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The Antitrust Guide for International Operations - Another Point of View

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The Antitrust Guide for International Operations—Another Point of View

Volume 11 of the *Cornell International Law Journal* contains an article by Joseph P. Griffin[1] critiquing the Justice Department's 1977 *Antitrust Guide for International Operations*[2] and a critical rejoinder by Professor Donald I. Baker.[3] Professor Baker was one of the principal drafters of the *Antitrust Guide* while serving as Assistant Attorney General in charge of the Antitrust Division prior to joining the Cornell law faculty. Thus, his remarks cannot be judged as those of an impartial observer. Accordingly, the object of this Comment is to present a different perspective on the *Antitrust Guide* and to elaborate on certain issues implicitly raised but not pursued by Mr. Griffin or Professor Baker.

I. The *Antitrust Guide* as a Response to Business Criticism

It would be a mistake to believe that the *Antitrust Guide* was an altruistically inspired effort by the Justice Department to sweep away the cobwebs of misunderstanding which surround the application of United States antitrust laws to international business operations.[4] The *Antitrust Guide,* in reality, is a response to the criticism of an increasingly concerned and vocal American business community.[5] The hypothetical examples in the *Antitrust Guide* are

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[1]Griffin, *A Critique of The Justice Department's Antitrust Guide for International Operations,* 11 CORNELL INT'L L.J. 215 (1978).

[2]ANTITRUST DIVISION, U.S. DEPT. OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977) [hereinafter cited as ANTITRUST GUIDE], *reprinted in* 799 ANTITRUST & TRADE REG. REP. (BNA) at E-1.

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

[4]"'The guide is intended to give the business community, the bar, and the Antitrust Division's own staff some sense of the Division's priorities and concerns. . . . It is a very deliberate attempt to make the subject less arcane, less technical, and less mysterious. . . ." *Id.* at 255.

[5]*See, e.g.,* THE INTERNATIONAL IMPLICATIONS OF U.S. ANTITRUST LAWS: AN ISSUE ANALYSIS OF GLOBAL ECONOMIC REALITY, INTERNATIONAL ECONOMIC AFFAIRS DEPARTMENT, THE NATIONAL ASSOCIATION OF MANUFACTURERS (a report to Mr. Peter Chumbris, Subcommittee on Antitrust

designed not so much to aid the ordinary business person as to demonstrate the "reasonableness" of the Antitrust Division's enforcement policies. These examples skillfully create the illusion that an American business may engage in a wide variety of international operations without incurring liability under the antitrust laws.[6]

But the hypotheticals are carefully qualified and the conclusions regarding lawful spheres of activity are narrowly drawn. For example, in Case B, involving a United States firm's acquisition of a foreign firm, the *Guide*'s conclusion that this transaction probably would not contravene the antitrust laws is qualified in the event that the foreign firm, Glint, holds patent (or trademark?) rights to its new product.[7] Yet, who can doubt that the Glints of this world will have some form of proprietary protection for their valuable new products? Similar qualifications abound throughout the *Guide*. As Professor Baker concedes, the *Guide* "does not resolve all confusion and fears,"[8] and it is no substitute for "experienced antitrust counsel."[9] Professor Baker concludes, however, that if the *Guide* "simply reduces some substantial part of the confusion and fears in this area, it will have succeeded in all that its creators could have hoped for."[10]

This concluding statement reflects a disturbing lack of concern for the adverse social welfare consequences of an unnecessarily vague or overly zealous antitrust enforcement policy. Furthermore, Professor Baker seems to discount the possibility of establishing a more concrete and balanced enforcement policy by innovative approaches. These points are discussed below.

II. Some Economic Aspects of Current Antitrust Policy

A respected, if not universally accepted, body of economic literature argues that a perfectly competitive market is not only an unrealizable goal[11] but

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and Monopoly, Senate Judiciary Committee, Sept. 11, 1974) [hereinafter cited as NAM REPORT]. The foregoing report, the results of a ten-month study, concludes:

> U.S. companies are handicapped in their international competitive efforts as exporters and foreign investors by the extraterritorial application of U.S. antitrust laws. Contrary to commonly expressed assumptions, the NAM found that better than 70 percent of those firms responding to its questionnaire indicated that U.S. antitrust laws had injured their international competitiveness.

Id.

