Law, *International Antitrust: The Rules of the Game Get Clearer* 5 (Apr. 20, 1977) (copy on file at the offices of the *Cornell International Law Journal*).

7. ANTITRUST GUIDE, *supra* note 1, at *Preface*

8. *Id.* at 1. See, e.g., Shenefield, *Foreword*, 1 REVUE SUISSE DU DROIT INTERNATIONAL DE LA CONCURRENCE 2, 4 (1977); Address by Donald A. Farmer, Jr., Special Ass't to the Ass't Attorney General, Antitrust Div., U.S. Dep't of Justice, before the Council of the Americas, *An Overview of the Justice Department's Guide to International Operations* (June 8, 1977), reprinted in [1977] 5 TRADE REG. REP. (CCH) ¶ 50,325, at 55,682.

forcement policies of one of those agencies, the Justice Department. 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."⁹ Although this disclaimer appeared in the press release announcing the Guide's issuance, it does not appear in the Guide itself. In fact, the Introduction to the Guide states that "we try here to provide a working statement of *government* enforcement policy . . ." ¹⁰ and a few pages later discusses the two major purposes of "[a]ntitrust enforcement by the United States Government."¹¹

Perhaps as a result, John T. Fischbach, the Assistant to the General Counsel for International Affairs at the FTC, was quick to point out that the Guide "is not a complete directory to United States antitrust laws or their enforcement," and that businessmen should not be misled "into thinking that, if only they comply with the policies set forth in the Guide, they need not fear any United States antitrust problems."¹² Mr. Fischbach noted that because section 5 of the Federal Trade Commission Act¹³ is broader than the Sherman¹⁴ and Clayton¹⁵ Acts, "some of the hypothetical conduct described in the Guide as lacking characteristics which would cause the Justice Department to institute proceedings could be viewed differently by the Federal Trade Commission."¹⁶ Furthermore, although the Justice Department declines to enforce the Robinson-Patman Act¹⁷ and has advocated that it be substantially modified or repealed,¹⁸ the FTC does, according to Mr. Fischbach, enforce the Act, which applies to international transactions in some circumstances.¹⁹

9. U.S. Dep't of Justice, Press Release (Jan. 26, 1977) (copy on file at the offices of the *Cornell International Law Journal*). See also ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ANNUAL REPORT ON COMPETITION POLICY 121 (No. 2) (1977) ("The Guide does not cover the enforcement policies of the Federal Trade Commission.")

10. ANTITRUST GUIDE, *supra* note 1, at 1 (emphasis added).

11. *Id.* at 4.

12. Fischbach, *Possible Applications of United States Restrictive Business Practices Laws to International Operations—A Few Steps Beyond the United States Department of Justice's "Antitrust Guide for International Operations,"* 1 REVUE SUISSE DU DROIT INTERNATIONAL DE LA CONCURRENCE 48, 48-49 (1977) (footnote omitted).

13. 15 U.S.C. § 45 (1976). For examples of cases involving the FTC and foreign commerce, see *Luria Bros. v. FTC*, 389 F.2d 847 (3d Cir.), *cert. denied*, 393 U.S. 829 (1968); *Branch v. FTC*, 141 F.2d 31 (7th Cir. 1944); *Eastman Kodak Co. v. FTC*, 7 F.2d 994 (2d Cir. 1925).

14. 15 U.S.C. §§ 1-7 (1976).

15. *Id.* §§ 12-27 (1976).

16. Fischbach, *supra* note 12, at 49-50 (footnote omitted).

17. 15 U.S.C. § 13 (1976).

18. U.S. DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT (1977).

19. Fischbach, *supra* note 12, at 58-59. See, e.g., *Canadian Ingersoll-Rand Co. v. D. Loveman & Sons*, 227 F. Supp. 829 (N.D. Ohio 1964); *Baysoy v. Jessop Steel Co.*, 90 F. Supp. 303 (W.D. Pa. 1950). See generally Rill & Frank, *Antitrust Consequences of United States Corporate Payments to Foreign Officials: Applicability of Section 2(c) of the Robinson-Patman Act and Sections 1 and 2 of the Sherman Act*, 30 VAND. L. REV. 131 (1977).

In addition to the FTC, the International Trade Commission (ITC) has some authority to apply the antitrust laws to international transactions. Section 337 of the Tariff Act of 1930 prohibits "unfair methods of competition and unfair acts in the importation of articles into the United States" ²⁰ The ITC has exclusive primary jurisdiction over Section 337 and has adopted a broad view of the types of anticompetitive conduct that fall within its jurisdiction. ²¹ Moreover, in two recent cases, the ITC has taken enforcement positions inconsistent with the Justice Department's views in the same cases. ²² Consequently, the Guide may have little or no effect on ITC enforcement activities.

B. NOT A GUIDE BINDING ON THE JUSTICE DEPARTMENT

The Preface to the Guide concludes with the comment that "positions stated in the Guide should not be regarded as barring any action believed appropriate under the antitrust laws." ²³ This remark is more important than it may first appear to be to those with little experience in the international antitrust field.

20. 19 U.S.C. § 1337(a) (1976).

21. See *Symposium: Section 337 of the Trade Act of 1974*, 8 GA. J. INT'L & COMP. L. 27 (1978); deKieffer & Hartquist, *Unfair Trade Practices and Section 337—Promises and Uncertainties*, 2 N.C.J. INT'L L. & COM. REG. 107 (1977); Minchew, *The Expanding Role of the United States International Trade Commission*, 27 MERCER L. REV. 429 (1976); Brown, *Unfair Methods of Competition in Importation: The Expanded Role of the U.S. International Trade Commission Under § 337 of the Tariff Act of 1930, as Amended by the Trade Act of 1974*, 31 BUS. LAW. 1627 (1976); Note, *The Revitalization of Section 337 of the Tariff Act of 1930 Under the Trade Act of 1974*, 11 J. INT'L L. & ECON. 167 (1976); N.Y. Times, Dec. 27, 1977, at 57, col. 5.

22. In *Certain Color Television Receiving Sets* (337-TA-23), the ITC proceeded against Japanese color television exporters despite Justice Department objections that the Commission lacked jurisdiction and that the alleged activities of the exporters did not warrant an ITC proceeding. See Letter from Donald I. Baker, then Ass't Attorney General, Antitrust Div., U.S. Dep't of Justice, to Senator Edward M. Kennedy (Feb. 16, 1977) (copy on file at the offices of the *Cornell International Law Journal*), partially reprinted in TRADE REG. REPORTS (CCH) No. 274, at 15-16 (1977). For Senator Kennedy's letter to Mr. Baker (Jan. 17, 1977), see TRADE REG. REPORTS (CCH) No. 269, at 7-8 (1977). The case was eventually settled by a consent decree. 42 Fed. Reg. 39,492 (1977). For a discussion of this proceeding, see *Administrative Survey: October 1976 to September 1977*, 10 LAW & POL'Y INT'L BUS. 1, 4-9 (1978).

In *Certain Welded Stainless Steel Pipe and Tube* (337-TA-29), the Justice Department advised the ITC either to dismiss the complaint or to require submission of supporting information from complainants before proceeding. Letter from Jonathan C. Rose, Deputy Ass't Attorney General, U.S. Dep't of Justice, to Daniel Minchew, Chairman, ITC (Jan. 25, 1977) (copy on file at the offices of the *Cornell International Law Journal*). The ITC ignored this advice and proceeded. On February 9, 1978, the ITC held that Japanese steel producers had violated section 337, and issued a cease and desist order. U.S. Int'l Trade Comm., Publication 863 (Feb. 22, 1978) (copy on file at the offices of the *Cornell International Law Journal*). But on April 24, 1978, President Carter overruled the Commission, in part because of "[t]he need to avoid duplication and conflicts in the administration of the unfair trade practice laws of the United States." Office of the Special Representative for Trade Negotiations, Press Release No. 269, at 1 (Apr. 25, 1978) (copy on file at the offices of the *Cornell International Law Journal*).

23. ANTITRUST GUIDE, *supra* note 1, at Preface.

Because the Guide is neither a statement of the law nor a body of administrative rules promulgated pursuant to the Administrative Procedure Act,²⁴ it does not bind the Justice Department. The Antitrust Division is thus still free to proceed against those who have acted in accordance with their understanding of the Guide. The Chief of the Division's Intellectual Property Section has stated:

[T]he Guide is an informal indication of the enforcement intentions of current top officials of the Antitrust Division. Obviously, the enforcement intentions of the officials of the Department in the past and the future may differ from this. . . . [T]he Department's legal position will depend primarily on its view of substantive law. . . . [T]he Department probably will not (in my view) be willing to engage in a wrangle over the meaning of the Guide in lieu of arguing the meaning of the statute and case law.²⁵

Moreover, in an interview shortly after the Guide's release, Mr. Baker remarked that "you also provide guidance by bringing cases."²⁶

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. But the Guide would be more helpful if its advisory nature were more fully disclosed. The existing one-sentence caveat, coupled with the Guide's reference to the possible need to use the Business Review Procedure,²⁷ may not sufficiently warn all readers that compliance with the Guide does not prevent the Antitrust Division from bringing antitrust actions.

C. NOT A GUIDE TO PRIVATE, STATE, OR FOREIGN ANTITRUST ACTIONS

The scope of the Guide is also limited in several further respects. It does not mention that private persons, including citizens of foreign countries,²⁸ may sue to recover treble damages under the Clayton Act.²⁹ State³⁰ and

24. 5 U.S.C. § 553 (1976).

25. Address by Richard H. Stern, then Chief, Patent Section, Antitrust Div., U.S. Dep't of Justice, before the Licensing Executives Society 12 (Apr. 1, 1977) (copy on file at the offices of the *Cornell International Law Journal*).

26. BUS. WEEK, Mar. 14, 1977, at 100.

27. The Business Review Procedure is "necessary if a firm expression of Antitrust Division views is desired in regard to particular transactions which pose close or difficult antitrust questions." ANTITRUST GUIDE, *supra* note 1, at 1.

28. *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng'r Co.*, [1977] 1 Trade Cas. ¶ 61,256 (S.D.N.Y. 1977); *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, 375 F. Supp. 610 (E.D. Pa.), *modified in part*, 383 F. Supp. 586 (E.D. Pa. 1974).

29. 15 U.S.C. § 15 (1976).

30. For an example of a state suing on its own behalf, see *Georgia v. Evans*, 316 U.S. 159 (1942). For examples of states suing as *parens patriae*, see *Burch v. Goodyear Tire & Rubber Co.*, 554 F.2d 633 (4th Cir. 1977); *Washington v. Standard Oil Co. of Calif.*, ANTITRUST & TRADE REG. REP. (BNA) No. 834, at D-5 (W.D. Wash. Oct. 15, 1977). See also 15 U.S.C. § 15(c) (1976).

foreign³¹ governments may also bring actions under that Act. All of these "persons" may have substantial incentives to sue when, for reasons of enforcement policy, comity, or lack of resources, the Justice Department does not prosecute.³²

The Guide also fails to point out that state antitrust laws may apply to international operations. Many state laws are patterned after federal antitrust laws, and provide for private rights of action.³³ Where international transactions have some contacts with a state, that state's antitrust laws are a potential source of liability.³⁴

The Guide does not purport to advise its readers on how to conform their conduct to the requirements of the antitrust laws of foreign nations. Many corporate counsel advise their clients that the American antitrust laws are the strictest in the world and that if the clients operate abroad in a manner consistent with American antitrust laws, they will automatically comply with less strict foreign laws.³⁵ Although the validity of such advice was always doubtful, today it is clearly wrong. As Joel Davidow, the Justice Department's representative in the United Nations forums, recently stated, compliance with the Guide does not assure a transnational enterprise that it will be considered a good corporate citizen in developing countries.³⁶

31. *Pfizer, Inc. v. Government of India*, 98 S. Ct. 584 (1978). Legislation is pending in Congress that would overrule this decision. *E.g.*, H.R. 11942, 124 CONG. REC. H2615 (1978). *See* ANTITRUST & TRADE REG. REP. (BNA) No. 858, at A-1 (1978).

32. Two current examples of such situations are the pending cases involving the alleged international uranium cartel, and the claims by American manufacturers of electronic products that Japanese producers of similar products violated several antitrust laws. *TVA v. Urangesellschaft, GmbH & Co.*, No. 77 Civ. 5617 (S.D.N.Y. 1977); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, No. 76 C 3830 (N.D. Ill. 1976); *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, M.D.L. No. 235 (E.D. Va. 1975); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 244 (E.D. Pa. 1975). *See generally Hearings on International Uranium Cartel Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. (1977).

33. *See* AMERICAN BAR ASS'N, STATE ANTITRUST LAWS (1974). In 1976, Congress authorized the expenditure of \$10 million per year for three years for grants to state attorneys general who submit approved plans for improving the effectiveness of state antitrust enforcement programs. 42 U.S.C. § 3739 (1976).

