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## The 1988 Justice Department International Guidelines: Searching for Legal Standards and Reassurance

### Introduction

Antitrust is a less than wholly clear body of substantive law, as judges with highly diverse philosophies, prejudices, and economic preferences have gradually formed the rules over the course of a century.<sup>1</sup> The resulting legal ambiguity thus leaves antitrust prosecutors with a range of choices, and invites the thoughtful prosecutor to issue guidelines advising potential defendants about what actions the enforcement agency will or will not pursue in enforcing the law.<sup>2</sup> Any prosecutor issuing guidelines is likely to let his or her own sense of priorities, standards, and proper policy creep into the guidance process. Yet attorneys can use the guidelines as a counseling tool to the extent that (a) the prosecutor has a *de facto* monopoly on prosecution decisions, and (b) attorneys can apply the criteria to particular factual situations with relative ease. Alas, neither is true with respect to the 1988 International Guidelines.

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1. See R. BORK, *THE ANTITRUST PARADOX* 15-49, 164-74, 201-18, 234-37, 246-60, 280-91, 299-309, 330-46, 349-55 (1978); L. SULLIVAN, *ANTITRUST* 165-86, 213-24, 232-38, 268-73, 472-79, 579-87, 590-91, 593-96 (1977); P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶¶ 529-36, 602-13 (1978).

2. "Uncertainty in the law is compounded by uncertainty about prosecutors and prosecutorial discretion. Even the clearest of laws becomes uncertain in its ultimate impact if it is unevenly enforced." Address by D.I. Baker, "Antitrust in the Sunshine," before the New York State Bar Association, Antitrust Law Section (January 26, 1977) (announcing release of the 1977 Department of Justice Antitrust Guide for International Operations [hereinafter 1977 Guide]).

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The 1988 Department of Justice Antitrust Enforcement Guidelines for International Operations ("1988 Guidelines")<sup>3</sup> read more like a preacher's sermon than a counselor's guide. The Antitrust Division (hereinafter "Division") of the U.S. Department of Justice does not purport to tell the reader in the 1988 Guidelines what constitutes the law in this difficult area, but rather what it thinks the law ought to be. Since the Division adopts positions in the 1988 Guidelines that are often less stringent than in case law,<sup>4</sup> its normative pronouncements cannot offer any client a safe harbor from an enraged private plaintiff, the Federal Trade Commission, or a state attorney general.

The 1988 Guidelines are meant to reach the courts, Congress, the antitrust intelligentsia, and perhaps foreign governments. The 1988 Guidelines seem to be an appeal to an influential yet diverse audience. Stated another way, the 1988 Guidelines constitute an omnibus amicus brief to any jurist, politician, or philosopher-king who will listen.<sup>5</sup>

The 1988 Guidelines offer a substantial body of intellectual ammunition for use in private litigation, as well as in litigation brought by state and federal antitrust enforcement agencies. Because the document bears the seal of the U.S. Department of Justice,<sup>6</sup> the 1988 Guidelines should carry more weight than an amicus brief by a less august party. Therefore, the Division is also addressing antitrust litigators and their clients.

In addition, the antitrust courtiers who specialize in dealing with the federal antitrust enforcers on questions of law, fact, economic policy, and prosecutorial discretion will find the 1988 Guidelines useful. Such attorneys can use the 1988 Guidelines to persuade the Division (and perhaps even the Federal Trade Commission) to refrain from damaging their clients.<sup>7</sup>

Finally, the 1988 Guidelines have some general political utility in an area of great diplomatic sensitivity and market uncertainty. They can exert influence where dangerous potential exists for conflict with important U.S. trading partners. The risk of U.S. antitrust law deterring efficiency-promoting investments and efforts by domestic and foreign firms is high. A wordy but generally soothing restatement of federal enforcement policy may make a positive contribution in such circumstances.

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3. Antitrust Enforcement Guidelines for International Operations [hereinafter 1988 Guidelines], 4 Trade Reg. Rep. (CCH) ¶ 13,109.10, at 20,589 (1989), *reprinted in* 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391 (Nov. 17, 1988) (Special Supp.).

4. See generally Fugate, *The New Justice Department Antitrust Enforcement Guidelines for International Operations—A Reflection of Reagan and, Perhaps, Bush Administration Antitrust Policy*, 29 VA. J. INT'L L. 295 (1989) (reviewing 1988 Guidelines in light of case law).

5. See, e.g., 1988 Guidelines, *supra* note 3, pt. I, No. 5, ¶ 13,109.10, at 20,612 n.167 ("In the Justice Department's view, antitrust suits prosecuted by the U.S. Government should not be subject to dismissal by U.S. courts on the basis of comity.").

6. 1988 Guidelines, *supra* note 3, ¶ 13,109.10, at 20,589.

7. Such use rests on the assumption that the agency itself will generally seek to follow its own guidelines in exercising its discretion, even if the position stated in its guidelines is not supported by (or is inconsistent with) decided case law. See Baker, *Critique of the Antitrust Guide: A Rejoinder*, 11 CORNELL INT'L L.J. 255, 257 (1977).

## I. The Role of Guidelines in Antitrust Enforcement

The guideline tradition in antitrust began during Professor Donald Turner's reign as Assistant Attorney General in Charge of the Antitrust Division (1965-1968). During this period, the Government won a series of ever-less-plausible merger cases in the populist climate of the Warren Supreme Court.<sup>8</sup> This line of cases led an exasperated Justice Stewart to exclaim in his dissent in *United States v. Von's Grocery* that, "[t]he sole consistency . . . is that in litigation under § 7, the Government always wins."<sup>9</sup> This situation caused substantial dissent and uncertainty in the business and investment banking communities, as well as in the antitrust bar. Since the cases always went one way, the key variable in merger analysis became whether the Government would choose to sue. Professor Turner and his colleagues responded to the problem with almost two years of hard work that produced the 1968 Merger Guidelines ("1968 Guidelines").<sup>10</sup> The 1968 Guidelines were very brief and relied almost exclusively on market share and other structural data. For the most part, the Division simply indicated which mergers the Government would "ordinarily challenge" based on market share. In accordance with the decided case law of the day,<sup>11</sup> it set fairly low thresholds for bringing cases.<sup>12</sup> At the same time, however, the 1968 Guidelines did not address the most extreme of the government's victories (including *Brown Shoe*<sup>13</sup> in the vertical area and *Von's Grocery*<sup>14</sup> in the horizontal area). Nevertheless, the Division intended the 1968 Guidelines to reflect generally the existing law and explained its purpose as such at the time of issuance.

The next exercise in "guidelinesmanship" by the Division resulted in the 1977 Antitrust Guide for International Operations ("1977 Guide"),<sup>15</sup> which introduced the "hypothetical case" type of guidance also found in the 1988 Guidelines. The 1977 Guide opened with a very

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8. See *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. Aluminum Co. of America (Rome Cable)*, 377 U.S. 271 (1964); *United States v. Von's Grocery*, 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

9. 384 U.S. at 301.

10. The 1968 Merger Guidelines [hereinafter 1968 Guidelines], 4 Trade Reg. Rep. (CCH) ¶ 13,101, at 20,521 (1988). As an assistant section chief in the Antitrust Division, D. I. Baker helped prepare the 1968 Guidelines.

11. See P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 909a (1980).

12. 1968 Guidelines, *supra* note 10, at 20,523, 20,525. For example, in markets with four-firm concentration ratios of less than 75%, the Department stated that it would ordinarily challenge mergers in which the acquiring and acquired firm each had a market share of 5%.

13. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

14. *United States v. Von's Grocery*, 384 U.S. 220 (1966).

15. The 1977 Antitrust Guide for International Operations [hereinafter 1977 Guide], 4 Trade Reg. Rep. (CCH) ¶ 13,110, at 20,643 (1989), *reprinted in* *Antitrust & Trade Reg. Rep. (BNA) No. 799*, at E-1 (Feb. 1, 1977). D. I. Baker helped prepare the 1977 Guide while on the Cornell Law School faculty. On January 26, 1977, after Baker became Assistant Attorney General in charge of the Division, the Division issued the Guide.

brief expository statement (8 1/2 typescript pages), followed by 14 case examples (covering 54 typescript pages). The Division, faced with general concern in the U.S. business community that antitrust rules were limiting the competitiveness of American firms, decided that case examples would best deal with this concern.

The Division repeated this exercise three years later in issuing the Antitrust Guide Concerning Research Joint Ventures ("1980 Guide").<sup>16</sup> The Division issued the 1980 Guide in response to political concern that antitrust was unduly discouraging collective research efforts.<sup>17</sup> Again in "case example" form, but somewhat longer than the 1977 Guide, the 1980 Guide covered a variety of research issues. It also republished a case example from the 1977 Guide concerning a joint research venture.<sup>18</sup> The 1980 Guide became part of an ongoing political dialogue which led to the passage of the National Cooperative Research Act in 1984.<sup>19</sup>

In 1982, Professor William Baxter, as Assistant Attorney General, issued the 1982 Merger Guidelines ("1982 Guidelines") which departed radically from past guidelines.<sup>20</sup> The Division produced the 1982 Guidelines in an expository form and included many sections and subsections addressing important issues in detail and with analytical precision. About twice as long as the 1968 Guidelines, the 1982 Guidelines served as an intellectual *tour de force* and introduced new concepts such as the Herfindahl-Hirschman Index ("HHI"),<sup>21</sup> now routinely used by antitrust practitioners. The 1982 Guidelines presented standards for challenging mergers which were less stringent than decided case law<sup>22</sup> and widely accepted as a very useful tool.<sup>23</sup>

The Division updated the 1982 Guidelines in 1984, primarily to give greater weight to international competition as a factor in merger

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16. The Antitrust Guide Concerning Research Joint Ventures [hereinafter 1980 Guide], 4 Trade Reg. Rep. (CCH) ¶ 13,120, at 20,651 (1988). The Division released the 1980 Guide in November 1980.

17. *Id.*

18. *Id.*, Case D, at 20,674-76.

19. 15 U.S.C. §§ 4301-4305 (Supp. II 1989).

20. The 1982 Merger Guidelines [hereinafter 1982 Guidelines], 4 Trade Reg. Rep. (CCH) ¶ 13,102, at 20,521 (1988). The Division announced the 1982 Guide on June 14, 1982.