[6]Thus, the Department of Justice reaches ". . . the general conclusion that a very large proportion of international business transactions involving American firms and/or American markets usually will not involve violations of U.S. antitrust law because such transactions will not adversely affect U.S. consumers or competitors." ANTITRUST GUIDE, *supra* note 2, at E-2.

[7]*See* ANTITRUST GUIDE, *supra* note 2, at E-5.

[8]*See* Baker, *supra* note 3, at 255.

[9]*Id.* Note the implication of this passage that a cautious business person will not rely on the advice of general counsel or even that of the routine antitrust lawyer but only on the advice of *experienced* antitrust counsel!

[10]*Id.* at 261.

[11]*See, e.g.*, J. GALBRAITH, AMERICAN CAPITALISM (1952); J. GALBRAITH, THE NEW INDUSTRIAL STATE (2d ed. 1971); Robinson, *The Impossibility of Competition*, in MONOPOLY AND COMPETITION AND THEIR REGULATION 245-254 (E. Chamberlin ed. 1954).

may not always be an economically desirable result.[12] By definition, antitrust law is intended to demarcate the boundary between commercial practices which promote competition and are, therefore, beneficial to society and anti-competitive practices which are detrimental to society.[13] In the economic jargon of Alfred Marshall, "consumer surplus" increases the more closely society approaches this boundary without crossing it.[14] Correspondingly, there is a loss of "consumer surplus" and a "dead-weight" loss[15] imposed on society as a whole when, because of uncertainty or overly zealous enforcement of the antitrust laws, firms operate inside the boundary.[16]

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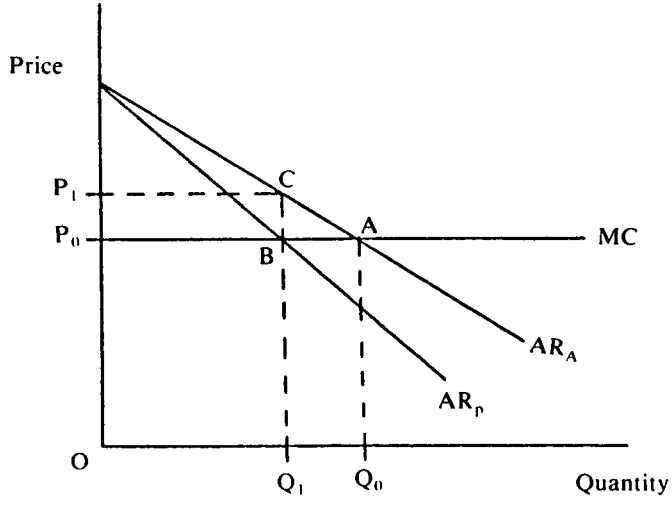
[12] *See* E. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (8th ed. 1965); J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 87-106 (3rd ed. 1950). *See also* MONOPOLY AND COMPETITION AND THEIR REGULATION (E. Chamberlin ed. 1954); MONOPOLISTIC COMPETITION THEORY: STUDIES IN IMPACT (R. Kuenne ed. 1967); W. FRIEDMANN, LAW IN A CHANGING SOCIETY 293-311 (2nd ed. 1972). The difference between "imperfect competition" and "monopolistic competition" is summarized in D. DEWEY, MONOPOLY IN ECONOMICS AND LAW 91-93 (1966). The argument, in essence, is that some element of monopoly power is necessary to promote industrial innovation. This is, of course, the basis for the United States patent system, which has also come under sharp criticism by the Justice Department.

[13] In economic terms this is equivalent to saying that a society should produce at its "production possibility frontier." *See, e.g.*, P. SAMUELSON, ECONOMICS 19-23 (10th ed. 1976); E. MANSFIELD, MICROECONOMICS: THEORY AND APPLICATIONS 202-205, 427-28 (2nd ed. 1975). Improper antitrust policy, as well as monopoly, can lead to market distortions and cause a society to produce inside its production possibility frontier.

[14] *See, e.g.*, P. SAMUELSON, ECONOMICS 519, n. 10 (10th ed. 1976); E. MANSFIELD, MICROECONOMICS: THEORY AND APPLICATIONS 282-83 (2d ed. 1975); F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 404-409 (1970); D. DEWEY, MONOPOLY IN ECONOMICS AND LAW 77-78, n. 15 (3d ed. 1966). "Consumer surplus" is maximized in Marshall's model when production attains the level that equates marginal cost and average revenue.

