International Lawyer

Volume 23 | Number 1 Article 24

1989

American Bar Association Section of Antitrust Law and Section of International Law and Practice Report to the House of Delegates

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RECOMMENDATION

BE IT RESOLVED that the ABA recognizes that in issuing Antitrust Guidelines for International Operations, the U.S. Department of Justice is performing a significant public service by setting forth its analysis of a wide variety of transnational transactions; and

BE IT FURTHER RESOLVED that the ABA urges the Department of Justice to revise the draft Guidelines to make clear in such Guidelines where the Department's enforcement position departs from established law or lacks substantial legal support, specifying the variance in each case; and

BE IT FURTHER RESOLVED that the ABA urges that in considering finalization of its draft Guidelines, the Department of Justice should take into account the following suggestions:

(i) Discussion of several topics not covered in the draft should be added, including the application of the U.S. antitrust laws to export arrangements; the relationship between antitrust laws and the legal regimes governing international transport; the act of state doctrine; and the Department's use of Civil Investigative Demands on foreign parties;

(ii) The Guidelines should acknowledge the role of the courts in dealing with jurisdictional issues and defenses, in both government and private

antitrust litigation, relating to foreign affairs. These issues include the foreign sovereign compulsion defense, petitioning foreign governments, the act of state doctrine, and the application of *Parker v. Brown* to foreign state action;

(iii) Revival of the *Bernstein* exception to the act of state doctrine should not be endorsed;

(iv) The section on foreign sovereign compulsion should take account of the substantial authorities indicating that (a) it is the fact of compulsion not its form, that should be the focus of the analysis; (b) inquiry into the validity of the foreign state's activity may be limited by the act of state doctrine; (c) the defense rests on fundamental fairness principles, and pragmatic judgments about the preservation of foreign commerce, as well as comity;

(v) The Guidelines should address the authorities supporting the proposition that a doctrine analogous to the *Parker v. Brown* state action doctrine applies to foreign government-regulated conduct;

(vi) Consistent with former Department of Justice practice, the Guidelines should support application of the *Noerr-Pennington* doctrine to petitioning of foreign governments;

(vii) Merger analysis in the guidelines should be consistent with the Department's existing Merger Guidelines or, where at variance, the difference and the Department's new policy should be clearly articulated;

(viii) The relationship between the trade and antitrust laws should be more fully explored.

REPORT

Introduction

International antitrust has grown in importance with the increasing economic interdependence between the United States and the rest of the world. The Department of Justice's draft Antitrust Guidelines for International Operations[1] are important to all who deal with competition law and policy. This is so for two reasons: first, the need to reconcile the requirements of several sovereign nations has become more urgent as transnational arrangements have proliferated; and second, the antitrust principles described in the Guidelines will normally apply to purely domestic cases as well.

1. 53 Fed. Reg. 21584 (June 8, 1988); 53 Fed. Reg. 22426 (June 15, 1988). *See also* the Department of Justice's Antitrust Guide for International Operations dated January 26, 1977, revised March 1, 1977, and the American Bar Association, Section of Antitrust Law, Task Force Report on that Guide (54 *Antitrust L.J.* 839 (1985)).

The American Bar Association's Section of Antitrust Law and Section of International Law and Practice (the "Sections") consider it important to provide comments on the draft Guidelines, because these issues are significant and involve difficult questions of law, and because in our view the draft does not adequately address the relevant legal authorities.[2] Due to the short comment period provided, the Sections limited their comments to what they believe to be the most important points raised in the draft.

The discussion that follows is organized by topic, rather than page-by-page. In Section I, we address the general question of the nature of guidelines issued by the Department of Justice ("the Department"), including the distinction between "the law" and "enforcement policy," the utility and purposes that Guidelines may serve, and the audience that the Guidelines should reach. We also point out several areas that were not addressed in the June 8 draft that we believe should be included in the final version issued by the Department. Section II moves on to certain specialized international and jurisdictional issues, including the role of comity in international jurisdictional determinations, the applicability of the *Parker v. Brown*[3] state action doctrine to the acts of foreign governments, the appropriateness of applying *Noerr-Pennington*[4] immunity to the petitioning of foreign governments, and the Department's apparent decision to revive the *Bernstein*[5] exception to the act of state doctrine. Section III discusses the various substantive antitrust doctrines that appear in the draft Guidelines, including antitrust aspects of mergers, vertical restraints, intellectual property law, and the relationship between the trade laws and antitrust.

I. Overview of the Draft Guidelines

A. The Nature of the Guidelines

Department of Justice Guidelines can serve several purposes. First, they can simply inform the outside world about the enforcement priorities that a particular Administration has adopted. Second, where the law being enforced is unclear in certain respects, they can explain how the Justice

2. The list of members of the Task Force, the authors of the Report, is attached as Appendix 1.

3. 317 U.S. 341 (1943).

4. *See* Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1964); and California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

5. *See* Bernstein v. N.V. Nederlandsche-Amerikaansch, Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954); cf. Bernstein v. Van Heyghen Freres Societe anonyme, 163 F.2d 246 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947).

Department interprets that law, indicating when conduct will be viewed as illegal by the Department, and when not. Third, they can represent an effort by an agency with special expertise to "contribute to the orderly development" of the law, functioning effectively as a brief to courts or Congress and not purporting to represent the law as it presently exists.

In the introductory section of the draft, the Antitrust Division announces its purpose in issuing these Guidelines:

> These Guidelines are intended to provide practical guidance concerning the Department's internal antitrust enforcement policies and procedures . . .
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> * * *
>
> [A]lthough the Department believes that the analysis stated in these Guidelines is economically and legally correct and consistent with the trend in the courts, these Guidelines are not intended to be a restatement of the law.[6]

This statement indicates that the Department is drawing a distinction between its enforcement policy and the existing case law, and purports to be restricting its remarks to enforcement policy.[7] While it is clearly the Department's prerogative to decide what it wants to say when it issues guidelines, given the great respect that the public at large has for official statements of the Department, it is extremely important that the Department make clear at critical points throughout the Guidelines whether it is describing current enforcement policy, existing law, or desired changes for future developments in the law. Most of the audience for these Guidelines—business executives, in-house counsel, and general antitrust practitioners who do not deal with international cases on a daily basis—lack the expertise in U.S. antitrust law to make these critical distinctions on their own. In addition, foreigners both in and outside of governments are likely to read the Guidelines as an official statement of the content of and their exposure under U.S. antitrust law. Accordingly, when the Department "speaks," it must let its audience know whether it is stating the law or only its enforcement policy—not just in an introductory caveat, but at key points in the Guidelines when its position does not restate established law.

For instance, it is stated that the Department views as illegal under section 1 of the Sherman Act only restraints of trade that would create or facilitate the exercise of market power. Accordingly the first step in the rule of reason analysis is to determine whether the restraint has that effect: if not, the analysis goes no further.[8] Putting aside the question

6. 53 Fed. Reg. 21584, 21585.

7. Thus, these draft Guidelines differ from the 1985 Vertical Restraints Guidelines, which in addition to discussing enforcement policy, also expressed a desire to contribute to the orderly development of vertical restraints case law. Vertical Restraints Guidelines, 4 Trade Reg. Rep. (CCH) Par. 13,105 (Jan. 23, 1985).

8. 53 Fed. Reg. at 21587 Cols. 2 and 3.

whether this would be a desirable approach for antitrust, aside from some decisions dealing with nonprice vertical restraints it does not describe present-day doctrine in the courts.[9]

Readers of the Guidelines could rely to their detriment on these statements. The lack of definition between law and enforcement policy undercuts the force of the Department's opinions on those many areas of antitrust law where clarification is all that is needed. As the Department revises the draft Guidelines during and after this comment period, it should take care throughout to make clear the precise nature of its various statements, including the fact that, despite the Department's enforcement policy, actual litigation may proceed differently.[10]

To be helpful, these Guidelines should concisely restate the antitrust laws, as they apply to foreign commerce cases.[11] When the law is somewhat unclear, they should indicate the way in which the Department interprets it. If the Department wishes to go further and to argue for changes or extensions, the Guidelines should clearly indicate that this is what is being done. Once the law is explained, enforcement priorities within that law should be identified. To assist in this regard, the Sections refer in this report to case law which should be addressed in the final form.[12]

B. Subjects Omitted from the Scope of the Guidelines

Although the draft covers many issues quite thoroughly, such as joint ventures, technology licensing, and mergers, it does not address other

9. *See,* for example, National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 109-10, where the Supreme Court made it clear, in the context of a rule of reason analysis, that if a naked restriction of price or output exists, market power is not, and never has been, necessary. Another example is the discussion of *Noerr* in Case 13, in the paragraph bridging pages 21613-14 and the following paragraph, which appears to reject the view expressed in Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982), *cert. denied,* 461 U.S. 958 (1983) to the effect that bringing a lawsuit may constitute an antitrust violation even if the action is ultimately successful. If that is the Department's enforcement policy, it should be stated.

10. Compare 1984 Merger Guidelines, 4 Trade Reg. Rep. (CCH) Par. 13,103, at 20,555 (June 14, 1984) ("[t]he Guidelines are designed primarily to indicate when the Department is likely to challenge mergers, not how it will conduct the litigation of cases that it decides to bring").

11. The final version of the Guidelines should include more citations to and discussion of authority—the leading cases that support key propositions.