34. *See, e.g., Rosack v. Volvo of America Corp.*, [1977] 1 Trade Cas. ¶ 61,395 (Cal. Super. Ct. 1977).

35. *See* Rahl, *American Antitrust and Foreign Operations: What Is Covered?*, 8 CORNELL INT'L L.J. 1 (1974); Address by Joel Davidow, then Chief, Foreign Commerce Section, Antitrust Div., U.S. Dep't of Justice, before the Eleventh New England Antitrust Conference, *Foreign and International Antitrust: Variations on the Themes of U.S. Law 1-2* (Nov. 18, 1977) (copy on file at the offices of the *Cornell International Law Journal*).

36. *Id.* at 10.

II

GENERAL PRINCIPLES OF ENFORCEMENT POLICY

The Introduction is the most useful part of the Guide. It is a well-written, concise, and comprehensive expression of the Division's enforcement policy. With one exception,³⁷ it contains nothing new or controversial. The most important single quality of the Introduction is its balanced tone, which undercuts some critics' assertions that Antitrust Division officials are zealots who consider themselves to be world policemen of restrictive business practices and who automatically apply domestic antitrust precedents to international situations.³⁸

The Introduction to the Guide states that enforcement policy "should avoid unnecessary interference with the sovereign interests of foreign nations."³⁹ Senior Justice Department officials have elaborated on this statement in recent speeches. Both Attorney General Griffin B. Bell and Associate Attorney General Michael J. Egan have stated that comity⁴⁰ should be a major consideration in the Justice Department's international antitrust enforcement efforts.⁴¹ To give effect to this position, the Department recently adopted a new policy of "notify[ing] any foreign government at any time that an Antitrust Division official wishes to conduct investigative interviews or other official business within its territory."⁴² This policy apparently was precipitated by the rediscovery of a World War I statute dealing with foreign actions on U.S. soil⁴³ and by foreign outrage over the Justice Department's involvement in efforts to obtain information about the alleged international uranium cartel.⁴⁴ Like the Guide, the new attitude

37. See notes 66-81 *infra* and accompanying text.

38. "[P]urely domestic decisions may not be readily generalized to the international context." ANTITRUST GUIDE, *supra* note 1, at 1 n.1.

39. *Id.* at 6-7.

40. The doctrine of comity provides that, in order to reach an internationally acceptable accommodation with other nations, states will refrain from fully exercising their power on the basis of politeness, convenience, and goodwill. The doctrine is based upon mutual respect, but it is not binding. See *Hilton v. Guyot*, 159 U.S. 113, 163-66 (1895); Yntema, *The Comity Doctrine* 65 MICH. L. REV. 1 (1966).

41. Address by Griffin B. Bell, U.S. Attorney General, before the American Bar Ass'n (Aug. 8, 1977) (copy on file at the offices of the *Cornell International Law Journal*); Address by Michael J. Egan, Assoc. Attorney General, U.S. Dep't of Justice, before the Business Law Section, International Bar Ass'n (Nov. 3, 1977) (copy on file at the offices of the *Cornell International Law Journal*).

42. Address by Egan, *supra* note 41, at 9. See also Address by Joe Sims, Deputy Ass't Attorney General, Antitrust Div., U.S. Dep't of Justice, before the Practicing Law Institute, *The Justice Department's International Antitrust Program* 14 (Jan. 20, 1978) (copy on file at the offices of the *Cornell International Law Journal*) ("[W]e have been trying to find ways to carry out our mandate to protect American consumers from foreign anticompetitive activities in ways which do not raise the hackles of foreign governments quite so dramatically.").

43. 18 U.S.C. § 951 (1976); Address by Egan, *supra* note 41, at 10.

44. See ANTITRUST & TRADE REG. REP. (BNA) No. 829, at A-8 (Sept. 1, 1977). Canada adopted Uranium Information Security Regulations, SOR/77-836, 111 Can. Gaz. pt. II, at

reflects both a deliberate effort to achieve flexibility in enforcement policy and a recognition that a *pax Americana* in antitrust enforcement is neither feasible nor desirable.⁴⁵

The Guide states that, except in the area of per se horizontal restraints, the test of the legality of international trade restraints is the rule of reason. More importantly, the Guide acknowledges that the rule of reason may permit a wider range of anticompetitive activities when either "(1) experience with adverse effects on competition is much more limited than in the domestic market, or (2) there are some special justifications not normally found in the domestic market."⁴⁶ The Guide's conclusion that "[e]ither circumstance could justify a fuller factual inquiry"⁴⁷ constitutes an important⁴⁸ and welcome concession in the Antitrust Division's enforcement pol-

4619 (1977) (replacing Uranium Information Security Regulations SOR/76-644, 110 Can. Gaz. pt. II, at 2747 (1976)), to prevent disclosure of uranium cartel information. For two cases involving these regulations, see *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977); *United Nuclear Corp. v. General Atomic Co.* (D.N.M. 1978), reprinted in 17 INT'L LEGAL MATERIALS 376 (1978). Australia has a similar new law. Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, No. 121 (Austl.), as amended by Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act, 1976, No. 202 (Austl.), as implemented by Order of the Attorney General, Austl. Gov't Gaz. No. S214 (Nov. 29, 1976), No. 237 (Dec. 23, 1976), and No. 239 (Dec. 24, 1976). The House of Lords refused to order certain British executives to provide evidence concerning uranium in response to letters rogatory from a U.S. federal district court. *In re Westinghouse Elec. Corp. Uranium Contract Litigation*, [1978] 2 W.L.R. 81 (H.L. 1977). See generally Note, *Discovery in Great Britain: The Evidence (Proceedings in Other Jurisdictions) Act*, 11 CORNELL INT'L L.J. 323 (1978); Washington Post, Dec. 11, 1977, at K1, col. 2; FORBES, Nov. 15, 1977, at 45; THE ECONOMIST, Aug. 20, 1977, at 77.

For earlier examples of foreign statutes enacted in response to U.S. antitrust proceedings, see Law of June 28, 1956, [1956] Staatsblad [Stb.] 461 (Neth.), as amended by Law of July 16, 1958, § 39, [1958] Stb. 413 (Neth.); Shipping Contracts and Commercial Documents Act, 1964, c. 87 (U.K.), modified by Transfer of Functions (Shipping and Construction of Ships) Order, 1965 Stat. Inst. No. 145 (U.K.), as amended by Industrial Expansion Act, 1968, c. 32, §§ 14(1), 18(2), sched. 4 (U.K.); Law of May 24, 1965, § 11, [1965] Bundesgesetzblatt [BGBl] II 835 (W. Ger.); Business Concerns Records Act, QUE. REV. STAT. c. 278 (1961); Business Records Protection Act, ONT. REV. STAT. c. 54 (1970). The British and West German statutes were enacted in reaction to a 1960 investigation of multinational shipping conferences, *In re Grand Jury Investigation of the Shipping Indus.*, 186 F. Supp. 298 (D.D.C. 1960). See generally Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 VA. J. INT'L L. 747 (1974).

45. For other indications of the flexibility and importance of comity, see Competitive Impact Statement on *United States v. Bechtel Corp.*, 42 Fed. Reg. 3718 (1977), and *United States v. Addison-Wesley Publishing Co.*, 41 Fed. Reg. 32,615 (1976).

46. ANTITRUST GUIDE, *supra* note 1, at 2-3. In a recent speech, Attorney General Griffin B. Bell noted that a "current major concern is that the realities of foreign competition should be considered in the enforcement of the antitrust laws." Address by Griffin B. Bell, U.S. Attorney General, before The University Club 10 (Dec. 14, 1977) (copy on file at the offices of the *Cornell International Law Journal*).

47. ANTITRUST GUIDE, *supra* note 1, at 3.

48. The argument made on appeal in *BOC Int'l Ltd. v. FTC*, 557 F.2d 24 (2d Cir. 1977), shows the importance of this concession. The British Government as *amicus curiae* there argued on BOC International's behalf that "a foreign firm seeking to enter a market in another

icy. Unfortunately, the Guide's hypothetical cases nowhere develop this broader rule of reason test. For example, the hypothetical involving a U.S. firm's acquisition of a foreign company⁴⁹ does not mention the special problems of entering a foreign market.⁵⁰ Future editions of the Guide ought to present and discuss the factors that the Division considers important to an "international rule of reason" analysis.

The Guide's description of subject matter jurisdiction is, for the most part, lucid and helpful. Nevertheless, it is regrettable that the Guide perpetuates the "magic words" approach to the "effects" test of subject matter jurisdiction.⁵¹ At one point the Guide states that the test for jurisdiction is whether the conduct in question has "a substantial and foreseeable effect on U.S. commerce."⁵² On the very next page, the formula is changed to require a "direct or intended effect."⁵³ Presumably there is no difference in these two formulations; unfortunately, they merely add to the existing case law formulas, which include "affects,"⁵⁴ "directly affects,"⁵⁵ "substantially affects,"⁵⁶ "directly and substantially (or materially) affects,"⁵⁷ and has an

country faces numerous additional commercial, cultural, and legal barriers which do not confront firms expanding inside a single nation." Brief for Amicus Curiae at 19 (copy on file at the offices of the *Cornell International Law Journal*). Although the Second Circuit did not reach this contention in its decision, such considerations are likely to become increasingly important under the Guide's formulation of the international rule of reason.

49. ANTITRUST GUIDE, *supra* note 1, at 15 (Case B).

50. For an examination of the business difficulties a foreign firm encounters upon entering an American market, see *Wall St. J.*, May 3, 1978, at 44, col. 1; *id.*, Dec. 16, 1977, at 1, col. 1.

51. See generally Kintner & Griffin, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act*, 18 B.C. INDUS. & COM. L. REV. 199 (1977); Ongman, "Be No Longer a Chaos": *Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope*, 71 Nw. U.L. REV. 733 (1977). The European Communities have adopted the "effects" test of subject matter jurisdiction. See COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTH REPORT ON COMPETITION POLICY 31-32 (1977).

52. ANTITRUST GUIDE, *supra* note 1, at 6. This formula is similar to that in RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) ("direct and foreseeable result").

53. ANTITRUST GUIDE, *supra* note 1, at 7.

54. See, e.g., *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917); *United States v. Aluminium Co. of America*, 148 F.2d 416, 445 (2d Cir. 1945); *United States v. Flynn-Learner*, [1963] Trade Cas. ¶ 70,732, at 77,901 (D. Hawaii 1963); *Sanib Corp. v. United Fruit Co.*, 135 F. Supp. 764, 766 (S.D.N.Y. 1955); *United States v. Imperial Chem. Indus., Ltd.*, 100 F. Supp. 504, 592 (S.D.N.Y. 1951), *aff'd and modified*, 105 F. Supp. 215 (S.D.N.Y. 1952); *United States v. National Lead Co.*, 63 F. Supp. 513, 525 (S.D.N.Y. 1945), *aff'd and modified*, 332 U.S. 319 (1947).

55. See, e.g., *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, 383 F. Supp. 586, 587 (E.D. Pa. 1974); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 102-03 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); *United States v. Imperial Chem. Indus., Ltd.*, 105 F. Supp. 215, 237 (S.D.N.Y. 1952), *supplemental opinion*, 105 F. Supp. 215 (S.D.N.Y. 1952).

56. See, e.g., *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743 (1976); *Vanity Fair Mills, Inc. v. Eaton Co.*, 234 F.2d 633, 641 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956).

57. See, e.g., *United States v. Watchmakers of Switz. Information Center, Inc.*, [1963] Trade Cas. ¶ 70,600, at 77,457 (S.D.N.Y. 1962), *order modified*, [1965] Trade Cas. ¶ 71,352 (S.D.N.Y. 1965); *United States v. Oldham Co.*, 152 F. Supp. 818, 822 (N.D. Cal. 1957); *United States v.*

“impact upon.”⁵⁸

The differences among these formulas are more apparent than real. They do not use legal reasoning, but merely state a conclusion that the connection between the restraint and U.S. commerce is sufficient to warrant a finding of subject matter jurisdiction. In recent interstate commerce cases, the Supreme Court has held that the effect of the restraint upon commerce must be viewed “in a practical sense.”⁵⁹ Similarly, in *Timberlane Lumber Co. v. Bank of America*,⁶⁰ cited in a footnote to the Guide’s discussion of subject matter jurisdiction,⁶¹ the Ninth Circuit held that the “effects test by itself is incomplete”⁶² and suggested that the proper standard is a “jurisdictional rule of reason.”⁶³ Because of this increasing emphasis on case by case determinations, the Guide would be more useful if it stated and analyzed those factors that justify an assertion of subject matter jurisdiction, rather than presented aphoristic tests of jurisdiction.⁶⁴

The one controversial position stated in the Introduction raises a long-debated issue of subject matter jurisdiction that is of considerable academic but little practical importance.⁶⁵ According to the Guide, it is not the Department’s policy “to apply the Sherman Act to a combination of U.S. firms for foreign activities which have no direct or intended effect on United States consumers or export opportunities.”⁶⁶ Mr. Rosenthal has advanced three arguments in support of this position:

(1) “There is not a shred of evidence that any of those who sponsored the Sherman Act intended it as a magna carta of competition for the benefit of foreign persons in foreign markets, to hold to account United States export-

Timken Roller Bearing Co., 83 F. Supp. 284, 309 (N.D. Ohio 1949) (“direct and influencing”), *aff’d and modified*, 341 U.S. 593 (1951); *United States v. General Elec. Co.*, 82 F. Supp. 753, 891 (D.N.J. 1949), *modified*, 115 F. Supp. 835 (D.N.J. 1953); *United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft*, 200 F. 806, 807 (S.D.N.Y. 1911), *modified*, 216 F. 971 (S.D.N.Y. 1914), *rev’d as moot*, 239 U.S. 466 (1916).