21. *Id.* at 20,536. The Herfindahl-Hirschman Index ("HHI") measures market concentration. The HHI of a market equals the sum of the squares of the individual market shares of the firms in the market. For example, a market consisting of one firm with a 30% share, one firm with a 20% share, and five firms each with 10% shares has an HHI of 1800 ((30 x 30) + (20 x 20) + 5(10 x 10) = 1800). The highest possible HHI (10,000) corresponds to a market consisting of a single monopolistic firm. By contrast, an unconcentrated market consisting of 50 firms of equal size (2% shares) has an HHI of 200 (50 x (2 x 2) = 200).

22. See Baker & Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CALIF. L. REV. 311 (1983).

23. For a review of the literature on the relative merits of the HHI compared to alternative measures of concentration, see W. BLUMENTHAL, A.B.A. ANTITRUST SECTION, MONOGRAPH NO. 12, HORIZONTAL MERGERS: LAW AND POLICY 178-82 (1986).

analysis and to introduce efficiency as an explicit defense.<sup>24</sup> The Division followed the 1982 format, but the standards seemed generally to be even a little less stringent than their predecessors.<sup>25</sup> The Division and the Federal Trade Commission have continued to use the 1984 Guidelines to analyze particular cases.<sup>26</sup> Courts, too, have found the updated merger guidelines useful. In 1987, the state attorneys general issued a set of counter-guidelines, covering horizontal mergers only, in the same general format as the 1984 Merger Guidelines.<sup>27</sup>

The Division's next entry in the guideline derby simply failed in practical terms. In 1985, the Division issued its Vertical Restraints Guidelines.<sup>28</sup> These brought many complex and unfamiliar abstractions to a heavily litigated legal area in which the Antitrust Division had not actively participated for at least two decades.<sup>29</sup> The Division's statement of its enforcement policy constituted, therefore, a transparent fiction. The Division offered, in effect, a long amicus brief generally supporting those who wished to impose, *inter alia*, territorial restraints, tie-ins, and restrictive licenses. Sparking an acute political controversy,<sup>30</sup> the guidelines simply strayed too far from existing law for counselors to use them. Moreover, they attracted strong political opposition from populist voices in antitrust, including Congress and the state attorneys general. Congress passed a joint resolution urging withdrawal of the Vertical Restraints Guidelines,<sup>31</sup> while the state attorneys general issued

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24. The 1984 Merger Guidelines [hereinafter 1984 Guidelines], 4 Trade Reg. Rep. (CCH) ¶ 13,103, at 20,551 (1988). See Baker & Blumenthal, *The Revised Merger Guidelines: One Step Forward, Two Steps Back*, Nat'l L.J., July 9, 1984, at 39.

25. For example, the 1984 Guidelines took a more favorable view of claimed efficiencies from mergers than did the 1982 Guidelines. 4 Trade Reg. Rep. (CCH) ¶ 13,103, at 20,554 (1988).

26. See, e.g., 60 Minutes with Daniel Oliver, Chairman, Federal Trade Commission, 58 ANTITRUST L.J. 355, 365-67 (1989).

27. Horizontal Merger Guidelines of the National Association of Attorneys General (NAAG), 4 Trade Reg. Rep. (CCH) ¶ 13,405, at 21,181 (1988). NAAG adopted the Guidelines unanimously on March 10, 1987.

28. 50 Fed. Reg. 6263 (Feb. 14, 1985), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,105, 20,575 (1988). See Baker, *New Vertical Restraints Guidelines: Justice's Effort to Influence Courts*, Nat'l L.J., Mar. 4, 1985, at 22.

29. Following its much criticized victory in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967) (overruled in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977)), the Division stopped allocating significant resources to vertical investigations. The Division brought occasional cases; the most noted (and criticized) was *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24 (2d Cir. 1981), cert. denied, 460 U.S. 1068 (1983), in which the Division sought criminal indictments for vertical price-fixing.

30. The Government's amicus brief in *Monsanto v. Spray-Rite*, 465 U.S. 752 (1984), urged the Supreme Court to reverse the long-standing *per se* prohibition against vertical price-fixing. An angry Congress responded with a rider to the Department appropriation prohibiting the expenditure of any funds so as to urge repeal of the *per se* rule. Pub. L. No. 98-166, § 510, 97 Stat. 1071, 1102 (1983). This rider appears to have fenced in the Government in its preparation of the 1988 Guidelines.

31. Pub. L. No. 99-180, § 605, 99 Stat. 1169 (1985).

counter-guidelines in this area.<sup>32</sup>

## II. The 1988 International Guidelines

The 1988 Guidelines combine the two prior formats and begin with a lengthy exposition of theory (105 typescript pages), organized in a format very similar to the 1982 Guidelines and 1984 Merger Guidelines. The Division places different subjects in discrete pigeonholes with appropriately complex numbers.<sup>33</sup> In addition, the 1988 Guidelines include an even longer discussion of eighteen cases (121 typescript pages). The format for the cases is generally similar to that used in the 1977 Guide and the 1980 Guide, although the case explanations are longer than in the earlier guides.

The 1988 Guidelines both differ from and parallel the 1977 Guide.<sup>34</sup> The 1988 Guidelines extensively discuss the principles underlying action by the Division, and also reveal the difficulty in quantifying and predicting variables crucial to guided decisions.

### A. Special Factors Relating to the International Guidelines

International antitrust cuts across the interests of various sovereigns which will often support cartels favoring their producers, while perhaps opposing other cartels which injure their consumers.<sup>35</sup> Within the American system, the federal government could opt for competition as a preemptive national policy and override local cartels, even government-supported cartels, under the Supremacy Clause.<sup>36</sup> In the international arena, the Supremacy Clause has no force and, therefore, automatic resolution of conflicts does not exist either. Instead, various legal doctrines, such as "sovereign immunity,"<sup>37</sup> "foreign government

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32. 4 Trade Reg. Rep. (CCH) ¶ 13,400, at 21,151 (1989). NAAG adopted the Vertical Restraints Guidelines on December 4, 1985, and amended them on December 7, 1988.

33. See *infra* Appendix A: Plain English Summary of International Guidelines, which uses official titles and numbering.

34. See *infra* Appendix B, which compares the cases in the 1988 Guidelines to those in the 1977 Guide.

35. Baker, *The Proper Role for Antitrust in a Not-Yet-Global Economy*, 9 CARDOZO L. REV. 1135 (March 1988).

36. The American system has not done this. The Supreme Court's most recent pronouncements in the domestic context allow an enormous (and undesirable) range for local cartelization under the aegis of the "state action" doctrine. See *Southern Motor Carriers Rate Conf. v. United States*, 471 U.S. 48 (1985); *Patrick v. Burget*, 108 S.Ct. 1658 (1988). So long as there exists clearly articulated state policy in favor of cartelization and active public supervision of the cartel, such activity remains exempt.

37. See, e.g., *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698-705 (1976) (White, J., plurality opinion); Foreign Sovereign Immunities Act (FSIA), Pub. L. No. 94-583, 90 Stat. 1891 (1976); see generally A.B.A. ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS [hereinafter ANTITRUST LAW DEVELOPMENTS] 560-62 (2d ed. 1984).

compulsion,"<sup>38</sup> "act of state,"<sup>39</sup> and "comity,"<sup>40</sup> seek to determine when the policy and jurisdiction of one sovereign succumb to those of another. In addition, in cases in which the United States government is a party to litigation, a foreign sovereign will feel free to use diplomatic negotiations as a way to persuade the government to exercise prosecutorial discretion and to refrain from doing what it has clear jurisdiction to do.<sup>41</sup>

Thus, international antitrust enforcement has three important characteristics. First, the American business community does not want U.S. antitrust enforcement (particularly enforcement against mergers, joint ventures, and restrictive licenses) to handicap firms facing global competition. Second, foreign governments do not want the exercise of U.S. antitrust jurisdiction based on the "effects doctrine"<sup>42</sup> to constitute judicial imperialism and to interfere with their internal affairs.<sup>43</sup> Finally, foreign enterprises and their governments do not want U.S. antitrust enforcement either to constitute a thinly-veneered non-tariff barrier to foreign investment in the United States (usually by merger or joint venture) or to interfere with a foreign government's particular domestic policy intended to foster the interests of its own producers.

## B. Comparing International Guidelines

The Division issued the 1988 Guidelines and its 1977 predecessor for different reasons; therefore, not surprisingly, the two differ substantially in tone and style, as well as in substantive policy.

### 1. *The 1977 Guide*

As noted, the Division issued the 1977 Guide to allay the recurrent business concern that antitrust rules unnecessarily restricted the interna-

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38. See, e.g., *Interamerican Refining Corp. v. Texaco Maracaibo*, 307 F. Supp. 1291, 1296-98 (D. Del. 1970); see generally ANTITRUST LAW DEVELOPMENTS, *supra* note 37, at 566-68.

39. See, e.g., *Alfred Dunhill of London, Inc.*, 425 U.S. 682; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); see generally ANTITRUST LAW DEVELOPMENTS, *supra* note 37, at 562-66.

40. See, e.g., *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), 749 F.2d 1378, 1382-86 (9th Cir. 1984).

41. See, e.g., *United States v. Baker Hughes Inc.*, 731 F. Supp. 3, 6 n5 (D.D.C. 1990) (diplomatic note from Finnish Embassy opposing blocking of merger). In November 1984, President Reagan ordered the Justice Department to close its grand jury investigation of suspected anticompetitive conduct by international airlines offering transatlantic service. The President's decision reportedly followed "extensive consultations" between the American and British governments. 47 *Antitrust & Trade Reg. Rep. (BNA) No. 1192* (Nov 29, 1984).

42. See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) (L. Hand, J.) ("[I]t is settled in law. . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends. . . .")

43. Baker, *U.K. Using New Weapons to Attack Foreign Reach of U.S. Trust Laws*, Nat'l L.J., Jan. 14, 1980, at 24.



tional flow of U.S. capital and exports.<sup>44</sup> Many in the Division believed that this concern was largely ungrounded, and that, to the extent that antitrust concerns constrained the business community, overly cautious legal advice created an obscure area of law.<sup>45</sup> Accordingly, the Division invited a presidentially-appointed council on exports to submit examples and problems, and the Division offered to provide written explanations of the antitrust rules applicable to such situations. Two years later the Division issued the 1977 Guide. Upon its release, the Assistant Attorney General cautioned:

Of course, no Guide can make the hard cases easy: such cases will surely turn on slight variations of fact and policy judgments. What the Division hopes this Guide will do is to make clearer what we think the really hard cases are.

....