12. Additionally, it would be preferable for the Guidelines to be a joint statement by the Department of Justice and the Federal Trade Commission. As an alternative, it would be helpful for the FTC to publish either its comments on the Department's Guidelines, or its own Guidelines. Statements of enforcement policy that do not reflect FTC input can be misleading for foreign enterprises who rely on the Guidelines, if not for guidance on antitrust liability in private challenges, then at least as statements of predictable U.S. government position.

subjects that are also of central importance to international antitrust. We have identified four such subjects: the application of the U.S. antitrust laws to export arrangements; the relationship between antitrust laws and the legal regimes governing international transport (*i.e.*, shipping and aviation); the total omission of the act of state doctrine; and the use of Civil Investigative Demands in investigations of foreign parties.

1. *Exports*. The most important statements about normal, non-government funded, export commerce occur in the Introduction and in Case 10, footnote 197.[13] The Introduction to the draft Guidelines states:

> [n]or is the Department concerned with the export conduct of U.S. firms except where that conduct has a direct, substantial, and reasonably foreseeable anticompetitive effect on price and/or output in the United States or where the U.S. government is the purchaser, or substantially funds the purchase, of affected goods or services.[14]

Rather than devoting a hypothetical case to this important topic, the draft suggests in a footnote the "special circumstances" in which these criteria might be satisfied. The implication of footnote 197 is that the only cases that would raise antitrust problems are those in which exporters made an agreement on export levels with the purpose and effect of reducing supplies within the United States, and cases involving re-exports into the United States. The footnote adds the point that foreign-initiated restrictions on the export trade of U.S. exporters "would not have the requisite direct effect on U.S. commerce to trigger antitrust concern."

These are controversial propositions which we believe require more straightforward discussion than the present draft offers. For example, the basic statement relating to export commerce is a significant revision, legislative in nature, of the antitrust implications of export commerce compared with the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) quoted a few pages later in the draft.[15] A clear premise of the FTAIA is that injury to a U.S. exporter's export business in the United States can give rise to an antitrust claim.[16]

2. *Transportation Services*. Given the significance of antitrust issues in transportation industries, such as the ocean shipping investigation and the trans-Atlantic air carrier cases, it is unfortunate that this subject was not included in the draft Guidelines. When it is necessary to reconcile competing regulatory regimes, such as the Shipping Act and the antitrust laws, or the various international air transport agreements and the anti-

13. 53 Fed. Reg. 21586-87, and 21610.
14. *Id.* at 21586-87 (footnote omitted).
15. *See* 53 Fed. Reg. 21595, col. 1.
16. 15 U.S.C. § 6a(1)(B) and (2).

trust laws, guidance from the Government with respect to its enforcement policies and intentions would be welcome.

3. *Act of State*. The total omission of the act of state doctrine, notwithstanding multiple references to the so-called "comity based" defenses, is surprising.[17]

The act of state doctrine has been recognized in U.S. court decisions at least since the 1897 decision in *Underhill v. Hernandez*, and was discussed in the 1977 Guidelines.[18] The later decision in *Banco Nacional de Cuba v. Sabbatino* held that the Judicial Branch may invoke the doctrine when it believes that a court decision would "hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."[19] Both textual discussion and a hypothetical case should be added to indicate the circumstances under which a party arguably subject to the U.S. antitrust laws might nonetheless be entitled to assert an act of state defense.

4. *Civil Investigative Demands*. Another point on which the draft Guidelines offer little assistance is the Department's practice with respect to Civil Investigative Demands (CIDs) served outside the territory of the United States. The Antitrust Civil Process Act, 15 U.S.C. § 1311-1314, specifically authorizes the Department to serve CIDs on persons outside the territory of any court of the United States, by using the methods of service set forth in Federal Rule of Civil Procedure 4(i). At two points in the draft Guidelines, the Department indicates that it would use this authority to supplement its other enforcement efforts.[20] Unfortunately, these references raise more questions than they answer. These questions include (1) to what extent would the Department moderate the exercise of its CID enforcement powers in light of the jurisdictional reasonableness factors mentioned in the draft, (2) to what extent would foreign blocking statutes be respected by the Department, and (3) what outer limits on this extraterritorial discovery power does the Department recognize. As past conflicts with foreign nations attest, excessive exercise of the CID power may give rise to international tensions. Furthermore, to say that CIDs raise only procedural issues, or relate only to investigations, does not mean that they have no place in guidelines devoted to a discussion of enforcement policy. If anything, the contrary is true. Given the longstanding and crucial nature of such discovery disputes it would therefore be helpful if the Department's discussion of the use of CIDs were amplified in the Department's final product.

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17. *See also* II.C. *infra* regarding the revival of the *Bernstein* exception, and II.D below.
18. 168 U.S. 250 (1897).
19. 376 U.S. 398, 423 (1964).
20. 53 Fed. Reg. 21586 n. 22 and 21602 col. 1.

II. Specialized International and Jurisdictional Issues

The Guidelines address a number of concepts involving the legal limits of U.S. antitrust jurisdiction in foreign commerce. These include comity, foreign sovereign compulsion, the *Noerr-Pennington* doctrine, and an undefined notion of "comity-related" defenses.[21] However, although those areas unique to transnational transactions should receive special focus in the Guidelines, these terms are not precisely explained and the concepts underlying them are not interrelated.

There is a further problem with the Department's coverage of the limits on jurisdiction: the Department's characterization of recognized defenses to antitrust liability as exclusively based on comity is unsupported in substantive law. While considerations of comity play a separate role in the exercise of prosecutorial or judicial discretion, comity in no way limits the availability or modifies the application of established antitrust defenses.

A. Executive Branch v. Private Suits

The most controversial portion of the draft Guidelines' discussion of issues related to "comity" is the assertion that because the Constitution charges the Executive Branch with responsibility for the conduct of U.S. foreign relations, it would be improper for a court to dismiss a suit brought by the Executive Branch on "comity-related" grounds: which the Department takes to include foreign government compulsion, and presumably act of state, as well as aspects of jurisdiction. The Sections believe that this broad assertion, which is repeated throughout the draft, is unsupported by the case law.

There has been wide consensus for years that the courts play an important role in the law of foreign relations.[22] As early as 1812, the Supreme Court (Marshall, C. J.) decided whether the government of France should enjoy sovereign immunity for a claim against one of its armed national vessels.[23] The comity aspects of recognition of foreign judgments were

21. *See, e.g.* 53 Fed. Reg. 21616 n. 232.

22. *See, e.g.* American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States:*

> The special place of the judiciary in United States jurisprudence is as significant for the law of foreign relations as for other United States law. Judicial review gives the court power to invalidate actions of the political branches in foreign relations—statutes, international agreements, and executive actions, as violations of the Constitution. § 1, Reporters' Note 4, at 11 (1987).

Also, L. Henkin, "The Courts in Foreign Affairs," in *Foreign Affairs and the Constitution*, ch. VIII, (1972).

23. The Schooner Exchange v. M'Faddon, 11 U.S. 116 (1812).

involved in *Hilton v. Guyot.*[24] The Supreme Court applied principles of international law in *The Paquete Habana.*[25] More recently, of course, Congress has delegated to the courts the task of deciding when sovereign immunity should be recognized for foreign governments or their instrumentalities, pursuant to the Foreign Sovereign Immunities Act of 1976.[26] It would be hard to argue that immunity determinations have no effect on foreign relations.[27]

For antitrust suits brought by the Department, the Guidelines, without discussion of these established precedents, state that the evaluation of foreign interests under the comity test should be made by the Executive Branch only, meaning the Department of Justice, and that courts shall be restrained from dismissing or limiting such suits on the basis of comity:

> In the Department's view, government actions should not be subject to dismissal on the basis of comity. A decision by the U.S. government to prosecute an action amounts to a determination by the Executive Branch that the interests of the United States supersede the interests of any foreign sovereign and that the challenged conduct is more harmful to the United States than would be any injury to foreign relations that might result from the antitrust action. Thus, government suits do not create the risk raised by private actions that a judicial finding of liability will intrude on the legitimate interests of foreign sovereigns.[28]

As to whether courts may take account of the effect of antitrust prosecution on United States' foreign relations, another footnote states the Department's belief:

> [T]his factor should [not] properly be considered by courts in the context of either private litigation or in litigation initiated by the United States, since the conduct of foreign relations is constitutionally reserved to the Executive Branch.[29]

This broad assertion of executive power fails to note that the Congress is given responsibility under the Constitution for regulating commerce among foreign nations (Article I, Section 8). The Sherman Act was passed pursuant to this Constitutional authority. Nothing in that Act frees the Executive Branch from having to comply with its provisions. On the contrary, the Sherman Act may reach conduct by U.S. government officials.[30] There is nothing in the legislative history of the Act to indicate

24. 159 U.S. 113 (1895).
25. 175 U.S. 677 (1900).
26. 28 U.S.C. §§ 1300, 1602-11 (1985).
27. *See, e.g.*, Jackson v. People's Republic of China, 550 F. Supp. 869 (N.D. Ala. 1982). After the court entered a default judgment, the State Department suggested that the judgment be vacated in the interest of U.S. foreign relations, 23 Int'l Leg. Mat. 402 (1984). Subsequently the judgment was set aside and the action was dismissed, 596 F. Supp. 386 (N.D. Ala. 1984), *aff'd*, 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1371 (1987).
28. 53 Fed. Reg. 21595 n. 112.
29. 53 Fed. Reg. 21596 n. 115.
30. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) and Consumers Union of the United States, Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974).

that the Congress intended one standard to apply to government prosecutions and another standard to apply in private suits.