58. *See, e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962); *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng’r Co.*, [1977] 1 Trade Cas. ¶ 61,256, at 70,783 (S.D.N.Y. 1977); *Raubal v. Engelhard Minerals & Chems. Corp.*, 364 F. Supp. 1352, 1356 (S.D.N.Y. 1973) (“impact” on commerce).

59. *See, e.g.*, *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 745 n.3 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 784 n.11 (1975) and cases cited therein.

60. 549 F.2d 597 (9th Cir. 1976).

61. ANTITRUST GUIDE, *supra* note 1, at 7 n.14.

62. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 611 (9th Cir. 1976).

63. *Id.* at 613.

64. *See, e.g.*, I P. AREEDA & D. TURNER, ANTITRUST LAW 260-66 (1978).

65. The issue is principally of academic importance because “even anticompetitive agreements specifically designed to injure or disadvantage foreigners frequently have easily foreseeable anticompetitive consequences upon domestic consumers.” Address by Donald A. Farmer, Jr., Special Ass’t to the Ass’t Attorney General, Antitrust Div., U.S. Dep’t of Justice, before the Council of the Americas, *An Overview of the Justice Department’s Guide to International Operations* (June 8, 1977), *reprinted in* [1977] 5 TRADE REG. REP. (CCH) ¶ 50,325.

66. ANTITRUST GUIDE, *supra* note 1, at 7.

ers engaged in restrictive practices in those markets."⁶⁷

(2) Existing cases go no further than to hold that "foreign plaintiffs injured in foreign markets can sue under the Sherman Act where they can show that the restraints that injured them injured others in United States markets as well."⁶⁸

(3) The U.S. Government need not prosecute such restraints because other governments have their own antitrust enforcement capabilities and because they are not likely to interpret American inaction as approval of such activities or as a retreat into isolation.⁶⁹

These arguments invite the following replies:

(1) There is no evidence that the Sherman Act's sponsors did not intend the Act to protect persons injured in foreign markets by American exporters. The legislative history of the Act is silent on the issue, and numerous decisions have noted that legislative intent may not be inferred from legislative silence.⁷⁰

(2) Where both foreigners and persons in American markets have been injured, the courts have not made injury to persons in U.S. markets a prerequisite to jurisdiction.⁷¹ Moreover, it would be anomalous to define a statute's reach by reference to whether the allegedly unlawful conduct simultaneously injured someone other than the complainant.⁷²

(3) Numerous policy considerations militate against a policy of acquiescence. For example, failure to prosecute U.S. firms for their anticompetitive conduct abroad could (a) injure the foreign subsidiaries of American corporations and individual Americans living abroad; (b) make the domestic operations of the conspirators less competitive; (c) cause foreign governments to adopt similarly lenient policies, possibly injuring American consumers and businesses; and (d) make the anticompetitive conduct unassailable, since many foreign governments do not apply their antitrust laws

67. Address by Douglas E. Rosenthal, Chief, Foreign Commerce Section, Antitrust Div., U.S. Dep't of Justice, before the American Society of International Law, *Subject Matter Jurisdiction in United States Export Trade* 8-9 (Apr. 23, 1977) (copy on file at the offices of the *Cornell International Law Journal*), partially reprinted in 71 AM. SOC'Y INT'L L. PROC. 214, 217 (1977).

68. *Id.* at 14 (this portion of the speech is not reprinted in the PROCEEDINGS).

69. *Id.* at 17, 71 AM. SOC'Y INT'L L. PROC. at 218-19.

70. See, e.g., *Zuber v. Allen*, 396 U.S. 168, 185 (1969); *Girouard v. United States*, 328 U.S. 61, 69 (1946); *Helvering v. Hallock*, 309 U.S. 106, 119-20 (1940).

71. *Pfizer, Inc. v. Government of India*, 98 S. Ct. 584 (1978); *Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance et D'Armement*, 451 F.2d 727 (2d Cir. 1971), cert. denied, 406 U.S. 906 (1972); *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, 375 F. Supp. 610 (E.D. Pa.), modified in part, 383 F. Supp. 586 (E.D. Pa. 1974).

72. In *United States v. Learner Co.*, 215 F. Supp. 603 (D. Hawaii 1963), one of the alleged violations of the Sherman Act was the fixing and maintaining of identical or similar terms and prices by American exporters of scrap metal to Japan. Although the indictment survived a motion to dismiss, *id.*, the Government later successfully moved to dismiss the indictment with prejudice, [1961-70 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,062 at 52,478.

extraterritorially.⁷³

The Guide apparently includes an *intended* effect on U.S. commerce as an element of the jurisdictional test applied to foreign activity of American companies. But in *United States v. Aluminum Co. of America*,⁷⁴ the court stated that intent was a requirement only as to the foreign conduct of *alien* companies.⁷⁵ Moreover, at least one court has rejected an American company's defense of lack of an intent to restrain trade.⁷⁶

Although the commentators have debated these conflicting contentions *ad infinitum*, if not *ad nauseam*,⁷⁷ the issue remains for the courts to resolve definitively. Consequently, the precise scope of the Sherman Act and the test for determining whether specific conduct falls within its prohibitions remain unclear.

Since 1909⁷⁸ no American court has failed to find subject matter jurisdiction in a case brought under the Sherman Act. Moreover, the likelihood is small that a situation as carefully confined as Mr. Rosenthal's example of a precisely targeted conspiracy⁷⁹ would actually arise, because companies often have no control over the effects of their anticompetitive conduct. In fact, one of Mr. Rosenthal's colleagues in the Division has stated that "even anticompetitive agreements specifically designed to injure or disadvantage foreigners frequently have easily foreseeable anticompetitive consequences upon domestic consumers."⁸⁰ Thus, as one distinguished commentator has noted, Mr. Rosenthal's thesis constitutes more of a problem for other commentators than for businessmen.⁸¹

73. Rahl, *A Rejoinder*, 8 CORNELL INT'L L.J. 42 (1974); Davidow, *Antitrust, Foreign Policy, and International Buying Cooperation*, 84 YALE L.J. 268, 275-78 (1974).

74. 148 F.2d 416 (2d Cir. 1945).

75. *Id.* at 444-45.

76. *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 309-10 (N.D. Ohio 1949), *aff'd and modified*, 341 U.S. 593 (1951).

77. See, e.g., K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 82 (1958); Baker, *Antitrust and World Trade: Tempest in an International Teapot?*, 8 CORNELL INT'L L.J. 16 (1974); Rahl, *supra* note 38; Comments by Stefan A. Riesenfeld, 71 AM. SOC'Y INT'L L. PROC., *supra* note 67, at 219.

78. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

79. Mr. Rosenthal's example is as follows: Speed and Sneed are Delaware corporations and significant competitors in the worldwide peanut butter industry. They manufacture peanut butter in the southeastern United States. Each agrees to ship peanut butter from its plant at a jointly agreed price to customers in the Kingdom of Rex, in North Africa. They do not sell peanut butter anywhere else. R. Company, a private firm incorporated in Rex, distributes in Rex the peanut butter it buys from a citizen of Rex who acts as a sales agent for both Speed and Sneed in Rex. The peanut butter is delivered to R. Company from a warehouse leased by the sales agent. Address by Rosenthal, *supra* note 67, at 216.

80. Address by Donald A. Farmer, Jr., Special Ass't to the Ass't Attorney General, Antitrust Div., U.S. Dep't of Justice, before the Council of the Americas, *An Overview of the Justice Department's Guide to International Operations* (June 8, 1977), reprinted in [1977] 5 TRADE REG. REP. (CCH) ¶ 50,325, at 55,684.

81. Comments by G. Winthrop Haight, 71 AM. SOC'Y INT'L L. PROC., *supra* note 67, at 222.

III

HYPOTHETICAL CASES

The Guide presents fourteen hypothetical situations designed to illustrate how the Division reaches enforcement decisions. The authors of the Guide acknowledge that, because the analysis of each case relies heavily on the rule of reason, each "turns heavily on [the] facts."⁸² Thus, a slight change in the facts may produce a different result. The analyses are nonetheless helpful, according to Joe Sims, Deputy Assistant Attorney General, because they demonstrate the Division's approach to international issues.⁸³ The hypotheticals would have been more helpful if the Guide had illustrated how the broader international rule of reason is to be applied,⁸⁴ and had distinguished the factors of greater analytical importance from those of lesser significance.

A. CASE A: TERRITORIAL ALLOCATION BY MULTINATIONAL CORPORATIONS

Case A⁸⁵ is derived from the facts of *Timken Roller Bearing Co. v. United States*,⁸⁶ and involves an international manufacturing corporation that coordinates its worldwide activities through a group of subsidiaries, each of which conducts all of the parent corporation's business in an assigned territory. The Guide concludes that "a parent corporation may allocate territories or set prices for the subsidiaries that it fully controls."⁸⁷ Control depends on whether the parent owns a majority of the voting stock, or, if the parent is a minority shareholder, whether it exerts "effective working control."⁸⁸

This statement of the Division's policy on the opaque doctrine of intraenterprise conspiracy⁸⁹ will come as a relief to those who have read *Timken* and related cases⁹⁰ as holding that American firms cannot lawfully

82. ANTITRUST GUIDE, *supra* note 1, at 9. "Of course no Guide can make the hard cases easy: such cases will surely turn on slight variations of fact and policy judgments." Address by Baker, *supra* note 2, at 16. "All cases are different, and in this area more than most, antitrust results will turn on specific facts." Address by Sims, *supra* note 42, at 23.

83. Address by Sims, *supra* note 6, at 6.

84. See text accompanying notes 49 & 50 *supra*.

85. ANTITRUST GUIDE, *supra* note 1, at 10-14.

86. 341 U.S. 593 (1951).

87. ANTITRUST GUIDE, *supra* note 1, at 12.

88. *Id.* at 13.

89. See J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 6.01[2][c], in 16 BUSINESS ORGANIZATIONS (1969); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. REV. 20 (1968); Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717 (1977).

90. See, e.g., *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19 (1962); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951). For recent cases applying the

organize foreign subsidiaries and then allocate markets among and establish prices for them.⁹¹ Nevertheless, the Guide's reliance on the test of effective working control may in some cases be too narrow and inflexible.

In contrast to the great importance that the Guide places on the issue of control, some courts have considered control to be only one factor to be considered along with such others as the firms' independence of action, the degree to which they compete with each other or are held out to the public as competitors, and whether they were created or acquired to effect anticompetitive purposes.⁹² Professor Hawk has offered, as an example of a situation in which the Guide's control-based analysis is too narrow, the case of a multinational corporation compelled by the country in which its subsidiary is located to hold only a small minority stock interest in the subsidiary.⁹³

The Guide's consideration of intraenterprise conspiracy also contains an important and restrictive caveat: the control test "would still allow use of the Sherman Act to reach coercive attempts by members of a corporate group to drive third parties out of business or out of markets."⁹⁴ This brief statement raises several questions that the Guide ought to address: What factors are relevant in determining whether there is a lawful expansion of market share or an unlawful conspiracy? Is it logical to argue that, even though the parent controls the subsidiary, the two entities can conspire if they intend to lower prices in order to drive third parties out of business, but not if they intend to raise prices? And finally, how, if at all, does a pre-existing stock affiliation between potential competitors affect the analysis?⁹⁵

intraenterprise conspiracy doctrine in an international context, see *International Rys. of Cent. America v. United Brands Co.* 532 F.2d 231 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); *Sulmeyer v. Seven-Up Co.*, 411 F. Supp. 635 (S.D.N.Y. 1976). For other international cases, see W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* 319-24 (2d ed. 1973).

91. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 88 (1955); Carlston, *Foreign Economic Policy and the Antitrust Laws*, 40 MINN. L. REV. 125, 140 (1956).

92. See, e.g., *Brager & Co. v. Leumi Sec. Corp.*, 429 F. Supp. 1341, 1345-46 (S.D.N.Y. 1977).

93. Hawk, *The OECD Guidelines for Multinational Enterprises: Competition*, 46 FORDHAM L. REV. 241, 252-53 (1977).

94. ANTITRUST GUIDE, *supra* note 1, at 12 n.26. This is consistent with the position of "most" members of the Attorney General's National Committee to Study the Antitrust Laws that "when a parent and its subsidiary, though short of an attempt to monopolize, nonetheless plan to drive out a competitor, Section 1 [of the Sherman Act] may be transgressed." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 35 (1955).