Our cases are not precious or highly technical: we act where we can find evidence and see positive benefit to the American public as consumers and exporters. If this is our policy we ought to state it — and this is what we have tried to do in the International Guide.<sup>46</sup>

The Division intended the 1977 Guide to simplify, clarify, and “examine in a coherent way an area of the law that has been characterized by much mechanistic lawyering and academic quibbling. . . . It is a very deliberate attempt to make the subject less arcane, less technical, and less mysterious, and to inject a broader view into the field.”<sup>47</sup> The Division targeted the 1977 Guide as much to in-house counsel across the country as to antitrust specialists in major cities.

The Division stated the goals of the 1977 Guide in terms of the Division’s enforcement *policy*, but actually intended it to serve as a legal document based on decided case law. Thus, not surprisingly, the 1977 Guide contained many more references to decided cases than the 1988 Guidelines. The Division did this because it believed that the threat of overly cautious, private counseling and overly aggressive, private damage litigation posed real risks to efficient business planning.<sup>48</sup> In order to persuade counselors to use the 1977 Guide as a counseling tool, the Division had to offer something more than a policy statement. The Division had to ground the 1977 Guide in law to enable the 1977 Guide to serve as an amicus brief in support of some reasonable restraint.

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44. 1977 Guide, *supra* note 15 and accompanying text.

45. In the Introduction to the 1977 Guide, the Division noted that uncertainty as to antitrust enforcement issues “may sometimes cause businesses to abandon or limit unobjectionable transactions, or to embark upon unnecessarily restrictive transactions which would not be undertaken if the antitrust risk were more clearly perceived.” 1977 Guide, *supra* note 15, Introduction. See also Baker, *supra* note 7, at 255-57, 259-60.

46. D.I. Baker, *supra* note 2.

47. Baker, *supra* note 7, at 255.

48. The Division saw the Federal Trade Commission as a potential risk in the international area, but not to the same degree as private plaintiffs.

In at least two areas, however, the 1977 Guide departed from the state-of-the-law in 1977. The first was with regard to jurisdiction, a highly debated subject among international lawyers and a source of concern to foreign governments as well as to U.S. and foreign businesses because the Division had used the U.S. antitrust laws so extensively over the years to reach overseas restraints. The 1977 Guide stated that the Department would not "apply the Sherman Act to a combination of United States firms for foreign activities which have no direct or intended effect on United States consumers or export opportunities."<sup>49</sup> Elsewhere, the 1977 Guide used the slightly different phrase, "a substantial and foreseeable effect."<sup>50</sup> Essentially, the drafters of the 1977 Guide wanted to leave the protection of foreign consumers to foreign governments. This position (which was criticized initially)<sup>51</sup> received support from policymakers on Capitol Hill; the export trading company legislation in 1982 amended the Sherman Act and the FTC Act to require "a direct, substantial, and reasonably foreseeable" impact on (a) the U.S. internal market and imports into that market, or (b) the export opportunities of U.S. firms.<sup>52</sup>

The second area in which the Division staked out a clear position amid much confusion involved the application of the *Noerr-Pennington* doctrine overseas.<sup>53</sup> The Division took the position that the doctrine protected lobbying "efforts to cause a foreign government to impose restraints on U.S. commerce."<sup>54</sup> The Division based its position on the premise, articulated in *Noerr*, that U.S. antitrust law was not intended to reach government-imposed restraints or efforts to procure them.<sup>55</sup> Thus, the issue was broader than just the question of whether the First Amendment applied to petitions addressed to foreign governments. Over twelve years later, the Supreme Court has yet to resolve the issue.<sup>56</sup>

## 2. *Usefulness of the 1988 Guidelines*

The 1988 Guidelines are more ambitious than the 1977 Guide in the positions articulated and more limited in the targeted audience. In other words, the Division does not intend the 1988 Guidelines to func-

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49. 1977 Guide, *supra* note 15, ¶ 13,110, at 20,646.

50. *Id.* at 20,645.

51. See Griffin, *A Critique of the Justice Department's Guide for International Operations*, 11 CORNELL INT'L L.J. 215, 224-27 (1977).

52. Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, tit. IV §§ 401-403, 96 Stat. 1246 (1982) (codified at 15 U.S.C. §§ 1 note 6a, 45).

53. *Eastern R.R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). This doctrine establishes that the antitrust laws do not apply to concerted action designed to influence the government and thereby procure favorable treatment. See ANTITRUST LAW DEVELOPMENTS, *supra* note 37, at 613-19.

54. 1977 Guide, *supra* note 15, Case N, ¶ 13,110, at 20,649-17.

55. 365 U.S. at 135-38.

56. See ANTITRUST LAW DEVELOPMENTS, *supra* note 37, at 569-70 (2d ed. 1984 & 2d Supp. 1983-1988).

tion as a quick and readily accessible tool for in-house counsel seeking to give on-the-run antitrust advice concerning some immediate situation. They neither purport to represent an application of established law,<sup>57</sup> nor pose the risk of chilling the enthusiasm of plaintiffs more dangerous to business than the Division. The Division addressed the scope of the guidelines:

These Guidelines are intended to provide businesses engaged in international operations with practical guidance concerning the *Department's* internal antitrust enforcement policies and procedures.

....

Readers should separately evaluate the risk of *private litigation* by competitors, consumers, and suppliers, as well as the risk of enforcement by state prosecutors under state and federal antitrust laws.<sup>58</sup>

Counselors should find the 1988 Guidelines most useful in those few areas in which the Division presents a tougher position than the decided case law. Foreign sovereign compulsion represents the most obvious example.<sup>59</sup> The Division requires legal compulsion of some form as a defense,<sup>60</sup> in contrast to the domestic rule under *Southern Motor Carriers* that exempts conduct carried out pursuant to a clearly articulated policy and subject to active government supervision.<sup>61</sup> This aggressive position may place either counsel or client in a politically difficult situation with a foreign government, but all parties benefit from advance warning of the Division's position.

The difficulty involved with calculation of certain market data may cause the 1988 Guidelines to be less useful to counselors. The 1988 Guidelines rely heavily on an initial market power screen in applying the rule of reason. This methodology introduces the complex market definition issue at a time when the counselor may not yet have enough facts on demand and supply elasticities to make a confident prediction as to what constitutes the market. Therefore, caution requires the counselor to assume a narrow market (producing high market shares), and then to proceed to considerations of market conditions, entry, and efficiencies, including less anticompetitive alternatives to the proposed transaction.<sup>62</sup> Counselors may find many (and sometimes all) of these factors hard to predict and quantify. Thus, the level of counseling comfort in advance of a deal, venture, or action may not greatly increase.

The antitrust specialist or litigator with a foreign antitrust case may find the 1988 Guidelines more useful. The Division seems candid in explaining how it looks at matters and makes decisions. Its stated positions should act as a catalyst for further thought and perhaps legislative

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57. 1988 Guidelines, *supra* note 3, pt. I, 3.0 n.43, ¶ 13,109.10, at 20,589-3, 20,593.

58. *Id.*, ¶ 13,109.10, at 20,589-3 (emphasis added).

59. 1988 Guidelines, *supra* note 5, pt. I, No. 6, ¶ 13,109.10, at 20,613-14.

60. *Id.*

61. *Southern Motor Carriers Rate Conf. v. United States*, 471 U.S. 48, 57 (1985).

62. 1988 Guidelines, *supra* note 3, pt. 3.3, ¶ 13,109.10, at 20,598-99.

action, as did the 1977 Guide and the 1980 Guide. The utility is not limited to international cases; in a number of areas (e.g., mergers) the Division states positions that differ, albeit slightly, from its past guidelines and these positions apply domestically as well.<sup>63</sup> The length and detail of the 1988 Guidelines, which make them less useful for counselors rendering on-the-spot legal advice, are less problematic to the specialists and the litigators who commonly handle bulky documents and have time to do so.

### 3. *What Messages Do the Guidelines Send?*

In addition to identifying safe harbors for mergers, joint ventures, and intellectual property licensing arrangements, the 1988 Guidelines communicate the Division's generally favorable view of territorial restrictions, its generally suspicious view of trade law proceedings, its unwillingness to apply the state action doctrine to foreign governments, and its refusal (at least in 1988) to accept U.S. exporters as intended beneficiaries of the antitrust laws.

#### a. Safe Harbors for Mergers

The 1988 Guidelines add new safe harbors to the one offered by the 1984 Merger Guidelines while eliminating certain danger zones that the 1984 Merger Guidelines declared presumptively challengeable. The only safe harbor in the 1984 Merger Guidelines was for mergers that left markets unconcentrated (post-merger HHI's less than 1000).<sup>64</sup> The 1988 Guidelines create two new safe harbors: one for certain mergers that result in moderate concentration (post-merger HHI's between 1000 and 1800), and one for certain mergers that result in high concentration (post-merger HHI's over 1800).<sup>65</sup>

For mergers resulting in moderate concentration, the 1988 Guidelines establish an increase in the HHI of 100 points as the upper limit of a new safe harbor.<sup>66</sup> Under the 1984 Merger Guidelines, an increase in the HHI of 100 points for a merger resulting in moderate concentration constituted a threshold above which the Division would likely challenge the merger, unless factors other than market share and market concentration led the Division to conclude that the merger would "not likely substantially . . . lessen competition."<sup>67</sup> The 1988 Guidelines, by contrast, omit any mention of a presumptive threshold of illegality for mergers resulting in moderate concentration.

Likewise, for mergers resulting in high concentration, the 1988 Guidelines convert an increase in the HHI of fifty points into a safe harbor boundary below which the Division will not raise a challenge. Under the former guidelines, an increase of fifty points constituted a threshold

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63. See *infra*, Appendix B, pt. 1.

64. 1984 Merger Guidelines, *supra* note 24, ¶ 13,103, at 20,552-553.

65. 1988 Guidelines, *supra* note 3, pt. I, No. 3.32, ¶ 13,109.10, at 20,598.