The Department cites no judicial precedent for this dual but divergent application of the antitrust laws other than a general (but largely unarticulated) reference to the separation of powers doctrine. Nor is there any indication that courts would accept the argument that they were constrained from reviewing prosecutorial decisions on the basis of comity or from taking account of foreign relations considerations. Contrary to the statement in footnote 232 of the draft Guidelines,[31] it would be improper for an Article III court *not* to construe the Sherman Act in the face of an Executive Branch assertion that it must apply that Act in foreign commerce as it and not the Congress deems appropriate.[32]

B. JURISDICTION

The Department of Justice has stated that the Foreign Trade Antitrust Improvements Act (FTAIA) codified a jurisdictional standard that the Department applies generally, not only in Sherman Act export cases, but in Sherman Act import cases and cases under Section 7 of the Clayton Act as well. The Department states it will attempt to give meaning to the terms "direct, substantial, and reasonably foreseeable" [effect] in the Act by taking action where there is, or would be, a significant adverse effect on consumers in the United States. This is correct in principle, particularly as the House Report on the bill which became the FTAIA indicates that the rule was regarded as being of general application.[33] The Guidelines, however, should state the test as requiring an *anticompetitive* effect in

31. "The Constitution charges the Executive Branch with responsibility for the conduct of foreign relations of the United States. It would be improper for a court to review the Constitutional actions of the Executive Branch [in bringing a foreign commerce antitrust case by adjudicating comity-related defenses raised in a government suit]" (53 Fed. Reg. 21616 n. 232).

32. *See generally*, Webster v. John Doe, 108 S. Ct. 2047 (June 15, 1988) (where Congress intends to preclude judicial review of Executive action, its intent must be clearly expressed). The principle of separation of powers assumes a role for each of the three branches of government, not, as the Department states, only for the Executive. Congress passes laws affecting foreign commerce. The Executive administers those laws, and conducts U.S. foreign policy consistently with those laws. The courts construe that legislation and determine the legality of executive action consistent with that legislation, with the Constitution and with standards that the courts define for themselves. International law is part of the law of the United States, except to the extent that Congress has decreed otherwise. Congress has not, in the antitrust law, abrogated international law. *See, e.g.*, Marshall, C. J., in Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804): "an act of Congress ought never to be construed to violate the laws of nations if any other possible construction remains . . ."

33. H.R. Rep. No. 686, 97th Cong., 2d Sess., at 9-10 (1982).

the United States, as set out in *National Bank of Canada v. Interbank Card Ass'n.*[34]

The Guidelines also take a controversial view of conduct relating to export commerce that satisfies the FTAIA standard. The draft Guidelines suggest the Department's skepticism about the wisdom of the essential facilities doctrine.[35] The net result seems to be a rejection of a possible antitrust suit being brought involving, for example, a claim that rival exporters unlawfully predated against a U.S. exporter's business, or a claim that a certain export facility was essential to doing business in a specialized foreign market, or a claim that a foreign monopsony inflicted antitrust injury by depressing the prices that an exporter received.

The draft may cause confusion over export commerce issues in another respect. The language of the draft recognizing a potential antitrust claim where there are effects on "price and/or output" in the U.S. can be read as reviving the old *Minnesota Mining & Manufacturing* case.[36] If so, the draft might be interpreted as suggesting potential antitrust liability resulting from a joint venture's decision to use foreign sourcing.

The Guidelines continue with the assertion that the Government considers the legitimate interests of other nations before taking enforcement action, as a matter of prosecutorial discretion. It is, of course, appropriate for the Department to do so. The Guidelines then proceed to offer opinions on what the law of jurisdiction ought to be, without specific reference to developments in the law or to previous positions articulated by the Department.

The Guidelines imply that any assertion of jurisdiction by the Government is *per se* reasonable and not subject to judicial review as long as it satisfies the FTAIA standards. While no one could prevent the Department from so arguing to a court, it is doubtful that any federal court would subscribe to such a broad claim. By whatever name is chosen—jurisdictional rule of reason, *Timberlane,* or objective territoriality—there are principles of international law that allocate competence among nations, and which have been recognized in the federal courts. The Guidelines should discuss important developments like the Restatement (Third) of

34. 666 F.2d 6 (2d Cir. 1981). (The formulation is stated correctly in the draft Guidelines at 53 Fed. Reg. 21584 col. 3, for example, but not given in full on p. 21595 col. 1, in the section entitled "Jurisdictional Considerations.")

35. *See, e.g.*, 53 Fed. Reg. 21607, col. 3, and 21608, col. 1.

36. *See* United States v. Minnesota Mining & Manufacturing Co., 92 F. Supp. 947 (D. Mass. 1950). The arrangement challenged in *3M* had the effect of reducing output in the U.S. in two ways. First, the defendants themselves were manufacturing overseas for foreign markets instead of using their U.S. plants, which obviously meant less U.S. output. Second, the combination (according to the court) precluded defendants' American competitors from receiving business from the foreign markets that they might otherwise have gotten.

the Foreign Relations Law of the United States,[37] case law like *Timberlane* and *Mannington Mills*,[38] and its own prior support for the appropriateness of judicial oversight.[39] In addition, it may be anomalous for the Department to support legislation such as S. 539,[40] giving the courts the responsibility of weighing factors relating to the reasonableness of a jurisdictional assertion, and at the same time to assume that the courts will suddenly perform a poor job if the plaintiff happens to be the United States.[41]

C. REVIVAL OF THE BERNSTEIN EXCEPTION

The draft Guidelines imply that the courts should not recognize the act of state defense when the Executive Branch tells them not to. This is tantamount to a revival of the *Bernstein* exception to the doctrine, under which, when the Executive Branch represented to the courts that application of the act of state defense would not advance the interests of

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37. Reporter's Note to section 403 of the *Restatement* states that jurisdictional reasonableness in the extra-territorial application of U.S. law is not solely a matter of discretion, but required by principles of international law.

38. Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979). *See also* Montreal Trading, Ltd. v. Amax, Inc., 661 F.2d 864, 896 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982); Industrial Investment Development Corporation v. Mitsui & Co., 671 F.2d 876, 883-5 (5th Cir. 1982). Cf. Laker Airways Limited v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

There is also notable international support for the principle. A number of states, such as Canada, Switzerland and the United Kingdom have expressed the view that the widely accepted kindred doctrine of "moderation and restraint" is based on principles of international law that require each state to respect the sovereignty of every other state. Swiss authorities for example, "submit that this approach derives from the international legal principle of sovereign equality of states and two corollary rules: a state may only exercise jurisdiction in situations evidencing substantial links with it; and a state should refrain from intervening in the internal affairs of another state, directly or indirectly, especially in the sphere of the latter's territorial jurisdictional." Minimizing Conflicting Requirements: Approaches of "Moderation and Restraint," Report on OECD Committee on International Investment and Multinational Enterprise (1987), at 9-10. Other states have discovered support for the principle of reasonableness in the state practice of respect for the laws and policies of other nations. Meessen, "Antitrust Jurisdiction under Customary International Law," 78 AM. J. INT. L. 783,803 *et seq.* (1984).

39. *See* the comments of then Assistant Attorney General Shenefield in 1978:

> "I fully recognize that unique factors are involved in the foreign commerce aspects of enforcement and I intend to ensure that we give them adequate consideration. If we neglect to do so, then it is clear to me that the courts, under *Timberlane*, should rein us in."

Shenefield, "The Perspective of the U.S. Department of Justice," in *Perspective on the Extraterritorial Application of U.S. Antitrust and Other Laws* (J. Griffin ed. 1979).

40. S. 539, 100th Cong., 1st Sess. (1987): *see* 53 Fed. Reg. 21595 n. 114.

41. The draft does not say whether the FTC should be treated as a government or private plaintiff for this analysis. (*See also* n.12 above.)

American foreign policy, the courts followed that advice.[42] The fact that the opinion of the Executive Branch in the classic *Bernstein* cases was communicated in the form of a letter from the Department of State, and here would be communicated by the filing of a lawsuit, is immaterial. In any event, the difference is not explained.

A majority of the Supreme Court expressly rejected the *Bernstein* exception in *First National City Bank v. Banco Nacional de Cuba*, in 1972.[43] Only recently, the Third Circuit revisited the doctrine in *Environmental Tectonics v. W. S. Kirkpatrick, Inc.*, and again concluded "that the Department [of State's] legal conclusions as to the reach of the act of state doctrine are not controlling on the courts."[44] No court has adopted the position that Executive Branch lawsuits are exempt from the act of state doctrine. In *Associated Container Transportation (Australia), Ltd. v. United States*, the court simply decided that the invocation of the act of state defense to protect communications sought by a Civil Investigative Demand was premature.[45] Nothing in the court's discussion indicated, however, that the doctrine does not apply to government-initiated litigation.