95. See B. HAWK, *INTERNATIONAL ANTITRUST* 138 (manuscript to be published in 1978) (copy on file at the offices of the *Cornell International Law Journal*).

B. CASE B: ACQUISITION OF A FOREIGN FIRM BY AN AMERICAN COMPANY

Case B⁹⁶ deals with the purchase of a small foreign specialty manufacturer by a large American firm, the leader in its industry. At the time of the purchase, the foreign firm is marketing a new product that is arguably superior to those of the American corporation. These facts are a variation of those in *United States v. Gillette Co.*⁹⁷

The Guide first notes that the Antitrust Division supports congressional efforts to overturn the requirement laid down in *United States v. American Building Maintenance Industries*⁹⁸ that the acquired firm be engaged in commerce. The analysis then turns to the issue of potential competition by the foreign firm⁹⁹ and provides a list of four factors to be considered in determining whether the acquisition would violate the Clayton Act:

[W]hether (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 threatening to enter. If all these factors are present, a merger between such a firm and a leading American firm may well violate Section 7 of the Clayton Act¹⁰⁰

Most courts have been careful to distinguish between the "perceived potential entrant" and the "actual potential entrant" aspects of the potential competition doctrine. Although some cases have involved only one of these,¹⁰¹ both often arise in the same case, because a firm can be a perceived and an actual potential entrant simultaneously.¹⁰²

The perceived potential entrant theory, accepted as valid by the Supreme Court,¹⁰³ focuses on the present effect of a potential entrant on an oligopolistic market. If oligopolists perceive that one or more companies outside

96. ANTITRUST GUIDE, *supra* note 1, at 15.

97. 406 F. Supp. 713 (D. Mass. 1975) (approving a modified consent decree). For the original consent decree, see [1976] 1 Trade Cas. ¶ 60,691. The Competitive Impact Statement is reprinted at 40 Fed. Reg. 27,269 (1975).

98. 422 U.S. 271 (1975).

99. In February 1977, then Assistant Attorney General Baker stated that "recent judicial hostility to potential competition theory has probably influenced our decision to allocate some of our enforcement resources to other areas." Remarks by Donald I. Baker, then Ass't Attorney General, Antitrust Div., U.S. Dep't of Justice, before the Southwestern Legal Foundation, *Government Litigation Under Section 7: The Old Merger Guidelines and the New Antitrust Majority* 10-11 (Feb. 24, 1977) (copy on file at the offices of the *Cornell International Law Journal*).

100. ANTITRUST GUIDE, *supra* note 1, at 16.

101. *See, e.g.*, *BOC Int'l Ltd. v. FTC*, 557 F.2d 24, 26 (2d Cir. 1977); *FTC v. Atlantic Richfield Co.*, 549 F.2d 289, 293 n.6 (4th Cir. 1977).

102. *See, e.g.*, *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 534-36 n.13 (1973); *FTC v. Tenneco, Inc.*, 433 F. Supp. 105 (D.D.C. 1977); *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729 (D. Md. 1976).

103. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 625 (1974); *United States*

the market may enter it, the insiders may keep prices and profit margins below levels that would induce the outsiders to penetrate the market. By contrast, if the perceived potential entrant acquires a large firm already in the market, the possibility of its entering the market by internal expansion or a toehold acquisition¹⁰⁴ disappears, as does the procompetitive "wings" or "edge" effect on prices. Thus, the acquisition of a large firm in the market by a perceived potential entrant may decrease competition and violate Section 7 of the Clayton Act.¹⁰⁵

The second branch of the potential competition doctrine is the actual potential entrant theory. Although lower courts¹⁰⁶ and the Federal Trade Commission¹⁰⁷ have accepted this theory, the Supreme Court has twice refused to rule on its validity.¹⁰⁸ This approach focuses not on the perceptions of firms already in the market, but on the means of market entry chosen by a potential entrant and on how that entry affects future competition in a concentrated market. If the potential entrant enters the market by internal expansion or a toehold acquisition, a new competitor will be created, reducing market concentration and fostering competition. But if the outsider penetrates the market by acquiring a larger present market member, the acquisition removes the future procompetitive effect that would

v. Falstaff Brewing Corp., 410 U.S. 526, 532-33 (1973); *Ford Motor Co. v. United States*, 405 U.S. 562, 567 (1972).

104. A toehold acquisition involves the purchase of a small competitor in the market. See *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 864-65 (2d Cir.), cert. denied, 419 U.S. 883 (1974); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 77-78 n.8 (10th Cir. 1972); *The Budd Co.*, [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,998 (FTC 1975). See generally Fox, *Toehold Acquisitions, Potential Toehold Acquisitions and Section 7 of the Clayton Act*, 42 ANTITRUST L.J. 573 (1973); Note, 89 HARV. L. REV. 800 (1976).

105. 15 U.S.C. § 18 (1976). Although the cases are not entirely consistent, the following factors are usually among those considered in evaluating whether there has been a violation of the perceived potential entrant theory: (1) whether the target market is concentrated; (2) whether the acquired firm is larger than a mere toehold; (3) whether the acquiring company is perceived by those in the target market as one of a small group of likely potential entrants; (4) whether the perception of the acquiring company as a likely entrant has had a procompetitive effect in the target market; (5) whether there are feasible alternative means of entry for the perceived potential entrant other than acquiring a large existing member of the market; and (6) whether the acquisition will increase barriers to entry into the market. See generally Hood, *Potential Competition*, 21 ANTITRUST BULL. 485 (1976); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313 (1965); Note, *The Potential Competition Doctrine After Marine Bancorporation*, 63 GEO. L.J. 969 (1975).

106. *FTC v. Atlantic Richfield Co.*, 549 F.2d 289 (4th Cir. 1977); *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir.), cert. denied, 419 U.S. 883 (1974); *Ekco Products Co. v. FTC*, 347 F.2d 745 (7th Cir. 1965); *United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226 (C.D. Cal. 1973), *aff'd mem.*, 418 U.S. 906 (1974).

107. *Warner-Lambert Co.*, [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,141 (FTC 1976); *Beatrice Foods Co.*, [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,944 (FTC 1975), *aff'd*, 540 F.2d 303 (7th Cir. 1976); *British Oxygen*, [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,063 (FTC 1975), *rev'd and remanded*, 557 F.2d 24 (2d Cir. 1977).

108. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 625 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 537 (1973).

have resulted from its probable entry de novo or by a toehold acquisition. Elimination of probable future competition caused by the potential entrant's acquisition of a large existing firm may thus violate section 7 of the Clayton Act.

In *BOC International Ltd. v. Federal Trade Commission*,¹⁰⁹ the Second Circuit held that application of the actual potential entrant theory depends on the answers to two questions: "First, would the firm in question enter de novo or by toehold acquisition if not permitted to enter by acquiring a large company? Second, would the de novo or toehold entry of the firm have procompetitive effects on the market in question?"¹¹⁰ These two questions raise the further issues of what types of evidence would suffice to establish that the acquiring firm would have entered the market but for the acquisition,¹¹¹ and how to prove the probability of future procompetitive effects of an entry. In any event, the factors determinative of an acquisition's legality clearly vary for each of the two aspects of the potential competition doctrine.

The Guide's analysis of the hypothetical acquisition oversimplifies the potential competition doctrine by failing to explain its two different branches. Although the Guide at one point appears to refer to the actual potential entrant theory,¹¹² this reference does not elaborate on the factors peculiar to this theory. As currently written, the Guide also fails to set forth the factors the Division would consider in analyzing a foreign merger as opposed to a purely domestic one,¹¹³ and fails to discuss such other important possible anticompetitive aspects of mergers as a potential for reciprocity¹¹⁴ and the entrenchment of existing market power.¹¹⁵ The Division could remedy these deficiencies by including several hypotheticals dealing with mergers and acquisitions.

In the Guide's discussion of merger law, footnote 32 contains an unfortunate ambiguity that warrants clarification. In treating monopolization under section 2 of the Sherman Act,¹¹⁶ the footnote correctly cites the *Grinnell* test¹¹⁷ of illegality. The final sentence of the footnote, however,

109. 557 F.2d 24 (2d Cir. 1977).

110. *Id.* at 26-27 (footnotes omitted).

111. See Mr. Justice Marshall's statements concerning objective versus subjective evidence in *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 548, 566 (1973) (concurring opinion).

112. "If Glint's new type of blade is shown to be clearly superior to blades now sold in the U.S., this raises some inference that Glint might enter the U.S. market to exploit the blade and that its entrance might have a significant procompetitive impact in the U.S. market." ANTI-TRUST GUIDE, *supra* note 1, at 17.

113. See Note, *Foreign Acquisitions in the United States: A Challenge to the Potential Competition Doctrine*, 44 *FORDHAM L. REV.* 301 (1975).

114. See, e.g., *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965).

115. See, e.g., *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

116. 15 U.S.C. § 2 (1976).

117. "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the

states that "the requisite willfulness or intent may be found if the corporation has bought up the offeror of a new competitive product for the apparent purpose of creating or maintaining that monopoly power."¹¹⁸ Some commentators have noted that this statement could be read to mean that a specific intent to monopolize must be shown in order to establish a violation of section 2 of the Sherman Act.¹¹⁹ Of course, section 2 does not require a specific intent in order to establish monopolization in violation of the Act.¹²⁰

C. CASES C, D, E, & M: JOINT VENTURES

The Guide presents four hypothetical cases involving joint ventures. The Guide's more lengthy consideration of this topic reflects the frequent criticism by businessmen of the Antitrust Division's approach to joint ventures in the past. For example, a 1974 report of the National Association of Manufacturers remarked that "antitrust restriction to foreign joint venture formation is the most often cited problem in the field of internationally applied antitrust."¹²¹

1. *Joint Bidding: Case C*

In Case C,¹²² a consortium of electrical equipment manufacturers and engineering firms organize to bid on a large Latin American hydroelectric project. The consortium is similar to one that the Division approved in a 1976 business review letter.¹²³ According to the Guide, "[n]ormally, the Department would not challenge a merger or joint venture whose only effect was to reduce competition among the parties in a foreign market, even where goods or services were being exported from the United States."¹²⁴ Unless the joint venture is assumed not to "foreclose export opportunities for U.S. firms,"¹²⁵ this position conflicts with the Guide's earlier statement

possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power" *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

118. ANTITRUST GUIDE, *supra* note 1, at 17 n.32.

119. *See, e.g.*, Hawk, *supra* note 93, at 254.

120. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 622 (1953); *United States v. Griffith*, 334 U.S. 100, 105-06 (1948).

121. NATIONAL ASS'N OF MFRS., *supra* note 5, at 4. *See also* CHAMBER OF COMMERCE, *supra* note 5, at 2; BUS. WEEK, *supra* note 5, at 60. The Division has usually replied to such criticisms by pointing out that "there [have been] no suits brought . . . in the last twenty-five years . . . against joint ventures by Americans to sell a product abroad or construct a facility in a foreign country." Davidow, *Recent Developments in International Antitrust*, 10 AKRON L. REV. 603, 606 (1977). *See also* Letter from Thomas E. Kauper, *supra* note 5, at F-1.

122. ANTITRUST GUIDE, *supra* note 1, at 19.

123. *Id.* at 21 n.39. For an excellent discussion of the legality of international buying groups formed by American firms, see Davidow, *supra* note 73.

124. ANTITRUST GUIDE, *supra* note 1, at 21.

125. *Id.*

that a major purpose of antitrust enforcement "is to protect American export and investment opportunities against privately imposed restrictions."¹²⁶

If the joint venture does have an anticompetitive effect on U.S. export commerce, then it is subject to the Sherman Act. The Division's decision not to challenge the venture would then have to rest on policy considerations rather than on a lack of subject matter jurisdiction. The Guide mentions such policy factors as the venture's short-term nature, the large risks and dollar amounts involved, and the need for complementary skills. The discussion also appears to imply that the international rule of reason would apply to the joint venture and to any resulting collateral restraints. The Guide's approach is thus more flexible than that employed by the courts.

In most international joint venture cases, courts have focused first on the venture's purpose, to determine whether the venture is merely one part of a larger conspiracy or plan and whether the purpose of the venturers is to restrain trade.¹²⁷ If no such broader conspiracy or purpose exists, courts have then examined the reasonableness of the venture and the resulting collateral restraints. The Guide acknowledges that the hypothetical project in Case C is too large for any single member to perform alone, and so it is deemed reasonable. The Guide thereby avoids the issue of whether it would be reasonable for the participants to undertake the project as a joint venture in order to offer a more enticing bid, even though each member was individually capable of performing the project alone.

The discussion of "bottleneck" joint ventures in Cases C and M¹²⁸ should be expanded to address such questions as whether both foreign and domestic competitors must be considered in determining if a bottleneck exists, and whether, if there are two or three joint ventures among different members of an industry, a competitor excluded from all of them has a remedy under the bottleneck theory.