66. *Id.*

67. 1984 Merger Guidelines, *supra* note 24, ¶ 13,103, at 20,552.

point at which government challenge was likely unless the merger was "not likely substantially to lessen competition."<sup>68</sup>

The 1988 Guidelines also establish safe harbors for certain foreign acquisitions, although the 1988 Guidelines do not expressly describe them as safe harbors. Case 4 shows that the Division, due to the practical difficulty of obtaining effective relief, will not challenge a merger between two foreign firms where "all of their assets involved in producing and distributing [the relevant product] are located outside the United States."<sup>69</sup> Case 3 shows that the Division will not challenge the acquisition of a foreign firm that does not currently compete in the U.S. unless the Division can show that the firm actually "would enter the [U.S.] market independently in the near future" were it not for the merger.<sup>70</sup> By contrast, Case B of the 1977 Guide permitted the Division to challenge the acquisition of a foreign firm as long as the Division showed that the firm had the incentives and capability of entering the U.S. market.<sup>71</sup>

Perhaps most significantly, the 1988 Guidelines omit any mention of the 1984 Merger Guidelines' second threshold for mergers in highly concentrated markets. According to the 1984 Merger Guidelines, a merger that resulted in an increase in the HHI of more than 100 in a highly concentrated market would be presumptively illegal. The government would look to factors other than market share and market concentration to establish a merger's legality "only in extraordinary cases."<sup>72</sup> The 1988 Guidelines do not identify a merger in highly concentrated markets as presumptively illegal. As with any other merger that falls outside of all safe harbors, the 1988 Guidelines explain that the Division will consider the merger's "effect on concentration along with all other relevant factors bearing on whether the merger would likely create, enhance, or facilitate the exercise of market power."<sup>73</sup>

The Draft Guidelines issued in June 1988 ("Draft Revision of 1988 Guidelines") had stated that the Division would not "automatically challenge" mergers resulting in market concentrations that exceeded the safe harbor thresholds; but, rather, they stated that "much more extensive analysis of factors other than concentration data [would be] necessary to conclude that such mergers would create, enhance, or facilitate the exercise of market power."<sup>74</sup> The ABA Task Force Report on the Draft Guidelines ("ABA Report on Draft Guidelines") pointed out that

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68. Compare 1988 Guidelines, *supra* note 3, pt. I, No. 3.32, ¶ 13,109.10, at 20,598, with 1984 Merger Guidelines, *supra* note 24, ¶ 13,103, at 20,560-61.

69. 1988 Guidelines, *supra* note 3, ¶ 13,109.83, at 20,620-21. Cf. *U.S. v. CIBA Corp.*, 1970 Trade Cas. (CCH) ¶ 73,269 (S.D.N.Y. 1970) (consent decree requiring merging Swiss chemical companies to divest specified assets of U.S. subsidiaries).

70. 1988 Guidelines, *supra* note 3, ¶ 13,109.82, at 20,619-20.

71. 1977 Guide, *supra* note 15, Case B, ¶ 13,110, at 20,648-49.

72. 1984 Merger Guidelines, *supra* note 24, ¶ 13,103, at 20,560-61.

73. 1988 Guidelines, *supra* note 3, pt. I, No. 3.32, ¶ 13,109.10, at 20,598.

74. Draft Revision of 1988 Guidelines, pt. I.B.2, Antitrust & Trade Reg. Rep. (BNA) No. 54, at S-7 n. 58 (June 9, 1988) (Special Supp.).

the Draft Guideline language “implies a significant shift in the presumptions accorded the concentration thresholds, and greatly reduces the significance of the numerical index itself.”<sup>75</sup> The Report stated, and we concur, that the Draft Guideline language “is probably a more accurate description of current Division practice” than is the language of the 1984 Merger Guidelines.<sup>76</sup> The Report also warned, however, that the shift in presumptions had caused “a confusion that should be clarified in the final version of the Guidelines.”<sup>77</sup> The final version of the 1988 Guidelines states that they do not offer “bright line tests except to the extent that they define ‘safe harbors.’”<sup>78</sup> Thus, while the mechanical application to mergers of the 1988 Guidelines (assuming that they can be applied “mechanically”) may support the conclusion that the Division will not challenge a particular merger, the 1988 Guidelines do not support the conclusion that the Division will likely or should challenge a particular merger.

Ordinarily, guidelines that provide only safe harbors have two advantages: they provide businesses with the option of avoiding any appreciable risk of liability by confining their activities to the enunciated safe harbors, and they provide the enforcement agency with the flexibility to refrain from prosecuting in any given set of circumstances. Unfortunately, given that private litigants will challenge mergers notwithstanding Division action, a harbor that only the Division has declared safe is probably not safe enough. As a result, the 1988 Guidelines will more likely provide an intellectual basis for the Division’s decision not to oppose certain mergers than provide practical guidance to businessmen and lawyers.

#### b. Additional Uses of Merger Safe Harbors

The 1988 Guidelines send a clear message that the Division will use the HHI safe harbors not only in merger analysis but also as part of the preliminary analyses of joint ventures and licensing arrangements. Such an approach to regulation of these arrangements is conceptually useful and may allow the parties to short-cut Division inquiries when good market data exists.

According to the 1988 Guidelines, in determining whether a joint venture would likely have an anticompetitive effect in the joint venture

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75. *ABA Section of Antitrust Law and Section of International Trade and Practice, Report to the House of Delegates, [On Draft Antitrust Guidelines for International Operations]* [hereinafter *ABA Report on Draft Guidelines*], 57 ANTITRUST L.J. 651, 672 (1988).

76. *Id.*

77. *Id.*

78. 1988 Guidelines, *supra* note 3, pt. I, No. 3.32, ¶ 13,109.10, at 20,598. According to the ABA, “[w]hile the discussion from the draft is amplified and refined, the message remains the same: only mergers that are both above the HHI thresholds and demonstrate a high likelihood of hurting consumer welfare will be challenged.” *ABA Section of Antitrust Law and Section of International Trade and Practice, Report: Analysis of Department of Justice Guidelines for International Operations Antitrust Enforcement Policy (Final Version)* [hereinafter *ABA Report on Final Guidelines*], 57 ANTITRUST L.J. 957, 960 (1989).

market, the Division first considers the effect on concentration of a hypothetical merger of the parties.

If, based on market concentration, the Division would not challenge a merger of the joint venture participants in a relevant market, then the Division would conclude without detailed examination of other factors that the joint venture and its individual restraints would not likely have any anticompetitive effect in that market, and would proceed to step 2 [consideration of other markets].<sup>79</sup>

The Division would use a similar approach in assessing a joint venture's effect on competition in a "relevant spill-over market."<sup>80</sup> For example, an R&D joint venture (a venture to engage in research and development) might affect competition in a spill-over market composed of products that are made using that R&D. In such a case, the Division would determine first whether a hypothetical merger of the joint venture participants would fall within an HHI safe harbor for that spill-over market.<sup>81</sup> The Draft Revision of 1988 Guidelines further provides in Case 6 ("Research and Development Joint Venture") that "the actual or potential existence of four comparable R&D efforts creates a 'safe harbor' " for an R&D joint venture that constitutes one of these R&D efforts.<sup>82</sup> The ABA Report on the Draft Guidelines noted a "troublesome inconsistency" between this statement and the use of the HHI to identify safe harbors since a market consisting solely of four comparable R&D ventures would necessarily constitute a highly concentrated market (with an HHI likely over 2500).<sup>83</sup> The final version of the 1988 Guidelines, while deleting the express reference to a "safe harbor" under these circumstances, retains the statement appearing in the Draft Guidelines that an anticompetitive effect is "unlikely where there are at least four comparable R&D efforts underway or where there is a substantial potential for such efforts by firms or groups of firms included in the market."<sup>84</sup>

The 1988 Guidelines also suggest that the Division will apply the HHI safe harbors, already applicable to mergers and joint ventures, to intellectual property licensing arrangements. The 1988 Guidelines state that in considering whether a licensing arrangement would have an anticompetitive effect in the market for the licensed technology, the Division first considers "whether the complete elimination of competition by merger between the licensee and licensor would likely lead to the unilateral or collective exercise of market power with respect to the licensing of technologies in [the relevant technology markets]."<sup>85</sup> This analysis entails assigning market shares to each technology based on "the best available evidence of the relative efficiencies of the technolo-

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79. 1988 Guidelines, *supra* note 3, Pt. I, No. 3.42, ¶ 13,109.10, at 20,600.

80. *Id.*, pt. I, No. 3.43, at 20,601-02.

81. *Id.* at 20,602.

82. Draft Revision of 1988 Guidelines, *supra* note 74, at S-23.

83. ABA Report on Draft Guidelines, *supra* note 75, at 676-77.

84. 1988 Guidelines, *supra* note 3, Case 6, ¶ 13,109.85, at 20,625.

85. *Id.*, pt. I, No. 3.63, ¶ 13,109.10, at 20,607.

gies,” with equal market shares being assigned to each technology “[i]f it appears that [the] competing technologies are all comparably efficient.”<sup>86</sup> Of course, the absence of clear standards for determining market concentration in a technology market reduces the usefulness of HHI safe harbors in providing assurance that a particular licensing arrangement does not raise serious antitrust concerns.

According to the 1988 Guidelines, the Division will use merger analysis safe harbors in determining a licensing arrangement’s potential for producing an anticompetitive “spill-over” effect in a market other than the technology licensing market (such as in a market in which the technology constitutes an input).<sup>87</sup> As it does in analyzing the technology licensing market, the Division considers, first, whether a merger of the licensor and its licensee in the market under consideration would fall within a safe harbor, and, therefore, not be anticompetitive.<sup>88</sup> This approach, as illustrated by Case 11 (“Exclusive Patent Cross Licenses with Grantbacks”), results in a determination that no anticompetitive effect exists if either the licensor or the licensee have an insignificant presence in the spill-over market.<sup>89</sup> Moreover, in quantifying the licensee’s presence in a spill-over market, one “would consider only sales that [the licensee] would have made without having access to [the licensor’s] technology.”<sup>90</sup>

### c. Territorial Restrictions

Perhaps the greatest contrast between the 1988 Guidelines and the 1977 Guide is their respective approaches to territorial restraints ancillary to arrangements such as exclusive distributorships, licensing, and joint ventures. The shift was in part in reaction to the Supreme Court’s landmark opinion in *Continental T.V., Inc. v. GTE Sylvania Inc.*,<sup>91</sup> rendered just five months after the issuance of the 1977 Guide. The 1988 Guidelines appear to have abandoned any concern regarding competitors’ use of ancillary restrictions to allocate territories. As the ABA Task Force Report on the Draft Guidelines observed, if “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.”<sup>92</sup>

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86. *Id.*

87. *Id.*, pt. I, No. 3.64, ¶ 13,109.10, at 20,608.

88. *Id.* at 20,608-609.

89. *Id.*, Case 11, ¶ 13,109.90, at 20,634.

90. *Id.*, Case 12, ¶ 13,109.91, at 20,637.

91. 433 U.S. 36 (1977). *Sylvania* held that nonprice vertical restrictions were not *per se* illegal, as the Supreme Court had held in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), but rather that courts should judge them under a rule of reason.

92. *ABA Report on Draft Guidelines*, *supra* note 75, at 674.