D. Foreign Sovereign Compulsion

The Guidelines accept only the existence of "an implied (and thus limited) defense" based on "notions of comity," that is "not properly regarded as a legal defense in antitrust suits brought by the United States."[46] It is said to apply where: (1) the foreign sovereign actually compels the challenged conduct under circumstances in which a refusal to comply would give rise to significant penalties; (2) the foreign sovereign's command is within "the scope of its authority under its own laws";[47] (3) the compelled conduct did not occur wholly or primarily in the United States; and (4) U.S. deference to the foreign sovereign's action is warranted under the circumstances.

We consider each of these elements in turn.

The requirement that there be actual compulsion rather than mere encouragement or acquiescence by the foreign sovereign is a well established

42. *Supra* n.5.

43. 406 U.S. 759 (1972).

44. 1988-1 Trade Cas. (CCH) 67,994 at 58,096 (3d Cir. 1988). The decision itself reinforces the premise of judicial independence. The court disagreed with the Legal Adviser's suggestion that the act of state doctrine did not apply to the award of the contract in question, on the ground that the award might not have represented a sufficiently formal expression of Nigeria's public policy. It agreed, however, that adjudication of the case would not be embarrassing to the political branch's conduct of foreign relations, placing considerable weight on the Executive's opinion on the latter point.

45. 705 F.2d 53 (2d Cir. 1983).

46. 53 Fed. Reg. 21596 col. 1 and n.118.

47. 53 Fed. Reg. 21596.

element of the foreign sovereign compulsion defense.[48] The Guidelines add a gloss by stating that the refusal to comply with a foreign sovereign's mandate must "give rise to significant penalties (as opposed to the mere denial of benefits, for example)."[49] This "penalty/loss of benefits" distinction is inconsistent with *Texaco Maracaibo,* where the threat was loss of the right to export oil from Venezuela,[50] and with prior Antitrust Division practice.[51]

It would also be helpful for the Guidelines to state clearly that it is the fact of compulsion—not the form of compulsion—that should be the focus of any inquiry. In their amici brief in the *Matsushita* case the governments of Australia, Canada, France and the United Kingdom pointed out:

> [T]he determinative inquiry for a U.S. court is whether the foreign sovereign exercised its authority to mandate the relevant conduct. The fact that a foreign sovereign may express itself in a manner other than by explicit, compulsory orders may reflect a different style of governance, not a less intense involvement in the issue. . . . Inflexibility by U.S. courts in requiring explicit formal orders would discriminate improperly in favor of governments with centrally planned and highly regulated economies and would elevate the form of the foreign sovereign's involvement over the substance of that involvement.[52]

The Guidelines' second requirement, that the foreign sovereign's command must have been "within the scope of its authority under its own laws," raises the issue of the act of state doctrine. The plaintiff in *Texaco Maracaibo* contended that for the defense to prevail, the Venezuelan Government's acts must have been valid under Venezuelan law. The court rejected that contention because an inquiry into the validity of the acts was barred by the act of state doctrine.[53] Numerous cases[54] and

48. Cases in which the foreign government has specifically authorized and actively supervised the private conduct may qualify for the *Parker* defense: *see infra* II.E.

49. 53 Fed. Reg. 21596.

50. Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1294.

51. For example, in the *Oil Cartel* consent decrees, certain otherwise prohibited acts were exempted from the decrees if the defendant acted "pursuant to request or official pronouncement of policy" by a government within whose territory the act would be performed and "where failure to comply with [such] request or policy would expose [the defendant] to the risk of the present or future loss of the particular business in such foreign nation." *E.g.*, United States v. Standard Oil Co. (NJ), 1969 Trade Cas. Par. 72,742 § V(c)(2) (S.D.N.Y. 1968).

52. Amicus Brief at 10 (June 15, 1985).

53. 307 F. Supp. 1291, 1298-99.

54. *See, e.g.*, Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D.Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); Occidental of UMM al Qaywayn, Inc. v. A. Certain Cargo of Petroleum, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979); Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404 (9th Cir. 1983), *cert denied*, 464 U.S. 1040 (1984).

commentaries[55] support the correctness of that holding. After the publication of a similar statement in the original Guide[56] a Justice Department official conceded that the statement appeared to contradict the act of state doctrine and, consequently, needed to be clarified.[57] In our view this aspect in the Guidelines needs elaboration. Although the validity of the sovereign's act may have some bearing on the existence of compulsion[58] there is substantial authority to indicate that a court may be limited in any inquiry into the "validity" of the acts of a foreign sovereign.

Although the Guidelines recognize that the third element, the "territorial test," is often "difficult" to apply,[59] the Department states that it "will not generally recognize" the defense where the compelled conduct "plainly has occurred wholly or primarily in the United States. . . ."[60] This territorial preference is in accordance with the weight of opinion on the issue,[61] although it may be inconsistent with the decision in *Texaco Maracaibo*.[62]

Finally, the Department asserts that "foreign sovereign compulsion is not properly regarded as a legal defense in antitrust suits brought by the

55. *See, e.g.*, American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* § 443 (1987); J. Atwood & K. Brewster, *Antitrust and American Business Abroad* 265 (2d ed. 1981); 1 B. Hawk, *United States, Common Market and International Antitrust: A Comparative Guide* 614 (2d ed. 1987).

56. 1977 Guide, at 54 ("The act upon which the defense is based must be the act of a truly sovereign entity acting within the scope of its powers under the law of nations.")

57. Rosenthal, "An Overview of the Guide and its Objectives," in *Perspectives on the Extraterritorial Application of U.S. Antitrust and Other Laws* 82,91 (J. Griffin ed. 1979).

58. For example, defendant's failure to challenge a clearly unlawful order issued without even plausible authority is certainly relevant in determining actual compulsion. Good faith compliance is used as the test under the Uniform Commercial Code in connection with excuse of non-performance of contracts. Section 2-615 excuses non-performance where the party proves "compliance in good faith with any applicable foreign . . . governmental regulation or order whether or not it later proves to be invalid." U.C.C. § 2-615 (1977). *See generally* T. Quinn, *Uniform Commercial Code Commentary and Law Digest* 2-393 to 2-399 (1978).

59. 53 Fed. Reg. 21596.

60. *Id.*

61. Restatement (Third), *supra* note 23, at § 441 Comment b. *See* Linseman v. World Hockey Assn., 439 F. Supp. 1315, 1324-25 (D. Conn. 1977) (Canadian government compulsion order may not shield a boycott of a hockey league, implemented in the United States, of players under 20 years of age); United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231, 263 (1980), *appeal dismissed*, 451 U.S. 901 (1981). ("We cannot agree with the proposition that if a foreign state compels an American corporation to take actions in the United States which are intended to and do have severe adverse consequences to free and fair trade in the United States, the American corporation is thereby immunized from the full force of the laws of its own sovereign.")

62. Although the issue was not discussed directly, the defense was upheld as to a refusal to sell oil to a particular company after the oil had been processed in a bonded refinery in the United States.

United States,"[63] although it recognizes the defense in private suits. This follows from the Department's view that the defense is based solely on comity, together with its insistence that only the Executive Branch may evaluate comity-based issues in government-initiated suits.

Comity clearly is one basis of the defense but it is not the only basis. Courts and commentators have consistently identified at least two other bases—fairness to the defendant and the need to preserve the existence of commerce.[64]

It is a fundamental tenet of U.S. law that a defendant lacking free will should not be held liable for his conduct. This fairness policy was expressly recognized in *Texaco Maracaibo,* the one decision upholding the defense on the facts:

> "[I]t requires no precedent . . . to acknowledge that sovereignty includes the right to regulate commerce within the nation. When a nation compels a trade practice, firms there have no choice but to obey."[65]

Several leading treatises on international antitrust law cite "fairness" as a basis of the defense,[66] one citing it as the "most important" basis.[67] The only acknowledgment of the fairness rationale in the Guidelines appears in footnote 117: "abstract and undefined notions of 'fairness' to firms that engage in anticompetitive conduct should not obstruct the legitimate prosecution of antitrust offenses. . . ."[68] Given the well developed body of law on fairness, duress, necessity, mens rea and related concepts, "fairness" is no more "abstract" or "undefined" than other basic legal concepts employed in our jurisprudence for hundreds of years.

The third basis of the foreign sovereign compulsion defense is not mentioned in the Guidelines. That basis is the pragmatic judgment that the antitrust laws should yield where their application would eliminate, rather than restrain, commerce. As the Justice Department observed in defending limitations in the *Bechtel* consent decree, the goal of competition in U.S. commerce is not usually advanced by placing American firms in a

63. 53 Fed. Reg. 21596 n.118.

64. Even if comity were the only basis, there is no authority for the Guidelines' view that the defense would be inapplicable in government-initiated lawsuits.

65. 307 F. Supp. at 1298. *See also,* O.N.E. Shipping, Ltd. v. Flota Mercante Grancolombiana, 830 F.2d 449, 453 (2nd Cir. 1987), *cert. pending,* (no. 87-1350): ". . . where as here the conduct of the appellees has been compelled by the foreign government they are entitled to assert the defense of foreign government compulsion and the act of the state doctrine is applicable." (Footnote omitted.)

66. *Supra* note 55. *But see* Fugate, *Foreign Commerce and the Antitrust Laws,* section 2.26, 2.27 (3d ed. 1982).