[15] *Id.*

[16] Under conditions of uncertainty about the scope of the antitrust laws or unduly vigorous enforcement policies, firms will not produce up to the level that equates marginal cost and actual average revenue (AR_A). Instead, producers will perceive a steeper (that is, more negatively sloping) average revenue curve and produce only up to the point that equates marginal cost and perceived average revenue (AR_P). This condition is shown graphically below:



Thus, a law of diminishing returns applies to antitrust enforcement: there exists a point, however ill-defined, at which the gains from further enforcement efforts are more than counter-balanced by losses arising from greater uncertainty. This line of reasoning is a strong justification for an expansive "Rule of Reason" approach[17] which accords some leeway to borderline commercial transactions.[18] The "Rule of Reason" establishes in effect a narrow band around whatever is defined as "zero monopoly" conditions and thereby sanctions slight departures from perfect competition in limited circumstances.

In summary, from an economic standpoint, too much antitrust is as bad as too much monopoly. If the result is a net loss of consumer welfare, it matters little whether this is attributable to the work of monopolists or the men in white hats from the Justice Department.

III. Some Practical Aspects of Current Antitrust Policy

From a practical standpoint, uncertainty and overly zealous antitrust enforcement policies put American business at a serious competitive disadvantage.[19] It is no secret that anticompetition laws in the United States are con-

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Following the notation used by Mansfield, *supra* note 13, in the above diagram, MC is the marginal cost line, AR_A the *actual* average revenue line, and AR_P the *perceived* average revenue line. Instead of producing quantity Q_0 and selling at price P_0, producers will produce the lesser quantity Q_1. With respect to international antitrust policy, this result may be explained as follows: small, marginal producers are discouraged by uncertainty and "red tape" from engaging in international operations; thus, the outputs of these producers are geared to demand in the domestic market only. However, because *aggregate* demand is the sum of both domestic demand and demand in the export market, as reflected by the *actual* average revenue line AR_A, quantity Q_1 can command the artificially high price P_1 in the domestic market. Under these conditions consumers lose rectangular area P_0P_1CB of "consumer surplus" to producers as monopoly profits, and triangular area ABC is a "dead-weight" loss to society as a whole. Paradoxically, the economic impact of uncertain and overly vigorous antitrust policies is similar to that of monopoly!

[17] *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911); Chicago Board of Trade v. United States, 246 U.S. 231 (1918). *See also* ANTITRUST GUIDE, *supra* note 2. A good summary of the emergence of the "Rule of Reason" appears in F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 455-58 (1970).

[18] *See* W. FRIEDMANN, LAW IN A CHANGING SOCIETY 299-301 (2d ed. 1972). *Cf.* D. DEWEY, MONOPOLY IN ECONOMICS AND LAW 159-66 (3rd ed. 1966); Joelson, *International Antitrust*, 12 WM. & MARY L. REV. 565 (1971). *But see* F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 438-43 (1970). Professor Scherer argues that the "Rule of Reason" actually *increases* business uncertainty, introduces added costs due to more complex adjudication, and creates "an enhanced probability of irrational and erroneous choices." *Id.* at 439. It can be argued, however, that even under the existing system of *ex post facto* antitrust enforcement, an expansive "Rule of Reason" reduces uncertainty in borderline situations where there is truly an economic "justification" for conduct which might be held to violate antitrust law under a *per se* rule. *Compare* Northern Pac. R.R. v. United States, 356 U.S. 1 (1958) *with* Continental T.V., Inc. v. GTE Sylvania Inc., 429 U.S. 1059 (1977). Furthermore, if the Antitrust Division were to establish a procedure for binding advance determinations of the legality of proposed transactions as is advocated in part IV of this Comment, *infra*, Professor Scherer's criticism of the "Rule of Reason" would clearly be inapposite.

[19] *See generally* U.S. SENATE FINANCE COMM., REPORT ON ANTITRUST LAW 864-67 (1973) [hereinafter cited as U.S. SENATE FINANCE COMMITTEE REPORT]. On the problem of uncertainty, the NAM REPORT, *supra* note 5, at 6, states:

strued and administered more stringently than are similar laws in other countries, including our principal trading partners—Canada, Britain, Western Europe, and Japan.[20] In fact, many of these countries actively encourage and support mergers, export associations, and even cartels in cases where the net effects are increased efficiency and benefit to the domestic economies.[21] It

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One of the problems most frequently cited by the U.S. business community concerns the general ambiguity of antitrust statutes. . . . Uncertainty with respect to international antitrust has serious ramifications for U.S. international business. It becomes difficult to properly weigh costs and advantages of a specific international investment. . . . Many business representatives interviewed by NAM felt that the uncertainty of the law together with stiff penalties for being found in violation of antitrust statutes combine to force abandonment of many foreign ventures.