### 1. Case Example 7: Exclusive Distributorships

The 1988 Guidelines differ most from the 1977 Guide in their treatment of case examples concerning exclusive distributorships. Case J of the 1977 Guide<sup>93</sup> and Case 7 of the 1988 Guidelines<sup>94</sup> present nearly identical factual patterns, but very dissimilar analyses and outcomes. Both cases involve the mutual appointment by a U.S. manufacturer and a German manufacturer of each other as exclusive distributor in North America and in the EEC, respectively.<sup>95</sup> Both firms manufacture machine tools, and their respective products are, for the most part, either complementary or sufficiently different so that they are not interchangeable in use.<sup>96</sup>

According to the 1977 case discussion, each party to the arrangement represents a "substantial manufacturer who can (or could) compete in the territory of the other," and the firms have not confined the scope of the exclusive distributorship provisions to products over which the firms do not compete.<sup>97</sup> According to the discussion, the exclusive distribution arrangement creates a "territorial allocation" and thus is illegal *per se* under section 1 of the Sherman Act.<sup>98</sup>

The 1988 case discussion, by contrast, emphasizes that the firms' product lines seem to be "largely complementary," that the arrangement "appears to involve a form of economic integration of the parties' operations," and that the arrangement is "open and notorious."<sup>99</sup> These factors, the 1988 Guidelines maintain, justify analyzing the exclusive distributorships under the rule of reason.<sup>100</sup> According to the discussion, the arrangement would, arguably, permit both firms to distribute machine tools in the U.S. more effectively.

### 2. Case Example 12: Know-How Licensing

The 1977 Guide and 1988 Guidelines also present the contrasting approaches to ancillary territorial restraints in the case examples pertaining to know-how licensing.<sup>101</sup> In Case F of the 1977 Guide<sup>102</sup> and Case 12 of the 1988 Guidelines,<sup>103</sup> a small U.S. corporation with "valua-

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93. 1977 Guide, *supra* note 15, Case J, ¶ 13,110, at 20,649-12 -49-13.

94. 1988 Guidelines, *supra* note 3, Case 7, ¶ 13,109.86, at 20,627-29.

95. 1977 Guide, *supra* note 15, case J, ¶ 13,110 at 20,649-12; 1988 Guidelines, *supra* note 3, Case 7, ¶ 13,109.86, at 627.

96. *Id.*

97. 1977 Guide, *supra* note 15, Case J, ¶ 13,110, at 20,649-12 -49-13.

98. *Id.*; 1988 Guidelines, *supra* note 3, Case 7, ¶ 13,109.86 at 627.

99. 1988 Guidelines, *supra* note 3, Case 7, ¶ 13,109.86, at 20,627-29.

100. *Id.*

101. *Cf.* Remarks by Charles F. Rule, Deputy Assistant Attorney General, Antitrust Division, Conference sponsored by World Trade Ass'n & Cincinnati Patent Law Ass'n (Oct. 21, 1986) (discussing application of U.S. antitrust laws to international licensing agreements), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,131 (1988). The Department acknowledged that it had "dramatically changed its attitude toward licensing, whether international or domestic." *Id.* at 20,733.

102. 1977 Guide, *supra* note 15, Case F, ¶ 13,110, at 20,649-7 -49-8.

103. 1988 Guidelines, *supra* note 3, Case 12, ¶ 13,109.91, 20,675.

ble" unpatented technology agrees to license the know-how for twenty years to a large, well-financed foreign manufacturer. Both case examples involve restrictions on the foreign manufacturer's right to sell certain products in the U.S. In Case F, the U.S. corporation restricts the foreign manufacturer for the twenty-year term of the license from competing in the U.S. in any product for which the licensed technology is used.<sup>104</sup> In Case 12, the foreign corporation uses the know-how at issue to produce a particular product, and the U.S. corporation prohibits the foreign manufacturer for twenty years from selling any of the product in the U.S., irrespective of whether the foreign company manufactured it using the licensed technology.<sup>105</sup>

According to the 1977 Guide's discussion of Case F, the Division would likely challenge the twenty-year restriction on the ability of a major foreign manufacturer to enter the U.S. market if twenty years exceeded the time needed for "reverse-engineering" of the technology involved, unless the parties could justify the restriction in some way.<sup>106</sup> Thus, while the parties might persuade the Division to allow an unnecessarily long restriction, the restriction would appear to face a presumption of illegality.

The 1988 Guidelines' discussion of Case 12, on the other hand, proceeds with a rule-of-reason analysis of the territorial restriction that makes no mention of its longevity.<sup>107</sup> The 1988 discussion also does not suggest any predisposition to challenge the restriction, even though the restriction applies to sales of the product manufactured *without* using the licensed know-how. The discussion emphasizes, instead, that the restriction on U.S. sales "could encourage the transfer of know-how in the first place" by preventing the recipient from reducing the value of the know-how.<sup>108</sup> While acknowledging that one could make the argument that "U.S. consumers would not be the primary beneficiaries of the transfer of . . . know-how," the 1988 Guidelines posit that the enabling of the U.S. firm "to exploit its technology in foreign markets serves to stimulate the production of technology that ultimately benefits U.S. consumers."<sup>109</sup>

### 3. *Case Example 11: Patent Rights*

The 1988 Guidelines depart from the 1977 Guide in their apparent endorsement of the use of grantback provisions in patent licenses to allocate patent rights territorially. In Case 11, a U.S. firm and a Japanese firm cross-license one another to practice their Japanese and U.S. patents, respectively.<sup>110</sup> A grantback clause in each license requires the

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104. 1977 Guide, *supra* note 15, Case F, ¶ 13,110, at 20,649-7.

105. 1988 Guidelines, *supra* note 3, Case 12, ¶ 13,109.91, at 20,636.

106. 1977 Guide, *supra* note 15, Case F, ¶ 13,110, at 20,649-9.

107. 1988 Guidelines, *supra* note 3, Case 12, ¶ 13,109.9,1 at 636.

108. *Id.* at 638.

109. *Id.*

110. *Id.*, Case 11, ¶ 13,109.90, 20,633-35.

licensee, for any patented improvements it makes on the licensor's technology, to assign the licensor exclusive rights to practice the improvements in the licensor's home country. The teaching of this case is that a grantback of patent rights constitutes a "logical choice" for "compensat[ing] the patentee for improvements developed by the licensee that the licensee could not have developed without having access to the patentee's technology."<sup>111</sup>

The discussion of Case I ("Exclusive Grantback Licensing") in the 1977 Guide, by contrast, warns that such an arrangement "may isolate the U.S. market from significant import competition from a leading foreign firm" and suggests that license agreements should make grantbacks nonexclusive to avoid uncertainties as to their legality.<sup>112</sup>

#### 4. Case Example 6: Joint Ventures

The 1988 Guidelines also look relatively favorably upon territorial allocations by joint venturers. Case 6 concerns a research and development joint venture formed by three large U.S. producers of X-metal and a large EEC producer of X-metal.<sup>113</sup> For each new process patent it obtains, the joint venture grants licenses in North America to the U.S. venture partners and licenses in the EEC (and certain other countries) to the EEC venture partner.<sup>114</sup> Such an arrangement, as described so far, should pass muster under the 1977 Guide on the ground that the enforcement of *process* patent rights alone would not result in territorial division of the X-metal product market.<sup>115</sup>

Case 6, however, expands upon the hypothetical; the EEC venture partner agrees not to sell in North America any X-metal produced using the licensed technology.<sup>116</sup> The 1988 Guidelines, in applying a rule-of-reason analysis to the territorial restriction in Case 6, appear to commend the arrangement:

Joint venture partners who have created a new technology may desire to control the processes and products that incorporate or are a complement to that technology in order to recover as quickly and fully as possible the value of their inventive efforts. Without such joint coordination, the value of the parties' R&D might be dissipated through competition in the product market . . . . Coordination in markets using the technology output of the joint venture is therefore often essential to beneficial R&D.<sup>117</sup>

Finally, the discussion of joint research in the 1988 Guidelines makes no reference to the "general rule" set forth in the 1977 Guide that "aggregations of patents cannot be used to create broad territorial

111. *Id.*, Case 12, ¶ 13,109.91, at 20,635-38.

112. 1977 Guide, *supra* note 15, Case I, ¶ 13,110, at 20,649-10 -49-12. *See generally* ANTITRUST LAW DEVELOPMENTS, *supra* note 37, at 496-97 (2d ed. 1984) (collecting grantback cases).

113. 1988 Guidelines, *supra* note 3, Case 6, ¶ 13,109.85, 20,623-27.

114. *Id.* at 20,623.

115. 1977 Guide, *supra* note 15, Case D, ¶ 13,110, at 20,649-5.

116. 1988 Guidelines, *supra* note 3, Case 6, ¶ 13,109.85, at 20,624.

117. *Id.*, Case 6, ¶ 13,109.85, at 20,626.

allocations going beyond any single patent or discrete group of patents.”<sup>118</sup>

d. Trade Law Proceedings

Three of the eighteen case examples in the 1988 Guidelines focus on antitrust issues raised by firms’ pursuit of remedies under the U.S. trade laws. The 1977 Guide did not address this area through case examples. These three cases merit special attention because they represent an enforcement area in which the Division will more likely bring an action than will the States or a private party. Thus, the standards established by the Division in this area may serve a useful prescriptive function. The cases concern the filing of an action under a trade law to prohibit the importation of a rival’s product into the U.S.,<sup>119</sup> an agreement between U.S. producers and foreign producers to settle a trade case,<sup>120</sup> and an exchange of information by U.S. producers in the course of jointly seeking relief under the U.S. trade laws.<sup>121</sup>

1. *Case Example 13: Filing an Action Under Trade Law to Prohibit Rival Import*

In Case 13, a major U.S. chemical company files an action under section 337 of the 1930 Tariff Act<sup>122</sup> seeking an order from the U.S. International Trade Commission excluding imports from a small Italian chemical producer on the grounds that the Italian producer makes the good using a process protected by the U.S. company’s U.S. patent.<sup>123</sup> The U.S. company’s technical staff has informed the company’s management that the Italian process falls outside the scope of the patent.<sup>124</sup> Management, however, decides to file the action in the hope of saddling the Italian firm with costs and delays and thereby deterring it from competing in the U.S.<sup>125</sup>

According to the 1988 Guidelines, the filing of a trade action is a sham and, therefore, unprotected by the *Noerr-Pennington* doctrine.<sup>126</sup> If “[j]udged objectively,” there “was no reasonable basis for the petitioner to believe that the action had merit,” or “the Division had evidence that the petitioner believed the claim to be baseless.”<sup>127</sup> The second half of this formulation (concerning evidence of the petitioner’s subjective belief as to the merits of its claim) does not appear terribly useful since attorney-client or work product privileges may often protect such evi-

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118. *Id.*

119. 1988 Guidelines, *supra* note 3, Case 13, ¶ 13,109.92, at 20,638-39.