67. Hawk, *supra* note 55, at 614.

68. 53 Fed. Reg. 21596, n.117.

position where it is impossible for them to conduct business.[69] The *Texaco Maracaibo* court explained this "self-evident" proposition as follows:

> Anticompetitive practices compelled by foreign nations are not restraints of commerce, as commerce is understood in the Sherman Act, because refusal to comply would put an end to commerce. American business abroad does not carry with it the freedom and protection of competition it enjoys here, and our courts cannot impose them. Commerce may exist at the will of the government, and to impose liability for obedience to that will would eliminate for many companies the ability to transact business in foreign lands. Were compulsion not a defense, American firms abroad faced with a government order would have to choose one country or the other in which to do business. The Sherman Act does not go so far.[70]

E. The Parker Doctrine

The Guidelines acknowledge that the Sherman Act does not apply to private anticompetitive conduct taken pursuant to clearly articulated policies of a state within our federal system, which is subject to the active supervision of officials within that state.[71] The Guidelines assert, however, that it would be inappropriate to apply such a state sovereignty defense to foreign commerce. Two principal reasons for this view are given. First, it is suggested that since the federal government retains authority, under the Supremacy Clause, to void state-promoted cartels, the federal interest in promoting competition is not fundamentally undermined by accepting the sovereignty of U.S. domestic states to promote anticompetitive conduct within their territory in isolated cases. This does not apply to international commerce. Second, to review the extent of foreign government officials' supervision of anticompetitive conduct within their territory "would require difficult inquiries into foreign sovereign's conduct of its own affairs."[72]

69. "[A] judgment without [the limiting provisions] would have jeopardized the continued conduct of any business by the defendants (and possibly others) in Arab Countries. . . ." Without exceptions the decree "may have appeared to impinge upon the sovereignty of Arab League Countries over their internal affairs with a possible result that, instead of opening up this commerce to United States Blacklisted Persons, it would be closed off entirely for all United States Prime Contractors and Subcontractors." Further, placing the defendants at a competitive disadvantage vis-a-vis other American companies and foreign contractors would be "a result inconsistent with the Department's objective, under the antitrust laws, to promote competition." Competitive Impact Statement for Proposed Consent Judgment in United States v. Bechtel Corp., 42 Fed. Reg. 3716, 3723 (Jan. 19, 1978). For the decree as entered, *see* 1979-1 Trade Cas. (CCH) ¶ 62,429 (N.D. Cal. 1979).

70. 307 F. Supp. 1291 at 1298.

71. 53 Fed. Reg. 21596 col. 3, citing Parker v. Brown, 317 U.S. 341 (1943) and Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985).

72. *See* the discussion at p. 21596 col. 3.

In *Parker v. Brown,* the Supreme Court looked to the intent of Congress in passing the Sherman Act and concluded that:

> There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations."[73]

There is nothing in the Sherman Act legislative history to indicate that the Congress intended it to reach foreign government-regulated conduct either. The Guidelines do not discuss how the Sherman Act can be enforced against such conduct without such a clear legislative intent.

The courts have properly recognized that Congress did not intend to exercise jurisdiction over all foreign conduct affecting U.S. markets, especially where "international complications [are] likely to arise" under conflict of law standards.[74] U.S. prosecution of foreign persons acting lawfully pursuant to the clearly articulated policies of foreign states and pursuant to ongoing supervision by those states is especially likely to create such international complications. Moreover, as the Supreme Court noted in considering the scope of proper U.S. maritime jurisdiction in foreign commerce, Congress should not be presumed to have intended U.S. commercial law enforcement jurisdiction to require the application of U.S. law in the face of competing laws enforced by foreign governments in respect of conduct with which this nation is less significantly connected, in the absence of clear language to that effect.[75] These precedents support the proposition that the *Parker* doctrine applies internationally.

Precedent aside, there are sound reasons for applying the *Parker* doctrine internationally. Sovereign foreign states, entitled as a matter of international law to equal status with the United States federal government, deserve at least as much respect for their regulatory actions as semi-sovereign states within our federal system.

The Guidelines' objection based on the alleged difficulty of reviewing foreign regulatory systems is not convincing. In *Southern Motor Carriers*[76] different states exercised different types and degrees of supervision over intrastate trucking rates. Determining whether these regulatory schemes reflected clearly articulated policy and active supervision posed no special problems for the Court even though it required factual inquiry into government conduct. The only concern might be an objection by foreign governments to U.S. courts scrutinizing their conduct at all. However, such scrutiny can be conducted without significant intrusion, particularly as the purpose of the scrutiny is to permit deference to foreign law, and

73. *Supra* n.3, at 350.
74. United States v. Aluminum Company of America, 148 F.2d 416, 443 (2d Cir. 1945).
75. Lauritzen v. Larsen, 345 U.S. 571, 581-82 (1953).
76. 471 U.S. 48 (1985).

to determine the fact, rather than the validity, of foreign government supervision.

F. The Noerr-Pennington Doctrine

For decades, the courts have ruled that the antitrust laws do not apply to political activity and thus do not interfere with the right of companies to petition government officials, even where the petitioning efforts have anticompetitive goals.[77] While the Supreme Court has not yet conclusively decided the question, the substantial weight of authority has supported application of this rule—the *Noerr-Pennington* doctrine—to efforts to petition foreign governments as well as domestic ones.[78] Heretofore, the Justice Department has supported international application of the rule.[79]

The proposed Guidelines depart from the longstanding Justice Department position by stating that the *Noerr-Pennington* doctrine "may not apply to the petitioning of foreign governments" and that only as a matter of policy will the Department "generally" not prosecute foreign political activity.[80] Footnotes give prominence to *dicta* in two lower court decisions to the effect that *Noerr* may not apply internationally,[81] and the text

77. *E.g.*, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

78. *E.g.*, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) (by implication); American Banana Co. v. United Fruit Co., 213 U.S. 347, 358 (1909) ("It is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper.") (dictum); Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358 (5th Cir. 1983).

79. *E.g.*, Antitrust Guide for International Operations 63 (1977); United States v. Watchmakers of Switzerland Information Center, 1965 Trade Cas. Par. 71,352 § XI(E)(5) (S.D.N.Y. 1965) (consent decree). *See also* C. Stark, (speech before World Trade Institute seminar on international antitrust) *"Recent International Antitrust Development"* 5-10 (May 12, 1983) (the *Coastal States* holding is "eminently sensible" and "is the view the Antitrust Division has taken for some time").

80. 53 Fed. Reg. at 21597 and 21615.

81. 53 Fed. Reg. 21597 n.129, 21615 n.229.

The *Guidelines'* citations overstate the weight entitled to the two lower court opinions, in several respects. The relevant discussion in *Occidental Petroleum* appears only in dictum in the district court opinion and played no role in the Ninth Circuit's *per curiam* affirmance on other grounds, contrary to what is suggested at 53 Fed. Reg. 21597 n.129. *See* Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 108 (C.D. Cal.1971), *Aff'd per curiam on other grounds*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972). Australia/Eastern U.S.A. Shipping Conference, 537 F. Supp. 807 (D.D.C. 1982), dealt with enforcement of a C.I.D. It is, accordingly, hardly dispositive on the scope of *Noerr*, since even domestic *Noerr* activity is subject to discovery and other investigative processes. *See e.g.*, Associated Container Transp. (Australia) Ltd. v. United States, 705 F.2d 53 (2d Cir. 1983); North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 666 F.2d 50 (4th Cir. 1981); Stark, *supra* note 79, at 9 (noting that the Justice Department in the C.I.D.

suggests further skepticism by emphasizing the First Amendment rationale of the *Noerr* doctrine, which of course is only one of the several bases of the doctrine. The most recent and authoritative decision on the issue—Judge Rubin's decision for the Fifth Circuit in *Coastal States*—is cited only as "*but see*."[82]

The basic rationale of *Noerr-Pennington* is that the Sherman Act cannot reasonably be construed as restricting political activity. First Amendment considerations play a part in the analysis, but only a part.[83] Use of the U.S. antitrust laws to regulate foreign political activity could be offensive to our trading partners, damaging to the ability of U.S. owned multinational firms to operate abroad,[84] and in all likelihood in violation of international law. Treating this simply as an issue of prosecutorial discretion invites unwarranted treble-damage litigation and leaves the U.S. business community without the legal guidance that the Guidelines seek to provide. In fairness to businesses engaged in foreign commerce, acts that would be protected if done in the United States should have the same treatment in a United States Court if done abroad. Accordingly, it is recommended that the Department should reiterate its support for *Coastal States* and for the international application of the *Noerr* doctrine.

III. Substantive Antitrust Issues

A. Mergers

The draft Guidelines' discussion of mergers focuses on Justice Department enforcement policy and does not discuss established precedent.[85] While as a general matter we question this omission in a guide used by non-specialists and businessmen, most of the merger analysis is familiar, since it relies almost solely upon and restates the Department's 1984 Merger Guidelines.[86]

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shipping litigation agreed with the respondents that *Noerr* would ultimately shield contacts with foreign governments from any antitrust liability). Finally, the *Guidelines* fail to note that district court's *Australia/Eastern* was vacated as moot on the government's own motion. Australia/Eastern U.S.A. Shipping Conference, Nos. 82-1516 & 82-1683 (D.C. Cir. Aug. 27, 1986).

82. The *Coastal States* decision was endorsed in Stark, *supra* note 79, at 6, in which the Chief of the Department's Foreign Commerce Section persuasively outlined the merits of the decision.

83. In its review of the origins and scope of the *Noerr* doctrine, the Supreme Court's most recent decision on the subject makes barely a mention of the First Amendment. Allied Tube & Conduit Corp. v. Indian Head, Inc., 108 S.Ct. 1931 (1988).