[20]For example in H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 996-97 (2d ed. 1976), the authors, while noting that "[f]oreign antitrust laws offer a variety of parallels and contrasts," make the following generalizations:

First, most foreign laws permit more justifications for agreements among competitors than does the Sherman Act. . . . Second, it is common [in the EEC to grant] dispensations to those agreements which are judged to be, on balance, beneficial. . . . Third, it is rare for any foreign system to place such strong emphasis on discouraging monopoly or oligopoly as is found in Section 2 of the Sherman Act or Section 7 of the Clayton Act.

A good summary of the anticompetition laws of the European Community, Britain, Japan, and Canada, including contrasts with United States legislation, appears in the U.S. SENATE FINANCE COMMITTEE REPORT, *supra* note 19, at 838-63. This report states:

The European businessman has an apparent advantage over his American counterpart in choosing his methods of sale and distribution as long as he can show that the restrictive practices engaged in will have the effects of increased efficiency and benefit to the economy. . . . The European approach remains one of encouraging the growth of European industry to create rivals for the third-country industrial might of the United States and Japan.

Id. at 848. *See also* F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 434-38, 490-94 (1970).

[21]Thus, the U.S. SENATE FINANCE COMMITTEE REPORT concludes:

The United States antitrust laws are based on the philosophical premise that a freely competitive economic system is the most efficient and most desirable form of society. This view is not necessarily shared by America's trading partners and competitors. Their view is that restrictive business practices are not undesirable per se, and may in many instances be beneficial to the economic growth and development of the region.

Concepts of fairness in the application of sanctions prohibiting restrictive business practices are viewed differently in the United States and abroad. The American approach has been to prohibit unfair practices on the theory that increased competition results which in turn assures the growth of independent firms. The foreign approach is, in a sense, the more pragmatic one of examining the actual result of the restrictive business practice to determine what benefits it may produce.

U.S. SENATE FINANCE COMMITTEE REPORT, *supra* note 19, at 864-65.

The prevailing philosophy behind current United States antitrust policy is perhaps best expressed by Judge Learned Hand in United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945):

[Congress] did not condone "good trusts' and condemn "bad" ones; it forbade all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.

Although Congressional intent regarding the Sherman Act is a subject of much controversy, *see* D. DEWEY, MONOPOLY IN ECONOMICS AND LAW 142-44 (1966), Learned Hand's interpretation appears inconsistent with the legislative history of the Sherman Act which includes the statement that it is only "the unlawful combination, tested by the rule of common law and

is no accident that substantial portions of the *Antitrust Guide,*[22] Griffin's critique,[23] Baker's rejoinder,[24] and two recent case notes[25] are devoted to the problem of conflicting legislation. Professor Baker's entreaties for stronger foreign antitrust enforcement notwithstanding, it is unlikely, in the face of stiffening international competition for export markets and the growing United States balance of payments deficit, that many countries will rush to follow American precedents in this area.[26]

Professor Baker is openly critical of the Webb-Pomerene Act,[27] which provides a limited exemption from the antitrust laws for export associations. This legislation was designed by Congress with the express purpose of facilitating competition by smaller American businesses with large, often government-backed foreign cartels.[28] Thus, Professor Baker recently invited for-

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human experience, that is aimed at by this bill, *and not the lawful and useful combination.*" 21 CONG. REC. 2457 (1890) (emphasis added).

[22]ANTITRUST GUIDE, *supra* note 2, at E-14 to E-18.

[23]Griffin, *supra* note 1, at 242–54.

[24]Baker, *supra* note 3, at 260. *See also* Baker, *Antitrust Conflicts Between Friends: Canada and the United States in the Mid-1970s,* 11 CORNELL INT'L L.J. 165 (1978).

[25]Note, *American Antitrust Liability of Foreign State Instrumentalities: A New Application of the Parker Doctrine,* 11 CORNELL INT'L L.J. 305 (1978); Note, *International Law-Antitrust Law-Immunities to Extraterritorial Application of United States Antitrust Law,* 12 J. INT'L L. & ECON. 487 (1978).