2. Joint Research: Case D

The second largest U.S. producer and one of the largest Common Market producers of a hypothetical metal combine in Case D to develop jointly a new process for producing the metal. The discussion of this case is generally consistent with the position taken by the Division in the past,¹²⁹ although it

126. *Id.* at 5.

127. *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 312 (N.D. Ohio 1949), *aff'd and modified*, 341 U.S. 593 (1951). *See generally* Atwood, *International Joint Ventures and the U.S. Antitrust Laws*, 10 AKRON L. REV. 609 (1977); Joelson & Griffin, *Multinational Joint Ventures and the U.S. Antitrust Laws*, 15 VA. J. INT'L L. 487 (1975).

128. ANTITRUST GUIDE, *supra* note 1, at 21-22, 59-60.

129. *See* Remarks by Thomas E. Kauper, then Ass't Attorney General, Antitrust Div., U.S. Dep't of Justice, before the Seminar on Institutional and Legal Constraints to Cooperative

reflects a reduced emphasis on the relative size of the competitors.¹³⁰

Some readers of the Guide may not immediately sense the importance of the statement that "a territorial division created explicitly by such [patent] rights is not now regarded by the Department as being illegal *in itself* under the antitrust laws."¹³¹ Although courts have approved patent license provisions that divide territories between licensee and licensor and prohibit each from selling in the other's territory,¹³² Antitrust Division officials have criticized these decisions as being overly broad. Such contractual provisions, the Division officials said, would be "looked at with great suspicion."¹³³ Thus, although such a provision may not be "illegal in itself," it may still trigger a time-consuming and expensive investigation by the Antitrust Division.

The only government antitrust suits involving joint research ventures have involved the additional element of patent pooling.¹³⁴ In these cases, patent pooling eliminated existing and potential competition in research and development by removing commercial incentives for separate firms to engage in innovative endeavors.¹³⁵ Nevertheless, patent pools are not per

Energy Research and Development (Dec. 16, 1974), reprinted in ANTITRUST & TRADE REG. REP. (BNA) No. 694, at A-3 (1974); Turner, *Joint Ventures, Acquisitions and Mergers*, LES NOUVELLES, Nov. 1968, at 32, reprinted in 2 THE LAW AND BUSINESS OF LICENSING 743 (M. Finnegan & R. Goldscheider eds. 1977); Remarks by Donald I. Baker, then Deputy Ass't Attorney General, Antitrust Div., U.S. Dep't of Justice, before the U.S. League of Savings Associations' 82d Annual Convention, *Antitrust as a Positive Force in Relation to Financial Joint Ventures* 12 (Nov. 13, 1974), reprinted in ANTITRUST & TRADE REG. REP. (BNA) No. 691, at D-1 (1974); Address by Paul Rand Dixon, Chairman, FTC, before the Economic Club of Detroit (Mar. 12, 1962), reprinted in *id.* No. 35, at X-4 (1962).

130. ANTITRUST GUIDE, *supra* note 1, at 24. Turner, *supra* note 129, at 753 ("[T]he legality of joint research ventures among competitors is, I believe, most likely to be determined primarily on the relative size of the competitors and the number and size of other competitors.").

131. ANTITRUST GUIDE, *supra* note 1, at 25 (emphasis in original).

132. *Dunlop Co. v. Kelsey-Hayes Co.*, 484 F.2d 407 (6th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974); *Brownell v. Ketcham Wire & Mfg. Co.*, 211 F.2d 121 (9th Cir. 1954).

133. Davidow, *United States Antitrust Laws and International Transfers of Technology—the Government View*, 43 FORDHAM L. REV. 733, 739 (1975). For another criticism, see L. SULLIVAN, ANTITRUST 538-39 (1977).

134. Turner, *supra* note 129.

135. *United States v. Line Material Co.*, 333 U.S. 287 (1948); *United States v. Manufacturers Aircraft Ass'n, Inc.*, [1977] 4 TRADE REG. REP. (CCH) ¶ 45,072, at 53,464 (S.D.N.Y., filed Mar. 29, 1972) (complaint), 40 Fed. Reg. 30,838 (1975) (consent decree); *United States v. Automobile Mfrs. Ass'n*, [1969] Trade Cas. ¶ 72,907 (C.D. Cal. 1969) ("smog" case consent decree); *United States v. Imperial Chem. Indus., Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951), *supplemental opinion*, 105 F. Supp. 215 (S.D.N.Y. 1952). See also *In re Multidistrict Vehicle Air Pollution*, [1973] 2 Trade Cas. ¶ 74,819 (C.D. Cal. 1973) (joint ventures and cross-licensing but no evidence of delay in development of pollution control device), noted in 20 WAYNE L. REV. 1321 (1974). See Note, *Joint Research Ventures Under the Antitrust Laws* 39 GEO. WASH. L. REV. 1112 (1972); Letter from Thomas E. Kauper, then Ass't Attorney General, Antitrust Div., U.S. Dep't of Justice, to Phil E. Gilbert, Jr., Esq. (Dec. 15, 1975) (business review letter regarding design, development, manufacture, and sale of jet engines) (copy on file at the offices of the *Cornell International Law Journal*).

se unreasonable and should be examined individually to determine their competitive merits. According to Mr. Baker:

The scope of the pool is clearly important to the antitrust inquiry. An industry-wide pool is more likely to raise antitrust problems than a limited pool of a few members. Where the pool covers only a limited number of interfering patents, clearly it can gain some legitimacy from settling competing claims. Where it covers future as well as present patents, however, and where it operates for a very long period of time, the pool looks increasingly like a sort of nonaggression pact between the various elements of an industry.¹³⁶

In contrast to the detail of this statement, the general rule stated in the Guide—that “aggregations of patents cannot be used to create broad territorial allocations going beyond any single patent or discrete group of patents”¹³⁷—does not provide much guidance. It leaves unanswered the questions of when there is an “aggregation” of patents, when there are “broad territorial allocations,” and what a “discrete group of patents” is.

3. *Manufacturing Joint Venture and Know-How License: Case E*

Case E¹³⁸ hypothesizes a joint venture between a large Japanese industrial combine and an American transistor manufacturer to produce transistors in Japan, using the American firm’s know-how. The Guide discusses the “perceived potential entrant” branch of the potential competition doctrine,¹³⁹ but fails to mention the “actual potential entrant.” It notes that, unlike the situation in Case C, the “joint venture by itself does not appear to be any part of a broader arrangement to divide world markets. . . .”¹⁴⁰

According to the Guide:

One measure for insuring that the restraint is truly no longer in duration than necessary, is to limit an ancillary territorial restraint of this type to no longer than the time it would take for [the foreign venturer] to develop the equivalent know-how itself (the “reverse engineering” period). Where the restraint exceeds the reverse engineering period, a defendant must be prepared to bear the burden of proving the necessity of the restraint.¹⁴¹

Although the reverse engineering period is a helpful concept, it is imprecise. One commentator has noted that the Guide’s discussion of reverse engineering

presumes that it is possible to predetermine this “reverse-engineering” period of time regardless of the product that may be involved, whether it be a nuclear power generating facility or a better mousetrap. Aside from the technological difficulties in accurately forecasting when someone else can come

136. Remarks by Baker, *supra* note 129.

137. ANTITRUST GUIDE, *supra* note 1, at 27.

138. *Id.* at 28.

139. *Id.* at 29.

140. *Id.* at 28-29.

141. *Id.* at 31.

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 possible brand name loyalties and the organization of sales and service outlets, before the newly developed product can be truly competitive with the licensed product.¹⁴²

Moreover, in some situations there is no realistic possibility that the licensee could ever develop the transferred technology on its own. In light of these difficulties, a more appropriate limitation period would be that during which the transferred know-how remains secret.

The Guide's discussion of possible justifications for ancillary territorial restraints fails to take sufficient account of *United States v. E.I. duPont de Nemours & Co.*¹⁴³ and *United States v. Pan American World Airways, Inc.*¹⁴⁴ Both cases suggest that reasonable territorial limitations essential to the success of an otherwise justifiable joint venture are lawful, whereas territorial limitations not essential to the venture's success, but intended merely to protect joint venture patents from competition, will be struck down.

The analysis of Case E also indicates that if the venturers could prove that the "know-how being transferred is of substantial value,"¹⁴⁵ then it might be lawful to prohibit the Japanese venturer from exporting Japanese transistors to the United States. However, the Guide's discussion of Case F¹⁴⁶ states that "[b]ecause know-how licensing lacks the protections and legislative mandate of the patent system . . . , know-how licenses will in general be subject to antitrust standards which, if anything, are *stricter* than those applied to patent licenses."¹⁴⁷ The Chief of the Antitrust Division's Intellectual Property Section has noted that, with the exception of the "nine

142. Seki, *The Justice Department's New Antitrust Guide for International Operations—A Summary and Evaluation*, 32 BUS. LAW. 1633, 1653-54 (1977) (footnote omitted). For another criticism of the reverse engineering concept, see Fugate, *The Department of Justice's Antitrust Guide for International Operations*, 17 VA. J. INT'L L. 645, 674 (1977).

143. 118 F. Supp. 41 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956).

144. 193 F. Supp. 18 (S.D.N.Y. 1961), *rev'd on primary jurisdiction grounds*, 371 U.S. 296 (1963).

145. ANTITRUST GUIDE, *supra* note 1, at 31.

146. See notes 151-55 *infra* and accompanying text.

147. ANTITRUST GUIDE, *supra* note 1, at 33-34 (emphasis added). For a previous, apparently contradictory statement of Antitrust Division enforcement policy, see Davidow, *Antitrust and International Patent Licensing*, 43 ANTITRUST L.J. 530, 537 (1974) (the Antitrust Division's position is that "know-how and trade secrets may not be licensed with restrictions greater than those which would raise antitrust problems in regard to the licensing of patents." (emphasis added)); U.S. Dep't of Justice Memorandum, *supra* note 5, at 55,208 ("Where know-how and patents are both involved and are closely related it is usually possible to impose the same restriction on the know-how as those permitted for the accompanying patents." (emphasis added)).

no-no's,"¹⁴⁸ patent licenses are analyzed pursuant to the rule of reason: "For restrictions in a know-how license to be subject to stricter antitrust standards than a patent license must therefore mean that they are subject to something stricter than the rule of reason. What would that be?"¹⁴⁹

The same official has further noted that in a recent trial brief the Government asserted that "[a] territorial allocation that gives one party . . . the power to determine the sales territory of its actual or potential competitor . . . is thus illegal per se. This rule applies regardless of whether the quid pro quo for the territorial restraint is . . . agreeing to transmit know-how."¹⁵⁰

D. CASES F, G, H, & I: INTERNATIONAL LICENSING

1. *Know-How License: Case F*

Case F¹⁵¹ involves a small Massachusetts corporation that possesses valuable unpatented technology, which it licenses to a major German manufacturer. Although most of the issues raised by this hypothetical have already been discussed, two points merit consideration here.

First, the Guide states that "[t]he exclusion of overseas suppliers of the tied items from overseas sales *normally* does not constitute U.S. foreign commerce, and hence, their exclusion is not prohibited by U.S. antitrust law."¹⁵² The use of the word "normally" and the implication that the exclusion of overseas suppliers would in some cases constitute U.S. foreign commerce create an important and unresolved ambiguity that, because of its significance, deserves more detailed discussion.

Second, in discussing section 526 of the Tariff Act of 1930,¹⁵³ the Guide notes that "the Department would look with considerable suspicion upon the use of Section 526 to exclude identical German trademarked goods" ¹⁵⁴ But the Guide also remarks that a territorial restriction prohibiting the German licensee from competing with the licensor in the United States would be reasonable if the restriction were limited to the reverse engineering time. If such a territorial restriction would be permissible, why

148. For a list of the "nine no-no's," see Morse, *Is Antitrust Really Anti-patent?*, 55 CHI. BAR REC. 154, 157 (1974).

149. Address by Richard H. Stern, then Chief, Patent Section, Antitrust Div., U.S. Dep't of Justice, before the Electronics Industries Ass'n Conference on Technology Transfer in Transition, *International Licensing and the New Antitrust Guide for International Operations* 19 (Dec. 8, 1977) (copy on file at the offices of the *Cornell International Law Journal*).

150. *Id.* at 21. See generally Kirkpatrick & Mahinka, *Antitrust and the International Licensing of Trade Secrets and Know-How: A Need for Guidelines*, 9 LAW & POL'Y INT'L BUS. 725 (1977).

151. ANTITRUST GUIDE, *supra* note 1, at 33.

152. *Id.* at 35 (emphasis added).

153. 19 U.S.C. § 1526 (1976).

154. ANTITRUST GUIDE, *supra* note 1, at 36.

would it be unreasonable for the licensor to invoke section 526 to exclude trademarked goods for the same period of time?