84. Take, for example, Case 15 in the *Guidelines*. If Alpha, the foreign subsidiary of a U.S. company, were unable to participate in Country A's advisory council of producers, it would be severely handicapped in its ability to protect its export position in that country.

85. Moreover, as previously noted, the absence of a coordinated Federal Trade Commission policy on merger enforcement raises a real possibility of dual enforcement standards.

86. U.S. Department of Justice Merger Guidelines (June 14, 1984) (1984 Merger Guide-

In one important respect, however, the draft Guidelines diverge even from their stated goal: they conflict with a key part of the 1984 Merger Guidelines, the Department's previously announced "internal antitrust enforcement policies." The result is likely to be confusion and a reduction in the value of the Guidelines as a practical guide.[87]

In the 1984 Merger Guidelines, the Department stated that in highly concentrated markets—those with a post-merger Herfindahl-Hirschman Index (HHI) above 1800—it was "likely" to challenge a merger that increased the HHI by more than fifty points, unless the existence of specified factors such as ease of entry, a gain in efficiencies, the existence of foreign competition, or other market conditions reduced the likelihood that the transaction would substantially lessen competition.[88] In contrast, where such a merger would increase the HHI by more than 100 points, the Department stated that these factors would be extremely unlikely to stave off a challenge, since "only in extraordinary cases will such factors establish that the merger is not likely to lessen competition."[89]

The new Guidelines appear to reveal a change in the latter policy. The Department now states the proposition the opposite way: not only will it not virtually "automatically" challenge a merger in a highly concentrated market causing an increase of more than 100 in the HHI, but it will have to be convinced, by a "much more extensive analysis" of non-numerical factors, that "such mergers would create, enhance, or facilitate the exercise of market power."[90] This language implies a significant shift in the presumptions accorded the concentration thresholds, and greatly reduces the significance of the numerical index itself. While this is probably a more accurate description of current Division practice than are the 1984 Guidelines, there is a confusion that should be clarified in the final version of the Guidelines.

B. Joint Ventures

The discussion of joint ventures is helpful, and we have only certain specific comments. The proposed general Guidelines regarding joint ven-

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lines), *supra* note 10. The only exception is the reference to a speech by Assistant Attorney General Charles F. Rule, 53 Fed. Reg. 21589 n. 65 (June 8, 1988).

Nothing in the draft Guidelines suggests that its merger analysis applies only to international transactions, and, given the fact that the 1984 Guidelines by their terms apply to both domestic and international transactions (§ 2.34), there is no particular reason the draft Guidelines' analysis should differ from the Department's normal merger review process except to the extent international doctrines described elsewhere in the draft Guidelines (e.g., the "comity"-related defenses) would require this result.

87. 53 Fed. Reg. 21584, col. 3.

88. 1984 Merger Guidelines § 3.11(c), *citing* factors set forth at §§ 3.2-3.5.

89. *Id.* § 3.11(c).

90. 53 Fed. Reg. 21589 n.58.

tures are reasonable to the extent that they suggest that anticompetitive effects in the joint venture market are unlikely if a merger of the joint venture participants would not be considered anticompetitive because the merger would fall within a "safe harbor" as determined by the Herfindahl-Hirschman Index (HHI).[91] We question, however, the use here of the phrase "could not be anticompetitive" as failing to make an appropriate distinction between enforcement policy using the HHI and all conceivable factual situations.

The two-step analysis proposed for joint ventures involves identifying and analyzing, first, the joint venture market and, second, any spill-over markets that might be affected. The last three paragraphs regarding the step 1 analysis of the joint venture market,[92] however, may go beyond an appropriate statement of rule of reason analysis in an apparent effort to cure a past excessive focus on exclusion of competitors. No support is shown for the proposition that "exclusion from membership in a joint venture is rarely anticompetitive." That statement appears inconsistent with analysis by analogy to mergers. Similarly, the next paragraph overstates the situation and appears to exclude rule of reason analysis of the actual facts by saying, for example, that "selectivity in membership . . . generally enhances . . . procompetitive potential," and that "only where a joint venture is the only one of its kind possible in the relevant market is there any possibility of concern about the exclusionary effects of limited membership."

In the discussion of step 2, Spill-Over Markets,[93] the draft guidelines indicate that the existence of procedural or operational safeguards may lead to the conclusion, without an elaborate structural analysis, that there is no threat of anticompetitive effects. If there are no such safeguards, the Department would, it is stated, examine market concentration and other relevant economic factors, such as market shares and the existence of "strong disincentives" for collusion, to determine whether anticompetitive effects may occur. In this respect, the draft Guidelines may not provide adequate guidance as to when safeguards are necessary or desirable to minimize the risk of such effects.

C. Vertical Restraints

The Sections as a general matter endorse the now widely held view, reflected in both these Guidelines and the Department's Vertical Restraints Guidelines, that non-price vertical restraints are procompetitive in the great majority of circumstances.

91. 53 Fed. Reg. 21590, col. 2-3.
92. 53 Fed. Reg. 21590, col. 3 to 21591, col. 1.
93. 53 Fed. Reg. 21591, cols. 2 and 3.

The hypothetical examples in Cases 7 and 8 are applications of the antitrust law as it has developed since the *Sylvania* decision,[94] and incorporate most of the suggestions made by the 1984 Task Force Report of the ABA Antitrust Section on the 1977 Guidelines.[95]

Case 7 outlines how, in the Justice Department's view, appointment of an exclusive reciprocal foreign distributor does not by itself raise concerns under the U.S. antitrust laws. It notes that, by contrast with the position taken in the 1977 Guide (which concluded that such an arrangement would be illegal *per se* under the *Timken* case), the arrangement would be examined to see if it were an unlawful horizontal market allocation or a possible procompetitive vertical arrangement. If the latter, it would be analyzed under the rule of reason, applying the standards set out in the Merger Guidelines.

This approach avoids the over-simplified *per se* characterization of such restraints in the 1977 Guide. The draft Guidelines, however, may have moved too far in the opposite direction without sufficiently elaborate analysis of potential anticompetitive effects. If, for example, the parties are direct, actual or potential competitors, there must be some room for doubt about the initial determination that the arrangement is not an unlawful allocation of markets. While the *Timken* and *Topco* cases on which the Department relied in 1977 have been somewhat eroded through the years, for example, by the *BMI* and *National Collegiate (Football)* cases, the Supreme Court in the *Business Electronics* case in 1988 specifically stated that, "a horizontal agreement to divide territories is *per se* illegal," citing *Topco*.[96] *Copperweld* limited *Timken* only with respect to intra-enterprise conspiracies, and not the holding finding illegal cartel activity.[97] The Guidelines should make it clear that the appointment of a competitor as an exclusive distributor is not a risk-free practice.

Footnote 186 refers to a naked restraint on output or price of a related product, that has no plausible connection to efficiency, as being subject to careful scrutiny. This is certainly correct, but such a restraint would be horizontal, and the example does little to illuminate the discussion of *vertical* restraints.

Case 8 discusses the use of a distributor for imported products whose distribution agreement contains territorial and manufacturer restrictions.

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94. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

95. *See* n.1 *supra*.

96. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. Topco Associates, Inc., 405 U.S. 596 (1972); Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979); National Collegiate Athletic Association v. Board of Regents, 468 U.S. 85 (1984); Business Electronics Corporation v. Sharp Electronics Corporation, 108 S. Ct. 1515 (1988).

97. Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731 (1984).

Again, since it is hypothesized that the manufacturers in question are "significant, but not dominant,"[98] with several other distributors available to handle products of other manufacturers, the example is a straightforward statement of current law.

Discussion of Justice Department enforcement policy with respect to distribution in the international context would be much more helpful if there were a greater elaboration of the risk factors present in distribution arrangements. Practitioners are now generally aware that non-price vertical restraints are defensible under the antitrust laws; what they need, in addition to the existing hypotheticals, are practical examples of the possible limits of legality in the international context. This is particularly important, given the lack of Justice Department enforcement activity in this area. Discussion of an international distribution arrangement in the context of an attempted monopolization scheme by a domestic manufacturer, or a viable "raising rivals' costs" scheme, for example, would provide the kind of helpful information that would make the Guidelines more valuable.

The Department observes that "Under special market conditions, a vertical restraint might also result in the anticompetitive exclusion of revivals from the market by denying them access to an essential input." A sentence should be added to clarify that, so far as patent licensing is concerned, denial of access to a patented invention is permissible even if the invention is an essential input, because of the statutory right of a patentee to exclude others from the use of its patented invention.

D. Intellectual Property

The Guidelines realistically acknowledge the importance of intellectual property rights in creating and maintaining competition. In general, the sections dealing with intellectual property are consistent with current law, and also the comments made by the American Bar Association Task Force on the 1977 Guide.[99] The Sections nevertheless submit the following comments.

First, there are some areas where it should be made clearer that the Guidelines state enforcement policy not the law. For example, it is stated that a patent or other intellectual property should not be assumed to delimit the relevant market.[100] While this may be a reasonable expression of enforcement policy, it should be acknowledged that the law is not consistent in this area.[101]

98. 53 Fed. Reg. at 21607.

99. *See* n. 1 *supra*.

100. 53 Fed. Reg. 21594, col. 2.