120. *Id.*, Case 17, ¶ 13,109.96, at 20,641-42.

121. *Id.*, Case 18, ¶ 13,109.97, at 20,642-43.

122. Tariff Act of 1930, 19 U.S.C. § 1337 (1980 & Supp. 1989).

123. 1988 Guidelines, *supra* note 3, Case 13, ¶ 13,109.92, at 20,638-39.

124. *Id.* at 20,638.

125. *Id.*

126. See *Eastern R.R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

127. 1988 Guidelines, *supra* note 3, Case 13, ¶ 13,109.92, at 20,638-39.

dence from discovery. The 1988 Guidelines state that "[a]lthough most litigated findings of sham petitioning have involved a pattern of abuse, a single anticompetitive abuse of governmental processes may suffice in appropriate circumstances."<sup>128</sup>

## 2. Case Example 17: International Agreement to Settle Case

In Case 17, the producers of X in a foreign country offer to raise their U.S. prices by a given amount to settle a dumping case brought by the three largest U.S. producers of X.<sup>129</sup> According to the case discussion, if the U.S. producers accept this offer, they will have entered into a *per se* illegal agreement to raise prices and "[t]he fact that the agreement purported to settle a dumping case would not constitute a defense."<sup>130</sup> Only settlement agreements entered into pursuant to the suspension agreement provisions of the antidumping law enjoy an "implied immunity" from antitrust prosecution.<sup>131</sup>

## 3. Case Example 18: Exchange of Information Among U.S. Producers Seeking Relief Under U.S. Trade Laws

Finally, in Case 18, three U.S. producers of X, in preparing their ultimately successful antidumping case against the producers of X in a foreign country, exchange among themselves cost and price data relating to specific transactions.<sup>132</sup> The 1988 Guidelines state that in such a situation the Division would first determine whether the exchange was "incidental to prosecuting the antidumping case" and, therefore, protected under the *Noerr-Pennington* doctrine, and, if not, "whether on balance the exchange was likely to be anticompetitive (i.e. whether it would make collusion more likely)."<sup>133</sup> The 1988 Guidelines note that in order to avoid raising antitrust issues, competitors can provide sensitive information to an intermediary, like an independent accounting firm, which can then aggregate the information for use in trade proceedings without disclosing the particular data submitted by each firm.<sup>134</sup>

128. *Id.*, pt. I, ¶ 13,109.10, at 20,614.

129. *Id.*, Case 17, ¶ 13,109.96, 20,641-42.

130. *Id.* at 20,641.

131. 19 U.S.C. § 1673c(b)-(j) (1980 & Supp. 1989).

132. 1988 Guidelines, *supra* note 3, Case 18, ¶ 13,109.97, at 20,642-43. This case example responds to the ABA Task Force's recommendation that the Guidelines address the antitrust issues that may be implicated by cooperation in prosecuting or defending a trade law case. *ABA Report on Draft Guidelines*, *supra* note 75, at 683-84.

133. 1988 Guidelines, *supra* note 3, ¶ 13,109.97, at 20,643.

134. The ABA Task Force criticizes this case example for "presuming that *Noerr* does not apply" and for failing to "articulate the extent to which members of a U.S. industry may cooperate in prosecuting a case." *ABA Report on Final Guidelines*, *supra* note 78, at 970. However, the fact that the antidumping case is described as ultimately successful would seem to indicate that the case example presumes that *Noerr* does apply to the prosecution as a whole. At the same time, the case example helpfully points out that the protection afforded a prosecution by *Noerr* does not automatically extend to all exchanges of information by the cooperating parties, and that the parties should avoid direct exchanges of information.

These three case examples clearly illustrate some of the antitrust risks that firms may face in pursuing remedies under the trade laws, in settling trade cases, and in exchanging information for use in trade proceedings. These examples warn firms of both the limited nature of the antitrust immunity bestowed by *Noerr-Pennington* and the danger of settling a trade case in a manner not specifically provided for under U.S. trade law.

e. Requiring a Strict Compulsion Test for Immunity Based on a Mandate from a Foreign Government

The 1988 Guidelines insist that antitrust law requires government *compulsion* in the foreign context, even though domestic law requires only government-supervised voluntarism pursuant to a clearly articulated state policy.<sup>135</sup> The 1988 Guidelines offer a less than satisfying explanation of why the Division will not apply the state action doctrine to foreign governments:

The Division believes that the defense of foreign sovereign compulsion must be distinguished from the federalism-based state action doctrine. The state action doctrine applies to private anticompetitive conduct that is taken pursuant to clearly articulated state policies and is subject to active state supervision, as well as to conduct that actually is compelled by a state. The doctrine embodies the notion that the U.S. Congress should not be presumed to have intended to interfere with the authority of the states constitutionally "to regulate their domestic commerce." Because our federal structure of government is designed to secure to the states a wide range of regulatory alternatives, the U.S. Supreme Court has held that compulsion is too strict a standard to employ in state action cases. At the same time, the federal government retains authority under the Supremacy Clause to void any state program that has a noxious effect on interstate commerce. In contrast, the sovereign compulsion defense serves the quite different purposes of preventing direct clashes with the most significant interests of foreign sovereigns and of protecting parties whose actions are compelled by a foreign sovereign from being unfairly condemned under the U.S. antitrust laws. These purposes are advanced most directly when the foreign government has actually compelled the challenged conduct.<sup>136</sup>

Are we to presume that Congress intended to interfere with the authority of *foreign* governments "to regulate their domestic commerce" or that our structure of government is designed to curtail the "wide range of regulatory alternatives" available to *foreign* governments? Likewise, are

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135. *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48 (1985), held that collective ratemaking activities of common carriers, though not compelled by the States, enjoyed Sherman Act immunity under the "state action" doctrine. The Court reasoned that a "compulsion requirement" would reduce "the range of regulatory alternatives available to the State" and that "insofar as it encourages States to require, rather than merely permit, anticompetitive conduct . . . may result in *greater* restraints on trade." *Id.* at 61.

136. 1988 Guidelines, *supra* note 3, Pt. I, ¶ 13,109.10, at 20,613-14 (footnotes omitted).

we to believe that the state action doctrine serves any purpose other than to prevent "direct clashes" with significant state interests? The Division's strained (and undiplomatic) analysis overlooks the starting point of the Supreme Court's discussion of state action in *Parker v. Brown* that "[t]he governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers."<sup>137</sup>

While the state action doctrine as currently applied<sup>138</sup> is overly tolerant of cartelization that is fortunate enough to be under nominal state supervision, the Division has failed to articulate a principled basis for treating more stringently cartelization that occurs under the supervision of foreign governments. Indeed, the Supreme Court's recent articulation of the rationale for permitting private parties to claim "state action" immunity appears equally applicable to foreign programs that restrain competition.<sup>139</sup> The absence of an international analogue of the Supremacy Clause would seem to justify even more lenient treatment of foreign-supervised cartels.<sup>140</sup>

#### f. Attitude Toward U.S. Exporters

The Division reveals in a footnote of the 1988 Guidelines that it considers U.S. exporters to be no more than incidental beneficiaries of its anti-trust enforcement efforts:

Although the [Foreign Trade Antitrust Improvements Act of 1982<sup>141</sup>] extends jurisdiction under the Sherman Act to conduct that has a direct, substantial, and reasonably foreseeable effect on the export trade or export commerce of a person engaged in such commerce in the United States, the Division is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.<sup>142</sup>

The 1977 Guide, by contrast, treated the prevention of anticompetitive

137. 317 U.S. 341, 359-60 (1943) (establishing state action doctrine) (emphasis added).

138. See generally A.B.A. ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS (SECOND) X-6 - X-8 & n.63e (2d Supp. 1988) (collecting cases).

139. *Patrick v. Burget*, 108 S.Ct. 1658, 1662 (1988) (if the Sherman Act were always enforced against private practices, "then a State could not effectively implement a program restraining competition among them.").

140. The ABA Task Force Report observed: "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." *ABA Report on Draft Guidelines*, *supra* note 75, at 669 (1988). The Task Force fears that its views on this issue have "fallen on deaf ears" given the identical positions taken by the Department in the draft and final Guidelines. *ABA Report on Final Guidelines*, *supra* note 78, at 967.

141. Pub. L. No. 97-290, tit. IV §§ 401-403, 96 Stat. 1246 (1982) (codified at 15 U.S.C. §§ 1 note 6a, 45).

142. 1988 Guidelines, *supra* note 3, pt. I, No. 4.1, n.159, ¶ 13,109.10, at 20,611.

injury to U.S. exporters as a legitimate goal of the antitrust laws.<sup>143</sup> At first blush, the Division's current view appears to follow logically from its policy not to "reach anticompetitive conduct that has no effect, or only a remote effect, on U.S. consumer welfare."<sup>144</sup> However, as the Division appears to acknowledge in the above-quoted footnote, Congress has not drawn the line that the Division seeks to draw between protection of U.S. consumers and protection of U.S. exporters. It is not even clear that these goals are actually separable. Anticompetitive injury to U.S. competitors hurts the productive efficiency of the U.S. economy and, in turn, the ability to generate national income. Thus, in the long run, anticompetitive injury to U.S. competitors may have a significant adverse effect on U.S. consumers.

The A.B.A. Report on Draft Guidelines correctly pointed out that the Division's approach in the 1988 Guidelines "is a significant revision, legislative in nature, of the antitrust implications of export commerce compared with the Foreign Trade Antitrust Improvements Act of 1982."<sup>145</sup> In enacting the Foreign Trade Antitrust Improvements Act, Congress clearly contemplated on the premise that "injury to a U.S. exporter's export business in the United States can give rise to an antitrust claim."<sup>146</sup> The A.B.A. Report recommended that the jurisdictional test of the 1988 Guidelines require "an *anticompetitive* effect in the United States, as set out in *National Bank of Canada v. Interbank Card Association*."<sup>147</sup> *National Bank of Canada* would base jurisdiction on "any anticompetitive effect upon United States commerce, either commerce within the United States or export commerce from the United States,"<sup>148</sup> rather than limit jurisdiction to restraints which harm U.S. consumers through anticompetitive effects.