[26]*See, e.g.,* Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad,* 11 CORNELL INT'L L.J. 195 (1978). The U.S. SENATE FINANCE COMMITTEE REPORT, *supra* note 19, at 866, notes in this connection:

> The European, Canadian, and Japanese approaches favor combination and cartelization of domestic enterprises in order to compete effectively with the powerful United States-based multinationals. Government support for this kind of concentration shows no apparent signs of diminishing in the near future. On the contrary, it seems probable that United States-based firms will face increasingly stiff competition from European and Japanese cartels.

[27]Section 2 of the Webb-Pomerene Act of 1918, 15 U.S.C. §61 (1976) states that nothing in the Sherman Act

> shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: And provided further, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

[28]*See* U.S. SENATE FINANCE COMMITTEE REPORT, *supra* note 19, at 823–25; H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 994–96 (2d ed. 1976); and NAM REPORT, *supra* note 5, at 1425–27. In a recent statement expressing concern over lagging United States exports, President Carter noted the potentially adverse effects of continued uncertainty by American business as to the legality of cooperative export arrangements:

> Nevertheless, many businessmen apparently are uncertain on this point, and this uncertainty can be a disincentive to exports. I have, therefore, instructed the Justice Department, in conjunction with the Commerce Department, to clarify and explain the scope of the antitrust laws in this area, with special emphasis on the kinds of joint ventures that are unlikely to raise antitrust problems.

BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, EXPANDING U.S. EXPORTS 3 (1978).

eign countries to prosecute United States Webb-Pomerene associations.[29] Again the emphasis is on other countries bringing their anticompetition policies into line without first questioning the propriety of United States antitrust policy. One wonders whether, in the spirit of evenhandedness, Professor Baker would support using United States tariff laws[30] to exclude, as an "unfair method of competition," imports produced in a country with less-rigorous antitrust laws than in the United States.[31] Of course, even this extreme approach to the problem of differences between United States and foreign antitrust laws and enforcement policies would affect only the domestic market and do nothing to facilitate greater American competitiveness abroad.

IV. Toward a Balanced and Predictable Antitrust Policy

The reality that current United States antitrust policy places American business at a competitive disadvantage in the international marketplace could perhaps be accepted in the name of free enterprise and related ideals if there were no better way of regulating monopolistic activities. It is possible, however, to devise alternative mechanisms for controlling anticompetitive activities which are both compatible with American ideals regarding free enterprise and, at the same time, less damaging to legitimate business interests. One such mechanism designed for a limited category of international commercial transactions is proposed and described in a recent article on legal barriers to energy technology transfer.[32] Somewhat different enforcement mechanisms may be suitable for other types of commercial transactions.

The key to such alternative mechanisms is a willingness on the part of the Justice Department, not presently evident, to make binding advance determinations of the legality of certain kinds of proposed transactions so busi-

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[29]Baker, *Antitrust Conflicts Between Friends: Canada and the United States in the Mid-1970s,* 11 CORNELL INT'L L.J. 165, 193 (1978).

[30]Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337 (1976) (as amended), prohibits unfair practices in import trade. If, after investigation, the International Trade Commission (formerly the Tariff Commission) determines that the effect of the imported articles is to "destroy or substantially injure an industry efficiently and economically operated, in the United States, . . . or to restrain or monopolize trade and commerce in the United States," it may order that the goods be excluded from entry.

[31]Section 337 of the Tariff Act includes provision for the exclusion of articles covered by an unexpired United States patent. A companion provision, section 337(a), 19 U.S.C. § 1337a (1976), provides for the exclusion of unpatented articles produced abroad by a United States-patented process. If the exclusion of imports produced in a country with less rigorous antitrust laws is not directly covered by sections 337 and 337(a), it surely would require no major extension of the principles evident in these provisions to bring such cases within their scope. The U.S. SENATE FINANCE COMMITTEE REPORT, *supra* note 19, at 826–27, states that at least a few complaints of this nature have been brought before the Commission and that "[r]ecognition of the potential of section 337 has been voiced often."

[32]Silverstein, *Sharing United States Energy Technology With Less-Developed Countries: A Model For International Technology Transfer,* 12 J. INT'L L. & ECON. 363 (1978).

nesses could operate within the framework of relatively fixed guidelines.[33] The guidelines would have to be carefully drawn to reflect a realistic balance between valid antitrust policies and the exigencies of commercial operations in a complex and competitive international marketplace. The relatively fixed guidelines would provide American businesses with intelligible standards by which to structure their transactions; a binding advance ruling on each transaction would replace the present *ad hoc, ex post facto* enforcement policy.