101. *Compare* Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861 (Fed. Cir. 1985); USM Corp. v. SPS Technologies Inc., 694 F.2d 505 (7th Cir. 1982), *cert. denied*, 462 U.S. 1107 (1983);

The intellectual property sections contain other examples of the same general problem. For instance, the rule of reason analysis stated in section I.B.5[102] also appears to be more lenient than traditional rule of reason analysis. The Department's enforcement analysis looks at the agreement as a whole and does not consider whether a particular term is more restrictive than necessary. While we acknowledge the care taken to label much of this section as the Department's approach, the references to "the rule of reason" in the first and last paragraphs under the heading "Rule of Reason Analysis" should be changed to emphasize the internal nature of the test.

At times, the draft clearly goes beyond accepted law. The statement that the Department "would generally not be concerned that a horizontal intellectual property licensing arrangement (for example, a patent pool) was not opened to competitors,"[103] is a case in point. It appears to suggest that most patent pools are per se legal. While the Guidelines' comment that "a patentee should not be compelled to forego its statutory right to exclude . . . because it has chosen not to exclude a few" may be appropriate, that factor alone cannot preclude a full rule of reason examination of *all* factors. This point is particularly important for a joint venture that would not survive analysis under merger standards.

Similarly, Case 11 (Exclusive Patent Cross Licenses with Grantbacks) may overstate the law in at least two important respects. The first occurs in the analysis of exclusive grantbacks.[104] As noted elsewhere in these comments, exclusive restrictions should be subject to rule of reason analysis. Exclusive and non-exclusive grantbacks can lead to different results, and each should be evaluated in the context of the particular license, parties and market.[105]

Case 11 may also overstate current law with the statement that "If an outright acquisition of Beta's technology would not violate the antitrust laws, then either would these licenses violate the law."[106] The Department's position would be better stated as an enforcement judgment that these cases are so unlikely to pose anticompetitive problems that enforcement action is not justified.

Second, the discussion of joint ventures that include intellectual property elements may at times confuse the reader with respect to enforcement policy. In step 1, Joint Venture Markets, there is a troublesome incon-

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with Digidyne Corp. v. Data General Corp., 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985).

102. 53 Fed. Reg. 21593, col. 3.

103. 53 Fed. Reg. 21594, col. 2.

104. 53 Fed. Reg. 21611, col. 2.

105. *See generally*, ABA Section of Antitrust Law, *U.S. Antitrust Law and International Patent and Know-How Licensing*, 53-62 (1981) (Monograph No.6).

106. 53 Fed. Reg. 21611, col. 2.

sistency between the statement that "the actual or potential existence of four comparable R&D efforts creates a 'safe harbor' "[107] and the Merger Guidelines. Under the Merger Guidelines, there would be an HHI for the competing producers in this case of over 1650 (assuming the third largest producer has a 10 percent market share), placing the pre-joint venture market in the moderate range. The joint venture would raise the HHI by over 2000 to a post-joint venture HHI exceeding 3600. Thus, it would not qualify for "safe harbor" treatment.[108] The possibility of four equal R&D joint ventures, postulated in Case 6, would be likely to have a post-joint venture HHI in excess of 2500. Traditional analysis would not lead to a "safe harbor" conclusion in that case either. For these reasons and because five or more similar joint ventures seem unlikely, the proposed "general rule" regarding four or more comparable R&D efforts should be reconsidered.

The discussion of Case 6, a Research and Development Joint Venture, appropriately states that the R&D agreement "should be analyzed as a joint venture that eliminates horizontal competitors in a relevant R&D market."[109] We question, however, the unconditional statement that the licensing agreement should be analyzed as a vertical restraint. The characterization of the licensing agreement as vertical may not be appropriate because the joint venture is controlled equally by the four owners. Thus, with the votes of three owners required for a majority (at least two of which would be U.S. companies) the joint venture appears incapable of making the independent licensing decisions characteristic of a licensor in a typical vertical agreement. Furthermore, the statement that joint venture participants are prohibited from competing with the joint venture in developing related technology (cited in justification of a vertical analysis) appears at odds with the later argument that the joint venturers are *not* prevented from licensing competing technologies.[110] Although freedom to license competing technologies is one procompetitive factor to be considered in a rule of reason analysis, the continuing restraint on R&D competition by three of the four largest U.S. companies and their control of the joint venture may be of competitive significance.

107. 53 Fed. Reg. 21605, col. 2.

108. *See* 53 Fed. Reg. 21589, nn. 57-58.

109. 53 Fed. Reg. 21604, col. 2. That vertical analysis of the licensing agreement is mentioned also at the paragraph bridging pages 21605-6, where the Guidelines say that "These license restrictions are properly analyzed as vertical restrictions because, by the terms of the joint venture agreement, the joint venture participants are prohibited from competing with the joint venture in developing related technology," and the footnote says that "to the extent that any horizontal restraint on technology development was an issue, it would be resolved in step 1 of the analysis."

110. 53 Fed. Reg. 21606, col. 1.

Third, the draft Guidelines at times do not acknowledge that certain restrictions may hamper rather than help innovation. The first sentence of footnote 195 in Case 10, Vertical Restraints in a Patent License, says "If AGPLEX proved to be so superior to uncoated safety eyeglasses that it truly monopolized the relevant market, then the coordination of competition among producers of AGPLEX-coated eyeglasses would not violate the antitrust laws."[111] This does not address the possibility that, absent such "coordination of competition," one of the licensees might be more likely to design around the patent. Since the licensees are bound not to deal in competing products, it is less likely that one of them would seek to develop an alternative during the term of the AGPLEX patent. Thus, the sentence quoted above should be stated as a rule of reason factor rather than as defining a situation as *per se* legal.

Similarly, the statement that "In general, the cross-licensing of competing or potentially competing technologies is procompetitive because it expands access to technology"[112] should be rephrased to suggest that cross-licensing *may be* procompetitive. It is not *always* procompetitive, as the proposed Guidelines now suggest, because cross-licensing—especially with grantbacks—may deter development of alternatives and may deter each party from licensing a new entrant or relatively weak participant in the market, either of which might be more procompetitive.

Finally, the Guidelines do not offer sufficient guidance in at least two instances. The first involves the analysis of technology markets in Case 11. The Department would focus "on the relative efficiency of the available technologies and the time that it would like[ly] take for comparably efficient alternative technologies to be brought to the market," and would attempt to "qualitatively assess the likely future strength of such technologies in the market as well as whether alternative technologies would likely be brought to the market sufficiently promptly, so as to undercut any attempted exercise of market power."[113] We question whether the Department, businesses, or their advisers can make practical assessments regarding the future availability of alternative technologies with sufficient accuracy to form a basis for antitrust enforcement decisions and corresponding business decisions.

Second, the discussion of safeguards in cooperative arrangements is insufficiently comprehensive. In step 2, Spill-Over Markets, Case 6 refers to the use of safeguards without guidance on when such safeguards should

111. 53 Fed. Reg. 21609.
112. 53 Fed. Reg. 21610, col. 3.
113. 53 Fed. Reg. 21611, col. 3.

be employed, other than where price and cost data are given to the joint venture.[114]

In addition to the four areas outlined above, we would offer the following detailed comments.

The phrase "some exclusive use," used twice at the top of column 3 on page 21593, is unclear. "Exclusive use in a defined area" would be a better phrase. The definition of a vertical restraint in the second full sentence on page 21594 also is unclear.

The introduction to Case 11 (Exclusive Patent Cross-Licenses with Grantbacks), at page 21610, column 2, concludes with a statement that "Finally, Alpha and Beta agree that X they produce with the licensed technology will not be marketed in the home country of the other party." Since this case deals with patents, we suggest that "with the licensed technology" be changed to "under the patent license." Similarly, the analysis of "Restriction on Competition between Licensor and Licensee" beginning at column 2 on page 21611 should be directed to patented technology. Besides the point that technology licenses are discussed in Case 12, and not in Case 11, it is important for the discussion as a whole to make clear the right of a U.S. patent holder to bind a foreign licensee not to sell products manufactured under its patent license in the United States.[115]

The restriction on the use of competing technologies, that Amer-Eye not use any other coating on its safety glasses, is said by the Department to be procompetitive. However, the restriction goes beyond the scope of the patent and would appear to use the monopoly of the patent to prevent manufacture in other fields and possibly to be illegal. The calculation of royalties based on AmerGlass's total sales, including non-patented eye glasses, might also be illegal under the Supreme Court holding in *Zenith Radio Corp. v. Hazeltine Research, Inc.*,[116] that a patentee cannot "coerce an agreement to pay a percentage royalty on merchandise not employing the discovery which the claims of the patent define." That case should be mentioned in the draft Guidelines.

While Case 11 appears to be based on the right of a patent owner to exclude others, the patent owner's rights in Case 11 are limited because the case refers to process patents rather than product patents. As the case

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114. *See* discussion at III.B. *supra*.

115. 1 Hawk, *United States, Common Market and International Antitrust: A Comparative Guide*, 388-389 (2d Ed. 1986):

> "Contractual restrictions on foreign licensees not to export to the United States (import bans) and restrains on U.S. licensees not to export (export bans) have been almost invariably upheld where they are not part of a cartel."

116. 395 U.S. 100 (1969) at 140.

acknowledges in the paragraph on Restriction on Competition between Licensor and Licensee, beginning at the middle of column 2 on page 21611, importation and sale in the United States of a product manufactured outside the United States by a patented process does not infringe the U.S. process patent, although other relief may be available.