2. *Tying of Licensed Technology: Case G*

In Case G,¹⁵⁵ a major American manufacturer requires of its licensee, a local enterprise in a less developed country, that the licensee purchase from the licensor all components, supplies, and equipment necessary to manufacture goods under the license. As a further means of boosting its income from the license, the licensor also requires the licensee to purchase unrelated patents. Although not essential to this case, a consideration of the difference in jurisdictional criteria between section 1 of the Sherman Act and section 3 of the Clayton Act would have made the Guide more useful, since the Clayton Act's requirements that the goods be in commerce and be for use within the United States are sometimes overlooked.

Also absent is any treatment of the use of a trademark to tie the sale of unwanted supplies or equipment and the applicability of such cases as *Siegel v. Chicken Delight, Inc.*¹⁵⁶ to international licenses. Finally, the discussion of mandatory package licensing contains a cryptic reference "to something less than a per se prohibition."¹⁵⁷ As in the discussion of the know-how licensing case,¹⁵⁸ the Guide is unnecessarily confusing, since this statement could easily be read to indicate that there is some unstated test of legality, stricter than the rule of reason, yet less strict than a per se prohibition.

In his rejoinder,¹⁵⁹ Mr. Baker states that he does not believe that this aspect of the Guide is confusing, because "[i]n the real world, there is indeed a never-never land between strict per se and full rule of reason"¹⁶⁰ But his explanation of this never-never land of "soft core" per se situations appears to be an explanation of the thought processes of judges and not a statement of a test of illegality recognized in the cases. My contention that the Guide is confusing on this point would seem to be supported by the previously quoted statement of the Chief of the Antitrust Division's Intellectual Property Section.¹⁶¹

155. *Id.* at 37.

156. 311 F. Supp. 847 (N.D. Cal. 1970), *modified*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

157. ANTITRUST GUIDE, *supra* note 1, at 38.

158. *See* note 152 *supra* and accompanying text.

159. Baker, *Critique of the Antitrust Guide: A Rejoinder*, 11 CORNELL INT'L L.J. 255 (1978).

160. *Id.* at 259.

161. *See* note 149 *supra* and accompanying text.

3. *Licensing a State-Owned Enterprise: Case H*

Case H¹⁶² deals with an American company that licenses the use of its unpatented technology to a government agency in a country having a non-market economy, but prohibits export of goods produced under the license to the United States. The Guide concludes that the permanent prohibition of sales into the United States is of questionable legality. The major difficulty with the analysis that follows this conclusion is its overstatement of the protection afforded the American licensor under existing antidumping¹⁶³ and countervailing duty¹⁶⁴ statutes. Many commentators have noted that these remedies are expensive, time-consuming, and often easily circumvented.¹⁶⁵ American industry should not have to forego more effective and cost-efficient contractual remedies, in order to placate the fears of antitrust enforcement officials that the contractual provisions contain hidden restrictions.

The Guide also suggests that a licensor protect himself by including in the license a provision for "an increase in royalties based on increased production and sales"¹⁶⁶ Were this not the Division's suggestion, one could well argue that such a provision is a thinly veiled territorial restriction, prohibited by section 1 of the Sherman Act.

4. *Exclusive Grantback Licensing: Case I*

In Case I,¹⁶⁷ use of patents and know-how under a license from an American company is conditioned upon the licensee's granting back any new patents or know-how it develops that relate to the licensed technology rights. The Guide's discussion of this case is clear and helpful. The test of the legality of the grantback provision, according to the Guide, is whether the licensor effectively controls the licensee. Where such control exists, the grantback term is unobjectionable as a "matter of internal organization."¹⁶⁸ If the licensor and licensee are unaffiliated, the case is "broadly analogous to *Timken*."¹⁶⁹ Where they are unaffiliated but the licensee is capable of competing with the licensor in the United States, the grantback provision is "likely to be per se illegal."¹⁷⁰

162. ANTITRUST GUIDE, *supra* note 1, at 40.

163. 19 U.S.C. §§ 160-171 (1976).

164. *Id.* § 1303.

165. See, e.g., Applebaum, *The Antidumping Laws—Impact on the Competitive Process*, 43 ANTITRUST L.J. 590, 602 (1974).

166. ANTITRUST GUIDE, *supra* note 1, at 41.

167. *Id.* at 42.

168. *Id.* at 45.

169. *Id.*

170. *Id.*

Any analogy between an exclusive grantback from a potential competitor and the *Timken* case is very broad indeed, since Case I does not contain any suggestion of the kind of comprehensive scheme to suppress trade that was crucial in *Timken*. The simple fact that a licensee is a potential competitor should not be equated with the facts of *Timken*.

E. CASE J: EXCLUSIVE DISTRIBUTORSHIPS

Case J¹⁷¹ involves an agreement between American and German machine tool manufacturers under which each appoints the other its exclusive distributor in the other's market. After noting that territorial allocations among competitors are per se unreasonable, the Guide states that such a per se treatment should also apply to exclusive distributorship agreements between American and foreign manufacturers if "each party is a substantial manufacturer who can (or could) compete in the territory of the other."¹⁷²

The Guide does not, however, explain what factors the Division would consider in determining whether this test is met. Nor does it specify the degree of potentiality required before per se treatment would apply. Must the foreign manufacturer be an "actual potential entrant" in the U.S. market as defined in *BOC International*¹⁷³ before the per se prohibition applies? Would the Division weigh the special problems of foreign entry into American markets¹⁷⁴ in evaluating the degree of potentiality?

The Guide also states that if the companies are not competing producers of the goods involved in the distributorship, then a "full factual inquiry would probably be required under the rule of reason to determine whether the effect of the arrangement was significantly to promote or limit (i) market competition in the United States or (ii) U.S. firms' ability to compete abroad."¹⁷⁵ This formulation is not the traditional focus of a rule of reason inquiry.¹⁷⁶ Although the two factors mentioned are relevant, they are not the only pertinent factors. As the Supreme Court recently stated in *Continental T.V., Inc. v. GTE Sylvania Inc.*,¹⁷⁷ under the rule of reason "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable re-

171. *Id.* at 46-49.

172. *Id.* at 47.

173. 557 F.2d 24 (2d Cir. 1977). See notes 109-10 *supra* and accompanying text.

174. See notes 48 & 50 *supra*.

175. ANTITRUST GUIDE, *supra* note 1, at 48 (emphasis added).

176. Mr. Justice Brandeis stated the classic formulation of the rule of reason in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."). This statement of the rule was quoted with approval in *National Soc. of Professional Eng'rs v. United States*, 46 U.S.L.W. 4356 (U.S. Apr. 25, 1978).

177. 433 U.S. 36 (1977).

straint on competition."¹⁷⁸

Another issue presented by Case J is the legality of each party restricting exportation of its products by its other domestic distributors so that one party's products, exported initially to a third country, are not reexported to the exclusive distribution area of the other party. Relying on *United States v. Arnold, Schwinn & Co.*,¹⁷⁹ the Guide states that "the first arms-length sale of a product exhausts the seller's right to restrain those to whom it may be resold."¹⁸⁰ After the Guide was written, the Supreme Court expressly overruled *Schwinn* in *Continental T.V.*,¹⁸¹ rejecting *Schwinn's* per se approach to nonprice vertical restrictions and mandating a "return to the rule of reason that governed vertical restrictions prior to *Schwinn*."¹⁸² The Guide's position on this issue is thus of little present significance.

Important questions relating to exclusive distributorships are not addressed by the Guide, including vertical territorial restrictions, customer restrictions, and profit passovers. The Guide also fails to consider the status of field-of-use restraints on purchasers and marketing restrictions in patent licenses in light of *Continental T.V.*¹⁸³

F. CASES K, L, M, & N: FOREIGN GOVERNMENT INVOLVEMENT

The Guide's last four cases analyze three related issues which implicate foreign governments in anticompetitive conduct. Case K¹⁸⁴ hypothesizes that an American oil company complies with a foreign government's ban on sales of oil to a specified U.S. oil refiner and sells instead to others in the same market at a price set by the foreign government. Case L¹⁸⁵ involves a cartel formed by seven or eight ore producers, only one of which is incorporated in the United States, but all of which, directly or indirectly, market their ore in the United States. In Case M,¹⁸⁶ five major oil companies organize a joint venture to provide a backup commitment of oil for use if political events in countries where their operations are located jeopardize any member's production. Case N¹⁸⁷ examines a tariff increase or embargo imposed by a foreign government to strengthen a local industry on the rec-

178. *Id.* at 49 (footnote omitted).

179. 388 U.S. 365 (1967).

180. ANTITRUST GUIDE, *supra* note 1, at 49.

181. 433 U.S. 36 (1977).

182. *Id.* at 59.

183. For one commentator's speculation on these issues, see Remarks of James H. Wallace, Jr., before the Section of Antitrust Law, American Bar Ass'n, *Recent Developments in Patent and Trademark Antitrust Law* (Aug. 10, 1977) (copy on file at the offices of the *Cornell International Law Journal*).

184. ANTITRUST GUIDE, *supra* note 1, at 50.

185. *Id.* at 53.

186. *Id.* at 58.

187. *Id.* at 62.

ommendation of industry members, including a wholly owned subsidiary of a U.S. company.

I. *Act of State Defense*

The act of state defense is not a rule of international law, but an exception to conflict of laws principles that is based upon comity. The act of state doctrine provides that "courts of one country will not sit in judgment on the acts of the government of another done within its own territory."¹⁸⁸ The doctrine's "major underpinning . . . is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations."¹⁸⁹ Although applied primarily in cases not presenting antitrust issues,¹⁹⁰ the doctrine was crucial to the decision in *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*¹⁹¹ Much as in the Guide's Case K, the Venezuelan Ministry of Mines and Hydrocarbons had instructed defendants Texaco and Monsanto not to ship crude oil to plaintiff Interamerican for refining. When Texaco and Monsanto refused to sell to middleman Amoco Trading Company for resale to Interamerican, Interamerican sued all three companies for treble damages alleging an illegal boycott. Because the Venezuelan authorities compelled the boycott, the district court granted defendants' motions for summary judgment. In doing so, it rejected Interamerican's contention that compulsion would be a complete defense only if the acts of compulsion were valid under Venezuelan law. The court stated that the act of state doctrine barred the inquiry necessary to determine the validity of the Venezuelan Ministry's actions.¹⁹²

The Guide would limit the availability of the act of state defense in three ways: (1) the defense would not apply to "an act inside the United States";¹⁹³ (2) the act would have to be that of "a truly sovereign entity acting within the scope of its powers under the law of its nationality";¹⁹⁴ and (3) the defense would not apply to "'commercial' actions of a foreign government or instrumentality, but only to its public, political actions."¹⁹⁵ Although the Antitrust Division understandably seeks to limit antitrust de-

188. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). See generally 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1-54 (1968); Swan, *Act of State at Bay: A Plea on Behalf of the Elusive Doctrine*, 1976 DUKE L.J. 807; Comment, *The Act of State Doctrine: A History of Judicial Limitations and Exceptions*, 18 HARV. INT'L L.J. 677 (1977).

189. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697 (1976).

190. See generally Annot., 12 A.L.R. Fed. 707 (1972).

191. 307 F. Supp. 1291 (D. Del. 1970).

192. *Id.* at 1299.

193. ANTITRUST GUIDE, *supra* note 1, at 54.

194. *Id.*

195. *Id.* at 55.

fenses as much as possible, each of these three limitations is nevertheless subject to challenge.

The first restriction—that the defense does not protect acts within the United States—is acceptable in the context of expropriation cases.¹⁹⁶ But it is irrelevant to the more pressing question of whether the act of state defense protects the extraterritorial effect in the United States of a foreign sovereign's act within its own territory. Several courts have recognized that a foreign state's act may have an effect outside that state's territory yet not bar the act of state defense.¹⁹⁷ In *Interamerican Refining*,¹⁹⁸ the Venezuelan Government's acts took place within Venezuela, but their effects extended to the United States. The district court concluded that act of state was a complete defense, because “[w]hen a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign.”¹⁹⁹

The second limitation that the Guide imposes upon the act of state defense—that the act be that of a truly sovereign entity acting within the scope of its powers—directly contradicts existing case law. By definition, the doctrine precludes courts from adjudicating “the legality”²⁰⁰ or “passing on the validity”²⁰¹ of the acts of foreign states. Yet a court must do just that if it is to determine whether a foreign government has acted within the scope of its powers.

*Hunt v. Mobil Oil Corp.*²⁰² illustrates the check that the act of state doctrine places upon a court's inquiry into whether the foreign sovereign's actions are within the scope of its authority. Hunt alleged that the defendants, seven major integrated oil producers, had indirectly caused Hunt's assets in Libya to be nationalized by the Libyan Government. The Second Circuit affirmed the district court's dismissal of Hunt's antitrust claim, stating that in order to dispose of the claim on its merits, the court would have to examine “the motivation of the Libyan action and that inevitably involves its validity.”²⁰³ But, the court said, the act of state doctrine bars such an inquiry.²⁰⁴ In view of such clear statements that a court may

196. *Maltina Corp. v. CAWY Bottling Co.*, 462 F.2d 1021, 1025 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972); *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

197. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892, 911 (S.D.N.Y. 1968), *modified*, 433 F.2d 686 (2d Cir. 1970); *Naamloze Vennootschap Suikerfabriek “Wono-Aseh” v. Chase Nat'l Bank*, 111 F. Supp. 833, 841 (S.D.N.Y. 1953).