Increased concern regarding possible anticompetitive conduct and lax antitrust enforcement abroad has led the Division to reassess the 1988 Guidelines "to make clear that the department will not tolerate violations of the U.S. antitrust laws, where we have jurisdiction that impair export opportunities for U.S. business."<sup>149</sup> The Division noted, in particular, "a perception that price fixing, bid rigging, market allocation, and group boycotts have become very prevalent in Japan."<sup>150</sup>

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143. See 1977 Guide, *supra* note 15, Case N, ¶ 13,110, at 20,649-16 -49-17 (considering activity to restrain U.S. exports to a foreign country). Cf. 1988 Guidelines, *supra* note 3, Case 15, ¶ 13,109.94, at 20,640 (patterned after Case N of 1977 Guide, but involving a restraint on a foreign country's exports to the U.S.).

144. 1988 Guidelines, *supra* note 3, ¶ 13,109.10, at 20,589-3.

145. ABA Report on Draft Guidelines, *supra* note 75, at 656.

146. *Id.*

147. *Id.* at 661.

148. 666 F.2d 6, 8 (2d Cir. 1981).

149. 58 Antitrust & Trade Reg. Rep. (BNA) 554 (1990) (quoting statement by Assistant Attorney General James F. Rill on April 9, 1990).

150. *Id.*



### Conclusion

The ultimate test of a set of enforcement guidelines is whether they actually *guide* somebody. Only time can verify this test of utility. We cannot render a verdict so soon after the issuance of the 1988 Guidelines. The Bush Administration's antitrust team has neither embraced nor distanced itself from them. The government has neither prosecuted nor refrained from prosecuting a case relying on their principles. Most likely, in contrast to the numerous domestic merger cases, not many international investigations and cases exist; moreover, private litigants have not yet used the 1988 Guidelines to resolve any cases. Hence, it may take a long time to render a final judgment on their success. If the government or courts find the 1988 effort useful in resolving specific issues, then the 1988 Guidelines may take an important place in the anti-trust history of the 1990s. If not, they will likely find themselves as late Reagan-era footnotes in some scholarly journals.

## APPENDIX A

## PLAIN ENGLISH SUMMARY OF THE 1988 INTERNATIONAL GUIDELINES

1. *Introduction*

The Guidelines seek to provide practical guidance on the Department's policies. They are not a restatement of the law currently being applied by the courts. Even if the Guidelines suggest that the Department would not bring suit, a suit could still be brought by a private party, a state, a foreign country, or the FTC. Seek advice from experienced private antitrust counsel.

2. *Relevant Antitrust Laws*

Antitrust enforcement by the Department is likely to be based on the Sherman Act, the Clayton Act, and the Hart-Scott-Rodino Act. Limited antitrust exemptions are provided in the National Cooperative Research Act of 1984, the Webb-Pomerene Act, and the Export Trading Company Act of 1982. Only the Sherman Act provides for criminal penalties.

3. *Enforcement Policy*

## 3.0 Restraints of trade are illegal only if they are "unreasonable." To be "unreasonable," they must increase market power or facilitate its use in some defined market. Agreements involving some integration, like R&amp;D joint ventures, are evaluated under the rule of reason. An agreement will pass muster under the rule of reason if it would not be anticompetitive, or if the risk of anticompetitive harm is outweighed by procompetitive efficiencies. "Naked" restraints, like price-fixing and bid-rigging, are condemned per se.

3.1 *Criminal Violations of the Sherman Act*

Naked agreements to raise price are criminally prosecuted.

3.2 *Monopolization*

Conduct will not be challenged as unlawful monopolization if there is not a dangerous probability of successful monopolization, or if the conduct is not predatory. Usually, conduct that appears to be predatory is not really predatory. Pricing above marginal cost is never predatory, but abuse of governmental processes may be predatory.

3.3 *Mergers*

Look to the Department's 1984 Merger Guidelines for the standards applied to mergers.

3.31 *Market Definition*

Market definition is the first step. To define the relevant markets, identify a group of products and a geographic area which, if monopolized, would permit the exercise of market power.

3.32 *Competitive Analysis*

The Herfindahl-Hirschman Index (HHI) is used to identify "safe harbors" within which mergers will not be challenged. A merger that does not fall within a "safe harbor" must be evaluated to determine whether it would be likely to increase market power or facilitate its use. Among the factors considered are the firms' future competitive significance, ease of entry, efficiencies, and foreign competition. If subject to effective trade restraints, foreign firms may have little or no competitive significance.

### 3.4 *Joint Ventures*

"Joint venture" covers any collaboration among firms, falling short of merger, that concerns R&D, production, distribution, or marketing and which is designed to achieve efficiencies. Bona fide joint ventures are evaluated under a rule of reason.

#### 3.41 *Rule-of-Reason Analysis*

Rule-of-reason analysis of joint ventures involves up to four steps. In the first three steps, the Department looks for significant anticompetitive risks, and, if such risks are present, the Department goes on in the fourth step to consider procompetitive efficiencies.

#### 3.42 *Step 1 - The Joint Venture Market or Markets*

If the participating firms would have been allowed to merge outright based on HHI concentration, then their joint venture automatically survives based on step 1 of the analysis. If not, the Department goes on to consider whether the joint venture will restrict price and output decision making less than a merger would have. Anticompetitive effects are generally enhanced if a joint venture includes most of the competitors in a given market.

Restrictions on membership often enhance procompetitive potential.

#### 3.43 *Step 2 - Other Markets*

Some aspects of joint venture relationships, such as information exchanges, may have "spillover" effects in other markets. A rule of reason approach is used to determine whether the joint venture would be likely to facilitate collusion outside the joint venture market.

#### 3.44 *Step 3 - Vertical Restraints Analysis*

Any vertical nonprice restraints in a joint venture are analyzed for possible anticompetitive effect according to the method set forth in Section 3.5, below.

#### 3.45 *Step 4 - Offsetting Efficiency Benefits*

Claimed efficiency benefits for an anticompetitive joint venture must be proved by clear and convincing evidence. Before approving such a joint venture, the Department is likely to require that an anticompetitive restriction that does not contribute to the claimed efficiencies be stricken.

### 3.5 *Vertical Nonprice Distribution Restraints*

Vertical nonprice restraints often promote competition by allowing more efficient distribution of a manufacturer's products. Under certain market conditions, however, such restraints could facilitate collusion among manufacturers or among dealers. They could also have the anticompetitive effect of excluding competitors from an essential input or essential distribution facility. The Department will normally not challenge a vertical nonprice restraint if (1) the market share of the firm imposing it is 10% or less, or (2) the affected market is not highly concentrated, or (3) entry into such market is not difficult, or (4) the risk of anticompetitive harm is outweighed by procompetitive efficiency benefits. A distribution restraint that "may only incidentally affect price" will be treated as a non-price restraint and will be analyzed under the rule of reason.

### 3.6 *Intellectual Property Licensing Arrangements*

While intellectual property does not necessarily confer market power, the owner of such property is entitled to whatever market power is in fact conferred.

**3.61 *Licensing Benefits***

If license restrictions would likely increase market power or facilitate its use in a way that goes beyond the market power necessarily conferred by the intellectual property itself, the Department balances that risk against any efficiency benefits. Tie-ins or package licenses can be used as devices for metering licensees' use and differentiating among them on that basis.

**3.62 *Rule-of-Reason Analysis***

Rule-of-reason analysis of intellectual property licensing arrangements involves up to four steps, much like the rule-of-reason analysis of joint ventures set forth in Sections 3.41-3.45 above.

**3.63 *Step 1 - The Technology Licensing Market***

The Department first considers whether an outright merger of the licensee and licensor would be anticompetitive. Only if this is so does the Department go on to consider whether the license restriction will restrict price and output decision making less than a merger would have. In general, "open" patent pools are more likely to create competitive problems than are "closed" (exclusive) patent pools.

**3.64 *Step 2 - Other Markets***

A rule of reason approach is used to determine whether license restrictions or features, such as information exchanges, may have an anticompetitive "spill-over" effect in a market other than the technology licensing market.

**3.65 *Step 3 - Vertical Restraints Analysis***

Any vertical restraints in a license are analyzed for possible anticompetitive effect according to the method set forth in Section 3.5. If there are no economic substitutes for the licensed technology, purely vertical restraints are unlikely ever to be anticompetitive.

**3.66 *Step 4 - Offsetting Efficiency Benefits***

Claimed efficiency benefits for an anticompetitive licensing arrangement must be proved by clear and convincing evidence. Before approving such a licensing arrangement, the Department is likely to require that an anticompetitive restriction that does not contribute to the claimed efficiencies be stricken.

**4. *Jurisdictional Considerations***

**4.0** The U.S. antitrust laws apply to foreign conduct that relates to U.S. import trade and harms consumers in the U.S.

**4.1 *Foreign Trade Antitrust Improvement Act of 1982***

Notwithstanding the broader jurisdictional reach of the Sherman Act (as refined in the 1982 Act), the Department is concerned only with anticompetitive conduct that harms U.S. consumers, not with conduct that merely harms export trade or export commerce. However, when more than half the cost of purchasing export goods or services has been borne by the U.S. Government (whether in the form of a payment or financing), jurisdiction will be asserted by the Department.

**4.2 *Foreign Sovereign Immunities Act***

The "commercial activity" of foreign sovereigns and their agencies is within the purview of U.S. antitrust laws.

**5. *Factors Affecting The Department's Discretion In Asserting Jurisdiction***

Comity considerations are weighed in deciding whether to assert jurisdiction, and, in extraordinary circumstances, the Department considers effects on U.S. foreign relations. However, suits brought by the Department should never be dismissed by the courts on the basis of comity or foreign policy concerns.

6. *Foreign Sovereign Compulsion*  
Anticompetitive conduct *compelled* by a foreign sovereign will not be prosecuted unless the conduct occurred primarily in the U.S. The necessary compulsion may have come from the imposition of penalties or from the withholding of benefits. Mere encouragement is not enough. The Department does not apply the domestic "state action" doctrine to the actions of foreign sovereigns. Comity considerations may still cause the Department to decline prosecution against some anticompetitive conduct that "is not strictly compelled."
7. *International Trade Function And The U.S. Trade Laws*  
The joint conduct of competitors in petitioning the U.S. Government or foreign governments is protected under the so-called *Noerr-Pennington* doctrine. Such petitioning activity will not be prosecuted unless it was a sham. A "naked" restraint is not protected simply because a government official, U.S. or foreign, is involved.
8. *Conclusion*  
Efficient arrangements are good. Naked restraints to fix prices or allocate markets are bad.

## APPENDIX B

Below are summary comparisons between the 1977 Guide and the 1988 Guidelines and predicted results under hypothetical circumstances. Under each topic heading is a brief description of facts which both sets of guidelines use as a starting point.