If Case 11 is intended to deal with technology which is fully protected by U.S. patents, the example would be clarified by referring to product patents rather than process patents. Product patents probably should be mentioned in the case in any event. If the intent is to deal with the more difficult issue of process patents under current U.S. law, the analysis should discuss how the ownership of such patents affects the Department's analysis.

Case 12 (Know-how Technology Transfer Agreement with Exclusive Territories) makes the welcome statement that restrictions may be more necessary in a know-how license (because of the absence of statutory protection) than in a patent license. However it fails to direct sufficient attention to the importance and useful life of the know-how as factors in evaluating a know-how license under the rule of reason.

The analogy to merger analysis, used throughout the proposed Guidelines, has less relevance where, as in Case 12, the license is for a limited period. That factor should be mentioned in Case 12.

E. Trade Law

As the proposed Guidelines note, trade laws and antitrust laws are often in conflict: trade laws are designed to protect U.S. industries from certain foreign competition, while the antitrust laws are designed to promote competition. These conflicting policies, moreover, are administered by different agencies of the U.S. government, with different statutory mandates and political agendas. The Guidelines, we believe, inadequately address this tension between trade and antitrust law and policies, and the antitrust issues that can arise in a U.S. trade law context.

Most importantly, we believe that the Guidelines present an incorrect characterization of the legal significance, under the antitrust laws, of U.S. government involvement in export decisions made by overseas firms. The Guidelines (specifically Case 16) state that "[f]or reasons of comity . . . the Department would not likely challenge a *voluntary* export restraint that clearly arose from the decision and official action of the government of A in response to specific trade concerns expressed by the U.S. government" (emphasis added).[117] We believe this exaggerates the legal sig-

117. 53 Fed. Reg. 21616, col. 1.

nificance of any action by U.S. government officials to encourage "voluntary export restraints" by exporters, particularly in a context in which, stripped of any comity considerations, a likely *per se* antitrust offense is being committed by exporters to the U.S. in their agreement to restrain export volumes or adhere to certain pricing guidelines.

The issue is an important one, since the past several decades have witnessed several significant efforts by U.S. government trade officials to limit or otherwise manage the volume or price of exports to the United States. In 1968, for example, a voluntary steel export restraint agreement was negotiated by the U.S. government with European and Japanese steel producers to forestall possible quota legislation by Congress. In 1981, the Japanese government imposed restraints on exports by its automobile manufacturers, with the encouragement of the U.S. government, following the rejection of a petition for import relief filed by domestic auto interests. In 1982 the EC agreed with the U.S. to limit exports of steel to the U.S. And in 1986, the Japanese and U.S. governments entered into a comprehensive agreement designed to prevent and monitor dumping of Japanese semiconductor chips in the U.S.

Antitrust concerns were raised in all four situations and, in the three in which the Department of Justice expressed its views, no mention was made of the legal significance of the role of U.S. government involvement in the export restraints. In the Japanese automobile case, Attorney General Smith opined only that the Japanese government's involvement would likely support a sovereign compulsion defense to antitrust liability.[118] In the semiconductor chip case, the Acting Attorney General stated that antitrust liability would not attach to certain pricing arrangements between a Japanese producer and a U.S. related party, if that related party were owned and controlled by the Japanese producer/exporter; comity was not mentioned.[119] In the third case, Assistant Attorney General Baxter stated merely that, on the basis of the EC's "representation" that the restrictions would be mandatory controls imposed by governmental entities acting within their sovereign powers, the foreign sovereign compulsion defense would apply.[120] In the other case, involving the 1968 steel import restraints, antitrust concerns were raised in private litigation challenging those restraints. The District Court in *Consumers Union of U.S., Inc. v. Rogers*[121] stated indictum that the Executive Branch could not confer

118. 1981 Trade Cas. (CCH) Par. 63,998 (1981).

119. 25 I.L.M. 1428 (1986).

120. *See* exchange of letters dated October 21, 1982 between Sir Roy Denman (Head of the Delegation of the EC Commission) to William F. Baxter (Assistant Attorney General, Antitrust Division).

121. 352 F. Supp. 1319, 1323 (D.D.C. 1973).

antitrust immunity on the export restraint arrangement it had negotiated. The Court of Appeals vacated that portion of the District Court's opinion on grounds of mootness (because the antitrust claims had been withdrawn),[122] and ultimately legislation was adopted conferring antitrust immunity on the steel arrangements.[123]

In the automobile case the restraints were imposed pursuant to apparent official foreign government action. In the others, foreign firms appear to have agreed (often with encouragement or at the instigation of their government, and in each case with active U.S. government involvement) or complied with their respective governments' policy to restrain exports to the U.S. In none of these cases were the actions of U.S. officials relied on or found to be a basis for antitrust immunity, and the Guidelines themselves cite no authority for their assertion that the discretionary, nonstatutory activities of a U.S. trade official can be the basis for a defense to otherwise unlawful horizontal behavior.

The comity discussion in Case 16 should not therefore suggest to foreign companies that their otherwise objectionable behavior can be immunized from Department of Justice antitrust enforcement because a U.S. trade official suggested that they enter into a voluntary export restraint agreement. Such a result would be a departure from the position enunciated at page 22 of the 1977 Guide that informal encouragement by a senior U.S. government official "would not convey any sort of antitrust exemption." In fact, the only difference between Case 14 (International Cartel Activities, in which the Guidelines find an unlawful cartel), and Case 16 (in which an arguably horizontal export restraint agreement is not challenged) is that in the latter a U.S. government trade official suggested that the trade restraint be entered into. It is hard to understand how the conduct in Case 16 can avoid U.S. antitrust prosecution unless it meets a *Parker* standard as involving a clearly articulated policy of the *foreign* government with ongoing monitoring by that government.[124]

In practical terms, an approach to foreign governments to implement export restraints, minimum export prices or similar controls, such as occurred in the above examples, may be no more than an expression of an enforcement position by U.S. government agencies with trade responsibilities, and not a U.S. government position in which, *inter alia,*

122. Consumers Union of U.S., Inc. v. Kissinger, 506 F.2d 136, 144 (D.C. Cir. 1974), *cert. denied,* 421 U.S. 1004 (1975).

123. 19 U.S.C. § 2485.

124. It is curious, and perhaps inconsistent, that the draft Guidelines set forth a foreign sovereign compulsion standard stricter than that for domestic "state action," while allowing the antitrust laws to be overridden by activities of a U.S. trade official that have no legislative basis at all.

competition law and policy considerations have been addressed. While the Justice Department might decline to prosecute in such a case for political or diplomatic reasons, the informal involvement of U.S. trade officials would not protect the foreign companies from antitrust claims brought by private parties or state attorneys general.[125]

A second trade/antitrust law concern raised by the proposed Guidelines is their inadequate attention to the antitrust implications of participation in trade law proceedings by U.S. firms. Case 17—Settling a Trade Case—discusses only the narrow situation of a price-fixing agreement entered into to "settle" an antidumping case. In noting that no antitrust exemption would apply to such an arrangement, because done *outside* the provisions of the antidumping law, the Guidelines state further that no antitrust exemption would extend "to any anticompetitive provisions in a suspension agreement (i.e., to one done *pursuant* to statutory settlement procedures) that were not necessary to comply with the antidumping law."[126] Since an antidumping suspension agreement (under 19 U.S.C. § 1673c) is inherently anticompetitive (requiring either quantitative limits on or cessation of exports, or an increase in prices), it would have been helpful to know what the Department had in mind in referring to anticompetitive provisions that were not necessary to comply with the law.

The Guidelines should also address antitrust issues that can arise during the prosecution of a trade law case. Proceedings under antidumping, countervailing duty and escape clause (Section 201) laws concern the effect of imports on the competing U.S. industry. Assuming that the trade law proceeding is not a sham under *Noerr,* questions exist concerning how much members of a U.S. industry may cooperate in prosecuting a trade case without incurring antitrust liability. *Noerr* and the statutory remedies provided by the trade laws themselves would appear to confer authorization for some such cooperation which could, with appropriate protective measures, include exchange of data and collaboration on the presentation of an "injury" case. A similar authorization of limited cooperation would appear to extend to exporters who are respondents in a trade law proceeding to allow them to cooperate in their defense and possibly in the negotiations of any suspension agreement.

125. Cf. Otter Tail Power Co. v. United States, 410 U.S. 366, 378-791 (1973); National Gerimedical Hospital & Gerontology Center v. Blue Cross, 452 U.S. 378 (1981). The Department of Justice in 1983 issued CIDs to U.S. subsidiaries of Japanese semiconductor companies that had allegedly fixed prices after meeting with a high U.S. Commerce Department official who urged the companies to take steps to avoid dumping into the United States. *See also* p. 22 of the 1977 Guide, referred to above.

126. 53 Fed. Reg. 21616, col. 3.

Conclusion

The publication of an up-to-date and detailed statement of the Department's policy in this area is welcomed, and should be of substantial assistance to organizations, and their advisers, involved in transnational operations of the kind dealt with by the draft Guidelines. The Sections hope that the comments in this report will be seriously considered by the Department in the preparation of a final version of the Guidelines that provides comprehensive guidance on these issues.

Respectfully submitted,

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August 1988