It is unlikely that such a radical proposal will receive a favorable response from the Justice Department. The counterargument is likely to be that the possible adverse effects of a particular transaction cannot always be foreseen, and therefore protection of the public interest requires review and reexamination of commercial transactions on a case-by-case basis after the anticompetitive results become manifest. It should be apparent in view of my earlier arguments,[34] however, that this counter-argument is persuasive only as long as the negative social welfare consequences of uncertainty and overly zealous enforcement are disregarded. When the latter effects are taken into account, there is no reason why the existence of some small amount of monopoly activity in the few cases which, in hindsight, are judged incorrectly cannot be compatible with the public interest.

Something more is required, therefore, to explain why a group of highly competent and dedicated Justice Department officials has not been more adept in resolving the conflicts, inconsistencies, and uncertainties in international antitrust policy. At least a part of the answer may lie in the principle of "bureaucratic politics."[35] According to "bureaucratic politics" theory, a conflict of interest may arise between a government organization and the public which it is intended to serve because the organization defines the public interest in terms of its perceived "mission" instead of defining its mission in terms of the public interest.[36]

Thus, the Antitrust Division seems to believe that it must retain considerable leeway in reviewing commercial transactions for anticompetitive effects even if this leeway generates ambiguity and uncertainty in its enforcement policies. This is because the Antitrust Division seems to perceive its "mission" as stamping out monopoly, and it equates the public interest with the realization of this objective. The possibility that there may be a social disutil-

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[33] *Id.* at 411-12. Although the Antitrust Division has established a "Business Review Procedure," 28 C.F.R. § 50.4 (1967), available to businesses with doubts about their investment plans, many problems with this procedure have led to relatively infrequent use. *See* NAM REPORT, *supra* note 5, at 1425. The problems cited include delays of six weeks or more in obtaining a response, drawing attention to a transaction which might otherwise escape notice, public disclosure of the review letter, and, most significantly, the fact that a "clearance" from the Justice Department under this procedure creates no immunity from subsequent prosecution even if the actual transaction is exactly as described.

[34] *See* notes 11-18 *supra* and accompanying text.

[35] *See, e.g.*, M. HALPERIN, BUREAUCRATIC POLITICS AND FOREIGN POLICY (1974); G. ALLISON, ESSENCE OF DECISION 144-186 (1971).

[36] *See generally* HALPERIN, *supra* note 35, at 26-62. Halperin discusses these issues in a limited way in terms of conflicts between "roles" and "missions". *Id.* at 40-51.

ity arising from increasing uncertainty as the antitrust enforcers press ever closer to their elusive goal clearly has no place in this idealistic view of modern capitalist society.

The foregoing argument need not imply any self-serving motivation on the part of Antitrust Division personnel. On the contrary, proponents of the "bureaucratic politics" principle usually emphasize the deeply felt sense of "mission" which motivates government officials in the sincere, if mistaken, belief that they are acting in the public interest.[37] Although "bureaucratic politics" can never be entirely eliminated from government, its existence must be candidly acknowledged as a constraint in effectively serving the public. In evaluating alternative policies, Antitrust Division officials should recognize that their views may be colored by their sense of "mission" and that the public might better be served by approaches which, at first blush, appear contrary to the accepted norms.

Conclusion

Thus, this Comment has come full-circle. Starting with the caveat that Professor Baker's remarks concerning the *Antitrust Guide for International Operations* should not be judged as those of an impartial observer, it concluded with a possible explanation for such bias. In between, it was argued that, in spite of the *Antitrust Guide*, enforcement policies concerning international operations are unnecessarily vague and overly stringent and that such policies may not be in the public interest. It was further argued that superior enforcement mechanisms could be devised compatible with the public interest if the Antitrust Division were willing to accept a broader definition of its "mission."

The *Antitrust Guide* must be applauded and welcomed as a step toward a more rational antitrust policy. At the same time, the Antitrust Division cannot rest complacently on these laurels. It should continue to seek a more balanced and predictable enforcement mechanism.

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[37] *Id.* At least one scholar in the field of organization theory, however, has linked bureaucratic power with controlling the points of ambiguity in an otherwise rational and predictable system. M. CROZIER, THE BUREAUCRATIC PHENOMENON, 145–169 (1964).