1. *Acquisitions of Foreign Firms*

Acquisition of foreign manufacturer by U.S. manufacturer of the same product. Foreign manufacturer's export sales to the U.S. are non-existent or insignificant.

	Case	Outcome
1988 Guidelines:	<p><i>Case 3:</i> Foreign firm does not currently sell the product in the U.S. would take foreign firm at least 18 months to begin selling in the U.S.</p> <p><i>Case 4:</i> Merger of the two most significant foreign producers of product X accounting for approximately 60% of all X consumed in the U.S. Neither of the merging firms' U.S. assets are used to produce or sell X.</p>	<p>Necessary condition for anticompetitive effect is that foreign firm "actually would enter the U.S. market independently . . . but for this merger."</p> <p>Department would not challenge merger, notwithstanding any possible anticompetitive effect, due to difficulty of obtaining effective relief. Merger may still be subject to Hart-Scott-Rodino Premerger Notification Requirements.</p>
1977 Guidelines:	<p><i>Case B:</i> Foreign firm's current export sales to U.S. are "insignificant." Foreign firm's product is "arguably superior" to the "traditional" product offered by the U.S. firm.</p>	<p>Necessary conditions for challenge are that foreign firm have incentives to enter and capability of entering (or threatening to enter) U.S. market.</p>

## 2. Joint Bidding

Establishment of consortium of several U.S. manufacturers and engineering firms for purpose of bidding on a large hydroelectric project in a foreign country.

	Case	Outcome
1988 Guidelines:	<i>Case 5:</i> Foreign country to finance entire project through a 30-year loan from the U.S. Government	Possible harm to U.S. taxpayers supports assertion of jurisdiction. Apply rule-of-reason analysis. Department would not challenge solely on basis of competitive effects in foreign market.
1977 Guidelines:	<i>Case C:</i> No mention of financing by U.S. Government.	Consider possible foreclosure of export opportunities for U.S. firms. Government challenge solely on basis of competitive effects in foreign market.

3. *Joint Ventures*

Formation of R&D joint venture by large U.S. producer(s) and one of the largest EEC producers of X-metal to develop new metal. U.S. producer(s) to receive exclusive license in North America to all resulting patent rights and know-how, and EEC producer to receive same license in EEC and certain other countries.

	Case	Outcome
1988 Guidelines:	<i>Case 6:</i> Joint venture includes three of the largest U.S. producers, which collectively supply 50% of U.S. consumption of X-metal. EEC producer agrees not to sell in North America any X-metal produced using the licensed technology.	Apply rule-of-reason analysis. Territorial coordination may be necessary to prevent dissipation of value of R&D due to competition in X-metal product market.
1977 Guidelines:	<i>Case D:</i> Joint venture includes only one U.S. producer—the second largest of five producers of X-metal in the U.S. [Agreement does not restrict exports of X-metal to North America.]  <i>Case E:</i> Formation of manufacturing joint venture by third largest U.S. manufacturer of certain transistor parts and by one of Japan's largest industrial combines. Neither Japanese combine nor joint venture may export transistors to U.S. market.	Focus carefully on territorial division created by exclusive patent rights. Parties' enforcement of <i>process</i> patent rights only would not result in territorial division in X-metal product market.  Department would likely challenge the "open-ended restraint" on exporting transistors to the U.S. since restraint motivated by U.S. firm's concern over cost-cutting by joint venture. Only a short-term ancillary territorial restraint would seem appropriate.



#### 4. *Exclusive Distributorships*

Mutual appointment by U.S. and German manufacturer of machine tools of each other as their exclusive distributors in North America and the EEC, respectively. Some of their products are directly interchangeable in use, but most are either complementary or have significantly different special features.

	Case	Outcome
1988 Guidelines:	<i>Case 7:</i> Manufacturers are "significant, but not dominant," in their respective countries.	Apply rule-of-reason analysis. Do not treat as per se unlawful market allocation because arrangement involves economic integration and largely complimentary product lines, and is open and notorious.
	<i>Case 8:</i> Same as Case 7 except that U.S. manufacturer and German manufacturer appoint the same independent firms as their exclusive distributor in the U.S. The distributor agrees to distribute only machine tools supplied by these two manufacturers.	Apply rule-of-reason analysis. Exclusive distributorship "ordinarily" raises no antitrust concern. This particular arrangement poses no significant risk of collusion because both the manufacturing and distribution markets are unconcentrated.
1977 Guidelines:	<i>Case J:</i> Manufacturers are "substantial, but not dominant," in their respective countries.	Apply per se rule against territorial allocations among competitors since parties are both "substantial" manufacturers, and exclusive distributorship provisions cover products as to which manufacturers compete.

#### 5. *Multinational Operations*

Assignment of territories by large, U.S.-based multinational corporation to subsidiaries that sell throughout much of the world.

	Case	Outcome
1988 Guidelines:	<i>Case 9</i>	Parent Corporation and any subsidiary of which the parent owns more than 50% of the voting stock are considered legally incapable of conspiring with one another within meaning of § 1 of Sherman Act.
1977 Guidelines:	<i>Case A</i>	Parent corporation may allocate territories or set prices for subsidiaries for which it controls a majority of the voting stock.

6. *Licenses with Grantbacks*

Licensing of foreign firm by U.S. firm to practice certain patents in foreign firm's country. Foreign firm is required to grant back to U.S. firm rights to practice certain new patents that foreign firm may develop that are related to the licensed technology.

	Case	Outcome
1988 Guidelines:	<i>Case 11:</i> U.S. firm and Japanese firm mutually grant each other exclusive rights to practice patents. If either firm makes "patented improvements" on the other's technology, it will assign the other firm rights to practice the improvements in its home country. Patents involved are process patents used in manufacturing X.	Apply rule-of-reason analysis. Effect in technology market considered same as outright acquisition by U.S. firm of Japanese firm's technology. Effect in market for X unlikely to be anticompetitive if merger of firms would fall within "safe harbor." Grantback feature can be procompetitive, especially if nonexclusive, by protecting patentee's interest in its own technology.
1977 Guidelines	<i>Case I:</i> U.S. firm licenses three foreign firms: a subsidiary in which it has 85% of the voting stock, a firm in which it has 30% of the voting stock, and a leading local firm. Each licensee required to grant back title or exclusive license on any new patents or knowhow it may develop "related to the licensed technology rights."	Breadth of grantback obligations likely to be challenged if foreign firm "could in any way be regarded" as an actual or significant potential competitor in the U.S. Grantback obligations limited to improvement patents would be less likely to be anticompetitive. Firms in which U.S. firm has effective control through ownership of voting stock are not considered actual or potential competitors.

### 7. *Know-How Licenses*

Twenty-year "technology transfer agreement" or "know-how license" between small U.S. corporation with valuable unpatented technology (or know-how) and foreign firm. U.S. corporation will convey technology or know-how used to produce certain products to foreign firm, which is bound not to sell (a) certain product(s) in the U.S.

	Case	Outcome
1988 Guidelines:	<i>Case 12:</i> U.S. corporation's know-how is used to produce product X. For the duration of the "technology transfer agreement," foreign firm may not sell X in the U.S., whether or not manufactured using the transferred technology.	Apply rule-of-reason analysis. Unlikely to find anticompetitive effect in relevant technology market, or in relevant market for X, unless some indication that foreign firm would sell X in the U.S. even without access to U.S. corporation's technology. Enabling U.S. corporation to exploit technology in foreign markets stimulates production of technology that ultimately benefits U.S. consumers.
1977 Guidelines:	<i>Case F:</i> For the duration of "know-how license," foreign firm will not compete with U.S. corporation, in the U.S., in any product for which the licensed technology is used in the manufacturing process. In executing the process, the foreign firm will use only components provided by the U.S. corporation.	Department would likely challenge territorial restriction if 20-year period exceeded time needed for reverse-engineering of the technology ("unless the parties could justify it as necessary to the . . . agreement"). Tie-in unlikely to be challenged unless it forecloses other U.S. sources of the components.

8. *International Cartels and Boycotts*

Formation of cartel by five or six foreign X-ore producers that agree on quotas and prices for all X-ore production. Foreign government urges large U.S. multinational corporation that mines X-ore abroad and processes it into X-product to abide by cartel's quotas and prices.

	Case	Outcome
1988 Guidelines:	<i>Case 14:</i> Quotas and prices are set at a secret meeting. More than 25% of world X-ore production is consumed in the U.S.	Department would likely prosecute agreement as a naked agreement to fix price and quantity, although particular defendants may be protected by foreign sovereign immunity, foreign sovereign compulsion, or considerations of comity. U.S. corporation not being compelled, so not protected by foreign sovereign compulsion.
1977 Guidelines:	<i>Case L:</i> [No mention of secret meeting.] Foreign brokers resell about 25% of world X-ore production in the U.S.	Agreement would clearly violate U.S. antitrust laws "unless defenses peculiar to the international situation apply to particular defendants." U.S. corporation may have a defense under act of state or foreign compulsion doctrines.
	<i>Case K:</i> U.S. oil company complies with decree of foreign government prohibiting oil companies operating in the country from selling country's oil to a particular U.S. refiner.	Appears to be an illegal boycott by oil companies, each of which only deals directly with the foreign government. Company co-conspirators not shielded by sovereign immunity, and since conduct is within U.S. territory, act of state and sovereign compulsion defenses not available either.

## 9. Foreign Trade Restraints

Joint advice by producers of X in foreign country, including wholly-owned subsidiary of U.S. company, to the country's government favoring imposition of a trade restraint.

	Case	Outcome
1988 Guidelines:	<p><i>Case 15:</i> Foreign government issues an order limiting amount of X that may be exported to the U.S. and allocating export quota among the country's producers.</p> <p><i>Case 16:</i> Voluntary export restraint ("VER"). In response to trade concerns expressed by U.S. Government, foreign country's Minister of Trade persuades each of the country's five producers of X to agree to reduce exports to the U.S. by 10%.</p>	<p>Collective petitioning of foreign government by competitors is protected under <i>Noerr-Pennington</i> doctrine. Compliance with order would likely be protected under foreign sovereign compulsion.</p> <p>For reasons of comity, Department would likely not challenge.</p>
1977 Guidelines:	<i>Case N:</i> Producers of X, in advising foreign government, suggest either a tariff increase or an embargo, either of which would affect exports to the country by a U.S. manufacturer.	Collective activity to cause foreign government to impose restraints on U.S. commerce is protected under <i>Noerr-Pennington</i> doctrine. Foreign government's imposition of tariffs and quotas is protected under act of state doctrine.