198. 307 F. Supp. 1291 (D. Del. 1970). *See* notes 191-92 *supra* and accompanying text.

199. 307 F. Supp. at 1298. *See also* *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1324-25 (D. Conn. 1977).

200. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697 (1976).

201. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

202. 550 F.2d 68 (2d Cir.), *cert. denied*, 98 S. Ct. 608 (1977).

203. 550 F.2d at 77.

204. *Id.*

not examine the validity of foreign sovereign acts, the precedents do not support the Guide's insistence on a "valid decree of a foreign government"²⁰⁵ as a prerequisite for asserting the act of state defense.²⁰⁶

Similarly, the Guide's refusal to apply the act of state defense to "commercial" acts of foreign sovereigns goes beyond existing law. *Alfred Dunhill of London, Inc., v. Republic of Cuba*²⁰⁷ involved a suit by an American importer of Cuban cigars to recover funds mistakenly paid for cigars sold by certain Cuban cigar companies that had been expropriated by the Cuban Government. The United States filed an *amicus curiae* brief in which it took the position that the act of state doctrine should be held to apply to governmental but not to commercial acts of foreign sovereigns.²⁰⁸ This position was supported by the Legal Adviser of the Department of State in a letter attached to the Government's brief.²⁰⁹

This distinction between governmental and commercial activity is recognized under the restrictive theory of sovereign immunity²¹⁰ and was codified in the Foreign Sovereign Immunities Act of 1976.²¹¹ That statute provides that a foreign sovereign is not entitled to sovereign immunity in cases

in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.²¹²

The Act defines "commercial activity" as "either a regular course of com-

205. ANTITRUST GUIDE, *supra* note 1, at 54.

206. The Justice Department filed an *amicus curiae* brief supporting Hunt's petition for a writ of certiorari. In the brief, the Justice Department contended that:

[T]his case presents the important issue whether the act of state doctrine bars judicial examination of the motives behind a foreign government's official acts. We submit that it does not. While judicial examination of such motives raises some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial examination of the validity or legality of such acts under appropriate legal principles. Petitioners' third claim does not require any inquiry into the validity of the Libyan government's act in any way that implicates the act of state doctrine.

Brief for the United States as Amicus Curiae, at 7. The Supreme Court denied the petition for a writ of certiorari. 98 S. Ct. 608 (1977).

207. 425 U.S. 682 (1976).

208. Brief for the United States as Amicus Curiae, at 41-42.

209. The letter is reprinted as an Appendix to the Court's Opinion. 425 U.S. at 706-11.

210. See generally Reeves, *The Foreign Sovereign Before United States Courts*, 38 FORDHAM L. REV. 455 (1970); Comment, *Restrictive Sovereign Immunity, The State Department, and the Courts*, 62 NW. U.L. REV. 397 (1967); Comment, *Sovereign Immunity for Commercial Instrumentalities of Foreign Governments*, 58 YALE L. J. 176 (1948).

211. 28 U.S.C. §§ 1330, 1602-1611 (1976). See generally Atkenson, Perkins, & Wyatt, *H.R. 11315—The Revised State-Justice Bill on Foreign Sovereign Immunity: Time for Action*, 70 AM. J. INT'L L. 298 (1976).

212. 28 U.S.C. § 1605(a)(2).

mercial conduct or a particular commercial transaction or act,"²¹³ and provides that the nature of the conduct, rather than its purpose, is the determinative criterion.²¹⁴

Despite the contentions of the Justice and State Departments in *Dunhill* that the governmental/commercial distinction should apply to act of state situations, a majority of the Court held that there was insufficient evidence in the record to establish that the repudiation of the debt, by the persons named by the Cuban Government to operate the expropriated businesses, was an act of state by the Cuban Government.²¹⁵ Mr. Justice White, speaking for only four members of the majority, went further. He noted that it was unlikely that embarrassing intrusions by the judiciary into the executive's conduct of foreign relations would arise in matters involving the purely commercial conduct of foreign governments, because many other countries have also adopted the restrictive theory of sovereign immunity and the governmental/commercial act distinction.

Of equal importance is the fact that subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts. In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on 'national nerves' For all the reasons which led the Executive Branch to adopt the restrictive theory of sovereign immunity, we hold that the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label "Act of State" than if it is given the label "sovereign immunity."²¹⁶

The Guide acknowledges that distinguishing governmental from commercial acts may be difficult and "may turn in part on questions of foreign law, custom, and practice."²¹⁷ Elsewhere, the Guide notes that such distinctions may be hard to draw "unless the two sovereigns distinguish the two concepts in a similar way."²¹⁸ Although Antitrust Division officials have recognized the vagueness of the governmental/commercial distinction,²¹⁹ the Guide offers no guidance on how private parties should deter-

213. *Id.* § 1603(d) (1976).

214. *Id.* For a recent antitrust case involving commercial acts of a foreign sovereign see *United States v. Pan American World Airways, Inc.*, No. 77-197 (D.D.C., filed Feb. 3, 1977), [1977] 4 TRADE REG. REP. (CCH) ¶ 45,077 (case no. 2560, 2561) (complaint noted); [1977] 5 TRADE REG. REP. (CCH) ¶ 50,353 (D.D.C., filed Dec. 9, 1977) (consent decree) (suit against airlines, including the government-owned Lufthansa German Airlines, for price-fixing on certain military excursion fares).

215. 425 U.S. at 690.

216. *Id.* at 703-05.

217. ANTITRUST GUIDE, *supra* note 1, at 8 n.21.

218. *Id.* at 55 n.98.

219. "[H]ow do we distinguish ambiguous conduct which has both significant commercial

mine whether the conduct of a foreign government with which they are dealing is governmental or commercial. It also fails to suggest how to determine whether the act of state doctrine protects the conduct of a foreign governmental commission, board, agency, or government-owned company.²²⁰

The Guide also suggests that in some cases, even if there is an act of state, the overriding importance of enforcing the antitrust laws should bar use of the defense. Mr. Rosenthal has stated that there are some "forms of foreign governmental conduct which, though more nearly political than commercial, and, although undertaken within the territory of that foreign government, should nonetheless not be the basis of nullifying the role of our courts."²²¹ *United States v. Sisal Sales Corp.*²²² supports this view, according to Mr. Rosenthal.²²³ But *Sisal Sales* did not involve a situation where the Court refused to recognize an act of state. The discriminatory legislation procured by the defendants was not the target of the Government's complaint. The Court stated:

The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True, the con-

and political characteristics—for example, the issuance of government bonds to raise funds for a railroad?" Address by Douglas E. Rosenthal, Chief, Foreign Commerce Section, Antitrust Div., U.S. Dep't of Justice, before the Antitrust and Trade Regulation Committee, U.S. Chamber of Commerce (Mar. 9, 1977), reprinted in [1977] 5 TRADE REG. REP. (CCH) ¶ 50,309, at 55,653. "Some would argue that any truly important economic activity is necessarily 'political,' since most countries today view the management of their own economies as a central mission of government." Baker, *Antitrust Remedies Against Government-Inspired Boycotts, Shortages, and Squeezes: Wandering on the Road to Mecca*, 61 CORNELL L. REV. 911, 931 (1976).

220. In *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 608 (9th Cir. 1976), the court held that judicial proceedings instituted by a private party in Honduran courts and subsequent actions were not acts of Honduras. See also *Cofinco Inc. v. Angola Coffee Co.*, [1975] 2 Trade Cas. ¶ 60,456 (S.D.N.Y. 1975). For one analysis of these issues, see Baker, *Sovereign Compulsion, the Noerr Doctrine and Government Cartelizing*, in PRACTICING LAW INSTITUTE, 17TH ANNUAL ADVANCED ANTITRUST LAW SEMINAR 95, 99-101 (1977).

The governmental/commercial distinction is of little utility when dealing with nonmarket economies and developing nations. See, e.g., article 5 of the U.N. General Assembly's Charter of Economic Rights and Duties of States:

All States have the right to associate in organizations of primary commodity producers in order to develop their national economies, to achieve stable financing for their development and, in pursuance of their aims, to assist in the promotion of sustained growth of the world economy, in particular accelerating the development of developing countries. Correspondingly, all States have the duty to respect that right by refraining from applying economic and political measures that would limit it.

G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974). See also Permanent sovereignty over natural resources, G.A. Res. 3171, para. 4, 28 U.N. GAOR, Supp. (No. 30) 52, 53, U.N. Doc. A/9030 (1973). See generally Joelson & Griffin, *The Legal Status of Nation-State Cartels Under U.S. Antitrust and Public International Law*, 9 INT'L LAW. 617 (1975).

221. Address by Rosenthal, *supra* note 219.

222. 274 U.S. 268 (1927).

223. Address by Rosenthal, *supra* note 219.

spirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States.²²⁴

Mr. Rosenthal has, however, also noted that his position raises important unanswered questions: "[H]ow many and what kinds of contacts with United States commerce overcome an act of state defense, where foreign governments are involved in their own backyard, cannot now be stated precisely. We need more experience with concrete factual situations."²²⁵

2. Foreign Sovereign Compulsion

Closely related to the act of state doctrine is the defense of foreign sovereign compulsion. Whereas the former is based upon judicial noninterference in the conduct of foreign affairs and focuses on the acts of a foreign sovereign, the latter is grounded on common law principles of fairness, duress, and comity. The foreign sovereign compulsion defense focuses on the acts of nonsovereign bodies that are compelled by sovereign entities. The two defenses are often treated as one, principally because many courts consider acts compelled by foreign sovereigns to be, in effect, acts of that state.²²⁶

The only reported case that has unequivocally recognized the defense of foreign sovereign compulsion is *Interamerican Refining*.²²⁷ The district court there held that "[a]nticompetitive practices compelled by foreign nations are not restraints of commerce, as commerce is understood in the Sherman Act."²²⁸ The uncontroverted facts established that defendants had neither procured the Venezuelan order nor acted voluntarily pursuant to a delegation of authority from the Venezuelan Government. Consequently, sovereign compulsion was held to be a complete defense.

The Guide states the Justice Department's belief that *Interamerican Refining* was "wrongly decided"²²⁹ and the Antitrust Division's policy that the foreign sovereign compulsion defense should be limited to situations where: (1) the acts complained of were "commanded," not merely "encouraged," by a foreign sovereign; (2) the acts took place within the foreign state's territory; (3) the "command" was legal under the foreign sovereign's law; (4) "the company [was] being reasonable in doing what it felt it had to

224. 274 U.S. at 276 (1927).

225. Address by Rosenthal, *supra* note 219.

226. *See, e.g.,* *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970). *See generally* Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 TEX. L. REV. 1, 25-26 (1976); Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 100 (1967); Note, *Development of the Defense of Sovereign Compulsion*, 69 MICH. L. REV. 888 (1971).

227. 307 F. Supp. 1291 (D. Del. 1970). *See* notes 191-92 *supra* and accompanying text.

228. *Id.* at 1298.

229. ANTITRUST GUIDE, *supra* note 1, at 52.

do,"²³⁰ and (5) "a balancing of the comity interests of Restatement Section 40 results in greater deference" to the foreign sovereign than to American antitrust law.²³¹ As with the Guide's limitations on the act of state doctrine, each of these restrictions on the foreign sovereign compulsion defense is subject to challenge.

The requirement that the restraint be commanded by the sovereign is well established. In *Cantor v. Detroit Edison Co.*,²³² a plurality of the Supreme Court held that Detroit Edison so influenced the Michigan State Public Service Commission's decision to impose the challenged restraint that the restraint was not "compelled" by the state, and therefore was subject to the antitrust laws. The test, according to the Court, is whether "the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision."²³³

This standard is difficult to apply fairly in international situations,²³⁴

230. *Id.* at 55.

231. *Id.* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) provides:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

- (a) vital national interests of each of the states,
- (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- (c) the extent to which the required conduct is to take place in the territory of the other state,
- (d) the nationality of the person, and
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

232. 428 U.S. 579 (1976).

233. *Id.* at 593. Judge Van Graafeiland of the Second Circuit has read this passage from the *Cantor* opinion to apply to foreign governments because, in a footnote, the Court had cited *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 80 (2d Cir.) (Van Graafeiland, J., dissenting), *cert. denied*, 98 S. Ct. 608 (1977).

234. In several other cases, defendants have attempted to demonstrate compulsion, but have failed to sustain their burden of proof. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), plaintiff *Continental Ore* alleged that *Union Carbide's* subsidiary, which had been appointed by the Canadian Government as the exclusive wartime agent to purchase and allocate vanadium for Canadian industries, had eliminated the plaintiff from the Canadian vanadium market by refusing to purchase vanadium from *Continental Ore*. Both the trial court and court of appeals ruled that, even if the Canadian subsidiary's activities were such as to enhance a monopolistic plan affecting the United States, the company was acting as an arm of the Canadian Government, so that its activities were not within the purview of the Sherman Act. The Supreme Court unanimously reversed, holding that the Canadian subsidiary's anticompetitive activities had not been approved or directed by the Canadian Government and that the mere fact that the company was acting in a manner permitted by Canadian law did not insulate the activity from the Sherman Act. The Court stated: "[t]here is nothing to indicate that [the Canadian law] in any way compelled discriminatory purchasing, and it is

since many countries have unwritten systems of "administrative guidance," "advice," or "traditional methods," which have the same binding effect as statutes. The Guide's limitation of the foreign sovereign compulsion defense to actions taken pursuant to a "valid decree" and actions of a "non-governmental agent of a foreign government" who is "authorized to perform the alleged acts of state as a delegated sovereign function"²³⁵ may, therefore, be too narrow and rigid in the complex and subtle world of international business transactions.

The Antitrust Division has rationalized the second requirement, that the challenged acts must occur within the foreign state, by arguing that the anti-

well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme." 370 U.S. at 707.

United States v. Watchmakers of Switz. Information Center, Inc., [1963] Trade Cas. ¶ 70,600 (S.D.N.Y. 1962), *order modified*, [1965] Trade Cas. ¶ 70,352 (S.D.N.Y. 1965) (the Swiss Watch case) also involved an analysis of whether conduct was compelled by a foreign sovereign. The alleged conspirators—manufacturers and sellers of Swiss watches and watch parts and their trade associations—had, over a period of years, entered into successive private agreements that were designed to protect the Swiss watch industry and to prevent the growth of competitive watch industries in the United States and elsewhere. The basis of the complaint was an agreement known as the "Collective Convention," executed in Switzerland, which was intended to, and did, restrict unreasonably the manufacture of watches and watch parts in the United States, and restrain U.S. imports and exports of watches and watch parts for both manufacturing and repair purposes. Various other restrictive practices were charged. The Swiss Government passed legislation to aid the Convention's signatories, providing that any signatory who breached any of the Convention's provisions was subject under Swiss law to private sanctions provided in the Convention.

Defendants claimed that the court should not have assumed jurisdiction over their activities because the agreements were entered into and became effective in Switzerland, and were sanctioned by Swiss law. The district court responded that if "the defendants' activities had been required by Swiss law, this court could indeed do nothing." *Id.* at 77,456. The challenged agreements, however, had been formulated privately, without compulsion by the Swiss Government. Moreover, the fact that the private agreements were recognized, and even approved of, by the Swiss Government was insufficient to "convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from foreign governmental mandate." *Id.* at 77,457. The court held that "[i]n the absence of direct foreign governmental action compelling the defendants' activities, a United States court may exercise its jurisdiction as to acts and contracts abroad, if . . . such acts and contracts have a substantial and material effect upon our foreign and domestic commerce." *Id.*

See also Sabre Shipping Corp. v. American President Lines, Ltd., 285 F. Supp. 949 (S.D.N.Y. 1968). The Sabre Shipping case involved a suit by an independent shipping line against members of two shipping conferences alleging that the defendants unreasonably restrained and monopolized Hong Kong-United States and Japan-United States shipping trade by charging unreasonably low rates. In denying motions to dismiss the complaint, the trial court noted that whether Japanese defendants engaged in unlawful activities at the direction of the Japanese Government was a matter for defense, "which even if established in their favor would not necessarily immunize them from prosecution or civil responsibility for acts done in United States commerce." *Id.* at 954.

In *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315 (D. Conn. 1977), the World Hockey Association (WHA) prohibited persons under age twenty from playing professional hockey for any WHA team. The Canadian Minister of Health "endorsed" the regulation because he wished to "discourage" the drafting of teenagers from the amateur leagues, but the district court judge expressed doubt that this would provide antitrust immunity. *Id.* at 1324.

235. ANTITRUST GUIDE, *supra* note 1, at 54-55.

trust laws represent a fundamental and important national policy and comity does not, therefore, require the United States to treat a foreign sovereign's command to engage in conduct in the United States as controlling here. The Division recently tested this position in *United States v. Bechtel Corp.*,²³⁶ where it sought to enjoin an alleged conspiracy among American construction contractors who allegedly refused to deal with American subcontractors blacklisted by Arab League countries.²³⁷ There are, however, at least three problems with this restriction. First, if the foreign sovereign compulsion defense is based upon fairness and freedom of choice, why should the location of the conduct be determinative? Second, as with the act of state defense, the Division's position offers no guidance concerning conduct that occurs abroad but affects commerce within the United States. Third, this limitation appears to be somewhat inconsistent with another statement of Antitrust Division policy, that: "[W]e have generally followed for some years a policy against suing members of a foreign export association for conduct which the U.S. would permit under the Webb-Pomerene Act. . . ." ²³⁸ Such foreign export cartels by definition act outside their countries and, often, inside the United States.

The Guide's explanation for its third requirement—that there be a "valid" foreign command—differs somewhat from the rationale offered for the same limitation in the act of state context. An invalid command "reduces the 'command' to what amounts to 'informal encouragement' by the foreign governmental officials [The command's validity] is an issue which can bear on the good faith of the defendants, and the weight to which the 'command' is entitled in adjudicating private activity under it."²³⁹ Although the explanation differs, the limitation itself is flawed just as in the act of state context, since the restriction conflicts with case law²⁴⁰ and would overextend the judicial inquiry.²⁴¹

The last two restrictions on the applicability of the foreign sovereign compulsion defense—that the company act reasonably and that the interests of the foreign sovereign be balanced—reflect the Division's efforts to make its applications of the doctrine flexible. The Guide, however, provides no assistance as to what constitutes reasonable conduct, or how conflicting sovereign interests are to be balanced. Moreover, it is unclear

236. *United States v. Bechtel Corp.*, No. C-76-99 (N.D. Cal. 1976).

237. A proposed consent judgment to settle the case has been pending final court approval for more than a year. 42 Fed. Reg. 3716 (1977).

238. Letter from Donald I. Baker, *supra* note 22.

239. ANTITRUST GUIDE, *supra* note 1, at 52.

240. See notes 200-01 *supra* and accompanying text.

241. See notes 202-05 *supra* and accompanying text.

whether the Antitrust Division would apply the governmental/commercial distinction to sovereign commands, so as to deny the foreign sovereign compulsion defense to a company that obeys a commercial command.²⁴²

3. *Petitioning Foreign Governments*

The *Noerr-Pennington* doctrine,²⁴³ according to the Guide, protects joint "efforts to cause a foreign government to impose restraints on U.S. commerce."²⁴⁴ The Guide qualifies this position, however, by further providing that the doctrine's exceptions also apply in international situations.²⁴⁵

On the issue of *Noerr-Pennington* protection for petitioning foreign governments to restrain U.S. commerce, the courts are split. In *Occidental Petroleum v. Buttes Gas & Oil Co.*,²⁴⁶ the court rejected defendants' contention that their efforts to "induce and procure" the Ruler of Sharjah to make certain claims of territorial ownership were protected under the *Noerr-Pennington* doctrine. The doctrine, the court said, is based upon two rationales: "to avoid a construction of the antitrust laws that might trespass upon the First Amendment right of petition," and to ensure that "law-making organs retain access to the opinions of their constituents, unhampered by collateral regulation."²⁴⁷ According to the *Occidental* court, neither of these situations was present; therefore, application of the *Noerr-Pennington* doctrine "appear[ed] inappropriate."²⁴⁸ An opposite result, however, was reached in *United States v. AMAX, Inc.*,²⁴⁹ where the district court found the *Noerr-Pennington* doctrine applicable to defendant's petitioning of the Canadian Government to set production quotas and selling prices for potash.²⁵⁰

The Guide does not say whether the character of the government petitioned affects the availability of the *Noerr-Pennington* doctrine. The *Occidental* court appeared to approve of Professor Areeda's suggestion that the *Noerr-Pennington* doctrine applies only when a democratic government

242. At one point, the Guide appears to indicate that the commercial command of a foreign sovereign cannot be cited by entities seeking to invoke the foreign sovereign compulsion defense: "For example, if the government of C in its capacity as majority shareholder in the Natural Resources Group required that company's management to organize a commercial cartel, this may be regarded as a 'non-sovereign' act." ANTITRUST GUIDE, *supra* note 1, at 55 n.100.

243. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 669 (1965). See generally Note, *Corporate Lobbyists Abroad: The Extraterritorial Application of Noerr-Pennington Antitrust Immunity*, 61 CALIF. L. REV. 1254 (1973).

244. ANTITRUST GUIDE, *supra* note 1, at 63.

245. *Id.*

246. 331 F. Supp. 92 (C.D. Cal. 1971).

247. *Id.* at 108.

248. *Id.*

249. [1977] 1 Trade Cas. ¶ 61,467 (N.D. Ill. 1977).

250. *Id.* at 71,799.

is petitioned.²⁵¹ An Antitrust Division spokesman has criticized the court's position on this issue:

I find it exceedingly strange that a court could base a ruling upon such a characterization of the essential quality of a foreign government, and in the same decision dismiss an antitrust complaint based on the act of state doctrine, which is based upon judicial reluctance to avoid passing judgment on the nature of specific acts of foreign governments.²⁵²

The Guide, however, takes no position on this issue.

The Guide also does not state whether the Antitrust Division would permit a company to invoke the *Noerr-Pennington* doctrine if the company had petitioned a foreign government or a commercial governmental entity, such as a state trading company, to take commercial actions.

In his rejoinder, Mr. Baker states that *City of Lafayette v. Louisiana Power & Light Co.*²⁵³ "sustained" the Guide's view that "the antitrust laws do apply to 'commercial' actions of foreign governments or instrumentalities . . ." ²⁵⁴ I do not read *City of Lafayette* that broadly. The key factor in the case was the relationship among the federal antitrust laws, the "state action" exemption from those laws, and the question of when a state's subdivisions should be deemed to be entitled to that exemption. The majority of the Court held that:

[T]he *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service.

. . . .

[This decision] means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws.²⁵⁵

This case thus has little direct bearing on the issues of whose definition of "commercial" governs in international situations and what deference the foreign sovereign's definition is entitled to pursuant to comity.²⁵⁶ Moreover, as the Guide notes, "purely domestic decisions may not be readily generalized to the international context."²⁵⁷

A further issue that the Guide fails to address is whether the *Noerr-Pennington* doctrine protects joint efforts to obtain governmental approval or acquiescence in private restraints. *United States v. Sisal Sales Corp.*²⁵⁸

251. 331 F. Supp. at 108 n.26.

252. Remarks by Farmer, *supra* note 65, at 55,689.

253. 98 S. Ct. 1123 (1978).

254. Baker, *supra* note 159, at 260.

255. 98 S. Ct. at 1137-38.

256. See notes 226-30 *supra* and accompanying text.

257. ANTITRUST GUIDE, *supra* note 1, at 1.

258. 274 U.S. 260 (1927).

and *Cantor v. Detroit Edison Co.*²⁵⁹ suggest that such efforts are not entitled to *Noerr-Pennington* protection.

CONCLUSION

The Antitrust Division's Guide is the result of the Division's laudable intent to give guidance in a complex area. Much careful thought and analysis clearly went into the Guide's preparation, and as a result, it will undoubtedly strongly influence both antitrust counseling and court decisions. Nevertheless, the Guide does not resolve all confusion and fears concerning the application of American antitrust laws to international business operations.²⁶⁰ Many of the questions that it does not answer and that have been raised in this Article do not have right or wrong answers. But raising and discussing them may contribute to the dialogue between those who enforce and those who must comply with the antitrust laws.

I am somewhat disappointed that Mr. Baker has received "very little overall message" from this Article.²⁶¹ But it may be that my critique and Mr. Baker's rejoinder will illustrate the message I have attempted to convey. I believe that the concept of a Guide is an excellent one, and that the Guide itself reflects an excellent attempt to accomplish the goals it states. I have attempted to set out in detail the specific aspects of the Guide that are subject to challenge. It is my belief that such a point by point analysis is the most useful way to highlight possible problems in the Guide.

This critique was not intended to present my philosophical views of the antitrust laws or my personal experiences practicing law in the field of international antitrust. Simply stated, my primary criticism of the Guide is that it speaks in vague generalities that are useful in understanding the Antitrust Division's priorities and concerns. But the Guide would be immensely more useful if it also provided detailed discussions on specific points. Unlike Mr. Baker, I believe that the brevity of the Guide does not make it "useful to the ordinary person involved in an ordinary case."²⁶² In fact, the brevity and generality of the Guide make it less useful than a longer, more detailed document. The question is not whether the Guide is a success, but whether it is the best success that could have been achieved.

259. 428 U.S. 579 (1976).

260. Wall St. J., Nov. 16, 1977, at 13, col. 1.

261. Baker, *supra* note 159, at 258.

262. *Id.*